PIPA RESPONDENT SELECTION: mitigating risk and avoiding scattergun litigation

Authored by:
John Kimmins, Barrister, Inns of Court
Katie Caldow, Partner, Chambers Russell Lawyers

1. INTRODUCTION

1.1. At the outset, the authors wish to state that this paper is not intended to say, or otherwise imply, that a claim with multiple respondents under the *Personal Injuries Proceedings Act 2002* ("**PIPA**") is the product of scattergun litigation; there may be (and often is) legitimate reasons to join multiple PIPA respondents to a claim or inadequate time to thoroughly vet case theory prior to expiry of the primary time limit. The intention of this paper is to provide a refresher to experienced practitioners and assist in building the skill and knowledge of junior practitioners or practitioners who otherwise are not required to regularly handle claims under the PIPA.

1.2. We have all been there (or likely will be at some point in the personal injury lawyer journey) – running a claim under PIPA[1] where respondents just seem to keep popping up, the party count keeps rising and costs are increasing! Perhaps you have inherited a claim due to internal staff movements or commencing in a new role that requires you to take on a pre-established case load.

1.3. The risk to our clients of missing a limitation period and forever losing their right to recover compensation is so deeply engrained in us as plaintiff lawyers as an absolutely unacceptable outcome (and rightly so) that our desire to protect our clients (and in turn our firms and ourselves) can create a mindset of fear that drives our case strategy and respondent selection. This can lead to pulling PIPA respondents into a claim (or later naming them as defendants in proceedings) when it may not be reasonable (or necessary) to do so.

1.4. Whatever the circumstance, the risk and costs of failing to join all necessary respondents and/or joining incorrect respondents is all too real in this space. Even experienced practitioners can look back on a case and, with the benefit of hindsight and reflection, identify times of knee-jerk decision making on joining certain respondents to a claim or ways in which a case could have been run better from the outset to narrow the party pool. Unfortunately, the realities of modern-day private practice are such that, for some practitioners, they can find themselves with limited capacity in an environment of high demand that is ripe for such a circumstance. For junior solicitors new to the area it may simply be a case of inexperience coupled with inadequate supervision.

1.5. This paper is intended to bring the above issue to light in a manner that not only acknowledges the issue as one facing practitioners, but also considers a possible best practice approach to assist plaintiff lawyers in balancing (amongst other factors):

a. the protection of client rights;

b. the principle of proportionality of costs in litigation (analysing cost – risk – benefit);

[1] whether or not in a hybrid manner with a claim(s) under other injuries legislation

c. pursuing litigation in the spirit of the main purpose of PIPA and overriding philosophy of the *Uniform Civil Procedure Rules 1999*.

1.6. The authors will seek to do this by suggesting strategies to assist with:

- Identifying "proper" respondents
- Utilising the pre-proceedings process effectively
- Careful selection of respondents as defendants following an unsuccessful conference and identifying early risks on costs
- Adding value through early briefing of counsel

2. IDENTIFYIYING "PROPER" RESPONDENTS

2.1. It goes without saying that a respondent should be characterised as "proper" before a Part 1 is served upon it, but what does "proper" mean? Further, if a respondent is "proper" (as contemplated by s10 of PIPA) what relationship, if any, does such a characterisation have to the likelihood of success in a claim against it? This section of the paper considers these questions.

What it means to be "proper"

2.2. Section 10 of PIPA refers to a respondent as being "proper". The term "proper" is not defined and the authors were unable to locate any decision on point.

2.3. That does not, however, mean that "proper" cannot otherwise be defined by a holistic consideration of decisions of the Court on issues such as the following:

- Compliance (s12)
- Applications for leave to add a respondent out of time (s14(2))
- Applications for leave to add a contributor out of time (s16(2))

2.4. Cases dealing with disputes over compliance of a Part 1 are particularly helpful where the alleged non-compliance is lack of adequate detail in response to questions 9 and/or 18 of the Part 1:

> Q9: Give a brief description of the incident.
>
> Q18: Detail the reasons why the injured person believes that person caused the incident

2.5. Take for example the decision in *Hare v Mt Isa Mines Ltd & Ors* [2009] QCA 91 and obiter comments at [35] to [37] regarding the relevance of adequate articulation of a claim to consideration of whether one is a "proper" respondent (emphasis added):

> [35] As to the answer to Q 24, the respondent's solicitor, it was said, had cured any deficiency in the notice of claim by providing all medical records in the respondent's possession and control to the appellants.
>
> [36] It seems to me that non-compliance is remedied by putting the other party in as good a position as it would have been had the notice been complying. **The person to whom a notice of claim is given is entitled to particulars of how the incident happened, and the claimant's reasons for attributing responsibility to the recipient. The articulation of those details is important in order to enable the notice's recipient: to consider whether it is a proper respondent to the claim**, and whether it ought to add another person as a contributor; to meet its obligations to attempt to resolve the claim under s 20; and to provide documents and information under s 27. It also has a bearing on preparation

> for the compulsory conference, its conduct, and the exchange of mandatory final offers if the claim is not settled.
>
> [37] Against that background, I do not think it can be said that the mere provision of material from which the recipient of the notice of claim may be able to deduce the correct answers and ascertain the nature of the claimant's claim, amounts to remedying non-compliance with the requirements of the notice. To remedy her non-compliance in respect of the answers to Q 9 and Q 18, it was incumbent on the respondent to articulate to the appellants how she ingested the toxins and why she attributed responsibility to them.

2.6. With regards to an application seeking leave to join a respondent (s14(2)) or contributor (s16(2)) the provisions are "[r]elatively indistinguishable" in terms of what the Court must turn its mind to.[2] The Court is required to focus its attention on a consideration and balancing of "[p]rejudice, explanation for delay, the merits of the case at a reasonably superficial level, and finally the utility of the course proposed."[3] Consideration of the merits of the claim at a superficial level involves to some extent (whether expressly or otherwise) consideration of whether a party has the characterization of being "proper". The authors suggest such character consideration is comparable to that of a "proper respondent" as contemplated by s 10.

2.7. In *Palace v RCR O'Donnell Griffin Pty Ltd (in liq)* [2020] QSC 354 the applicant sought leave to add RCR as a respondent under s 14(2) PIPA and to commence against RCR under s 500(2) of the *Corporations Act 2001*. The following extracts relate to consideration of the merits of the claim. *Palace* was unsuccessful on the s14(2) for reasons which included a lack of merit in the claim to be advanced:

> [38] The material relied upon by the applicant does not go far enough. It does not demonstrate, even at a reasonably superficial level, that the injuries caused to the applicant's knee and ankles can be sheeted home to the respondent.
>
> [39] I am, for the purposes of this application, content to proceed on the basis that the heatstroke suffered by the applicant was caused by the breach of duty of the respondent in not providing a safe work environment. But, there is nothing to link the respondent to the injuries caused when he was transported to hospital. The issues of foreseeability and remoteness are not dealt with by the applicant. In cases of this nature, an applicant is well advised to provide a draft statement of claim which illuminates the basis upon which it is said that the respondent is liable. That has not occurred in this case and no argument was directed towards that by the applicant.
>
> [40] While there is medical evidence about the extent of the injury to the applicant, all that there is with respect to the connection between the respondent and those injuries is a view expressed by Mr Fryer that there were reasonable prospects of success in a claim for personal injury. In providing that view, Mr Fryer did not identify the factors upon which he reached that conclusion.

2.8. In *Arai v Sushi Train (Australia) Pty Ltd & Anor* [2004] QDC 162 the applicant sought leave to proceed with its claim despite a non-complying Part 1; the first respondent did not consider itself to be a "proper" respondent. The following extract from [10] of the judgment shows the relevance between case merit and a "proper" respondent (emphasis added):

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[2] *Palace v RCR O'Donnell Griffin Pty Ltd (in liq)* [2020] QSC 354, [27] referring to the judgment of Fryberg J in *Interpacific Resorts (Australia) Pty Ltd v Austar Entertainment Pty Ltd* [2004] QSC 427 and *Bridgeport Pty Ltd v Yelyruss Pty Ltd (in liq)* [2011] QSC 237.

[3] *Palace v RCR O'Donnell Griffin Pty Ltd (in liq)* [2020] QSC 354 citing Bridgeport Pty Ltd v Yelyruss Pty Ltd (in liq) [2011] QSC 237, which in turn cites *Inter Pacific Resorts Australia Pty Ltd v Austar Entertainment Pty Ltd* [2004] QSC 427.

> [10] It is conceded by Mr. Nam that the Applicant was working for the First Respondent at some stage as was the Second Respondent. The fact that the assault happened at work **raises the possibility of the First Respondent being liable** for the wrongful act of its servant. **Little more is needed to establish some potential liability**. The question of fault is not determined on this application. **Prima facie, the claim is not futile. The argument that the First Respondent is not a proper party is therefore rejected.** Also, the quantum of the claim is not really relevant at this point.

2.9. Based on the above (which is not an exhaustive list of cases in this parea), a suggested meaning of "proper" respondent is an entity (including an individual(s)) capable of being sued and who has a *potential* liability for the claim advanced against it as articulated in the Part 1 Notice of Claim. The possibility of liability means nothing more than that, "[p]rima facie, the claim is not futile".[4]

2.10. Given the above, it is fair to say that the threshold for case merit set out in the Part 1 required to characterise a respondent as "proper" is not particularly onerous.

2.11. That said, some practitioners have an approach on certain matters of serving multiple PIPA respondents and each with a Part 1 Notice that alleges exactly the same case against each respondent (notwithstanding that the nature of each respondent's connection with the incident and relationship to the claimant are far from similar). The authors suggest that such an approach can be described as "scattergun litigation". At the very least it is indicative of a lack of front end consideration of basic case theory and claim merits and can create a perception amongst respondents that a claimant is confused as to its own case.

Proper or not? A respondent's right of challenge

2.12. Notwithstanding the low threshold for characterisation of a respondent as "proper", s10 allows a respondent to challenge the claimant on this point before it is committed to the pre-litigation process.

2.13. If a respondent is either unable to satisfy itself as to whether or not it is a "proper" respondent on the face of the Part 1 or immediately considers itself not to be a "proper" respondent, it may utilise ss 10(1)(b) or (c) respectively. This triggers a requirement of response from the claimant and further right of reply of both parties through the workings of ss 10(2) to (4).

2.14. When utilised in the way it was intended (i.e. not as a means of intentional obstruction of a claimant's claim), an early dispute from a respondent under s 10 can be of assistance to a claimant. This can include, but is not necessarily limited to, screening out the respondent at an early stage where information provided shows the respondent is not proper, identification of other (appropriate) respondents and early identification of weaknesses in the case advanced. Such assistance will likely also result in reducing costs.

2.15. Of course, it is not entirely uncommon for PIPA respondents to fail to respond to a Part 1 within the prescribed time leaving the question of "proper or not?" to be addressed at a later stage when the respondent is already committed to the pre-litigation process.

My respondent is proper, but is being wound up or is in liquidation

2.16. It is outside the scope of this paper to consider pursuing claims against companies that are in the process of being wound up or are already in liquidation; save to say that,

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[4] *Arai v Sushi Train (Australia) Pty Ltd & Anor* [2004] QDC 162, per Forde DCJ at [10].

regardless of the merits of the case against such company careful consideration should be given to whether or not an insurer is available to respond to the claim and that coverage is likely to be sufficient (in particular, whether the deductible / self-insured retention (SIR) is likely to be exceeded a damages award). This is also relevant to early consideration of whether the claimant will succeed in obtaining necessary orders to commence under s 500(2) *Corporations Act 2001* if it's clear that the deductible / SIR will not be exceeded or will not be exceeded by a sufficient amount.[5]

2.17. In cases where it may also be necessary to seek leave to add the respondent company to the claim late under s 14(2) PIPA the issue of the deductible may also be relevant. This much was indicated by Martin J in the recent Supreme Court decision of *Palace v RCR O'Donnell Griffin Pty Ltd (in liq)* [2020] QSC 354 at [41]:

> [41] The insurance held by the respondent which, it appears, would respond to a properly formulated claim of this nature, is subject to a deductible of $100,000. If the applicant's claim against the respondent can only be proved with respect to the heatstroke injury then there is no prospect that the deductible would be exceeded by any award of damages. In those circumstances, there would be no point in granting leave and the applicant should pursue his claim by way of a proof of debt.

2.18. As stated above, this paper is not intended to look deeper into the issue of seeking to pursue a company that is being wound up. Suffice it to say that consideration needs to be given to the likely claim value and whether it will exceed any applicable deductible. Following is a suggested analysis tool showing various scenarios:

Deductible / SIR	**$50,000**				
Damages (gross)	$200,000	$200,000	$200,000	$200,000	$200,000
Liability %	5%	10%	15%	20%	100%
Damages (apportioned)	$10,000	$20,000	$30,000	$40,000	$200,000
Costs contribution[6]	$nil	$nil	$nil	$nil	$40,000
Total award	$10,000	$20,000	$30,000	$40,000	$240,000
Is deductible / SIR exceeded?	**No**	**No**	**No**	**No**	**Yes**

Deductible / SIR	**$75,000**				
Damages (gross)	$500,000	$500,000	$500,000	$500,000	$500,000
Liability %	10%	15%	20%	25%	100%
Damages (apportioned)	$50,000	$75,000	$100,000	$125,000	$500,000
Costs contribution[7]	$4,000	$4,000	$35,000	$35,000	$35,000
Total award	$54,000	$79,000	$135,000	$160,000	$535,000
Is deductible / SIR exceeded?	**No**	**Yes**	**Yes**	**Yes**	**Yes**
If "Yes", amount recoverable from insurer		**$4,000**	**$60,000**	**$85,000**	**$460,000**

[5] *Palace v RCR O'Donnell Griffin Pty Ltd (in liq)* [2020] QSC 354, per Martin J at [48]: "[T]he applicant has not demonstrated that leave should be granted to proceed under s500(2) even had leave been granted under PIPA".
[6] Assuming a date of injury on/from 1 July 2018, refer *Personal Injuries Proceedings Regulation 2014*, s 12.
[7] Assuming: (1) a date of injury on/from 1 July 2020, refer *Personal Injuries Proceedings Regulation 2014*, s 12 and (2) standard costs of $35,000.

Thoroughly vetting preliminary case theory

2.19. The ability to identify (or otherwise rule out with a degree of confidence) the existence of a duty of care, breach of the duty and causation are bread and butter skills of a personal injury practitioner. Of course, that is not to say that the task is always simple and some cases are particularly more complex and uncertain than others.

2.20. "[I]t is an intriguing feature of the law, in all its ever-growing breadth and complexity, that the more one practices the law, the more one appreciates the importance of elementary legal principles".[8] No matter what the case or your level of experience, one thing will always remain true: it comes back to first principles.

2.21. Sometimes, even for experienced practitioners, client instructions and volumes of evidence can create noise that takes away from the core elements of the cause of action being considered and whether a proposed respondent is worth pursuing. For that reason it can be extremely helpful to have tools in place that keep your mind focused on (amongst other things) first principles.

2.22. Most practitioners will have their own system and tools for developing case theory and case plans; however, as acknowledged elsewhere in this paper, not all practitioners have the benefit of robust precedents and systems. For that reason, following is a suggested "PIPA Respondent Checklist"[9] specific to preliminary case theory development and case planning that could be used as a means of "vetting" a theory and, by doing so, assist practitioners to identify when a preliminary case theory against a particular respondent needs more work or is otherwise unable to be maintained.

2.23. Refer Annexure A: PIPA Respondent Checklist

Can "delay" in issuing a part 1 be beneficial?

2.24. A claimant is required to serve the Part 1 on the earlier of the days that falls 9 months after the date of incident or 1 month after the day the claimant instructs a solicitor and the person against whom the proceeding is proposed to be started is identified.[10] The obligation to provide the notice continues after the relevant date, but a *reasonable excuse* for the delay is required.[11]

2.25. Proper investigation of a claim against a proposed respondent with a view to ensuring the respondent will not be joined unnecessarily is likely to be considered a *reasonable excuse* for delay in meeting the above timeframe. This assumes the claimant (or its solicitor) undertakes the relevant work in a timely manner.

2.26. A short delay in issuing a Part 1 to ensure preliminary case theory can be adequately vetted and, where possible, firmed up, may be a useful tactic to assist in identifying the right respondents early and engaging in a more effective pre-litigation process (the case having been advanced on a more solid footing).

3. UTILISING THE PRE-COURT PROCESSES EFFECTIVELY

[8] *The Agreement and the Pleadings: The Foundation of Successful Commercial Litigation*, address to NQLA Conference 16 May 2014 Cairns, the Honourable Justice Henry: accessed online at The Agreement and the Pleadings: (austlii.edu.au)

[9] The checklist is not intended to cover medical negligence or child abuse claims.

[10] *Personal Injuries Proceedings Act 2002*, s 9(3).

[11] *Personal Injuries Proceedings Act 2002*, s 9(5).

Avoiding self-limiting disclosure

3.1. The disclosure obligations placed upon a PIPA respondent are set out in section 27 of PIPA (emphasis added):

> 27 Duty of respondent to give documents and information to claimant
>
> (1)A respondent must give a claimant—
>
> (a) copies of the following in the respondent's possession that are directly relevant to a matter in issue in the claim—
>
> (i) reports and other documentary material **about the incident alleged** to have given rise to the personal injury to which the claim relates;
>
> (ii) reports about the claimant's medical condition or prospects of rehabilitation;
>
> (iii) reports about the claimant's cognitive, functional or vocational capacity; and
>
> (b) if asked by the claimant—
>
> (i) information that is in the respondent's possession about **the circumstances of, or the reasons for, the incident**; or
>
> (ii) if the respondent is an insurer of a person for the claim, information that can be found out from the insured person for the claim, about the circumstances of, or the reasons for, the incident.

3.2. The case advanced by a claimant in its Part 1 Notice is directly relevant to the scope of disclosure required under s 27; in particular, the "incident" as described in response to question 9 and the "reasons why…[the respondent] caused the incident" in response to question 18. As was stated in the recent decision of *Hare* referred to earlier:

> [36] …The person to whom a notice of claim is given is entitled to particulars of how the incident happened, and the claimant's reasons for attributing responsibility to the recipient. The articulation of those details is important in order to enable the notice's recipient…to provide documents and information under s 27.

3.3. Further, in the well-known decision of *Haug v Jupiters Ltd* [2007] QCA 199, Williams JA, who agreed with the reasons of Jerrard JA in that case, said (emphasis added):

> [2] The duty imposed upon a claimant by s. 22 of the Personal Injuries Proceedings Act 2002 ('the Act') and the duty imposed on a respondent by s. 27 thereof are consequent upon a notice of claim having been given pursuant to s. 9 of the Act. Section 9(2)(a) provides that the notice must contain the information required under a section, and s. 3(3) of the Personal Injuries Proceedings Regulation 2002 requires details of how the incident alleged to have caused the personal injury happened to be set out in the notice. Further, in the Schedule Dictionary to the Act the term 'incident' is defined in relation to personal injury as meaning 'the accident, or other act, omission or circumstance, alleged to have caused all or part of the personal injury'.
>
> [3] Against that background **when s. 27(1)(a)(i) of the Act requires a respondent to provide copies of reports and documents 'material about the incident alleged to have given rise to the personal injury to which the claim relates' that must be a reference to the 'incident' described and particularised in the notice of claim**.

> [4] Similarly, **when s. 27(1)(b)(i) of the Act requires a respondent to provide information 'about the circumstances of, or the reasons for, the incident' that must be a reference to the 'incident' described and particularised in the notice of claim**."

3.4. The recent decision in *SDA v Corporation of the Synod of the Diocese of Rockhampton & Anor* [2020] QSC 253 helpfully gives meaning to the term *reasons for an incident* under s27(1)(b)(i) of PIPA and indicates (although does not expressly state) the relevance of the claim advanced in question 18 of the Part 1 regarding failings of the respondent. The following extracts of the judgment are of note (emphasis added):

> [33] … in affixing a definition as to what may be the "reasons" for an incident under s 27(1)(b)(i) of the PIPA. It can be appreciated that the PIPA governs a large number of proceedings that appear before this, and other courts. The factual basis for those proceedings can range from malfunctioning equipment to, as is the case here, allegations of systemic physical and sexual abuse.
>
> [34] In deciding whether something is a "reason" for an incident **it must be first decided as to the level of involvement an action or inaction may have in the occurrence of the "incident"** (keeping in mind that the incident itself is discrete from the claim as a whole). Is it necessary that the "reason" be an indispensable link in the chain of causation or merely a strand in the rope of causation? As s 27 of the PIPA ought to be given "a broad, remedial construction"[39] the latter conclusion, that is that the "reason" be a strand in the rope of causation, is the appropriate conclusion.

3.5. The disclosure of materials and information under s 27 PIPA can be crucial to a claimant meeting its evidentiary burden to prove its claim against one (or more) respondents. It may also be the case that further materials and information elicited under s 27 could assist in determining that a claim does not have prospects (at least to a reasonable standard) of succeeding and thereby assisting a claimant to avoid the unnecessary cost and risk of pursuing that respondent into litigation.

3.6. Unfortunately, claimants are commonly met with a response to a s 27 request from a respondent along the lines of "the following requests are outside the scope of what your client is entitled to", "based on your client's claim our client has nothing to provide in response" or something to that effect. Be mindful that there is a big difference between a respondent saying there is no entitlement to a document or information and whether or not that document or information is in their possession or means of knowledge.

3.7. Given the explicit relationship between the case advanced in a Part 1 and the scope of disclosure under s 27, it could be said that limitations on the extent of documents and information to which a claimant is entitled under s 27(1)(a) and (b) may be self-imposed limitations (at least to the extent that the scope has been limited by the question 9 and 18 responses and could have, with improved planning and articulation of the case as against each respondent, expanded the scope of disclosure entitlement).

Liability responses

3.8. A respondent is required to provide a liability response pursuant to s20 within 6 months of receiving a complying Notice of Claim,[12] after having informed itself about the alleged incident.

3.9. Unfortunately, a respondent is not required to particularise the reasons why liability may be denied (and it usually is denied) in its s20 liability notice. This is contrary to the

[12] *Personal Injuries Proceedings Act 2002,* s 20(1).

obligation placed upon an employer under s 281(4)(a)(ii) of the *Workers' Compensation and Rehabilitation Act 2003* to *give particulars of the basis upon which liability is denied*.

3.10. Further, in the authors' experience, it is not uncommon for a denial of liability to be accompanied by a claim of contributory negligence on the part of the claimant to the extent of 100%. Again, no justification usually attaches to such a claim.

4. The above reality of PIPA liability responses is frustrating and, the authors' suggest, entirely inconsistent with what PIPA sets out to achieve. As was stated by Jerrard JA in *Watkins v State of Queensland* [2007] QCA 430 at [20], "[t]he PIPA intends that the claimant should have as full and correct an understanding of the bases of a respondent's denial of liability…as the respondent itself does".

4.1. The authors suggest that efforts should be made in written correspondence replying to unhelpful liability responses to invite a respondent to provide an explanation of its position. Further, the reason for the invitation should be expressly stated to be for the purpose of assisting in narrowing the issues and allowing the claimant to properly understand the respondent's position, which may ultimately be relevant to the claimant's decision as to whether to pursue the respondent in litigation. As will become clearer further along in the paper, evidence of such an invitation may be useful in future costs applications where the claimant goes on to win at trial, but not against all defendants.

5. FROM RESPONDENT TO DEFENDANT – IS IT JUSTIFIED and WHAT ARE THE COSTS IMPLICATIONS?

5.1. The authors offer as a proposition that, notwithstanding a respondent is characterised as "proper" for the purposes of s 10 PIPA, it is a separate question entirely whether they should become a defendant to proceedings following an unsuccessful conference,[13] after having had the opportunity to ventilate preliminary case theory through the pre-litigation process.

5.2. Notwithstanding that a claimant's independent assessment of claim prospects may indicate, from a cost / risk / benefit analysis, that a respondent should not be pursued in litigation, the authors accept that the conduct of the other respondents may well force the claimant's hand. Of course, that is not to suggest that a completely hopeless case should be pursued.

Closing evidence gaps and re-assessing prospects

5.3. By the time a matter has proceeded through an unsuccessful conference the parties should be in a better position to understand the case and its risks / prospects than at the point in time that the Part 1 Notices were served. It is an opportune time to re-visit the preliminary case theory and re-assess prospects against each respondent and the utility of pursuing them as a defendant in the litigation.

5.4. It may be the case that the conference sheds light on new matters or exposes gaps in the current state of the claimant's evidence that impact the claimant's prospects of succeeding. If that is the case, the claimant can embark on further evidence gathering post conference and prior to the filing of pleadings to ensure counsel is equipped with the full suite of evidence required to draft a pleading that puts the claimant's best foot

[13] This does not include circumstances of imminent limitation date expiry where commencing and staying proceedings against all respondents considered "proper" may be necessary.

forward right from the start. Alternatively, the further evidence gathering may indicate a respondent should not be pursued further.

5.5. The 60 days to start the proceeding post conference is adequate time to elicit further documents and information under s27 PIPA (assuming the above suggested advice from counsel is provided in the days following the conference). In the authors' experience, a verbal advice immediately following the conference can suffice whilst the issues are fresh in mind; however, where there is particular complexities with the request to the prepared it may be of utility of have counsel prepare or settle the draft.

5.6. In any event, informal agreement can be reached under s42(1)(b)(i) PIPA for a further period within which to file. This assumes there are no issues with expiry of the primary limitation period.

5.7. Whilst some practitioners take the view that pleadings should be filed with expediency following expiry of the mandatory final offers (and this may be the most appropriate course in some matters), if further evidence gathering will assist in preparing a more robust pleading to set the case up then the delay in commencement of the proceeding will likely be worthwhile and avoiding the necessity of having to amend the pleading will claw back delay. The alternative is that a less than satisfactory pleading may be filed and will likely require amendment at additional cost[14] and delay.

5.8. It is important to remember that when advising clients on which parties to pursue in litigation that the client must be fully advised and this includes advice regarding risks of <u>not</u> succeeding against particular defendants and what (if any) risks arise in regards to adverse costs orders that cannot, for example, be sheeted home to an unsuccessful defendant under a *Bullock* or *Sanderson* order.

<u>Costs – starting with the end in mind</u>

5.9. When selecting defendants consideration must be given to the cost consequences of the various possible outcomes should the matter proceed to trial.

5.10. In cases of multiple defendants that advice can be more complex. It must consider the risk of the claimant not succeeding against all defendants and being ordered to pay the costs of a successful defendant. Whether or not those costs can be put on an unsuccessful defendant will be the subject of an application for *Bullock* or *Sanderson* orders and entirely at the discretion of the Court. With discretion comes risk and the claimant must be advised on risks.

5.11. The extent of the risk may well change from time-to-time depending on the state of evidence and conduct of the parties. This must also be kept in mind.

5.12. The commercial risk to the plaintiff of an adverse costs order in the above circumstances may not be significant enough in terms of dollar value to cause the plaintiff any real concern. For example, in the case of a high quantum claim where the likely damages to be awarded significantly outweigh the value of any possible costs order. Of course, reaching such a conclusion with a degree of confidence requires a practitioner to go through the task of undertaking a cost – risk – benefit analysis specific to the case at hand. Following is a suggested method of analysing the commercial reality of the adverse costs risk eventuating. The figures are used purely for demonstration

[14] This may include costs of another party thrown away as a result of the amendment – see *Uniform Civil Procedure Rules 1999,* r386.

purposes, the intent here is simply to provide a proposed tool for undertaking this analysis.

Scenario A – high quantum

Total Damages Award	$600,000		
Defendant	1st	2nd	3rd
Outcome	Win	Win	Lose
Liability %	75%	25%	0%
Damages	$450,000	$150,000	$nil
Costs (in favour)	$50,000	$50,000	$nil
Costs (adverse)	$nil	$nil	$80,000
Sub-total	$500,000	$200,000	($80,000)
Net position	$620,000		
Less refunds	($80,000)		
Less professional fees	($120,000)		
End position	$420,000		

Scenario B – lower quantum

Total Damages Award	$150,000		
Defendant	1st	2nd	3rd
Outcome	Win	Win	Lose
Liability %	75%	25%	0%
Damages	$112,500	$37,500	$nil
Costs (in favour)	$50,000	$nil	$nil
Costs (adverse)	$nil	$nil	$60,000
Sub-total	$162,500	$37,500	($60,000)
Net position	$140,000		
Less refunds & disbursements	($65,000)		
Sub-total	$75,000		
Costs protection application	$75,000 / 2 = $37,500		
End position	$37,500		

5.13. Following are case references relevant to consideration of costs orders in multi-party litigation that may be of interest to readers.

5.14. *Skerbic v McCormack & Ors* [2008] ACTSC 4 (29 January 2008) is an example of a plaintiff who had succeeded in her primary action, but only against one of the three defendants. Paragraph [15] of the costs judgment sets the basis of the plaintiff's costs claim:

> [15] The plaintiff seeks an order for costs against the second defendant, and in addition a Bullock or Sanderson order against the second defendant in respect of her liability for the first defendant's costs; and a similar order against the second defendant in respect of her liability

for the third defendant's costs. The plaintiff argues that notwithstanding the Calderbank offer of 21 May 2007, she should not be subjected to a penal order as to costs, for the reason that it would have been unreasonable to expect her at that stage to predict the outcome of the litigation and to let the third defendant out, when it remained a possibility that, depending on how the evidence came out, she might fail against the second defendant but succeed against the third defendant

5.15. What is particularly helpful in *Skerbic* is the explanation of *Bullock* and *Sanderson* orders in multi-party litigation set out in [18] to [20] (emphasis added):

> [18] It has long been recognised that actions with a multiplicity of defendants can give rise to special problems. In the first place, **the costs of a defended action generally increase quite significantly where there are multiple defendants or additional parties**. Secondly, **the fruits of a victory by a plaintiff against one defendant can be severely diminished if the plaintiff loses against other defendants and is ordered to pay their costs**. To meet some of these problems, the courts over the years have developed special orders. A Bullock order (*Bullock v London General Omnibus Co* [1907] 1 KB 264) is an order that the plaintiff pay the costs of the successful defendant or defendants but add them as a disbursement to the plaintiff's own costs against the unsuccessful defendant. A Sanderson order (*Sanderson v Blyth Theatre Co* [1903] 2 KB 533) is an order made direct against an unsuccessful defendant to pay the costs of a successful defendant, as well as the costs of the plaintiff, despite the fact that there may have been no issue on the pleadings between the defendants. The choice of order can be significant where a party is insolvent or impecunious: this is not a factor in the present case.
>
> [19] The courts have long accepted that before a Bullock or Sanderson order will be made, **it must be seen to have been reasonable and proper for the plaintiff to have sued the successful defendant**. It is now clear that **there is an additional requirement that there must have been something in the conduct of the unsuccessful defendant which would make such an order a proper exercise of discretion**. Blackburn CJ, referring to earlier British and Australian authority, said in *Steppke v National Capital Development Commission* (1978) 21 ACTR 23 at page 30:
>
> > In my opinion there is a condition for the making of a Bullock order, in addition to the question of whether the suing of the successful defendant was reasonable, namely that the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant.
>
> [20] This statement of principle was approved by a number of the justices of the High Court of Australia in *Gould v Vaggelas* [1984] HCA 68; (1985) 157 CLR 215. Gibbs J said at page 229:
>
> > In my respectful opinion, however, the mere fact that the joinder of two defendants was reasonable does not mean that the unsuccessful defendant should be ordered to pay, directly or indirectly, the costs of the successful defendant. Obviously a judge should make a Bullock order only if he considers it just that the costs of the successful defendant should be borne by the unsuccessful defendant, and, if nothing that the unsuccessful defendant has said or done has led the plaintiff to sue the other defendant, who ultimately was held not to be liable, it is difficult to see any reason why the unsuccessful defendant should be required to pay for the plaintiff's error or overcaution.

5.16. The plaintiff in *Skerbic* was unsuccessful in obtaining a *Bullock* or *Sanderson* order and was left to contribute to the costs of the successful defendants (the *Calderbank* offer was relevant to the order for costs in relation to the third defendant). Insofar as the costs

of the successful first defendant were concerned the Court considered the conduct of the second defendant and the lack of conduct justifying the imposition of costs: "[T]he second defendant conducted the litigation entirely without reference to the claim by the plaintiff against the first defendant".[15]

5.17. In regards to hybrid claims under PIPA and the *Workers' Compensation and Rehabilitation Act 2003* (**WCRA**) the decisions of *Paskins v Hail Creek Coal Pty Ltd (No 2)* [2017] QSC 213 and *Thomson v State of Queensland & Anor (No 2)* [2019] QSC 115 are relevant to costs recovery where a plaintiff is successful against both defendants, but unable to recover costs against the employer due to the costs restrictions under the WCRA.

5.18. The following extracts from the decision in *Thomson* makes reference to consideration of the PIPA defendants claim for contribution or indemnity from the employer defendant as well as its denial of liability as conduct relevant to the exercising of the discretion:

> [22] The point remains that the first defendant's denial of liability, which was unmeritorious, put the plaintiff to the increased cost burden of pursuing a proceeding against the second defendant. If the first defendant had admitted liability and accepted the plaintiff's offer dated 12 May 2016 or his subsequent offer made pursuant to the *Uniform Civil Procedure Rules 1999* (Qld) dated 27 July 2017, then the plaintiff would not have been required to incur the costs which he did in pursuing a proceeding against the second defendant to trial.
>
> …..
>
> [24] The relevant order made in Paskins was for costs to be assessed on the standard basis. However, this was because it was common ground that the second defendant should be ordered to pay Mr Paskins' costs of the proceeding against the second defendant on the standard basis. In this matter, the plaintiff is entitled to indemnity costs against the first defendant because of the effective offer or offers which he made to it, and which were rejected by the first defendant. The issue, then, is whether the additional costs which the plaintiff incurred in pursuing a successful claim against the second defendant should be included as part of the costs order to be made against the first defendant and, if so, whether those costs should also be assessed on the indemnity basis.
>
> [25] In my view, it is appropriate to exercise my discretion as to costs to so order. The plaintiff was forced to pursue a proceeding against the second defendant in circumstances where the first defendant denied liability and sought indemnity or contribution against the second defendant in respect of its alleged negligence. It was reasonable for the plaintiff to not take the risk of suing one defendant and not the other. The plaintiff in fact succeeded in obtaining a judgment against the second defendant. He would not have been put to the cost of pursuing a claim against the second defendant if the first defendant had admitted liability. In the circumstances, it is just that the costs order against the first defendant should include the costs incurred by the plaintiff in proceeding against the second defendant. The indemnity costs order against the first defendant should include those costs.

5.19. To sum up on costs:

5.19.1. when selecting defendants to pursue in a multi-party PIPA claim be sure to consider the risk of a plaintiff only succeeding against one or more, but not all, defendants at trial. Such an outcome would see the plaintiff winning the battle at

[15] Skerbic v McCormack & Ors [2008] ACTSC 4, at [22].

trial, but losing the war on costs, such that the commercial benefit of pursuing the litigation may be significantly eroded and provide greater motivation for alternate dispute resolution;

5.19.2. where a respondent has taken a strong stance on liability and its inclusion in a claim from the outset consideration should also be given to the risk of that party seeking costs down the track if a decision is made not to pursue that defendant to trial or informally resolve the claim. Of course, the conduct of other respondents during the pre-litigation process will remain a relevant consideration regarding the extent of that risk.

5.20. Much like the prospects of an action, the risks on costs may change from time-to-time. It is therefore important to ensure that such risks are also continually assessed and (where appropriate) further advised upon.

6. ADDING VALUE THROUGH EARLY BRIEFING OF COUNSEL

6.1. It is commonplace for a personal injury practitioner to brief counsel at the point of compulsory conference. For multi-party claims consideration should be given to whether earlier briefing of counsel at discrete points in the pre-litigation process may be of added value to the claim and client (notwithstanding the additional disbursement).

6.2. If the claim cannot be resolved without commencing proceedings then it will likely be counsel that is tasked with drafting the pleadings. The better prepared counsel is to articulate a strong case in the pleading the better chance a claimant has of resolving the matter through alternate dispute resolution. Counsel's ability to do so will largely (if not entirely) be subject to the claimant's effective use of the pre-litigation process to adequately ventilate the issues and elicit necessary evidence to assist counsel in narrowing the scope of the case and assessing the prospects.

6.3. If counsel is only briefed in a complex multi-party claim at the point of conference a claimant may well be disadvantaged by the late briefing of counsel. This is particularly so if the brief is not received in a timely manner.

6.4. The incurring of disbursements for discrete issue advice will need to be considered on a case-by-case basis. For multi-party PIPA claims, there are various points in the pre-litigation process where the involvement of counsel for discrete issue advice and guidance may add value to the claimant's claim and prospects of avoiding litigation.

6.5. The following stages of a pre-litigation claim lend themselves well to counsel input on appropriate matters:

Stage	Counsel Input
Part 1 Notice of Claim	Early identification of issues with: • alleged duties in complex multi-party claims • self-limiting of scope of disclosure
Section 27 requests	• Settling of requests and identification of further disclosure needing to be requested • Advising in relation to "stalemate" situations where a respondent just won't give up the goods!

Post disclosure case and party re-assessment	Testing preliminary case theory and advising on prospects, parties and evidence gaps.[16]
Compulsory conference	• Prepare submissions for and appear at conference • Unsuccessful conference advice on further evidence gathering
Proceedings	Draft pleadings

[16] This nature of advice is often provided by counsel as part of the brief to appear at conference and will ultimately reduce the scope of work they are required to do when it is time to prepare for conference. If there are concerns over costs of obtaining this advice prior to a brief to appear at conference practitioners should discuss this with counsel directly to confirm whether any reduction in the "usual fee" for conference can be provided at the time of conference.

ANNEXURE A

PIPA Respondent Checklist: Preliminary Case Theory & Case Planning				
Case Theory:				
The Incident (Part 1 Q9):				
Item	**Factor**	**Preliminary Position**	**Evidence required**	**s27(1)(a) or (b) request (or other source to be utilised[17])**
The Respondent				
1	How was this respondent involved in or otherwise connected to the Incident?			
2	What evidence is currently available to support the involvement / connection, for example, direct evidence of claimant, documentary evidence, hearsay etc. Where inadequate evidence, can inquiries be made before lodging the Part 1 to firm up whether the respondent actually had the alleged involvement / connection? If so, what inquiries should be made?			
3	Where the proposed respondent is an individual are they likely to have insurance coverage (if not, are there "deep pockets" or sizeable assets from which a damages award could be recovered?)			
4	Where the proposed respondent is a company has an ASIC search been completed to ensure the company is not being wound up / in liquidation?			
5	Where the respondent is a company being wound up / in			

[17] Examples of other means of obtaining relevant evidence: lay witnesses, expert witnesses, Workplace Health & Safety files, QPS files, body corporate records (where the claimant is an *interested person* by the *Body Corporate and Community Management Act 1997*, s205, requests under the *Right to Information Act 2009* or *Information Privacy Act 2009*.

	liquidation are you aware of the existence of an insurance policy at the time of the Incident and, if so, what (if any) deductible applies in respect of that policy? Consider contacting administrator to make preliminary inquiries that may assist.			
6	Other – is the entity one capable of being sued in its own right or is there, for example, a controlling entity against whom the claim is to be made? What searches support the identification of the controlling entity?			
	The Case			
7	Duty – articulate the nature and scope of the duty alleged to have existed at the relevant time.			
8	Duty (delegation) – any knowledge or indication of delegation of the duty? If so, who is believed to have been delegated the duty and is there sufficient material to consider effectiveness and scope of delegation? If not, set out strategy of further investigation.			
9	What is the identified "risk(s)" that will underpin the case (**Risk**)?			
10	Foreseeability of the Risk – significance, whether known and (if not) why it ought reasonably to have been known by this particular respondent?			
11	Obvious risk – could the Risk be described as an *obvious risk* as defined in s 13 CLA?			
12	Dangerous recreational activity – does the Incident involve an activity that falls within the definition in s 18 CLA?			
13	Precautions against the materialisation of the Risk – what could have been done to avoid the Incident, why do you say a reasonable person in this particular respondent's position would have taken those precautions (ensure consideration of s9(2) CLA)			
14	Part 1 Q18 – detail the proposed allegations of negligence,			

	ensuring that consideration has been given to the above identified precautions and s9(2) supporting factors as well as any contract, Codes, Guidelines, Rules, Regulations, Standards etc. that may have been breached.			
15	Part 1 Q 18 – where multiple respondents are proposed to be served are the responses to Q18 proposed to be the same? If so, provide justification for this.			
16	Causation – is there adequate evidence at this stage to establish causation?			
17	Causation – are there <u>any</u> other possible causes for the incident / injuries such that causation requires further investigation? If yes, detail intended steps/investigations to be undertaken.			