# *Recasting the landscape of interlocutory applications:* Aon Risk Services Australia Ltd v Australian National University

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***Abstract***

In *Aon Risk Services Australia Ltd v Australian National University*, the High Court declared that parties do not have an absolute, untrammelled 'right' to amend pleadings at any stage of litigation, subject to costs. Rather, at least regarding amendments which are not 'necessary' to determine the 'real issues' in the proceeding, correct defects in pleadings or avoid multiple proceedings, leave to amend is dependent on the discretion of the trial judge, who must take all relevant matters into account, including — crucially — 'the concerns of case management'. In some cases, these 'concerns' may require that a party be 'shut out' from raising an arguable claim. This approach overturns the High Court's earlier decision in *Queensland v JL Holdings Pty Ltd*, which held that case management considerations could only 'perhaps' have this effect in 'extreme' circumstances. This case note will analyse Aon and its treatment in subsequent cases to ascertain whether, as predicted, it really has 'recast the landscape' of interlocutory applications in such a way that will enhance the 'quick and cheap' resolution of disputes without sacrificing substantive justice.

## I Introduction

> The High Court['s] decision in Aon … will change the culture that has developed since the earlier decision in *Queensland v JL Holdings* ... One would expect that in the future greater regard will be paid to case management … considerations, and to the implications of delay, which … include uncertainty and the stresses and pressures that those involved in litigation may come under.
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> — Judge Robin QC, *Parmac Investments Pty Ltd v Logan City Council.*[1]

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1 *Parmac Investments Pty Ltd v Logan City Council* [2009] QPEC 79 (6 August 2009) [8].

In *Aon Risk Services Australia Ltd v Australian National University*,[2] the High Court emphatically declared that parties do not have an absolute, untrammelled 'right' to amend pleadings at any stage of litigation, subject to costs. Rather, at least regarding amendments which are not 'necessary' either to determine the 'real issues' in the proceeding, or correct defects in pleadings or avoid multiple proceedings, leave to amend is dependent on the *discretion* of the trial judge, who must take all relevant matters into account, including — crucially — 'the concerns of case management'.[3] In some cases, these 'concerns' may require that a party be 'shut out' from raising an arguable claim. The approach in *Aon* overturns the High Court's earlier decision in *Queensland v JL Holdings Pty Ltd*,[4] which held that case management considerations could only 'perhaps' have this effect in 'extreme' circumstances.[5] This rearrangement of priorities was motivated by the growing recognition that, in the context of limited judicial resources, access to justice requires that some limits be placed on the traditional adversarial model of litigation.[6] This case note will analyse *Aon* and its treatment in subsequent cases to ascertain whether, as predicted, it really has 'recast the landscape' of interlocutory applications in such a way that will enhance the 'quick and cheap' resolution of disputes without sacrificing substantive justice.[7]

## II 'Anything Goes': The Position under *JL Holdings*

> [T]he ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim.
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> — Dawson, Gaudron and McHugh JJ, *JL Holdings*.[8]

In *JL Holdings*, the High Court held that justice *between the parties* was the 'paramount consideration' in determining an application to amend pleadings.[9] Consequently, an application should be granted so long as it raised an arguable issue and any prejudice to the respondent could be compensated by costs.[10] 'Case

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2 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 ('*Aon*').

3 Ibid 217 (Gummow, Hayne, Crennan, Kiefel and Bell JJ) (hereafter 'joint judgment').

4 *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 ('*JL Holdings*').

5 Ibid 154–5 (Dawson, Gaudron and McHugh JJ).

6 See, eg, *Aon* (2009) 239 CLR 175, 188–9, 192 (French CJ), 211, 213, 217 (joint judgment). See also, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) (see especially ch 1); Commonwealth, *Parliamentary Debates*, House of Representatives, 22 June 2009, 6732–4 (Robert McClelland, Attorney-General). This recognition in Australia was prompted by earlier reforms in England: see, eg, Lord Justice Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England* (1996).

7 *Gacic v John Fairfax Publications Pty Ltd* [2009] NSWSC 1198 (9 November 2009) [12] (Harrison J).

8 *JL Holdings* (1997) 189 CLR 146, 154.

9 Ibid 154–5 (Dawson, Gaudron and McHugh JJ). The court overturned the decision of the trial judge, current High Court Justice Kiefel J, who refused leave to amend because doing so would jeopardise the trial date, thus occasioning severe prejudice to JL Holdings: see *JL Holdings Pty Ltd v Queensland* (Unreported, Federal Court of Australia, Kiefel J, 16 June 1995).

10 *JL Holdings* (1997) 189 CLR 146, 154. This drew on a long line of authority: *Cropper v Smith* (1884) 26 Ch D 700, 710–11 (Bowen LJ, dissenting); *Tildesley v Harper* (1876) 10 Ch D 394, 396–7 (Bramwell LJ), 397 (Thesiger J); *O'Keefe v Williams* (1910) 11 CLR 171, 204 (Isaacs J); *Shannon v Lee Chun* (1912) 15 CLR 257, 260–1 (Barton J), 263 (O'Connor J), 265 (Isaacs J); *Clough &*

management considerations' could not be applied — 'except perhaps in extreme circumstances'[11] — to prevent this.[12] Correctly or incorrectly,[13] these statements were interpreted as effectively conferring a 'right' to amend pleadings at any stage of proceedings,[14] since 'arguable' is a low threshold and costs were viewed as a 'panacea' for prejudice[15] — especially as 'prejudice' did not encompass the 'strain' of litigation.[16] Thus, in the years between *JL Holdings* and *Aon*, applications to amend were almost invariably granted.[17]

The decision in *JL Holdings* encouraged a culture of carelessness and tactical game-playing by litigants, who knew they 'always ha[d] *JL Holdings* in [their] back pocket'.[18] This culture prolonged litigation and its associated drain on private and public resources, and judges were stymied in their attempts to prevent it.[19] Consequently, *JL Holdings* was subject to increasingly widespread and forceful criticism, such as that delivered by Finkelstein J:

> *JL Holdings* has been applied in many cases where a simple costs order will not do justice between the parties. The case has, in my view, unfairly hamstrung courts. … It is time that this approach is revisited. … [P]arties should not be treated as leniently as they have been.[20]

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*Rogers v Frog* (1974) 4 ALR 615, 618 (McTiernan ACJ, Menzies, Gibbs, Mason JJ). However, it was inconsistent with more recent Australian cases: see below n 21.

11 Such as bad faith or irreparable injury to the respondent: *Tildesley v Harper* (1876) 10 Ch D 394, 396–7 (Bramwell LJ); *Clough & Rogers v Frog* (1974) 4 ALR 615, 618.

12 *JL Holdings* (1997) 189 CLR 146, 154 (Dawson, Gaudron and McHugh JJ), 170 (Kirby J).

13 See Justice Byrne, 'Promoting the Efficient, Thorough and Ethical Resolution of Commercial Disputes: A Judicial Perspective' (Speech delivered at the LexisNexis Commercial Litigation Conference, Melbourne, 20 April 2005) 10: 'I am not at all certain that this is a correct reading of the judgments'. See also *Inamed Development Company v Morton Surgical Pty Ltd* (2007) 73 IPR 308, 310 (Gyles J). *Contra* Bowen LJ's explicit use of the word 'right' in *Cropper v Smith* (1884) 26 Ch D 700, 711.

14 *Aon* (2009) 239 CLR 175, 212 (joint judgment). See also Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 26 (13 February 2009) (Gummow J and JT Gleeson SC) (during argument); [2009] HCATrans 72 (28 April 2009) (French CJ).

15 *Cropper v Smith* (1884) 26 Ch D 700, 711 (Bowen LJ). See also *Shannon v Lee Chun* (1912) 15 CLR 257, 264 (O'Connor J), 266 (Isaac J). The High Court *appeared* to retreat from this extreme position in *JL Holdings*, accepting that costs are not a 'panacea': *JL Holdings* (1997) 189 CLR 146, 155 (Dawson, Gaudron and McHugh JJ), 170–1 (Kirby J), considering *Ketteman v Hansel Properties Ltd* [1987] AC 189. However, the court's endorsement of earlier cases which advocated this view and its refusal to recognise any non-compensable 'strain' in the case perpetuated this view.

16 'Prejudice' referred to proven 'specific' prejudice only, such as loss of witnesses or documents: see, eg, *Aon Risk Services Australia Ltd v Australian National University* (2008) 227 FLR 38, [66] (Penfold J). See also *Clough & Rogers v Frog* (1974) 4 ALR 615, 618: 'delay and irregularity … [are] relevant to costs but do not constitute injustice to the respondent'.

17 The decision in *JL Holdings* has been described as a 'carte blanche' to amend pleadings: Timothy Bowen and Andrew Saxton, 'Farewell to Carte Blanche Amendments' (10 August 2009) Dibbs Barker; Matthew McCarthy and Eleanor Bishop, 'The Importance of Case Management Principles in Civil Litigation' (24 August 2009) Allens Arthur Robinson.

18 Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 72 (28 April 2009) (JT Gleeson SC) (during argument). See also, *Aon* (2009) 239 CLR 175, 222 (Heydon J).

19 See, eg, Byrne, above n 13, 9–11. See also John P Hamilton, 'Thirty years of civil procedure in Australia: A personal reminiscence' (2005) 26 *Australian Bar Review* 258, [26]–[27].

20 *Black & Decker (Australasia) Pty Ltd v GMCA Pty Ltd* [2007] FCA 1623 (26 October 2007) [3]–[5] (application for leave to rely on additional evidence filed out of time).

Critics advocated returning to the approach in pre-*JL Holdings* cases, which recognised that a judge, in determining an interlocutory application, was entitled to consider the effect it would have on court resources and other litigants, and acknowledged that costs are not an all-healing medicine.[21] *JL Holdings* was increasingly distinguished in the Federal Court,[22] and the NSW Court of Appeal held that ss 56–58 of the *Civil Procedure Act 2005* (NSW) ('NSW CPA') had, in NSW, 'significantly altered' the *JL Holdings* approach.[23] Thus, when *Aon* arose, it was clear that the time had come for *JL Holdings* to 'undergo some reinterpretation'.[24]

## III *Aon*'s Path to the High Court

### A *The Facts*

> The reasons for placing [this case in the precedent books] turn on the numerous examples it affords of how litigation should not be conducted or dealt with.
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> — Heydon J, *Aon*.[25]

In December 2004, the Australian National University ('ANU') commenced proceedings in the ACT Supreme Court against three insurers. It sought an indemnity for losses due to damage to its buildings by a bushfire at its Mount Stromlo Complex. In their defences filed in April 2005, two insurers alleged, first, that property in the 'Property Not Insured' ('PNI') Schedule was *not* covered by ANU's insurance policies and, second, that, pursuant to s 28(3) of the *Insurance Contracts Act 1984* (Cth), they were entitled to reduce their liability to indemnify

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21 *Sali v SPC Ltd* (1993) 116 ALR 625, 636 (Toohey and Gaudron JJ), 629 (Brennan, Deane and McHugh JJ). See also *Bomanite Pty Ltd v Slatex Corporation Australia Pty Ltd* (1991) 32 FCR 379, 387 (Gummow J), 392 (French J); *Commissioner of Taxation v Brambles Holdings* (1991) 28 FCR 451, 456 (Sheppard J); *GSA Industries Pty Ltd v NT Gas Ltd* (1990) 24 NSWLR 710, 713 (Kirby P), 716 (Samuels JA); *Dawson v Deputy Commissioner of Taxation* (1984) 71 FLR 364, 366–7 (King CJ), 374 (Legoe J); *Squire v Rogers* (1979) 39 FLR 106, 113 (Deane J). This approach was also taken in more recent English cases: *Worldwide Corporation Ltd v GPT* [1998] EWCA Civ 1894; *Ashmore v Corporation of Lloyd's* [1992] 2 All ER 486; *Ketteman v Hansel Properties Ltd* [1987] AC 189.

22 See, eg, *Mijac Investments Pty Ltd v Graham* [2009] FCA 303 (1 April 2009); *Inamed Development Company v Morton Surgical Pty Ltd* (2007) 73 IPR 308, 310; *Pacific National (ACT) Ltd v Queensland Rail* (2005) 215 ALR 544; *Patrick v Capital Finance Pty Ltd* [2003] FCA 206 (18 March 2003); *Bray v F Hoffman-La Roche Ltd* [2003] FCA 1505 (19 December 2003).

23 *New South Wales v Mulcahy* [2006] NSWCA 303 (3 November 2006) [25], [29]; *Dennis v ABC* [2008] NSWCA 37 (1 April 2008) [28]–[29]. See also *Maronis Holdings Ltd v Nippon Credit Australia Ltd* [2000] NSWSC 753 (28 July 2000) [14]–[15]. Note that the expressed intention of the legislature in enacting the NSW CPA was in part to undo the effect of *JL Holdings*: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 April 2005, 15115 (Bob Debus, Attorney-General).

24 Gummow J, in the course of refusing special leave to appeal against Finkelstein J's judgment in *Black & Decker*: Transcript of Proceedings, *GMCA Pty Ltd v Black & Decker Inc* [2007] HCATrans 662 (14 November 2007).

25 *Aon* (2009) 239 CLR 175, 229.

ANU for the property that *was* insured[26] as it had been substantially undervalued by ANU. In response, in June 2005, ANU joined as a defendant its insurance broker, Aon Risk Services Australia Ltd ('Aon'). ANU claimed, as an alternative to its claim against the insurers, that if the PNI property was *not* covered by its insurance policies, then Aon had breached its contract with, and duty of care to, ANU by failing to arrange insurance for it.

On 13 November 2006, the first day appointed for a 4-week trial, ANU commenced mediation with those two insurers, having already settled its claim against the third. On 15 November, ANU settled with the insurers and consent judgments were entered. ANU then applied for an adjournment and leave to amend its statement of claim to add a substantial new claim against Aon: essentially, that Aon had breached a different contract for services and its duty of care in failing to declare the correct value of the property to the insurers. Gray J granted the adjournment, but did not hear the amendment application until 27 November. At that hearing, ANU stated that the decision to amend was made based on information received during mediation that demonstrated the importance of correct valuation, asserted the mediation was confidential, and refused to explain further. In cross-examination, ANU's solicitor acknowledged that a decision was made not to give a reason. In response, Aon produced letters from the insurers to ANU sent in 2003 and the insurers' underwriting manuals discovered to ANU in November 2005 which, Aon alleged, had alerted ANU to the importance of correct valuation much earlier.

## B *The Rules*

Rule 501 of the *Court Procedures Rules 2006* (ACT) ('the Rules') provides that all 'necessary' amendments *must* be made for the purposes of: (a) deciding the 'real issues' in the proceeding; and … (c) avoiding multiple proceedings.[27] Rule 502(1) provides that, at any stage of a proceeding, the court *may* give leave to or direct a party to amend a court document in the way it considers appropriate. Rule 21(1) states that the purpose of the Rules is 'to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense' and r 21(2) that, accordingly, the Rules are to be applied to achieve: (a) the 'just resolution of the real issues in the proceedings'; and (b) the 'timely disposal' of the proceedings, and all other court proceedings, at a cost affordable by the parties.[28]

## C *The Lower Courts*

On 12 October 2007 — over 10 months after the application was made — Gray J granted leave to ANU to amend its statement of claim, subject to costs.[29] He acknowledged that r 21(2)(b) encompassed case management principles, but did

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[26] Pursuant to s 28(3) of the *Insurance Contracts Act 1984* (Cth).

[27] Rule 501(b) provides the same in respect of amendments 'correcting any defect or error in the proceedings', but this provision was not considered in *Aon*.

[28] See also r 21(3) (the parties must help the court achieve the objectives), 21(4) (the court may impose appropriate sanctions if a party does not comply with the Rules or an order by the court).

[29] *Australian National University v Chubb Insurance Company of Australia* [2007] ACTSC 82 (12 October 2007) [60]–[61].

not think this justified departing from *JL Holdings*.[30] He declined to follow the recent NSW decisions qualifying *JL Holdings*, on the basis that the ACT Rules did not place as great an emphasis on case management considerations as the NSW CPA.[31] Accordingly, Gray J placed greatest weight on the fact that the amendments 'raise[d] real triable issues' between ANU and Aon.[32] Further, although he was 'not entirely satisfied' with ANU's explanation for delay, he accepted its lawyers had not appreciated the significance of proper valuation prior to mediation.[33] Consequently, he thought leave should be given and there was no reason for ordering indemnity costs.[34]

Another 10 months later, the ACT Court of Appeal upheld Gray J's decision on the amendment, but awarded costs on an indemnity basis.[35] All three judges agreed that r 21 did not justify departing from the High Court's binding decision in *JL Holdings*.[36] The two majority judges thought these amendments fell 'squarely within' the *JL Holdings* approach: they raised arguable claims, there were no case management considerations requiring leave to be refused, and any prejudice to Aon could be compensated by costs.[37] They acknowledged that ANU's explanation for delay was unsatisfactory, but thought this did not justify refusing leave.[38] Conversely, Lander J, dissenting, held that ANU had appreciated the importance of correct valuation well before mediation,[39] and that the lack of explanation for delay allowed an inference that it had deliberately decided to conduct its case this way.[40] Thus, there was no injustice in holding ANU to its decision,[41] especially since allowing the amendment would require Aon to 'start again' in preparing its defence.[42]

## D *Aon's Arguments in the High Court*[43]

Aon essentially argued that the amendment should have been refused because:

1. It was not 'necessary' under r 501, as it did not concern the 'real issues' and new proceedings would be barred by estoppel or abuse of process; and

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30 That is, the principle that justice is the 'paramount consideration': ibid [24], [36]–[37].
31 Ibid [35]–[36].
32 Ibid [43].
33 Ibid [42]–[43].
34 Ibid [58]–[59].
35 *Aon Risk Services Australia Ltd v Australian National University* (2007) 227 FLR 38, [18]–[19] (Higgins CJ), [22]–[23], [56], [69] (Penfold J).
36 Ibid [9] (Higgins CJ), [24], [26], [32], [45]–[46], [53] (Penfold J), [139]–[150], [175]–[177] (Lander J).
37 Ibid [67] (Penfold J). See also at [16] (Higgins CJ), [64], [66] (Penfold J).
38 Ibid [12]–[13] (Higgins CJ), [58]–[63] (Penfold J).
39 Ibid [229].
40 Ibid [225], [230].
41 Ibid [234]–[236].
42 Ibid [233]–[234]. Lander J implies that the case exhibited the 'exceptional circumstances' referred to in *JL Holdings* which justify refusing leave to amend: *possibly* bad faith and irremediable prejudice.
43 Special leave to appeal was granted on 13 Feb 2009: see Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 26 (13 February 2009).

2. It should have been refused under r 502 on the *JL Holdings* approach due to irremediable prejudice or, alternatively, that *JL Holdings* should be reconsidered.[44]

## IV Limits on Repleading: The High Court's Decision in *Aon*

> An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs … There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance.
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> — Gummow, Hayne, Crennan, Kiefel and Bell JJ, *Aon*.[45]

The High Court dismissed ANU's application for leave to amend and ordered it to pay Aon's costs.[46] Three judgments were delivered: one by French CJ, a joint judgment by Gummow, Hayne, Crennan, Kiefel and Bell JJ, and a concurring judgment by Heydon J. For conceptual clarity, I will break the decision down by issues, rather than judgments. The *Aon* plurality did not consider there to be 'any difference' between their judgment and French CJ's as to the principles,[47] and judges in subsequent cases have agreed.[48] This is generally correct, but there are some differences in emphasis that will be highlighted below.

The High Court said the 'starting point' for determining an application to amend is the rules governing such applications in the relevant jurisdiction;[49] here, the *Court Procedures Rules 2006* (ACT).[50] The court drew a distinction between rr 501 and 502.

### A *'Necessary' Amendments under Rule 501*

The court held that, to be a 'real issue in the proceeding', and for an amendment therefore to be 'necessary' under r 501(a),[51] the relevant controversy must have existed at the time of the application.[52] That is, it must already have been identified

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44 See Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 26 (13 February 2009); [2009] HCATrans 72 (28 April 2009) (JT Gleeson SC) (during argument).

45 *Aon* (2009) 239 CLR 175, 217.

46 Ibid 229.

47 Ibid 218 (joint judgment).

48 *Cleary Bros (Bombo) Pty Ltd v Waste Recycling & Processing Corporation* [2009] NSWSC 1248 (19 November 2009) [6] (Einstein J); *Public Trustee, South Australia v Commonwealth* [2009] NSWSC 1008 (25 September 2009) [36] (Patten AJ).

49 *Aon* (2009) 239 CLR 175, 200 (joint judgment).

50 Ibid 199.

51 There is some uncertainty as to what 'necessary' means, that is, whether r 501 imposes a positive *duty* to make amendments which fall within one of the three sub-rules, regardless of case management considerations, or whether r 21 somehow impacts the apparent obligation to amend imposed by this section. This uncertainty is considered below in Part VI(A).

52 *Aon* (2009) 239 CLR 175, 192 (French CJ), 205, 208–9 (joint judgment). The court rejected (at 204, 209) ANU's argument that the 'real issues' should be determined by reference to 'the subject-matter

as a matter in dispute *between the relevant parties*.[53] The authorities indicate that courts should not take an 'unduly narrow' approach to what are the 'real issues'[54] and the plurality accepted they may extend beyond the pleadings.[55] However, they do *not* include entirely new issues never previously agitated between the parties.[56] The plurality left open whether the 'real issues' must additionally be non-peripheral issues 'determinative of the … dispute'.[57]

In considering whether an amendment is necessary to avoid multiple proceedings under r 501(c), the court held that a judge is entitled to consider whether reasonable diligence by the applicant would have led to the claim being brought in the existing proceedings, so that any new proceedings would likely be barred on the grounds of abuse of process or *Anshun* estoppel.[58] Only if the applicant can explain how it could avoid such objections in new proceedings will the amendment truly be 'necessary' to avoid multiple proceedings.[59]

## B *'Discretionary' Amendments under Rules 502 and 21*

The plurality held that amendments raising entirely new issues fall to be determined in accordance with the 'general discretion' in r 502(1),[60] 'read with' (that is, attempting to achieve) the objects in r 21.[61] Accordingly, as captured in the

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of [the parties'] dispute, before there was any litigation', so that the term refers merely to issues which are raised in good faith and are fairly arguable: see Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 72 (28 April 2009) (BW Walker, SC) (during argument).

53 This will be the case when, for example, the issue has already been pleaded 'inferentially' or 'unclearly' (as in *Tildesley v Harper* (1876) 10 Ch D 394 and *Dwyer v O'Mullen* (1887) 13 VLR 993), raised by another party in a way that 'inextricably involve[s]' the party opposing leave to amend (as in *Cropper v Smith* (1884) 26 Ch D 700), or was 'present in the nature of the bargain struck' (as in *O'Keefe v Williams* (1910) 11 CLR 171): *Aon* (2009) 239 CLR 175, 209 (joint judgment).

54 *Aon* (2009) 239 CLR 175, 209 (joint judgment).

55 Ibid 205. Note, however, that French CJ seems to limit the 'real issues' to those contained in the pleadings: 'The real issues in the proceeding were to be determined … by reference to the limited way in which ANU had chosen to frame its original claim against Aon': at 192.

56 Ibid 205.

57 Ibid. It is beyond the scope of this case note to consider this proposition in depth, but it would seem to be supported by the natural meaning of 'real' and the objectives in r 21 — intuitively, the Rules should be applied to achieve the 'just resolution' of the parties' *central dispute* so that limited court resources are not wasted on issues of minor importance to the detriment of other litigants.

58 Ibid 194 (French CJ), 209–10 (joint judgment). An '*Anshun* estoppel' arises where the issue raised in subsequent proceedings is so intimately connected with the subject matter of prior proceedings that it was unreasonable not to have raised it in those prior proceedings, and so its determination in the subsequent proceedings is barred: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. See below Part V(D) for further discussion of the abuse of process and estoppel issue.

59 *Aon* (2009) 239 CLR 175, 193 (French CJ), 210 (joint judgment).

60 Except amendments that are 'necessary' under r 501(b) or (c). Further, if, as suggested above in Part IV(A), the phrase 'real issues' also imports a significance threshold, amendments regarding non-essential issues already in dispute between the parties may *also* fall to be determined under r 502.

61 *Aon* (2009) 239 CLR 175, 205, 210, 213 (joint judgment), 218 (Heydon J). Conversely, French CJ thought the conclusion that r 502 confers a discretion to be exercised with regard to all relevant factors, including case management considerations, could be reached 'without having regard to' r 21, though r 21 'strengthens this conclusion' and 'informs' the exercise of both rr 501 and 502: at 195. Thus, French CJ's decision on the factors to be considered in exercising r 502 is essentially

quote above, parties do not have a *right* to amend pleadings at any time, subject to costs.[62] Rather, leave to amend depends on the *discretion* of the trial judge, who must take all relevant matters into account, including 'the concerns of case management',[63] which are embodied in r 21(2)[64] and are 'an accepted aspect' of the Australian civil justice system.[65] French CJ and the plurality stated that, to the extent that statements in *JL Holdings* suggest otherwise, they 'should not be applied in the future'.[66] Heydon J more 'absolutely' declared that *JL Holdings* has 'ceased to be of authority', at least in jurisdictions with provisions resembling rr 21 and 502.[67]

The court indicated that matters relevant to the exercise of the judicial discretion to allow amendment include:[68]

1. the *extent of delay* in seeking leave and its associated *costs*;[69]
2. the *point the litigation has reached*:[70] applications brought during the time set for trial or that require vacating trial dates are less likely to be granted;[71]
3. the *prejudice* to the respondent if leave is granted[72] — *including* the financial and emotional 'strain' of ongoing litigation, which even indemnity costs may not heal;[73]
4. the prejudice to *other litigants* and the efficient use of *court resources*:[74] that is, the court held that the 'just' resolution of disputes is not limited to justice *between the parties*, but 'requires account to be taken of other litigants';[75]
5. the applicant's *explanation* for the delay;[76]
6. the '*nature and importance*' of the amendment to the applicant;[77] and
7. the 'need to maintain *public confidence* in the judicial system'.[78]

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the same as the plurality's, but he does not think r 21 is necessary to support this. Presumably, he considers that the relevance of case management considerations is mandated by the common law: see, eg, at 188–9.

62 At least, as explained above in Part IV(A), when the amendment does not fall within r 501.

63 *Aon* (2009) 239 CLR 175, 217 (joint judgment). See also at 182, 189, 192 (French CJ), 212, 213 (joint judgment).

64 In particular, r 21(2)(b): ibid 217 (joint judgment).

65 Ibid 211 (joint judgment). As explained above in n 61, French CJ presumably shares this view.

66 Ibid 182, 192 (French CJ), 215 (joint judgment).

67 Ibid 222. See also *ASIC v Rich* (2009) 75 ACSR 1, 29 (Austin J): Heydon J 'took the more absolute approach'.

68 Note that Heydon J agreed with the approach of the plurality: *Aon* (2009) 239 CLR 175, 218.

69 Ibid 214–15 (joint judgment). See also at 189, 191, 192 (French CJ).

70 Ibid 214–15 (joint judgment).

71 Ibid 217 (joint judgment).

72 Ibid 214 (joint judgment).

73 Ibid 182 (French CJ), 213–14, 217 (joint judgment). The plurality said 'personal litigants' will likely 'feel the strain' more than corporations or business persons, but that the latter are not immune: at 214. Conversely, Heydon J thought expedition is 'especially desirable' for commercial litigation because failing to resolve commercial disputes is injurious to commerce and hence the public interest: at 223–4. *Aon*'s statements on prejudice and costs overturned the *JL Holdings* line of authority in favour of pre-*JL Holdings* Australian cases and more recent English cases: see above n 21.

74 Ibid 182, 189, 192 (French CJ), 212, 214, 215 (joint judgment).

75 Ibid 212 (joint judgment), adopting the approach in the Australian and English cases in above n 21.

76 Ibid 215 (joint judgment). See also at 182, 189 (French CJ). This requirement will be discussed in detail below, in Part VI(B).

77 Ibid 214 (joint judgment) (emphasis added).

Thus, the High Court held that 'limits may be placed upon re-pleading, when delay and costs are taken into account'.[79] That is, it explicitly departed from *JL Holdings* and declared that 'case management considerations' may sometimes — and not only in 'extreme circumstances' – require that a party be shut out from raising an arguable claim.[80]

## C *Application to the Facts*

The court held that ANU's proposed amendments were not 'necessary' under r 501(a), because they raised substantial new claims not previously in dispute between the parties,[81] nor under r 501(c), because there was no reason to think refusal to amend would lead to new proceedings as ANU had not proved it could avoid abuse of process and estoppel objections.[82] Thus, the amendments could only be supported by r 502.[83]

The court found that, in exercising their discretion under r 502, the trial judge and Court of Appeal majority erred in not having sufficient regard to the following factors:[84]

1. ANU sought to introduce substantial new claims which would effectively require Aon to re-craft their defence from the beginning;[85]
2. the application was brought during the time set for trial and adjournment would vacate the remaining scheduled weeks of trial;[86]
3. even indemnity costs would not overcome the prejudice to Aon from the substantial delay and necessity of defending new claims;[87]
4. ANU had known the importance of proper valuation for 12 months and offered no explanation for delay in seeking leave to amend.[88] French CJ and the plurality said this lack of explanation suggested any explanation did not favour ANU;[89] and

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78 Ibid 182 (French CJ) (emphasis added). See also at 192.

79 Ibid 213 (joint judgment). See also at 181–2 (French CJ), 214, 217 (joint judgment).

80 See, eg, ibid 212 (joint judgment).

81 Ibid 192 (French CJ), 209 (joint judgment), 219 (Heydon J). The plurality stated that, prior to the application, there had been no issue about Aon's responsibility for the declared values, though the insurers had raised the issue of the declared values *as between the insurers and ANU*: at 209.

82 Ibid 192 (French CJ), 210 (joint judgment).

83 Ibid.

84 Note that Heydon J thought that, since the trial judge and Court of Appeal had only considered r 501, the High Court could exercise the discretion under r 502 itself for the first time and should exercise it against ANU for the reasons contained in the joint judgment: ibid 221.

85 Ibid 197, 215, 217 (joint judgment).

86 Ibid 215, 217 (joint judgment).

87 Ibid 213, 215, 217 (joint judgment). See also at 182 (French CJ).

88 Ibid 215, 217 (joint judgment).

89 Ibid 182 (French CJ), 215 (joint judgment). Heydon J, however, considered that no adverse inference could be drawn from the failure to explain given the plea of privilege: at 222. See below Part VI(B) for further discussion.

5. granting the application and adjournment would delay the hearings of other litigants[90] and undermine public confidence in the legal system.[91]

These factors indicated that adjourning the trial and granting leave to amend was contrary to the objectives set out in r 21 so should not have been allowed under r 502.[92]

## V Implications: The New Landscape

Since it was handed down just over a year ago, *Aon* has already been discussed, applied and distinguished by hundreds of cases. These cases provide guidance on the scope of the *Aon* doctrine and the extent to which it has 'recast the landscape' of interlocutory applications.

### A *Applies in Other Jurisdictions*

The plurality in *Aon* observed that r 21 is mirrored in most other Australian jurisdictions.[93] This suggests their statements apply to proceedings in other jurisdictions 'by a parity of reasoning'.[94] Consequently, in addition to the ACT Supreme Court,[95] federal and state courts across Australia — the Federal Magistrates Court[96] and Family Court,[97] and courts in NSW,[98] Victoria,[99] Queensland,[100] South Australia,[101] Western Australia,[102] the Northern Territory[103]

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90 Ibid 182 (French CJ), 217 (joint judgment).

91 Ibid 195 (French CJ).

92 Ibid 182 (French CJ), 215 (joint judgment), 221 (Heydon J).

93 Ibid 210–11. The plurality cited the *Civil Procedure Act 2005* (NSW) ss 56–58; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 1.14; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Supreme Court Civil Rules 2006* (SA) r 3; *Rules of the Supreme Court 1971* (WA) O 1 rr 4A, 4B; *Supreme Court Rules* (NT) r 1.10: at 210 n 181. Note also *Federal Magistrates Court Rules 2001* (Cth) r 1.03; *Family Law Rules 2004* (Cth) r 1.04. The plurality further observed that '[t]he *Supreme Court Rules 2000* (Tas) and the *Federal Court Rules* (Cth) appear to be the only rules now absent such a position': at 210 n 181. The treatment of *Aon* in the Federal Court and Tasmania will be discussed in detail in this Part.

94 Alain Musikanth and Steven Wong, 'Goodbye JL Holdings: A Case Note on *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27' (2009) 36(11) *Brief* 28, 30.

95 See, eg, *Winnel v Byron* [2009] ACTSC 146 (6 November 2009). See also *Makas v Peter Enders Building Consultant Pty Ltd* (2009) 232 FLR 455, in which Penfold J, one of the judges comprising the ACTCA majority in *Aon*, briefly considers the High Court decision in *Aon*: at 463–4.

96 See, eg, appeals to the Federal Court regarding decisions of the Federal Magistrates Court in *Heng V (Aust) Pty Ltd v Wang* [2009] FCA 922 (20 August 2009); *Pascoe v Boensch* [2009] FCA 1240 (3 November 2009) [69], [73].

97 See, eg, *Home v Home (No 2)* [2009] FamCA 1079 (17 November 2009) (application for extension of time); *Pond v Thurga (No 2)* [2009] FamCA 1241 (2 December 2009) (application for adjournment).

98 See, eg, *Phoenix Commercial Enterprises v City of Canada Bay Council* [2010] NSWCA 64 (1 April 2010); *Markisic v Cth* [2010] NSWSC 24 (25 February 2010); *Puruse Pty Ltd v Sydney City Council* (2009) 169 LGERA 85 (NSWLEC).

99 See, eg, *Re AWB (No 7)* [2009] VSC 413 (18 September 2009).

100 See, eg, *Hartnett v Hynes* [2009] QSC 225 (11 August 2009). Note also *Multi-Service Group Pty Ltd v Osborne* [2010] QCA 72 (26 March 2010), in which the QCA overturned Atkinson J's decision to refuse an application to reopen matters due to *Aon* considerations in the earlier case of *Multi Service Group (in liq) v Osborne* [2009] QSC 286 (11 September 2009). The QCA acknowledged the *Aon* approach, but thought it did not justify refusal here: at [31], [56].

— have embraced the *Aon* approach to amending pleadings, and extended it to other interlocutory applications, as will be discussed below.[104] Many cases emphasise that the starting point is the relevant jurisdiction's rules.[105] However, there have been few attempts to distinguish *Aon* on the basis of different statutory wording,[106] especially as the High Court suggested that case management considerations inhere in the common law.

One transient exception to the wholehearted embrace of *Aon* was that, in the brief period between the decision in *Aon* and the commencement of the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth) ('Amendment Act'), there was some speculation as to whether *Aon* applied to civil proceedings in the Federal Court, since the *Federal Court of Australia Act 1976* (Cth) did not contain a r 21-equivalent provision.[107] Jagot J seemed to suggest *Aon* was not directly applicable. In one case, she noted the argument that the *Federal Court Rules* ('FCR') differed from those considered in *Aon*,[108] and granted leave to amend a defence to introduce substantial new claims on the first day of a 6-day hearing, which seems inconsistent with *Aon*'s more rigorous approach. In another case, she said *Aon*'s impact on Federal Court proceedings was an open question.[109]

Conversely, other Federal Court judges thought *Aon was* directly applicable, notwithstanding the absence of a rule mirroring r 21. Perram J commented that:

> Despite the absence of such a rule it nevertheless appears to be established in this Court that there is a case management system and that

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101 See, eg, *Beverage Bottlers (SA) Ltd (in liq) v Abode Enterprises Pty Ltd* [2009] SASC 272 (3 September 2009) (application for dismissal of proceedings), though *Aon* principles did not justify dismissal in this case: at [234].

102 See, eg, *Brocx v Hughes* [2010] WASCA 57 (31 March 2010).

103 See, eg, *United Super Pty Ltd v Randazzo Investments Pty Ltd* [2009] NTSC 50 (22 September 2009).

104 See below Part V(C).

105 See, eg, *Bi v Mourad* [2010] NSWCA 17 (11 February 2010) [49] (Allsop P); *Markisic v Commonwealth* [2010] NSWSC 24 (25 February 2010) [143]; *Perpetual Ltd v Onesemo* [2010] NSWSC 43 (11 February 2010) [7]; *Grivas v Harrison* [2010] NSWSC 208 (18 March 2010) [9].

106 For example, Robson J stated that, although the plurality in *Aon* placed 'considerable reliance' on r 21 in their decision, *Aon* still has 'significant relevance' to Victorian courts, despite the different wording of the Victorian rule: *Re AWB (No 7)* [2009] VSC 413 (18 September 2009) [12], [17], [24]. Other judges have made similar observations: see, eg, *QBE Workers Compensation (NSW) Ltd v BAE Systems Regional Aircraft Ltd* [2010] NSWSC 82 (19 February 2010) [46] (Latham J); *Ehsman v Nutectime International Pty Ltd* [2009] NSWSC 909 (28 August 2009) [17] (Gzell J); *Perpetual Ltd v Onesemo* [2010] NSWSC 43 (11 February 2010) [7], [13] (Harrison AsJ); *Hartnett v Hynes* [2009] QSC 225 (11 August 2009) [20] (Applegarth J); *Field v Luxor Products Pty Ltd* [2009] QSC 218 (20 July 2009) [41] (P Lyons J).

107 As the plurality in *Aon* observed: see above n 93.

108 However, she did not directly consider the argument's validity: see *Genworth Financial Mortgage Insurance Pty Ltd v Peter Clisdell Pty Ltd* [2009] FCA 1014 (7 September 2009) [16].

109 *Media Ocean Ltd v Optus Mobile Pty Ltd (No 6)* [2009] FCA 1319 (5 November 2009) [33]: 'I do not accept a submission that the principles established in *Aon* are inapplicable because of the absence of a rule in this Court equivalent to the rule under consideration in *Aon*. But … I do not need to determine that conclusively in this case. Nor do I need to determine the question whether *Aon* effectively overrules [*JL Holdings*] or involves a different emphasis'.

> that system 'is the backdrop against which the relevant rules must be considered and applied'.[110]

Perram J opined that such a rule was only absent because the existence of a 'functioning case management system' in the Federal Court for over 25 years had rendered it unnecessary.[111] Besanko J took a slightly different approach, emphasising that French CJ in *Aon* did not view r 21 as crucial to his decision[112] and that the plurality suggested case management considerations were part of the common law.[113] Thus, he thought the *Aon* approach was available on the basis of FCR O 13 r 2 alone. Most significantly, the Full Federal Court did not hesitate in applying the *Aon* approach pre-Amendment Act.[114]

However, since the commencement of the Amendment Act,[115] there is *absolutely* no doubt that the *Aon* approach applies in the Federal Court. This Act amended the *Federal Court of Australia Act 1976* (Cth) to introduce provisions similar to ss 56 and 57 of the NSW CPA, including — crucially — an 'overarching purpose' of resolving disputes as '*quickly, inexpensively and efficiently* as possible'.[116] These new provisions are even *stronger* than r 21 in their endorsement of case management and consequently provide a clear statutory basis for the *Aon* approach. The Federal Court is clearly of this opinion, applying the *Aon* approach in numerous decisions in 2010.[117] This coheres with the intention of the legislature:

> *The provisions will make it clear that case management is a relevant consideration in the attainment of justice.* … Section 37M will provide support to judges so they can confidently employ active case management powers. The intention is to overcome the restrictive interpretation by the courts of what is in the interests of justice following [*JL Holdings*].[118]

Another possible exception is civil proceedings commenced in Tasmania before 4 September 2006. These are governed by the *Supreme Court Rules 2000*

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110 *Sportsbet Pty Ltd v NSW (No 7)* [2009] FCA 1585 (23 December 2009) [50]; quoting *Lenijamar Pty Ltd v AGC (Advances) Ltd* (1990) 27 FCR 388, 395 (Wilcox and Gummow JJ).

111 *Sportsbet Pty Ltd v NSW (No 7)* [2009] FCA 1585 (23 December 2009) [51].

112 *Aon* (2009) 239 CLR 175, 195. See above n 61.

113 *Scantech Ltd v Asbury* [2009] FCA 1480 (11 December 2009) [39].

114 See *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* (2009) 178 FCR 401. *Aon* was also applied to amendment applications pre-Amendment Act in *Heng V (Australia) Pty Ltd v Wang* [2009] FCA 922 (20 August 2009); *Pacific Exchange Corporation Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 300; *Verge v Devere Holdings Pty Ltd (No 2)* [2009] FCA 1048 (17 September 2009).

115 The relevant provisions commenced operation on 1 January 2010.

116 *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth) s 37M(1) (emphasis added). Section 37M(2) provides that the 'objectives' under the 'overarching purpose' include, inter alia, the just, timely and cost-proportionate resolution of disputes, the efficient use of judicial and administrative resources and the efficient disposal of the court's overall caseload. Section 37N places a duty on litigants and their lawyers to conduct proceedings in accordance with the 'overarching purpose', on pain of negative costs orders or other procedural sanctions under s 37P(5) and (6).

117 See, eg, *Ginger Roger Pty Ltd v Parrella Enterprises Pty Ltd (No 2)* [2010] FCA 128 (24 February 2010); *Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2010] FCA 215 (5 February 2010); *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 2)* [2010] FCA 275 (8 March 2010); *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* [2010] FCA 428 (15 April 2010).

118 Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Bill 2009 (Cth) 4, 9.

(Tas) ('Tas SCR'), which does not contain a rule mirroring r 21.[119] In one case, Blow J held that this excluded the *Aon* approach, and meant the old common law authorities continued to apply.[120] However, he said *Aon* provided a 'great deal of guidance' where the case management provisions in rr 414–17 — and their time-saving purpose in r 415(2)[121] — were engaged.[122] Conversely, two other judges applied *Aon* to amendment applications even where rr 414–17 did not apply, though both thought those principles did not require refusing leave,[123] and the Full Court said *Aon* considerations 'have some bearing on' the exercise of a discretion.[124] Thus, the cases have not produced a clear view on the applicability of *Aon* to proceedings governed by the Tas SCR where rr 414–17 do not apply. However, given the High Court's indication that case management considerations inhere in the common law and the dominant view in the Federal Court pre-Amendment Act,[125] the better view is that it *is* legitimate for the Tasmanian courts to apply the *Aon* approach to these proceedings, though possibly in an attenuated form.[126] Proceedings commenced on/after 4 September 2006 are governed by the *Supreme Court Civil Rules 2006* (Tas) which contains an 'objects' provision with case management principles,[127] justifying *Aon*'s application.

## B *'Raises the Bar' for Late Amendment Applicants*[128]

> [A] party that has had sufficient opportunity to plead their case may be denied leave to amend for the sake of doing justice to the other parties and to achieve the objective of the just and expeditious resolution of the real issues in dispute at a minimum of expense.
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> — Applegarth J, *Hartnett v Hynes*.[129]

When *Aon* was first handed down, various commentators opined that its shift from *JL Holdings* would mean trial judges would be 'freer to refuse applications for

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119 Note that the amendment of pleadings is governed by r 427.

120 *Campbell v Biernacki* [2009] TASSC 117 (18 December 2009) [34] (order for stay of proceedings).

121 Rule 415(2) states that '[t]he purpose of a directions hearing is to eliminate any lapse of time from the commencement of a proceeding to its final determination beyond that reasonably required for … interlocutory matters essential to the fair and just determination of the issues in contention between the parties and the preparation of the case for trial.'

122 *Pumptech Tasmania Pty Ltd v CB and M Design Solutions Pty Ltd (No 2)* [2009] TASSC 78 (10 September 2009) [84]–[85].

123 *Mirkazemi v Manns* [2009] TASSC 91 (14 October 2009) [10]–[14] (Holt AsJ); *Dodge v Snell* [2010] TASSC 12 (11 March 2010) [11] (Wood J).

124 *Aquagenics Pty Ltd v Break O'Day Council* [2010] TASFC 3 (10 May 2010) [42].

125 The reasoning of Besanko J particularly is apposite.

126 That is, that *Aon*'s approach to amendment applications — including the relevance of case management considerations, the expansion of the definition of 'prejudice' and the rejection of costs as a panacea — applies to proceedings governed by the Tas SCR, but that the threshold for refusing amendment applications based on case management considerations may be higher given the absence of explicit statutory endorsement of case management objectives.

127 *Supreme Court Civil Rules 2006* (Tas) r 3. The amendment of pleadings is governed by r 57.

128 Corrs Chambers Westgarth, 'The High Court Warns against Last-Ditch Amendments in Litigation' (28 August 2009) Corrs Chambers Westgarth.

129 *Hartnett v Hynes* [2009] QSC 225 (11 August 2009) [27].

adjournments and amendments',[130] so litigants would bear a 'heavier burden' to justify amendments.[131] This prediction is substantiated by subsequent case law. Australian courts have embraced *Aon*'s affirmation of the relevance of case management principles,[132] its broadening of the notion of 'prejudice',[133] its acknowledgment of the claims of other litigants,[134] its rejection of the heal-all power of costs,[135] and thus its central holding that parties have no *right* to amend subject to costs.[136] As a result, judges have been more willing to refuse amendments[137] — even if they would raise 'arguable claims' — that:

1. are brought during the hearing or would necessitate vacating the hearing;[138]
2. would substantially increase the length, cost and complexity of proceedings, especially due to the late introduction of substantial new issues;[139]

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130 Andrew Carter and Chris Burgess, 'The High Court Cracks the Whip: Arguable Claims Shut Out' (12 August 2009) Blake Dawson. See also Andrew Eastwood and Graeme Johnson, 'The High Court Upholds the Principles of "Just, Quick and Cheap" Litigation' (11 August 2009) Freehills.

131 *Aon* (2009) 239 CLR 175, 181–2 (French CJ). See also above n 128 .

132 See, eg, *Heng V (Aust) Pty Ltd v Wang* [2009] FCA 922 (20 August 2009) [38]; *University of Western Australia v Gray (No 26)* [2009] FCA 1229 (30 October 2009) [37], [41]; *Mijac Investments Pty Ltd v Graham* [2010] FCA 87 (20 January 2010) [22]; *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2010] FCA 274 (4 March 2010) [21]; *Spencer v Minister for Climate Change and the Environment (NSW)* [2010] NSWCA 75 (13 April 2010) [32].

133 Subsequent cases have interpreted the statements in *Aon* as introducing a factor of 'presumptive prejudice' from the 'simple fact' of delay, which must be taken into account when considering any interlocutory application that would lengthen proceedings: see, eg, *Genworth Financial Mortgage Insurance Pty Ltd v Peter Clisdell Pty Ltd* [2009] FCA 1014 (7 September 2009) [19]; *Sportsbet Pty Ltd v NSW (No 7)* [2009] FCA 1585 (23 December 2009) [54]; *Pacanowski v Wakerman & Associates* [2009] NSWCA 402 (10 November 2009) [14]–[15]; *Chaina v Presbyterian Church (NSW) Property Trust (No 3)* [2009] NSWSC 1243 (23 November 2009) [52]; *Duncan-Strelec v Tate* [2009] NSWSC 1252 (20 November 2009) [35]; *QBE Insurance (Australia) Ltd v Westpoint Realty Pty Ltd* [2009] NSWSC 1298 (16 November 2009) [10]; *Fletcher v St George Bank* [2010] WASC 75 (20 April 2010) [26]; *Field v Luxor Products Pty Ltd* [2009] QSC 218 (20 July 2009) [66]. Regarding corporations, see, eg, *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 2)* [2010] FCA 275 (8 March 2010) [36]; *Owners Strata Plan No 64622 v Australand Constructions Pty Ltd* [2009] NSWSC 1083 (9 October 2009) [71]–[72]; *Puppinato v D and D Machinery Pty Ltd* [2010] QSC 47 (24 February 2010) [48]; *Pumptech Tasmania Pty Ltd v CB and M Design Solutions Pty Ltd (No 2)* [2009] TASSC 78 (10 September 2009) [81], [83].

134 See, eg, *University of Western Australia v Gray (No 26)* [2009] FCA 1229 (30 October 2009) [37]; *Tinworth v WV Management Pty Ltd* [2009] VSC 552 (3 December 2009) [35] (circuit litigation); *Brocx v Hughes* [2010] WASCA 57 (31 March 2010) [93].

135 See, eg, *Nolan v MBF Investments Pty Ltd (No 3)* [2009] VSC 457 (14 October 2009) [39]; *Pond v Thurga (No 2)* [2009] FamCA 1241 (2 December 2009) [13].

136 See, eg, *Global Brand Marketing Inc v YD Pty Ltd* [2010] FCA 323 (1 April 2010) [38]; *Heng V (Australia) Pty Ltd v Wang* [2009] FCA 922 (20 August 2009) [38]; *Spencer v Minister for Climate Change and the Environment (NSW)* [2010] NSWCA 75 (13 April 2010) [33]; *MM Constructions (Aust) Pty Ltd v Port Stephens Council (No 1)* [2010] NSWSC 241 (23 March 2010) [11], [13], [27]–[28]; *Fletcher v St George Bank* [2010] WASC 75 (20 April 2010) [25].

137 And other interlocutory applications: see below Part V(C).

138 See, eg, *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 2)* [2010] FCA 275 (8 March 2010) (first day of hearing); *Ehsman v Nutectime International Pty Ltd* [2009] NSWSC 909 (28 August 2009) (first day of five-day trial); *MM Constructions (Aust) Pty Ltd v Port Stephens Council (No 1)* [2010] NSWSC 241 (23 March 2010) (second day of final hearing); *Nolan v MBF Investments Pty Ltd (No 3)* [2009] VSC 457 (14 October 2009) (after case closed); *Tinworth v WV Management Pty Ltd* [2009] VSC 552 (3 December 2009) (on first day of jury trial in context of circuit litigation).

3. are unexplained[140] or the result of a deliberate tactical decision;[141] and/or
4. occur in a context of repeated and unjustified non-compliance with court orders.[142]

However, *Aon* does not spell the 'death knell' for late amendments,[143] as the plurality emphasised.[144] *Aon* and subsequent cases have strongly affirmed that the 'paramount purpose' of the relevant court rules and the dispute resolution process is 'justice', though 'justice' in a reconceived form;[145] that a judge's powers cannot be exercised punitively;[146] and that 'some allowance' must be made for 'the complexity of matters and for changes which inevitably occur' in litigation.[147] Accordingly, subsequent cases indicate that a late application to amend pleadings will likely be more successful where:[148]

1. it is made at an *earlier stage* of the proceedings and/or is unlikely to require vacating trial dates[149] or substantially prolonging the hearing;[150]

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[139] Such amendments tend to cause prejudice to the opposing party and other litigants. See, eg, *Ginger Roger Pty Ltd v Parrella Enterprises Pty Ltd (No 2)* [2010] FCA 128 (24 February 2010) [27] (raised new substantial issues and would necessitate the respondents obtaining separate legal representation at a late stage); *Pacific Exchange Corporation Pty Ltd v Federal Commissioner of Taxation* (2009) 180 FCR 300, 311 (introduced a new allegation that would require adjournment for many months); *Nolan v MBF Investments Pty Ltd (No 3)* [2009] VSC 457 (14 October 2009) [36] (would effectively reopen the case).

[140] See, eg, *Tinworth v WV Management Pty Ltd* [2009] VSC 552 (3 December 2009) [36]; *Teo Tran v Calavista Australia Pty Ltd* [2010] ACTCA 5 (4 March 2010) [55]–[57]; *Winnel v Byron* [2009] ACTSC 146 (6 November 2009) [27].

[141] See, eg, *Sportsbet Pty Ltd v NSW (No 7)* [2009] FCA 1585 (23 December 2009) [55]; *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd (No 3)* [2010] FCA 428, (15 April 2010) [22]–[23]; *Bastas v Hodes* [2009] NSWSC 968 (14 September 2009) [13]–[16].

[142] See, eg, *Mijac Investments Pty Ltd v Graham* [2010] FCA 87 (20 January 2010) [21]–[22]; *Heng V (Aust) Pty Ltd v Wang* [2009] FCA 922 (20 August 2009) [38]; *Markisic v Cth* [2010] NSWSC 24 (25 February 2010) [141].

[143] Bowen and Saxton, above n 17. Or other late interlocutory applications: see below Part V(C).

[144] *Aon* (2009) 239 CLR 175, 214: 'The objectives stated in r 21 do not require that every application for amendment should be refused because it involves the waste of some costs and some degree of delay, as it inevitably will.'

[145] Ibid 188–9 (French CJ), 213 (joint judgment). See also *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* (2009) 178 FCR 401, [45] (though appeal against primary judge's summary dismissal of proceedings refused); *Wilder v Child Support Registrar* [2009] FamCAFC 175 (21 September 2009) [66] (though application for extension of time to file an application for leave to appeal against orders of primary judge refused); *ASIC v Rich* (2009) 75 ACSR 1, 30 (explaining length of trial and time in delivering judgment); *Best Care Foods Ltd v Origin Energy LPG Ltd* [2009] NSWSC 1134 (23 October 2009) [24], [45] (respondent granted leave to rely on expert evidence); *Perpetual Trustees Australia Ltd v Schmidt* [2009] VSC 508 (10 November 2009) [26] (application for dismissal of proceedings refused); *Environment East Gippsland Inc v VicForests (Ruling No 2)* [2010] VSC 53 (25 February 2010) [4]–[5] (application for leave to plead amended statement of claim allowed).

[146] Ibid 195 (French CJ). See also *Tinworth v WV Management Pty Ltd* [2009] VSC 552 (3 December 2009) [35].

[147] *Chaina v Presbyterian Church (NSW) Property Trust (No 3)* [2009] NSWSC 1243 (23 November 2009) [51] (Hoeben J). See also *Multi-Service Group Pty Ltd v Osborne* [2010] QCA 72 (26 March 2010) [32].

[148] And other late interlocutory applications: see below Part V(C).

[149] Especially when trial dates are not yet allocated: see, eg, *Scantech Ltd v Asbury* [2009] FCA 1480 (11 December 2009) [41]–[42]; *QBE Insurance (Aust) Ltd v Westpoint Realty Ltd* [2009] NSWSC 1298 (16 November 2009) [14]; *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2010] NSWSC 91

2. a *reasonable explanation* is given or,[151] at least, it is impossible infer that a deliberate tactical decision was made to amend at the last minute;[152]
3. the amendments *do not raise new issues* but rather prosecute or clarify existing claims,[153] so allowing the amendment could actually *save* time and costs later in the proceedings;[154]
4. the '*nature and importance*' of the amendment means the applicant will suffer significant prejudice if refused;[155]

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(19 February 2010) [24]–[25]; *Major v Woodside Energy Ltd (No 4)* [2009] WASC 248 (8 September 2009) [54]; *Hartnett v Hynes* [2009] QSC 225 (11 August 2009) [22]. However, a party does not have a right to amend their pleadings as many times as they like prior to the trial date, without explanation: *Hartnett v Hynes* [2009] QSC 225, [22] (Applegarth J). For non-amendment cases, see, eg, *Prasad v Victory Miracle Centre Inc* [2009] FCA 855 (10 August 2009) [24]; *Chaina v Presbyterian Church (NSW) Property Trust (No 3)* [2009] NSWSC 1243 (23 November 2009) [48], [51].

150 See, eg, *Verge v Devere Holdings Pty Ltd (No 2)* [2009] FCA 1048 (17 September 2009) [16] (6 weeks); *Abbhall Pty Ltd v Canberra Land Developments Pty Ltd* [2009] ACTSC 120 (18 September 2009) [30] (could reorganise timetable so no court time lost); *Perpetual Trustees Australia Ltd v Schmidt* [2009] VSC 508 (10 November 2009) [24] (1–2 extra hours of hearing time). For non-amendment cases, see, eg, *Ivanovski v Perdacher* [2009] NSWSC 913 (4 September 2009) [51].

151 See, eg, *Global Brand Marketing Inc v YD Pty Ltd* [2010] FCA 323 (1 April 2010) [51] (only recently discovered relevant new case authority). For non-amendment cases, see, eg, *Prasad v Victory Miracle Centre Inc* [2009] FCA 855 (10 August 2009) [26] (claims not known earlier and necessary to join new parties); *University of Western Australia v Gray (No 26)* [2009] FCA 1229 (30 October 2009) [42]–[43] (changed counsel); *Smart Company Pty Ltd v Clipsal Australia Pty Ltd* [2010] FCA 4 (15 January 2010) [68] (expert suddenly left country); *Nanevski Developments Pty Ltd v Rockdale City Council* [2010] NSWLEC 7 (5 January 2010) [18] (genuine attempts to contact expert). Unavailability of counsel is unlikely to qualify: *Platinum Investment Management Ltd v Chief Commissioner of State Revenue* [2009] NSWSC 988 (17 September 2009) [8].

152 See, eg, *Scantech Ltd v Asbury* [2009] FCA 1480 (11 December 2009) [40]; *Verge v Devere Holdings Pty Ltd (No 2)* [2009] FCA 1048 (17 September 2009) [16]. These cases were decided on *Aon* principles, though before the Amendment Act.

153 See, eg, *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2010] NSWSC 91 (19 February 2010) [24] (clarifying claim in response to judicial criticism); *Scantech Ltd v Asbury* [2009] FCA 1480 (11 December 2009) [42] (closely linked to existing allegations); *Abbhall Pty Ltd v Canberra Land Developments Pty Ltd* [2009] ACTSC 120 (18 September 2009) [35] (reframe claim consistently with affidavit material); *Zonebar Pty Ltd v Global Management Corporation Pty Ltd* [2010] QSC 67 (15 March 2010) [58] (stating claims in a more succinct way). See also *Pascoe v Boensch* [2009] FCA 1240 (3 November 2009) [79]. For non-amendment applications, see, eg, *Smart Company Pty Ltd v Clipsal Australia Pty Ltd* [2010] FCA 4 (15 January 2010) [68].

154 *Gerard Cassegrain & Co Pty Ltd v Cassegrain* [2010] NSWSC 91 (19 February 2010) [24]. For non-amendment applications see, eg, *Prasad v Victory Miracle Centre Inc* [2009] FCA 855 (10 August 2009) [27].

155 See, eg, *Genworth Financial Mortgage Insurance Pty Ltd v Peter Clisdell Pty Ltd* [2009] FCA 1014 (7 September 2009) [16], [20], [22] (if amendments established, apportionment provisions would apply, substantially reducing defendant's liability); *Pharm-a-Care Laboratories v Commonwealth (No 3)* [2010] FCA 361 (16 April 2010) [132] (amendments concerned serious and meritorious allegations involving misfeasance in public office, which should progress to public hearing); *Environment East Gippsland Inc v VicForests (Ruling No 2)* [2010] VSC 53 (25 February 2010) [4]–[5] (amendments necessary to provide court with best evidence upon which to decide land conservation issues of significant public interest). For non-amendment applications, see, eg, *Chaina v Presbyterian Church (NSW) Property Trust (No 3)* [2009] NSWSC 1243 (23 November 2009) [55] (application to file additional evidence allowed because claim may fail if refused); *Fair Work Ombudsman v Kentwood Industries Pty Ltd* [2010] FCA 98 (18 February 2010) [29] (refusing adjournment would force applicant with poor language skills and health problems to proceed without legal representation); *International Cat Manufacturing Pty Ltd v Rodrick* [2010] QSC 30 (12 February 2010) [50] (inappropriate to grant summary judgment where serious allegations concerning breaches of directors'

5. there is no or *little prejudice to the respondent* which cannot be cured by costs or an adjournment;[156]
6. the applicant has '*burn[t] the midnight oil*' since discovering the addition;[157] and/or
7. the applicant is *unrepresented*.[158]

Of course, an amendment will also usually be allowed where it is 'necessary' to determine the 'real issues' or avoid multiple proceedings.[159]

Note also that the High Court in *Aon* did not disapprove of the *outcome* in *JL Holdings*,[160] but only its absolutist approach to allowing amendments raising arguable issues. French CJ emphasised the 'entirely different factual setting' in *JL Holdings*: the application was brought before trial dates were fixed, there was a reasonable explanation for delay and the issue raised could not be avoided at trial because it was apparent on the face of certain documents.[161] It is highly likely amendment in these circumstances would still be allowed under *Aon*. This highlights the importance of locating *Aon*'s statements within the case's factual context; divorced from this, they suggest a greater change than *Aon* actually effects. Although, under *Aon*, case management considerations will not *only* be applied to shut out arguable claims in *extreme* circumstances, the facts in that case and subsequent cases

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duties with real prospects of success). Further, Lander J thought it would be 'draconian' to refuse an amendment brought 6 months before trial which would frustrate a $100 million claim: *Smart Company Pty Ltd v Clipsal Australia Pty Ltd* [2010] FCA 4 (15 January 2010) [70]; but note that there is no rule that a claim will not be 'shut out' on case management principles merely because a large sum of money is at stake, as this would invite litigants to disregard court authority: *Heng V (Australia) Pty Ltd v Wang* [2009] FCA 922 (20 August 2009) [34].

156 This will usually be the case when the amendment does not lead to substantial delay: see cases in above n 149. See also *Fletcher v St George Bank* [2010] WASC 75 (20 April 2010) [28] (prepared to go to trial on very general statement of claim anyway); *Environment East Gippsland Inc v VicForests (Ruling No 2)* [2010] VSC 53 (25 February 2010) [10] (can be significantly ameliorated by a 'basket of directions'). Note also that the prejudice to the respondent may be 'discounted' by their own inaction or non-compliance: *Beverage Bottlers (SA) Ltd (in liq) v Abode Enterprises Pty Ltd* [2009] SASC 272 (3 September 2009) [168], [232] (Kourakis J).

157 *Aon* (2009) 239 CLR 175 (Heydon J) (emphasis added). See, eg, *Nanevski Developments Pty Ltd v Rockdale City Council* [2010] NSWLEC 7 (5 January 2010) [17] (brought to court's attention immediately); *Genworth Financial Mortgage Insurance Pty Ltd v Peter Clisdell Pty Ltd* [2009] FCA 1014 (7 September 2009) [21] ('due expedition').

158 Greater indulgence is given to unrepresented litigants: *Grivas v Harrison* [2010] NSWSC 208 (18 March 2010) [10]. For non-amendment applications, see *Prasad v Victory Miracle Centre Inc* [2009] FCA 855 (10 August 2009) [30]; *Fair Work Ombudsman v Kentwood Industries Pty Ltd* [2010] FCA 98 (18 February 2010) [29]. However, this indulgence is not unlimited: *Markisic v Commonwealth* [2010] NSWSC 24 (25 February 2010) [205]; *Pond v Thurga (No 2)* [2009] FamCA 1241 (2 December 2009) [16].

159 For 'real issues', see, eg, *Acohs Pty Ltd v Ucorp Pty Ltd (No 2)* (2009) 82 IPR 493, [10], [20], [22], [25]; *Reliance Financial Services NSW Pty Ltd v Sobbi* [2009] NSWSC 1375 (10 December 2009) [65]; *ACN 074 971 109 v National Mutual Life Association of Australasia Ltd* [2010] VSC 186 (7 May 2010) [48]. For multiple proceedings, see, eg, *Duncan-Strelec v Tate* [2009] NSWSC 1252 (20 November 2009) [39]; *QBE Insurance (Aust) Ltd v Westpoint Realty Ltd* [2009] NSWSC 1298 (16 November 2009) [12]; *Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 144 (25 August 2009) [10]. See below Part VI(A) for a discussion on whether 'necessary' amendments under r 501 are mandatory.

160 See *Pascoe v Boensch* [2009] FCA 1240 (3 November 2009) [82].

161 *Aon* (2009) 239 CLR 175, 182. See also at 191.

show there must still be a *significant* failure to meet case management objectives before courts will *actually exercise* their broader *Aon* powers.

## C *Applies to Other Interlocutory Applications*

*Aon* not only 'recast the landscape' of amendment applications, but also the courts' approach to interlocutory applications generally.[162] Several judges have affirmed that *Aon's* statements are 'of general application',[163] because r 21-equivalents apply to the exercise of all powers under the relevant rules and because the 'public interest in the proper and efficient use of public resources' must necessarily permeate all aspects of the dispute resolution framework.[164] Consequently, the *Aon* approach has been applied to applications to adjourn,[165] extend time,[166] join parties,[167] adduce additional evidence,[168] vacate hearing dates,[169] strike out parts of pleadings,[170] and dismiss proceedings,[171] among other things.[172] That is, post-*Aon*,

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[162] As predicted by various commentators: see, eg, Musikanth and Wong, above n 94, 30; Eastwood and Johnson, above n 130; David Topp, 'Case Management in Civil Litigation — Is it Now an End in Itself?' (2009) 29(8) *Proctor* 43, 44.

[163] See, eg, *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* (2009) 178 FCR 401, 414; *Basha v Basha* [2010] QCA 123 (25 May 2010) [24]; *Brocx v Hughes* [2010] WASCA 57 (31 March 2010) [94]. See also, *Markisic v Commonwealth* [2010] NSWSC 24 (25 February 2010) [203]; *QBE Workers Compensation (NSW) Ltd v BAE Systems Regional Aircraft Ltd* [2010] NSWSC 82 (19 February 2010) [46]; *Field v Luxor Products Pty Ltd* [2009] QSC 218 (20 July 2009) [41].

[164] *Markisic v Commonwealth* [2010] NSWSC 24 (25 February 2010) [203] (Davies J).

[165] See, eg, *Mijac Investments Pty Ltd v Graham* [2010] FCA 87 (20 January 2010); *Wacket v Wacket* [2010] FamCA 154 (3 March 2010) [23]; *Gacic v John Fairfax Publications Pty Ltd* [2009] NSWSC 1198 (9 November 2009).

[166] See, eg, *Bi v Mourad* [2010] NSWCA 17 (11 February 2010); *Sedrak v Starr* [2009] NSWSC 996 (18 September 2009); *Hamilton v Kennedy* [2010] VSC 1 (3 February 2010) [28]; *Theodorelos v Nexus Projects Pty Ltd* [2009] ACTSC 149 (6 November 2009); *Brocx v Hughes* [2010] WASCA 57 (31 March 2010); *Pumptech Tasmania Pty Ltd v CB and M Design Solutions Pty Ltd (No 2)* [2009] TASSC 78 (10 September 2009).

[167] See, eg, *Anjin No 13 Pty Ltd v Allianz Australia Insurance Ltd* (2009) 15 ANZ Insurance Cas ¶61-822 (VSC); *Makas v Peter Enders Building Consultant Pty Ltd* (2009) 232 FLR 455 (ACTSC); *Dowdle v Pay Now For Business Pty Ltd* [2009] QSC 417 (4 December 2009).

[168] See, eg, *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 (1 April 2010) [40]. See also, *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2009] NSWSC 1370 (8 December 2009) (application for leave to rely on new affidavits); *Platinum Investment Management Ltd v Chief Commissioner of State Revenue* [2009] NSWSC 988 (17 September 2009) (application for leave to serve further expert report).

[169] See, eg, *On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner for Taxation* [2010] FCA 255 (16 February 2010); *Spencer v Minister for Climate Change and the Environment (NSW)* [2010] NSWCA 75 (13 April 2010).

[170] See, eg, *Building Insurers' Guarantee Corp v Touma* [2010] NSWSC 4 (13 January 2010); *Attorney-General of Botswana v Aussie Diamond Products Pty Ltd (No 2)* [2009] WASC 301 (8 October 2009).

[171] See, eg, *Mijac Investments Pty Ltd v Graham* [2010] FCA 87 (20 January 2010); *Bi v Mourad* [2010] NSWCA 17 (11 February 2010); *Field v Luxor Products Pty Ltd* [2009] QSC 218 (20 July 2009). See also *Markisic v Commonwealth* [2010] NSWSC 24 (25 February 2010) (application for default judgment); *International Cat Manufacturing Pty Ltd v Rodrick* [2010] QSC 30 (12 February 2010) (application for summary judgment); *Re AWB Ltd (No 10)* (2009) 76 ACSR 181 (application for permanent stay).

[172] See, eg, *Esso Australia Resources Pty Ltd v Commissioner of Taxation* [2010] FCA 215 (5 February 2010) (application for further discovery); *Australian Equity Investors v Colliers International (NSW) Pty Ltd* [2010] FCA 254 (22 March 2010) (application for order of separate determination of question); *Owners Strata Plan No 64622 v Australand Constructions Pty Ltd* [2009] NSWSC 1083

there has been a 'relaxation of the restrictions on the refusal' of all sorts of interlocutory applications that would prolong proceedings and increase costs.[173] *Aon's* statements have also been applied, in accordance with the legislation,[174] to inform the determination of costs,[175] including the power to award costs against a lawyer personally.[176] This provides an additional impetus for parties and lawyers to conduct litigation conscientiously and openly.

## D *Subsequent Proceedings Barred*

*Aon* indicates that failing to raise issues at the appropriate time may mean the applicant is prevented from raising those issues in subsequent proceedings.[177] Although the plurality thought it unnecessary to deal with Aon's abuse of process argument,[178] French CJ stated that abuse of process principles may be invoked to 'prevent attempts to litigate that which [sic] should have been litigated in earlier proceedings' and that the 'crucial question' would be 'whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it an issue which could and should have been raised earlier'.[179]

Two subsequent cases adopt this approach.[180] They demonstrate that if leave to amend is refused or proceedings dismissed on *Aon* principles, then new proceedings attempting to raise the same issues may be struck out as an abuse of process[181] or perhaps barred by *Anshun* estoppel.[182] This is because the initial

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(9 October 2009) (application to set aside referee's report); *Multi-Service Group Pty Ltd v Osborne* [2010] QCA 72 (26 March 2010) (application to reactivate matters); *Puppinato v D and D Machinery Pty Ltd* [2010] QSC 47 (24 February 2010) (application for leave to proceed).

173 *Pacanowski v Wakerman & Associates* [2009] NSWCA 402 (10 November 2009) [28] (Basten JA).

174 Which generally provides that a failure to comply with the rules and/or orders of the court may be taken into account in the determination of costs: see, eg, *Federal Court of Australia Act 1976* (Cth) s 37N(4).

175 See, eg, *Kelly v Jowett* [2009] NSWCA 278 (4 September 2009).

176 See, eg, *Puruse Pty Ltd v Sydney City Council* (2009) 169 LGERA 85, 90.

177 *Aon* (2009) 239 CLR 175, 193 (French CJ). See also 209–10 (joint judgment).

178 Ibid 218. This argument was that, if ANU's amendment is refused and it then seeks to commence a fresh claim, *Anshun* estoppel or abuse of process would apply because the new points were 'so blindingly obvious from the outset': Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 72 (28 April 2010) (JT Gleeson SC) (during argument). Aon's earlier abuse of process argument based on inconsistency with the consent judgments was rejected in the lower courts: *Australian National University v Chubb Insurance Company of Australia* [2007] ACTSC 82 (12 October 2007) [51]; *Aon Risk Services Australia Ltd v Australian National University* (2008) 227 FLR 388, [239] (Lander J).

179 *Aon* (2009) 239 CLR 175, 193–4.

180 In *Re AWB Ltd (No 10)* (2009) 76 ACSR 181, ASIC's new proceedings were struck out as an abuse of process where its claims were essentially the same as those in respect of which it had earlier been refused leave to amend (in *Re AWB (No 7)* [2009] VSC 413 (18 September 2009)). In *Brocx v Hughes* [2010] WASCA 57 (31 March 2010), new proceedings were struck out as an abuse of process where earlier proceedings had been dismissed for non-compliance with a springing order due to continual and 'contumacious' delay and inaction.

181 An abuse of process objection seems to be available regardless of whether the original proceedings are on foot (as in *Re AWB (No 10)*) or concluded (as in *Brocx v Hughes*).

182 Although neither case actually dismissed the proceedings on this ground. Robson J opined that an *Anshun* objection is probably only available where the first proceedings are concluded, but if he was wrong he would have found it made out on the facts: *Re AWB Ltd (No 10)* (2009) 76 ACSR 181, 227. See also at 227–8 for a useful summary of *Anshun* estoppel principles. Note that Aon conceded in argument that subsequent proceedings were unlikely to be barred by any estoppel based on

refusal/dismissal under *Aon* principles indicates it was *unreasonable* not to raise or prosecute the issues earlier. Further, allowing a litigant to circumvent the original decision would destroy the effectiveness of *Aon*'s limits on pleading and be contrary to the public interest in finality of litigation.[183] As stated in *Brocx v Hughes*,

> [i]t cannot be the case that so long as the limitation period has not expired a party can ignore the rules and orders of the court, secure in the knowledge that if … the action is struck out they can simply start again. It would bring the administration of justice into disrepute, and be 'productive of serious and unjustified trouble and harassment' to the defendant.[184]

Thus, post-*Aon*, not only is there no 'right' to amend at any stage subject to costs, there is also no unrestricted 'right' to bring fresh actions.[185]

## E *'Raises the Bar' for Judges*

In *Aon*, Heydon J was highly critical of Gray J's and the Court of Appeal's long delays in delivering their judgments.[186] He emphasised that, especially in urgent commercial cases involving large amounts of money, interlocutory decisions must be speedy or their rationale is negated.[187] Consequently, a 10 month delay in delivering an interlocutory decision is 'deplorable' and 'alien to every axiom of modern litigation'.[188] These comments emphatically remind judges that *they too* are obligated to facilitate the just, quick and cheap resolution of disputes[189] and suggest an explanation is required if they fail to do so.[190] Thus, it is expected that, post-*Aon*, judges will be more rigorous in delivering speedy judgments — or at least in justifying delay — lest they too are exposed to such chastisement. This is evident in Austin J's careful justification of the long time taken to deliver judgment in *ASIC v Rich*.[191] However, he also cautioned that 'hard [as] the judge might try … some cases are just very long and costly' and any artificial 'shaving [of time]' may endanger substantive justice.[192]

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Deane J's judgment in *Commonwealth v Verwayen* (1990) 170 CLR 394 because Aon would have real difficulty establishing that the prejudice was sufficient to found an estoppel: Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 72 (28 April 2009) (JT Gleeson SC) (during argument).

183 The WA Court of Appeal further stated that it would be 'inconsistent with the objects in O 1 r 4B' (the equivalent of r 21): *Brocx v Hughes* [2010] WASCA 57 (31 March 2010) [107].

184 Ibid, [97]. See also *Re AWB Ltd (No 10)* (2009) 76 ACSR 181, 228.

185 *Brocx v Hughes* [2010] WASCA 57 (31 March 2010) [97].

186 *Aon* (2009) 239 CLR 175.

187 Ibid 227–8.

188 Ibid 228.

189 See, eg, *University of Western Australia v Gray (No 26)* [2009] FCA 1229 (30 October 2009) [41] (Barker J). See also the earlier case of *State Pollution Control Commission v Australian Iron & Steel Pty Ltd* (1992) 29 NSWLR 487, 493–4 (Gleeson CJ).

190 *ASIC v Rich* (2009) 75 ACSR 1, 31 (Austin J).

191 Ibid 23–4.

192 Ibid 31.

## VI Two Persistent Issues

### A *Are 'Necessary' Amendments Subject to Case Management Considerations?*

The court in *Aon* seemed to hold that r 501 makes an amendment for the three listed purposes *mandatory*, in the absence of specific irremediable prejudice. The plurality said the only question 'which *arises from the terms*' of r 501 is whether the amendments are 'necessary' for those purposes and the rule 'obliges' such amendments.[193] Thus, it seems that *JL Holdings* still applies to r 501, meaning a judge cannot refuse such amendments on case management considerations.[194] However, there is some uncertainty surrounding this. The plurality technically left open whether the considerations in r 21 apply to r 501, but thought the rule 'appear[s] to oblige amendment without more'.[195] French CJ was of the opposite opinion: although r 501 imposes a *requirement*, rather than a *discretion*, to amend, r 21 nevertheless 'informs' this requirement.[196] Only Heydon J unequivocally stated that r 501 creates a *duty* and r 502 a *discretion*,[197] but even this is complicated by the fact that he was purporting to summarise and adopt the plurality's approach.

Some subsequent cases seem to adopt Heydon's rr 501–502 duty–discretion distinction. For example, Jessup J thought that, in light of the authorities, it was not open to hold that 'the mandatory terms' of the FCR r 501-equivalent,[198] are 'somehow qualified' by an overriding discretion to refuse based on considerations informing his discretion under the r 502-equivalent.[199] Admittedly, this case is not necessarily strong support for the distinction, since it was decided before the Amendment Act introduced the 'overarching' 'just, quick and cheap' purpose for Federal Court proceedings. However, the same conclusion was reached by Robson J, based on Victorian rules including a r 21-equivalent.[200] Indeed, excluding case management considerations from the 'necessary' amendments power seems the principled approach that reflects the natural, ordinary meaning of

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193 *Aon* (2009) 239 CLR 175, 205 (emphasis added). This interpretation seems to be supported by the language of r 501: '[a]ll *necessary* amendments … *must* be made …' (emphasis added).

194 See, eg, *Dwyer v O'Mullen* (1887) 13 VLR 933, 939, 940; *Cropper v Smith* (1884) 26 Ch D 700, 711.

195 *Aon* (2009) 239 CLR 175, 205.

196 Ibid 185, 195 (French CJ). See also Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 72 (28 April 2009) (French CJ): '501 is read subject to 21 so that in a sense the mandate is made a little — if I can use this metaphor — spongy'. French CJ did not explain exactly how a positive mandate may be informed by discretionary considerations.

197 *Aon* (2009) 239 CLR 175, 218.

198 *Federal Court Rules* (Cth) O 13 r 2(2).

199 *Acohs Pty Ltd v Ucorp Pty Ltd (No 2)* (2009) 82 IPR 493, [10], [22], [25]. He thus felt constrained to allow an application to amend made in the course of the respondent's closing submissions, despite its subversion of the just, efficient and speedy disposition of the proceedings: at [25].

200 *Re AWB Ltd (No 7)* [2009] VSC 413 (18 September 2009) [18]–[19]. The relevant rule is *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 1.14(1)(a).

the statutory terms *for jurisdictions in which the 'necessary' amendments power is not explicitly subject to such considerations.*[201]

However, the position is clearly different in NSW, where the power to make 'necessary' amendments under s 64(2) of the NSW CPA is expressly '[s]ubject to s 58'.[202] This makes it clear that, in NSW, the mandate in respect of 'necessary' amendments is made 'spongy'[203] by case management considerations. Thus, for example, in *Perpetual Ltd v Onesemo*, Harrison AsJ legitimately considered discretionary *Aon* factors, such as the extent of delay and the explanation for it, regarding an amendment which raised a 'real issue' between the parties.[204] To the extent that this approach has been applied in jurisdictions outside NSW, it *may* have been due to a confusion as to what constitutes the 'real issues' (as opposed to new issues that are highly important to the applicant's claim), rather than a considered decision to adopt French CJ's view that 'necessary' amendments are subject to r 21.

## B *Reasonable Explanation: A Free-standing Requirement?*

There is also doubt over whether 'reasonable explanation' constitutes a free-standing requirement that *must* be satisfied for *all* late interlocutory applications, or whether it is just one of many factors to be considered so need not be present if others overwhelmingly support granting leave. Some statements of the *Aon* plurality suggest that a late amendment '*invariably*' requires satisfactory explanation, that is, demonstrating good faith and 'bring[ing] the circumstances giving rise to the amendment to the court's attention' so they can be weighed against the delay.[205] This allowed the plurality to hold that a negative inference may be drawn from failure to do so.[206] However, the plurality also said an explanation is only required 'generally' or 'in most cases',[207] and Heydon J asserted that it is inappropriate to draw a negative inference where the party claims privilege,[208] implying that an explanation is not 'required' in such cases at least. Indeed, elevating explanation to an independent requirement seems to cut across

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201 Namely, federal courts and the Supreme Courts of the ACT, Victoria, Queensland, Western Australia, Tasmania (generally: see n 202 below) and the Northern Territory.

202 And hence ss 56 and 57. Note also that amendment to pleadings under r 427 of the *Supreme Court Rules 2000* (Tas) is made expressly subject to case management considerations by sub-r (3) for proceedings to which pt 14 div 1 applies (see Tasmanian Supreme Court, *Practice Direction No 11 — Case Management*), and South Australia does not distinguish between 'necessary' and other amendments (*Supreme Court Civil Rules 2006* (SA) r 57(1): 'The court may at any stage of the proceedings — (a) order the amendment of any document …'). Thus, arguably, the NSW approach would also apply in proceedings governed by these rules.

203 To use French CJ's metaphor in Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 72 (28 April 2009): see above n 196.

204 *Perpetual Ltd v Onesemo* [2010] NSWSC 43 (11 February 2010) [14], [30]. The same approach was taken in *Reliance Financial Services NSW Pty Ltd v Sobbi* [2009] NSWSC 1375 (10 December 2009), and also in respect of amendments 'necessary' to avoid multiple proceedings in *Duncan-Strelec v Tate* [2009] NSWSC 1252 (20 November 2009); *Hill Top Residents Action Group Inc v Minister for Planning* [2009] NSWLEC 144 (25 August 2009).

205 *Aon* (2009) 239 CLR 175, 214. Applying this principle to the facts, the plurality stated that there was 'no doubt' that an explanation was '*required*' here: at 215, 217 (emphasis added).

206 Ibid 215–16.

207 Ibid 215.

208 Ibid 222.

the assertion that r 502 mandates a discretionary balancing exercise in which *all factors* must be weighed.[209] Thus, the better view is that an explanation will *generally* be required to justify late applications, but its absence in certain cases *may* not be fatal where this is outweighed by other factors such as severe prejudice to the applicant.

This approach seems to be taken in subsequent cases. McDougall J stated that explanation of delay, though relevant, is 'only one of the factors' to be weighed and is usually less important than whether substantial prejudice is caused by delay.[210] He cautioned against treating statements in *Aon* as the 'commands of a statute', lest the injustice caused to respondents by that approach to *JL Holdings* be repeated against applicants.[211] In implicit accordance with this view, several judges have allowed late amendments and other interlocutory applications, purportedly on *Aon* principles, despite the lack of a satisfactory explanation[212] — or any explanation at all[213] — so long as it was not possible to infer a deliberate tactical decision and other factors strongly support granting leave.[214]

## VII Conclusion: A Flexible Approach Required

> 'A judge who ignores the modern imperatives of the efficient conduct of litigation may unconsciously work an injustice on one of the parties, or litigants generally, and on the public. But a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be resolved.'
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> — Kirby J, *JL Holdings*.[215]

The foregoing analysis of cases considering *Aon* demonstrates that it truly has lead to a more rigorous approach by judges to interlocutory applications. This in turn demands — and will of necessity inspire — a change in the practice of litigants. It will require parties to be much more conscientious in identifying the 'real issues' at the outset and adhering to court-ordered timetables.[216] If they fail to do so, they must alert the court immediately and frankly explain their failure, or could be

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209 See Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 26 (13 February 2009) (PR Garling SC) (during argument).

210 *QBE Insurance (Australia) Ltd v Westpoint Realty Ltd* [2009] NSWSC 1298 (16 November 2009) [19].

211 Ibid [8].

212 See, eg, *AED Oil Ltd v Puffin FPSO Ltd (No 4)* [2010] VSC 65 (11 March 2010); *Attorney-General of Botswana v Aussie Diamond Products Pty Ltd (No 2)* [2009] WASC 301 (8 October 2009) [70]; *Scantech Ltd v Asbury* [2009] FCA 1480 (11 December 2009) [40].

213 See, eg, *Pharm-a-Care Laboratories v Commonwealth (No 3)* [2010] FCA 361 (16 April 2010) [125] (Flick J).

214 Some judges appear hesitant to infer a deliberate tactical decision: see, eg, *Scantech Ltd v Asbury* [2009] FCA 1480 (11 December 2009) [40] (Besanko J). Cf *Brocx v Hughes* [2010] WASCA 57 (31 March 2010) [99], [103], [105].

215 *JL Holdings* (1997) 189 CLR 146, 172.

216 Carter and Burgess, above n 130; Topp, above n 162, 44. See also *Multi Service Group (in liq) v Osborne* [2009] QSC 286 (11 September 2009) [11], revd [2010] QCA 172 (2 July 2010): 'The court expects practitioners to be aware of the importance of case management principles and complying with court orders.'

barred from raising that issue later in the same and subsequent proceedings. This risk should discourage tactical game-playing and carelessness, and so facilitate the 'quick and cheap' resolution of disputes and improve access to justice. In brief, *Aon* reminds litigants, lawyers and judges that '[l]itigation is not a game',[217] so they must stop treating it like one.

However, *Aon* does *not* alter the fact that the ultimate aim of court proceedings is justice. It rather responds to contextual pressures which require that the focus on adversarialism and 'individualised justice' be broadened to accommodate procedural justice to respondents[218] and the claims of other litigants ('distributive justice').[219] Similarly, it does *not* assert that case management is 'an end in itself'.[220] Rather, it acknowledges that case management is an important 'aid' to the administration of justice, so 'serious departures' should 'not be treated lightly'.[221] Further, *Aon* does *not* require that parties be punished by refusing any application for indulgence that involves wasted time and costs. It rather mandates a discretionary balancing exercise that requires consideration of all relevant facts and *allows* refusal where there are *significant*, but not necessarily *extreme*, case management failures.

Applied properly, the broader judicial management powers under *Aon* should enhance the efficient resolution of disputes. However, it is vital that *Aon*'s statements are not given that 'slavishly adopted mantra-like quality' often attributed to its predecessor, *JL Holdings*.[222] Even with the best intentions, delay and wasted costs are an inevitable part of the inherently uncertain litigation process. Thus, in applying *Aon*, it is important that judges consider each case's particular facts and retain 'that flexibility which is the hallmark of justice'.[223]

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217 *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2009] NSWSC 1370 (8 December 2009) [46] (Einstein J).

218 That is, the acknowledgment that speed and efficiency are essential aspects of justice: *Hartnett v Hynes* [2009] QSC 225 (11 August 2009) [20] (Applegarth J); *Bi v Mourad* [2010] NSWCA 17 (11 February 2010) [47] (Allsop P).

219 See Australian Law Reform Commission, above n 6, [1.80]–[1.96] ('Notions of Procedural Justice').

220 See, eg, *Aon* (2009) 239 CLR 175, 192 (French CJ).

221 Transcript of Proceedings, *Aon Risk Services Australia Ltd v Australian National University* [2009] HCATrans 72 (28 April 2009) (J T Gleeson SC) (during argument). See also *Theodorelos v Nexus Projects Pty Ltd* [2009] ACTSC 149 (6 November 2009) [3]–[4]; *Hartnett v Hynes* [2009] QSC 225 (11 August 2009) [19].

222 *Gacic v John Fairfax Publications Pty Ltd* [2009] NSWSC 1198 (9 November 2009) [12] (Harrison J). See also *ACCC v Cement Australia Pty Ltd* [2010] FCA 294 (26 March 2010) [35]; *QBE Insurance (Aust) Ltd v Westpoint Realty Pty Ltd* [2009] NSWSC 1298 (16 November 2009) [8]–[9].

223 *JL Holdings* (1997) 189 CLR 146, 172 (Kirby J).