February 2011 page 53

Pre-litigation dispute resolution

What the new requirements will mean in practice

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For lawyers in the practice of filing proceedings without considering settlement options - firing first and aiming later - there are going to be big changes to the way they handle disputes.

New obligations on lawyers and their clients that will apply to many types of civil matters before litigation is commenced were introduced by amendments to the *NSW Civil Procedure Act 2005*. The provisions are expected to commence in the second half of 2011, six months after proclamation,[1] and failure to comply may have consequences for both lawyers and clients.

The major change is the introduction of a new pre-litigation requirement "to take reasonable steps having regard to the person's situation, the nature of the dispute (including the value of any claim and complexity of the issues) and any applicable pre-litigation protocol to (a) resolve the dispute by agreement, or (b) clarify and narrow the issues in dispute in the event that civil proceedings are commenced".[2]

If a case proceeds to court, parties will have to file a dispute resolution statement detailing compliance with the pre-litigation requirements.[3]

The amended Act also extends the overriding purpose of the Act, namely the "just, quick and cheap resolution of the real issues", to civil disputes even before they become civil proceedings in court.[4]

Victoria has already introduced a similar "reasonable steps" requirement,[5] and expected Federal legislation will require very similar pre-action settlement considerations for potential litigants.[6] These Australian developments have also been influenced by overseas experiences, particularly in the UK.[7]

Most practitioners will not notice dramatic changes to the way they approach civil disputes. Avoiding litigation, where it is in the best interests of clients, is best practice, and engaging in pre-litigation negotiation and alternative dispute resolution (ADR) is already common. However, practitioners will need to address the following issues in order to comply with the amended Act:

Do the pre-litigation requirements apply?

The pre-litigation requirements apply to civil disputes that may result in the commencement of civil proceedings in the Local Court, District Court, Supreme Court and the Land and Environment Court, except "excluded disputes", which include:

- appeals;
- ex parte proceedings;
- proceedings in which the parties have already been subject to a separate pre-litigation process, such as the scheme currently in operation under the *Motor Vehicle Accidents Compensation Act 1990*;
- disputes involving a vexatious litigant;

- civil penalty proceedings;[8] and
- further classes of proceedings excluded by rules of court and regulation.[9]

What pre-litigation steps are "reasonable"?

If there is a specific pre-litigation protocol requiring particular steps to be taken before a matter is filed, compliance with the protocol will constitute "reasonable steps" for the purposes of the pre-litigation requirements.[10] The Act itself does not prescribe such protocols, but allows for rules of court and regulations to do so.[11]

Where no pre-litigation protocols apply, both parties are to take "reasonable steps" to resolve, or at least narrow, the issues in dispute before filing proceedings in court.[12] The reasonable steps requirement is not prescriptive and does not require anything more specific than to do what is reasonable as defined by reference to a party's circumstances, including relevant disadvantages, and the nature of the dispute, including the value and/or complexity of the claim.[13] This incorporates the principle of "proportionality" and provides assistance to practitioners when determining what is reasonable in terms of time and legal costs.

In most cases reasonable steps will include providing and inviting an exchange of information about the subject matter of the dispute and any relevant documents, responding to any notification of a dispute by providing information and documents in return, engaging in negotiation and, where appropriate, ADR.[14]

In extreme cases, there may be no reasonable steps available, in which case the legislation does not require the parties to do anything additional except to file the dispute resolution statement.[15]

Reasonable steps and ADR

The reasonable steps requirement does not mandate ADR, although participation in ADR is likely to be a reliable way of both complying with the pre-litigation requirements and maximising chances of early settlement of all or some of the issues.

Case law already suggests that a failure to attempt ADR may be taken into account when a court exercises its discretion regarding costs,[16] and most courts have power that is regularly exercised to refer matters to ADR. What the amended Act provides is that this can and should take place pre-filing where possible.

Protection of pre-filing disclosures

The Act provides explicit protection for the confidentiality of mediation conducted in compliance with the pre-litigation requirements,[17] similar to the protection the Act provides for court-ordered mediation.[18] It also protects the use of documents exchanged by restricting their use (except in limited circumstances) to the subject dispute and related proceedings and providing that breach of this obligation constitutes contempt of court.[19]

File a dispute resolution statement

For clients and lawyers who already undertake reasonable steps, the filing of a dispute resolution statement will be the sole significant change in practice that this legislation demands. This short document must be filed by all parties at the same time as the first substantive pleading in the case. There will no additional filing fee, and courts may, in the future, introduce standard forms or other requirements for compliance.

For the plaintiff, the dispute resolution statement should outline what steps have been taken to try to resolve or narrow the issues in dispute, or, if no such steps were taken, why they were not.

For the defendant, the dispute resolution statement should either note agreement with the plaintiff's statement or, if there is disagreement, set out what other reasonable steps they have offered that could be undertaken to resolve the dispute.

Where there are good reasons not to comply with the pre-litigation process, and those reasons do not fall within the specified exceptions in the Act, the dispute resolution statement gives litigants the opportunity to explain, for the court's consideration, why steps were not taken.

Obligations associated with the extended overriding purpose

The amendments to s.56 of the Act provide that the overriding purpose (the just, quick and cheap resolution of the real issues) now applies to "civil disputes", including in the period before filing, rather than only to "civil proceedings" as drafted previously.[20]

In addition to requiring parties to further the overriding purpose of the Act by taking reasonable steps to resolve or narrow the issues in dispute,[21] the amendments impose a duty on solicitors, barristers and any other person with an interest in the proceedings (such as a litigation funder) not to cause a party to be in breach of any duty in s.56.[22]

Obligation to advise on alternatives to litigation

The amendments require legal practitioners to advise clients of:

- the applicability of the pre-litigation requirements, including the need to file a dispute resolution statement; and
- the alternatives to civil proceedings that are reasonably available to the client.[23]

This will assist lawyers who have trigger-happy clients.

Consequences of non-compliance

Failure to comply with the pre-litigation requirements does not prevent a person from commencing, responding to or continuing with litigation,[24] but it does risk a number of potential consequences.

Costs orders

While the general position is that each party bears their own costs of complying with pre-litigation requirements,[25] the court has discretion to take pre-litigation conduct into account when making costs orders with respect to pre-filing costs[26] or costs of the proceedings.[27] The court may have regard to any relevant matters, including any reasons given for failure to comply with the reasonable steps requirements and whether or not a person was legally represented.[28]

Costs orders against practitioners

Conduct by a legal practitioner that causes a party to civil proceedings not to comply with the pre-litigation requirements[29] and/or failure to advise clients about the pre-litigation requirements and the alternatives to litigation[30] can be taken into account by a court when considering making a costs order against legal representatives under the existing provisions of the Act.[31]

Court's power to make other orders

The Act provides that in the event a party has failed to comply with pre-litigation requirements, a court may make any other orders it considers appropriate.[32] Such orders are likely to be procedural orders referring the parties to ADR or to take other steps that may assist in the early resolution of the dispute, and in this sense will not entail a major change from current practice.

Conclusion

History tells us that over 95 per cent of disputes filed in court never make it to hearing. These amendments aim to bring settlement further forward, to the pre-filing stage, by encouraging information exchange, negotiations and ADR at the earliest stage.

The Act (and, if passed, the Commonwealth Dispute Resolution Bill 2010) should not significantly burden litigants or their lawyers. It is already the case that most courts refer appropriate matters to mediation as soon as possible - these changes encourage practitioners to take this step prior to filing. Many practitioners, including those who practise in the areas of farm debt recovery, retail leasing disputes and workplace injury damages claims will already be familiar with pre-litigation requirements that achieve settlement or narrow issues pre-filing.[33]

Some practitioners have expressed concern that the coercive powers of the court are sometimes needed to effect appropriate exchange of information and participation in negotiations. The possibility of adverse costs orders against parties who would otherwise be uncooperative at the pre-litigation stage may encourage early information exchange, negotiation, dispute resolution and the chance for parties to have their disputes resolve quickly, fairly and cheaply.

These legislative amendments show that governments are determined to bring about cultural change to ensure litigation is seen as a last resort, not the first step before properly considering other options for dispute resolution - cultural change that makes the fire-first-and-aim-later philosophy of some litigators a thing of the past.

ENDNOTES

1. The amendments are contained in schedule 6.2 of the *Courts and Crimes Legislation Further Amendment Act 2010* (the amending Act) which passed both Houses of Parliament on 30 November 2010 and will include the insertion of a new Part 2A into the *Civil Procedure Act 2005* (NSW) (the Act). All section references are to the Act unless otherwise specified.
2. Section 18E.
3. Sections 18G and 18H.
4. See Division 6, schedule 6.2 of the amending Act regarding the changes to s. 56.
5. *Civil Procedure Act 2010* (Vic).
6. The Civil Dispute Resolution Bill 2010 (Cth) is before the Senate. A Senate Committee Report dated 2 December 2010 recommended it be passed subject to some minor amendments.
7. There has been a steady movement towards the use of dispute resolution and pre-litigation requirements - see Tania Sourdin, "Conflict is inevitable ... new obligations to try to settle", *Law Society Journal*, October 2010, p.71. In the UK, the issue was considered in Lord Justice Jackson's Review of Civil Litigation Costs, released in January 2010.
8. Section 18B(2) and (3).
9. Section 18B(4) and (5).
10. As may be set out in rules of court (include uniform rules) or regulations, see s.18C.
11. Section 18C(3) and (4).
12. Section 18D and 18E.
13. Section 18E(1). See also Second Reading speech for the amending Act delivered by the Hon. John Hatzistergos on 24 November 2010.
14. See s.18E(2).
15. See also Second Reading speech for the amending Act delivered by the Hon. John Hatzistergos on 24 November 2010, where he gave examples of where it may not be reasonable to take steps, including where one of the parties is terminally ill; if the safety of a person is threatened; where a limitation period is about to expire; or if the matter is likely to become a test case or it is otherwise in the public interest.
16. Lancken, S., "Litigation: Is refusing to mediate worth the risk?", *Law Society Journal*, April 2004 p.70.
17. Section 18O.
18. Part 4 of the Act.
19. Section 18F(3) of the Act, which explicitly extends the common law protection of documents obtained by compulsory court process to pre-litigation exchange.
20. Section 56(1).
21. Section 56(3).
22. Section 56(4).
23. Section 18J.
24. Section 18K.
25. Section 18L.
26. Section 18M.
27. Section 18N.
28. Section 18N(2).
29. Section 18M(1)(b).
30. Section 18J.
31. The existing provisions in s.99 of the Act provide that orders against legal practitioners may be made where unnecessary costs have been incurred either (a) by the serious neglect, serious incompetence or serious misconduct of a legal practitioner, or (b) improperly, or without reasonable cause, in circumstances for which a legal practitioner is responsible.
32. Section 18N.
33. *The Farm Debt Mediation Act 1994* (NSW), *Retail Leases Act 1994 (NSW) and Workplace Injury Management and Workers Compensation Act 1998* (NSW) all require some form of pre filing ADR or information exchange before Court or Tribunal proceedings can be commenced.

Examples of dispute resolution statements

Plaintiff

The Plaintiff claims an account of profits under a partnership.

Defendant

The Defendant agrees with the chronology of events set out in the Plaintiff's Dispute Resolution Statement dated 1 August 2011 with the following additions.

• The amount in dispute is $100,000.00.

• Attached to this Statement and marked A is a letter sent to the Defendant on 19 May 2011 seeking an accounting of the profits of the partnership and providing a brief outline of why the Plaintiff says she is entitled to an account of profits, the documents upon which the claim is based and the Plaintiff's expert report.

• Attached to this statement and marked B is a letter dated 10 June 2011 seeking a without prejudice meeting involving the Plaintiff, her expert accountants and her lawyers and representatives of the Defendant.

• On 22 June 2011 the Defendant requested that the Plaintiff attend mediation to be conducted by a mediator from the Mediation Panel of the Law Society of NSW.

• The Plaintiff declined to participate in mediation as she wished first to have a without prejudice meeting without a mediator before incurring the costs of a mediation.

• The Plaintiff made an offer of settlement on 1 July 2011. That offer was without prejudice "except in regard to costs" and will be relied on in relation to costs should the proceeding be determined by the Court. Dated 1: August 2011

• The Defendant says that the relationship between the parties was not one of partnership but that the Plaintiff was the Agent of the Defendant and has been paid all monies due under the agency agreement.

• The Defendant sent a letter to the Plaintiff on 22 June 2011 that set out why it considers the relationship to be one of agency, the documents upon which that assertion is based and an accounting of fees paid under the Agency Agreement.

• The Defendant would like to attend a mediation conducted by a member of the panel of mediators of the Law Society of NSW and remains willing to do so if the Plaintiff consents. Dated 28: August 2011.

Where to find ADR service providers

- NSW Law Society Mediation Program - a panel of solicitor mediators available at a fixed fee to mediate disputes: www.lawsociety.com.au/DisputesMediation.
- Community Justice Centres NSW - provide free mediation services across NSW: www.cjc.nsw.gov.au.
- External dispute resolution providers, often industry-based ombudsman services, for example the Financial Ombudsman Service, Credit Ombudsman Service Ltd, Telecommunications Industry Ombudsman, Energy and Water Ombudsman NSW, Superannuation Complaints Ltd and the NSW Ombudsman: www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/EDR_quick_guide.pdf/$file/EDR_quick_guide.pdf.
- Links to other ADR providers listed on the Law Society website: www.lawsociety.co.au/DisputesMediation.

Reasonable steps checklist

- Check whether the pre-litigation requirements apply.
- Advise clients of pre-litigation requirements, the duties associated with overriding purpose of the Act and alternatives to litigation.
- Advise clients of consequences of failure to comply with above requirements.
- Consider and take reasonable steps, for example, exchange information and documents, offer to negotiate and propose and attend ADR.
- If litigation does commence, file dispute resolution statement, giving reasons for non-compliance or proposing further steps that should be taken if necessary.

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