



June 2011

New Pre-Litigation Requirements in Civil Proceedings

New pre-litigation procedures in civil proceedings were introduced in NSW by amendments to the Civil Procedure Act 2005 (NSW) (the "Act") on 1 April 2011. The amendments require "each person involved in a civil dispute to take reasonable steps to resolve or, at least, to clarify and narrow the issues in dispute" before litigation is commenced. It will be necessary to have taken the steps in all relevant proceedings commenced after 1 October 2011.

What Are the New Pre-Litigation Requirements?

The major changes are:

1. parties to a relevant civil dispute must take reasonable steps to:
 - 1.1. resolve the dispute by agreement; or
 - 1.2. clarify and narrow the issues in dispute. These steps must be taken before proceedings are commenced;
2. the extent to which the reasonable steps will apply must have "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" (S18E(1) of the Act);
3. the legislation states that "reasonable steps" include:
 - 3.1. notifying the other person of the issues that are, or may be in dispute, and offering to discuss them, with a view to resolving the dispute;
 - 3.2. responding appropriately to any such notification by communicating about what issues are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;
 - 3.3. exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute;
 - 3.4. considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including (but not limited to) resolution through genuine and reasonable negotiations and alternative dispute resolution processes; and
 - 3.5. taking part in alternative dispute resolution processes;
4. the legislation also allows for the creation of pre-litigation protocols which, if followed, would constitute reasonable steps for the purpose of the pre-litigation requirements. However, so far, none have been created; and
5. each person involved in a civil dispute affected by the legislation must not unreasonably refuse to participate in genuine and reasonable negotiations or alternative dispute resolution processes.

What Disputes are Affected by the Legislation?

The new procedure will apply to nearly all civil disputes when proceedings are commenced e.g. Local Court, District Court and the Land and Environment Court. However, civil proceedings in the NSW Supreme Court are excluded, at least until similar legislation has been enacted at a federal level. Federal legislation has already been approved by the Commonwealth Parliament and currently awaits royal assent. The federal legislation will affect most proceedings in the Federal Court of Australia and the Federal Magistrates

Court. The federal legislation largely reflects the NSW legislation.

Formal Requirements Once Litigation Commenced

A plaintiff who, after 1 October 2011, commences civil proceedings to which the new legislation applies, must file a dispute resolution statement setting out what steps have been taken to avoid litigation, when they file their originating process. A defendant must similarly file a dispute resolution statement with their defence. A defendant who disagrees that reasonable steps have been taken by the plaintiff must specify why and set out what steps could usefully be undertaken to resolve the dispute.

Consequences of Non-Compliance

Although failure to comply with the pre-litigation requirements will not prevent a person from commencing proceedings, or otherwise invalidate those proceedings, there is the potential for adverse cost orders and procedural repercussions for the party who fails to comply.

Can Pre-Litigation Documents be used in Court?

Currently, any document prepared for the "purpose of, in the course of, or as a result of" a pre-litigation mediation is not admissible in evidence in any proceedings before any court. This will probably mean that documents such as statements, expert opinions, reports etc., which have been prepared in order to comply with the pre-litigation requirements could not be used in the litigation itself.

Costs of Compliance

Generally, the cost of compliance with the pre-litigation requirements will not be recoverable against another party, including the losing party, unless the relevant court rules provide otherwise. However, a court may make orders in respect of the cost of compliance.

Obligations on Lawyers

Lawyer must inform their clients about the new laws and advise on alternatives to litigation.

Other Jurisdictions

To some extent, the new requirements reflect the procedures already adopted in various other jurisdictions. Similar provisions have been in force in the UK since 2000, and in Victoria since 2004.

However, on 29 March 2011, similar pre-litigation requirements were repealed by the Victorian Government because they *"add unnecessarily to the costs of resolving a dispute and make it more difficult for disputants to access the Courts"* and because they provide *"an opportunity for disputants who were not prepared to negotiate in good faith to delay a settlement or decision and thereby prevent or delay disputants with legitimate claims from gaining access to the Courts"*. The Victorian government also said that *"the Government's view, and the view of many practitioners, is that to seek to compel parties to comply with similar pre-litigation requirements through heavy handed provisions, will simply add to the complexity, expense and delay of bringing legal proceedings"*.

Advantages

The new requirements undoubtedly offer some advantages to potential litigants, particularly in assisting to resolve disputes earlier. Claimants will be required at an early stage, to provide details of their claim and exchange material which is "critical to the resolution of the dispute". This should, in turn, require the other party to consider the seriousness of the situation and respond at a level of adequate detail. However, experience has taught that many parties to litigation, particularly recalcitrant or evasive defendants are unlikely to comply with such "idealised" requirements.

If all parties comply with the requirements then each side should have a good understanding of the other side's position and the strength and weaknesses of both sides' cases. Theoretically, the parties should then be able to make a rational assessment of the risks and prospects involved in litigation before further steps are taken.

Likely Consequences

The amendments introduce a number of concepts, some of which correspond with best practice already adopted by some firms. However, the legislation does allow a great deal of flexibility. As a result, there is likely to be considerable uncertainty, at least in the early years after the changes apply, particularly because pre-litigation protocols have not yet been developed.

Although, some "reasonable steps" have been defined, the legislation does not provide an exhaustive definition of reasonable steps. Moreover, the wording in the amendments themselves will leave room for argument. In addition, whether or not a party needs to comply with the requirements will in part depend on

their situation and resources and the nature of the dispute. This itself leaves more room for dispute.

The fact that documents prepared for the purpose of pre-litigation mediation could not be used in the litigation itself is likely to lead to duplication of costs as and when proceedings are commenced.

When the, as yet unspecified protocols are introduced, they are likely to be complex and also substantially add to the cost of litigation. Again, these costs may not be recoverable.

We also anticipate that the flexibility allowed by the wording used in the legislation, particularly concerning the extent to which the requirements will apply, will itself lead to argument once the relevant proceedings are underway.

Conclusion

As a result of the changes, if you become involved in a civil dispute at any time where it is likely that proceedings will be commenced after 1 October 2011 then the new procedures will most likely apply. This means that the relevant steps must be taken:

1. just in case proceedings are commenced; or
2. if it is intended to commence proceedings, even if the proceedings are not in fact commenced.

Once relevant proceedings have commenced, it will be necessary to demonstrate to the court that the new procedures have been followed. Since it will be very difficult until later in the year to determine whether proceedings will or are likely to be commenced after 1 October 2011, prospective litigants and their lawyers should start complying with the new pre-litigation requirements almost immediately.

If, as is likely, significant costs are incurred in complying with the pre-litigation requirements and litigation is not subsequently commenced then the fees and expenses involved will simply be an additional cost for the client. Even if proceedings are commenced, given the vagaries and uncertainties of litigation, it will also often be uncertain whether these costs will be recoverable.

Also as a result of the changes, it will clearly be in each party's interest to attempt to resolve disputes before litigation has commenced (and costs have accumulated). However, in our view, it is questionable whether mandatory pre-litigation requirements will lead to quicker or cheaper resolution of disputes. Indeed, they may well have the opposite effect.

If you have any queries concerning the new pre-litigation requirements, please contact Ricky Lee at rlee@schweizer.com.au.



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