

New Rules Before You Litigate

The Federal Government has recently introduced the Civil Dispute Resolution Act, which commenced by Proclamation on 1 August 2011. Meanwhile in NSW, a new Part 2A has been inserted into the NSW Civil Procedure Act 2005 and is due to come into effect on 1 October 2011.

The changes require that parties to a dispute must attempt to resolve disagreements amongst themselves, before they proceed to litigate.

Before Commencing Litigation

In NSW, each party involved in a civil dispute is now required to take “**reasonable steps**” having regard to the person’s situation, the nature of the dispute and pre-litigation protocol to:

1. Resolve the dispute by agreement; or
2. To clarify and narrow the issues in dispute in the event that court action.

Meanwhile, the Federal Courts will require that a person takes “**genuine steps to resolve a dispute**”, having regard to the person’s circumstances and the nature and circumstances of the dispute.

What kinds of things will have to be done?

At both Federal and State courts, the legislation has offered some guidance as to the kinds of steps that might be taken in order to discharge this burden.

In particular, some of the following will be considered;

- notifying the other person of the issues that are in dispute, and offering to discuss them, with a view to resolving the dispute;
- providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;

When happens when proceedings are commenced?

At the commencement of proceedings, applicants and plaintiffs will be required to file a document outlining the steps that have been taken to try to resolve or narrow the issues in dispute between the plaintiff and the defendant in the proceedings, or

provide reasons why no such steps were taken. These may, for example, relate to urgency, safety or security. The respondent or defendant must file a document agreeing, or disagreeing and providing reasons for their disagreement.

Consequences for non-compliance

A party to proceedings who fails or refuses to comply with these new rules faces substantial potential costs orders against them.

The court has been given significant discretion under the new legislation in both jurisdictions to consider a failure to engage in pre-litigation steps against a party to proceedings.

For example, a court may award costs for pre-litigation compliance to the other party, or consider non compliance when determining costs in the proceeding generally. Further, the court may consider the fact of non-compliance in order to make any order about the obligations of parties during proceedings, or when making any other order it considers appropriate.

Accordingly, a litigant who fails to take the appropriate steps may have direct *and* indirect costs levied upon them as a result. Perhaps most significantly however, failing to do so may place the party at a strategic disadvantage during proceedings.

Conclusion

The commencement of proceedings can no longer be done capriciously. Parties will generally have the luxury (and burden) of being well informed of an impending dispute before court action is commenced.

If the possibility of bringing an action is being considered, a substantial period of time will need to be allowed before litigation is commenced to fully explore alternative dispute resolution procedures.

The pre-litigation preparation process may now commence long before parties have contacted a solicitor. Discussion and negotiations between business partners, around the dinner table or over email may come up when contemplating the commencement of proceedings.

Accordingly, record keeping of disputes and negotiations will be paramount for clients who may need to later defend against or claim costs if a matter reaches litigation.

If you would like any further information on this topic, please contact Richard Prangell on 8239 6500 or richard.prangell@kreissonlegal.com.au.

This newsletter provides a summary and general overview only. It is not intended to be comprehensive nor does it constitute legal advice.

Kreisson Legal Pty Limited ACN 113 986 824 is an incorporated legal practice under the Legal Profession Act 2004