



Introduction

Before embarking on litigation, parties to a dispute in New South Wales need to consider the pre-litigation civil dispute resolution requirements (**Pre-litigation Requirements**) which came into force on 1 April 2011¹. These requirements are designed to encourage the resolution of civil disputes prior to the commencement of certain proceedings by the use of cost penalties.

This article addresses:

- When do the Pre-litigation Requirements apply?
- What are the Pre-litigation Requirements?
- Obligations on defendants;
- Obligations on insurers;
- Obligations on solicitors;
- The effect of failing to comply with Pre-litigation Requirements.

Whilst similar requirements are in the process of being introduced at a Federal level, they are yet to take effect². For the purpose of this paper we only deal with the New South Wales requirements.

These important changes to the civil procedural rules are part of an ongoing trend towards using cost penalties and other paths to encourage parties to explore alternative dispute resolution before initiating litigation.

When do the Pre-litigation Requirements apply?

The Pre-litigation Requirements apply to any civil dispute, other than an excluded dispute, which may result in the commencement of civil proceedings.

An excluded dispute is a civil dispute in which:

- a party to the dispute is the subject of a vexatious proceedings orders; or
- the claim may result in the commencement of excluded proceedings.

Excluded proceedings include³:

- all proceedings commenced in the Supreme Court of New South Wales⁴;
- ex parte proceedings;
- an appeal in civil proceedings;
- proceedings involving vexatious litigants;
- proceedings in the Industrial Relations Commission or Dust Diseases Tribunal;

¹ The *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) inserted the new Part 2A into the *Civil Procedure Act 2005* (NSW) which sets out the Pre-litigation Requirements.

² The *Civil Dispute Resolution Bill 2010* (Cth) was passed by the Senate on 24 March 2011 and is awaiting Royal Assent.

³ For a full list of the excluded proceedings, please see the *Civil Procedure Act 2005* (NSW), s 18B(3)

⁴ *Civil Procedure Regulation 2005* (NSW), s 21. A dispute seeking equitable relief or damages greater than \$750,000 will be a dispute that results in proceedings commenced in the Supreme Court of New South Wales. If you are unsure whether your dispute will result in proceedings in the Supreme Court of New South Wales, it may be prudent to comply with the Pre-Litigation Requirements.

- proceedings in relation to the payment of workers compensation;
- proceedings in which a civil penalty under a civil penalty provision of an Act is sought.

Importantly, the Pre-litigation Requirements only apply to disputes which may result in civil proceedings commenced in the Local and District Courts. However, it appears that the intention of the NSW Parliament (and there is no suggestion as yet that the new NSW Parliament will have a different view) is to exclude disputes which may result in civil proceedings in the Supreme Court only until such time as the Federal legislation is introduced so that for disputes at that level there will be an equivalent position between the State and Federal systems⁵.

What are the Pre-litigation Requirements?

The Pre-litigation Requirements are mandatory steps a party must take to resolve the dispute before and after commencing litigation.

The obligations apply equally to a claimant/plaintiff and defendant alike.

Obligations prior to commencing litigation

Prior to commencing litigation, a party to the dispute must:

- take reasonable steps to resolve the dispute by agreement having regard to:
 - the person's situation (social, economic or other);
 - the nature of the dispute. This may include a consideration of:
 - the value of the claim (the costs of any Pre-litigation Requirement in the context of the quantum of the claim);
 - the complexity of the dispute (the complexity of a dispute may prevent or hinder resolution);
 - the limitation period (it may not be reasonable to engage in Pre-litigation Requirements if the limitation period will expire shortly);
 - clarify and narrow the issues that will be in dispute if civil proceedings are commenced.

The 'reasonable steps' a party must take include:

- notifying the other party to the dispute of the issues that are, or may be, in dispute and offering to discuss them with a view to resolving the dispute;
- responding appropriately to any such notification (and not unreasonably refusing to participate in genuine and reasonable negotiations);
- exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute;
- considering and proposing options for resolving the dispute without the need for civil proceedings in a court, including genuine and reasonable negotiations and alternative dispute resolution (**ADR**) processes such as mediation, expert determination, conciliation or arbitration; and
- taking part in ADR processes.

In complying with the Pre-litigation Requirements, a party to the dispute is not required to provide documents which might incriminate them, and any information and documents gathered in the course of taking 'reasonable steps' to resolve the dispute can only be used to resolve that dispute or in civil proceedings arising out of it.

Obligations after commencing litigation

If civil proceedings are commenced to which the Pre-litigation Requirements apply, the parties must file a dispute resolution statement at the same time as filing their pleadings.

⁵ *Civil Procedure Amendment (Excluded Proceedings) Regulation 2011* (NSW)

The statement must specify either:

- the steps that have been taken to try to resolve or narrow the issues in dispute between the parties in the proceedings; or
- the reasons why no such steps were taken, such as the urgency of the proceedings or the risk that such steps would pose to the safety and security of persons or property.

Obligations on a claimant/plaintiff

Whilst the Pre-litigation Requirements prior to commencing litigation are applicable to both parties, in practice they are more likely to fall to the claimant/plaintiff (given that the claimant is likely to be the party agitating the dispute).

Before taking any steps to commence litigation, a claimant/plaintiff should first determine whether the dispute is a type of dispute that is excluded from the operation of the Pre-litigation Requirements.

If the dispute is one to which the Pre-litigation Requirements apply or may apply, a claimant/plaintiff should take reasonable steps to:

- resolve the dispute; or
- clarify and narrow the issues in dispute in the event that litigation is commenced.

What constitutes 'reasonable steps' will depend on the situation and nature of the dispute. In particular, a claim ought to give consideration to the limitation period.

If it is reasonable to do so, the steps taken by the claimant/plaintiff before commencing litigation may include the following:

- notify all potential defendants to the dispute of the issues that are, or may be, in dispute. The notification ought to be clear on the issues that are in dispute and narrow those issues as much as possible;
- offer to discuss the issues in dispute with a view to resolving them;
- provide to the potential defendant(s) appropriate information and documents 'critical' to the resolution of the dispute. A 'critical' document is likely to be the most relevant and important document supporting the claimant's claim but need not include any document that is 'incriminating' (although this is more likely to apply to a defendant). The documents provided are subject to the same protections as those discovered in litigation;
- propose options for resolving the dispute such as a settlement negotiations or ADR processes (depending on which is more reasonable having regard to the nature of the dispute); and
- take part in the negotiation or ADR processes. The negotiations must be 'genuine and reasonable'. If negotiations or a mediation are proposed by the defendant, the claimant/plaintiff is not to unreasonably refuse.

The claimant/plaintiff is to bear its own costs of complying with the Pre-Litigation Requirements.

If the above steps do not resolve the dispute and litigation is commenced, the claimant/plaintiff must file a dispute resolution statement at the time of filing the originating process for the proceedings.

Obligations on a defendant

The Pre-litigation Requirements also apply to a defendant, regardless of whether or not the claimant/plaintiff has complied with them.

If a claimant/plaintiff does comply with the Pre-litigation Requirements, the defendant should respond to the steps taken by the claimant/plaintiff prior to the commencement of litigation.

Where a claimant/plaintiff notifies the defendant of the issues in dispute and offers to discuss those issues with a view to resolving them, the defendant should:

- respond appropriately to any such notification;

- notify the claimant/plaintiff of the issues the defendant believes to be in dispute and, if possible, narrow the issues in dispute; and
- not unreasonably refuse to participate in genuine and reasonable negotiations or ADR processes.

If the dispute remains unresolved and the claimant/plaintiff commences litigation, the defendant should file a dispute resolution statement at the time of filing the defence which either:

- states that the defendant agrees with the dispute resolution statement filed by the plaintiff; or
- if the defendant disagrees in whole or part with the plaintiff's statement, specifies how and why the defendant disagrees and other reasonable steps that the defendant believes could be undertaken to resolve the dispute.

The defendant is to bear its own costs of complying with the Pre-Litigation Requirements.

Obligations on insurers

It is important for insurers to be aware of Pre-litigation Requirements, and to ensure that an insured complies with them. If an insured fails to do so, the insured may be subject to cost orders which fall within the defence costs included in the policy.

When an insured notifies an insurer of a claim, it may be appropriate for the insurer to:

- ascertain whether it is a claim to which the Pre-litigation Requirements may apply;
- ascertain whether the claimant/plaintiff has taken any steps in compliance with the Pre-litigation Requirements; and
- take steps to ensure that the insured complies with the Pre-litigation Requirements, regardless of whether the claimant/plaintiff has done so.

Obligations on solicitors

If a client is a party to a dispute to which the Pre-litigation Requirements apply, solicitors have a duty to:

- inform the client of the Pre-litigation Requirements; and
- advise the client about the alternatives to the commencement of civil proceedings (including ADR processes) that are 'reasonably' available to the client in the circumstances in order to resolve or narrow the issues in dispute.

Failure by a solicitor to comply with this duty may result in a personal costs order against the solicitor in the resulting litigation.

The effect of failing to comply with Pre-litigation Requirements

Non-compliance with the Pre-litigation Requirements or a failure to file a dispute resolution statement will not:

- prevent a claimant from commencing civil proceedings;
- invalidate those proceedings; or
- prevent a defendant from defending those proceedings.

However such failures may have significant costs implications. Whereas usually each party involved in a civil dispute will bear their own costs of compliance with the Pre-litigation Requirements, the Court has the power to order that a party pay all or part of another party's compliance costs if it is satisfied that it is reasonable to do so.

Additionally, if a Court is satisfied that a party to civil proceedings has failed to comply with the Pre-litigation Requirements, the Court may take into account that failure in:

- determining costs in the proceeding generally;
- making any order about the procedural obligations of parties to proceedings; and
- making any other order the court considers appropriate.

Observations

Whilst the Pre-litigation Requirements do not override the general discretion judges will have in relation to costs orders during or at the conclusion of proceedings, they provide an additional basis upon which that discretion can be exercised against a party which fails to comply with them.

Given the recent introduction of the Pre-litigation Requirements, the Courts have not yet had the opportunity to consider how they might be applied. However, it is expected that absent compelling reasons for the failure of a party to comply with the Pre-litigation Requirements, a Court is likely to take compliance or non-compliance into account in relation to final costs orders.

It is also too early to determine the impact of the Pre-litigation Requirements on litigation more generally. Whilst mediation and other ADR processes have become an essential part of the litigation landscape, there has been criticism that the blanket application of these processes has in some cases added another layer of significant unnecessary legal costs without adding any benefit to the ultimate outcome. Against this background it will be interesting to see the extent to which the Pre-litigation Requirements have an impact upon mediation and other ADR processes during the course of proceedings. In other words, will these requirements result in two stages of mediation or ADR processes?

Generally speaking, effective mediations occur when all parties have a sufficient understanding of the issues and risks in the dispute and it is often premature or unproductive to conduct any form of settlement discussions before the parties reach that point. Undoubtedly the hopeful side effect of the Pre-litigation Requirements is to force greater focus on the issues and risks (and thus greater preparation) before the commencement of proceedings, with the expectation that if the dispute is not resolved the proceedings should progress more efficiently. Whether or not the introduction of the Pre-litigation Requirements will have that effect obviously remains to be seen.

Notwithstanding these observations, it is clear that all potential litigants need to be conscious of and take into account the Pre-litigation Requirements in the conduct of any civil dispute to which they apply.

April 2011

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