Case notes

PRE-LITIGATION PROCEDURES: A LEGISLATIVE UPDATE AND MEDIATION MEDIA WATCH

CIVIL DISPUTE RESOLUTION ACT 2011 (CTH)

The *Civil Dispute Resolution Act 2011* (Cth) (the Commonwealth Act) received assent on 12 April 2011 and states as its purpose "to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted". Pursuant to s 5, the Act applies to civil matters before the Federal Court of Australia and the Federal Magistrates Court. Pursuant to s 15, the Act does not apply to: civil matters that carry a penalty provision; criminal matters; judicial review before certain named tribunals; appeals; proceedings related to discovery, subpoenas and warrants; vexatious litigant proceedings; ex parte proceedings; and proceedings to enforce an enforceable undertaking. Further, the Act does not apply to certain listed legislation and their concomitant subordinate legislation.

A controversial element of the Act is its requirement pursuant to ss 6 and 7 for applicants and respondents to file a "genuine steps" statement which is described as:

> (2) A genuine steps statement filed under subsection (1) must specify:
>
> (a) the steps that have been taken to try to resolve the issues in dispute between the applicant and the respondent in the proceedings; or
>
> (b) the reasons why no such steps were taken, which may relate to, but are not limited to the following:
>
> (i) the urgency of the proceedings;
>
> (ii) whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

Both the Senate Standing Committee and the opposition had concerns about the meaning of the phrase "genuine steps" and before the Act was passed by the Parliament the government inserted s 4(1A) which defines "genuine steps" as "steps taken by the person in relation to the dispute [that] constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute". The Act gives the following non-exhaustive examples of genuine steps in s 4(1):

> (a) 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;
>
> (b) responding appropriately to any such notification;
>
> (c) 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;
>
> (d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;
>
> (e) if such a process is agreed to:
>
> (i) agreeing on a particular person to facilitate the process; and
>
> (ii) attending the process;
>
> (f) if such a process is conducted but does not result in resolution of the dispute – considering a different process;
>
> (g) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.

Sections 6(1) and 7(1) of the Act respectively require an applicant who institutes civil proceedings to file a genuine steps statement at the time of filing the application and a respondent who is given a copy of a genuine steps statement filed by an applicant in the proceedings to file a genuine steps statement before the hearing date specified in the application.

Further controversy arose when the opposition raised concerns about s 9 of the Act which requires a lawyer acting for a person who is required to file a genuine steps statement to advise the person of the requirement and to assist the person to comply with the requirement. The opposition's Deputy Leader in the Senate and Shadow Attorney-General, Senator Hon George Brandis SC, stated during

debates on the second reading of the Bill:

> The bill provides that the lawyer must not only advise but also "assist" clients to comply. Costs may be ordered against legal representatives personally if they are considered to have failed to have complied with that obligation. Lawyers already have a duty to assist their clients and, where the client accepts the advice, restating it adds nothing. The question, however, arises as to the scope of the obligation imposed upon the lawyer to "assist" a party to comply with its duty in circumstances in which a party chooses to conduct the proceeding in a manner which may not be in compliance with the duty imposed upon the client. Disputes of this nature may require inquiries into matters covered by lawyer client privilege, foment discord between lawyers and their clients, penalise innocent parties and result in further costs and delays while alternative representation is being arranged.[1]

The Senator expressed concern that a court imposing costs' sanctions may be required to determine matters that took place during settlement negotiations and between a lawyer and client that breach without prejudice privilege. To allay the opposition's concerns, prior to the passing of the Act, the government inserted s 17A which provides that the Act will not exclude or limit the operation of a Commonwealth, State or Territory law, or the common law relating to the use or disclosure of information, the production of documents or the admissibility of evidence.

The powers of the court are set out in Pt 3 of the Act and provide, pursuant to s 12, that the court, in performing its functions and exercising its powers including awarding costs may take into account whether a person who was required to file a genuine steps statement has indeed filed it and whether such a person took genuine steps to resolve the dispute. Section 12(2) provides when awarding costs the court may take account of any failure by a lawyer to comply with the duty assist a client to comply with the genuine steps requirement. Further, subs (3) provides that if a lawyer is ordered to bear costs personally because of a failure to assist a client then the lawyer must not recover the costs from the lawyer's client.

Finally, to ensure there is no rorting of this new set of procedures, pursuant to s 10 of the Act, any failure to file a genuine steps statement does not invalidate proceedings.

The pre-litigation procedures set out in the Act are really only an extension of what already exists in some States of Australia, most notably in New South Wales and Victoria with the exception that there is now a requirement to furnish the litigants and the court with evidence of the duty to advise and assist. However, as raised in the Second Reading Speech of the Bill, the interesting element of the Act will come when the first piece of litigation comes before the court for breach of the requirement to advise and assist, and costs against a lawyer who has breached the requirement is assessed. The real issue here is what evidence will be required to prove that genuine steps have been taken to resolve the dispute. Law Societies, Institutes and Bar Associations will need to assist their members in ensuring that they understand what type of evidence will be sufficient should a court determine a breach of s 9 of the Act.

CIVIL PROCEDURE ACT 2005 (NSW)

The *Courts and Crimes Legislation Further Amendment Act 2010* (NSW), assented to on 7 December 2010, inserted a new Pt 2A into the *Civil Procedure Act 2005* (NSW) (the NSW Act) which is contained in ss 18A – 18O. This new Part of the NSW Act sets out pre-litigation procedures and pursuant to s 18B applies to all civil disputes and proceedings. The term "civil disputes" is defined as "a dispute that may result in the commencement of civil proceedings" and so we see for the first time on the Australian legislative landscape an attempt by the New South Wales Parliament to persuade parties to consider dispute resolution prior to the state appropriating disputation and applying its own legislative solution.

"Alternative dispute resolution" (ADR) is defined in s 18A(1) to mean:

> processes (other than a judicial determination) in which an impartial person assists persons in dispute to resolve or narrow the issues in dispute, including (but not limited to) the following:
> (a) mediation (whether or not by a referral under this Act),

[1] Commonwealth Senate, *Parliamentary Debates*, George Brandis (23 March 2011) p 1656.

(b) expert determination,
(c) early neutral evaluation,
(d) conciliation,
(e) arbitration (whether or not by a referral under this Act).

The NSW Act excludes a range of matters that are listed in s 18B(2) and (3) that are similar to the Commonwealth Act discussed above. Section 18D requires of persons involved in a civil dispute to comply with the pre-litigation requirements pursuant to the Act prior to commencing civil proceedings in a court.

Section 18E sets out the threshold requirement that people are to take reasonable steps having regard to the person's situation, the nature of the dispute (including the value of the claim and the complexity of the issues) and any prior attempts to resolve the dispute, to settle the dispute by agreement or to clarify and narrow the issues in dispute in the event that civil proceedings are commenced. Subsection (2) sets out the following non-exhaustive list of reasonable steps that could be taken to satisfy the requirements of Pt 2A of the NSW Act that are very similar to the Commonwealth Act:

(a) 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,
(b) 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,
(c) exchanging appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute,
(d) 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,
(e) taking part in alternative dispute resolution processes.

Subsection (3) requires each party the subject of the NSW Act to not unreasonably refuse to participate in genuine and reasonable negotiations or ADR processes.

Section 18F of the NSW Act sets out confidentiality requirements for matters discussed or documents produced as part of the pre-litigation requirements. Section 18O deals with confidentiality in mediation conducted pursuant to Pt 2A of the Act.

Similar to the Commonwealth Act, s 18G requires a plaintiff to file a dispute resolution statement at the time that the originating process is filed and for a defendant receiving such a statement to similarly file such a statement at the time of filing a defence in the proceedings. A dispute resolution statement must specify:

(a) 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
(b) the reasons why no such steps were taken, which may relate to (but are not limited to) the following:
  (i) the urgency of the proceedings (including that the limitation period for the commencement of the proceedings is about to expire),
  (ii) whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

Section 18J requires New South Wales legal practitioners to inform clients about the pre-litigation requirements to the dispute including the need to file a dispute resolution statement and to advise on the alternatives to the commencement of civil proceedings that are reasonably available to resolve the dispute or to narrow the issues that include participating in ADR.

Like the controversial elements of the Commonwealth Act, subs (2) states, "in determining whether a costs order should be made against a legal practitioner under section 99, a court may take into account a failure by the legal practitioner to comply with subsection (1)". Further, s 18M allows a court to award the costs of the pre-litigation requirements taking into account any conduct by a legal practitioner that causes a party not to comply with the pre-litigation requirements. Pursuant to s 18N(2):

> In determining whether to take into account a failure to comply with the pre-litigation requirements, the court may have regard to any of the following matters:

(a) whether or not the persons in dispute were legally represented,
(b) whether or not compliance might have resulted in self-incrimination by a person in dispute,
(c) any reasons that have been provided for the failure by the persons in dispute,
(d) any other matter that the court considers relevant.

Section 18K provides that non-compliance with the pre-litigation requirements does not invalidate the originating process or proceedings that have been commenced.

Similar to the Commonwealth Act, the new Pt 2A of the NSW Act extends the codification of the overriding purpose of the Act pursuant to s 56(1) which provides that the court, its officers and litigants must seek to deal with civil disputes in a way that facilitates a just, quick and cheap resolution of the real issues in the dispute or proceedings. This Act supports the overriding purpose by providing pre-litigation requirements that will facilitate the overriding purpose.

CIVIL PROCEDURE ACT 2010 (VIC)

The *Civil Procedure Act 2010* (Vic) (the Victorian Act) was assented to on 24 August 2010 and commenced operation on 1 January 2011. Chapter 3 of the Act contained pre-litigation requirements that were almost identical to those contained in both the Commonwealth and New South Wales Acts as described above.

On 27 November 2010, Victoria had a State election and elected a new government of a different political persuasion to the previous government. On 10 February 2011, the responsible Minister in the new Victorian government read for the first time the *Civil Procedure and Legal Profession Amendment Bill* which after passing both houses of parliament was assented to on 29 March 2011. In its Second Reading Speech in the Victorian Legislative Assembly on 10 February 2011, the newly appointed Attorney-General, Hon Robert Clark MP criticised the previous government for passing Ch 3 of the Act in the following way:

> It is common sense and good practice for parties to attempt to resolve their dispute without resorting to litigation if there is a reasonable prospect of success in such an attempt. However the government's view, and the view of many practitioners, is that to compel parties to do so through these heavy-handed provisions will simply add to the complexity, expense and delay of bringing legal proceedings, because of the need to comply with these mandatory requirements, whether or not they are likely to be useful in any particular case. In many instances, the PLRs will allow dishonest parties to postpone and frustrate proceedings.[2]

The Attorney-General raised the issue of costly hurdles being put in place, particularly in small debt recovery matters by the use of pre-litigation requirements. The Attorney-General surmised:

> Since the election, most parties with whom the government has consulted are of the view that, rather than adding to the complexity of the prelitigation requirements by including yet more exceptions, it is better to remove the mandatory prelitigation requirements altogether.[3]

That is precisely what the Victorian Attorney-General did when the *Civil Procedure and Legal Profession Amendment Act 2011* (Vic) (the Amendment Act) achieved Royal Assent on 29 March 2011.

The Amendment Act removes any references to pre-litigation requirements, repeals Ch 3 and the certification requirements in s 43 of Ch 4 of the Victorian Act. What Victoria is left with is similar to the original version of the *Civil Procedure Act 2005* (NSW) – its overarching purpose being, pursuant to s 7 of the Act:

(1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.
(2) Without limiting how the overarching purpose is achieved, it may be achieved by–
  (a) the determination of the proceeding by the court;
  (b) agreement between the parties;
  (c) any appropriate dispute resolution process–

[2] Victorian Legislative Assembly, *Parliamentary Debates*, Robert Clark (10 February 2011) p 307.

[3] Clark, n 2, p 308.

(i) agreed to by the parties; or
(ii) ordered by the court.

It remains to be seen what impact the Commonwealth and New South Wales pre-litigation requirements have on achieving the common overarching purposes to ensure the court facilitates a just, quick, efficient, timely, cost-efficient, cheap resolution of the dispute or narrowing of the issues (this is an amalgam of all the aspirations of the various pieces of legislation). It is hoped that some matters will not even find their way onto court lists because the pre-litigation requirements force parties and their lawyers to address the possibility of resolving disputes without recourse to the courts. We watch this space with some interest to see if the number of new filings decreases with the introduction of the new pre-litigation requirements.

MEDIATION MEDIA WATCH

COUNTRY ROAD

The Herald Sun reported that the Federal Court has ordered Country Road ex-chief John Cheston to mediation. The paper, citing journalist Antonia Magee from *The Australian*, reported on 25 March 2011 that mediation had been entered into between Cheston and Country Road's chairman Ian Moir who referred to the relationship between the two as having deteriorated to "irreconcilable differences".

Magee reported that "Mr Cheston – who was Country Road chief for just 10 weeks – filed a case against the fashion heavyweight last October, alleging misleading and deceptive conduct … Country Road fired back saying Mr Cheston had allegedly undermined the company and denied the misconduct claim".

Magee noted that Cheston had only joined Country Road in July 2010 and was dismissed in September the same year. Mediation of the corporate divorce was to be kept confidential and was being run by the Federal Court.

SIR DONALD BRADMAN

The Australian Associated Press (AAP) reported on 20 April 2011 that a judge has directed Sir Donald Bradman's son to consider mediation over the alleged exploitation of the legendary cricketer's name.

The report stated: "John Bradman and two other executors of Sir Donald's estate are suing law firm Allens Arthur Robinson, claiming it breached its contract and was negligent in assigning Sir Donald's name to the Bradman Foundation. Both parties told the South Australian Supreme Court on Wednesday they were well on track to go to trial for five weeks on August 2."

The report further stated: "Justice Richard White directed them to consider mediation first, and let him know at a directions hearing on June 3. 'I want to know … their respective attitudes to mediation, in particular whether or not there is simply no point in mediation being held,' he said. 'I don't want this to simply trickle on'."

AAP reported that Bradman's son was displeased with the law firm, a fact which became public in 2005 when the foundation licensed an Australian food company to market Bradman chocolate chip cookies in India.

The report stated: "The family at the time described Bradman as 'a loved and missed family member, not a brand name like Mickey Mouse' but the foundation counter-claimed that it had confidence Sir Donald would have approved the venture. An inconclusive mediation ensued at the end of 2006."

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