

Steps to be taken before the commencement of civil proceedings: the new regime(s)

The following schedule sets out the main provisions of the *Civil Procedure Act 2005* (NSW) and *Civil Dispute Resolution Act 2011* (Cth) concerning pre-litigation requirements in certain civil disputes and proceedings.

The legislation imposes obligations upon lawyers to, among other things, advise the persons for whom they act of the requirement to take “reasonable” or “genuine” steps to resolve certain civil disputes before commencing proceedings.

The schedule may assist members in complying with those obligations.

Members should note that the Federal Court Rules 2011 will commence on 1 August 2011 and that the draft rules and associated Court Forms are available now on the Federal Court’s website. Rules 5.03 and 8.02 and Forms 11 and 16 deal with genuine steps statements by applicants and respondents.

The Supreme Court is currently exempted from the operation of the *Civil Procedure Act 2005* (NSW) but it is anticipated that the exemption will be removed and that there may be amendments to the UCPR.

ADR Committee of the New South Wales Bar Association
June 2011

Topic	Part 2A - Civil Procedure Act 2005 (NSW)	Civil Dispute Resolution Act 2011 (Cth)
Commencement	<p>1 April 2011.</p> <p>The transitional provisions provide that Part 2A extends to civil proceedings commenced on or after 1 April 2011 in relation to civil disputes arising before that date, but only if the proceedings are commenced after the expiry of the transitional period (being 1 October 2011) (see <i>Courts and Crimes Legislation Further Amendment Act 2010</i>).</p>	<p>12 April 2011 (formal provisions).</p> <p>Operative provisions to commence on a date to be fixed by Proclamation (no later than 13 October 2011).</p>
Object of Act	<p>See section 56.</p> <p><i>Note new subsections (3A), (4), (6) and (7) and expanded application of subsection (1) (ie to “civil disputes or civil proceedings”).</i></p> <p>In his Second Reading Speech, the Attorney-General stated that: <i>“These reforms follow extensive consultation on the Government’s ADR Blueprint released in 2009”</i>.</p>	<p>The object of the Act is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted.</p> <p>The Act draws on recommendations of the NADRAC in its report <i>“The Resolve to Resolve - Embracing ADR to improve access to justice in the federal jurisdiction”</i> (November 2009) (see Explanatory Memorandum).</p>
Application of Part 2A/Act	<p>See section 18B.</p> <p>Applies in relation to civil disputes and civil proceedings other than excluded disputes or excluded proceedings.</p> <p>“Civil dispute” defined as “a dispute that may result in the commencement of civil proceedings” (see section 18A).</p> <p>“Civil proceedings” defined as “any proceedings other than criminal proceedings” (see section 3).</p>	<p>See sections 5 (for definition of “eligible court”) and 6.</p> <p>Applies to proceedings in the Federal Court and Federal Magistrates Court.</p>

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Parties to take reasonable/genuine steps to resolve dispute	<p>See sections 18D, 18E.</p> <p>Before the commencement of proceedings, each person involved in a civil dispute to which this Part applies is 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 resolve the dispute by agreement, or to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.</p> <p>Examples include:</p> <ul style="list-style-type: none"> • giving notice of the dispute to the other person and offering to discuss it with a view to resolving it; • providing relevant information and documents to the other person; • considering and participating in an ADR process. 	<p>See section 4.</p> <p>A person takes genuine steps to resolve a dispute if the steps taken by the person in relation to the dispute 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.</p> <p>Examples include:</p> <ul style="list-style-type: none"> • giving notice of the dispute to the other person and offering to discuss it with a view to resolving it; • providing relevant information and documents to the other person; • considering and participating in an ADR process.
Plaintiff's/Applicant's obligation to file statement about steps taken to resolve dispute	<p>See section 18G.</p> <p>A plaintiff who commences civil proceedings to which Part 2A applies is to file a dispute resolution statement at the time the originating process for the proceedings is filed.</p> <p>The obligation does not apply to excluded disputes or excluded proceedings.</p>	<p>See section 6.</p> <p>An applicant who institutes civil proceedings in an eligible court must file a genuine steps statement at the time of filing the application.</p> <p>The obligation does not apply to proceedings that are wholly excluded proceedings or parts of a proceedings that are excluded proceedings.</p>

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What should the statement contain?	<p>See subsection 18G(2).</p> <p>A dispute resolution statement is to specify:</p> <ul style="list-style-type: none"> 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 the reasons why no such steps were taken, which may relate to (but are not limited to) the following: <ul style="list-style-type: none"> (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. 	<p>See subsection 6(2).</p> <p>A genuine steps statement must specify:</p> <ul style="list-style-type: none"> the steps that have been taken to try to resolve the issues in dispute between the applicant and the respondent in the proceedings; or the reasons why no such steps were taken, which may relate to, but are not limited to the following: <ul style="list-style-type: none"> (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.
Defendant's/Respondent's obligation to file statement	<p>See section 18H.</p> <p>Defendant must - at the time of filing its defence - file a statement either agreeing with the plaintiff's statement or specifying any areas of disagreement.</p>	<p>See section 7.</p> <p>Respondent must - before the first return date - file a statement either agreeing with the applicant's statement or specifying any areas of disagreement.</p>

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What disputes and proceedings are excluded?	<p>See section 18B.</p> <p>“Excluded disputes” includes any civil dispute that involves claims that may result in the commencement of excluded proceedings if the issues in dispute are not resolved or narrowed.</p> <p>“Excluded proceedings” includes:</p> <ul style="list-style-type: none"> • any civil proceedings in the Dust Diseases Tribunal, • any civil proceedings in the Industrial Relations Commission, including the Commission in Court Session (the Industrial Court), • any civil proceedings in relation to the payment of workers compensation, • any civil proceedings in relation to a claim to which the Motor Accidents Act 1988 or the Motor Accidents Compensation Act 1999 applies, • any civil proceedings in relation to a claim made under the Motor Accidents (Lifetime Care and Support) Act 2006, • any civil proceedings in which a civil penalty under a civil penalty provision (however described) of or under an Act (including a Commonwealth Act) is sought, • ex parte civil proceedings, • civil appeals. <p>Disputes or proceedings may also excluded by regulation or by the rules of court.</p> <p><i>Note that Regulation 21 of the Civil Procedure Regulations presently provides that civil proceedings in the Supreme Court are “excluded proceedings”.</i></p>	<p>See sections 15 to 17.</p> <p>Proceedings are “excluded proceedings” to the extent that they are:</p> <ul style="list-style-type: none"> • proceedings in the appellate jurisdiction of the Federal Court or Federal Magistrates Court; • proceedings relating to review of the Administrative Appeals Tribunal (and like bodies); • civil penalty proceedings; • ex parte proceedings. <p>Other excluded proceedings include proceedings under, or under regulations made under, any of the following Acts:</p> <ul style="list-style-type: none"> • the Australian Citizenship Act 2007; • the Fair Work Act 2009; • the Family Law Act 1975; • the Migration Act 1958. <p>Proceedings may also be excluded by regulation.</p> <p><i>Note: not an exhaustive list.</i></p>

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Obligations of lawyers	<p>See section 18J, 18M(1)(a).</p> <p>A legal practitioner who is engaged to represent a person involved in a civil dispute to which Part 2A applies is to inform the person about the applicability of the pre-litigation requirements to the dispute (including of the need to file a dispute resolution statement in relation to those requirements if civil proceedings are commenced), and advise the person about the alternatives to the commencement of civil proceedings (including alternative dispute resolution processes) that are reasonably available to the person in the circumstances in order to resolve or narrow the issues in dispute.</p> <p>Failure to comply with duty may result in lawyer being ordered to bear costs personally: see sections 18J(2), 18M(1)(a).</p>	<p>See section 9.</p> <p>A lawyer acting for a person who is required to file a genuine steps statement must advise the person of the requirement; and assist the person to comply with the requirement.</p> <p>Failure to comply with duty may result in lawyer being ordered to bear costs personally: see section 12.</p>
Effect of failure to comply with Part 2A/Act	<p>See sections 18K, 18N.</p> <p>Failure to comply with Part 2A does not invalidate the proceedings.</p> <p>However a court may take the failure into account in determining costs and in making procedural orders.</p>	<p>See subsections 10(2), and sections 11 and 12.</p> <p>Failure to comply with the Act does not invalidate the proceedings.</p> <p>However a court may take the following matters into account in exercising its functions and powers in relation to civil proceedings, including in the exercise of its discretion to award costs:</p> <ul style="list-style-type: none"> • whether a person who was required to file a genuine steps statement filed such a statement; • whether such a person took genuine steps to resolve the dispute.

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Disclosure of information	<p>See sections 18F, 18O.</p> <p>A person who receives information or documents as a result of the other person's complying with pre-litigation requirements must not use them for a purpose other than in connection with the resolution of the dispute or proceedings arising out of the dispute.</p> <p>However, the usual rules and procedures applicable in the court in relation to the obtaining and admission of documentary evidence continue to apply.</p> <p>Information and documents disclosed in the course of a mediation are the subject of specific protections: see section 18O.</p>	<p>See section 17A.</p> <p>The Act does not exclude or limit the operation of a law of the Commonwealth, a law of a State or Territory, or the common law (including the rules of equity), relating to the use or disclosure of information, the production of documents or the admissibility of evidence.</p> <p>Paragraphs 9 and 10 of the Supplementary Explanatory Memorandum state that "the intention [of the clause] is to make it explicitly clear that all current provisions dealing with the use or disclosure of information, the production of documents or the admissibility of evidence are not affected by [the Act]. This includes, for example, section 131 of the <i>Evidence Act 1995</i>, section 53B of the <i>Federal Court of Australia Act 1976</i> and section 34 of the <i>Federal Magistrates Act 1999</i>".</p>
Rules of Court	<p>See section 18I.</p> <p>A dispute resolution statement must comply with such additional requirements as may be specified in rules of court (including the uniform rules).</p>	<p>See sections 9, 18.</p> <p>A genuine steps statement must comply with any additional requirements specified in the Rules of Court of the eligible court in which the statement is filed.</p> <p>Rules of Court may make provision for or in relation to the following:</p> <ul style="list-style-type: none"> • the form of genuine steps statements; • the matters that are to be specified in genuine steps statements; • time limits relating to the provision of copies of genuine steps statements.

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Pre-litigation protocols	<p>See section 18C.</p> <p>A “pre-litigation protocol” is a set of provisions setting out steps that will constitute reasonable steps for the purposes of the pre-litigation requirements in their application to a specified class of civil disputes to which Part 2A applies.</p> <p>A pre-litigation protocol for a class of civil disputes may provide for any of the following matters:</p> <ul style="list-style-type: none"> • appropriate notification and communication steps, • appropriate responses to notifications and communication steps, • appropriate correspondence, information and documents for exchange between the persons involved in the dispute, • appropriate negotiation and alternative dispute resolution options, • appropriate procedures to be followed in relation to the gathering of evidence (including expert evidence). <p>Pre-litigation protocols may be imposed by regulation or rules of court.</p>	No equivalent provision.
Costs of compliance	<p>See sections 18L, 18M.</p> <p>Generally, parties bear their own costs of compliance with Part 2A.</p> <p>However, if proceedings are commenced, a court may order that a party pay all or a specific part of another party’s costs of compliance with the pre-litigation requirements if satisfied that it is reasonable to do so, having regard to the overriding purpose of this Act.</p>	No equivalent provision.