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An Experiment: Australian Pre-Litigation ADR Requirements

Jeremy Gormly (National Alternative Dispute Resolution Advisory Council) · Monday, October 3rd, 2011

Australia is passing legislation encouraging parties to most forms of civil disputes to take genuine steps to resolve their dispute prior to commencing litigation.

The idea came from a report of NADRAC (National Alternative Dispute Resolution Advisory Council) of which I am the new Chair. NADRAC advises the Commonwealth Attorney-General and has been in existence for over 15 years. Its 2009 report to the Attorney-General 'Resolve-to-Resolve' focussed on the development of ADR in the Australian Federal jurisdictions. One of its recommendations has led to the Federal Act called the 'Civil Dispute Resolution Act 2011' which only commenced a month ago on 1 August 2011. The new Act does not make compliance a pre-requisite for commencement —it expressly says it does not. That would raise obvious constitutional issues of access to a court. It does say that a Statement must be filed and responded to showing the pre-commencement steps taken towards resolution; the Court may use the material in the exercise of its other powers.

The two largest of the six Australian states (New South Wales and Victoria) passed similar but not identical legislation. There has been extensive debate and some disagreement about the new measures; after a change of Government in Victoria the legislation was repealed before its operation commenced. A change of government in NSW has also occurred and the new NSW Attorney-General has decided to postpone operation of the NSW scheme for 18 months. It wants the chance to see how the Commonwealth scheme works before putting it into operation in NSW.

There are many categories of exemption listed in the Act; there is a regulation power to exempt more. The legislation is aimed at the more routine type of case often repetitive in fact and law that can produce backlogs in Court lists and which usually resolve some time into the litigation process. The main driver behind the legislation however was not to reduce Court lists. It was to aid a change of culture towards dispute that made use of ADR generally and aided negotiation such as mediation in particular.

The opponents of the new measures have asserted that the requirements are unnecessary as lawyers try to settle cases anyway before they commence. It is also said that the new measures will just create another layer of cost to the litigation process. The additional costs are said to be in the attempts to settle and in the preparation of the Genuine Steps Statement as an additional document not previously required. It is said that the statement will become a rote form with rote words on it. There is said to be risks of satellite litigation as parties use the pre-litigation requirements and statements to fight over costs issues later or to fend off directions for mediation. The fear is that

both will lead to the increased use of Court time and more issues over which to fight.

Those who support the legislation take the view that it is not aimed at behaviour and attitude during the litigation process, but prior to it. The principal requirements of the legislation are not imposed on the lawyers but on the persons involved. The task of the lawyers is not to meet the requirements of the Act. Rather it is to advise the clients of the requirement to file a Genuine Steps Statement and to assist them to meet the obligation.

There is no additional cost. The statement is likely to involve no more than the bare facts of the attempts to resolve. It might say attempts were made by both parties, or that one party was rebuffed or acted in a patently unreasonable way ('go to hell. See you in Court'). Alternatively the statement might say that there is a good reason why steps could not be taken before commencement. Such reasons might include matters such as the limitation period was about to expire, the other party has died and there is no informed representative at present or the matter is not for some reason amenable to resolution by agreement. Cost of compliance with the genuine steps statement will be minimal. There is no 'additional' cost in trying to resolve. The Court will require the attempt anyway after the proceedings have commenced. As for the rote filling out of forms issue, that seems unlikely. Each case will be different on its facts but in any event the form may the foundation for proving unreasonable behaviour by an opponent. It may be a defence against an allegation of unwillingness to take genuine steps. The task of the lawyer is to advise the client they have an obligation to make a genuine attempt to resolve. That will usually produce a response of some reasonable type especially if it is true that most lawyers try to bring about settlement.

It is likely that the Federal Court will see the obligation for what it is—a simple obligation designed to encourage exploration of resolution before going to Court. It seems likely that it will take an interest in the statements to determine when and in what way mediation might take place. It may use the statements at the conclusion of litigation to visit cost consequences on a party that has plainly acted unreasonably before commencement of action. For example a business in a contractual dispute or an ordinary Trade Practices claim about misleading and deceptive conduct might write to its opponent and suggest mediation or even just a meeting to try and resolve the dispute. A response that says 'Go to hell; See you in Court' (or some similar variation even if polite), is one that the party may have difficulty justifying to a Court after judgment especially if they lost the case. The party that proposed mediation or a meeting will no doubt be seen to have taken a genuine step to resolve. A lawyer that files proceedings after 'attempts' to settle that amount to correspondence sparring or posturing is unlikely to have done their client a favour.

If genuine steps are taken to resolve it is likely that the impact of this Act on litigation will be minimal.

The new legislation will not affect every case. Urgency will be a justification for filing in court before taking steps to settle. Circumstances may preclude it as well. The parties may deliberately seek judicial determination on a point of law. The legislation will impose a minimal burden on those who have tried to resolve and that will be most parties. Those who act unreasonably are the only ones likely to be affected.

The Federal Court and the Federal Magistrates Courts have only received a small number of Genuine Steps Statements in the last month in the civil proceedings to which the scheme applies. It is too early to tell how the Courts will handle the legislation. The Statements so far filed are said to be quite short and to the point. It seems likely that the Federal Courts will apply a light touch to the

procedures recognizing that the requirements of the Act are not ‘legal’, ‘procedural’ or ‘litigation’ requirements. They belong to the side of the fence on which litigation has not yet occurred. It is aimed at pre-litigation behaviour of the parties to the dispute. It is not aimed at conduct during the litigation.

Everyone awaits with interest evidence of the outcome of the litigation. I suspect it will be undramatic in most cases. It will have an impact where there was unreasonable pre-commencement behaviour. Otherwise it will be what it was intended to be; a reminder to intending litigants of the obligation to take steps to resolve a dispute before sending it on the Court.

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