Genuine steps obligations and pre-litigation requirements

Julie Soars examines whether genuine steps obligations in Federal courts and pre-litigation requirements are a cultural shift in how the courts are perceived or an unnecessary and potentially costly burden.

From 1 August 2011[1] parties to civil disputes will be required to take 'genuine steps' to resolve the disputes *before* proceedings are commenced in the Federal Court of Australia. The avowed goal of these pre-litigation requirements is to 'improve access to justice' and 'reflect a cultural shift in how the position of the courts is perceived in the justice system'[2]. The shift can be described as being away from a system of adversarial justice towards a consensus based pre-court system of resolution.

The requirements in relation to proceedings brought in Federal courts are found in the *Civil Dispute Resolution Act 2011* (Cth)[3] (CDRA) and also in corresponding changes to be made to court rules. The overall aims of the CDRA as explained in the Explanatory Memorandum to this Act (Explanatory Memorandum) are:

- to change the adversarial culture often associated with disputes;
- to have people turn their minds to resolution before becoming entrenched in a litigation position; and
- where a dispute cannot be resolved, ensuring that if a matter does progress to court, the issues are properly identified, ultimately reducing the time required for a court to determine the matter[4].

The changes will apply to civil proceedings commenced in the Federal Court and Federal Magistrates Court from 1 August 2011 (the expected date for the commencement of a proposed new set of Federal Court Rules 2011[5]). Any proposed amendments to the Federal Magistrates Court Rules have not yet been made available.

Similar requirements in NSW courts[6] are contained in amendments made to the *Civil Procedure Act 2005* (NSW)(CPA) by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) which introduced into the CPA a new Part 2A (sections 18A to 18O) and made amendments to section 56 of the CPA, including to extend the overriding purpose of 'just, quick and cheap' to apply to civil disputes prior to commencement. The NSW amendments to the CPA were passed by the previous state Labor government but are not yet in effect and are subject to a transitional period which will expire on 1 October 2011. There is also a regulation in force exempting NSW Supreme Court matters pending the Federal provisions coming into force[7].

In Victoria provisions equivalent to those in NSW were enacted in 2010 and were expected to come into force in Victorian courts from 1 July 2011. These were repealed prior to coming into effect upon the change to a Liberal coalition government in Victoria.

The new Victorian Attorney General Robert Clark in the media release announcing the repeal of the reasonable steps requirements described them as 'heavy handed mandatory requirements' which could 'allow parties who are only interested in avoiding their responsibilities to postpone and frustrate proceedings'[8].

At the time of going to press the position in NSW is uncertain pending a public announcement by the NSW Attorney General Greg Smith SC as to whether the recently elected Liberal government will continue with the introduction of these reforms and/or as to the scope of any exclusions from the reasonable steps requirements (whether by regulation or rules of court). If the new NSW government continues with these reforms, then the requirements will apply to civil proceedings commenced in NSW courts on and from 2 October 2011 (in the NSW Supreme Court from this date only if the regulation currently excluding all proceedings in that court is repealed). It is not clear, however, whether these amendments will come into force in NSW on this date, or at all.

Given these uncertainties, this article will focus on the Federal provisions.

Lawyers groups have challenged the assumption that change is necessary, the current system is adversarial or that the culture of the legal profession is a barrier to ADR[9]. Lawyers groups have generally criticised the proposed changes as being likely to 'front-load' case preparation and as being inappropriate given their 'one-size fits all' approach[10] especially in relation to complex commercial disputes.

Barristers are potentially impacted because they are 'lawyers' subject to the CDRA[11] (and in NSW are 'legal practitioners' subject to the 'reasonable steps' obligations under the CPA). Barristers therefore need to be aware of the obligations imposed on them in relation to pre-litigation requirements and, in particular, of their potential exposure to a personal costs order if they do not advise clients of the genuine steps requirements and assist the client to comply with their genuine steps obligations.

To add to the complexity, there are differences between the Federal provisions and the proposed NSW provisions, in particular in the description of the obligation – in NSW it is a 'reasonable steps' obligation compared to the Federal 'genuine steps' obligation. The term 'genuine steps' arguably allows factors subjective to the party to be taken into account and is a novel term less certain in its meaning than 'reasonable steps'[12]. It is likely therefore that there will be differences in the development of case authority in relation to the Federal provisions and the NSW provisions (if they come into force).

Federal – 'genuine steps' to resolve disputes before certain civil proceedings are instituted

These requirements impose three new obligations/ duties:

- an *obligation on litigants* to take 'genuine steps' (in NSW it is 'reasonable steps') to clarify or narrow the issues in dispute and/or engage in alternative dispute resolution (ADR) prior to commencement of proceedings otherwise they can be subjected to a possible costs or adverse procedural orders for non-compliance (by reason of the interaction between sections 6, 7 and 12 CDRA);
- an *obligation on litigants* in Federal courts to file a Genuine Steps Statement (GSS) (it will be a Dispute Resolution Statement in NSW courts) at the time of commencement of the proceedings (sections 6 and 7 CDRA, rules 5.03 and 8.02 of the draft Federal Court Rules 2011 and forms 16 and 11 of the new draft Federal Court forms); and
- a *duty on lawyers* (as defined in the *Federal Court of Australia Act 1976* (Cth) (legal practitioners in NSW) to inform clients about these requirements (including the filing of a GSS) and advise on ADR alternatives (subjecting the lawyer to a possible personal costs order for non-compliance) (sections 9 and 12(3) CDRA).

The term 'genuine steps to resolve a dispute' is now[13] defined in s 4(1A) CDRA to be satisfied if the steps taken by a person in relation to the disputes 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.

Illustrative examples of genuine steps in s 4(1) CDRA include notifying the other person of the issues in dispute and offering to discuss them with a view to resolving them, responding appropriately to any such notification, providing relevant information and documents, considering or agreeing to ADR[14] and attempting to negotiate with the other person with a view to resolving some or all of the issues in dispute.

The changes do not require compulsory mediation prior to the commencement of proceedings. The obligation is to consider and use ADR (broader than just mediation – includes early neutral evaluation and expert determination), where appropriate[15]. ADR is a key, although not mandatory, component of the genuine steps requirement.

The Federal provisions were referred to a Senate Standing Committee (SSC) for inquiry and report in late 2010. The Federal Court submitted to the SSC that the changes were not suitable for much of its work including admiralty, bankruptcy, corporations, taxation and patent matters and sought to have those classes of matters excluded from the operation of the CDRA.[16]

These submissions were not accepted by the SSC which in its December 2010 Report (SSC Report) stated that it was satisfied with the proposed list of exclusions and that if the need arises to exempt further matters this could be done by regulation.[17] The SSC was also satisfied that the CDRA did not introduce mandatory pre-action protocol but was flexible and allowed the circumstances to be taken into account.[18]

On 30 June 2011 a regulation[19] was made under the CDRA which excludes from the operation of the genuine steps requirements proceedings for a sequestration order under s 43 of the *Bankruptcy Act 1966* (Cth)(where the act of bankruptcy arose under s 40(1)(g) of that Act, being a failure to comply with a bankruptcy notice based on a final judgment or order), and proceedings for an order under s 459A of the *Corporations Act 2001* (Cth) to wind up a company in insolvency where the application is based on the failure to comply with a statutory demand.

Currently excluded civil proceedings under sections 15 and 16 of the CDRA include proceedings for a pecuniary penalty for contravention of a civil penalty provision, proceedings by the Commonwealth for an order connected with a criminal offence or contravention of a civil penalty provision, proceedings for review of

Administrative Appeals Tribunal and other Tribunal decisions, *ex parte* proceedings, appellate proceedings and matters under various specified Acts.[20]

Rule 8.02 of the draft Federal Court Rules 2011 provides for the applicant's GSS (draft form 16) and rule 5.03 the respondent's GSS in response (draft form 11).

The applicant's GSS (draft form 16) requires the applicant to:

- list the issues in dispute and the date on which the issue arose;
- state whether 'genuine steps' were taken by it to resolve the dispute (or if not, explain why not) and list in tabular form the steps taken to resolve the dispute (including the date the step was taken, the respondent's response and the date of the respondent's response);
- if the applicant claims that responses of the respondent were not genuine steps, these steps need to be listed and reasons provided; and
- identify and provide details of any referral to ADR and of any issues resolved by ADR.

The respondent's GSS (draft form 11) requires the respondent to state whether it agrees with the applicant's GSS or if not, specify the respect in which it disagrees and the reasons why. If the applicant has filed a GSS, the respondent's GSS must be filed before the first return date (rule 5.03(1) of the draft Federal Court Rules 2011).

It is noted that the draft Federal Court Rules 2011 do not make provision for the filing of a GSS in respect to cross claims, the inference being that the CDRA is not considered to apply to cross claims in Federal courts.

Failure to file a GSS does not invalidate the application instituting proceedings (section 10(2) CDRA). Existing laws protecting privileged documents and in relation to the admissibility of evidence are preserved (section 17A CDRA).

Potential impact of the reforms

To the extent that the reforms reflect 'best practice' or existing obligations[21], there may be little practical impact on how many civil disputes are handled by barristers given that barristers have a general obligation to advise clients generally on the availability of ADR in any event[22].

Legal practitioners will now need to consider whether it is necessary for their clients to elect well before commencing proceedings in which court an action will be commenced if the civil dispute cannot be resolved – Federal courts or Supreme courts, to ensure compliance with the particular requirements. They will also need to ensure that accurate advice is given to clients on the applicable pre-litigation requirements (particularly given the difference in the tests – genuine steps as opposed to reasonable steps and terms such as confidentiality protection of information and documents exchanged for the purposes of the dispute only being expressly provided for in the NSW provisions[23]).

There remains a possibility that the introduction of these pre-litigation requirements may lead to forum shopping, such as commencing in the Victorian Supreme Court where it is possible to do so, to avoid the application of these requirements in Federal courts (or in NSW courts if the state amendments come into effect).

One response of lawyers to these changes may be to draft a standard form letter of advice to clients (in the case of barristers, to their instructing solicitors to be passed on to the client) in relation to these requirements, identifying the available forms of ADR and when they may be suitable, which can be amended as required for a particular matter.[24]

Alternatively, if oral advice is to be given, it would be prudent for the lawyer to keep a good file note or other record of oral advice given to clients on the requirements.

Unless it is an excluded matter, or it is not reasonable in the circumstances (for example, due to urgency or that the safety or security of any person or property would have been compromised by the taking of such steps[25]), at a bare minimum a lawyer should advise their client to send a detailed letter to the proposed defendant before commencing action, proposing any ADR that may be appropriate and containing all information and documents critical to the dispute.

Alternatively, a draft pleading containing all necessary particulars of the claim could be sent to the proposed defendant prior to commencement. Consideration would need to be given in each case as to whether

this was necessary and appropriate or was overkill and unnecessarily increasing costs.

Whether the letter pre-action will generally be sent on a 'without prejudice'[26] or an 'on the record' basis and whether more than one letter will be sent are issues left to be worked out in practice.

Adequate records need to be kept to enable the fast and accurate completion of the GSS by the relevant party.

Conclusion

It remains to be seen what effect the genuine steps requirements have on civil disputes and whether they lead to the sought after cultural shift, or as their opponents say, will only serve to add an administrative burden, increase costs and delay.

Given that the reforms did not have the support of many lawyers' representative groups, it is possible that litigation lawyers will resist the changes leading to 'lip service' compliance and opening up a potential new battleground for satellite litigation by way of interlocutory applications in which the focus is not on the issues in dispute, but on whether an applicant (or respondent) has taken genuine steps (or its lawyer advised it to do so).

The failure to exclude many matters in the Federal Court not thought to be suitable to the application of genuine steps requirements according to a number of stakeholders could add to potential costs to litigants with little expected gain (although it is noted that some bankruptcy and corporations matters have been recently excluded by regulation).

The difference in the tests as between the Federal provisions (genuine steps) and those proposed in NSW (reasonable steps) is likely to lead to potentially confusing and conflicting lines of case authority, decreasing certainty.

It is sobering to bear in mind the experience in relation to pre-action protocols in the UK. While the UK protocols are both mandatory and prescriptive and therefore arguably different in approach to the reforms proposed federally[27] and in NSW, they were an attempt to bring about a cultural change in the UK in how civil disputes (including commercial disputes) were handled and to increase access to justice. The conclusion of Lord Justice Jackson in his report of December 2009 *Review of Civil Litigation Costs* (Jackson Report) was that the general pre-action protocol should no longer apply to commercial disputes and there was no need for a specific commercial pre-action protocol[28]. Jackson noted[29] that the clear majority view amongst commercial solicitors and counsel, shared by Commercial Court judges, was that pre-action protocols were unwelcome in commercial litigation. They generated additional costs and delay to no useful purpose and this was a view shared by clients, particularly overseas clients. In Jackson's view a requirement in the relevant Court users guide for a concise letter of claim and response attaching only essential documents would be sufficient[30].

Insofar as the federal reforms go further than requiring a concise letter of claim and response and essential documents (the Jackson approach) or service before commencement of a statement of the case (the alternative approach proposed by the Federal court to the SSC[31]), they open up the possibility that they will generate additional costs and delay to no useful purpose, and will potentially be misused in interlocutory applications made in satellite litigation.

The alternative is that the Federal genuine steps requirements will increase the number of disputes that settle pre-commencement of litigation due to the use of appropriate ADR, thereby decreasing costs and reducing the need for court services. These requirements may assist litigants to narrow the issues in dispute (with corresponding costs savings) or to be aware of possible ADR options at an earlier stage, leading potentially to matters resolving earlier, with costs and efficiency savings. Lawyers may be caught up in this 'cultural shift', more readily adopting and using ADR early in disputes, including prior to commencement of proceedings.

Only time will tell what the outcome of these reforms in Australia will be.

Endnotes

1. See the Proclamation under the CDRA made on 30 June 2011 at http://www.comlaw.gov.au/Details/F2011L01408 accessed on 5 July 2011 which fixes 1 August 2011 as the date on which Parts 2 to 5 of the CDRA commence. 1 August 2011 is also the proposed date of commencement of the new Federal Court Rules 2011.

2. Report dated December 2010 of the SSC on Legal and Constitutional Affairs located at http://www.aph.gov.au/Senate/committee/legcon_ctte/civil_dispute_resolution_43/report/report.pdf and accessed on 5 July 2011 at [3.58]).
3. Passed on 24 March 2011 – the substantive sections have been proclaimed to commence on 1 August 2011.
4. Explanatory Memorandum to the CDRA located at http://www.austlii.edu.au/au/legis/cth/bill_em/cdrb2011306/memo_0.html
5. http://laredef.typepad.com/fedcourt/ and accessed on 5 July 2011 at [7].
6. They will apply to NSW courts subject to the CPA – in particular the Supreme, District and Local Courts and the Land and Environment Court.
7. Note - currently NSW Supreme Court civil proceedings are excluded by a regulation made on 1 April 2011 (located at http://www.austlii.edu.au/au/legis/nsw/num_reg/cpa2005cpapr20112011126l3m2011750.pdf and accessed on 5 July 2011) pending commencement of 'comparable provisions' in federal courts – therefore there is a possibility of later commencement in the Supreme Court as the excluding regulation will have to be repealed.
8. Located at http://vic.liberal.org.au/News/MediaReleases/tabid/159/articleType/ArticleView/articleId/2628/Coalition-Government-simplifies-civil-litigation-rules.aspx and accessed on 5 July 2011.
9. The New South Wales Bar Association '*NADRAC Issues Paper Alternative Dispute Resolution in the Civil Justice System*' March 2009 at p. 8.
10. See Law Council of Australia submissions to the SSC referred to at [3.4]-[3.5] of the SSC Report.
11. s5 CDRA.
12. See SSC Report at [3.30]-[3.37].
13. The SSC recommended that a definition be inserted – SSC Report at [3.61].
14. The existence of ADR as a key component of genuine steps was noted by the SSC in the SSC Report at [2.5].
15. Compare the approach taken in other countries such as Indonesia and Italy where compulsory mediation prior to commencement or at the time of commencement has been introduced.
16. SSC Report – appendix 3.
17. SSC Report at [3.62].
18. SSC Report at [3.59].
19. *Civil Dispute Resolution Regulations 2011* (Cth) Select Legislative Instrument 2011 No. 113 at http://www.comlaw.gov.au/Details/F2011L01409 accessed on 5 July 2011.
20. Set out in ss 15 and 16 of the CDRA, for example proceedings under the *Migration Act 1958* (Cth).
21. A 'similar' duty on lawyers to advise exists in s 37N of the *Federal Court of Australia Act 1976* (Cth), see Explanatory Memorandum at [34].
22. Rule 17A of the NSW Barristers' Rules provides: A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.
23. Section 18F CPA.
24. Similar to standard discovery/disclosure/costs disclosure letters.
25. Section 6(2)(b) CDRA.
26. Given the potential limitations to the use of 'without prejudice' material (the law on the use of information and admissibility of evidence is expressly preserved in the federal provisions – see s 17A of the CDRA).
27. The intention being to address in these reforms the concerns raised in the Jackson Report – see the SSC Report at [3.11].
28. Jackson Report at [2.8].
29. Jackson Report at [2.1].
30. Jackson Report at [2.7]-[2.8].
31. SSC Report at [3.26]-[3.29].