Recent Civil Procedure Reforms

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Commercial and litigation lawyers should take note of recent changes to the civil dispute pre-trial procedures requirements now in force in the Federal Court and reflected in the Supreme Court of the Northern Territory. The days of the evolving case are over. On 6 October 2011 Alistair Wyvill SC from William Forster Chambers in conjunction with the Law Society presented a seminar on the topic of *Recent Civil Procedure Reforms*.

Federal Court and Federal Magistrates Court – civil disputes.

The *Civil Dispute Resolution Act 2011* (Cth) No 17 0f 2011 (the CDR Act)which received assent on 12 April 2011 is yet another affirmation of that the Courts are seeking to impose obligations on parties to resolve disputes prior to finding their way to Court. The right to litigate is being replaced with a duty to mediate and there are serious consequences for litigants and lawyers if attempts to resolve disputes are not made prior to commencing litigation. These changes also have implications for lawyers drafting dispute resolution clauses in commercial agreements.

The CDR Act is a recognition that the Courts – being taxpayer funded - need to ensure that litigants make the best use of precious Court time. By imposing duties to engage in dispute resolution it is anticipated (evidence suggests?) that this will have flow on effects and overall cost savings. Hopefully once parties have made legitimate attempts to resolve issues they will be better placed to narrow the issues, agree facts and submissions and focus the use of the Court's time on resolving those issues in which agreement cannot be reached.

The CDR Act applies to proceedings commenced in the Federal Court and the Federal Magistrates Court.

The CDR Act provides for certain proceedings to be excluded particularly proceedings in the appellate jurisdiction and arising from decisions of specified Tribunals e.g. Administrative Appeals Tribunal. Proceedings arising under specified legislation such as the *Native Title Act 1992*

Case Management Handbook

Law Council OF AUSTRALIA
Federal Litigation Section

The Federal Litigation Section of the Law Council of Australia was very pleased to publish the **Federal Court of Australia Case Management Handbook** on 13 October 2011. This initiative has grown out of continuing close liaison between the Court and the Section and ongoing workshops and discussions regarding the best approaches to the management of cases before the Court.

The work on the Handbook does not stop here, however. It will remain a living document which will be subject to ongoing review and updating. Additional chapters will be added over time which will draw on the experience of practitioners and Judges in other aspects of the Court's work. Existing chapters will be regularly reviewed to ensure they remain current and relevant.

The Handbook is published on the Law Council of Australia website and is available to download.

are also excluded

Genuine Steps

In summary, applicants are required to file a genuine steps application specifying the "genuine steps to resolve the dispute" which the applicant has taken.

The statement must set out 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 respondent files an answering statement.

The CDR Act imposes a duty on lawyers to advise their clients of the requirement to take genuine steps and assist their clients in complying with this requirement. In practical terms in order for lawyers to best assist their clients they will need to be well versed in the issues in dispute in advance of the proceedings being commenced.

The Court may order costs against lawyers personally and expressly prohibits the recovery of those costs from clients.

The Federal Court Rules 2011 (FCR 2011)

In support of the amended Act the Federal Court Rules have been amended to include a new form16 "The genuine Steps Statement"

Commencement

The FCR 2011 commenced on 1 August 2011 and repealed the former Rules. The FCR2011 apply to all proceedings started in the Court on or after 1 August 2011 and to any step taken after that date in any existing proceeding. The Court may order, however, that the former Rules, with or without modification, apply to any step in such an existing proceeding.

Parties will need to explain what steps they have taken and if no steps have been taken provide an explanation why not (limitation periods and personal safety are expressly provided reasons for failing to take reasonable steps).

The FCR 2011 go on to severely curtail discovery (see part 20) where there is no discovery without an order and no discovery is to be given without an order – with costs implications to flow.

Rule 20 deals with discovery and the notes to the new rules provide as follows:

> Provision is also made restricting discovery to only where it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible; requiring that discovery be given only where an order is made for discovery; allowing a party to apply for an order for discovery but limiting when this can be done and the types of discovery which can be sought; specifying what standard discovery (if ordered) entails; specifying what must be identified if non-standard (or more extensive) discovery is sought and how this is to be done; specifying the process to be followed in giving discovery and providing guidance on practical issues (for example that the list of documents to be filed must be in the approved form, if more that one copy of a document is held discovery of that document is required only once, privilege may not be claimed by a party on the ground that a document related solely to and did not undermine that party's case and it does not relate to or support another party's case and that a party who has given discovery remains under a continuing obligation to discover any additional document found or obtained which is within the scope of the order for discovery);

There is also provision for the filing of a list of undisputed documents and correspondence in interlocutory application (Rule 17.02). At his recent CPD William Forster Chambers / Law Society Northern Territory Alistair Wyvill provided a sample precedent to attendees proposing an agreement as to the ambit of discovery. The precedent included information under the following headings in the table at *figure 1*.

Number	Issue	Paragraphs of SOC/ Reply/ Defence to Counter Claim	Paragraphs of Defence, Counterclaim	Discovery from [party]	Discovery from [party]
	Brief summary of disputed issue	Number of the relevant paragraphs	Number of the relevant paragraphs	Explanation of the types of documents required to be discovered	Explanation of the types of documents required to be discovered

Figure 1

37M-37P of the Federal Court Act

The provision of s37M(1) of the Federal Court Act 1976 (as amended [date]) state the overarching purpose of the civil practice and procedure provisions are to facilitate the just resolution of disputes; (a) according to law ; and (b) as quickly, inexpensively and efficiently as possible. These amendments came into effect on 01 January 2009.

The FCA as amended sets out the overarching purpose to include the objective of the efficient use of judicial and administrative resources and ss37M(2) the resolution of disputes at a cost that is **proportionate** to the importance and complexity of matters in dispute. The FCA then goes on to mandate that the duties and powers conferred by the civil practice and procedure provisions must be exercised in a way that promotes the overarching purpose. In other words parties have a duty to take steps to resolve their dispute in a cost effective and proportionate manner e.g. parties with a dispute of less than $10,000 ought not to be obliged to engage a mediator at the cost of $5,000 per day

NT Position

All of this is reflected in Supreme Court Practice Direction 6 of 2009 (PD 6 of 2009) which in accordance with the Supreme Court rules Order 48.28 may only remain in force for a period of 12 months. PD 6 of 2009 was extended to 31 December 2011 by practice Direction 04 of 2010 to and has since been extended to 1 January 2013. The Supreme Court Rules Committee is looking at what other jurisdictions are doing in regard to formalising pre-trial dispute resolution.

Suggestions for how lawyers can assist clients with complying with these obligations.

Prior to filing the proceeding:

- Know your case early on
- Brief counsel early to set the framework for management of the matter
- Exchange correspondence detailing the dispute
- Attempt mediation
- Attempt to narrow the issues in dispute
- Prepare and provide to the defendant a draft statement of claim
- Draft a document outlining agreed discovery

All of this adds up to legal costs being incurred by parties which are not readily recoverable from the other side. This begs the question of whether a costs only case could be commenced and sustained in circumstances where parties had agreed the substantive issues prior to proceedings being commenced but were unable to agree on legal costs. This is an issue that may be resolved in the drafting of commercial agreements which contemplate that legal fees will be incurred prior to the commencement of proceedings as part of the requirement to comply with these obligations.

How can commercial lawyers assist their clients deal with these requirements?

Prior to a dispute arising

- When drafting commercial agreements consider more detailed dispute resolution requirements
- Consider who should bear the costs of dispute resolution.

In summary, the issue of cost effective use of precious Court time remains on the agenda and practitioners need to be conscious of their role in assisting clients comply with these obligations and the consequences of failing to do so.

A final Word on Health and Wellbeing...

For those of you who watch what you eat, here's the final word on nutrition and health. It's a relief to know the truth after all those conflicting nutritional studies.

1. The Japanese eat very little fat and suffer fewer heart attacks than Americans.
2. The Mexicans eat a lot of fat and suffer fewer heart attacks than Americans.
3. The Chinese drink very little red wine and suffer fewer heart attacks than Americans.
4. The Italians drink a lot of red wine and suffer fewer heart attacks than Americans.
5. The Germans drink a lot of beer and eat lots of sausages and fats and suffer fewer heart attacks than Americans.

CONCLUSION: Eat and drink what you like. Speaking English is apparently what kills you!