

# LegalUpdate

December 2010

## Pre-litigation protocols introduced by the *Courts and Crimes Legislation Further Amendment Bill* (2010)

The *Courts and Crimes Legislation Further Amendment Act* NSW (2010) (**Act**) was assented to on 7 December 2010. The Act amends various NSW Acts in relation to crime, evidence, courts, civil and criminal procedure.

Of note are the amendments to the *Civil Procedure Act* 2005 (**Civil Procedure Act**) detailed in Schedule 6.2 of the Act relating to dispute resolution. Schedule 6.2 introduces a pre-litigation protocol into the Civil Procedure Act setting out what constitutes reasonable steps to be taken by the parties for the purposes of pre-litigation requirements.

"Pre-litigation requirements" (as defined in the Act) involve parties taking reasonable steps, with regard to their situation, the nature of the dispute, and any applicable pre-litigation protocol; to resolve the dispute by agreement, or in the event that civil proceedings are commenced, to clarify and narrow the issues in dispute.

Reasonable steps are set out in section 18E(2) of the Act and include (but are not limited to) the notification to the other party or parties regarding the issues that are in dispute - those other parties are then required to respond appropriately to such a notification by communicating the disputed issues in existence, or those which might arise. A reasonable step also includes an offer to discuss the issues with a view to resolution. Appropriate pre-litigation correspondence such as documents and information essential to resolving the dispute should be exchanged between the parties. Options are to be considered to resolve the dispute without civil proceedings in a court, including genuine and reasonable negotiations or alternative dispute resolution processes.

Section 18F provides some protection to parties in relation to restricting the use to which information or documents provided to another party pursuant to the protocol, can be put by that other party.

Section 18G requires a plaintiff who commences civil proceedings, to file a dispute resolution statement at the time the originating process is filed, setting out the steps which have already been taken to try to resolve the dispute or narrow the issues. If such steps have not been taken the dispute resolution statement must set out why such steps have not been taken. A defendant to the proceedings must also file a similar dispute resolution statement at the time of filing a defence.

The addition of a pre-litigation protocol into the Civil Procedure Act means that parties to a dispute must look to resolving the dispute or at least identify and narrow the issues in a structured manner before the dispute reaches litigation and be able to report to the court the steps taken to attempt to resolve the dispute.

Schedule 6 will commence on a date to be proclaimed.

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