cbp Lawyers

Construction
LegalUpdate

December 2010

Pre-litigation protocols soon to be in force

There has been a substantial change in the *Civil Procedure Act 2005* (**CPA**) which will affect the way that construction disputes are commenced and run in NSW.

On a date soon to be proclaimed, proposed section 18A of the CPA requires that "certain steps" be taken *before* the commencement of proceedings. This is part of the new regime known as a "pre-litigation protocol".

While this change is new to NSW, pre-litigation protocols for construction and engineering disputes are becoming more and more common. Pre-action protocols have been in force in the United Kingdom since 2000 and a similar provision in Victoria since 2004.

The NSW pre-litigation protocol requires that parties satisfy "pre-litigation requirements", which are reasonable steps to either resolve the dispute by agreement, or clarify or narrow the issues in dispute.

Essentially, pre-litigation requirements are a series of steps that a party is required to take in an effort to resolve a dispute before commencing proceedings. Similar to a letter of demand, a party needs to notify the other party of a potential claim and articulate its claim with clarity. The other party is required to respond and make its position on the dispute known.

Examples of pre-litigation requirements include:

- corresponding with the party involved in the dispute,
- disclosure of information and documentation in relation to the potential dispute,
- the parties to conduct themselves in a cooperative manner, and
- undertaking some form of alternative dispute resolution, such as mediation.

A failure to comply with these pre-litigation requirements may result in a costs order against a party.

The advantage in this procedure is that claimants are required from an early stage to provide details of their claim and exchange appropriate material which is "critical to the resolution of the dispute" (this is a pre-litigation requirement set out in proposed clause 18E(2)(c)). This in turn requires the other party to consider the seriousness of the situation and respond in a level of adequate detail. By having both parties articulate their respective positions,

a respondent should have a well founded understanding of the claim. Similarly, a claimant would be armed with information and some certainty of its opponent's position. A rational assessment of risks and prospects should be available before further steps in the dispute are taken.

However, this change also raises the following questions:

- What is the meaning of a "proceeding"? Does this include arbitrations? Under the proposed changes to the CPA, a civil dispute is defined as a dispute which might result in the commencement of "civil proceedings". Is this definition limited to court proceedings or do arbitrations fall within this meaning?
- Under the proposed changes, must parties undertake alternative dispute resolution in an open process or can it be in a privileged environment such as a mediation? This is important because in the usual course, information disclosed by a party during a confidential mediation will remain confidential and privileged even if the matter remains unresolved and proceedings are commenced.
- How do pre-litigation requirements interact with a party's obligation to notify a dispute under a construction contract? Query whether existing dispute resolution clauses in construction contracts need to be reviewed to bring those clauses in line with the changes to the CPA.

Despite these questions, the introduction of pre-litigation protocols signifies a cultural change and the growing importance of alternative dispute resolution in construction disputes. Ultimately, a party who gets in early and uses the pre-litigation protocol to its advantage will be better prepared in dealing with any potential dispute which may arise.

Joanne Chaina
Solicitor

02 8281 4609
jmc@cbp.com.au

If you have any questions in relation to this article, please contact Nick Crennan, partner on 02 8281 4608 or Joanne Chaina, solicitor on 02 8281 4609.

>>> return to first page

Disclaimer - The information in this publication is of a general nature and its brevity could lead to misinterpretation. It is not legal or any other advice. Although we endeavour to provide accurate and timely information, we do not guarantee that the information in this publication is comprehensive for the requirements of any reader, is applicable to any particular factual circumstance or that the law may not change in the future. No reader should act on the basis of any matter contained in this publication without first obtaining specific professional advice.