By Ramina Kambar and Greg Walsh

A CRITICAL EVALUATION of the PRE-LITIGATION PROTOCOLS

Photo © Stefanschurr226 / Dreamstime.com.

Legislative provisions have recently been introduced by the Commonwealth and NSW governments requiring parties involved in a civil dispute to take formal steps to resolve the dispute before proceedings can be commenced. Although the Commonwealth provisions have been operational since 1 August 2011, the NSW provisions that were to commence on 1 October 2011 have been deferred for 18 months so that the government can further consider practical concerns about whether the protocol will indeed minimise the costs of legal disputes.

This article evaluates the new provisions found in the *Civil Dispute Resolution Act* 2011 (Cth) and Part 2A of the *Civil Procedure Act* 2005 (NSW), discusses the merits of the new laws, and considers the challenges and practical implications for the plaintiff lawyer in complying with the protocols.

OVERVIEW OF THE PRE-LITIGATION PROTOCOLS

Part 2A of the *Civil Procedure Act* 2005 (NSW)

The NSW provisions require each party involved in a civil dispute to take reasonable steps, having regard to the person's situation, the nature of the dispute and any applicable pre-litigation protocol, to resolve the dispute by agreement, or to clarify and narrow the issues in dispute in the event that civil proceedings are commenced (s18E(1)). The 'pre-litigation' protocol is defined as '*a set of provisions setting out steps that will constitute reasonable steps for the purposes of the pre-litigation requirements*' and can be made by either regulation or court rules (s18C(1), (3) and (4)).

'Reasonable steps' may include:

- notifying the other person of the issues in dispute and offering to discuss the issues with a view to resolving the dispute;
- responding appropriately to any such notification by communicating about the issues that are in dispute and offering to discuss them with a view to resolving the dispute;
- exchanging appropriate pre-litigation correspondence, information and documents critical to resolving the dispute;
- considering and proposing options for resolving the dispute without the need for civil proceedings in a court, including resolution through genuine and reasonable negotiations and alternative dispute resolution processes; and
- taking part in alternative dispute resolution processes (s18E(2)).

The Commonwealth provisions set out in the *Civil Dispute Resolution Act* 2011 (Cth) refer to 'genuine steps' rather than 'reasonable steps'. It remains to be seen whether the different terminology will result in any substantial difference in the operation of the provisions. The Commonwealth provisions also contain a list of steps that could constitute 'genuine steps' to resolve a dispute (s 4(1)). Parties are prohibited under the provisions from refusing to participate in genuine and reasonable negotiations or alternative dispute resolution processes (s18E(3)).

A plaintiff who commences civil proceedings must file a dispute resolution statement at the same time as the originating process for the proceedings, outlining the steps that were taken to resolve the dispute or the reasons why no such steps were taken (s18G). The defendant is required to file a dispute resolution statement at the time of filing a defence, which either states that the defendant agrees with the plaintiff's dispute resolution statement or indicates the parts of the statement with which the defendant disagrees and indicates what further reasonable steps should have been taken to resolve the dispute (s18H).

A legal practitioner is required to advise their client about the pre-litigation requirements and the alternatives to the commencement of civil proceedings (including alternative dispute resolution (ADR)) that are reasonably available to the parties to resolve or narrow the issues in dispute (s18J(1)). A court may take into account a failure by a legal practitioner to comply with this requirement in deciding whether to make a personal costs order against that practitioner (s18J(2)). The provisions require each party to bear their own costs incurred in complying with the pre-litigation requirements, unless the rules of court otherwise provide, or a court considers it reasonable for one party or a legal practitioner to pay some or all of the other party's costs in complying with the pre-litigation requirements (ss18L(1) and 18M(1)).

A failure by a legal practitioner to comply with the pre-litigation requirements does not prevent a person from commencing civil proceedings or invalidate civil proceedings that have already commenced (s18K(1)). If, however, a party has failed to comply with the pre-litigation requirements, the court may take into account that failure in determining costs, in making an order about the procedural obligations of the parties, and in making any other order it considers appropriate (s18N(1)).[1] >>

> The main criticism of the new requirements is that far from resulting in a 'fairer, quicker and cheaper resolution of disputes', they may actually make a just outcome less likely by increasing costs and delays.

The main criticism of the new requirements is that the provisions will not result in a 'fairer, quicker and cheaper resolution of disputes' and may actually make it less likely that a just outcome will be produced by increasing costs and causing further delays. The Victorian attorney-general, Robert Clark, expressed the point as follows:

> 'It is common sense and good practice for parties to attempt to resolve their dispute without resorting to litigation if there is a reasonable prospect of success in such an attempt. However, the government's view, and the view of many practitioners, is that to seek to compel parties to do so through these heavy-handed provisions will simply add to the complexity, expense and delay of bringing legal proceedings, because of the need to comply with these mandatory requirements, whether or not they are likely to be useful in any particular case.'[4]

CHALLENGES WITH COMPLYING WITH PRE-LITIGATION PROTOCOLS

The purpose of the pre-litigation provisions is said to be a fairer, quicker and cheaper resolution of disputes between parties. The former NSW attorney-general, John Hatzistergos, in his Second Reading Speech, stated:

> 'These reforms extend the overriding purpose in s56 of the *Civil Procedure Act*, which is the just, quick and cheap resolution of the real issues to civil disputes before they are commenced in court… The reforms will require parties to identify the issues, exchange relevant information and, most importantly, to start talking to one another before they set foot in the courthouse. That not only will increase the chances of early settlement, but also should assist the parties to keep the costs of resolution proportionate to the subject matter of the dispute.'[2]

While the authors agree with the sentiment and intention behind the creation of pre-litigation protocols, the overriding concern for a plaintiff lawyer in grappling with the need to comply with them is the practical effect they may have upon case velocity and the inability to recover costs for complying with this process. In terms of case velocity, the concern is that the parties may become embroiled in complying with the need to exchange information, and there is no time limit within which the defendant has to reply to requests made by the plaintiff for information, or assess the case as one that is capable of being resolved without the need to formally issue proceedings.

The former NSW attorney-general and other supporters of the provisions would respond by arguing that only 'reasonable' or 'genuine' attempts at resolution are necessary and that the provisions make it clear that in appropriate circumstances (for example, if the limitation date is about to expire, where there are concerns about safety, if a party requires emergency medical treatment, etc), the provisions do not require a party to attempt to resolve or narrow the issues in dispute with the other party.[5] At present, what other classes of case will fit within this exception is unclear.

Timeframes

The provisions do not prescribe timeframes within which parties are to comply with their obligations, and so it is a matter for the parties themselves to set such timeframes in order to minimise delay in commencing proceedings. It is arguable that the best way to tackle the lack of unspecified timeframes is to have an informal agreement between parties that dialogue about issues likely to be in dispute should take place earlier rather than later, and that this should include a discussion about the nature of the exact dispute, the complexity of these issues, and an honest acknowledgement in circumstances where a matter is not capable of resolution without it being litigated.

In practice, issuing personal injury proceedings in the district and supreme courts results in a time delay of between roughly two to four months before the matter comes before the court for initial directions. The time taken to engage in the reasonable or genuine steps required under the provisions prior to commencing proceedings should then be added to this period. Any delays in addressing an initial letter giving notice of a potential claim by a defendant, or associated with the defendant making an assessment of whether the case is one capable of resolution within the pre-litigation framework, could therefore result in a delay of six months or more. Such a delay could have a significant impact upon an injured plaintiff. Although the provisions suggest that exceptions with compliance apply where there is any urgency of proceedings, it is not clear whether general hardship experienced by an injured plaintiff would qualify as such an exception.

The recent repeal of similar provisions in Victoria in March 2011 and the deferral of the commencement of NSW provisions confirm the concerns about the impracticality of formalising informal early dispute resolution processes that are already widespread in the legal community.[3]

Expert evidence

The pre-litigation provisions do not directly address whether expert evidence must be provided by either party during the pre-litigation stage

and prior to filing proceedings, nor do they make provision for the payment of costs should expert evidence be procured and served during this stage. In most personal injury cases, the issues between parties are often contingent on medical evidence either addressing breach of duty of care, causation and the nature and extent of injuries. A standard approach to the implementation of the protocols will not assist personal injury cases. For example, in a commercial property dispute the parties involved will often be commercially sophisticated and well-resourced individuals, while in a personal injury claim the plaintiff will typically have limited financial resources to pay for expert evidence. Matters requiring expert evidence before a defendant is willing to assess whether the case can be resolved that actually do resolve without the need to commence proceedings will produce an unjust outcome for plaintiffs who bring personal injury proceedings, due to the costs restrictions on recovery of work performed during this stage.

CONCLUSION

In the authors' view, it is unnecessary to establish a legal requirement that parties involved in a legal dispute must seek to resolve the matter before commencing proceedings. Early resolution of legal disputes clearly offers many benefits, including reduced costs, earlier settlement and reduced stress for those involved in the dispute; and legal practitioners typically already pursue the settlement of legal disputes in a manner and time that, in their professional opinion, is appropriate for the matter. A general legislative requirement as to when negotiations should begin and the kind of information that should be exchanged may interfere with the ability of legal professionals to attempt to resolve successfully their client's dispute by adapting an approach to negotiation that is tailored to the particular circumstances of the case.

The NSW attorney-general's announcement on 23 August 2011 that the NSW pre-litigation protocols have been put on hold, and acknowledgement that a large number of lawyers and clients already take reasonable steps to resolve a civil dispute before resorting to litigation, demonstrate that the concerns highlighted above have not fallen on deaf ears. The intended introduction of these provisions on 1 October 2011 in NSW (now deferred for 18 months) excited a lively debate in the legal community and triggered a re-evaluation among practitioners as to how and in what circumstances a case can satisfactorily be resolved without the need to resort to formal litigation. The deferral of the introduction of pre-litigation provisions in NSW will no doubt provide time for plaintiff lawyers and insurers to continue to address these issues and hopefully work out an informal and acceptable way of assessing those cases that may indeed benefit from an unlitigated approach, and those cases that will undoubtedly require judicial case management, expert evidence, discovery, interrogatories and time to prepare forensic evidence. The authors watch with interest the issues that may arise with the application of the Commonwealth pre-litigation provisions. ■

Notes: **1** Under s18(B), an extensive range of proceedings are exempted from the operation of the pre-litigation requirements, including proceedings involving motor accidents legislation and the payment of workers' compensation and proceedings before the Dust Diseases Tribunal and the Industrial Relations Commission. Proceedings before the NSW Supreme Court are also currently exempted from the operation of these provisions (Civil Procedure Regulation 2005 (NSW) cl 21). **2** Government of New South Wales, Parliamentary Debates, Legislative Council, 24 November 2010, 28065 (J Hatzistergos—Attorney General), 28066. http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/0/BBD108848960D25BCA2577F100267DCF.
3 The provisions containing the pre-litigation requirements were contained in the *Civil Procedure Act* 2010 (Vic) and were repealed with the passing of the *Civil Procedure and Legal Profession Amendment Act* 2011 (Vic).
4 Government of Victoria, Parliamentary Debates, Legislative Assembly, 10 February 2011, 306 (R Clark – Attorney General), 307. **5** Government of New South Wales, Parliamentary Debates, Legislative Council, 24 November 2010, 28065 (J Hatzistergos – Attorney General), 28066.

Ramina Kambar *is an associate in the Medical Law Department of Maurice Blackburn Lawyers:*
PHONE *(02) 8267 0933* **EMAIL** *RKambar@mauriceblackburn.com.au.*

Greg Walsh *is a lawyer in the Medical Law Department of Maurice Blackburn Lawyers and a lecturer in the School of Law at the University of Notre Dame Australia:*
PHONE *(02) 8204 4304*
EMAIL *GWalsh@mauriceblackburn.com.au.*

Fast, professional legal costing