



Introduction

From 1 April 2011, Part 2A “Steps to be taken before the commencement of proceedings” were inserted into the Civil Procedure Act 2005 (see Schedule 6 of *The Courts and Crime Legislation Further Amendment Act 2010*) (**the legislation**).

This legislation is likely to affect a substantial number of claims received by insurers and it is therefore important that insurers understand and appreciate the possible costs ramifications for failing to comply with these requirements.

Whilst the obligation to comply with the pre-litigation protocols will only apply to proceedings commenced from 1 October 2011, the pre-litigation protocols will need to have been followed before this time; therefore insurers may begin to shortly receive correspondence from claimants in an attempt to comply with the pre-litigation protocols.

The legislation, in many ways, is unclear and it is difficult to determine exactly what is required to comply with the pre-litigation protocols. The legislation allows for the implementation of Rules in this area which have not yet been enacted. It will be interesting to see exactly how Parliament expects these protocols to be implemented in due course and we also await any guidelines or Practice Notes to be issued by the Courts.

Purpose

The general purpose of this legislation is to require parties to take certain “reasonable steps” prior to the commencement of proceedings in an attempt to either resolve the dispute or narrow the issues in dispute. If parties fail to comply with these requirements they will be subject to possible costs consequences.

Jurisdiction

The pre-litigation protocols will apply to disputes that result in the commencement of civil procedures in the following courts:

- Local Court; District Court and Land and Environment Court.

The pre-litigation protocols do not apply to certain types of proceedings which are considered to be “excluded proceedings” under the legislation, including:

- Supreme Court; The Dust Diseases Tribunal; Industrial Relations Commission;
- Proceedings in relation to the payment of workers compensation or proceedings where the Motor Accidents Act 1988 or the Motor Accidents Compensations Act 1999 applies; and
- Ex parte civil proceedings and Appeal proceedings.

Pre-Litigation Requirements

Section 18E of the legislation provides that each person involved in a civil dispute is to take “reasonable steps” to resolve the dispute by agreement or clarify and narrow the issues in dispute in the event that civil proceedings are commenced.

Reasonable steps are to include:

- (a) Notifying the other person of the issues that are or may be in dispute and offering to discuss them with a view to resolving the dispute;

- (b) Exchanging appropriate pre-litigation correspondence information and documents critical to the resolution of the dispute; and
- (c) Participating in genuine and reasonable negotiations and alternative dispute resolution processes.

Section 18E also provides that each party is not to unreasonably refuse to participate in genuine and reasonable negotiations or alternative dispute resolution processes.

Privilege

Nothing affects the operation of the Evidence Act 1995 if documents are exchanged in accordance with the pre-litigation requirements and are then used in any subsequent civil proceedings.

Dispute Resolution Statement

Section 18G states that a person who commences civil proceedings is to file a dispute resolution statement at the time the originating process for proceedings is filed. The dispute resolution statement is to specify the steps that have been taken to try and resolve or narrow the issues in dispute or explain why these steps have not been taken if this is the case.

At the time of filing its defence, the defendant is to state whether it agrees with the dispute resolution statement filed by the plaintiff.

Duties of Legal Practitioners

Section 18J requires legal practitioners representing a person involved in the civil dispute to inform the person about the applicability of the pre-litigation requirements. A legal practitioner may be subject to a personal costs order if they fail to comply with this section.

Consequences of Non-Compliance

If a party fails to comply with the pre-litigation requirements or fails to file a dispute resolution statement in the civil proceedings it does not invalidate the civil proceedings. However, a court is able to take this into account when making any orders about costs or the procedural obligations of parties to proceedings.

Costs in General

The legislation provides that each party is to bear its own costs of compliance with the pre-litigation requirements. However, a court may make an order that a party pay all or a specific part of another party's costs of compliance with the pre-litigation requirements if satisfied that it is reasonable to do so.

Implications for Insurers

Once an insurer is notified of a claim by an insured, insurers must be aware that they may be under an obligation to comply with the pre-litigation protocols. In this regard, we make the following comments:

Privilege	We expect that "reasonable steps" to resolve the dispute by agreement or clarify and narrow the issues in dispute will involve the service of evidence. If an insurer decides against retaining external solicitors to comply with the pre-litigation protocols, then care must be taken in relation to maintaining privilege over correspondence with any expert or factual investigator.
Costs	The pre-litigation protocols are likely to increase costs at the outset of the claim. If insurers appear to not engage with the pre-litigation protocols, then insurers may be subject to a costs order in the event that proceedings are subsequently commenced.
Management	The pre-action protocols will also require proactive involvement by claims managers at an early stage.

Conclusion

How effective these pre-litigation protocols will be in resolving matters before litigation will partly depend on how the courts will interpret such phrases as 'reasonable steps' or 'genuine and reasonable negotiations' in the legislation.

In the meantime, insurers may soon receive correspondence from claimants in compliance with the pre-litigation protocols and it is important that insurers become familiar with these requirements in order to avoid any negative cost ramifications from non-compliance.

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