

# CG LAW BULLETIN

## TRY TO RESOLVE BEFORE GOING TO COURT

The commencement of the substantive provisions of the *Civil Dispute Resolution Act 2011 (Cth)* (“the Act”) on 1 August 2011 brings into effect a change that will require parties seeking to litigate in the Courts to demonstrate the “genuine steps” they have taken to resolve their dispute.

If genuine steps have not been taken the parties must explain why that is the case.

It is clear that the intent of the legislation is to reduce the amount of disputes that move straight to litigation without the parties seeking alternative options to settle their disagreement.

### OBLIGATIONS IMPOSED BY THE ACT

The main requirement imposed by the Act is for applicants who commence civil proceedings to file a genuine steps statement at the time of filing their court proceeding. The genuine steps statement must specify:

1. the steps that have been taken to try to resolve the issues in dispute between the parties to the proceeding; or
2. the reasons why no such steps were taken (which could be because of the urgency of the proceeding or because of safety or security concerns).

A respondent to the proceeding must then file a genuine steps statement in response stating whether the respondent:

1. agrees with the genuine steps statement filed by the applicant; or
2. disagrees with the genuine steps statement filed by the applicant and specifying the reasons for disagreement.

### WHAT ARE GENUINE STEPS?

The Act does not set a mandate of specific steps that must be taken that will constitute ‘genuine steps’. However, a person will be considered to have taken genuine steps to resolve a dispute if the steps taken constitute 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 Act does provide some examples of the steps that could be taken by a person to genuinely attempt to resolve a dispute, including:

1. notifying the other party of the issues that are in dispute and offering to discuss them with a view to resolving the dispute;
2. providing information and documents to other parties to enable them to understand the issues involved in the dispute and how it might be resolved;
3. participating in an alternative dispute resolution process (such as a mediation); and
4. attempting to negotiate with a view to resolving some or all of the issues in dispute.

## CONSEQUENCES OF FAILING TO COMPLY WITH THE ACT

A failure to file a genuine steps statement does not invalidate a proceeding, however, the Court may take into account the fact that a party did not genuinely attempt to resolve a dispute when making orders about costs.

A Court can also take into account a failure to take genuine steps to resolve a dispute when exercising other powers. The Explanatory Memorandum to the Act when introduced into Parliament suggests some examples of orders a Court could make in circumstances where it is not satisfied that genuine steps have been taken to resolve the dispute including:

1. referring the dispute or parts of the dispute to mediation, arbitration or some other alternative dispute resolution process;
2. dismissing the proceeding or part of the proceeding;
3. striking out, amending or limiting any part of the claim or defence;
4. disallowing or rejecting evidence; and
5. ordering documents to be produced.

Businesses or individuals contemplating litigation in a matter that falls under this Act would therefore be well advised to make sure they come to the matter with clear evidence of their genuine steps efforts so as not to face these types of orders.

## APPLICATION OF THE ACT

The Act applies to all federal civil law matters commenced in the Federal Court or the Federal Magistrates Court of Australia, unless a specific exemption is provided for in the Act or in the Regulations to the Act.

Engaging experienced specialist litigators will ensure genuine steps are taken before commencing litigation proceedings. Our team of litigators will ensure minimal costs are incurred on this important process, should litigation be necessary, but equally important will be our focus on resolving what might otherwise prove a costly and time consuming court dispute.

If you have any questions in relation to this bulletin please do not hesitate to contact any of the members of CG Law's litigation team.

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