Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

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1. Introduction and Summary
    1.1 Legal Challenge to Pre-action Protocols
2. Traditional Pre-action Procedures
        2.1 Preservation and other orders
        2.2 Disclosure to identify a defendant or to determine merit
3. 'New' Pre-action Requirements
        3.1 England and Wales
            3.1.1 Pre-action conduct not covered by an approved protocol
            3.1.2 Compulsory pre-action disclosure by court order
            3.1.3 Legal challenges to pre-action discovery
        3.2 Canada
            3.2.1 Canadian Bar Association Report
            3.2.2 Alberta Rules of Court Project
            3.2.3 Nova Scotia Rules Revision Project
            3.2.4 British Columbia Justice Review
            3.2.5 Ontario Civil Justice Reform Project
        3.3 The United States
        3.4 Hong Kong
        3.5 Other Jurisdictions
        3.6 Australian Pre-action Procedures
            3.6.1 Queensland
            3.6.2 Family law proceedings
            3.6.3 South Australia
            3.6.4 New South Wales
            3.6.5 Victoria
4. Consequences of Noncompliance
5. Impact of Pre-action Procedures
6. Disclosure and Service of Documents when commencing proceedings
        6.1 NSW professional negligence claims
        6.2 NSW workers compensation proceedings
        6.3 NSW dust disease proceedings
7. Submissions
        7.1 Support for Pre-action Protocols
        7.2 Opposition to Pre-action Protocols
        7.3 Other Issues Raised in Submissions

Recommendations

> *Pre-action procedures 'are useful mechanisms for (a) reminding parties that they might avoid litigation and instead achieve a settlement, whether by simple negotiation or ADR, notably mediation, (b) sponsoring informed settlement by the exchange of information between disputants, (c) fostering a spirit of co-operation between adversaries so that the dispute can be narrowed or even resolved amicably, and (d) canalising preparation for litigation (if settlement is elusive).*[1]

1. INTRODUCTION AND SUMMARY

Customarily, formal court-based dispute resolution procedures start when legal proceedings begin between the parties in dispute. Usually, this is preceded by a letter of demand and response to the letter of demand. Until recently, such 'pre-action' communications were optional and unregulated.

The rules of most courts allow for various types of pre-action procedures, designed to facilitate the future conduct of litigation. These include procedures to identify the appropriate party to sue, to decide whether there is a cause of action and to prevent the prospective defendant from disposing of or removing assets or property from the jurisdiction where this would have the effect of frustrating any judgment or order of the court.

In some Australian and overseas jurisdictions forms of pre-action procedure have recently been introduced for a fundamentally different purpose—to avoid litigation entirely. These pre-action procedures seek to encourage:

(a) early and full disclosure of relevant information and documents

(b) settlement

(c) where settlement is not achieved, identification and narrowing of the real issues in dispute in order to reduce the costs and delays involved in litigation.

The ways used to achieve these objectives vary considerably between and within jurisdictions.

In its Justice Statement the Victorian Government foreshadowed that it:

> *will investigate the scope for pre-litigation protocols that require a party initiating litigation to have initially made a genuine attempt to resolve the dispute without resorting to litigation.*[2]

The commission has sought the views of interested parties through both the Consultation Paper in October 2006 and the draft proposals set out in the exposure draft released in June 2007. The submissions received are summarised at the end of this chapter. The chapter also reviews the development of pre-action protocols in various Australian jurisdictions and in other countries.

The commission believes there is a need for greater disclosure of information and cooperation before legal proceedings are commenced. A key policy objective of the commission's proposals is to accelerate disclosure of relevant information and provide time frames for communication and standards of sensible conduct *before* proceedings are commenced, to avoid the necessity for litigation in many cases. This is proposed through the introduction of pre-action protocols. The commission's recommendations are set out in the final part of this chapter.

1.1 LEGAL CHALLENGE TO PRE-ACTION PROTOCOLS

If pre-action protocols are seen to present a barrier to access to the courts, they may be open to challenge as being incompatible with the right to have a dispute decided by a 'competent and impartial court or tribunal after a fair and public hearing' under the Victorian *Charter of Human Rights and Responsibilities Act* (2006) (the Charter).[3] As has been noted in the English context: '[t]he tentacles of the *Human Rights Act1998* reach into some unexpected places'.[4]

The commission's proposals in relation to pre-action protocols do not seem to be incompatible with the provisions of the Charter. Although parties in dispute would be expected to meet the requirements of the pre-action protocols there would be no bar to the commencement of legal proceedings in the event of noncompliance (although there might be costs or other consequences of noncompliance). Accordingly, the protocols would not deny access to the courts.

Section 24(1) of the Charter applies to a 'party' to a 'proceeding'. The pre-action protocols are intended to apply to persons in dispute before they become parties to a legal proceeding and are designed to facilitate resolution of the dispute without the need for legal proceedings. Even if a

1 Neil Andrews, 'The Pre-Action Phase: General Report' (Paper presented at the World Congress of Procedural Law, International Association of Procedural Law, September 2007, Brazil) 35.

2 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 36.

3 *Charter of Human Rights and Responsibilities Act 2006* s 24(1).

4 *Mousaka v Golden Seagull Marine* [2002] 1 WLR 395.

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

court orders a stay of proceedings commenced by a party who has failed to comply with applicable pre-action protocol requirements, this is unlikely to provide a basis for challenge under the provisions of the Charter. The disclosure and other obligations imposed under pre-action protocols are similar to those imposed by civil procedural rules, which apply in any event to parties once proceedings are commenced. The pre-action protocol disclosure and other obligations are intended to serve the same purpose as the Charter: to facilitate a 'fair' hearing of disputes unable to be resolved by agreement between the parties.

The commission has also proposed that where parties have complied with pre-action protocol requirements the courts should consider a means of 'fast tracking' cases where the dispute has not resolved, and possible dispensation with certain interlocutory steps.

2. TRADITIONAL PRE-ACTION PROCEDURES

A wide variety of 'ancillary' orders may be made by various courts prior to the formal commencement of proceedings for 'primary' relief. The power to make such orders may come from procedural rules or from the inherent, implied or statutory jurisdiction of the court.

2.1 PRESERVATION AND OTHER ORDERS

As in most common law jurisdictions, civil procedural rules in Victoria enable a prospective party to seek court orders to search for and to preserve evidence as well as property in dispute.[5] The power to make such orders is also part of the inherent, implied or statutory jurisdiction of some courts, including the Supreme Court of Victoria.

Prospective plaintiffs may also apply for 'freezing' orders to restrain defendants or prospective defendants from removing, disposing of, dealing with or diminishing the value of their assets where this would prevent the plaintiff or prospective plaintiff from satisfying any judgment made by the court.[6]

The court may also make an order related to a freezing order, including for obtaining information about assets relevant to the freezing order or prospective freezing order.[7] This may encompass discovery of documents and interrogatories.

These orders, developed out of and often described as *Anton Piller*[8] and *Mareva*[9] orders respectively, are usually made ex parte.

In urgent situations, the court may, on the application of a person who intends to commence a proceeding, make any order which the court might make if the applicant had commenced a proceeding and the application was made in the proceeding.[10] This may include injunctive relief or discovery.

2.2 DISCLOSURE TO IDENTIFY A DEFENDANT OR DETERMINE MERIT

In Victoria, as in most Australian jurisdictions, rules of court make provision for pre-action disclosure in a variety of situations. Some provisions permit pre-action discovery to enable a person to identify a prospective defendant.[11] Other provisions enable a person to seek discovery from a prospective defendant to determine whether to commence an action.[12] In addition to discovery of documents, oral examination before the court may be ordered in certain circumstances.[13] Apart from provisions for disclosure in court rules, the principles of equitable discovery may be relied upon in the higher courts in some situations.

3. 'NEW' PRE-ACTION REQUIREMENTS

A different model of pre-action procedure is developing in some Australian jurisdictions. Although most civil procedural rules traditionally started with the commencement of proceedings, various forms of pre-action protocol now seek to govern the conduct of parties to disputes before they begin litigation, to assist them to resolve the dispute without litigation. These protocols also provide for mutual exchange of information and documentation and aim to narrow the issues in dispute if litigation is unavoidable.

In different jurisdictions, pre-action protocol requirements may be voluntary or mandatory. However, such procedures usually regulate the commencement of litigation of matters which are unable to be resolved by other methods, rather than being a means of precluding access to the courts. Attempts

to preclude access to the courts may give rise to legal challenges on human rights or constitutional grounds (see Legal Challenge to Pre-action Protocols, above).[14]

Apart from the introduction of formal pre-action procedural rules or protocols, Andrews notes the 'interesting suggestion' that procedural systems should recognise a 'duty of cooperation' between persons in dispute, even within the pre-action phase.[15] As he observes, there are a number of international developments in this direction.

In some situations parties may be required to attempt to resolve disputes by means other than litigation as a result of pre-dispute contractual arrangements between the parties. This is discussed in detail in Chapter 4.

3.1 ENGLAND AND WALES

English courts have recognised a 'constitutional right' to bring legal proceedings before the courts.[16] In *Ex parte Witham* Justice Laws concluded that it was not lawful to set court fees at a level which made them unaffordable to persons on income support, thus in effect depriving them of their right to sue.[17] The constitutional right at common law of access to the courts can be set aside by a specific provision in primary legislation or by subordinate legislation where the primary legislation specifically gives the power to do so.[18] However, such legislation may itself be subject to challenge as being incompatible with human rights provisions which seek to protect the right to trial.

Notwithstanding the 'right' of access to the courts, pre-action protocols were introduced in England and Wales in 1999 as part of the English civil procedure reforms following the recommendations of Lord Woolf. In the course of his inquiry, Lord Woolf examined a number of civil procedural innovations in Australia. By 1995 at least one jurisdiction, South Australia, had introduced a form of pre-action disclosure regarded as very successful. Pre-action protocols were adopted in England and Wales when major changes were incorporated in the *Civil Procedure Rules 1998* (SI 1998/3132).

Lord Woolf described the introduction of pre-action protocols as one of the most significant of the procedural changes he was recommending.[19]

In his final report, Lord Woolf stated that the purposes of pre-action protocols are:

> *(a) to focus the attention of litigants on the desirability of resolving disputes without litigation;*
>
> *(b) to enable them to obtain the information they reasonably need in order to enter into an appropriate settlement; or*
>
> *(c) to make an appropriate offer (of a kind which can have costs consequences if litigation ensues); and*
>
> *(d) if a pre-action settlement is not achievable, to lay the ground for expeditious conduct of proceedings.*[20]

Lord Woolf recommended:

> *(1) Pre-action protocols should set out codes of sensible practice which parties are expected to follow when faced with the prospect of litigation …*
>
> *(2) When a protocol is established for a particular area of litigation, it should be incorporated into the relevant practice guide.*
>
> *(3) Unreasonable failure by either party to comply with the relevant protocol should be taken into account by the court, for example in the allocation of costs or in considering any application for an extension of the timetable.*
>
> *(4) The operation of the protocols should be monitored and their detailed provisions modified so far as is necessary in the light of practical experience.*[21]

It was not proposed that such protocols would cover all areas of litigation. Instead, they were intended to deal with particular problems in specific areas, including personal injury, medical negligence and housing.[22]

Rather than appearing in the Civil Procedure Rules themselves, the protocols have been implemented by way of a Practice Direction. This sets out the requirements for compliance with the protocols and the consequences of noncompliance, and provides guidance for those cases not covered by a pre-existing protocol. The Practice Direction applies to pre-action protocols which have been approved by the Head of Civil Justice.

5 See, eg, *Supreme Court (Chapter I Amendment No. 2) Rules 2006* O 37B. See also *Uniform Civil Procedure Rules 2005* (NSW) r 25.19, *Supreme Court Civil Rules 2006* (SA) O 148.

6 See *Supreme Court (Chapter I Amendment No. 2) Rules 2006* O 37A. See also *Uniform Civil Procedure Rules 2005* (NSW) r 25.11, *Supreme Court Civil Rules 2006* (SA) O 247.

7 See *Supreme Court (Chapter I Amendment No. 2) Rules 2006* O 37A.03.

8 See *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55.

9 See *Mareva Compania Naviera SA of Panama v International Bulk Carriers* [1975] 2 Lloyd's L Rep 509.

10 See *Supreme Court (General Civil Procedure) Rules 2005* O 4.08.

11 See *Supreme Court (General Civil Procedure) Rules 2005* r 32.03; *Rules of the Supreme Court 1971* (WA) O 26A r 3; *Uniform Civil Procedure Rules 2005* (NSW) r 5.2.

12 See *Supreme Court (General Civil Procedure) Rules 2005* r 32.05; *Federal Court Rules 1979* (Cth) O 15A r 6; *Supreme Court Civil Rules 2006* (SA) r 146; *Supreme Court Rules 2007* (NT) r 32.05.

13 See *Supreme Court (General Civil Procedure) Rules* 2005 O 31.

14 Submission CP 36 (Human Rights Law Resource Centre).

15 Neil Andrews, 'The Pre-action Phase: General Report' (Paper presented at the World Congress of Procedural Law, International Association of Procedural Law, Brazil, September 2007) 11.

16 See, eg, *R v Lord Chancellor, ex parte Witham* [1998] QB 575, Div Ct referred to in Neil Andrews (2007), above n 15, note 27.

17 See also *R v Lord Chancellor, ex parte Lightfoot* [1999] 2 WLR 1126 and the subsequent decision of the Court of Appeal; *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597.

18 See, eg, the decision of the Court of Appeal in *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597. See also the discussion in Joseph M Jacob, *Civil Justice in the Age of Human Rights* (2007) ch 3.

19 Lord Woolf, *Access to Justice—Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1996) ch 9 [2].

20 ibid, ch 10 [1].

21 ibid, ch 10 Recommendations.

22 ibid, ch 10 Recommendations [1].

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

In England and Wales, the Practice Direction relating to pre-action protocols provides that the objectives of such protocols are:

> *(1) to encourage the exchange of early and full information about the prospective legal claim*
>
> *(2) to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings*
>
> *(3) to support the efficient management of proceedings where litigation cannot be avoided.*[23]

When Lord Woolf prepared his final report in July 1996, pre-action protocols were being developed in the areas of housing disrepair, medical negligence, construction industry disputes, and personal injury cases. This involved a process of consultation among various interest groups in each of these areas. As Lord Woolf noted:

> *Protocols will be most effective if they are agreed, broadly speaking, on behalf of those most likely to be frequent users of the procedures, whether as litigants or as professional advisers.*[24]

Two protocols had been finalised when the rules were introduced in 1999. These were for personal injury (in force since 26 April 1999) and clinical negligence (in force since 26 April 1999). Subsequent protocols cover:

- construction and engineering disputes (2 October 2000, revised from 6 April 2007)
- defamation (2 October 2000)
- professional negligence (16 July 2001)
- judicial review (4 March 2002)
- disease and illness (8 December 2003)
- housing disrepair (8 December 2003)
- possession claims based on rent arrears (2 October 2006).[25]

Unlike the personal injury protocol and other protocols, the clinical negligence protocol incorporates 'good practice commitments' which extend beyond the legal claims process and adopt best practice procedures for dealing with the reporting of adverse health outcomes, patient dissatisfaction and complaint mechanisms.[26] For example, health care providers are required to ensure that patients receive clear and comprehensible information in an accessible form about how to raise concerns or lodge complaints.[27] However, a study of the impact of the Woolf reforms noted that, although communication between complaints and claims departments seemed to work well, claims managers were uncertain about the extent of their duty to advise patients of the steps open to them following an adverse incident. Moreover, they remained reluctant to admit liability unprompted by a claim or to advise patients to seek legal advice. This was said to be sanctioned by Department of Health policy.[28]

In September 2001 the Lord Chancellor's Department (now the Ministry of Justice) published a consultation document proposing a general pre-action protocol for all types of litigation.

The Civil Justice Council considered whether a general protocol should be developed to cover all cases not caught by specific protocols. Although initially deciding against this, given the general guidance provided by the Practice Direction, the council has further considered the introduction of a consolidated pre-action protocol. This arose out of growing concern about the proliferation of pre-action protocols, many of which have common or identical elements. One option under consideration was to reduce the present nine protocols to one protocol incorporating the core steps and guidance common to all the protocols but with separate appendices for particular subject areas.

Following further recent consultation it became apparent that there was considerable opposition to such a proposal, including from stakeholders who had been involved in the drafting of the present specific protocols. Accordingly, the Civil Justice Council is presently preparing a General Pre-Action Protocol which would apply, by default, where other specific pre-action protocols were not applicable. In due course this could be used as a template for the purpose of reviewing and modifying the various individual protocols.

The existing protocols incorporate different guidelines and different time frames for responses, etc. Some include full precedents, such as letters of claim, letters of response and letters of instruction to medical experts (eg, the personal injuries protocol). Others use templates (eg, the clinical negligence protocol) or simply provide general guidance (eg, the judicial review protocol).

These protocols have become quite lengthy and detailed. In some ways they constitute their own procedural code. They set out the steps that must be taken, a timetable and, instead of forms, a series of draft documents that can be adapted to meet the circumstances of the claim.

For cases not covered by a protocol, the Practice Direction sets out detailed steps which each of the parties to the dispute is expected to take. These are summarised below. At present the Practice Direction is under review and a revised draft has been circulated by the Civil Justice Council for comment. In the draft, arbitration has been added to the list of alternative dispute resolution options. Also, there is a more explicit statement that parties are expected to make continual efforts to settle, both before a case is commenced and during proceedings.

The pre-action protocols are not intended to be exhaustive but prospective parties are required to substantially comply with approved protocols.[29] Noncompliance can result in cost orders and/or interest penalties.

In England and Wales the Civil Procedure Rules enable the court to take into account compliance or noncompliance with an applicable pre-action protocol when giving directions for the management of proceedings[30] and when making orders for costs.[31]

The Practice Direction relating to pre-action protocols provides that if the court is of the opinion that noncompliance has led to the commencement of proceedings which might otherwise not been commenced, or has led to costs being incurred that might otherwise not have been incurred, the orders the court may make include:

> *(1) an order that the party at fault pay the costs of the proceedings, or part of those costs, of the other party or parties;*
>
> *(2) an order that the party at fault pay those costs on an indemnity basis;*
>
> *(3) if the party at fault is a claimant in whose favour an order for the payment of damages or some specified sum is subsequently made, an order depriving that party of interest on such sum and in respect of such period as may be specified, and/or awarding interest at a lower rate than that at which interest would otherwise have been awarded;*
>
> *(4) if the party at fault is a defendant and an order for the payment of damages or some other specified sum is subsequently made in favour of the claimant, an order awarding interest on such sum and in respect of such period as may be specified at a higher rate, not exceeding 10% above base rate (cf. CPR rule 36.21(2)), than the rate at which interest would otherwise have been awarded.*[32]

The Practice Direction further provides that the court will exercise its powers under paragraphs 2.1 and 2.3 with the object of placing the innocent party in no worse position than that party would have been in if the protocol had been complied with.[33]

The Practice Direction specifies various circumstances where either a claimant or a defendant may be found to have failed to comply with the protocol. For claimants, this may be supplying insufficient information to the defendant or not following the procedure required by the protocol.[34] For defendants, this may be failing to respond to the letter of claim within the time period specified in the protocol, not making a full response within the specified time, or not disclosing documents required to be disclosed by the protocol.[35]

The court is not likely to be concerned with 'minor infringements' of the practice direction or protocols and is likely to look at the effect of noncompliance on the other party in determining whether to impose sanctions.[36]

Where a party to a dispute or potential dispute fails to consider whether some other form of alternative dispute resolution (ADR) would be more suitable than litigation or fails to endeavour to agree on which form of ADR to adopt, the court will take this into account when determining costs.[37]

Compliance or noncompliance with a relevant pre-action protocol will be taken into account by a court only where the claim was started after the protocol came into effect.[38] Where a claim is started

23 Department for Constitutional Affairs, *Practice Direction: Protocols* (2006) [1.4] <www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm> at 3 December 2007.

24 Lord Woolf (1996), above n 19, ch 10 [13].

25 Each of the protocols is available online on the Department for Constitutional Affairs website: <www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm> at 3 December 2007.

26 Ministry of Justice [UK], *Pre-Action Protocol for the Resolution of Clinical Disputes* (1999) [3.4]–[3.5] <www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_rcd.htm> at 3 December 2007.

27 ibid at [3.4(v)].

28 Tamara Goriely, Richard Moorhead and Pamela Abrams, *More Civil Justice? The impact of the Woolf reforms on pre-action behaviour*, Research Study 43, The Law Society & the Civil Justice Council (2002) 221–2.

29 Ministry of Justice [UK], *Practice Direction—Protocols* (2006) [2.2] <www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_protocol.htm> at 26 November 2007.

30 *Civil Procedure Rules 1998* (SI 1998/3132) rr 3.1(4)–(5), 3.9(e).

31 *Civil Procedure Rules 1998* (SI 1998/3132) r 44.3 (5)(a). See also r 36.10 in relation to pre-action offers of compromise.

32 Ministry of Justice [UK] (2006), above n 29, [2.3].

33 ibid, [2.4].

34 ibid, [3.1].

35 ibid, [3.2].

36 ibid, [3.4].

37 ibid, [4.7].

38 ibid, [5.2].

Facilitating the Early Resolution of Disputes without Litigation

after a protocol has come into force and a party has, by work done before that date, achieved the objectives sought to be achieved by certain requirements of that protocol, then the party need not take further steps to comply with those requirements.[39]

However, as noted above, the Practice Direction prescribes various standards of pre-action conduct and disclosure expected of parties in dispute or potentially in dispute even if there is no pre-action protocol applicable—either at all, or at the relevant time—to the type of dispute in question.

Pre-action protocols arose out of the recognition that the early stages of civil disputes, which had 'hitherto been neglected and largely unregulated [are] no less important than the … stages which ensue once litigation is commenced'.[40]

In the Court of Appeal Lord Justice Brooke noted the importance of pre-action protocols:

> *The introduction of pre-action protocols, and of the procedures they suggest for the obtaining of expert evidence, represents a major step forward in the administration of civil justice. Any practitioner or judge with significant experience of personal injuries litigation will have been very familiar with the mischiefs they seek to remedy. Under the former regime, in many disputed cases of any substance nothing very effective seemed to happen until a writ was issued close to the expiry of the primary limitation period … The resolution of these difficulties required ingenuity and imagination. [The protocols] are guides to good litigation and pre litigation practice, drafted and agreed by those who know all about the difference between good and bad practice.*[41]

3.1.1 Pre-action conduct not covered by approved protocol

Even where there is no specific protocol in place covering a particular type of litigation, the court may take into account the need for cooperative pre-action disclosure.[42] The Practice Direction deals in detail with the expected conduct of parties to a dispute in situations not covered by any approved protocol.

In such situations the court will expect the parties, in accordance with the overriding objective and the matters referred to in rules 1.1(2)(a), (b) and (c), to 'act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings'.[43]

The Practice Direction provides that parties to a potential dispute should follow 'a reasonable procedure, suitable to their particular circumstances, which is intended to avoid litigation. The procedure should not be regarded as a prelude to inevitable litigation'.[44] Such reasonable procedure should normally include:

> *(a) the claimant writing to give details of the claim;*
>
> *(b) the defendant acknowledging the claim letter promptly;*
>
> *(c) the defendant giving within a reasonable time a detailed written response; and*
>
> *(d) the parties conducting genuine and reasonable negotiations with a view to settling the claim economically and without court proceedings.*[45]

The Practice Direction provides further detailed suggestions concerning the nature and extent of information and documentation which should be exchanged between the parties to the 'potential dispute'.

The letter from the claimant should:

> *(a) give sufficient concise details to enable the recipient to understand and investigate the claim without extensive further information;*
>
> *(b) enclose copies of the essential documents which the claimant relies on;*
>
> *(c) ask for a prompt acknowledgement of the letter, followed by a full written response within a reasonable stated period [with one month suggested as a normal reasonable period for many claims] …*
>
> *(d) state whether court proceedings will be issued if the full response is not received within the stated period;*
>
> *(e) identify and ask for copies of any essential documents, not in [the claimant's] possession, which the claimant wishes to see;*

(f) state (if this is so) that the claimant wishes to enter into mediation or another alternative method of dispute resolution; and

(g) draw attention to the court's powers to impose sanctions for failure to comply with the practice direction and, if the recipient is likely to be unrepresented, enclose a copy of the practice direction.[46]

The Practice Direction also sets out in detail what is expected of defendants when they receive notification of a claim. The defendant should acknowledge the claimant's letter in writing within 21 days of receiving it.[47] The acknowledgement should state that the defendant will give a full written response. If the time for this is longer than the period stated by the claimant, the defendant should give reasons why a longer period is necessary.[48]

In the full written response the defendant should, as appropriate:

> *(a) accept the claim in whole or in part and make proposals for settlement; or (b) state that the claim is not accepted [or if accepted in part clearly state] which part is accepted and which part is not accepted.*[49]

With a view to avoiding mere bare denials of liability, the Practice Direction suggests that where a defendant does not accept a claim in whole or in part, the written response should:

(a) give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions are accepted and which are in dispute;

(b) enclose copies of the essential documents which the defendant relies on;

(c) enclose copies of documents asked for by the claimant, or explain why they are nor enclosed;

(d) identify and ask for copies of any further essential documents, not in [the defendant's] possession, which the defendant wishes to see; and …

(e) state whether the defendant is prepared to enter into mediation or another alternative method of dispute resolution.[50]

In addition to the abovementioned provisions in relation to mediation and ADR, the Practice Direction makes further detailed provision for resolution of the dispute through alternative dispute resolution.

The Practice Direction provides that parties should consider whether some form of ADR would be more suitable than litigation and if so endeavour to agree which form to adopt. Both the claimant and the defendant may be required by the court to provide evidence that alternative means of resolving the dispute were considered, as the court takes the view that litigation should be a last resort.[51] The Practice Direction outlines some of the options for resolving disputes without litigation: discussion and negotiation; early neutral evaluation by an independent party; and mediation, which is described as 'a form of facilitated negotiation assisted by an independent neutral party'.[52] The Practice Direction expressly recognises that no party can or should be forced to mediate or enter into any form of ADR.[53]

The Practice Direction provides that documents disclosed by either party in accordance with the Practice Direction may not be used for any purpose other than for resolving the dispute unless the other party agrees.[54]

If an expert is needed, the Practice Direction provides that the parties should, wherever possible and to save expense, engage a mutually agreed upon expert, and warns that if the matter proceeds to litigation the court may not allow the use of an expert's report. Furthermore, its cost is not always recoverable.[55]

The Practice Direction states that where a person enters into a funding arrangement within the meaning of rule 43.2(1)(k) the party should inform other potential parties that a funding arrangement has been entered into.[56]

Apart from the Practice Direction, the rules make provision for offers of compromise to be made *before* proceedings are commenced, and where the offer complies with the procedural requirements, the court will take that into consideration on the question of costs in any proceedings.[57]

39 Ibid, [5.3]. See also [5.4], where the noncompliance is because the time period between the publication date and the coming into force of the protocol was too short.

40 Neil Andrews, *English Civil Procedure: Fundamentals of the New Civil Justice System* (2003) [1.15].

41 *Carlson v Townsend* [2001] 3 All ER 663, 24, 28, 31.

42 *Ford v GKR Construction Ltd* [2000] 1 All ER 802, 810 (Lord Woolf MR).

43 Ministry of Justice [UK] (2006), above n 29, [4.1].

44 Ibid, [4.2].

45 Ibid.

46 Ibid, [4.3].

47 Ibid, [4.4].

48 Ibid.

49 Ibid, [4.5].

50 Ibid, [4.6].

51 Ibid, [4.7].

52 Ibid.

53 Ibid.

54 Ibid, [4.8].

55 Ibid, [4.9], [4.10].

56 Ibid, [4A.1]; [4A.2] provides that this applies to all proceedings, whether or not a pre-action protocol applies. As the practice direction notes, r 44.3B(1)(c) provides that 'a party may not recover [by way of costs] any additional liability for any period in the proceedings during which the party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order'.

57 See *Civil Procedure Rules 1998* (SI 1998/3132) r 36.10.

Facilitating the Early Resolution of Disputes without Litigation

3.1.2 Compulsory pre-action disclosure by court order

Where pre-action disclosure cannot be obtained through cooperation between those in dispute or their lawyers, an application may be made to the court for orders for pre-action disclosure. However, such applications need to satisfy certain jurisdictional requirements and involve the exercise of judicial discretion.

In *Stoke-on-Trent City Council v Waller*[58] the Court of Appeal reaffirmed the importance of pre-action protocols in considering the effect of its holding that admissions in pre-action protocols were not governed by the rules relating to withdrawal of admissions:

> *Now that such a valuable pre-action procedure has been introduced in advance of the formalities of litigation procedure, anything that lends uncertainty to the value of a pre-action admission of liability (given in these circumstances) appears to me to run against the grain of the overriding objective, and be likely to lead to avoidable delay, expense and worry.*[59]

The Practice Direction and the various pre-action protocols do not alter the time frame for the commencement of proceedings or any time limits required by the rules or ordered by the court. Where proceedings are for any reason started before the parties have followed the procedures in the Practice Direction, the parties are 'encouraged to agree to apply to the court for a stay of the proceedings while they follow the practice direction'.[60]

3.1.3 Legal challenge to pre-action discovery

In *Burrells Wharf Freeholds Ltd v Galliard Homes Ltd*[61] Justice Dyson rejected the argument that the provision which removed the restriction of pre-action disclosure to personal injury and death claims[62] was *ultra vires*.

3.2 CANADA

Pre-action protocols do not appear to be a standard feature of the litigation landscape in North American jurisdictions. However, protocols and other pre-action requirements have been considered in the course of several recent reform projects in Canada. The issue has also been considered in the United States and some limited reforms have been introduced.

In Canada, as in many other jurisdictions including the United States, there are many specific legal contexts where certain steps must be taken, or leave sought, before legal proceedings may be commenced. For example, where a landlord wishes to take action against a tenant for breach of a covenant or condition of a lease, the tenant must first be given notice of such intention with a view to resolving the issue before taking legal action.[63]

3.2.1 Canadian Bar Association report

The Canadian Bar Association's 1996 *Systems of Civil Justice Task Force Report* noted:

> *The Task Force is persuaded that a focus on early consensual resolution of disputes holds the greatest promise for reducing costs and delays … the Task Force has concluded that all jurisdictions must provide the opportunity for early, non-binding dispute resolution in the civil justice system … the goal of all such processes should be both to provide the opportunity as early as possible and to ensure that the opportunity is used by the parties.*[64]

However, the task force did not favour rendering participation in a non-binding dispute resolution process a prerequisite for commencing an action:

> *In our view … this would be an unrealistic requirement in many situations. For example, time might not permit participation in such a process before commencement of legal proceedings if the interests and rights of the client are to be protected. Moreover, in many circumstances, the issues between the parties are not defined until the close of pleadings, that is, until the parties have exchanged the formal statements (pleadings) setting out the issues they believe to be relevant and in dispute.*[65]

The task force did, on the other hand, recommend the imposition 'on all litigants [of] a positive, early and continuing obligation to canvass settlement possibilities and to consider non-binding dispute resolution processes'.[66] This recommendation has been the subject of limited implementation. Shone notes that '[t]he trend in most jurisdictions has been to build in procedures, often in conferences with judges … that encourage litigants to look to [settlement] possibilities'.[67]

3.2.2 Alberta Rules of Court Project

The use of pre-action protocols has in recent times been considered in the context of the Alberta Rules of Court Project, overseen by the Alberta Law Reform Institute. The Consultation Memorandum, *Management of Litigation*,[68] expressed the view that 'it would be too radical a change in Alberta to implement pre-action protocols'.[69] The Management of Litigation Committee felt that although pre-action protocols were 'seen as effective' in some other jurisdictions, the length of limitation periods in Alberta and possible opposition from the profession militated against their introduction.[70]

The committee was of the opinion that 'best practice' protocols were better confined to steps to be taken after the commencement of an action, and called for feedback on whether such protocols ought to be formulated.[71]

The Early Resolution of Disputes Committee also considered the use of pre-action protocols, as discussed in its Consultation Memorandum.[72] It noted that 'settlement prior to litigation advances the civil justice system objectives of reducing cost and delay',[73] and made note of two distinct options:

(a) Making settlement efforts a prerequisite to commencing litigation. The committee recognised that a requirement that the prospective parties 'participate' in some form of non-binding dispute resolution process prior to the commencement of action would be 'onerous', noting that such a requirement had been rejected in the Canadian Bar Association's Report. However, it stated that a less demanding requirement 'that the parties attest to having "canvassed" settlement options' could serve to '[engage] the parties in thinking about settlement possibilities and the processes that might be used to achieve settlement'.[74] The committee sought feedback as to whether resort to non-binding ADR processes ought to be a prerequisite to litigation.[75]

(b) Introducing some form of pre-action protocols. The committee recognised that this idea had been rejected by the Management of Litigation Committee (see above), but felt that it warranted fresh consideration given the differing emphasis of its work.[76] The committee noted that there were indications that the pre-action protocols introduced pursuant to the Woolf reforms in England had made 'a positive contribution to the goal of settling claims' and effected a measure of 'cultural change in the approach to litigation'.[77] It concluded that there was:

> *merit in the idea of developing pre-action protocols for use in particular actions relating to specific subject areas. In particular, we believe that an early exchange of information by the parties would promote the possibility of settlement before positions become fixed, as they tend to do once a statement of claim is filed. On the other hand, we recognise that settlement with insufficient information can be risky. Factual discovery and the exchange of expert reports may be a necessary prerequisite to settlement in some cases.*[78]

The committee sought feedback 'about the idea of introducing pre-action protocols, and who should be responsible to develop them'.[79]

It should be noted that the Draft Rules recently released by the Alberta Law Reform Institute do not appear to make provision for pre-action protocols.[80] The Draft Rules do oblige good faith participation in certain dispute resolution processes, but do not compel this at a pre-commencement stage.[81]

3.2.3 Nova Scotia rules revision project

The Supreme Court of Nova Scotia is undertaking a review of the civil procedure rules in the province. As part of the review, an Early Dispute Resolution Working Group released a Progress Report in 2005.[82] However, its proposals were in the main directed to dispute resolution 'at the end of the disclosure process after documents are exchanged and the parties' principal witnesses are examined on discovery',[83] and it did not consider the imposition of pre-action obligations.

58 [2006] EWCA Civ 1137.

59 [2006] EWCA Civ 1137 [Brooke LJ].

60 Ministry of Justice [UK] (2006), above n 29, [3.5].

61 [2000] CP Rep 4.

62 *Civil Procedure (Modification of Enactments) Order 1998* (UK) SI 1998/2940, art 5.

63 See the examples given by Colleen Hanycz in the *National Report* for Canada prepared for the World Congress of Procedural Law, International Association of Procedural Law, Brazil, September 2007, and referred to by Andrews (2007), above n 15, notes 23 and 25.

64 Canadian Bar Association, *Systems of Civil Justice Task Force Report* (1996) 32.

65 Ibid, 32–3.

66 Ibid, 34 (Recommendation 2). It was noted that 'the parties should be required to attest in an appropriate way that settlement options have been canvassed before they can use the court system'.

67 M Shone, 'Into the Future: Civil Justice Reform in Canada 1996 to 2006 and Beyond' (Paper presented at the Agenda for Civil Justice Reform, April–May 2006, Canada, and subsequently modified as a report) 15.

68 Alberta Law Reform Institute, *Management of Litigation*, Alberta Rules of Court Project Consultation Memorandum No 12.5 (2003).

69 Ibid, 53.

70 Ibid, 52–3. The committee also suggested that the use of oral examinations in Alberta affected the appropriateness of pre-action protocols.

71 Ibid, 53.

72 Alberta Law Reform Institute, *Promoting Early Resolution of Disputes by Settlement*, Alberta Rules of Court Project Consultation Memorandum No 12.6 (2003).

73 Ibid, [50].

74 Ibid, [51].

75 Ibid, [52].

76 Ibid, [53].

77 Ibid, [60]–[61].

78 Ibid, [63].

79 Ibid, [64].

80 Alberta Law Reform Institute, *Alberta Rules of Court: Test Draft 3* (2007).

81 Ibid, r 4.5.

82 Early Dispute Resolution Working Group, Nova Scotia, *Progress Report* (2005).

83 Ibid, 3.

Facilitating the Early Resolution of Disputes without Litigation

3.2.4 British Columbia justice review

In November 2006 the British Columbia Civil Justice Reform Working Group produced its report.[84] The report includes a number of recommendations designed to improve the *pre-litigation* process of resolving disputes. This includes the provision of information and assistance to those with disputes and the establishment of a 'central hub' to provide information, advice, guidance and other services required to assist people in solving their own legal problems.[85] The report further recommended a requirement that parties personally attend a case planning conference before they actively engage the civil justice system beyond initiating or responding to a claim.[86] The case planning conference would seek to address settlement possibilities and processes, and also seek to narrow the issues and determine procedural steps and deadlines for the conduct of litigation in the event that settlement is not possible.

3.2.5 Ontario Civil Justice Reform Project

In 2006, the Government of Ontario established the Civil Justice Reform Project, and a Consultation Paper was issued.[87] The aim of the project is to develop reform options to render the civil justice regime in that province 'more accessible and affordable'.[88] One option canvassed in the Consultation Paper is the introduction of pre-action protocols 'for specific case types on a pilot basis (ie, case types determined to involve the greatest amount of delay)'.[89] It was noted that '[c]ertain pre-action protocols may work to weed out cases early, or at least unnecessary parties, at the front end of the litigation process',[90] and further, that:

> *Pre-action protocols [in England] have been very effective in promoting early settlement of cases. However, they have also been criticized for raising litigants' costs for certain case types early in the litigation process.*[91]

Comments and suggestions were sought as to the possible use of pre-action protocols in Ontario. The report, issued in November 2007, does not contain any recommendations in relation to pre-action protocols.

3.3 UNITED STATES

In a recent review article, Richard Marcus, in discussing the emergence of pre-action protocols in England, noted that:

> *Such a pre-litigation exchange of views has enjoyed occasional popularity in the U.S.; the first President Bush issued an Executive Order directing federal litigators to employ such a strategy.*[92]

The order Marcus refers to is directed to setting an example for American litigants and states:

> *No litigation counsel [representing a federal agency] shall file a complaint initiating civil litigation without first making a reasonable effort to notify all disputants about the nature of the dispute and to attempt to achieve a settlement, or confirming that the referring agency that had previously handled the dispute has made a reasonable effort to notify the disputants and to achieve a settlement or has used its conciliation processes.*[93]

However, as Marcus also observes in another context, putting formal legal impediments in the path of plaintiffs wanting to litigate is frowned on in the United States, where access to the courts is highly valued.[94] Notwithstanding this, there are many specific legal contexts where pre-action notification is required, including environmental complaints, employment discrimination, and claims against public entities. In some other contexts there is also a need to exhaust alternative remedies or processes before court proceedings can be commenced against administrative agencies or in respect of corporate governance. More controversial has been the development of mandatory processes for pre-action submission to non-binding arbitration or expert complaints processes in medical negligence cases.[95]

3.4 HONG KONG

The use of pre-action protocols was considered in Hong Kong in 2004, as part of the final report of the Chief Justice's Working Party on Civil Justice Reform. The report noted there was substantial evidence that pre-action protocols in England and Wales had led to significant front-loading of costs. It considered that:

> *Protocols should therefore only be adopted where such front-loading is considered justifiable in that the benefits of early settlement resulting from the protocol are likely to outweigh the disadvantages of such front-loading.*[96]

This militated against an attempt to devise a protocol applicable 'across the board'. The report also noted that there had been difficulties in securing the meaningful enforcement of protocols in England and Wales, stressing that if a protocol was to remain credible, conscientious parties must be able to ensure compliance on the part of their opponents in an efficient and economic fashion:

> *These concerns suggest that pre-action protocols should only be introduced in specialist lists where there is active support for the system by the court and court-users so that enforcement and effective sanctions are likely.*[97]

Accordingly, the report concluded that pre-action protocols of a global nature ought not to be introduced, but recommended that courts operating specialist lists be permitted to create protocols of more limited scope, 'subject to the approval of the Chief Judge of the High Court and after due consultation with all relevant persons' (ie, regular users of those courts and any other interested persons).[98]

The report recommended that rules should be introduced to enable the court to take into account noncompliance with an applicable protocol in exercising any relevant discretionary power,[99] although it specified that 'special allowances may have to be made in relation to unrepresented litigants'.[100]

The Hong Kong report also considered the issue of costs where a dispute is settled pursuant to a pre-action protocol. It noted that it was 'important that [allocating] the front-loaded costs generated by pre-action protocols should not be allowed to undermine settlements achievable on the substantive dispute'.[101] The report recommended there should be available a procedure analogous to that developed in England and Wales, whereby separate 'costs-only' proceedings can be brought in relation to the taxation of costs where a dispute has been settled at a pre-commencement stage.[102] The Civil Justice (Miscellaneous Amendments) Bill, introduced into the Legislative Council on 25 April 2007, makes provision for such proceedings.[103]

3.5 OTHER JURISDICTIONS

Pre-action procedures designed to provide for early exchange of information and settlement of disputes without the necessity for litigation have recently been introduced or recommended in numerous countries.

In Finland the Finnish Bar Association has adopted rules of professional conduct which provide that, prior to commencing proceedings, an advocate must notify the opposing party of their client's claim and give the opposing party both reasonable time to consider the claim and an opportunity to reach an amicable settlement.[104] In many other jurisdictions the rules of professional legal bodies exhort lawyers to proactively encourage their clients to pursue ADR rather than litigation.[105]

In Norway the parliament enacted new legislation governing civil procedure in June 2005 although the provisions did not come into force until January 2008.[106] In part, the reforms are intended to facilitate resolution of disputes outside the courts. Norwegian civil procedure differs from other Scandinavian civil procedure because a pre-action procedure is normally obligatory before legal proceedings can be commenced. A Conciliation Board has been established to facilitate resolution of disputes without the need for litigation. The compulsory nature of proceedings before the Conciliation Board has given rise to concerns that this may not be compatible with the requirement of Article 6 of the *European Charter of Human Rights*. However, the Ministry of Justice has adhered to the obligatory procedure because of the possibility of bringing the claim before a court later and also because the conciliation procedures are cheaper and simpler than court proceedings and 'more decentralised than the court system'.[107]

Under the new Code of Civil Proceedings and Mediation, which came into force in January 2008, parties are required to attempt to reach an amicable settlement of the dispute prior to commencing legal action. This may be attempted through conciliation: before the Conciliation Board, by non-judicial mediation, or through a non-judicial dispute resolution board. Where a party unreasonably opposes attempts at achieving settlement, costs sanctions may later be imposed by the court.[108]

84 Civil Justice Reform Working Group, British Columbia, *Effective and Affordable Civil Justice* (Report to the Justice Review Task Force) (2006).

85 Ibid, Recommendation 1.

86 Ibid, Recommendation 2.

87 Coulter Osborne, *Ontario Civil Justice Reform Project: Consultation Paper* (2006).

88 Ibid, 1.

89 Ibid, 7.

90 Ibid, 6.

91 Ibid, 7.

92 Richard L Marcus, 'Putting American Procedural Exceptionalism into a Globalized Context' (2005) 53 *American Journal of Comparative Law* 709, 715.

93 Executive Order 12778, 57 CFR 3640 §1(a) (1991). Richard Marcus notes that 'Executive Order No 12778 was superseded by Executive Order No 12998, which retained the provisions of §1(a) of Executive Order No 12778. See Executive Order No 12988, 61 CFR 4729 (1996)': Marcus (2005), above n 92, note 18.

94 See the *National Report* for the US, prepared for the World Congress of Procedural Law, International Association of Procedural Law, Brazil, September 2007, and referred to by Andrews (2007), above n 15, 3 (n 12).

95 Andrews (2007), above n 15, 6 (note 24).

96 Chief Justice's Working Party on Civil Justice Reform, *Civil Justice Reform: Final Report* (2004) [126].

97 ibid, [130].

98 ibid, Recommendations 5, 6.

99 ibid, Recommendation 7.

100 ibid, Recommendation 8.

101 ibid, [134].

102 ibid, Recommendation 9.

103 Civil Justice (Miscellaneous Amendments) Bill 2007 (HK) pt 2. It is hoped that the Bill will come into force by mid-2008: Government Information Centre, *Civil Justice (Miscellaneous Amendments) Bill to be Gazetted* (2007) <www.info.gov.hk/gia/general/200703/28/P200703280249.htm> at 3 January 2008.

104 See Laura Ervo, 'Scandinavian Trends in Civil Pre-trial Proceedings' (2007) 26 *Civil Justice Quarterly* 466, 473–4.

105 Andrews refers to Canada, Denmark, England and France in addition to Finland: Andrews (2007), above n 15, 18.

106 *The Code of Civil Proceedings and Mediation 2005* (Norway). For more information, see Ervo, above n 104, 479–80.

107 See generally, Ervo, above n 104, 480.

108 See the National Report by Laura Ervo referred to by Andrews (2007), above n 15, 7 (footnotes 33–7).

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

In the Netherlands, recent reviews of the law of civil procedure have recommended various reforms in relation to the 'forgotten' pre-action phase of disputes.[109] These include the proposed introduction of pre-action protocols to provide for a systematic approach to the early exchange of information between parties in dispute.

As noted by Andrews, Japan has recently introduced a voluntary pre-action regime designed to facilitate the early exchange of information between parties in dispute, access to information from other sources, settlement and better preparation for formal proceedings where disputes do not resolve.[110]

In Brazil pre-action procedures in various regions seek to encourage parties to negotiate openly and frankly with a view to resolving disputes without the necessity of litigation. Where a person intends to file proceedings against another party they are required to write to the other party informing them of their intention. The other party is required to respond within a reasonable period. The parties are then required to negotiate. Penalties can be imposed for failure to comply with the negotiation protocols.[111]

Mandatory pre-action conciliation has a long history in Switzerland.[112]

In Italy mandatory mediation procedures apply in some legal contexts.[113]

As Andrews notes, pre-action procedures:

> *are useful mechanisms for (a) reminding parties that they might avoid litigation and instead achieve a settlement, whether by simple negotiation or ADR, notably mediation, (b) sponsoring informed settlement by the exchange of information between disputants, (c) fostering a spirit of co-operation between adversaries so that the dispute can be narrowed or even resolved amicably, and (d) canalising preparation for litigation (if settlement is elusive).*[114]

However, as he also observes, pre-action regulation should not be 'excessively prescriptive; over-scrupulous regulation might generate disproportionate costs'.[115]

3.6 AUSTRALIAN PRE-ACTION PROCEDURES[116]

In some Australian jurisdictions, pre-action disclosure and other obligations have been introduced pursuant to statutory provisions (eg, in Queensland for certain types of personal injury litigation), rules of court (eg, in South Australia and in the Family Court) or by agreement between stakeholder groups (eg, in Victoria for transport accident claims). Each of these developments is summarised below.

3.6.1 Queensland

In recent years a number of reforms implemented in Queensland either impose specific pre-action obligations on persons in certain types of dispute or facilitate the making of various types of court orders before litigation begins.

Queensland has enacted the *Personal Injuries Proceedings Act 2002* and amended other legislation to provide for new pre-action procedures for certain categories of personal injury claims. The main purpose of the legislation is 'to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury'.[117]

This is sought to be achieved by:

> *(a) providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies; and*
>
> *(b) promoting settlement of claims at an early stage wherever possible; and*
>
> *(c) ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial …*[118]

The Personal Injuries Proceedings Act makes provision for notification of claims,[119] compulsory disclosure of information and documents,[120] a compulsory conference,[121] compulsory final offers,[122] and costs.[123] Similar provisions exist in separate legislation for injury claims arising from motor vehicle and work-related accidents. Accordingly, major areas of Queensland personal injury claims are now governed by extensive pre-action procedures.

In certain situations, the provisions require a prospective plaintiff to provide prospective defendants with extensive details within nine months of the incident or symptoms becoming manifest or one month of consulting a lawyer, whichever is the earlier. This includes personal information about the

claimant, including the consumption of alcohol or drugs in the 12 hours prior to the incident giving rise to the claim, extensive details about the injuries, and the names, addresses and telephone numbers of any witnesses.[124]

In addition to the notice of claim and provision of information, the claimant is required to grant the prospective defendant authority to obtain information about the claim and the claimant from a wide variety of sources. The parties are required to attend a compulsory conference, which may be a mediation, to attempt to resolve the matter. If the claim remains unsettled, parties must file final offers. The provisions are examined in further detail below.

Personal Injuries Proceedings Act

The Personal Injuries Proceedings Act introduced major procedural reforms,[125] which, as noted above, are said to have been designed to ensure the affordability of insurance.[126]

In particular, the legislation seeks to:

- provide 'a procedure for the speedy resolution of claims for damages for personal injury to which the Act applies'
- promote 'settlement of claims at an early stage wherever possible'
- ensure 'that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial'
- impose reasonable limits on awards of damages
- minimise the costs of claims
- regulate inappropriate advertising and touting.[127]

The Act applies in relation to all personal injuries arising out of an incident occurring before, on or after 18 June 2002,[128] with the exception of various categories of personal injury, such as motor accidents and accidents at work.[129] Some of these other categories of personal injury are governed by separate legislation.

Provision is made for notice of a claim to be given in an approved form.[130] The legislation sets out certain steps which a claimant and a person against whom a claim is made are required to take before legal proceedings are commenced.

Claims procedures[131]

The claimant must give written notice of the claim in the approved form.[132] This may include information required to be verified by statutory declaration.[133] The notice authorises access to records and sources of information relevant to the claim[134] and must be accompanied by documents required under a regulation.[135] Notice must be given in two parts and there are different time limits applicable to each part.[136]

Separate provisions apply to notice of a claim in medical negligence cases.[137] A person to whom an initial notice is given is required, within one month after receiving the notice, to

109 W D H Asser, H A Groen and J B M Vranken (with the aid of I N Tzankova), *A Fundamental Review of the Dutch Law of Civil Procedure*: *Interim Report* (2003) and *Final Report* (2006), referred to by Andrews (2007), above n 15, 2–3.

110 Andrews (2007), above n 15, 3. In 2004 the Japanese Code of Civil Procedure was amended and a pre-action procedure was introduced as a general provision for all cases. The procedure is voluntary and there are apparently no sanctions for noncompliance.

111 Ibid, 6 (n 22).

112 Ibid, 8.

113 Ibid.

114 Ibid, 35.

115 Ibid, 36.

116 The commission is grateful for the information provided by David Bamford, Associate Professor and Deputy Dean of the School of Law, Flinders University, including the paper 'Stretching Civil Procedure: The Growth of Pre-action Requirements' (Paper presented at the Civil Litigation Conference, University of Melbourne Law School, 22 September 2006).

117 *Personal Injuries Proceedings Act 2002* (Qld) s 4(1).

118 *Personal Injuries Proceedings Act 2002* (Qld) s 4(2).

119 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, ss 9–20J.

120 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, div 2, ss 30–34.

121 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, div 4, ss 36–38.

122 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, div 4, s 39.

123 *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 3, s 56.

124 *Personal Injuries Proceedings Regulation 2002* (Qld) reg 3.

125 Various provisions are deemed to be 'substantive' rather than 'procedural': *Personal Injuries Proceedings Act 2002* (Qld) s 7. However, see the decision of the NSW Court of Appeal in *Hamilton v Merck and Co Inc; Hutchinson v Merck Sharp and Dohme (Australia) Pty Ltd* [2006] NSWCA 55 (Spigelman CJ, Handley and Tobias JJA).

126 *Personal Injuries Proceedings Act 2002* (Qld) s 4(1).

127 *Personal Injuries Proceedings Act 2002* (Qld) s 4(2).

128 *Personal Injuries Proceedings Act 2002* (Qld) s 6(1).

129 These exceptions, and relevant governing legislation, are set out in detail in s 6 (2)–(5) of the *Personal Injuries Proceedings Act 2002* (Qld).

130 *Personal Injuries Proceedings Act 2002* (Qld) s 7(2), (3).

131 See *Personal Injuries Proceedings Act 2002* (Qld) ch 2, pt 1, div 1.

132 *Personal Injuries Proceedings Act 2002* (Qld) s 9(1).

133 *Personal Injuries Proceedings Act 2002* (Qld) s 9(1B).

134 *Personal Injuries Proceedings Act 2002* (Qld) s 9(2)(b).

135 *Personal Injuries Proceedings Act 2002* (Qld) s 9(2)(c).

136 *Personal Injuries Proceedings Act 2002* (Qld) s 9(3), (3A).

137 *Personal Injuries Proceedings Act 2002* (Qld) s 9A.

Facilitating the Early Resolution of Disputes without Litigation

provide a written response advising whether any documents are held in relation to the medical services mentioned in the notice and providing a copy of all documents held by the person about the medical services.[138]

The legislation requires a person to whom a notice is given to provide a written response, within a prescribed period, dealing with, among other things, the issue of whether that person is a proper respondent to the claim.[139] There are pecuniary penalties for failure to comply with the various obligations.

Where a proper respondent receives a notice that person is required, within a prescribed time, to provide written notice to the claimant about compliance with the obligations in part 1 of a notice of claim.[140] Except in certain circumstances, a claimant is prohibited from proceeding with a claim if they fail to comply with the notice requirements applicable to part 1 of a notice of claim.[141] The claimant may seek authorisation from the court to proceed despite noncompliance.[142]

Notification of claims on behalf of children

There are special provisions for notification of claims in relation to children.[143]

If part 1of the required notice is not given within the prescribed time the person to whom the notice is given may apply to the court for an order that the claim not proceed further.[144] In considering an application under this section, the court must consider the justice of the case, having regard to:

> *(a) the extent of injuries;*
>
> *(b) the reason for the delay;*
>
> *(c) any prejudice suffered by the applicant;*
>
> *(d) the nature of the parties' conduct; and*
>
> *(e) any other relevant matter.*[145]

Following receipt of a claim a respondent is obliged to, among other things, take reasonable steps to obtain information about the incident alleged to have given rise to the personal injury, indicate whether liability is admitted or denied (and if contributory negligence is claimed, indicate the degree of contributory negligence, expressed as a percentage), indicate whether any offer made by the claimant is accepted or rejected, make a fair and reasonable estimate of the damages and make a written offer, or counteroffer, setting out in detail the basis on which the offer is made.[146]

An offer or counteroffer of settlement must be accompanied by a copy of medical reports, assessments of cognitive functional or vocational capacity and all other material, including documents relevant to economic loss, in the possession of the offeror that may help the person to whom the offer is made make a proper assessment of the offer.[147]

Particular provisions apply to notice of a claim for damages for a child, including an obligation on a parent or legal guardian of the claimant to give notice and obligations on legal practitioners acting for a parent or guardian.[148] A failure on the part of the legal practitioner to comply is deemed to be professional misconduct.[149]

Even if an application for an order that the claim not proceed is dismissed, the claimant is not entitled to recover an amount for costs incurred by the claimant's parent or legal guardian for medical or other expenses, or legal costs paid or incurred, and an amount for gratuitous services provided by the parent or legal guardian unless the court orders otherwise.[150]

Provision is made for notice of an adverse incident to be given by a person providing medical treatment to the parent or legal guardian of the child.[151] Where a notice of adverse event is given and a notice of a claim is not given within the required time, such notice can only be given with leave of the court and the claimant must show why the claim should proceed.[152] Certain costs may not be recovered unless the court orders otherwise.[153]

Disclosure obligations of parties

Division 2 of the Act relates to the obligations of the parties and is intended to put the parties in a position where they have enough information to assess liability and quantum.[154]

The claimant has a duty to provide certain documents and information to the respondent.[155] The respondent may require the claimant to verify certain information by statutory declaration.[156] If a claimant fails, without proper reason, to comply fully with a request by a respondent, the claimant is liable for costs to the respondent resulting from the failure.[157]

A respondent and claimant may jointly arrange an expert report, although neither has an obligation to agree to such a report.[158] Provision is also made for payment of the costs of the report.[159] If the claimant does not agree to an expert report in respect of certain prescribed matters, the claimant must comply with a request by the respondent to undergo, at the respondent's expense, either or both a medical examination or an assessment.[160]

A respondent must provide documents and information to the claimant[161] within certain prescribed time limits. The claimant may require the respondent to verify certain information by statutory declaration.[162] If the respondent fails, without proper reason, to fully comply, the respondent is liable for costs to the claimant resulting from the failure.[163]

There are also obligations on respondents to give documents to any contributor added by the respondent,[164] and obligations on contributors to give documents to the respondent.[165]

The obligations to provide documents and give disclosure do not apply to information or documents protected by legal professional privilege.[166] Investigative reports, medical reports and reports relevant to the claimant's rehabilitation must be disclosed even though otherwise protected by legal professional privilege, but the statements of opinion may be omitted.[167]

Where the respondent has reasonable grounds to suspect a claimant of fraud, 'the respondent may apply, ex parte, to the court for approval to withhold from disclosure … documents that (a) would alert the claimant to the suspicion; or (b) could help further the fraud'.[168]

There are pecuniary penalties if respondents withhold information or documentation other than as permitted by the legislation or with court approval.[169]

Where a document is not provided to the other party and this amounts to a failure to comply with the legal obligations for disclosure, the document cannot be used in any subsequent court proceedings based on the claim unless the court otherwise orders.[170]

There is no obligation to provide documents or information to another party already in possession of such information or documents.[171]

Powers of enforcement

Where a party fails to comply with a duty imposed under division 1 or 2, the court may order the party to take specified action to remedy the default and the court may make consequential or ancillary orders, including orders as to costs.[172]

138 *Personal Injuries Proceedings Act 2002* (Qld) s 9A(8).

139 *Personal Injuries Proceedings Act 2002* (Qld) s 10.

140 *Personal Injuries Proceedings Act 2002* (Qld) s 12; see also s 13 concerning presumed compliance if the respondent does not respond within the required time.

141 *Personal Injuries Proceedings Act 2002* (Qld) s 18.

142 *Personal Injuries Proceedings Act 2002* (Qld) s 18(1)(c)(ii).

143 See *Personal Injuries Proceedings Act 2002* (Qld) div 1A.

144 *Personal Injuries Proceedings Act 2002* (Qld) s 20D.

145 *Personal Injuries Proceedings Act 2002* (Qld) s 20E.

146 *Personal Injuries Proceedings Act 2002* (Qld) s 20(1).

147 *Personal Injuries Proceedings Act 2002* (Qld) s 20(3).

148 *Personal Injuries Proceedings Act 2002* (Qld) ss 20C(1), (2).

149 *Personal Injuries Proceedings Act 2002* (Qld) s 20C(3).

150 *Personal Injuries Proceedings Act 2002* (Qld) s 20F.

151 *Personal Injuries Proceedings Act 2002* (Qld) s 20G.

152 *Personal Injuries Proceedings Act 2002* (Qld) s 20H. The court is required to consider the same factors identified in 20E for an application under s 20D. See s 20I.

153 *Personal Injuries Proceedings Act 2002* (Qld) s 20J.

154 *Personal Injuries Proceedings Act 2002* (Qld) s 21.

155 *Personal Injuries Proceedings Act 2002* (Qld) s 22.

156 *Personal Injuries Proceedings Act 2002* (Qld) s 22(7).

157 *Personal Injuries Proceedings Act 2002* (Qld) s 22(8).

158 *Personal Injuries Proceedings Act 2002* (Qld) s 23.

159 *Personal Injuries Proceedings Act 2002* (Qld) s 24.

160 *Personal Injuries Proceedings Act 2002* (Qld) s 25(1), (2).

161 *Personal Injuries Proceedings Act 2002* (Qld) s 27.

162 *Personal Injuries Proceedings Act 2002* (Qld) s 27(3).

163 *Personal Injuries Proceedings Act 2002* (Qld) s 27(4).

164 *Personal Injuries Proceedings Act 2002* (Qld) s 28.

165 *Personal Injuries Proceedings Act 2002* (Qld) s 29.

166 *Personal Injuries Proceedings Act 2002* (Qld) s 30.

167 *Personal Injuries Proceedings Act 2002* (Qld) s 30(2).

168 *Personal Injuries Proceedings Act 2002* (Qld) s 30(3).

169 *Personal Injuries Proceedings Act 2002* (Qld) s 31.

170 *Personal Injuries Proceedings Act 2002* (Qld) s 32.

171 *Personal Injuries Proceedings Act 2002* (Qld) s 34.

172 *Personal Injuries Proceedings Act 2002* (Qld) s 35.

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

Compulsory conferences

In addition to the pre-action disclosure obligations, the legislation also provides for compulsory conferences *before* a court proceeding is started.[173] There are provisions for the exchange of documents, etc., before any compulsory conference.[174] The Act prescribes the procedure at compulsory conferences.[175]

Costs disclosure

Where a party is legally represented, the lawyer is required to give the client a costs statement containing:

> *(a) details of the party's legal costs … up to the completion of the compulsory conference*
>
> *(b) an estimate of the likely legal costs … if the claim proceeds to judicial determination at trial and*
>
> *(c) a statement of the consequences to the party … in each of the following cases:*
>
> *(i) if the damages awarded are equal to, or more than, the claimant's mandatory final offer;*
>
> *(ii) if the … damages awarded [are] less than the claimant's mandatory final offer but more than the respondent's … mandatory final offer;*
>
> *(iii) if the damages awarded … [are] equal to, or less than, the respondent's … offer.*[176]

Mandatory final offers

Mandatory final offers are required to be exchanged if the claim is not settled at the compulsory conference, unless the court dispenses with this obligation.[177] The Act provides for the time for acceptance of such offers and for costs.[178]

Time for commencement of proceedings

The legislation specifies the time for starting a proceeding after the conclusion of the compulsory conference[179] and for the commencement of proceedings in urgent cases.[180]

Failure to comply with requirements

The legislation provides for costs consequences for failure to comply with claims procedures,[181] in addition to the abovementioned costs provisions, penalty provisions, and sections relating to professional misconduct by lawyers.

Costs generally

The Act contains detailed provisions in relation to legal costs.[182]

Limitation period provisions

Proceedings may be commenced, within prescribed time limits, after the expiration of a period of limitation where a claimant has given a part 1 notice before the limitation period expires.[183]

Fraud

A respondent may recover from a claimant or other person costs reasonably arising from fraud or attempted fraud.[184] A person who defrauds or attempts to defraud a respondent, deliberately misleads or attempts to deliberately mislead a respondent or 'connives at conduct' by another that contravenes the relevant provisions may be fined or imprisoned.[185]

False or misleading information or documents

The Act provides for fines and imprisonment for knowingly making or providing false or misleading statements and documents.[186]

Motor Accident Claims

The *Motor Accident Insurance Act 1994* (Qld) makes provision for notification of claims,[187] compulsory disclosure,[188] a compulsory conference,[189] compulsory final offers,[190] and costs.[191]

Workers Compensation Claims

The *Workers Compensation and Rehabilitation Act 2003* (Qld) makes similar provision for notification of claims,[192] compulsory disclosure,[193] a compulsory conference,[194] compulsory final offers,[195] and costs.[196] Various provisions are intended 'to facilitate the just and expeditious resolution of the real issues in a claim for damages at a minimum of expense'.[197]

There are also relevant provisons under the *WorkCover Queensland Act 1996* (Qld).

Personal Injury Uniform Pre-Action Procedures

In late 2003 the Queensland Attorney-General appointed a stakeholder reference group,[198] chaired by Richard Douglas SC, to consider a common pre-proceedings process for personal injury claims.[199] The reference group was assisted by an interdepartmental working group.[200]

In June 2004 the reference group prepared a report which proposed a revised pre-proceedings process for personal injury claims. It recommended that this process replace the existing regimes established by the *Personal Injuries Proceedings Act 2002* (Qld), the *Motor Accident Insurance Act 1994* (Qld), the *Workers' Compensation and Rehabilitation Act 2003* (Qld) and the *WorkCover Queensland Act 1996* (Qld). The proposed pre-proceedings process would apply to all cases of personal injury other than dust-related diseases, medical negligence and claims from minors.

It was proposed that, as far as practicable, uniform procedures and processes would be introduced in the following five areas:

- early notification of claims
- compulsory disclosure of information and documents
- a compulsory conference
- compulsory final offers
- costs.[201]

The advantages of a common pre-action procedure were said to include:

- simplification and standardisation of the claims process
- allowing a broader base of lawyers to initiate claims
- the earlier reporting of claims
- expediting the claim process
- avoiding lawyer-driven delays
- introducing a barrier to marginal claims
- consistency of practice for lawyers and insurers
- consistency of time frames for all personal injury claims
- reduced disputation costs
- enforcement of positive claim management practices and disciplines
- providing a catalyst for legal cost reforms

173 *Personal Injuries Proceedings Act 2002* (Qld) s 36.

174 *Personal Injuries Proceedings Act 2002* (Qld) s 37.

175 *Personal Injuries Proceedings Act 2002* (Qld) s 38.

176 *Personal Injuries Proceedings Act 2002* (Qld) s 37(4).

177 *Personal Injuries Proceedings Act 2002* (Qld) s 39.

178 *Personal Injuries Proceedings Act 2002* (Qld) s 40.

179 *Personal Injuries Proceedings Act 2002* (Qld) s 42.

180 *Personal Injuries Proceedings Act 2002* (Qld) s 43.

181 *Personal Injuries Proceedings Act 2002* (Qld) s 48.

182 *Personal Injuries Proceedings Act 2002* (Qld) s 56. See also s 48.

183 *Personal Injuries Proceedings Act 2002* (Qld) s 59.

184 *Personal Injuries Proceedings Act 2002* (Qld) s 60.

185 *Personal Injuries Proceedings Act 2002* (Qld) s 72.

186 *Personal Injuries Proceedings Act 2002* (Qld) s 73.

187 *Motor Accident Insurance Act 1994* (Qld) ss 37–44.

188 *Motor Accident Insurance Act 1994* (Qld) pt 4, div 4.

189 *Motor Accident Insurance Act 1994* (Qld) pt 4, div 5A, ss 51A, 51B.

190 *Motor Accident Insurance Act 1994* (Qld) pt 4, div 5A, s 51C.

191 *Motor Accident Insurance Act 1994* (Qld) pt 4, div 6, s 55F.

192 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 5, ss 275–287.

193 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 5, ss 284–287.

194 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 6, div 1, ss 288–290A.

195 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 6, div 1, s 292.

196 *Workers' Compensation and Rehabilitation Act 2003* (Qld) ch 5, pt 12, ss 310–318.

197 *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 273.

198 For the list of participants in the reference group, see Report of a Stakeholder Reference Group, *A Review of the Possibility of a Common Personal Injuries Pre-Proceedings Process for Queensland* (2004).

199 Queensland, *Parliamentary Debates*, Legislative Assembly, 3 April 2003, 1271 (R J Welford, Attorney-General and Minister for Justice).

200 The group comprised staff from the Motor Accident Insurance Commission, the Department of Industrial Relations and the Department of Justice and Attorney-General. See Report of a Stakeholder Reference Group (2004), above n 199, 6.

201 Ibid, 3.

Facilitating the Early Resolution of Disputes without Litigation

- overcoming identified concerns with existing processes
- consistency with the objectives of the Uniform Civil Procedure Rules to facilitate the just and expeditious resolution of the real issues in dispute at minimum expense.[202]

The disadvantages of the proposed reform were said to include:

- time and expense incurred in becoming familiar with the new process
- additional interlocutory applications which would have an impact on the courts
- possible alienation of claimants not represented by a lawyer
- the risk of increased claimant participation as a result of simplification
- the need for consequential amendment of personal injury claim legislation.[203]

The group recommended that the proposed common pre-proceedings process should be 'substantive' rather than 'procedural' in nature.[204] All personal injuries claims (other than the excluded claims referred to above) would be handled in accordance with the proposed common procedures. The filing of a notice of claim would give rise to a stay of the limitation period under the *Limitation of Actions Act 1974*, either by order of the court or by agreement of the defendant.[205]

Pre-proceedings expert appointments

In Queensland, the *Uniform Civil Procedure Rules 1999* make provision for persons in dispute to apply to the court for the appointment of an expert to prepare a report giving an opinion on an agreed issue in dispute before a proceeding is started.[206] The rule may be invoked where there is a dispute that will 'probably' result in a proceeding and where immediate expert evidence may help in resolving a substantial issue in dispute.[207]

Apart from the provision for a jointly agreed pre-action expert, the Rules also allow one of the persons to a dispute that will 'probably' result in a proceeding to apply to the court for the appointment of an expert to prepare a report giving an opinion on a 'substantial' issue where this may help in resolving that issue.[208] In deciding whether to appoint an expert, the court may consider:

> *(a) the complexity of the issue; and*
>
> *(b) the impact of the appointment on the costs of the contemplated proceeding; and*
>
> *(c) the likelihood of the appointment expediting or delaying the contemplated proceeding; and*
>
> *(d) the interests of justice; and*
>
> *(e) any other relevant consideration.*[209]

Where an expert is appointed under any of the above provisions and a proceeding is subsequently commenced, the expert appointed is the only expert who may give expert evidence on the issue in question, unless the court otherwise orders.[210]

3.6.2 Family law proceedings

The Family Court has extensive pre-action procedures. Before starting a case, each prospective party is required to comply with the pre-action procedures.[211] These include a requirement that they must attempt to resolve the dispute using dispute resolution methods.[212]

The pre-action procedures apply to financial cases (property settlement and maintenance)[213] and parenting cases,[214] but do not have to be complied with in certain circumstances.[215] The procedures also allow the court to accept that it was not possible or appropriate for a party to follow the pre-action procedures in some circumstances, including where there is a genuinely intractable dispute, where a person would be unduly prejudiced or adversely affected if notice of an intention to start a case is given to another person in the dispute, and where a time limitation period is close to expiring.[216]

The court may take into account a party's failure to comply with a pre-action procedure when making an order, including in relation to costs.[217] Similarly, where a party applies for relief from certain rules or orders, the court may consider the extent to which a party has complied with pre-action procedures.[218]

Each prospective party to a case in the Family Court is required to make a genuine effort to resolve the dispute before commencing proceedings. This requires participation in dispute resolution procedures such as negotiation, conciliation, arbitration and counselling; exchanging a notice of intention to claim

and exploring options for settlement by correspondence; and complying, as far as practicable, with the duty of disclosure.[219] The range of information and documentation required to be exchanged is extensive.[220]

The objects of the pre-action procedures are:

> *(a) to encourage early and full disclosure by the exchange of information and documents;*
>
> *(b) to provide the parties in dispute with a process to help them avoid legal action by reaching a settlement;*
>
> *(c) to provide a procedure to resolve cases quickly and limit costs;*
>
> *(d) to help the efficient management of the case, if proceedings become necessary, by clear identification of the real issues so as to reduce the duration and cost of the proceedings; and*
>
> *(e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence.*[221]

The Family Court in its public information brochure states that '[t]he aim of the pre-action procedures is to explore areas of resolution and, where a dispute cannot be resolved, to narrow the issues that require a court decision. This should control costs and if possible, resolve disputes quickly, ideally without the need to apply to a court'.[222]

In addition to the obligations imposed on parties to the dispute, the pre-action procedures also impose obligations on lawyers, including to:

> *(a) advise clients of ways of resolving disputes without starting legal action;*
>
> *(b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty;*
>
> *(c) ... endeavour to reach a solution by settlement rather than start or continue legal action;*
>
> *(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement if [it is], in the lawyer's opinion … reasonable …;*
>
> *(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and*
>
> *(f) advise clients of the estimated costs of the legal action …*[223]

Lawyers are also required to 'actively discourage clients from making ambit claims or seeking orders that the evidence and established principle, including recent case law, indicates is not reasonably achievable'.[224] It is noted in the pre-action procedures that the court recognises that pre-action procedures cannot override a lawyer's duty to the client and that a pre-action procedure may not be complied with because

202 Ibid, 7–8.

203 Ibid, 8.

204 Ibid 3

205 Ibid

206 *Uniform Civil Procedure Rules 1999* (Qld) r 429R.

207 *Uniform Civil Procedure Rules 1999* (Qld) r 429R(1)(a).

208 *Uniform Civil Procedure Rules 1999* (Qld) r 429S.

209 *Uniform Civil Procedure Rules 1999* (Qld) r 429S(7).

210 *Uniform Civil Procedure Rules 1999* (Qld) rr 429R(6), 429S(11).

211 The pre-action procedures are set out in Schedule 1 of the *Family Law Rules 2004* (Cth).

212 *Family Law Rules 2004* (Cth) r 1.05.

213 *Family Law Rules 2004* (Cth) pt 1, sch 1.

214 *Family Law Rules 2004* (Cth) pt 2, sch 1. See also s 60I(2) and (3) of the *Family Law Act 1975* (Cth), which require that a party comply with r 1.05 and pt 2 of sch 1 of the *Family Law Rules 2004* (Cth) before an application is made for a parenting order.

215 The pre-action procedures are not required to be complied with (a) in parenting cases involving allegations of child abuse or family violence; (b) in property cases involving allegations of family violence or fraud; (c) where the application is urgent; (d) where the applicant would be unduly prejudiced; (e) where there has been a similar application in the same cause of action in the 12 months preceding the start of the case; (f) in applications for divorce; (g) in child support applications or appeals; or (h) in bankruptcy proceedings within the court's jurisdiction under s 35 or 35B of the *Bankruptcy Act*. See *Family Law Rules 2004* (Cth) r 1.05(2).

216 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 1(4) and pt 2, s 1(4).

217 *Family Law Rules 2004* (Cth) r 1.10 (2) (d).

218 *Family Law Rules 2004* (Cth) r 11.03 (2)(b). See also r 19.10(1)(b), which provides for orders to be made against a lawyer if they fail to comply with a pre-action procedure.

219 *Family Law Rules 2004* (Cth) r 1.05 and sch 1, s 1. Rule 13.01(2) provides that the general duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalised.

220 See *Family Law Rules 2004* (Cth) sch 1 and the disclosure obligations listed in ch 13, pt 4, sch 1.

221 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 1(5).

222 Family Court of Australia, *Before you file – pre-action procedure for financial cases* (2006) <www.familycourt.gov.au/presence/resources/file/eb001243e3d0999/BRPreFin_0706w.pdf> at 28 November 2007.

223 *Family Law Rules 2004* (Cth) sch 1, pt 1, ss 6(1)(a)–(f) and sch 1, pt 2, ss 6(1)(a)–(f).

224 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 6(1)(i) and sch 1, pt 2, s 6(1)(i).

Facilitating the Early Resolution of Disputes without Litigation

a client may refuse to accept advice. However, lawyers are required not to mislead the court and have an obligation to cease to act if a client wishes not to disclose a fact or document that is relevant to the case.[225]

The pre-action procedures also include detailed provisions relating to expert witnesses. Expert witnesses must be instructed in writing and be 'fully informed' of their obligations.[226] Experts should only be retained on an issue where the expert evidence is 'necessary to resolve the dispute'.[227] If practicable, the 'parties should agree to obtain a report from a single expert witness instructed by both parties'.[228] If separate experts' reports are obtained, the pre-action procedural provisions state that the court requires the reports to be disclosed.[229]

3.6.3 South Australia

Since 1992 South Australia has continued to expand pre-action procedures in all courts. Provisions requiring the exchange of a formulated claim and expert reports prior to commencing proceedings were initially limited to personal injury cases, but have been extended to all claims for liquidated and unliquidated damages since September 2000. This has been effected through rules of court.

The *Supreme Court Rules 2006* (SA) and the *District Court Rules 2006* (SA) provide that a plaintiff must, at least 90 days before commencing an action to which the rule applies, give the defendant a written notice containing or accompanied by:

> *(a) an offer to settle the … claim on the basis set out in the notice; and*
>
> *(b) sufficient details of the claim, and sufficient supporting material, to enable the defendant to assess the reasonableness of the plaintiff's offer of settlement and to make an informed response …; and*
>
> *(c) if the plaintiff is in possession of expert reports relevant to the claim—copies of the expert reports.*[230]

If the plaintiff believes that the defendant is insured and knows the identity of the insurer, the plaintiff must send a copy of the notice and accompanying material to the insurer.[231]

The defendant must, within 60 days after receiving the notice, respond in writing by '(a) accepting the plaintiff's offer of settlement; or (b) making a counter-offer; or (c) stating that liability is denied and the grounds on which it is denied'.[232] The defendant must provide the plaintiff with a copy of any expert reports relevant to the claim in the defendant's possession.[233]

Where a court proceeding is subsequently commenced, the originating process must include a statement as to whether the plaintiff has complied with the requirements of the rule and if not, why not.[234] The plaintiff's notice to the defendant and the defendant's response must be filed in the court as a 'suppressed file'.[235] In awarding costs of the action the court may take into account whether the parties have complied with their obligations under the rule and the terms of any offer, counteroffer and any responses and the extent to which they are 'reasonable or unreasonable in the circumstances'.[236]

In both the Supreme and District Courts the rule relating to pre-action obligations applies to monetary claims, with some exceptions.[237]

At the Magistrates Court level the rules make provision for a prospective plaintiff to serve on the prospective defendant notice of an intended claim.[238] Subject to any order of the court, a plaintiff is not entitled to the costs for filing a claim unless notice of an intended claim was given not less than 21 days before the filing of the claim.[239] In an action for damages for personal injury 'notice of the claim must be given at least 90 days before the filing of the claim'.[240] Notice must be given to the defendant's insurer if the identity of the insurer is known to the prospective plaintiff.[241] The notice must include notice of any intended claim for past and future economic loss and be supported by 'medical reports setting out the nature and extent of the plaintiff's injuries and residual disabilities as known to the plaintiff at the time of giving the notice'.[242] Generally, the notice should briefly outline the nature and amount of the plaintiff's claim and inform the prospective defendant of the options for settling the claim, including free mediation prior to the commencement of proceedings.

In the Magistrates' Court, a person intending to bring an action may also, 'by notice in writing to another person, request the … person to make discovery of documents and disclose the … whereabouts of any document or property that is relevant to the proposed action'.[243] Where there is noncompliance within seven days of service of the notice, 'the court may order … discovery and disclosure by letter or affidavit'.[244]

The new South Australian pre-action provisions contain no explicit objectives but are clearly intended to promote early settlement. In *Stewart v Jacobsen* the Full Court of the South Australian Supreme Court stated:

> *The purpose of the 90 day Rule is to ensure that litigants take all such proper steps to address the relevant issues prior to the issue of proceedings. The rule is designed to encourage an exchange of information at an early stage in the hope that parties can resolve matters by negotiation and discussion rather than by litigation.*[245]

The court went on to uphold a 10 per cent reduction in costs awarded for failure to comply with pre-action requirements.

3.6.4 New South Wales

In New South Wales there are no statutory provisions or rules of court which impose general pre-action obligations on persons in dispute. There are, however, provisions for pre-action orders of the court to be obtained in various circumstances, including to identify a potential defendant, to ascertain the merits of a proposed cause of action and to prevent the removal or dissipation of assets. Also, in some circumstances there are obligations to obtain experts' reports or other documents prior to the commencement of litigation and to disclose such documents to parties when proceedings are commenced or pleadings are served (see Disclosure and Service of Documents, below).

3.6.5 Victoria

Magistrates' Court

During 2003 the Magistrates' Court canvassed a proposal requiring prospective claimants to send prospective defendants a standard form of letter of claim outlining the nature of the claim and the circumstances in which it was said to have arisen. The recipient was to be given 21 days in which to either 'pay the amount claimed or contact the claimant to discuss resolution of the dispute or agree to attend a mediation'. It was proposed that the services of the Victorian Dispute Resolution Service would be available to provide mediation services at no cost to the parties. In the event of noncompliance the claimant would be deprived of the costs of issuing proceedings. The proposal was not implemented due to 'vehement opposition from both arms of the legal profession'.[246]

During 2004, the Magistrates' Court introduced a modified version of this proposal.[247] Parties were encouraged to mediate their dispute before the issue of proceedings. The costs of mediation would form part of the costs of the action if the matter proceeded to litigation.[248] Where the pre-action procedures had been followed the court would fast-track the case to trial and give the matter priority on the day of hearing over all other proceedings except those which were partially heard. According to the Magistrates' Court's submission to

225 *Family Law Rules 2004* (Cth) sch 1, pt 1, ss 6(1)(i), (2)–(4) and sch 1, pt 2, ss 6(1)(i), (2)–(4).

226 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 5(2)(a) and sch 1, pt 2, s 5(2)(a).

227 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 5(2)(b) and sch 1, pt 2, s 5(2)(b).

228 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 5(2)(c) and sch 1, pt 2, s 5(2)(c).

229 *Family Law Rules 2004* (Cth) sch 1, pt 1, s 5(2)(d) and sch 1, pt 2, s 5(2)(d). See also *Family Law Rules 2004* (Cth) pt 15.5.

230 *Supreme Court Civil Rules 2006* (SA) s 33(2); *District Court Civil Rules 2006* (SA) s 33(2).

231 *Supreme Court Civil Rules 2006* (SA) s 33(3); *District Court Civil Rules 2006* (SA) s 33(3).

232 *Supreme Court Civil Rules 2006* (SA) s 33(4); *District Court Civil Rules 2006* (SA) s 33(4).

233 *Supreme Court Civil Rules 2006* (SA) s 33(5); *District Court Civil Rules 2006* (SA) s 33(5).

234 *Supreme Court Civil Rules 2006* (SA) s 33(6)(a); *District Court Civil Rules 2006* (SA) s 33(6)(a).

235 *Supreme Court Civil Rules 2006* (SA) s 33(6)(b); *District Court Civil Rules 2006* (SA) s 33(6)(b).

236 *Supreme Court Civil Rules 2006* (SA) s 33(7); *District Court Civil Rules 2006* (SA) s 33(7).

237 Section 33(1) of the *Supreme Court Civil Rules 2006* (SA) and the *District Court Civil Rules 2006* provides that the rule does not apply to (a) an action in which urgent relief is sought; (b) an action brought in circumstances where the plaintiff reasonably believes there is a risk that the defendant will take action to remove assets from the jurisdiction and intends to seek an injunction to prevent this; or (c) an action excluded from the application of the rule by direction of the court.

238 *Magistrates Court (Civil) Rules 1992* (SA) rr 20, 20A, 20B, 21.

239 *Magistrates Court (Civil) Rules 1992* (SA) r 20A(1).

240 *Magistrates Court (Civil) Rules 1992* (SA) r 20A(2).

241 *Magistrates Court (Civil) Rules 1992* (SA) r 20A(2).

242 *Magistrates Court (Civil) Rules 1992* (SA) r 20A(2).

243 *Magistrates Court (Civil) Rules 1992* (SA) r 20(1).

244 *Magistrates Court (Civil) Rules 1992* (SA) r 20(2).

245 *Stewart v Jacobsen* [2000] SASC 198, [78] (Nyland J).

246 Submission CP 55 (Magistrates' Court of Victoria).

247 See Practice Direction No 13 of 2004 of the Magistrates' Court, *Pre-issue Mediation* (2004) operative from 1 January 2005, <www.magistratescourt.vic.gov.au/CA256902000FE154/Lookup/Chief_Magistrates_Directions/$file/pd1304.pdf> at 4 December 2007.

248 Submission CP 55 (Magistrates' Court of Victoria).

Facilitating the Early Resolution of Disputes without Litigation

the commission, the procedure has not been utilised. In its submission, the Magistrates' Court suggested that based on its experience any form of compulsory pre-action steps must have a legislative basis.[249]

Transport Accident Claims In Victoria

Protocols have been adopted in Victoria for procedures associated with benefit delivery and disputes arising out of transport accident claims.

The protocols are of particular interest because of the specific pre-action procedural requirements, the process through which they were developed, and the provisions relating to costs.[250]

Protocol development process

The protocols were developed through a process of negotiation between representatives of stakeholders, which commenced in early 2004. On 12 October 2004, representatives of the Law Institute of Victoria, the Australian Plaintiff Lawyers' Association (now the Australian Lawyers Alliance) and the Transport Accident Commission (TAC) signed three protocols. These deal with no-fault dispute resolution, impairment benefit claims and serious injury and common law claims. Two of the protocols applied from 1 March 2005 and the third came into force from 1 April 2005. They have been subsequently amended a number of times.

The protocols recognise that further review and amendment may be necessary and provide for 'review forums' to be attended by representatives of the abovementioned bodies. Such review forums are to be held at least once every six months.

Although essentially voluntary in nature the protocols are said to 'bind' the TAC and all members of the Law Institute of Victoria and the Australian Lawyers Alliance. The legal status of the protocols is unclear. The two legal professional organisations do not seem to have the power to bind their members. Nor do the members of the legal profession appear to have authority to bind present or future clients in the absence of instructions. It is also unclear how a court would regard noncompliance with the protocols in any subsequent legal proceedings. This could presumably be taken into account in the exercise of discretion in relation to costs. However, the protocols provide a useful framework for the resolution of disputes and appear to have been widely accepted and successfully applied in practice.

Pre-action disclosure requirements

One of the objectives of the no-fault dispute resolution protocols is to facilitate the 'mutual and early exchange of relevant and reasonable information and documents'.[251] The protocol applies to benefit disputes arising out of decisions under Part 3 and Part 10 of the *Transport Accident Act 1986*. The objective is to resolve such disputes without the need for 'contested review proceedings before the Victorian Civil and Administrative Tribunal (VCAT)'.[252]

The protocol applies to disputes where the claimant has 'retained a lawyer, who is a member of the [Law Institute of Victoria] or the [Australian Lawyers Alliance], to provide advice about the consequences of the accident injury'.[253]

Before applying for VCAT to review the disputed decision, the protocol requires completion of a pre-issue review (dispute application). The pre-issue review involves the exchange of prescribed information, followed by a pre-issue conference.[254]

The protocol specifies the time frames within which various steps must be carried out.

Recognising that different 'dispute resolution pathways' should be available, the protocol allows parties in dispute: '(a) to appoint an independent mediator … or (b) to appoint a facilitator to assist with resolution, or (c) [to appoint a] joint expert … where medical benefits or services … are in dispute or (d) …[to] appoint a joint expert or special referee' where a novel issue of interpretation of the AMA Guidelines arises.[255] The costs of the mediator, facilitator, joint expert or special referee are to be paid by the TAC.[256]

At the conclusion of the pre-issue review the TAC is required to affirm, vary or set aside its decision or to confirm that the dispute has been resolved.[257] If the dispute is not resolved the matter may proceed to litigation.[258]

Depending on the nature of the dispute in question there are differing requirements in relation to pre-action disclosure of information and documents. Disputes have been categorised into:

- *disputes involving an eligibility decision under ss 3 and 35 of the Transport Accident Act 1986;*
- *loss of earnings rate disputes;*
- *loss of earnings duration and loss of earning capacity disputes;*
- *medical and like benefit disputes;*
- *dependency and death benefit disputes; and*
- *impairment disputes*.[259]

For example, where the dispute relates to eligibility, unless already provided before the disputed decision, the claimant is required to provide to the TAC:

- *a signed statement by the claimant setting out the relevant facts known to the claimant regarding the … accident;*
- *any statements or reports of any witnesses relied upon by the claimant …;*
- *medical reports having regard to the denial of eligibility;*
- *relevant photographs or diagrams;*
- *medical reports and treating medical or allied health professional practitioner notes …;*
- *any report by a non medical witness … [which is to] be relied upon;*
- *when relevant, legal contentions, including citations of any legal authorities relied upon.*[260]

In such cases, unless already provided to the claimant, the TAC is required to provide to the claimant's lawyers, within a specified time:

- *police reports and statements taken by the police where the TAC has them;*
- *any report by a non medical expert witness …;*
- *statements of any witnesses … [obtained by the TAC];*
- *copies of any investigation reports … [obtained by the TAC];*
- *copies of any medical reports and records … relied on to deny the claim; and*
- *when relevant, legal contentions [and legal authorities] relied upon*.[261]

Where the dispute is not resolved and the matter proceeds to a contested proceeding before VCAT, compliance with the requirements of the protocol is intended to avoid the need for compulsory conferences or further mediation.[262]

When a dispute has been the subject of a pre-issue review, the application for review should have 'defined and confined the issues remaining in dispute and … all relevant documentation required for review of the decision … should have been exchanged'.[263]

The protocol provides that in any proceeding before VCAT a party should not call a witness 'whose statement has not [been exchanged] or adduce evidence in chief beyond that contained in any statement [exchanged], except by consent or by the leave of the VCAT'.[264]

Apart from the obligations arising out of the protocol, the TAC has made a commitment to adhere to model litigant guidelines in conducting litigation and in seeking to resolve disputes. Recently, there have been several instances where it is alleged that the TAC has not in fact complied with such guidelines.[265]

Provisions relating to costs

Representatives of the abovementioned stakeholders reached agreement on the legal costs to be paid by the TAC to claimants' lawyers in connection with disputes resolved according to the various protocols. Each of the three protocols specifies the circumstances in which such fees are payable and the fixed lump-sum amount payable.[266]

For example, the no-fault dispute resolution protocol provides that specified amounts are payable by the TAC to the claimant's lawyer where the TAC revokes or varies the decision under review.[267] Although fixed lump-sum amounts are payable for legal costs, the amounts vary according to the

249 Submission CP 55 (Magistrates' Court of Victoria).

250 The commission is grateful for the information about TAC protocols provided by solicitors, including John Voyage, Clara Davies, Peter Burt and Cath Evans. TAC officers also provided valuable assistance and information.

251 Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2005, amended as from August 2007) [2.1] <www.tac.vic.gov.au/upload/Dispute%20Resolution%20Protocols.pdf> at 28 November 2007.

252 Ibid, [2.4].

253 Ibid, [3.2].

254 Ibid, [6.7].

255 Ibid, [7.6].

256 Ibid, [7.10].

257 Ibid, [8.1].

258 Ibid, [8.3].

259 Ibid, [9–14].

260 Ibid, [9.2].

261 Ibid, [9.3].

262 Ibid, [16.5].

263 Ibid, [16.6].

264 Ibid,[16.9].

265 See, eg, *Cracknell v TAC (General)* [2007] VCAT 1615 (31 August 2007) [49]–[59].

266 See, eg, Transport Accident Commission (2005), above n 251, [15].

267 Ibid, [15.1].

Facilitating the Early Resolution of Disputes without Litigation

nature of the dispute and the stage at which it is resolved in the claimant's favour.[268] Additional amounts are payable for the reasonable costs of records or reports, fees for Freedom of Information Act requests, interpreter fees, etc.[269]

The protocols provide that the fixed lump-sum amounts for costs will be indexed annually from 1 January 2006 in accordance with the Consumer Price Index for Melbourne.[270]

The protocols also specify the basis on which costs may be recovered following a merits review at VCAT.[271] Where there is a TAC order to pay an applicant's legal costs, then such costs shall, by consent of the parties, be limited in cases of pre-issue review to the lump-sum amount specified in the protocol plus costs for activity following the conclusion of the pre-issue review.[272] The common law protocols also deal with how party–party costs are to be calculated in legal proceedings following failure to resolve the dispute according to the protocols.[273] The impairment assessment protocols contain various provisions relating to payment of costs.[274]

Any costs payable by the TAC on a party–party basis are separate from legal costs payable to the claimant's lawyers on a solicitor–client basis under a fee and retainer agreement. There is no prohibition on charging solicitor–client costs.

Additional protocols

There are two other protocols relating to transport accident disputes.

The impairment assessment protocols apply to the determination of impairment benefits in accordance with sections 46A, 47, 48, 54 and 55 of the *Transport Accident Act 1986*.[275]

The common law protocols apply to various procedures and proceedings under section 93 of the *Transport Accident Act 1986*. These are requests to the TAC for a serious injury certificate, applications to a court for leave to bring an action for damages, actions for damages where the TAC is on risk.[276] The protocol provides that a common law damages claim cannot be issued before the processes prescribed in the protocol have been completed.[277] The protocols seek to facilitate the exchange of information and documentation without the necessity for seeking formal orders of the Court. However, the protocols envisage that there may be a need to apply to the Court for orders, including in respect of interrogatories and discovery. The County Court Rules provide that both of these procedural steps require leave of the court.[278]

As with the other protocols, there are time frames within which each party is required to disclose material information and documents to the other side. This includes an obligation on claimants to provide the TAC with liability information and documents, including experts' reports, within 30 days of being given a serious injury certificate.[279] This may prove onerous or unworkable in some cases.

General comments on the protocols

One important advantage of the protocols is that they streamline and seek to expedite the various procedures and processes involved in dispute management. They also seek to facilitate early mutual disclosure of relevant information and documentation. This will no doubt enhance the prospect of early resolution of disputes in many instances. The constraint on the subsequent use in court proceedings of information or documents not disclosed serves an an important incentive for both early investigation and compliance.

According to the TAC, since the protocols were introduced in December 2004, there has been a 27 per cent decline in VCAT applications for review.[280] It would appear there has also been a reduction in common law litigation and a decrease in the time taken to resolve serious injury disputes.[281]

As the TAC notes in its submission to the commission,

> *[i]n the future the court may be able to fast track the minority of disputes that have not resolved at the pre-issue stage because there will already have been mutual exchange of documents and clarification of the key issues of law and fact in dispute.*[282]

Importantly, the protocols reflect the agreement of representatives of the various stakeholders. They also incorporate mechanisms for regular review and modification.[283] Thus, they may be adapted in the light of experience. This provides for greater flexibility and stakeholder input than a number of other methods of prescribing procedural rules, including legislation, subordinate legislation or practice notes.

The specification of fixed costs payable in prescribed circumstances, with regular adjustments based on the Consumer Price Index, achieves a greater level of predictability and less complication and expense than other methods for the individualised determination and quantification of party–party costs.[284]

Although the mechanisms for review and revision of the protocols by representatives of the various stakeholder groups are important, there is no provision for an independent 'umpire' or 'facilitator' to assist in resolving ongoing disputes between the interest groups.

4. CONSEQUENCES OF NONCOMPLIANCE

Australian jurisdictions, and provisions within jurisdictions, vary in their approach to the consequences of noncompliance with pre-action procedural requirements.

Various legislative provisions in Queensland require, except in limited exceptional circumstances, compliance with notification and other disclosure requirements before certain personal injury proceedings can be commenced in a court for damages.

Queensland legislation provides for significant sanctions for noncompliance with the newer pre-action procedures—a plaintiff cannot proceed further with the claim unless the respondent waives the requirement or a court authorises the plaintiff to proceed.[285] In circumstances of urgency, proceedings may be commenced despite noncompliance with the pre-action procedural requirements.

Failure to comply with the newer general pre-action disclosure requirements in South Australia and the Family Court does not prevent a plaintiff from commencing proceedings. Generally, cost penalties exist for noncompliance and the *Family Court Rules 2004* (Cth) expressly provide that such noncompliance can be taken into account when making case management orders.[286]

In England and Wales costs and other sanctions may be imposed for unreasonable pre-action conduct even if there is no specific pre-action protocol applicable to the dispute in question.

The Queensland legislative provisions applicable to certain types of personal injury proceedings appear to be the most onerous to comply with and the most draconian in the event of noncompliance. They are intended to prevent the commencement or continuance of legal proceedings for damages where there has been a failure to comply with the notification, disclosure and other obligations.

5. IMPACT OF PRE-ACTION PROCEDURES

The pre-action procedures appear to have had a major impact. They have:

- facilitated the resolution of many disputes that would otherwise have been litigated
- ensured early disclosure of information and documentation
- assisted in narrowing the issues in dispute, even where the matter proceeds to litigation, thereby reducing costs and delay
- fostered a more cooperative approach to dispute resolution on the part of both parties and lawyers.

However, there is insufficient evidence to fully assess the impact of the various pre-action procedures. The limited data available suggests a significant decrease in the number of civil actions commenced in those jurisdictions where the newer pre-action procedures have been introduced. Although in some Australian jurisdictions it may be difficult to discern the simultaneous effect of legislative tort reform measures and other procedural changes, it would seem that the substantial decrease in the volume of civil litigation before the higher courts in England and Wales is in large measure due to the impact of pre-action protocols.

A detailed research study of the impact of pre-action protocols in England and Wales was commissioned jointly by the Law Society and the Civil Justice Council two years after the reforms were introduced.[287] The study examined three areas of dispute: personal injury, clinical negligence and housing disrepair. At the time, pre-action protocols had been introduced in respect of both personal injury and clinical negligence claims. The research was mainly qualitative and involved in-depth interviews with 54 lawyers, insurers and claims managers.[288] This was supplemented with a study of personal injury files in matters concluded both before and after the introduction of the Woolf reforms.[289]

268 See, eg, ibid, [15.2], [15.3].

269 Ibid, [15.4]; Transport Accident Commission, *Impairment Assessment Protocols* (2005, amended as from August 2007) [7.1] <www.tac.vic.gov.au/upload/Impairment%20Protocols.pdf> at 28 November 2007.

270 Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2005), above n 251, [15.6].

271 Scale A of the County Court scale of costs: Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2005), above n 251, [15.5].

272 Ibid.

273 Transport Accident Commission, *Common Law Protocols* (2005, amended as from August 2007) [cl 12] <www.tac.vic.gov.au/upload/Common-Law-Protocols.pdf> at 28 November 2007.

274 Transport Accident Commission, *Impairment Assessment Protocols* (2005), above n 269, [7].

275 ibid,[3.1].

276 Transport Accident Commission, *Common Law Protocols* (2005), above n 273, [3.1].

277 Ibid, [2.1.5].

278 *County Court Rules of Procedure in Civil Proceedings 1999* r 34A.17.

279 Transport Accident Commission, *Common Law Protocols* (2005), above n 273, [9.1.1].

280 Transport Accident Commission, *Annual Report 2006* (2006) 20–1 and fig 7 <www.tac.vic.gov.au/upload/TAC_AR_Front%20Section.pdf> at 28 November 2007.

281 ibid, 20–21 and Fig 8.

282 Submission CP 37 (Transport Accident Commission).

283 Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2005), above n 251, [17].

284 Ibid, [15.6].

285 See, eg, *Personal Injuries Proceedings Act 2002* (Qld) s 18; *Workers' Compensation and Rehabilitation Act 2003* (Qld) ss 275, 276, 295, 296, 297, 298, 299.

286 *Family Law Rules 2004* (Cth) r 11.03(2)(b).

287 Goriely, Moorhead and Abrams (2002), above n 28.

288 Ibid, xi.

289 Ibid.

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

In general, the study found that the protocols had been well received. There appeared to have been improvements in the levels of cooperation and settlement.[290] However, concern was expressed that opponents had failed to comply with the protocol requirements or had complied late. Moreover, the problem of costs appeared to be intractable.[291]

The reforms were liked because they provided a clearer structure, greater openness and made settlements easier to achieve.

There were four main areas of concern or criticism.[292] First, there was a perceived lack of sanctions in cases where there had been a failure to act reasonably or in accordance with the protocol requirements.

Second, expert evidence remained controversial, with resistance to the move towards joint experts and continuing disputes over various issues.

Third, there were perceived to be failings within the courts, especially with regards to case management, inefficiency and delay.

Fourth, defendants complained that the Woolf reforms had failed to reduce the cost of litigation.[293]

As the research study notes, procedural reforms need to be understood in the context of the funding and organisational developments affecting different forms of litigation. The research suggested that court reforms work best when they correspond with other changes so as to transform the prevailing culture and approach 'beyond the details of the specific rule'.[294] The study examined:

- changes in the insurance industry in the area of personal injury
- changes in funding with the abolition of legal aid and the introduction of conditional fee agreements
- the substantial reduction in the workload of defendants' solicitors arising out of the increase in settlements and the increase in cases settled 'in-house' by insurers
- increasing specialisation and the concentration of certain categories of work (eg, clinical negligence) among a smaller group of specialist firms
- more centralised claims handling by defendants in clinical negligence matters
- more proactive methods of claims management.[295]

In some areas, defendants had experienced an increase in workload arising out of the need to investigate a greater number of cases at an earlier stage.[296] Solicitors in all three areas of dispute reported a reduction in the use of barristers.[297] Although this was considered to be a general trend which would have occurred independently of the reforms, the reforms themselves made solicitors 'more conscious of the need to keep control of proceedings, to respond quickly and to show that costs were proportionate'.[298] This contributed to a more selective use of counsel.

In some areas the pre-action protocol requirements increased the amount of work required in the early stages of the case and the time taken to send the first letter to the defendant.[299] The tight time limits for compliance with protocol requirements were not adhered to in a significant proportion of cases.[300] However, it is clear that the protocols substantially improved the quality, quantity and pace of disclosure compared with previous practice.[301]

In personal injury claims the file study showed that insurers were 'more likely to make admissions of liability and less likely to simply indicate a willingness to negotiate'.[302] However, over half of the protocol responses involved 'some form of equivocation' on the part of insurers.[303] Where there were denials of liability it was generally agreed that these were 'more reasoned' and this represented an improvement on the previous position.[304]

The findings of the study on the impact of the reforms in relation to expert evidence are considered in Chapter 7.

The study found that alternative dispute resolution techniques such as mediation have made 'almost no impact on the three subject areas studied'.[305]

Almost all respondents in the study were of the view that more cases were now resolved without court involvement.[306] This was particularly so in personal injury cases, where a number of insurers estimated a one-third reduction in litigation.[307] Clinical negligence cases were found to be more difficult to resolve and were therefore more likely to proceed to litigation, although some 'small, straightforward cases were more likely to settle without proceedings being issued'.[308] Housing disrepair cases were

also felt to be 'considerably more likely' to settle without litigation.[309] A study by the Lord Chancellor's Department found a substantial drop in claims immediately after the reforms were introduced, with the overall trend remaining at a lower level than before.[310]

The research study by the Civil Justice Council and the Law Society notes that the 'perceived effect of less court involvement depends on one's point of view'.[311] Personal injury insurers saw it as a 'major improvement' given that they were able to settle more cases through in-house claims handlers rather than through solicitors.[312] Perhaps not surprisingly, defendants' solicitors were 'less positive'.[313] Claimants' solicitors considered that 'much the same work was required to be done to prepare and settle claims, but it was done [earlier and] without court involvement'.[314]

Although the claims resolution process had become less adversarial and more settlement focused, most respondents were of the view that the move away from adversarialism 'still had some way to go'.[315] There was some ongoing concern about various matters, including insurers using inexperienced claims handlers, insurers' lack of resources, unacceptable rudeness on the part of some claimants' solicitors, a prevalent 'culture' of nonadmission in housing disrepair cases, a lack of openness in certain cases, and alleged prolongation of cases for financial gain on the part of lawyers.[316] Notwithstanding earlier settlement in many cases, 'most negotiations were conducted on a "without prejudice" basis, and actual admissions were extremely rare'.[317]

These perceptions were tested on the basis of data from the study of personal injury files. It was found that 'once a medical report had been obtained the remaining stages of the case were concluded more quickly'.[318] Claimant offers were thought to have expedited the process and there was support for the assertion that insurers were more focused on 'achieving settlements quickly'.[319]

The file survey found that there did not appear to be any change in the number of pre-action contacts but there was some evidence that the quality had improved.[320] However, procedural arguments had clearly not been eliminated and the requirements of the protocols themselves provided a 'whole new area' for disputes in relation to compliance.[321]

Overall, the study concluded that it was 'difficult to gauge the effect of the reforms on the duration of cases'.[322] The pattern of results varied across the types of cases examined. In some areas cases appeared to be settling earlier but in other instances some cases were taking longer to resolve.[323]

Although a reduction in costs was a 'major objective' of the reforms, the evidence on this issue was found to be inconclusive.[324] Initial indications suggested that case costs had not decreased.[325] Each area where there were potential savings was offset by other areas where more work was required to bring about a faster resolution of the case.[326] The data suggested that the costs of settling a simple personal injury case had increased slightly faster than the rate of inflation since the reforms were introduced.[327] The data analysed in relation to personal injury cases came from cases dealt with before the introduction of recoverable success fees, which have substantially increased the costs borne by insurers.

In personal injury cases there were said to be two possible explanations for the increase in costs since 1999. One relates to the 'front loading' of work. The other explanation is that there had been general inflation within the personal injury industry.[328] Both costs and damages appeared to have increased for certain types of case. Thus, when expressed as a proportion of damages, costs had remained constant.[329] A further complication was the excessive time spent arguing about costs. This problem had been exacerbated by the introduction of recoverable success fees and insurance premiums in conditional fee agreement cases. Insurers expressed concern that without a fixed fee regime, the Woolf proposals had only been 'partially implemented'.[330]

The authors of the Law Society–Civil Justice Council study concluded that 'although many of the findings reflect well on the reforms, [the achievement of] Lord Woolf's objectives will require ongoing review and reform'.[331]

Almost all of the pre-action procedures in various jurisdictions are likely to result in an increase in activity at an earlier point in time than would be the case in the absence of such provisions. However, it seems reasonable to conclude that, notwithstanding this front loading of costs, pre-action protocols provide considerable scope for an overall reduction in costs in both settled and litigated disputes. This appears to be particularly the case for personal injury litigation.[332]

290 Ibid, xiii.
291 Ibid.
292 Ibid, xiv.
293 Ibid.
294 Ibid, xvi.
295 Ibid, xvi–xx.
296 Ibid, xx.
297 Ibid, xxi.
298 Ibid.
299 Ibid, xxii.
300 Ibid, xxiv.
301 Ibid, xxiv–xxv.
302 Ibid, xxiv.
303 Ibid.
304 Ibid, xxv.
305 Ibid, xxxii.
306 Ibid, xxxiv.
307 Ibid.
308 Ibid.
309 Ibid.
310 Department for Constitutional Affairs, *Emerging Findings: An Early Evaluation of the Civil Justice Reforms* (2001) [3.1]–[3.16] <www.dca.gov.uk/civil/emerge/emerge.htm> at 28 November 2007.
311 Goriely, Moorhead and Abrams (2002), above n 28, xxxiv.
312 Ibid.
313 Ibid.
314 Ibid.
315 Ibid, xxxv.
316 Ibid.
317 Ibid.
318 Ibid, xxxvi.
319 Ibid.
320 Ibid.
321 Ibid.
322 Ibid.
323 Ibid, xxxvi–xxxvii.
324 Ibid, xxxvii.
325 Ibid.
326 Ibid.
327 Ibid, xxxviii.
328 Ibid, xxxviii–xxxix.
329 Ibid, xxxix.
330 Ibid.
331 Ibid.
332 Ibid, xxxviii.

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

There appears to be little evidence concerning the extent to which self-represented parties comply with pre-action procedural requirements. In some instances, such as the transport accident scheme in Victoria, the pre-action protocols only apply to parties who are legally represented.[333] In some respects, the incorporation into pre-action procedures of explicit and detailed identification of steps required to be taken and of information and documentation required to be disclosed, together with precedent or model letters and letters of instruction to medical experts, etc., should make the process easier for parties who are not professionally represented.

Cairns suggests that the effect of the Queensland pre-action procedures has been that '[m]ost personal injury litigation has disappeared'.[334] A significant proportion of personal injury cases are settled before proceedings are commenced.

Similarly, the impact of the Family Court provisions appears to have been considerable. Altobelli argues that '[t]he pre-action procedure provisions in the new Rules may well be one of the most significant developments in and dramatic changes to, family law practice and procedure, since the *Family Law Act 1975* (Cth) was enacted'.[335] However, it should be borne in mind that in recent years the development of 'collaborative law' is also likely to have had a major impact on dispute resolution in the family law context. This is discussed in Chapter 4.

In 2000, Cannon's research in South Australia found that the introduction of pre-action disclosure had had a dramatic effect on litigation. The number of personal injuries claims commenced fell by 75 per cent, which was not accompanied by a sufficient fall in accident rates to explain the reduction in claims.[336] The sole insurer for personal injuries arising from motor vehicle accidents indicated that its medico-legal costs fell from $44 million to $26 million in the three years following the introduction of the pre-action procedure in 1992.[337]

Cannon suggests that the introduction of quasi-mandatory pre-action disclosure was accompanied by a change in culture on the part of insurers who aggressively attempted to settle claims, and that the changes in litigation may have resulted more from the culture change than simply the rule changes.[338]

The cumulative effect of empirical and other evidence supports the conclusion that pre-action protocols play an important part in facilitating earlier disclosure and settlement, reducing the number of litigated cases, narrowing the issues in litigated disputes, encouraging a more cooperative, less adversarial approach to dispute resolution and reducing costs and delays. However, they are not in themselves a panacea for the problems of cost and delay.

6. DISCLOSURE AND SERVICE OF DOCUMENTS WHEN COMMENCING PROCEEDINGS

Rather than requiring disclosure of information *before* the commencement of legal proceedings, some procedural provisions provide for disclosure and service of information and documents *contemporaneously* with the commencement of litigation. This is in a sense a halfway house between pre-action procedures and those applicable following the commencement of litigation.

6.1 NSW PROFESSIONAL NEGLIGENCE CLAIMS

The *Uniform Civil Procedure Rules 2005* (NSW) provide that a person commencing a professional negligence claim (other than a claim against a legal practitioner) must, unless the court orders otherwise, file and serve *with* the statement of claim an expert's report that includes an opinion supporting:

> *(a) the breach of duty of care, or contractual obligation, alleged against each person sued for professional negligence; and*
>
> *(b) the general nature and extent of damage alleged (including death, injury or other loss or harm and prognosis, as the case may require); and*
>
> *(c) the causal relationship alleged between such breach of duty or obligation and the damage alleged.*[339]

Failure to comply may result in an order dismissing the whole or any part of the proceeding.[340]

6.2 NSW WORKERS COMPENSATION PROCEEDINGS

In workers compensation proceedings before the Workers Compensation Commission in NSW the *Workers Compensation Commission Rules 2006* require an applicant and respondent to lodge all relevant documents they propose to rely on and which are in their possession, at the time of filing an application, reply and response.[341]

Where relevant evidence is not available at the time of lodgement a party must seek leave to introduce the evidence. Leave will be granted if the commission is satisfied that it is necessary to do so in the interests of justice.[342]

Section 344 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) enables the commission to make certain orders in respect of the payment of costs by a legal practitioner where that practitioner's serious neglect, serious incompetence or serious misconduct delays or contributes to delaying the determination of the matter.

6.3 NSW DUST DISEASES PROCEEDINGS

In NSW, the *Dust Diseases Tribunal Regulation 2007* requires a plaintiff to file and serve on each defendant, with the statement of claim, prescribed particulars of the plaintiff's claim and certain documents and information. This does not include witness statements and expert or other reports.[343]

A defendant is required to file and serve a reply to the claim and in doing so is required to provide certain prescribed information and documents.[344]

7. SUBMISSIONS

7.1 SUPPORT FOR PRE-ACTION PROTOCOLS

The Insurance Council of Australia and its members expressed support for the early exchange of relevant information 'to aid settlement and to avoid the necessity for litigation in many cases'. Its members believe that the early identification of relevant material in other jurisdictions has been useful in promoting the early resolution of disputes.[345]

Both the Magistrates' Court and the Supreme Court were generally supportive of introducing pre-action requirements of some kind.

In its submission, the Magistrates' Court noted that in 2003 it considered introducing a requirement that a prospective claimant send a prospective defendant a standard form letter of claim, giving brief particulars of the circumstances said to give rise to the claim and inviting the prospective defendant to enter into settlement negotiations or mediation. The sending of the letter would have been a prerequisite to recovering costs specific to the issuing of proceedings. However, the proposal was abandoned 'owing to vehement opposition from both arms of the legal profession'. The court subsequently sought to encourage parties to engage in pre-action mediation by undertaking to ensure that the costs of doing so would be regarded as litigation costs and fast-tracking mediated proceedings to trial where mediation was unsuccessful. It reported that 'the take-up of this procedure has been non-existent'. Based on these experiences, the court submitted that 'any form of compulsory pre-action steps must have a legislative basis'. It also said that '[a]lthough the areas covered by pre-action protocols in England and Wales have been limited to nine, this is no reason for such protocols to be so limited in this State'.[346]

A further joint submission from the Magistrates' Court and the Victorian Dispute Settlement Centre suggested that during the pre-action stage the Dispute Settlement Centre could offer a large pool of trained and quality controlled mediators with broad representation around Victoria to assist in resolving disputes. This submission also suggested that it might be useful to consider a 'reverse' costs scale that 'provides a greater or equal cost award for pre-action activity than that which may have been awarded if the matter had been issued and settled shortly thereafter'.[347]

The Supreme Court supported investigating the introduction of pre-action protocols, although it cautioned that such protocols could have 'unintended adverse consequences' if insufficient care was taken in their implementation. The court emphasised the need to differentiate between different kinds of proceedings in formulating protocols, but suggested their provisions could address such matters as the pre-commencement exchange of information and disclosure, pre-commencement offers of

333 See, eg, Transport Accident Commission, *No Fault Dispute Resolution Protocols* (2007), above n 251, [3.2].

334 Bernard Cairns, 'A Review of Some Innovations in Queensland Civil Procedure' (2005) 26 *Australian Bar Review* 158, 184.

335 Tom Altobelli, 'Family Law Rules 2004' (2004) 18 *Australian Journal of Family Law* 1, 8.

336 Andrew Cannon, *Some desirable features of lower court systems to verify and enforce civil obligations* (D Phil Thesis, University of Wollongong, 2000) 204. See also Andrew Cannon, *An evaluation of some ways of limiting and reducing the costs to parties of conducting litigation in the Magistrates Court (Civil Division) in South Australia* (Unpublished LLM (Hons) Thesis, University of Wollongong, 1996).

337 Andrew Cannon (2000), above n 336, 204.

338 ibid, 205. See also David Bamford, 'Litigation reform 1980–2000: a radical challenge' in Wilfrid Prest and Sharyn Roach Anleu (eds), *Litigation: Past and Present* (2004) 146.

339 *Uniform Civil Procedure Rules 2005* (NSW) r 31.36(1).

340 *Uniform Civil Procedure Rules 2005* (NSW) r 31.36(3).

341 *Workers Compensation Commission Rules 2006* (NSW) r 10.3(1).

342 *Workers Compensation Commission Rules 2006* (NSW) r 10.3(3); see also Practice Direction No 2 of the Workers Compensation Commission, *Adjournment of Commission Proceedings and Leave to Introduce Evidence* (2006) <www.wcc.nsw.gov.au/NR/rdonlyres/ADB62A10-C507-4CAD-AA0C-93BD7E336958/0/No2PracticeDirection2.pdf> at 29 November 2007.

343 *Dust Diseases Tribunal Regulation 2007* (NSW) reg 24.

344 *Dust Diseases Tribunal Regulation 2007* (NSW) reg 26.

345 Submission ED1 21 (Insurance Council of Australia).

346 Submission CP 55 (Magistrates' Court of Victoria).

347 Submission ED1 30 (Magistrates' Court of Victoria and the Victorian Dispute Settlement Centre).

Facilitating the Early Resolution of Disputes without Litigation

settlement, pre-commencement mediation and ADR, and the use of experts. It considered that there would need to be some kind of incentive for compliance with the protocols, and noted that under the South Australian scheme parties who are uncooperative in this regard can receive costs penalties.[348]

The Supreme Court also stressed 'the need to ensure interaction between procedural reforms and changes to the culture and structure of the legal profession, if the goals of the reforms are to be met'. It considered that '[t]he introduction of pre-action processes should be accompanied by training programmes for lawyers and possibly a Judicial College of Victoria seminar for Judges'.[349]

Victoria Legal Aid expressed general support for the disclosure of relevant information before proceedings are commenced. However, it was concerned that the proposed protocols could 'increase the administrative burden and cost of litigation' and the 'costs consequences of noncompliance may disproportionately affect financially disadvantaged parties and self-represented litigants'. It suggested that if such protocols were introduced the proposal to allow parties to dispense with compliance by consent or where the dispute was 'intractable' could allow parties with more bargaining power to avoid compliance. It strongly supported the introduction of some form of privilege to ensure information and documents obtained could not be used for any other purpose, and referred to the provisions of the Charter in relation to privacy.[350]

The Victorian Aboriginal Legal Service supported the introduction of a 'pre-issuing procedure' designed 'to determine the merit of [an] application'. Under this model, a standard form originating process would need to 'have attached to it all the facts, law, legal claims, list all witnesses, specialists (medical/others), pleadings and discoverable documents to be relied upon', which would need to be assessed and approved by a judge prior to service on a defendant. The defendant would be required to file similar documentation, and a mediation conference would need to take place before the matter proceeded to a directions hearing.[351]

Some submissions were supportive of particular pre-commencement initiatives. The joint submission of AXA Australia and TurksLegal suggested that making mediation a prerequisite to the commencement of litigation might encourage settlement in some kinds of dispute (and in particular contractual disputes).[352]

In response to the commission's first draft proposals, AXA and TurksLegal suggested the ambit of the pre-action discovery obligations was uncertain and their scope might be unclear in the absence of pleadings. They said the issue of costs required further consideration, particularly the draft proposal that there should be access to the court in respect of costs even though the dispute had been settled without litigation. However, they supported the proposal that specific pre-action protocols should be developed by the Civil Justice Council in conjunction with representatives of stakeholder groups.[353]

Peter Mair suggested that prospective litigants should be compelled to meet before an 'independent reviewer' to discuss their dispute at the outset, and that they should be required to come to some agreement as to the costs of the proceeding should it go to hearing. In his view, 'natural justice demands that those accused be given an opportunity to respond before formal proceedings are commenced'.[354]

The Police Association suggested that pre-commencement screening of claims by an 'appropriate person' would assist to eliminate 'frivolous or vexatious' legal actions prior to engagement in mediation.[355]

Edison Masillamani advocated a pre-action step involving the discussion of issues in dispute between prospective parties before a 'Conciliation Officer', without the involvement of legal practitioners.[356]

The Legal Practitioners' Liability Committee supported a requirement that a plaintiff forward a letter to a prospective defendant 'detailing the nature and quantum of the plaintiff's claim' prior to commencing proceedings:

> *LPLC's experience is that if this were done more frequently, much litigation would be avoided. Many cases are settled by LPLC in house without incurring costs because of this.*[357]

Other submissions expressed support for the introduction of pre-action requirements in particular areas. For example, the Construction & Infrastructure Law Committee (Victorian Group) of the Law Council of Australia considered that pre-litigation protocols along the lines of those applicable in England would be beneficial in construction cases.[358] The SRC Legal Service favoured rules to encourage the non-litigious resolution of debt and motor vehicle claims. In particular, it suggested

that providing a debtor with the chance to serve an affidavit of financial circumstances in response to a creditor's letter of demand could assist the creditor to make a more realistic assessment of the probable usefulness of litigation, and encourage compromise.[359] On the other hand, Maurice Blackburn contended that pre-commencement requirements would *not* be appropriate in the context of medical negligence, in part because of the well-developed case management approach already used on the relevant specialist list.[360]

Other submissions made favourable comment on existing pre-litigation procedures that have been implemented in particular contexts. Dr Dooley noted that most states in the United States have, since the 1960s, introduced mandatory panel reviews in medical liability cases. Such reviews occur before proceeding to trial, and result in as many as 40–50 per cent of plaintiffs withdrawing their cases. Dr Dooley suggested that such a panel be introduced in Victoria, similar to the current system of workers compensation claims, to provide parties with an 'immediate, unbiased consensus opinion on liability and extent of harm'.[361]

The TAC submission noted its own pre-litigation dispute resolution protocols (discussed under Transport Accident Claims in Victoria, above). The TAC stated that, although it is too soon to be conclusive, there are strong indications that the protocols are proving effective. Even where a matter cannot be resolved at a pre-litigation stage, adherence to the process set out in the protocol should allow it to be developed to such a point that it can be fast-tracked to trial. The TAC suggested that pre-commencement requirements could be reinforced by, for example, precluding parties from later relying on documents that ought to have been disclosed prior to commencement.[362]

WorkCover drew attention to its own 'statutory pre-litigated dispute resolution procedure', which is 'supported by Ministerial Directions and Ministerial Costs Orders':

> *In essence the pre-litigated process provides for the formal exchange of all material in the possession of a party on which the party seeks to rely and includes a draft statement of claim defining the cause of action. A party who fails to disclose documentation in the party's possession cannot later rely upon this document. A similar obligation, including the provision of a draft defence, rests with the prospective defendant/employer. The process is supported by fixed costs payable by the defendant where damages are recovered and also incorporates potential costs penalties where the matter is not resolved in the pre-litigated process.*[363]

The authority found this 'cards upon the table' approach effective in producing earlier settlement of claims. It also spoke favourably of the mandatory conciliation process it uses in non-common law benefits disputes, which must be certified as 'genuine' before proceedings can be commenced.[364]

A confidential submission advocated that the regime adopted in the *Accident Compensation Act 1985* with respect to 'serious injury' workplace accident matters ought, with some modification, to be of general application. The submission stated:

> *My experience indicates that pleadings have become a device for clouding and obscuring the issues in dispute rather than the reverse. Generally speaking, I think they should be abandoned. In their stead, I suggest the plaintiff should articulate what his cause of action is in a summary way and then swear an affidavit deposing to the relevant evidence on which he relies to prove his case. This should be done, as with 'serious injury' applications, before any proceeding is filed in the court … Likewise the defendant insurer should be required to indicate, also by filing an affidavit, why the application is opposed … Both parties should be on affidavit at, or soon after, any proceeding is commenced in the Court. In my view, such a procedure would go a long way to ridding the system of unmeritorious claims and defences.*[365]

The submission also expressed concern at the conduct of defendants' insurers and the prevalence of trial by ambush. In particular, where surveillance film is available to contradict crucial elements of the plaintiff's case it is said to be often withheld until late in the litigation process. If disclosed earlier it may lead to settlement or withdrawal of the application.

Some submissions expressed general support for pre-action protocols but raised particular concerns, including about their impact on certain categories of persons. The Mental Health Legal Centre suggested that better access to information and expert advice to assist people to evaluate their legal position would be preferable to the imposition of 'additional "hurdles" or threshold requirements'.[366]

348 Submission CP 58 (Supreme Court of Victoria). The court gives 'commercial litigation, serious injury cases, and neighbourhood disputes' as 'possible examples' of types of litigation in which pre-action protocols might be of particular benefit.

349 Submission CP 58 (Supreme Court of Victoria).

350 Submission ED1 25 (Victoria Legal Aid). Section 13 of the *Charter of Human Rights and Responsibilities Act 2006* provides that 'a person has the right not to have his or her privacy … or correspondence unlawfully or arbitrarily interfered with'.

351 Submission CP 27 (Victorian Aboriginal Legal Service).

352 Submission CP 41 (AXA Australia and TurksLegal). Submission CP 53 (Michael Redfern) supported '[compulsory] pre-litigation mediation except in those cases where urgent relief is required'.

353 Submission ED1 22 (AXA Australia and TurksLegal).

354 Submission CP 10 (Peter Mair).

355 Submission CP 6 (Police Association Victoria).

356 Submission CP 15 (Edison J Masillamani).

357 Submission CP 21 (Legal Practitioners' Liability Committee).

358 Submission CP 12 (Construction & Infrastructure Law Committee (Victorian Group) of the Law Council of Australia).

359 Submission CP 3 (SRC Legal Service).

360 Submission CP 7 (Maurice Blackburn).

361 Brendan J Dooley, 'Medical Indemnity in New Zealand and Australia: Suggestions for Reform' (Paper presented at the Annual Scientific Meeting of Royal Australasian College of Surgeons, Christchurch, 8 May 2007) referred to in Submission CP 60 (Royal Australasian College of Surgeons).

362 Submission CP 37 (Transport Accident Commission).

363 Submission CP 48 (Victorian Workcover Authority).

364 Submission CP 48 (Victorian Workcover Authority).

365 Submission CP 5 (Confidential submission, permission to quote granted 4 February 2008).

366 Submission CP 22 (Mental Health Legal Centre).

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

Although accepting that pre-action protocols, which clarify and simplify proceedings and have the potential to avoid the need for litigation, were clearly of benefit for all parties, it suggested there should be sufficient flexibility to accommodate vulnerable or disadvantaged parties. This included those with psychiatric disability and self-represented persons. The legal centre suggested that the 'exceptional circumstances' where compliance with pre-action protocols would not be required should be expanded to include situations where a party did not have adequate resources or capacity.[367]

The Public Interest Law Clearing House (PILCH) also expressed concern about the possible adverse effect of pre-action protocols on self-represented persons. PILCH suggested that such persons would require legal advice about compliance with the requirements and that this would put added pressure on both courts and legal aid/pro bono organisations. It recommended that compliance with pre-action requirements should not be mandatory for self-represented litigants.[368]

The Human Rights Law Resource Centre also cautioned against measures that would have the effect of screening out proceedings deemed to be 'unmeritorious' without their having been considered by a court, stating that such measures would restrict parties' access to a fair hearing.[369]

IMF (Australia) proposed that Victoria should introduce a system of pre-litigation conferences, which parties would be required to attend before proceeding with litigation.[370] It referred to the model for a case planning conference proposed by the Civil Justice Reform Working Group in British Columbia in its recent report.[371] IMF proposed that Victoria should adopt the Canadian model with some additional provisions for detailed legal budgets, limiting interlocutory disputes, limits on costs, and opting out. The 'pre-litigation' conferences would be presided over by a judicial officer and would be convened after commencement of a proceeding but before any steps were taken in the litigation.[372]

Judge Wodak supported pre-action protocols but had reservations about whether they should be implemented by way of practice notes, the force and effect of which was 'unclear'. He suggested that it would be preferable if they had a statutory basis. He expressed further concerns about costs, including the fairness of the presumption that each party should bear its own costs where such costs are relatively modest. He suggested that this might create hardship for individuals required to establish a claim against a large corporation and that successful claimants should not be out of pocket. He supported protection from disclosure or collateral use of information and documents obtained through compliance with pre-action protocols.[373]

Other submissions expressing general support for pre-action protocols included one from an individual litigant who wished to remain anonymous[374] and one from the law firm Corrs Chambers Westgarth. In Corrs' experience the majority of disputes at present go through some form of pre-action process. Its primary concern was that pre-action protocols should not apply to all disputes. Corrs also expressed concern at the potential sanctions applicable in the event of noncompliance. It suggested that this might encourage practitioners seeking to delay proceedings to initiate interlocutory applications alleging noncompliance with pre-action steps.[375]

7.2 OPPOSITION TO PRE-ACTION PROTOCOLS

The Victorian Bar opposed the introduction of pre-action protocols, arguing that at present cost factors work to prevent overhasty commencement of proceedings. It considered the informal exchange of correspondence to be usually sufficient to define the issues in dispute at a pre-action stage. Pre-action protocols would therefore be unjustified, and would serve to inflate costs.[376] In a further submission the Bar noted mixed reports as to the success of pre-action protocols in the UK and said the empirical evidence should be closely investigated. It suggested that 'research needs to be undertaken to identify the areas of civil litigation where the introduction of pre-action protocols is likely to be most useful'.[377]

The Bar also contended that the proposal that the court should be able to order a stay of proceedings pending compliance with pre-action protocol requirements might give rise to unnecessary 'satellite litigation'. It suggested it would be preferable that 'unreasonable failure to comply would be a matter that the Court could take into account in its discretion in awarding costs [or] in making procedural directions'.[378]

The Bar indicated that it would like to be involved in the development of any pre-action protocols. Although agreeing that the costs of compliance with pre-action protocols should be recoverable in any civil proceedings, it expressed concern at the concept of fixing such costs. It contended that the fixing of costs was likely to be arbitrary, especially in commercial litigation where cases differ substantially in terms of complexity and may not always involve the recovery of money.[379]

The Law Institute of Victoria made submissions to similar effect. It contended that the proposed protocols would have the effect of delaying the onset of litigation and increasing costs in cases that were unable to be resolved. It also suggested that compliance with the pre-action protocol requirements in WorkCover and TAC matters had led to high settlement rates but had also incurred significant legal costs.[380]

The Law Institute expressed concern at the likely impact on self-represented persons. It said indemnity costs orders against such persons for failure to comply with the protocol requirements were a 'draconian consequence'.[381]

The Law Institute also opposed the notion of having fixed costs for work carried out in compliance with the protocol requirements. However, it contended that the present regime of fixed costs in WorkCover and TAC matters was appropriate because of the limited ability to recover from clients any difference between actual costs and the recoverable fixed costs and because the work was of a standard nature with the potential for costs savings through efficiencies and the use of technology. It suggested that fixed costs were not appropriate for Supreme Court matters because of the enormous variation in the work. Fixed costs would also disadvantage clients because firms would recover from the client any shortfall between the actual costs and the recovered fixed costs.[382]

The Law Institute said the proposed provision for costs applications to the court in cases where the matter had been settled without litigation was unrealistic, as parties would be pressured to abandon the claim for costs as a price of settling the dispute. The proposed presumption that parties should bear their own costs where they were 'relatively modest' was criticised on the grounds that such costs might still represent an enormous sum to an individual litigant.[383]

Maurice Blackburn noted (in the context of medical negligence claims) a number of concerns about the introduction of pre-commencement requirements, including their potential to generate pre-commencement disputes and to add to delays and costs. The firm '[did] not believe that imposing additional requirements on plaintiffs [in medical negligence cases] by way of pre-commencement requirements would reduce costs, enhance efficiency or promote fairness'.[384]

Several submissions urged consideration of the access to justice implications of pre-action requirements.[385]

Some submissions expressed concerns about specific aspects. Slater & Gordon stressed the need to ensure that the effective benefits of particular pre-action requirements were balanced against any additional expense or delay caused:

> *As an example, we would support a requirement that the parties swear to the facts in their statement of claim and defence at the time those documents were served. This would not impose any great additional cost or delay, but could narrow the issues between the parties. However, we would oppose a move towards pre-action service of expert material etc which we believe results in the 'front-ending' of costs, which might prove ultimately unnecessary to the resolution of a claim'.*[386]

The Human Rights Law Resource Centre expressed concern at the possible impact of pre-action protocols on self-represented parties. The centre considered that such persons would require legal advice during the pre-litigation process. In the absence of additional funding for civil legal aid and community legal centres, this was likely to place additional burdens on them, as well as on courts and pro bono organisations that are already under resourced. The prospect of an indemnity costs order for failure to comply with the applicable pre-action protocol requirements was likely to have an adverse impact on self-represented persons, and the necessity to comply with pre-action protocol requirements had the potential to increase costs and delays.[387]

The Australian Corporate Lawyers Association supported the aim of earlier resolution and communication between the parties but expressed concern that pre-action protocols would not reduce the costs of litigation but rather might increase them through the additional steps imposed.[388]

Telstra noted that many commercial organisations have established methods of addressing customer compensation without the need for court proceedings. It stated that the 'aim of these procedures is to resolve issues, without the need to engage lawyers', and to 'maintain satisfied customers'. It suggested that the proposed pre-action protocols could become a bureaucratic hurdle that impeded established dispute resolution processes.[389]

367 Submission ED1 11 (Mental Health Legal Centre).

368 Submission ED1 20 (Public Interest Law Clearing House).

369 Submission CP 36 (Human Rights Law Resource Centre).

370 Submission CP 57 (IMF (Australia)).

371 Civil Justice Reform Working Group, British Columbia, *Effective and Affordable Civil Justice* (Report to the Justice Review Task Force) (2006).

372 Submission CP 57 (IMF (Australia)).

373 Submission ED1 7 (Judge Wodak).

374 Submission ED1 5 (Confidential submission, permission to quote granted 17 January 2008).

375 Submission ED1 32 (Corrs Chambers Westgarth, Confidential Submission, permission to quote granted 14 January 2008).

376 Submission CP 33 (Victorian Bar).

377 Submission ED1 24 (Victorian Bar).

378 Submission ED1 24 (Victorian Bar).

379 Submission ED1 24 (Victorian Bar).

380 Submission ED1 31 (Law Institute of Victoria).

381 Submission ED1 31 (Law Institute of Victoria).

382 Submission ED1 31 (Law Institute of Victoria).

383 Submission ED1 31 (Law Institute of Victoria).

384 Submission CP 7 (Maurice Blackburn).

385 Submissions CP 20 (Slater & Gordon Lawyers); ED1 19 (Human Rights Law Resource Centre); CP 37 (Transport Accident Commission); CP 58 (Supreme Court of Victoria).

386 See, eg, submission CP 20 (Slater & Gordon).

387 Submission ED1 19 (Human Rights Law Resource Centre).

388 Submission ED1 16 (Australian Corporate Lawyers Association).

389 Submission ED1 17 (Telstra Corporation) annexure.

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

An anonymous submission from a law firm expressed the view that at the Magistrates' Court level pre-action protocols would add to delay and increase costs. It contended that this would only serve the interests of 'deep pocketed and insured litigants who already have access to the best of representation'.[390]

Law firm Battley & Co expressed concern that the proposed pre-action protocols would remove the current commercial realities of pre-action negotiation and that accident victims would incur greater unrecoverable costs, which would force them to accept unreasonable offers of settlement. The firm suggested that an item should be introduced into the scale of costs dealing specifically with matters resolved on a pre-action basis. It also suggested that the recoverable costs where the matter is settled at the pre-action stage should be two-thirds of the scale costs allowable for 'instructions to sue' where litigation has been commenced.[391]

The Australian Bankers' Association questioned whether mandatory 'strict adherence to pre-action protocols might actually foment an atmosphere conducive to litigation'.[392] The submission noted the ADR schemes established by private industries in recent years. Banks and other organisations licensed to carry on financial services businesses under Chapter 7 of the *Corporations Act 2001* (Cth) are, as a condition of their licence, required to provide clients with access to an independent ADR scheme. This is provided through the Banking and Financial Services Ombudsman. There are similar schemes covering general insurance, life insurance and the financial advisory and planning industry. Other ADR schemes provide both dispute resolution and compensatory relief in parts of the mortgage finance industry. VCAT also has jurisdiction in disputes concerning consumer credit and the Consumer Credit Code.[393] The commission acknowledges the importance of these schemes, which are discussed in Chapter 4 of this report.

Law firm Clayton Utz questioned the assumption that parties in dispute needed to be compelled or given an incentive to cooperate to resolve matters before resorting to litigation, especially in the area of commercial disputes. The firm said pre-action protocols were unnecessary, and raised three main concerns about them. They added 'another layer of complexity' and therefore were likely to increase cost and delay. They were likely to 'impose further burdens on the courts', which would be required to adjudicate on the conduct of the parties at the pre-trial stage. Where they required an exchange of information they would be susceptible to abuse by encouraging 'fishing'. This would subvert the 'well established principles in relation to pre-action discovery'. If such pre-action protocols were to be introduced, then:

(a) compliance with the protocol should not be required in all cases where an interlocutory injunction was sought

(b) there should be an implied undertaking that any documents produced would not be used for any purpose other than in connection with the resolution of the dispute between the parties

(c) there was little to commend 'costs only' proceedings.[394]

7.3 OTHER ISSUES RAISED IN SUBMISSIONS

The Legal Services Commissioner raised a concern about how the obligations on practitioners in respect of pre-action protocols would interact with the rules governing the conduct of the legal profession.[395]

The Police Association suggested it should be made clear that documents which fall within the ambit of client legal privilege and those classified under 'public interest immunity' should be exempt from pre-action disclosure.[396]

RECOMMENDATIONS

1. Pre-action protocols should be introduced for the purpose of setting out codes of 'sensible conduct' which persons in dispute are expected to follow when there is the prospect of litigation.
2. The objectives of the protocols would be:
   - to specify the nature of the information required to be disclosed to enable the persons in dispute to consider an appropriate settlement
   - to provide model precedent letters and forms

- to provide a time frame for the exchange of information and settlement proposals
- to require parties in dispute to endeavour to resolve the dispute without proceeding to litigation
- to limit the issues in dispute if litigation is unavoidable so as to reduce costs and delay.

3. Although information and documentation about the merits and quantum of the claim and defence would be available for use in any subsequent litigation, offers of settlement made at the pre-action stage would be on a 'without prejudice' basis but would be able to be disclosed, following the resolution of the dispute after the commencement of proceedings, and would be taken into account by the court in determining costs.

4. The general standards of pre-action conduct expected of persons in a dispute would be incorporated in statutory guidelines. Each person in a dispute and the legal representative of such person would be required to bring to the attention of each other or potential party to the dispute the general standards of pre-action conduct and any specific pre-action protocols applicable to the type of dispute in question (where such other person is not aware of such protocols).

5. The statutory guidelines should provide that, where a civil dispute is likely to result in litigation, prior to the commencement of any legal proceedings the parties to the dispute shall take reasonable steps, having regard to their situation and the nature of the dispute, to resolve the matter by agreement without the necessity for litigation or to clarify and narrow the issues in dispute in the event that legal proceedings are commenced. Such reasonable steps will normally be expected to include the following:

   (a) The claimant shall write to the other party setting out in detail the nature of the claim and what is requested of the other party to resolve the claim, and specifying a reasonable time period for the other person to respond.

   (b) The letter from the person with the claim should:

      (i) give sufficient details to enable the recipient to consider and investigate the claim without extensive further information

      (ii) enclose a copy of the essential documents in the possession of the claimant which the claimant relies upon

      (iii) state whether court proceedings will be issued if a full response is not received within a specified reasonable period

      (iv) identify and ask for a copy of any essential documents, not in the claimant's possession, which the claimant wishes to see and which are reasonably likely to be in the possession of the recipient

      (v) state (if this is so) that the claimant is willing to undertake a mediation or another method of alternative dispute resolution if the claim is not resolved

      (vi) draw attention to the courts' powers to impose sanctions for failure to comply with the pre-action protocol requirements in the event that the matter proceeds to court.

   (c) The person receiving the written notification of the claim shall acknowledge receipt of the claim promptly (normally within 21 days of receiving it), specify a reasonable time within which a response will be provided and indicate what additional information, if any, is reasonably required from the claimant to enable the claim to be considered.

   (d) The person receiving the written notification of the claim, or that person's agent, shall respond to the claim within a reasonable time and provide a detailed written response specifying whether the claim is accepted and if not the detailed grounds on which the claim is rejected.

   (e) The full written response to the claim should, as appropriate:

      (i) indicate whether the claim is accepted and if so the steps to be taken to resolve the matter

      (ii) if the claim is not accepted in full, give detailed reasons why the claim is not

390 Submission ED1 27 (anonymous). The submission also expressed concern that the introduction of the small claims '[a]rbitration system in the Magistrates' Court, and the consequential capping of costs, has proved to be a bonus for insured litigants and a powerful disincentive for private uninsured litigants to prosecute claims of less than $10 000'.

391 Submission ED1 13 (Battley & Co).

392 Submission ED1 29 (Australian Bankers' Association). However, as noted above, the commission's proposed pre-action protocols are not intended to be mandatory in the sense that they must be complied with before legal proceedings can be validly commenced.

393 Submission ED1 29 (Australian Bankers' Association).

394 Submission ED1 18 (Clayton Utz).

395 Submission ED1 10 (Legal Services Commissioner).

396 Submission ED1 2 (Police Association Victoria).

Facilitating the Early Resolution of Disputes without Litigation

accepted, identifying which of the claimant's contentions are accepted and which are disputed and the reasons why they are disputed

(iii) enclose a copy of documents requested by the claimant or explain why they are not enclosed

(iv) identify and ask for a copy of any further essential documents, not in the respondent's possession, which the respondent wishes to see

(v) state whether the respondent is prepared to make an offer to resolve the matter and if so the terms of such offer

(vi) state whether the respondent is prepared to enter into mediation or other form of dispute resolution.

(f) In the event that the claim is not resolved or withdrawn, the parties should conduct genuine and reasonable negotiations with a view to resolving the claim economically and without court proceedings.

(g) Where a person in dispute makes an offer of compromise before any legal proceedings are commenced the court may, after the determination of the court proceedings, take that into consideration on the question of costs in any proceedings.[397]

6. Specific pre-action protocols applicable to particular types of dispute should be developed by the proposed Civil Justice Council in conjunction with representatives of stakeholder groups in each relevant area (eg, commercial disputes, building disputes, medical negligence, general personal injury, etc.).

7. Where a specific pre-action protocol is developed for a particular type of dispute it would be referred to the Rules Committee for approval and implementation by way of a practice note in each of the Magistrates' Court, the County Court and the Supreme Court, with such modifications as may be appropriate in each of the three jurisdictions.

8. Except in (defined) exceptional circumstances, compliance with the requirements of the practice notes would be an expected condition precedent to the commencement of proceedings in each of the three courts. The obligation to comply with the requirements of applicable practice notes would be statutory. A person seeking to formally commence a legal proceeding should be required to certify whether the pre-action protocol requirements have been complied with, and where they have not to set out the reasons for such non compliance.

9. Because it would not be practicable for court registry staff to determine whether there had been compliance with the pre-action protocol requirements or to evaluate the adequacy of the reasons for noncompliance, the court would not have power to decline to allow proceedings to be commenced because of noncompliance. [398] However, where the pre-action protocol requirements have not been complied with the court could, in appropriate cases, order a stay of proceedings pending compliance with such requirements.

10. The 'exceptional' circumstances where compliance with any pre-action protocol requirements would not be mandatory would include situations where:
    - a limitation period may be about to expire and a cause of action would be statute barred if legal proceedings are not commenced immediately
    - an important test case or public interest issue requires judicial determination
    - there is a significant risk that a party to a dispute will suffer prejudice if legal proceedings are not commenced, in circumstances where advance notification of proceedings may result in conduct such as the dissipation of assets or destruction of evidence
    - there is a reasonable basis for a person in dispute to conclude that the dispute is intractable
    - the legal proceeding does not arise out of a dispute
    - the parties have agreed to dispense with compliance with the requirements of the protocol.

11. Unreasonable failure to comply with an applicable protocol or the general standards of pre-action conduct should be taken into account by the court, for example in determining costs, in making orders about the procedural obligations of parties to litigation, and in the awarding of interest

on damages. Unless the court orders otherwise, a person in dispute who unreasonably fails to comply with the pre-action requirements:

- would not be entitled to recover any costs at the conclusion of litigation, even if the person is successful
- would be ordered to pay the costs of the other party on an indemnity basis if unsuccessful.

12. The operation of the protocols and general standard of pre-action conduct should be monitored by the Civil Justice Council, in consultation with representatives of relevant stakeholder groups, and modified as necessary in the light of practical experience.

13. There should be an entitlement to recover costs for work done in compliance with the pre-action protocol requirements in cases which proceed to litigation. Specific pre-action protocols should attempt to specify the amount of costs recoverable, on a party–party basis, for carrying out the work covered by the protocols. As with the current Transport Accident Commission (TAC) protocols in Victoria, such costs should be either fixed (with allowance for inflation) or calculated in a determinate manner (eg, like the fixed costs payable in certain types of simple cases in England and Wales, where costs are calculated on a fixed base amount plus an additional percentage of the amount claimed). Consideration should be given to whether specific pre-action protocols should include a procedure for mandatory pre-trial offers which would be taken into account by the court when determining costs at the conclusion of any legal proceeding.

14. Where the parties to a dispute have agreed to settle the dispute before starting proceedings but have not agreed on who is to pay the costs of and incidental to the dispute or the amount to be paid [399], and there is no pre-action protocol which provides for such costs, any party to the dispute may apply to the court for an order:

    (i) for the costs of and incidental to the dispute to be taxed or assessed, or

    (ii) awarding costs to or against any party to the dispute, or

    (iii) awarding costs against a person who is not a party to the dispute, if the court is satisfied that it is in the interests of justice to do so.

15. Where, taking into account the nature of the dispute and the likely means of the parties, the costs of and incidental to the dispute are relatively modest, there should be a presumption that each party to the dispute will bear its own costs. The court should have power to determine the application on the basis of written submissions from the parties, without a hearing and without having to give reasons, or refer the matter to mediation or other form of alternative dispute resolution.

PRE-ACTION PROTOCOLS: ADDITIONAL MATTERS

1. Where a defendant only agrees to settle a case, prior to commencement of proceedings, without payment of any costs and on condition that the other party *not* seek an order for costs, the other party will have to elect to either settle the case on the terms proposed or proceed with litigation of the claim, notwithstanding the settlement offer. Where the matter proceeds to litigation, the reasonableness of the conduct of each party, including in relation to costs, could be later taken into account by the court.

2. A statutory provision is required to protect the information and documents provided in accordance with the protocol, to ensure they are not used for a purpose other than in connection with the resolution of the dispute between the parties. This could be an implied undertaking as for documents produced on discovery in litigation, or an express statutory prohibition on use other than in connection with the dispute and any litigation arising out of the dispute.

3. Where a party to a dispute is particularly vulnerable, under a disability or otherwise not reasonably capable of complying with the pre-action protocol requirements, this may be taken into account by the court as an acceptable ground for noncompliance if the dispute proceeds to litigation. This should provide some protection for some self-represented persons.

397 These draft guidelines are based substantially on the Protocols Practice Direction, October 2006, adopted in England and Wales. See the discussion below, and the Department for Constitutional Affairs, *Practice Direction: Protocols* (2006) <www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm> at 3 December 2007.

398 Accordingly, unlike in Queensland under the *Personal Injuries Proceedings Act 2002* (Qld), it will not be necessary to consider the question of whether proceedings can be *validly* commenced when the pre-action requirements have not been complied with. It is also presumably unnecessary to specify whether or not the requirements are 'procedural' or 'substantive'. See the consideration of the *Personal Injuries Proceedings Act 2002* (Qld) in the decision of the NSW Court of Appeal in *Hamilton v Merck and Co Inc* [2006] NSWCA 55 (Spigelman CJ, Handley JA and Tobias JA). Any proceedings commenced would not be a nullity merely because of noncompliance with the pre-action requirements, but the court would be empowered to stay proceedings pending compliance, in appropriate cases.

399 In Hong Kong, the Civil Justice (Miscellaneous Amendments) Bill 2007 (HK) makes provision for 'costs only proceedings', including where a dispute is settled before proceedings are commenced and where the parties have agreed on who is to pay the costs of and incidental to the proceedings but have not agreed on the amount of such costs (s 52B(1)): above n 103.

Chapter 2

Facilitating the Early Resolution of Disputes without Litigation

4. The basis on which costs can be awarded by the court in circumstances where the dispute has settled without proceedings being commenced requires further consideration when specific pre-action protocols are developed. Should such costs be on the scale which would have applied if proceedings had been commenced? This may be problematic as it may not be clear which court the proceedings might have been commenced in, particularly given the overlapping jurisdictions of the civil courts. The commission has received suggestions from stakeholders about how such costs should be dealt with. Although the commission is in favour of such costs being reasonably certain, particularly to avoid ongoing disputes about costs and the further costs that these entail, there is no simple solution likely to be applicable to all types of dispute. In relatively straightforward and standardised disputes, a fixed costs regime makes sense. In other types of disputes, which vary in complexity and in quantum, there is clearly a need for greater flexibility.
5. Similar considerations apply in determining costs payable for compliance with pre-action protocol requirements in cases which do not settle before litigation.
6. Where parties have complied with pre-action protocol requirements the courts should consider a means of 'fast-tracking' any legal proceedings where the dispute is not resolved, and possible dispensation with certain interlocutory steps. Since compliance with pre-action protocol requirements may 'front end' certain costs and cause additional delays in the commencement of proceedings, the parties should get priority over cases where pre-action protocol requirements have not been complied with, and a dispensation from having to comply with such court procedural steps as may duplicate or overlap with pre-action steps already taken. The details of how this might be achieved would vary between different types of cases. This matter should be investigated further by the Civil Justice Council.