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Resolving Disputes without Courts Commentary from Law Institute of Victoria

Michael Holcroft

Law Institute of Victoria

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22 June 2012

Professor Tania Sourdin
Director ACCJSI
Monash University Law Chambers
Marsh Building
555 Lonsdale Street
Melbourne VIC 3000 Australia

Also by email: Tania.Sourdin@monash.edu

Dear Professor Sourdin,

Re: Resolving Disputes without Courts – Measuring the Impact of Civil Pre-action Obligations
Background Paper, March 2012

The Law Institute of Victoria (“LIV”) refers to the email sent to Michael Holcroft (LIV President) on 12 April 2012 by Nina Massara on your behalf requesting feedback on the Resolving Disputes without
Courts – Measuring the Impact of Civil Pre-action Obligations Background Paper prepared by the
Australian Centre for Court and Justice System Innovation (ACCJSI). The LIV welcomes the
opportunity to provide feedback on this paper.

The LIV notes that Chapter 3 of the Civil Procedure Act 2010 which imposed pre-litigation
requirements was repealed by the Civil Procedure and Legal Profession Amendment Act 2011.

As a general proposition, the LIV opposes the introduction of mandatory pre-action obligations in civil disputes.

The LIV notes that there are already obligations on lawyers to “… where appropriate inform the client
about the reasonably available alternatives to fully contested adjudication of the case unless the
practitioner believes on reasonable grounds that the client already has such an understanding of
those alternatives as to permit the client to make decisions about the client's best interests in relation
to the litigation.” (Rule 12.3 of the Law Institute of Victoria Professional Conduct and Practice Rules 2005).

The LIV is also concerned that, should mandatory pre-action obligations be imposed on parties, this
can have the effect of significantly increasing the costs of one or both parties. Those costs may not be
recoverable as they will have been incurred prior to legal proceedings having been issued. The LIV
contends that the introduction of mandatory pre-action obligations would represent an obstacle to
access to justice, especially in relation to debt collection and small claims.

For these reasons, the LIV is strongly opposed to introducing mandatory pre-action obligations in all
civil disputes.
However, even if mandatory pre-action obligations were to be introduced in civil disputes generally, the LIV contends that mandatory pre-action obligations should not be imposed in civil disputes which involve one or more of the following:

- a limitation period is about to expire and the cause of action would be barred by statute if the civil proceeding is not commenced immediately;
- the civil proceeding involves an important test case or a public interest issue;
- a person involved in a civil dispute or civil proceeding has a terminal illness;
- the civil dispute involves allegations of fraud;
- expert opinion is required;
- multi party civil disputes and civil proceedings are contemplated;
- compliance with the pre-action obligations would cause personal or financial hardship;
- the subject matter of the dispute or proposed civil proceeding has been dealt with at arbitration pursuant to a contractual (or statutory) obligation and such arbitration was not successful, provided that the arbitrator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such arbitration despite the best efforts of the parties to resolve the dispute;
- the subject matter of the dispute or proposed civil proceeding has been dealt with at mediation pursuant to a contractual (or statutory) obligation and such mediation was not successful, provided that the mediator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such mediation despite the best efforts of the parties to resolve the dispute;
- the civil dispute or civil proceeding involves allegations of medical negligence;
- mortgagee actions for possession of land;
- civil proceedings not involving a dispute;
- claims where there already exists a legislative or industry obligation to serve a notice or notices before taking action;
- civil disputes where the amount claimed or in dispute is less than $25,000;
- civil proceedings in which additional parties are brought in subsequent to the commencement of the proceeding;

**Example**

Civil proceedings in which parties are joined pursuant to a Third Party Notice or Notice of Contribution.

- a judicial officer determines otherwise;
- a court makes rules or issues practice notes exempting classes of cases in accordance with proportionality.
In addition, the LIV would be concerned about imposing an obligation to comply with pre-action obligations when a claim for personal injury is pursued by a litigation guardian on behalf of a person under a disability. On one view, litigants under a disability and children should not be treated differently from other litigants where any pre-action obligations assist the resolution of a dispute without adversarial litigation. However, the LIV understands that any resolution of a claim pursued on behalf of a person under a disability or a child is usually submitted to a court for approval of the compromise, and that proceedings are usually issued or an application by way of originating motion is usually made on behalf of the person under a disability by their litigation guardian to enable the court to determine the appropriateness of the settlement and whether it is in the best interests of the person under a disability. Any obligation to comply with pre-action obligations may cause delay in settlement for people under a disability in situations where the court provides an important protective role in scrutinising settlements of people under a disability. If pre-action obligations were to be introduced, the LIV would urge a consideration of whether litigation guardians ought to be exempt from any obligation to comply with any pre-action obligations.

It is the view of the LIV that carving out these exceptions from any pre-action obligations would increase uncertainty and place a greater burden on lawyers to determine whether their client’s dispute would be covered by one of these exceptions. The LIV suggests that it is preferable to maintain the current position under the Civil Procedure Act 2010 (Vic).

The LIV notes that interviews and focus groups involving stakeholders will be held as part of the Research Project. As a stakeholder, the LIV would like to participate in the interview and focus group process, and will nominate LIV representatives for this purpose upon receiving further details from you as to the requirements for these.

If you would like to discuss these matters further please contact me by email on livpres@liv.asn.au or by phone on 9607 9497, or Irene Chrisafis by email on IChrisafis@liv.asn.au or by phone on 9607 9386.

Yours sincerely,

Michael Holcroft
President
Law Institute of Victoria