

# Changing the adversarial culture of disputes – litigants in the federal system will need to take genuine steps to resolve disputes before embarking on litigation

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If a bill recently introduced into federal parliament<sup>1</sup> becomes law, any party wishing to pursue litigation in the federal civil justice system in Australia will need to file a statement with the court which sets out the ‘genuine steps’ that have been taken in an attempt to resolve the dispute prior to commencement of proceedings. The bill, which will apply to most proceedings in the Federal Court and Federal Magistrates Court, provides consequences for parties, and their lawyers, who fail to take the necessary ‘genuine steps’, particularly when it comes to the question of who should pay the costs of the proceedings.

This article discusses the proposed new requirements and asks whether they will change the adversarial culture of disputes, as claimed, or merely become another procedural step adding to the cost of litigation.

## The rationale for introducing the ‘genuine steps’ requirement

The purpose of the bill is stated to be the improvement of access to justice by changing the adversarial culture of disputes. While that seems a contradiction in terms, the aim is sought to be achieved by requiring people to attempt resolution of the dispute before litigating, and, if resolution cannot be achieved, by ensuring that the issues in dispute have been properly identified to reduce the court’s time to determine the matter.

## What is a genuine steps statement and when will it be required?

Once the bill passes into law (expected later this year), a party which commences relevant proceedings in the Federal Court or Federal Magistrates Court (applicant) must, at the time it commences those proceedings, file a statement with the court in which it sets out the ‘genuine steps’ that have been taken in an attempt to resolve the dispute. Where no such steps have been taken the statement must include an explanation for the failure to do so.

Each respondent to the proceedings must also file a statement, in which it must state whether it agrees or disagrees with the applicant’s genuine steps statement. If it does not agree, it must include the reasons for such disagreement.

Neither party is obliged, or authorised, by the filing of a genuine steps statement to reveal the substance of any confidential settlement negotiations or without prejudice or privileged communications.

The requirement will apply to all proceedings other than those where it would not be practicable or appropriate. These include proceedings:

- which are taken in the absence of another party (*ex parte* proceedings);
- by way of appeals;
- for penalties for breach of civil penalty provisions;
- for criminal offences;
- in respect of decisions made by statutory bodies such as the Administrative Appeals Tribunal and the Australian Competition Tribunal); and
- proceedings commenced under certain Acts and regulations, such as the *Fair Work Act 2009* (Cth) and the *Native Title Act 1993* (Cth).

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<sup>1</sup> *Civil Dispute Resolution Bill 2010*

## **What are ‘genuine steps’?**

There is no exhaustive or prescribed list of the steps which will be considered to be genuine steps. However, the bill does give the following examples of steps which a court can consider to be ‘genuine steps’:

- writing to the other side outlining the issues in dispute and how they might be resolved;
- exchanging information and documents to clarify the issues in dispute;
- considering alternative dispute resolution processes such as mediation, conciliation or arbitration;
- considering different processes where alternative dispute resolution processes have been used but have failed; and
- participating/agreeing to participate in discussions where the parties present their views about what the dispute is about and what the important issues are for them.

## **Are there any acceptable reasons for failure to take genuine steps?**

The bill acknowledges that there are circumstances in which a party may not have been able to take genuine steps to resolve a dispute before commencing litigation. They include where notification of a dispute to the other party might compromise property or assets or where the urgency of commencement of proceedings means that it is impractical for any steps to be taken.

## **The role of lawyers**

The bill also obliges lawyers to advise their clients about the ‘genuine steps’ requirement and to assist clients to comply with those requirements. Any non-compliance by lawyers can be taken into account by a court when awarding costs, and can include the award of costs personally against lawyers who fail to advise clients of the requirements and/or fail to assist them to comply with the requirements.

## **How can courts use genuine steps statements?**

The failure to file a genuine steps statement will not preclude a party from commencing or continuing proceedings. It can, and almost certainly will, be taken into account by the court when exercising its case management functions and when exercising its discretion to award costs.

In terms of case management, knowledge of the steps taken (or not taken) by the parties will allow the court to make more informed decisions regarding, for example, referring the matter to mediation or other alternative dispute resolution mechanisms, requiring parties to take steps which it considers to be genuine steps to resolve the dispute, setting timetables for steps to be taken, striking out parts of the claim or defence, disallowing or rejecting evidence and requiring production of documents. Most importantly, a failure to take genuine steps may be reflected in the award of costs of the proceedings.

## **What can be expected to result from the genuine steps requirement?**

It is to be hoped that the introduction of the genuine steps requirement achieves the lofty aim of changing the adversarial culture of disputes. However, like any compulsory step in dispute resolution procedure, it can only hope to be successful where there is mutual commitment to the taking of truly genuine steps to achieve a resolution. Lawyers can advise of the requirement and can assist with compliance but, at the end of the day, it is the parties who must both be committed to taking such steps. That being the case, there will no doubt be cases in which the requirement becomes one more box to be ticked and one more procedural step to be undertaken in the path to court determined resolution of disputes.

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*Truman Hoyle is a Sydney based law firm serving the new economy industries across the Asia Pacific region. Australasian Legal Business has recently ranked the firm's Telecommunications, Media & Technology and Intellectual Property practices as top-tier in Sydney. The firm was named Australian Law Firm of the Year in 2005 and again in 2006, for firms with 50 lawyers or less. In 2009 our firm was awarded the prestigious ACOMM Award for Professional Services Excellence at the annual Australian telecommunications industry awards.*

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