



Express law fast track information for clients

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Genuine steps statements under the Civil Dispute Resolution Act 2011

On 12 April 2011, the [Civil Dispute Resolution Act 2011](#) (the Act) received Royal Assent. The Act requires prospective litigants to file statements that either outline what genuine steps have been taken to resolve disputes before proceedings are commenced or, where no steps have been taken, explain why not.

Civil Dispute Resolution Act 2011

The Act is consistent with the Federal Government's [Strategic Framework for Access to Justice in the Federal Civil Justice System](#) and is one of a number of measures that have been introduced to promote the timely, inexpensive and efficient resolution of disputes in the federal civil justice system. The Act implements key recommendations from the National Alternative Dispute Resolution Advisory Council report, [The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction](#) (2009), and seeks to improve access to justice by focusing parties on the early resolution of disputes and encouraging parties and their lawyers to move away from litigation and resolve disputes outside of the courts.

What will be required?

The Act seeks to ensure that, as far as possible, parties take genuine steps to resolve disputes before certain civil proceedings are commenced (s 3).

It requires an applicant to file a genuine steps statement when any civil proceedings are instituted in the Federal Court or the Federal Magistrates Court (s 6(1)). The statement must specify:

- what steps have been taken to try to resolve the dispute before the proceedings have been commenced
- if no steps were taken, the reasons they were not (s 6(2)).

Urgency and the safety or security of a person or property are examples of reasons that steps may not be taken (s 6(2)(b)).

Respondents who are served with the applicant's genuine steps statement must file their own statement before the application is heard and indicate whether they agree with the

applicant's statement. If they do not, they must indicate what aspects of the statement they disagree with and why (s 7(1)–(2)).

Lawyers must advise their clients of the requirement to file a genuine steps statement and help them to file these statements (s 9).

Statements must also comply with any additional requirements specified in court rules (ss 8 and 18).

Which proceedings are affected?

Under the legislation, a genuine steps statement must be filed in any civil proceedings instituted in the Federal Court or the Federal Magistrates Court that are *not* excluded proceedings.

Excluded proceedings

Excluded proceedings are listed in Pt 4 of the Act (ss 15–17).

Under s 15, examples of kinds of excluded proceedings include *ex parte* applications, appeals, proceedings commenced by regulators relating to criminal offences or civil penalty provisions, native title cases and matters that have already been considered by the following statutory tribunals:

- the Administrative Appeals Tribunal
- the Australian Competition Tribunal
- the Copyright Tribunal of Australia
- the Migration Review Tribunal
- the Refugee Review Tribunal
- the Social Security Appeals Tribunal
- the Veterans' Review Board
- a body prescribed by the regulations.

Proceedings under (or under regulations made under) the following Acts are also classified as 'excluded proceedings' (s 16):

- the *Australian Citizenship Act 2007*
- the *Child Support (Registration and Collection) Act 1988*
- the *Fair Work Act 2009*
- the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*
- the *Family Law Act 1975*
- the *Migration Act 1958*
- the *National Security Information (Criminal and Civil Proceedings) Act 2004*
- the *Native Title Act 1993*

- the *Proceeds of Crime Act 1987*
- the *Proceeds of Crime Act 2002*.

Where only some of the proceedings are excluded proceedings, a genuine steps statement must be filed for what is not excluded proceedings (s 6(4)).

What are 'genuine steps'?

The Act does not require parties to take any specific steps to resolve disputes. However, the Act contains a definition of 'genuine steps' to guide litigants and the court in considering whether genuine steps were taken.

'Genuine steps' defined

The definition provides that a person takes *genuine steps to resolve a dispute* if the steps taken by the person in relation to the dispute constitute a sincere and genuine attempt to resolve the dispute, having regard to the person's circumstances and the nature and circumstances of the dispute (s 4(1A)).

Examples of genuine steps that could be taken are included in the Act (s 4) and include:

- notifying the issues in dispute and offering to discuss them with the other side with a view to resolution
- exchanging information to help parties to understand the issues in dispute and how they might be resolved
- participating in alternative dispute resolution (ADR)
- attempting to resolve through negotiation some or all of the issues in dispute.

Parties and their lawyers will need to decide what genuine steps are appropriate to take in each matter and when these steps should be taken, if at all.

What are the implications for Commonwealth litigants?

Increased emphasis on ADR and out-of-court resolution

Commonwealth litigants already consider and undertake genuine steps to resolve disputes before litigation is commenced when it is appropriate to do so. The Act does not change this but requires greater emphasis on ADR and early, out-of-court resolution.

Expectations of pre-litigation steps

There is now an expectation that prospective litigants in the Federal Court and Federal Magistrates Court will take genuine steps to resolve their disputes before proceedings are commenced, unless they are commencing excluded proceedings. Prospective litigants are required to document these steps in the genuine steps statements that must be filed. If no steps have been taken, an explanation must be given as to why they have not. It is not just an applicant who is required to file a genuine steps statement. The respondent too must file a response indicating either agreement with or an explanation of its disagreement with the applicant's genuine steps statement.

Relationship to requirements under the *Legal Services Directions 2005*

For Commonwealth agencies, the genuine steps requirement will also need to be considered alongside the existing requirement in paras 5.1 and 5.2 of Appendix B to the [Legal Services Directions 2005 \(Cth\)](#) that the Commonwealth or an agency only start proceedings if it has considered other methods of dispute resolution and, when participating in ADR, that it participate fully and effectively.

Case management and costs

Importantly, courts will be able to take into account whether parties have complied with the requirement to file a genuine steps statement as well as the information contained in any statements that are filed when exercising their functions and case management powers and awarding costs (ss 11 and 12).

Protecting privilege

The Act makes it explicitly clear that all current provisions dealing with the use or disclosure of information, the production of documents or the admissibility of evidence are not affected by the Act (s17A). This includes, for example (Supplementary EM, para 10):

- *Evidence Act 1995*, s 131
- *Federal Court of Australia Act 1976*, s 53B
- *Federal Magistrates Act 1999*, s 34.

Care should be exercised when preparing genuine steps statements or responses to avoid waiver of any legal professional privilege that subsists in related documents or information.

Where to from here?

The Act will take effect upon proclamation of Pts 2 to 5 on a date yet to be fixed. In the absence of this, it will take effect on 13 October 2011, being the day after the end of the six months period from the date of Royal Assent (s 2 (1)).

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