

CIVIL DISPUTE RESOLUTION OBLIGATIONS: WHAT IS REASONABLE?

TANIA SOURDIN*

I INTRODUCTION¹

Pre-action requirements specify that disputants take steps or use dispute resolution processes to attempt to resolve their dispute before commencing litigation. These types of requirements have been introduced in a range of jurisdictions within and outside Australia in recent years. They may arise as a result of agreements to enter into alternative dispute resolution ('ADR') processes, legislative arrangements, regulatory schemes as well as through court or non-court protocols and guidelines. For example, some pre-action protocols require disputants to engage in ADR, or consider using ADR, as a precondition to commencing legal proceedings. Others require that 'would-be' litigants take steps or file a statement about what they have done to resolve their dispute if they are unable to resolve it and then commence court or tribunal proceedings. Most pre-action requirements have 'opt-out' provisions. For example, certain categories of litigants are not required to comply with some types of pre-action obligations and requirements if there is urgency or violence, or the category of cases is exempt for some other reason (for example, certain uncontested debt recovery and corporations winding up matters).

The reasons for introducing pre-action protocols and obligations include that, by focusing on earlier dispute resolution, time and cost can be saved and a better outcome may be achieved. In this regard, there is a concern that commencing adversarial court proceedings can lead to the destruction of existing business and other relationships, and the polarising of disputant positions can limit the options available to resolve the dispute.

* Tania Sourdin, Professor of Law, Monash University, Director of the Australian Centre for Court and Justice System Innovation ('ACCJSI'). The author thanks reviewers who commented on an earlier version of this article.

1 Parts of this article are drawn from Tania Sourdin, *Alternative Dispute Resolution* (Thomson Reuters, 4th ed, 2012) with kind permission as well as Tania Sourdin, *Resolving Disputes without Courts: Measuring the Impact of Civil Pre-action Obligations* (March 2012) ACCJSI, Monash University <<http://www.law.monash.edu.au/centres/accjsi/projects/accjsi-pre-action-background-paper-mar2012.pdf>> and Tania Sourdin, *Resolving Disputes outside Courts Final Report* (2012) (unpublished, copy on file with author).

On the other hand, some commentators consider that pre-action protocols and obligations can limit access to justice, access to the courts and increase time and cost when matters do not resolve or when costs are ‘front loaded’. There is also a concern that people may reach a compromise without adequate legal advice or that, because commencing legal proceedings is too expensive or too difficult, they may be unable to exercise their legal rights. These concerns have been explored in Australia in a number of reports (including a Senate Subcommittee Report and a recent report by the Australian Centre for Justice Innovation) and in the United Kingdom (‘UK’) in the Jackson Review. This article considers whether it is reasonable to require disputants to comply with these types of requirements by exploring the opposition to these types of arrangements as well as factors that may impact on compliance with these types of obligations.

II DISPUTE RESOLUTION REQUIREMENTS

Dispute resolution obligations in the pre-filing or pre-action² context can include requiring disputants to take some action (including preparing a statement) that is directed at exploring dispute resolution or attending a form of ADR (whether or not as part of a scheme where the ADR process is arranged) before court or tribunal proceedings are commenced. These types of obligations are an increasing feature of the modern litigation landscape in Australia as well as in the UK,³ and they continue to attract both proponents and opponents. Pre-action dispute obligations can incorporate:

- the ‘need to disclose information or documents in relation to the cause of action’;
- the ‘need to correspond, and potentially meet, with the person or entity involved in the dispute’;
- ‘undertaking, in good faith, some form of’ ADR; and
- ‘conducting genuine and reasonable negotiations with a view to settling without recourse to court proceedings’.⁴

2 These terms are used interchangeably in this article. The article is concerned with measures taken before proceedings are commenced in a court or tribunal.

3 See Sourdin, *Resolving Disputes without Courts*, above n 1 and Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, which set out in some detail the arrangements in Australia and refer to the arrangements in the UK. A more comprehensive study of the UK arrangements is located in Christopher Hodges and Magdalena Tulibacka, *Civil Justice in England and Wales – Beyond the Courts: Mapping Out Non-Judicial Civil Justice Mechanisms in England and Wales* (2009) University of Oxford Centre for Socio-Legal Studies <<http://www.cslls.ox.ac.uk/documents/ENGLISHJUSTICESYSTEM-RESEARCHDOC.docx>>.

4 Australian Law Reform Commission (‘ALRC’), *Discovery in Federal Courts*, Consultation Paper No 2 (2010) 160 (‘*Discovery Report*’), citing Victorian Law Reform Commission (‘VLRC’), *Civil Justice Review*, Report No 14 (2008) 109 and Michael Legg and Dorne Boniface, ‘Pre-action Protocols in Australia’ (2010) 20 *Journal of Judicial Administration* 39, 39.

Pre-action obligations that are directed at encouraging or requiring dispute resolution have existed for many years in the social, community, health, family, business, personal injury⁵ and online consumer and business sectors. There are considerable differences in the way in which they operate and whether or not they are linked to any systemic arrangements, and if so, how they are so linked. They can incorporate requirements to arbitrate, mediate or use an ADR⁶ or external dispute resolution ('EDR') (for example, in the banking and financial sector)⁷ scheme. They have recently been the subject of considerable, and at times heated, discussion in the Australian legal environment as a result of legislation that has been proposed or enacted that extends the application of protocols and obligations to a broader category of disputes.⁸

Apart from government and law reform reports, the topic of pre-litigation protocols has been the subject of some discussion, with differing views being expressed by various commentators. Some commentators consider that pre-action dispute resolution obligations can increase legal costs,⁹ while others consider that they will lead to forced settlements and a reduction in lawyer involvement in dispute resolution. There is, however, little research to support either view.¹⁰

There is somewhat limited guidance about what might be required to comply with these types of obligations, and uncertainty about what is required has, in part, led to divergent views being expressed about their efficacy. In addition,

5 Many States have introduced pre-action schemes that apply to categories of personal injury cases (often motor vehicle) and workers compensation. For example, in NSW, just over 10 years ago, the *Motor Accidents Compensation Act 1999* (NSW) ('MAC Act') formally introduced ADR into the Motor Accidents Scheme in NSW. The MAC Act provided the framework and defined the jurisdiction for the Claims Assessment and Resolution Service ('CARS') and the Medical Assessment Service ('MAS'), establishing CARS and MAS as functions of the Motor Accidents Authority, the scheme regulator. (See Tania Sourdin, *User Perceptions of Claims Assessment and Resolution Service* (March 2011) (unpublished, copy on file with author). Under the *Personal Injuries Proceeding Act 2002* (Qld) ch 2 pt 1 div 4, prior to issuing proceedings in personal injury claims, a conference must be held by the parties, unless dispensed with by the court.

6 For example the Retail Lease Schemes in NSW or Victoria, as described in Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1.

7 See Tania Sourdin, 'Mediation in Australia: Impacts on Litigation' in Nadja Marie Alexander (eds), *Global Trends in Mediation* (Kluwer Law International, 2006) 37, 49–50:

Dispute resolution schemes have been set up in various industries to provide low-cost (or free), effective and relatively quick means of resolving consumer complaints about products and services. These schemes are often funded by a cooperative of industry members and are intended to deal with disputes between business and consumers. Examples include the Telecommunications Industry Ombudsman ... [and the] Financial Ombudsman Service. Generally, the scope of these schemes is limited in that they do not deal with internal disputes or disputes with contractors, suppliers or other business entities.

8 See the discussion and submission reported at Parliament of Australia, *Senate Committees: Civil Dispute Resolution Bill 2010* <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/civil_dispute_resolution_43/index.htm>. See also Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, 12–13.

9 See Richard Ackland, 'Mediation More Pork for Lawyers', *Sydney Morning Herald* (Sydney), 5 August 2011, 11.

10 This topic has recently been explored by the Australian Centre for Justice Innovation ('ACJI'). Qualitative and quantitative evidence suggests that some arrangements can be effective, just and save time and money. See Sourdin, *Resolving Disputes Outside Courts Final Report*, above n 1, 48–9.

these obligations have at times been equated with a restriction on access to justice (which can be narrowly construed as access to the courts) or have been viewed as an attack on the judicial dispute resolution system. This article considers the broader opposition to these types of obligations, and also the nature of these obligations and what they may mean in the context of disputant conduct.

III IS IT REASONABLE TO EXPECT DISPUTANTS TO TRY TO RESOLVE THEIR DISPUTE BEFORE ACCESSING THE LITIGATION SYSTEM?

To some extent, questions about what constitutes reasonable attempts to resolve or try to resolve disputes before commencing litigation have been overshadowed by the significant question of whether or not it is appropriate to have any pre-action requirements at all. While some would suggest that citizens in a modern democratic state should do something or have some obligation to try to resolve a dispute before heading to court, others suggest that imposing a formal obligation to attempt to resolve a dispute could undermine the rule of law or have a negative impact on courts.¹¹

These different views reflect a shift in thinking in terms of how justice is perceived. It has been noted that:

Justice is perceived as a much broader concept and the litigation system is more simply perceived as a part of this broader justice system. From this lens, judicial dispute adjudication is viewed as a smaller although critical dimension of the justice system that includes the far broader alternative dispute resolution (ADR) environment.¹²

As ‘justice’ resides outside as well as within courts, it might seem more reasonable to impose obligations and requirements upon those who are engaged in dispute resolution in this broader justice system (as one might, for example, impose limitations or obligations on litigants through case management, guidelines and rules within the litigation system). In this regard, some pre-litigation dispute resolution protocols have been designed to support processes within and outside courts and prevent the worst excesses of adversarialism by requiring early and transparent disclosure and thus limiting opportunities for a range of more adversarial tactics including for example, the once popular ‘trial by ambush’¹³ approach used by litigators.¹⁴

11 Tania Sourdin, ‘A Broader View of Justice’ in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis, 2012) (forthcoming).

12 Ibid. See also Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, 173–6, for a fuller discussion regarding the definition of justice.

13 See VLRC, above n 4, 139.

Within Australia, access to fair, cost-effective, early dispute resolution is an essential element of many government strategies,¹⁵ and how best to foster this and support effective dispute resolution and through this approach – better access to justice – is an ongoing area of policy development¹⁶ and reform.¹⁷

The discussion about where and how far the justice system stretches is also linked to the question about where and how the government supports dispute resolution processes and the extent to which it is appropriate to impose pre-action requirements on disputants. In recent years, there have been significant changes in terms of how broadly justice is defined within Australia.¹⁸ Recently, the Commonwealth attempted to explore how the broader justice system works.¹⁹ In deciding to adopt a much broader view of justice, it cited a number of theorists and noted that:

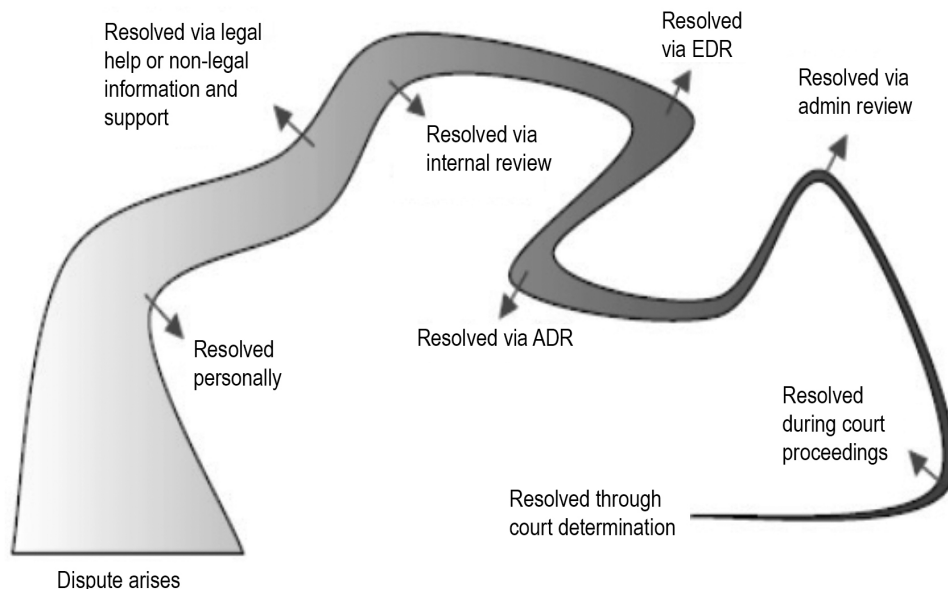
Just as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions. Ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.²⁰

The reformulation of the parameters of the justice system has implications for the design and support that the government provides to support access to justice

-
- 14 See, eg, Supreme Court of the Northern Territory, *Practice Direction No 6 of 2009 – Trial Civil Procedure Reforms*, 11 June 2009 ('*Practice Direction 6 of 2009*'), which supports the exchange of material about the dispute before proceedings commence. These requirements appear to have reduced the time taken to resolve matters in most cases and have had a positive impact on the time taken to finalise matters once they have entered the court system. Effectively this practice direction is used as a case management tool as well as a pre-action protocol. See Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1.
 - 15 Rob Hulls, *New Directions for the Victorian Justice System 2004–2014: Attorney General's Justice Statement May 2004* (Department of Justice (Vic), 2004) 13. The Attorney-General's Justice Statement 2 was published in October 2008. This set out that 'a series of initiatives would focus on expanding Appropriate Dispute Resolution (ADR) in Victoria so the community, business and industry have better options for resolving disputes quickly and cheaply': Sourdin, *Resolving Disputes without Courts*, above n 1, 53, citing Department of Justice (Vic), *Roadmap of Reform for Victoria's Justice System*, Premier of Victoria Archived Web Site (14 October 2008) <<http://archive.premier.vic.gov.au/component/content/article/5020.html>>.
 - 16 Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System: Report by the Access to Justice Taskforce* (Attorney-General's Department (Cth), 2009) ('*Access to Justice Taskforce Report*') <<http://www.ag.gov.au/Publications/Documents/Full-Report-of-the-Access-to-Justice-Taskforce.pdf>>.
 - 17 National Alternative Dispute Resolution Advisory Council ('NADRAC'), *The Resolve to Resolve – Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Commonwealth of Australia, 2009) 142–6 ('*NADRAC Report*').
 - 18 See Sourdin, 'A Broader View of Justice', above n 11.
 - 19 See the publications at Attorney-General's Department, *Access to Justice* (24 September 2011) <www.ag.gov.au/a2j>.
 - 20 Marc Galanter, 'Justice in Many Rooms' in Mauro Cappelletti (ed), *Access to Justice and the Welfare State* (Sijthoff and Noordhoff, 1981) 147, 161–2, quoted in Access to Justice Taskforce, above n 16, 3.

as well as how it might support processes in the pre-action area.²¹ In the 2009 report of the Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, ‘the system was mapped as a complex and somewhat winding pathway with few matters progressing to court proceedings’.²²

Figure 1: The relationship between the number of disputes and method of resolution employed²³



21 For a more complete discussion of ‘justice’ and the various configurations, see Sourdin, ‘A Broader View of Justice’, above n 11. This definition is also explored in some detail in the context of civil justice objectives and ‘procedural’ and ‘outcome’ justice in Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1. There is extensive material now available relating to procedural justice concepts as well as more limited material relating to the redefined concept of justice in response to an ‘emotional, non-rational, expressive trend in law and society [that] has emerged in contradiction to the formal, rational, administrative and routinized forms of law which came to be termed “technocratic justice”’: Arie Freiberg, ‘Affective versus Effective Justice’ (2001) 3 *Punishment and Society* 265, 266.

22 Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, 75, 173. See, eg, in relation to business disputes, Graeme Peacock, Preslav Bondjakov and Erk Okerstrom, *Dispute Resolution in Victoria: Small Business Survey 2007* (August 2007) Consumer Affairs Victoria <<http://www.consumer.vic.gov.au/library/publications/resources-and-education/research/dispute-resolution-in-victoria-small-business-survey-2007-report.pdf>>. In relation to individual disputes, see Graeme Peacock, Preslav Bondjakov and Erk Okerstrom, *Alternative Dispute Resolution in Victoria: Community Survey 2007* (4 June 2007) Consumer Affairs Victoria <<http://www.consumer.vic.gov.au/library/publications/resources-and-education/research/dispute-resolution-in-victoria-community-survey-2007.pdf>>. The approach taken by the Access to Justice Taskforce was based on a series of reports relating to dispute resolution behaviour.

23 Access to Justice Taskforce, above n 16, 4.

Another threshold issue in exploring the role of pre-action processes is linked to the role of ADR in our dispute resolution system and how ADR processes can relate to the conventional litigation system.²⁴ For example, it was once suggested that ADR processes should be kept quite separate and apart from litigation, as an option to be resorted to only with the agreement of the parties. It was also thought by a minority that the role of courts and tribunals within the litigation system should be limited to traditional adjudication processes only.²⁵

To some extent, this is not an issue now,²⁶ given the close integration of traditional and ADR systems within Australia. The Commonwealth Government has accepted that this close integration will continue. In the *Federal Civil Justice System Strategy Paper* that was released for discussion purposes in late 2003, a key recommendation was that 'Government ... continue[s] to take a leadership role in facilitating the coordination of the various elements of the federal civil justice system [including ADR] and takes a holistic approach to the system when undertaking policy development'.²⁷

In 2009, the *Access to Justice Taskforce Report*, the final Commonwealth Government report, noted that many litigants cannot afford either to commence court proceedings or continue with court proceedings.²⁸ '[R]esearch on the demographics of those using the higher civil court system suggests that many disputants will not access higher courts because the system is too complex, costly or confusing'.²⁹ The report's major recommendation was for the establishment of a strategic framework for access to justice underpinned by the principles of accessibility, appropriateness, equity, efficiency and effectiveness.³⁰ A key

24 This issue was raised by the ALRC in the context of their review of the federal civil justice system: ALRC, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000), [6.52]-[6.66].

25 See, eg, Owen M Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073; Margaret Harrison, 'Resolution of Disputes in Family Law: Should Courts Be Confined to Litigation?' (1997) 46 *Family Matters* 43. For more recent commentary on this role, see also Hazel Genn, 'What Is Civil Justice For? Reform, ADR, and Access to Justice' (2012) 24 *Yale Journal of Law and the Humanities* 397, 411, cited in Sourdin, above n 11. A former federal Attorney-General has suggested that one approach to the provision of ADR and counselling services that are related to the Family Court would be to:

have all or most Government funded non-judicial services in family law managed by one body, an agency within my department ... Such a body could over time come to be the central agency for the planning, contracting and management of all non-judicial family law services with overall responsibility for ensuring quality, location, and the mix of services available.

Daryl Williams, 'Family Law: Future Directions' (Speech delivered at the National Press Club, Canberra, 15 October 1996) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FLM930%22>>.

26 Compared to the situation in 1984 when Fiss considered that it was essential that separate systems be maintained. See Fiss, 'Against Settlement', above n 25.

27 Attorney-General's Department, *Federal Civil Justice System Strategy Paper* (December 2003) <<http://www.ag.gov.au/Documents/9%20FULL%20STRATEGY%20PAPER.pdf>>, quoted in NADRAC, *Federal Civil Justice Systems Strategy Paper Comments* (14 April 2004) <<http://www.nadrac.gov.au/publications/PublicationsByDate/Documents/FederalCivilJusticeSystemStrategyPapercomments.pdf>>.

28 Access to Justice Taskforce, above n 16, 17-18, 58.

29 Tania Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 37 *Monash University Law Review* 145, 148, citing Access to Justice Taskforce, above n 16, pt 1 ch 2.

30 Access to Justice Taskforce, above n 16, ch 5.

finding was that an increase in the early consideration and use of non-litigious dispute resolution has a significant capacity to improve access to justice.³¹

More recently, there has been increasing discussion about broad dispute resolution objectives and the role and relationship of ADR processes to the litigation system.³² Much of this discussion has also suggested that ADR is effective within and outside the litigation system. In addition, reports from the NSW Department of Attorney General and Justice,³³ the Commonwealth³⁴ and the VLRC³⁵ in adopting this broader view of justice have made policy recommendations to impose obligations on potential litigants to resolve disputes before commencing court proceedings, and this has resulted in the development of additional legislation and policy approaches in the ADR area.

Some of the impetus to support pre-filing or pre-action obligations has been related to the apparent success of these types of obligations in particular jurisdictions. For example, in discussing the processes used in terms of the family law arrangements, the Commonwealth taskforce noted that the processes used to resolve, settle or determine disputes in that area had changed in recent years. The report noted that:

Government intervention in a non-violent family dispute focuses initially on improved access to information, to filter some disputes and assist all, then mandate the use of informal mechanisms to resolve the most entrenched disputes (and those involving violence) for the courts.³⁶

These initiatives have resulted from the acceptance of a broader view of justice³⁷ (referred to previously) and support the notion that justice can be found outside courts as well as in the dispute resolution system (sometimes referred to as the 'informal' justice system). It has therefore been somewhat inevitable that questions have been posed about the role of the state and the individual in the justice system:

Whilst there is little argument that a modern democratic state must provide its citizens with access to dispute resolution processes and courts that are founded on

31 Access to Justice Taskforce, above n 16, ch 7.

32 See material relating to the 'Building an Evidence Base for the Civil Justice System' project, at Attorney-General's Department, *An Evidence Base for the Civil Justice System* <<http://www.ag.gov.au/Legalsystemandjustice/Pages/BuildinganEvidenceBasefortheCivilJusticeSystem.aspx>>.

33 Department of Attorney-General and Justice, *ADR Blueprint: Draft Recommendations Report 1: Pre-Action Protocols & Standards* (August 2009) NSW Courts and Tribunal Services <http://www.courts.lawlink.nsw.gov.au/agdbasev7wr/_assets/cats/m40265213/adr_blueprint_draft_recsl_preaction_protocols.pdf>.

34 Access to Justice Taskforce, above n 16.

35 VLRC, above n 4.

36 Access to Justice Taskforce, above n 16, 5.

37 See discussion in Sourdin, 'A Broader View of Justice', above n 11. Here the author argued that this broader view does not displace courts, as:

ADR will never supplant judicial determination in a civil justice system; however, it will remain a useful part of the civil justice system. To support justice, all components of the system must be considered and supported in a civil advanced society. The reality is that the relationship between the parts of the system that focus on dispute resolution are symbiotic – each is reliant on the other and each is required to support a just society.

Institutionalised justice is supported by informal justice, and informal justice requires institutions and impartial judicial determination.

the rule of law, is it also reasonable to expect that citizens should be obliged to attempt to resolve their civil disputes before accessing courts provided by the state?³⁸

IV ISSUES RELATING TO THE TIMING AND NATURE OF PRE-ACTION DISPUTE RESOLUTION REQUIREMENTS

The questions that are posed by this broader view of justice include questions about how the various aspects of the system are supported and whether or not self-resolution or what is sometimes referred to as preventative dispute resolution can be supported through government and court based initiatives. These questions are most often linked to issues around the timing of dispute resolution attempts and the view that earlier, and in some cases, pre-action settlement will result in cost and time savings. As the 2011 UK Report in relation to civil justice reforms noted:

Despite significant improvements following the Access to Justice reforms, it remains the case that there are too many claims being brought in to the legal system inappropriately. Once in the system they are being resolved too late, too expensively, with business in particular exposed to high and disproportionate costs.³⁹

In the same report, it was noted that:

Late settlement is something on which Lord Justice Jackson commented on in his Review of Civil Litigation Costs:

‘A number of cases, which ought to settle early, in fact settle late in the day. Occasionally these cases go to trial. The cause of such futile litigation is (a) the failure by one or both parties to get to grips with the issues in good time or (b) the failure of the parties to have any effective dialogue.’⁴⁰

The criticisms of the Woolf reforms⁴¹ that were directed at case management as well as ADR and pre action reforms included that ‘the lack of sanctions on those who failed to act reasonably in their pre-action negotiations’.⁴²

In the UK, the various views about pre-action requirements have been expressed and summarised in *The Government Response to the County Court Reform Proposal* released in February 2012. In that report, it is clear that lawyers and non-lawyers hold different views about the efficacy of pre-action protocols. For example:

38 Tania Sourdin, ‘Making an Attempt to Resolve Disputes before Using Courts: We All Have Obligations’ (2010) 21 *Australasian Dispute Resolution Journal* 225, 225.

39 Ministry of Justice (UK), *Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System – A Consultation on Reforming Civil Justice in England and Wales* (Stationery Office, 2011) 4.

40 Ibid 9, quoting Lord Rupert Jackson, *Review of Civil Litigation Costs: Final* (Stationery Office, 2010) 49 (‘*The Jackson Report*’).

41 The extensive reforms were proposed by Lord Woolf. See Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Her Majesty’s Stationery Office, 1996).

42 Ministry of Justice (UK), above n 39, 19.

Q16: Do you agree that mandatory pre-action directions should be developed? If not, please explain why.

82 This question was answered by 211 respondents, 129 (61%) of whom were in favour of the proposal, whilst 82 (39%) were against it.

In favour of mandatory pre-action directions

- 83 All insurers and the majority of mediation providers supported mandatory pre-action directions. The common view expressed by insurers was that mandatory pre-action directions would reduce legal costs, particularly if the directions were underpinned by a fixed costs regime. Many also suggested that mandatory directions would promote effective case management, discourage non-meritorious cases and provide an early focus on the issues between the parties. However, whilst being in favour in principle, some were concerned about the level of detail required to ensure all eventualities were accounted for and that this may be counter-productive. There were also concerns about compliance, with many insurers keen to see robust sanctions for those who fail to comply.
- 84 42% of the 112 legal representatives that responded were also in favour of this proposal. Many showed support for the current suite of pre-action protocols and considered that they could be strengthened to ensure compliance. A common reason for support amongst all categories of respondent was that mandatory pre-action directions would encourage early settlement.
- 85 Whilst almost all mediators who responded were in favour of the proposal, most included caveats, such as ensuring that the pre-action directions do not render the process disproportionate and that access to justice remains a right, not a privilege. One mediator suggested a pilot at a number of courts in order to test the benefits of such a prescribed process before it is rolled out more widely.⁴³

Within Australia, concerns about pre-action requirements appear to vary greatly. There are many Australian reports that have considered the use and introduction of pre-action obligations and protocols. This work has mostly been directly linked to the introduction of legislation dealing with these issues. For example, the *Civil Dispute Resolution Act 2011* (Cth) (*'CDR Act'*) that essentially requires disputants to file a 'genuine steps' statement setting out what attempts have been made to resolve their differences before commencing litigation in respect of a range of civil disputes was preceded by a number of reports and inquiries. This legislation was specifically considered by a Senate Subcommittee appointed to comment on the draft legislation⁴⁴ and was the subject of a number of submissions.⁴⁵ The final conclusions of the Senate Subcommittee were that:

43 Ministry of Justice (UK), *Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System – A Consultation on Reforming Civil Justice in England and Wales – The Government Response* (Stationery Office, 2012) 23–4.

44 See Parliament of Australia, above n 8.

45 Ibid. Submissions were made by Professor Tania Sourdin, the Federal Court of Australia, Human Rights Law Resource Centre, Public Interest Law Clearing House, Homeless Persons' Legal Clinic, Castan Centre for Human Rights Law, National Legal Aid, Law Council of Australia, Victorian Federation of Community Legal Centres, Insolvency Practitioners Association, NSW Department of Justice and Attorney General, NADRAC and the Attorney-General's Department.

- 3.59 The committee has carefully considered arguments that the Bill introduces mandatory pre-action protocol. The committee is satisfied that this is not the case. Rather, while it is obligatory to provide a genuine steps statement, the Bill provides flexibility to the parties to determine the steps that they wish to take to resolve their dispute and allows for circumstances when genuine steps cannot be undertaken. The Bill provides examples of genuine steps but does not mandate those that should be taken. This is the case with ADR: although witnesses focused on mandatory ADR, the Bill only provides ADR as an example of a genuine step, not a mandated step.
- 3.60 However, the committee believes that the Bill would benefit from the addition of an inclusive definition of 'genuine' to better reflect the intention of the NADRAC report and to provide guidance to the parties involved.⁴⁶

The requirements in the 'genuine steps statement' are modelled on the recommendations in the NADRAC Report.⁴⁷

The *CDR Act* states in section 4:

4 Genuine steps to resolve a dispute

- (1A) For the purposes of this Act, 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.
- (1) Examples of steps that could be taken by a person as part of taking genuine steps to resolve a dispute with another person, include the following:
- (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;
 - (b) responding appropriately to any such notification;
 - (c) providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;
 - (d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;
 - (e) if such a process is agreed to:
 - (i) agreeing on a particular person to facilitate the process; and
 - (ii) attending the process;
 - (f) if such a process is conducted but does not result in resolution of the dispute—considering a different process;
 - (g) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.
- (2) Subsection (1) does not limit the steps that may constitute taking genuine steps to resolve a dispute.

In NSW and Victoria, attempts that have been made to introduce similar requirements have been linked to law reform and review reports. The legislative attempts have been somewhat controversial and have generated significant

46 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Civil Dispute Resolution Bill 2010 [Provisions]* (2010) 26.

47 NADRAC, above n 17.

comment (see below). In NSW, legislative amendments made in 2010 were postponed and then implemented on a restricted basis. In announcing the postponement in 2011, the NSW Attorney-General noted the following:

[T]he reasonable steps provisions would be postponed by 18 months to enable NSW to monitor the success of similar provisions that commenced in Federal courts on August 1 [2011]. ... The NSW Government will ultimately make informed decisions about the future of Part 2A, using all of the available evidence ...

Compliance with pre-trial obligations should reduce, not add to, the cost of resolving disputes. The purpose of this postponement is to ensure this is the case.⁴⁸

In September 2012, the provisions were reintroduced but with a more limited application (they are now intended to apply to NSW Local and District Court civil matters (subject to defined exceptions) and Supreme Court matters are expressly excluded from the provisions).⁴⁹

In Victoria, there was also an attempt to introduce a 'reasonable steps' obligation in 2010 as part of a much broader scheme of overarching obligations to bind courts, lawyers and litigants to a more 'reasonable' standard of behaviour. The section of the *Civil Procedure Act 2010* (Vic) dealing with pre-litigation requirements was repealed in 2011 following a change of government, although the changes that were made mean that courts can still make rules relating to pre-litigation requirements. The Victorian proposal emerged after consideration of the VLRC report⁵⁰ that focused on civil justice reform. The report provided a comprehensive overview of the litigation system in Victoria and made a series of recommendations. The report considered the aims of the civil justice system and the principles that should guide the rules of civil procedure, summarised factors influencing the justice system and assessed the performance of the civil justice system using empirical data and feedback. It suggested that many litigants in the higher courts are dissatisfied as a result of delay, inefficiency and disproportionate legal costs.⁵¹ The report made specific recommendations for reform, including increasing the use of ADR.⁵² Proposals for the provision of an increased array of ADR processes, more effective industry specific ADR schemes and additional provisions for mandatory referral to ADR were a prominent feature of the report.⁵³ The report also suggested that there is a need for ongoing civil justice review as well as other reform proposals.

48 Greg Smith, Attorney-General (NSW), 'NSW Government to Postpone Pre-Litigation Reform' (Media Release, 23 August 2011) <[http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/230811_litigation_reforms.pdf/\\$file/230811_litigation_reforms.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/230811_litigation_reforms.pdf/$file/230811_litigation_reforms.pdf)>.

49 See the *Civil Procedure Regulation 2012* (NSW). Clause 16 excludes Supreme Court proceedings from the pre-litigation requirements.

50 VLRC, above n 4.

51 Ibid 10.

52 Ibid 11.

53 Ibid.

The Commonwealth response to these issues was informed by a more specific ADR focus⁵⁴ and a consideration of the extensive pre-existing litigation reforms already present at the Commonwealth level (mainly in the family sector). The NSW approach considered each of these responses, and their approach in supporting pre-action obligations emerged after a detailed discussion and consultation process.⁵⁵

To some extent, the response in each area has been informed by the work of NADRAC as well as regulatory changes in the ADR sector.⁵⁶ NADRAC reports have specifically considered the use of pre-action protocols and have reviewed and considered concerns that, although such protocols would reduce the number of disputes progressing into the litigation system, they could also potentially lead to the front loading of work and legal costs.⁵⁷

Pre-action obligations were considered, to a limited extent in terms of their use as an alternative to traditional discovery procedures, in the ALRC's *Discovery Report*.⁵⁸ The advantages and disadvantages of pre-action protocols are summarised in the *Discovery Report* as follows:⁵⁹

- 5.5 In jurisdictions where they have been implemented, pre-action protocols have been met with some criticism. However, their potential to promote access to justice, efficiency, and promote cultural change has also gained currency.⁶⁰

Advantages of pre-action protocols

- 5.6 In many instances pre-action protocols place obligations on parties to disclose relevant information and documents with the aim of facilitating settlement. Where no settlement is reached, the procedures aim to narrow the issues in dispute between the parties in a manner that expedites the trial process.⁶¹ In principle, this should aid in reducing the need for, and cost of, any subsequent discovery of documents.
- 5.7 Moreover, the simplification and standardisation of the claims process may offer consistency for litigants, and help to promote a culture of cooperation and settlement of cases at an earlier stage. Paula Gerber and Bevan Mailman note in relation to pre-action protocols in construction disputes that:

54 This more specific focus was related to the *NADRAC Report* coupled with the *Access to Justice Taskforce Report*: see NADRAC, above n 17, 142–6.

55 Department of Attorney General and Justice, above n 33.

56 These changes include the adoption of self and industry-regulated mediation accreditation under the National Mediator Accreditation System that has operated from 1 January 2008.

57 The extent to which 'frontloading' takes place will vary depending on the requirements. See Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, 165.

58 ALRC, above n 4.

59 Ibid 160–2.

60 See, eg, Robin Byron, 'An Update on Dispute Resolution in England and Wales: Evolution or Revolution?' (2001) 75 *Tulane Law Review* 1297, 1311.

61 VLRC, above n 4, 109.

Pre-action protocols represent a philosophical shift in the way litigation is commenced and conducted ... towards a full consideration of alternative means of resolving differences. Pre-action protocols do this by forcing parties to fully investigate the merits of their claims and defences as a condition precedent to filing a law suit.⁶²

- 5.8 Many pre-action protocols also play an important role in encouraging parties to pursue ADR. Where ADR is successful, it results in cost savings to both individuals, and to the public in terms of reduced burden on the courts. Alternatively, it has been argued that proper pre-action protocols should reduce the need for ADR.⁶³

Disadvantages of pre-action protocols

- 5.9 A major concern with pre-action protocols relates to ‘front-loading’ of costs by requiring parties to spend more resources at an early stage of the process. For example, in complex cases where the parties are unlikely to reach early settlement, imposing onerous pre-action requirements may do no more than add to delay and costs for both parties in complying with the pre-action protocols.⁶⁴
- 5.10 Pre-action protocols also raise a number of access to justice issues, especially for individual litigants. For example, individuals may not necessarily have the monetary resources to comply with relevant protocols, or may be pressured into settlement for fear of having adverse cost orders made against them for non-compliance with the protocols.⁶⁵
- 5.11 Additionally, pre-action protocols may open up a battlefield for ‘satellite litigation’, by way of interlocutory applications as to whether a party has or has not complied with the relevant protocol.⁶⁶ This becomes more likely if parties risk adverse cost orders for not complying with the protocol, and has an obvious impact for courts and the judiciary, as well as adding to delay and the cost of litigation.⁶⁷
- 5.12 Finally, some have argued that pre-action protocols may be challenged on human rights grounds, if their effect is to impede an individual’s right of access to the courts.⁶⁸

There are many other reports that are relevant, including law reform reports (referred to above) as well as reports directed more at dispute resolution arrangements.⁶⁹ One of the most significant reports and studies has been undertaken in family dispute resolution and suggests that pre-action obligations can prompt early resolution and divert cases from the litigation system.⁷⁰

62 Paula Gerber and Bevan Mailman, ‘Construction Litigation: Can We Do It Better?’ (2005) 31 *Monash University Law Review* 237, 238.

63 Sir Igor Judge, ‘The Woolf Reforms After Nine Years: Is Civil Litigation in the High Court Quicker and Cheaper?’ (Speech to the Anglo-Australian Lawyers Society, Sydney, 16 August 2007).

64 See Legg and Boniface, above n 4, 50.

65 See, eg, VLRC, above n 4, 140–1, where a number of submissions are summarised which make this point.

66 Legg and Boniface, above n 4, 55; NADRAC, above n 17, 31.

67 See, eg, NADRAC, above n 17, 31.

68 VLRC, above n 4, 161–3.

69 See Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1.

70 In the family area see Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009). In the non-family context see Sourdin, *Resolving Disputes without Courts*, above n 1; Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1.

The most recent Australian Report on this issue by the ACJI and the Australian Institute of Judicial Administration ('AIJA') has found that pre-action requirements within Australia vary greatly in terms of their form and impact.⁷¹ For example, the *CDR Act* encourages parties to file a 'genuine steps' statement but does not impose a requirement to attend an ADR processes.⁷² Other pre-action requirements have resulted in the creation of obligations to take steps, and attempt to settle proceedings. At the other end of the spectrum, pre-action requirements have created schemes where mandatory mediation or other forms of dispute settlement are required.

Some pre-action arrangements have originated in industry, some have been fostered by government (such as the extensive EDR requirements), others have been fostered by courts, the profession and the ADR field.

In some arrangements lawyers are present, in others they are not and in some situations a blended model operates where schemes provide 'information' and offer some educational support (as in the industry based EDR schemes). In some schemes, an ADR practitioner is appointed in others there is no assumption that there will be an ADR process. The qualifications and competence of ADR practitioners may vary and some schemes have extensive public reporting and scheme evaluation requirements (for example the EDR schemes) and others do not have any reporting requirements.

These differences mean that it is difficult to draw any general conclusions about whether pre-action requirements are reasonable although it is possible to note factors that can suggest some arrangements can be more effective and 'reasonable' than others.⁷³ There is evidence that the some types of requirements have led to time and cost savings particularly when linked to schemes. It is difficult to assess fairness and access to justice in respect of the more minimalist model used in relation to the *CDR Act*, however, case studies of the more elaborate arrangements fostered in schemes and through court linked arrangements suggest that justice objectives can also be supported by these types of arrangements.⁷⁴

In contrast, in the UK, the views of those opposed to the extension of pre-action protocols (which differ in many ways from the *CDR Act* arrangements as they include specific requirements) were summarised in the Government Response Report as follows:

Against mandatory pre-action directions

Respondents who were against the introduction of mandatory pre-action directions included all of the judiciary and the majority of the legal profession. In addition, five out of the seven financial institutions who responded were against the proposal. Their concern was that for money claims, admission of liability is often not the issue; it is the debtor's ability or willingness to pay. Therefore court action

71 Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1.

72 Jeremy Gormly, *Resolving Disputes without Courts Commentary from NADRAC* (6 July 2012) Civil Justice Research Online
<<http://www.civiljustice.info/cgi/viewcontent.cgi?article=1006&context=access>>.

73 Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, 201.

74 Ibid 201–2.

is usually used as a means of enforcing the debt. One respondent pointed out that where the debt is regulated by the Consumer Credit Act, there is a standard pre-action process which companies must follow.

A common view amongst all those against the proposal is that mandatory pre-action directions would place undue burdens on parties, particularly claimants, and this would introduce delay and increase upfront costs. Many were concerned that enforced mediation/ADR, particularly in debt cases where the debtor refused to pay, was inappropriate.

Many respondents, including members of the judiciary, were of the view that the existing pre-action protocols go far enough, but recognised that these could be strengthened, particularly around sanctions for non-compliance. The judiciary in particular said that cases should be managed by the court, with tailored case-specific directions and referral by a judge to mediation/ADR only where appropriate.⁷⁵

These views suggest a concern relating to the application of protocols to debt recovery cases and also the view of the surveyed judiciary that courts need to supervise dispute resolution arrangements.

The Australian Senate Subcommittee Report⁷⁶ summarised many of these views (after considering the submissions), and as noted in the author's ACJI Background Paper⁷⁷ and ACJI Final Report⁷⁸ on this topic, it seems that the concerns can be grouped into four areas:

1. That pre-action requirements could increase the time and cost involved in dispute resolution – particularly if lawyers behave inappropriately and such costs may not be recoverable.
2. Satellite litigation may result from the obligations as they are interpreted by courts.
3. The role of the courts may be adversely impacted or disputants may resolve matters that should be litigated or may resolve matters without the benefit of information. This is sometimes linked to the view that courts should play a central role in dispute resolution and in supervising dispute resolution.
4. Lawyers and clients are already aware of ADR and use it before commencing litigation so there is no need to introduce additional requirements or obligations.⁷⁹

In contrast to these views (where concerns have been expressed about the extensive nature of pre-litigation obligations), other commentators suggest that they do not go far enough. These commentators suggest that pre-litigation mediation, not just protocols or obligations, should be mandatory in a wider class of disputes in order to:

remove the ability to go straight to litigation ... force parties to sit down together in a mediation context and confront their case, their witnesses, their lawyers and their claims at a stage in the dispute where strong business decisions can be made.⁸⁰

75 Ministry of Justice (UK), above n 39, 12.

76 See Parliament of Australia, above n 8.

77 See Sourdin, *Resolving Disputes without Courts*, above n 1.

78 See Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1.

79 Ibid 70–1.

80 Michael Redfern, *The Elephant in the Room – Should Pre-Litigation Mediation Be Mandatory?* (8 September 2011) LEADR Association of Dispute Resolvers
<<http://www.leadr.com.au/kongres2011/papers-ppts/michael-redfern>>.

V UK APPROACHES: THE JACKSON REPORT

‘The *Jackson Report* focused on the increasing cost of civil litigation within the UK, which was found to act as a significant impediment to access to justice.’⁸¹ As is made clear in the *Jackson Report* and discussed in Australian reports,⁸² the attempt to use pre-action protocols across a range of areas and jurisdictions in England and Wales may have led to the ‘front loading’ of costs in some areas. Therefore, while these UK protocols may have reduced the time taken to resolve disputes, they may have increased the average cost of settlement in some areas. Lord Jackson found that ‘there was a high degree of unanimity that the specific [pre-action] protocols serve a useful purpose.’⁸³

Lord Jackson noted in a summary of the report that:

- 6.1 Pre-action protocols ... There are ten pre-action protocols for specific types of litigation. By-and-large they perform a useful function, by encouraging the early settlement of disputes, which thereby leads (in such cases) to the costs of litigation being avoided. I recommend that these specific protocols be retained, albeit with certain amendments to improve their operation (and to keep pre-action costs proportionate).
- 6.2 On the other hand, the Practice Direction – Pre-Action Conduct, which was introduced in 2009 as a general practice direction for all types of litigation, is unsuitable as it adopts a ‘one size fits all’ approach, often leading to pre-action costs being incurred unnecessarily (and wastefully). I recommend that substantial parts of this practice direction be repealed. Were this to occur, however, it would not give carte blanche to claimants to whom no specific protocol applied to act unreasonably, eg, by commencing proceedings with no prior warning to the defendant of the claim or the nature of the claim. Cost sanctions will apply to curb unreasonable behaviour.
- 6.3 Alternative dispute resolution. Alternative dispute resolution (‘ADR’) (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be.⁸⁴

It was also noted that earlier use of ADR in the UK could decrease pre-action costs.⁸⁵ The *Jackson Report* was focused on costs – not just pre-action protocols. As summarised by the Judicial Communications Office in their 2010 news release, the key findings of the *Jackson Report* in relation to costs (and making reference to the Chapter headings in the *Jackson Report*) are as follows:

- Proportionality – the costs system should be based on legal expenses that reflect the nature/complexity of the case (Chapter 3);
- Success fees and after the event insurance premiums should be irrecoverable in no win, no fee cases (CFAs – Conditional Fee Agreements), as these are the greatest contributors to disproportionate costs (Chapters 9 & 10); to offset the claimants having to pay for success fees and conditional fee agreements from

81 See Sourdin, *Resolving Disputes without Courts*, above n 1, 167.

82 Jackson, above n 40. See ALRC, above n 4, ch 5 [5.25] for a review of the issue of front loading of costs.

83 Jackson, above n 40, 345.

84 Ibid xxii.

85 Ibid xxii. Concerns about costs have been explored in the context of pre-action requirements in Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1.

their damages, general damages awards for personal injuries and other civil wrongs should be increased by 10% (Chapter 10);

- Referral fees should be scrapped – these are fees paid by lawyers to organisations that ‘sell’ damages claims but offer no real value to the litigation process (Chapter 20);
- Qualified ‘one way costs shifting’ – claimants will only make a small contribution to defendant costs if a claim is unsuccessful (as long as they have behaved reasonably), removing the need for after the event insurance (Chapters 9 & 19);
- Fixed costs to be set for ‘fast track’ cases (those with a claim up to £25,000) to provide certainty of legal costs (Chapter 16);
- Establishing a Costs Council to review fixed costs and lawyers’ hourly rates annually, to ensure that they are fair to both lawyers and clients (Chapter 6);
- Allowing lawyers to enter into Contingency Fee Agreements, where lawyers are only paid if a claim is successful, normally receiving a percentage of actual damages won (Chapter 12); and
- Promotion of ‘before the event’ legal insurance, encouraging people to take out legal expenses insurance as, for example, a part of household insurance (Chapter 8).⁸⁶

The findings and recommendations in relation to costs are important because the *Jackson Report* suggests that, without appropriate cost rules and principles, pre-action protocols may not work as effectively as is possible.

As identified above, soon after their introduction in England and Wales, the use of pre-action protocols were subject to criticism for ‘front loading’ the costs for litigation – and it was claimed that, in some instances, they led to an increase in the total cost of settlement and litigious actions. It was noted in the ALRC’s *Discovery Report* that one cross-section and time-series data study concluded that ‘it seems overall case costs have increased substantially over pre-2000 costs for cases of comparable value, with the Woolf reforms being one possible explanation.’⁸⁷

This accords with some views that pre-action protocols in the UK ‘provided quicker, although not necessarily cheaper, justice and sensible, effective case handling’.⁸⁸ Dingwall and Cloatre⁸⁹ noted a further potential issue with the use of pre-action protocols, namely that by encouraging parties to resolve their disputes out of court, the creation of precedent and case law may be undermined by insufficient litigation, which may create difficulties in settlement negotiation, due to a lack of precedent to define bargaining power (which necessarily operates in the ‘shadow of the law’). This echoes concerns expressed more than two decades

86 Judicial Communications Office (UK), *Jackson Review Calls for a Package of Reforms to Rein in the Costs of Civil Justice* (News Release, 14 January 2010) Judiciary of England and Wales <<http://www.judiciary.gov.uk/media/media-releases/2010/media-release0210>>.

87 P Fenn, N Rickman and D Vancappa, ‘The Unintended Consequences of Reforming Civil Procedure: Evidence from the Woolf Reforms in England and Wales’ (Paper presented at 26th Annual Conference of European Association of Law and Economics, Università Luiss Guido Carli, 19–17 September 2009) 28, as cited in ALRC, above n 4, [5.25].

88 Byron, above n 60, 1312, cited in ALRC, above n 4, [11.29].

89 Robert Dingwall and Emilie Cloatre, ‘Vanishing Trials: An English Perspective’ (2006) *Journal of Dispute Resolution* 51.

ago by a small number of theorists who considered that the settlement of disputes and the use of dispute resolution processes other than court-based trial could weaken the foundations of judicial and social systems.⁹⁰

In February 2012, the UK Government responded to the March 2011 Consultation paper,⁹¹ which was on civil justice. The response notes that the aim of the civil justice reform in England and Wales is that:

the system helps people to resolve their problems quickly, efficiently and cost-effectively ... a system that prevents the unnecessary escalation of disputes before cases reach the court room; where courts offer quicker and more efficient services where they are needed;⁹² where judgments can be enforced fairly; and where costs are borne in a fair way.⁹³

The Government's concern was that:

too often disputes get bogged down in the legal system that could have been resolved outside it. Once in the system, cases are resolved too late, too expensively, with complex procedures and an adversarial climate imposing costs that sometimes dwarf the value of the contested claim.⁹³

In February 2012, the UK Government indicated that it would extend and further support pre-action protocols in the family law area.⁹⁴

VI WHAT IS REASONABLE BEHAVIOUR IN THE CONTEXT OF PRE-ACTION OBLIGATIONS?

The UK material suggests that much of the criticism in respect of pre-action obligations is related to the failure of lawyers and disputants to act 'reasonably' or 'proportionately'. Pre-action schemes that impose obligations to act in 'good faith' or create a scheme structure may support more reasonable behavior.⁹⁵ However, some lawyers consider that pre-action protocols are undesirable for other reasons.

For example, Australian lawyers Kamar and Walsh from Maurice Blackman set out their concerns about pre-litigation obligations, which, in their view, could mean that:

90 See Fiss, above n 25. The impact on the justice system and the court system is explored in Sourdin, 'A Broader View of Justice', above n 11.

91 Ministry of Justice (UK), above n 39.

92 Ministry of Justice (UK), above n 43. See also Ministry of Justice, 'Clarke: New Measures for "Less Daunting" Justice' (2 March 2012) <<http://www.justice.gov.uk/news/features/feature090212a>>.

93 Ministry of Justice (UK), above n 43, 3.

94 See Ministry of Justice and Department for Education (UK), *The Government Response to the Family Justice Review: A System With Children and Families at Its Heart* (February 2012) Department for Education (UK) <<https://www.education.gov.uk/publications/eOrderingDownload/CM-8273.pdf>>.

95 See Tania Sourdin, 'Good Faith, Bad Faith? Making an Effort in Dispute Resolution' (2012) (forthcoming) *Dictum – Victoria Law School Journal*.

- parties bear their own costs of pre-litigation steps
- it can be difficult to recover costs for complying with the process
- the costs of disputes may be increased and further delays created.⁹⁶

Kambar and Walsh suggested that the recent Australian civil pre-action requirements require only 'reasonable' or 'genuine' attempts at settlement and are concerned by the lack of structured timescales that they argue may lead to delay, adding the time for pre-action steps to the current delay created in issuing proceedings. They pointed to the Victorian repeal of legislation as demonstrating the:

impracticability of formalizing informal early dispute resolution processes that are already widespread in the legal community.⁹⁷

In a similar vein, some commentators consider that pre-action requirements may be impractical, or may not work, or increase disputant time and cost if lawyers do not engage with them appropriately. For example, the Chief Justice of NSW recently noted that:

The mistakes that are made in referring the wrong cases to alternative dispute resolution or entering alternative dispute resolution at the wrong time are largely a product of this being a relatively new form of dispute resolution and one that was not taught to the vast majority of practitioners as a major part of their legal education.⁹⁸

His Honour equates the 'genuine steps' requirements with mandatory mediation and states that:

I have serious reservations about any legislation requiring parties to take 'genuine steps' to resolve a dispute before commencing litigation, as they are required to do under the Commonwealth's *Civil Dispute Resolution Act 2011* before commencing proceedings ... At the most basic level, I do not believe that such legislation is necessary. Given the expansion of alternative dispute resolution services, and the extent to which parties and lawyers now consider alternative dispute resolution methods as their primary means of dispute resolution, I think it is difficult to accept that parties would not be aware of ADR or would be discouraged from using it were it to remain optional.

More fundamentally, I believe that forcing parties to alternative dispute resolution will undermine the justice system's goals of justice and fairness. In more complex cases, it is not unusual for parties to lack a clear understanding of the strength and merits of both their own case and the opponent's case. In circumstances where parties do not yet possess sufficient information to make a rational determination about whether to compromise proceedings, compulsory mediation is likely to either fail or to produce results that do not accurately reflect the legal position of the parties. ...

96 This has been previously canvassed in Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, 130–1

97 Ibid.

98 Chief Justice Tom F Bathurst, 'Dispute Resolution in the Next 40 Years: Repertoire or Revolution', (Speech to the UNSW Law 40th Anniversary Conference, Sydney, 1 December 2011) 8 <[http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst011211.pdf/\\$file/Bathurst011211.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst011211.pdf/$file/Bathurst011211.pdf)>.

Moreover, compulsory pre-trial mediation may paradoxically result in the courts being burdened by satellite litigation in which the court investigates what occurred or should have occurred during mediation before being able to determine the merits of each party's case.⁹⁹

Clearly, some of the concerns expressed by the legal profession and in the UK reports about pre-action requirements are that some lawyers or disputants may act inappropriately or inflate costs. It is partly for this reason that the Senate Subcommittee considered the wording of the pre-action requirements carefully (in particular, whether or not they should import a reasonable, genuine or sincere standard of conduct). It is also for this reason that 'good faith' is required of participants in some schemes and the notion of proportionality of actions has been considered.¹⁰⁰

Another question, therefore, is whether or not additional or clearer conduct requirements can help support pre-action obligations. In this regard, 'good faith' now features as the most widely used standard of conduct prescribed by federal and state/territory legislation for those involved in ADR processes. However, as noted in the 2009 *NADRAC Report*, while several federal and state laws impose 'good faith' obligations on participants in ADR processes, there is limited legislative guidance on the meaning of the phrase in the ADR context.¹⁰¹ Clearly, however, a critical issue in any analysis of 'good faith' is how it can be determined that someone has acted in bad faith in ADR processes that are intended to be confidential and where evidence of what has transpired in an ADR process would not otherwise be admissible in court proceedings.¹⁰² These issues of confidentiality, admissibility and practitioner obligations are also closely related to this topic and require separate consideration.¹⁰³

VII JUDICIAL EXPLORATION OF 'REASONABLENESS' IN THE CONTEXT OF PRE-ACTION REQUIREMENTS

There are many judicial determinations that have dealt with pre-action requirements and in particular mandatory pre-action contractual requirements to use mediation or arbitration. On the whole, particularly in recent years, courts have tended to uphold these types of requirements. However, it is only relatively recently that courts have begun to explore more fully what standard of conduct is imposed or imported if a 'genuine' or 'reasonable' effort is required in the pre-action setting. It seems likely that, as with the (now) long line of cases dealing with the definition of good faith in the context of mandatory ADR, there is likely

99 Ibid.

100 See Legg and Boniface, above n 4, 55; NADRAC, above n 17, 31.

101 NADRAC, above n 17, 142–6.

102 See discussion in Sourdin, 'Good Faith, Bad Faith?', above n 95.

103 See Sourdin, *Alternative Dispute Resolution*, above n 1, ch 12, which explores the impact of changing obligations on confidentiality.

to be some initial uncertainty about what constitutes reasonable behaviour (or the lack of it).

In this regard, initially, court cases focused on contract clauses that required parties to an agreement to negotiate in ‘good faith,’ engage in ADR in ‘good faith’ or do both if a dispute arose. Uncertainty regarding dispute resolution clauses and the meaning of good faith was the subject of comment in *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*¹⁰⁴ and *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd*.¹⁰⁵ What constitutes good faith was also explored in *Aiton Australia Pty Ltd v Transfield Pty Ltd*.¹⁰⁶ These cases suggested that a lack of clarity may exist regarding the elements¹⁰⁷ and definition of good faith. However, over the past decade, courts have increasingly enforced obligations that incorporate a good faith requirement.¹⁰⁸ In terms of how good faith is defined, as many commentators have noted, it is likely to be defined by a lack of good faith – that is the presence of bad faith.

It seems likely that reasonable behavior or genuine behavior will be explored in a similar way, that is, by reference to what is unreasonable or not genuine behaviour. So far there is limited case law regarding the meaning of ‘genuineness’ or essentially what is reasonable within the newer obligations framework, although there is evidence that this is likely to emerge as an increasingly popular argument in some litigation – that is, it is likely that it will be argued that a litigant should be sanctioned or penalised for their failure to act reasonably or take genuine steps.¹⁰⁹

The limited case law to date suggests that the standard of behaviour will be set by reference to a lack of any pre-litigation contact. For example, in *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys*,¹¹⁰ no genuine steps statement was filed by the applicant or respondent as required by sections 6 and 7 of the *CDR Act*. The lawyers had made no efforts to resolve the dispute, no discussion had occurred between the lawyers to resolve the dispute (prior to adjournment for that purpose), or to limit client and Court resources being wasted, in accordance with the objects of the *CDR Act*, principles of proportionality and the ethical obligations of lawyers.¹¹¹

Justice Reeves held that the lawyers’ management of the dispute was:

the absolute antithesis of the overarching purpose of civil practice and procedure set out in section 37M of the *FCA Act*, viz the just resolution of disputes according

104 (1995) 36 NSWLR 709.

105 (1992) 28 NSWLR 194.

106 (1999) 153 FLR 236.

107 See David Spencer, ‘Defining an Operational Standard of Good Faith Negotiation in the Performance of a Contract’ (Paper presented at the Australasian Law Teachers Association Conference, University of the South Pacific, Port Vila, Vanuatu, 2 July 2001).

108 See Sourdin, ‘Good Faith, Bad Faith?’, above n 95.

109 See, eg, ABC Radio National, ‘Slipper Case before Court Today’, *AM*, 18 May 2012 (Naomi Woodley) <<http://www.abc.net.au/am/content/2012/s3505469.htm>>.

110 [2012] FCA 282 (‘*Superior IP*’).

111 For a more extensive discussion relating to lawyers ethical requirements see Sourdin, ‘Good Faith, Bad Faith?’, above n 95. See also Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, 54.

to law and as quickly, inexpensively and efficiently as possible. It is not overstating the matter to observe that this is the sort of conduct that brings the legal profession into disrepute, that significantly undermines the efficient disposal of civil litigation and that has the potential to erode public confidence in the administration of justice in this country.¹¹²

In *Superior IP*, the total legal and filing fees involved approached twice the amount of the statutory demand in dispute, with affidavit evidence in excess of 400 pages. A usual order for costs for the successful party in the matter was not made and the hearing on the issue of costs adjourned for submissions. Justice Reeves ordered that the lawyers be joined as parties and that the original parties to the proceedings obtain independent legal advice on the issue of costs. This approach by Reeves J suggests that the court is aware that it is not just litigant behaviour, but also lawyer behaviour, that might be moderated or influenced by the new pre-action obligations.¹¹³ Whilst a final decision regarding the costs issue raised concerns about the applicability of pre-action requirements in the statutory demand area, it seems likely that courts will continue to consider both litigant and representative behaviour in the context of expectations relating to pre-action behaviour.¹¹⁴

In a recent case dealing with the Northern Territory Supreme Court requirements there was consideration given to the nature of the requirements, the standard of conduct required and that the pre-action requirements in that area. In *Spadaccini v Grice*,¹¹⁵ Barr J indicated that the court was prepared to exercise its powers to make adverse costs orders for non-compliance with *Practice Direction 6 of 2009*. In that case, the plaintiffs succeeded in obtaining the declaratory relief and mandatory injunction that they sought. Notwithstanding their apparent success, Barr J ruled that the plaintiffs had failed to adequately comply with *Practice Direction 6 of 2009* by refusing to provide the defendant with evidence to support the plaintiffs' damages claim and unreasonably continuing to refuse mediation. Therefore, he deprived the plaintiffs of some of their costs and ordered that they pay a portion of the defendant's costs.¹¹⁶

VIII CONCLUSION

Issues about whether or not it is appropriate to require litigants and their lawyers to act reasonably and attempt to resolve disputes before commencing

112 *Superior IP* [2012] FCA 282 [9].

113 It seems likely that proportionality will also be considered. See Legg and Boniface, above n 4, 55; NADRAC, above n 17, 31. See also Sourdin, *Resolving Disputes outside Courts Final Report*, above n 1, 155.

114 *Superior IP International Pty Ltd v Ahearn Fox Patent and Trade Mark Attorneys (No 2)* [2012] FCA 977.

115 *Spadaccini v Grice* [2012] NTSC 41. For a closer analysis of *Spadaccini v Grice*, see Cameron Ford, 'Case Note: Spirit of Civil Procedure Reforms Bites' (2012) 2 *Northern Territory Law Journal* 277.

116 *Spadaccini v Grice* [2012] NTSC 41, 45–6 [90].

legal proceedings are now the subject of significant scrutiny.¹¹⁷ While such obligations have been present for decades and have required many to attend mandatory forms of ADR in the pre-litigation environment, the extension of these obligations to a much broader class of civil disputes has caused significant concern among lawyers and judges. One other considerable difference in terms of these types of arrangements is that past requirements tended to be supported by 'schemes' or administrative infrastructure.

The schemes that support pre-action requirements can either be independent from government or may be funded or set up by government. They can be large with significant infrastructure as in the family, workers compensation, personal injury, motor accident, finance and banking (consumer) areas or they can be smaller as in some retail tenancy, franchise, farm debt legal practitioner/client dispute schemes. While some schemes are focused on consumers, other schemes apply to 'members' or those who have 'opted in' and still others are focused on the general public.¹¹⁸

The characteristics of the schemes vary in terms of how long they have been in operation, their mode of administration, and the goals and motivations behind their introduction. Further, the legislative or regulatory environment under which they may operate can require different pre-litigation reporting standards, notice periods and cost arrangements.¹¹⁹

More recently introduced pre-action requirements may not be linked to a scheme at all. Some arrangements or requirements operate as a result of a contractual agreement to use a dispute resolution process prior to commencing litigation or as a result of legislative or court or tribunal requirements. For example, at the federal level, the *CDR Act* requires that would-be litigants in many matters file a 'genuine steps' statement and there is no need for an application to be made to use a dispute resolution process outside the court system that is associated with a scheme, dispute resolution unit or some other entity. Essentially, these types of arrangements are interpreted and explored by litigants and legal practitioners and import a 'do it yourself' approach. They are 'court linked' in that they require the filing of some documentation with a court or tribunal if litigation is to be commenced.¹²⁰ Some court-linked arrangements will be more closely supervised by courts and tribunals than others. For example, the Northern Territory Supreme Court protocol requires that civil litigants will report in court at an early stage about how they have complied with the *Practice Direction 6 of 2009*.

Clearly, the operation of pre-action requirements can be closely linked to existing court or tribunal processes by legislation that requires documentation about compliance or exemption to be filed or they may be relatively independent. Other requirements can arise through industry protocols, ethical requirements and

117 See Sourdin, *Resolving Disputes Outside Courts Final Report*, above n 1. The Commonwealth Attorney Generals Department has also indicated that it will review the operation of the *CDR Act*.

118 See Sourdin, *Resolving Disputes Outside Courts Final Report*, above n 1, 54.

119 Ibid 59.

120 Ibid 54.

legal services directions or model litigant requirements may require certain classes or government litigants to consider engaging in ADR or may require certain types of conduct in ADR.

For many, these types of requirements are ‘reasonable’ if they work effectively and they do so within an appropriate time and at an appropriate cost. They are also ‘reasonable’ if they don’t disadvantage vulnerable disputants or prevent access to the court system when it is needed. For some, concerns about pre-action requirements stem from uncertainty about what the newer obligations may mean or how they will be interpreted by courts. For others, there is a concern that the lack of a framework, ‘scheme’ or perhaps tighter obligations may limit their effectiveness. Ongoing research will doubtless assist to explore the effectiveness of these types of arrangements and assist to inform the development of effective supporting mechanisms as well as the formulation of standards in this area into the future. In addition, the interpretation of the existing legislative arrangements by courts will also impact upon their future effectiveness and scope and the articulation of what constitutes ‘reasonable’ behavior within the negotiation and dispute resolution processes conducted in this broad justice system.