

## A. TYPES OF CASES THAT SHOULD BE EXCLUDED FROM PRE ACTION PROTOCOL

Type of case	Reasons why pre action protocol not appropriate
<b>Administrative Law</b>	Review of an administrative decision which applicant wants overturned <sup>1</sup> .
<b>Admiralty</b>	<ul style="list-style-type: none"> <li>Action in rem – more often than not neither the operator nor the charterer in Australia.</li> <li>Cargo claims – insurer and reinsurer unknown, usually offshore and in multiple jurisdictions.</li> </ul>
<b>Bankruptcy</b>	Sequestration orders – nearly always based on failure to comply with a bankruptcy notice which is based on a dispute dealt with by another court resulting in a judgment debt in favour of the applicant.
<b>Corporations</b>	<ul style="list-style-type: none"> <li>Actions by liquidators, receivers etc under the <i>Corporations Act 2001</i> (Cth) subject to statutory obligations concerning investigation and information gathering. When does protocol apply?</li> <li>Actions by ASIC under the <i>Corporations Act 2001</i> (Cth) and the <i>ASIC Act</i> subject to statutory obligations concerning investigation and information gathering. When does protocol apply?</li> <li>Winding up applications – statutory demand served and not complied with. Statutory demand often based on the dispute having been dealt with another court which has resulted in a judgment debt in favour of the plaintiff.</li> </ul>
<b>HREOC</b>	Complaint filed in HREOC. Complaint subject of conciliation and negotiation at HREOC.
<b>Intellectual property</b>	Urgent applications for injunctions to stop alleged infringing conduct from continuing. The effect of the pre-action protocols is that applicants will always move <i>ex parte</i> to avoid the Bill.
<b>Part IV TPA (Competition)</b>	<ul style="list-style-type: none"> <li>Proceedings often issued by regulators such as the ACCC and involve penalties, injunctions and whistle blowers.<sup>2</sup></li> <li>Actions by regulators (including the ACCC) subject to statutory obligations concerning investigation and information gathering. When does protocol apply?</li> </ul>
<b>Patents</b>	Intensive case management often required to prepare for mediation and trial because factual issues usually complex (involving science, medicine, engineering etc) requiring expert evidence.
<b>Taxation</b>	Prior to FCA proceedings, the taxpayer is usually extensively audited, an objection to an assessment is lodged with the ATO and subjected to review resulting in a decision on the objection.

<sup>1</sup> The 'genuine steps' provided for the *Civil Dispute Resolution Bill 2010 (the Bill)* do not need to be taken in relation to proceedings that are excluded proceedings. Proceedings that relate to a decision of, or a decision that has been subject to review by, the AAT (and other Tribunals) are excluded proceedings.

<sup>2</sup> Proceedings for an order imposing a pecuniary penalty for a contravention of a civil penalty provision are excluded proceedings.

**B. COMPARISON OF CURRENT ACTIVE CASE MANAGEMENT, PROPOSED  
PRE ACTION PROTOCOL AND ALTERNATIVE PROCESS REFERRED TO IN  
THE LETTER FROM THE CHIEF JUSTICE TO MR HANSFORD DATED 22  
OCTOBER 2010**

**(1) *Current active case management in the FCA***

- Proceeding filed
- Parties attend a directions hearing 6 weeks after proceeding filed or, in the case of Fast Track, a scheduling conference 45 days after proceeding filed
- Judge and parties discuss and identify factual and legal issues in dispute and the documents and / or information each party needs to address those disputed issues. Trial date usually set.
- Once issues in dispute identified and necessary information obtained, proceeding referred to mediation.
- Mediation occurs. As disputed issues identified and relevant information exchanged, parties in best position to assess risk (both legal and commercial) and know when the case will be heard, providing optimum chance of matter resolving at mediation.
- If matter does not resolve, case management conference conducted by a Registrar and procedural orders put in place to bring the matter to hearing.
- Minimum events and cost but maximum effect.

**(2) *Proposed genuine steps to resolve a dispute and current active case management in the FCA***

- Party A notifies other party (B) of fact of dispute, issues in dispute and offers to discuss them: s 4(1)(a)
- Party B responds to notification: s 4(1)(b)
- Both parties provide relevant information and documents to the other person: s 4(1)(c)
- Consider whether dispute could be resolved by, for example, alternative dispute resolution (ADR): s 4(1)(d)
- If ADR is agreed to, agreed on a person to facilitate ADR and then attend ADR: s 4(1)(e)
- If dispute does not resolve at ADR, consider a different process: s 4(1)(f);
- If dispute does not resolve at ADR, attempt to negotiate with a view to resolving some or all of the issues in dispute: s 4(1)(g)
- If unsuccessful, then proceeding is filed and the steps outlined in (1) occur.
- Maximum events, costs unrecoverable and lack any independent third party assessment and supervision of disputed issues and relevant information prior to the mediation.



**(3) *Alternative approach to proposed pre action protocol – see letter dated 22 October 2010***

To address the problems in (2), the Court proposes amendments to the steps (marked in **bold**):

- Party A notifies other party (B) of fact of dispute, issues in dispute and offers to discuss them **and files the notification of dispute with the Court: s 4(1)(a)**
- Party B responds to notification **and files the response to the notification of dispute with the Court within specified time limits: s 4(1)(b)**
- Both parties provide relevant information and documents to the other person **within specified time limits: s 4(1)(c)**
- Parties consider whether dispute could be resolved by, for example, alternative dispute resolution (ADR) **within specified time limits: s 4(1)(d)**
- If ADR is agreed to, the parties *could* enlist the assistance of a judge or registrar to refine the dispute and the information requires before **attending mediation before a Registrar of the Court or simply attend a mediation before a Registrar of the Court: s 4(1)(e)**
- If dispute does not resolve at ADR, **parties (with the assistance of the Registrar), have the following options: s 4(1)(f);**
  - (1) consider a further alternative ADR process (i.e. arbitration, assessment, etc);
  - (2) provision of further and better information to assist parties to better assess risk with further ADR with the Registrar;
  - (3) the Registrar conduct case management conference and list matter for trial;
  - (4) refer the matter to a judge for a scheduling conference.
- **If ADR not agreed to, matter proceeds in accordance with (1).**

**Minimum events, maximum effect, ability to control time taken, costs recoverable and independent third party assessment and supervision of dispute**