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Security of Payment - are you at risk of being served by email without knowing it?

Emails have become an increasingly frequent means of communicating in the building industry, including the sending of documents such as payment claims and payment schedules issued under Security of Payment legislation.

The increased use of email has in many cases created uncertainty for both the senders and recipients of payment claims, payment schedules and other documents. With that uncertainty comes greater risk (including potentially serious financial consequences) depending on whether there has been valid service by email.

In New South Wales, where Security of Payment legislation has been in force for over ten years, whether a document sent by email has in fact been validly served will, in general terms, turn on the relevant facts in each case.

In the Australian Capital Territory, where Security of Payment legislation came into force for the first time less than a year ago, the position on service by email is clearer, but potential recipients of documents must exercise great care to ensure that documents received by email are actioned within the appropriate time periods after receipt.

New South Wales

Section 31 of the *Building and Construction Industry Security of Payment Act 1999* (**NSW Act**) identifies various methods of serving documents under the NSW Act but does not explicitly refer to service by email.

However, section 31(1)(e) of the NSW Act provides for service "in such other manner as may be provided under the construction contract concerned." If the construction contract in a given case provides for service of documents under the contract by email, it may be argued that service by email is a valid method of service.

To minimise uncertainty, a term in a construction contract permitting service by email would ideally indicate that payment claims and other documents issued under the NSW Act may be served by email (not just progress claims or other documents issued under the contract) and would designate specific email address(es) for service. The contractual

term would also ideally set out the parties' agreement as to when a document sent by email is to be treated as having been received.

Whether or not the parties have made provision in the contract as to specific matters relating to service by email, disputes may still arise between the parties as to whether a document was validly served by email and whether it was served in time, depending on the facts in each case.

If the construction contract does not permit service by email, it may still be possible to establish by other laws relating to service that a document sent by email was validly served under the NSW Act. If it can be shown that:

- the recipient consented to the information in the document being given by email; and
- it was reasonable to expect at the time the email was sent that the information would be readily accessible to that person to be used for later reference,

a sender may argue that the *Electronic Transactions Act 2000* applies and that a document sent by email has been validly served under the NSW Act.

In this regard, "*consent*" may be established if it can be inferred from conduct (such as the regular exchange of payment claims and payment schedules by email).

If the provisions of the *Electronic Transactions Act 2000* apply (and unless the parties agree otherwise)

- a document sent by email to a designated email address (such as one provided for in a contract) is received when it becomes capable of being retrieved by the recipient; and
- a document sent by email to an email address other than a designated email address is received when:
  - the electronic communication is capable of being retrieved by the recipient at that address; and
  - the recipient becomes aware that the communication has been sent to that address.

In the absence of any agreement by the parties as to when an email is received, then, an email attaching a payment claim, for instance, would likely be considered to have been received at or shortly after the time that the email is sent to the designated email address. It would not be necessary for the individual with the designated address to be aware of the email having been sent.

Emails sent to other than designated email addresses, however, would not be considered to be received until the recipient becomes aware of the email having been sent.

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If the *Electronic Transactions Act 2000* is not applicable and if there is no agreement in the contract permitting service by email, it may still be possible to establish that a document sent by email has been validly served for the purposes of the NSW Act if it can be shown that the document sent by email was actually received and came to the attention of the person to be served. This would likely be the case if, as examples, the sender received a "*Read Receipt*" message after sending the email or the recipient later admitted that the email had been received.

To further complicate the NSW position, disputes sometimes arise when a document served by email has been served on the last day for service of the document but after the normal office hours of the recipient. There is authority for the proposition that documents sent by email after normal office hours are served within time, but to minimise the prospect of the issue being raised, best practice would be to send the email during normal office hours.

In summary, the position in NSW regarding validity and timing of service by email is largely dependent on the particular facts in each case. Great care must be taken when documents under the NSW Act are sent and received by email.

Australian Capital Territory

The ACT Security of Payment legislation, the *Building and Construction Industry (Security of Payment) Act 2009* (**ACT Act**), more clearly provides for service of documents by email as it incorporates by reference relevant provisions of the ACT *Legislation Act 2001*, which includes specific provision for service of documents by email on individuals, corporations and agencies.

In the case of corporations, a document may be served on a corporation by "*emailing it to an email address of the corporation*". "*Email address*" is defined to include "*the latest email address of the…corporation…(if any) recorded in a register or other records kept by the administrator of the law*", but is not defined to be the **only** email address of the corporation.

It is apparent that payment claims and payment schedules under the ACT Act may be validly served on a corporation by sending them to **any** email address of the recipient corporation. Comparable provisions apply to service on individuals.

As for when documents sent by email are taken to have been served, there is a presumption that a document sent by email is served **when it is sent** unless:

- The sender receives a signal/message from the equipment used to send the document (on the day of sending or the next working day) that the equipment did not send the document; or
- The email address was not an email address of the recipient.

A real risk for corporations, individuals and others in the ACT who may be subject to claims under the ACT Act is that a payment claim may

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have been validly served without having come to the prompt attention of relevant personnel. For instance, it may be that the email address to which the email was sent is not used or checked by the recipient on a regular basis or is not an email address of the relevant personnel involved in the project in question.

As the timeframes within which relevant steps must be taken under the Act are strictly enforced (and there are likely to be serious consequences if documents are not dealt with in a timely way), it will be very important for recipients of payment claims and other documents in the ACT to closely monitor all email addresses and put into place appropriate processes to ensure that such documents are dealt with promptly.

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Building Energy Efficiency Disclosure: it's now mandatory to go green

What is the *Building Energy Efficiency Disclosure Act* 2010?

The *Building Energy Efficiency Disclosure Act* 2010 (**BEEDA**) builds on existing benchmarks for energy efficiency by imposing mandatory obligations on owners and lessees to disclose certain information when selling or leasing office space.

While the full effect of the provisions in BEEDA will not be in force until 1 November 2011, the 12 month transitional period commenced on 1 November 2010, so it is important to be aware of how this legislation might affect your business' obligations and office space.

Why is it important?

BEEDA requires owners or lessees of "affected" commercial office buildings to disclose information relating to energy efficiency prior to a sale, lease or sub-lease of the premises. The purpose of BEEDA is to enhance the amount of meaningful information available to prospective purchasers and lessees of commercial office space and to consequently encourage owners to be more energy efficient in the maintenance of their buildings.

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Does BEEDA apply to me?

Commercial office spaces with at least a net lettable area of 2000m2 that are for sale, lease or sublease are covered by BEEDA. The following are exceptions to BEEDA:

- buildings that are new or have had a recent major refurbishment (Building Energy Efficiency Disclosure Determination 2010) and a certification for occupation was issued less than 2 years ago;
- strata titled buildings;
- buildings with total office space comprising less than 75% of the building by net lettable area;
- sale of a building through the sale of shares or units;
- short term leases of 12 months or less.

By way of example, an average large office building of 40 or so floors may have a net lettable office space of anywhere up to 70,000m2, which would fall within the ambit of BEEDA.

What do I have to do?

During the transitional period, owners and lessees are required to obtain a National Australian Built Environment Rating System (**NABERS**) energy star rating before the proposed sale or lease of an affected building and are required to display this rating on all advertisements. The NABERS rating is based on information collected about the building over a 12 month period and is assessed by an accredited assessor.

After 1 November 2011, a Building Energy Efficiency Certificate (**BEEC**) will need to be obtained before the property is offered for sale or lease, advertised or promoted. The BEEC will include the NABERS rating, an assessment of lighting and general energy efficiency guidance.

How do I obtain a BEEC?

An accredited assessor will carry out an assessment and submit this information to the issuing authority to obtain the BEEC.

What happens if I don't comply?

BEEDA imposes a range of penalties for failing to comply with its provisions. In particular, a civil pecuniary fine of up to 1000 units ($110,000) can be imposed for not obtaining a BEEC (or NABERS rating during the transition period). For every day that the contravention continues, a separate contravention occurs to a maximum of 100 penalty units ($11,000) each day.

If an owner or lessee does not comply with a request from a purchaser or lessee under section 12 to view a copy of the BEEC, a penalty of up

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to 350 units for an individual ($38,500) and 1000 units ($110,000) for a corporation may apply. Infringement notices with pecuniary penalties may also be issued.

What is the "Tax Breaks for Green Buildings" scheme and how do I become eligible?

While BEEDA is considered to be an important step towards raising awareness of energy efficiency in commercial office buildings, one of the impediments is the cost of retrofitting existing buildings to improve their NABERS rating. To alleviate these concerns and encourage refurbishment, the government has announced the *Tax Breaks for Green Buildings* program. $1 billion in tax cuts has been set aside for the program across 4 years to 30 June 2015. It proposes a one-off bonus tax deduction of 50 per cent of the cost of eligible improvements, on top of the normal capital allowance deduction.

There is a stringent application process to be followed and the tax deduction will apply only when the NABERS rating increases from 2 stars to 4 stars or more. The program is currently in the consultation and reporting phase and further details are expected to be announced soon.

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The Twilight Zone - What to do when the adjudicator gets it wrong!

Alexander Pope once said "*To err is human, to forgive divine*."

He was obviously not a building and construction participant faced with an erroneous adjudication determination and resulting cash-flow issues.

In the current economic climate, such a participant would be more likely to say: "*To err is human, to forgive is not company policy*", and then seek legal advice on an appeal.

It is not surprising that adjudicators sometimes get it wrong. The timeframes in the *Building and Security of Payment Act* 1999 (NSW) (**Act**) and other state and territory equivalents are severely truncated. Generally, an adjudicator will have only 2 weeks to deliver a determination. In that time, he/she will often be submerged under a

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mass of documentation and asked to emerge with a firm grasp of any number of factually and legally complex claims, and a properly considered decision. There is often insufficient time. Then of course, there is the inevitable fallibility of the human condition.

The problem is that when adjudicators get it wrong, there are often significant cash-flow ramifications for those affected. In this regard, there are very few building and construction industry participants that are not affected by the Act. Last financial year, 780 adjudication applications were made and $167 million was certified as payable in NSW alone. There are very few, therefore, who would not be interested to understand what they can do when faced with a defective adjudication determination. In particular, a key question that arises in this context is whether or not to "appeal" the decision.

Not all adjudication determinations that are wrong are appealable or otherwise reviewable by the Courts. The law in this regard is quite dynamic. Until last year, for example, the key authority was *Brodyn v Davenport*. In that case, the NSW Court of Appeal held that an adjudication determination could be set aside if, amongst other things:

- the adjudicator did not make a *bona fide* attempt to exercise the relevant power;
- there was a substantial denial of natural justice; or
- there was a failure to comply with one or more basic requirements, such as the:
  - existence of a construction contract;
  - service of a claim and application;
  - determination by the adjudicator of:
    - the amount of the progress payment;
    - the date on which it becomes or became due; and
    - the rate of interest payable.

Last year, however, in the case of *Chase Oyster v Hamo*, the Court of Appeal decided that this test was too narrow. Instead, it stated that the proper test for determining if an adjudication decision could be set aside, was whether the decision was affected by a "jurisdictional error". However, the Court did not provide a clear test for determining if a decision was affected by a "jurisdictional error". Instead, the Court stated, quite cryptically, that although "there is no single test or theory or logical process by which the distinction between jurisdictional and non-jurisdictional error can be determined" nevertheless there was a distinction, just as "twilight does not invalidate the distinction between night and day." Unfortunately, however, this does not provide much clarity.

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In order to shed light on the issue, it is important to have regard not only to *Chase Oyster*, but also to subsequent cases such as *Bauen Constructions* and *St Hilliers Contracting* (which incidentally Colin Biggers & Paisley was involved in). Distilling the essence of these cases, it is arguable that your adjudicator may be found to have fallen into jurisdictional error if he/she:

- makes a mistake about whether he/she has jurisdiction to determine the application or the limits of that jurisdiction (for example because he/she determines that an adjudication application has been served in time when it has not); or
- fails to comply with the statutory obligations upon which his/her jurisdiction is based (for example, by disregarding something which the Act requires to be considered as a condition of jurisdiction, or considering something required to be ignored); or
- makes a mistake because he/she has not intellectually engaged with the submissions (for example, because the determination gives no intellectual justification for the decision that was made or gives a justification which is arbitrary, capricious or irrational or not open to a reasonable person correctly understanding the meaning of the law under which authority is conferred); or
- has effected a denial of natural justice or procedural fairness (for example, because the adjudicator determines an incorrect due date for payment on a basis that was not put forward by either party or put to either party by the adjudicator).

In these situations, you might have an entitlement to "appeal" the adjudication decision. If such an application is successful, the decision will be quashed. As a result, depending upon whether you are the claimant or the respondent, you will either not have to pay the adjudicated amount or will be able to lodge a fresh application for payment. Clearly this can be a significant entitlement with potentially profound cash-flow implications.

This is not to say, however, that you should "appeal" every decision in which you have been the victim of jurisdictional error. It will always be necessary to consider such things as prospects of success, the cost of proceeding with such an application, and any other options available to you. For example, you might be better off commencing alternative dispute resolution or substantive proceedings in relation to the subject matter of the determination. Each of these considerations needs to be assessed having regard to the particular factual circumstances in your matter. However, such an assessment needs to be made quickly. As with most aspects of the Act, time is of the essence.

It is also important to bear in mind that similar principles apply in other States and Territories, such as Queensland, Victoria, Western Australia and the Northern Territory.

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Finally, we note that we have referred to the concept of an "appeal" in inverted commas. This is because, strictly speaking, you do not "appeal" an adjudication decision but rather "make an application for relief in the nature of *certiorari*". The concepts are similar. However, a full explanation of the meaning of "*certiorari*" could involve an analysis of 2000 year old Latin texts by a Roman jurist born in Tyre Lebanon, and prerogative writs used after the Norman conquest of England in 1066. That, however, is a story for another day.

One aspect of *certiorari* is especially noteworthy. The *Supreme Court Act* 1970 (NSW) provides that *certiorari* can be used to quash a determination where there is an "error of law" on the face of the record. This means that adjudication decisions may be reviewable on broader grounds than are currently relied upon - for example where an adjudicator has taken into account an irrelevant consideration, has acted on the basis of no evidence or has reached a mistaken conclusion. It remains to be seen, however, whether the Courts will require such grounds to go to a jurisdictional issue (as per the 2003 cases of *Musico* and *Multiplex*) or whether more recent developments (following *Chase Oyster*) are a sign of a broader approach.

One thing is certain. The current twilight presents an opportunity to expand the grounds for review into previously uncharted territory.

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Experts beware - expert immunity abolished in the UK

A recent decision of the UK Supreme Court has abolished the centuries old immunity enjoyed by expert witnesses who participate in judicial proceedings against suit for breach of duty of care arising from either contract or negligence.

The immunity still exists in Australia and was last upheld in *Sovereign Motor Inns v Howarth Asia Pacific* (***Sovereign***). However this is an important development in the common law which is likely to bear significant weight the next time expert immunity is considered in Australia.

The recent position in England & Wales

In dealing with *Jones v Kaney (**Jones**)* the UK Supreme Court had to grapple with two fundamental but competing public interests in deciding whether expert's immunity should be abolished:

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- the *pursuit* of justice, by encouraging honest and frank evidence without fear of being sued, versus
- the *provision* of justice by providing a proper remedy to a person who has suffered a wrong.

The facts of the suit were as follows:

- Mr Jones was involved in a road traffic accident and commenced personal injury proceedings. As part of those proceedings, Mrs Kaney, a consultant clinical psychologist, was instructed on Mr Jones' behalf to prepare a report which provided certain findings.
- Following a direction that a joint report be served, Mrs Kaney signed a damaging joint report that was prepared by the defendant's expert, without amendment or comment and not in accordance with her earlier formed views as to Mr Jones' psychological state.
- As a result of the damaging joint report, Mr Jones felt constrained to settle the claim for a less favourable amount.
- Mr Jones sued Mrs Kaney for negligence. The claim was struck out at first instance on the grounds that Mrs Kaney was immune from suit in her capacity as an expert witness. However, recognising the important public policy issue the claim posed, the court issued a "leapfrog certificate" to allow an appeal in the Supreme Court.

After considering the arguments for and against the immunity, the majority held that the immunity should be abolished. The absolute privilege enjoyed in respect of defamation is however maintained.

The scope of the immunity

The immunity developed from an absolute privilege against a claim for defamation for anyone engaged in legal proceedings. The object of this immunity was to encourage honest and frank participation in proceedings by offering the participants a form of protection from a disgruntled party to the litigation.

The immunity extended over evidence given by experts in court as well as reports and statements prepared in connection with an action, or for the purpose of a possible action or prosecution. The immunity was justified on the basis that the expert should be able to "resile fearlessly with dignity from a more extreme position taken in an earlier advice" without the fear of being sued by its client.

The downside of the immunity was that it provided protection to an expert in circumstances where he or she had breached their duty of care, thereby denying a remedy to the person who had suffered from that breach.

No overriding justification to maintain the immunity

In considering whether there was reasonable justification to maintain the immunity, the court considered a number of issues including whether the immunity was necessary to ensure the expert gave honest and considered

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evidence. The court formed the view the immunity was not necessary because:

- the paramount duty of the expert is to provide frank and objective evidence to the court which is expected of an expert irrespective of the immunity. This obligation overrides any duty to protect the client's interests by virtue of rule 35.3 of the *Civil Procedure Rules*[1]. The equivalent duties are set out in the Expert Witness Code of Conduct contained at schedule 7 of the *NSW Uniform Civil Procedure Rules*[2]; and
- the expert is contractually obliged to exercise reasonable skill and care when carrying out his services. Lord Brown noted that the removal of the immunity may heighten an expert's awareness of the risks of pitching his initial views of the merits too high or too inflexibly in case these views come to "expose or embarrass them at a later date".

The court acknowledged that the removal of the immunity could expose experts to claims for negligence and breach of contract, but recognised that such risks are common to all professional services and should, and usually are insured against. The risk of a claim was not a reason to maintain the immunity.

The court did not accept that the removal of the immunity would

- reduce the numbers of experts willing to give evidence and participate in legal proceedings;
- lead to a proliferation of vexatious claims commenced by a disgruntled or irrational client; or
- cause a multiplicity of suits or re-trials.

A timely reminder for experts and clients alike

While experts remain protected by the immunity in Australia, as confirmed in *Sovereign, Jones* provides a timely reminder of the overriding duty experts owe to the court on one hand and the obligations owed to the client on the other.

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1 Rule 35.3 of the Civil Procedure Rules (1995), England & Wales, provides:
Experts – overriding duty to the court
(1) It is the duty of experts to help the court on matters within their expertise.
(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

2 Expert Witness Code of Conduct: Schedule 7: Uniform Civil Procedure Rules (2005) NSW:
General duty to the court
(1) An expert witness has an overriding duty to assist the court impartially on matters relevant to the expert witness's area of expertise.
(2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
(3) An expert witness is not an advocate for a party.

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To ensure the management of a client's expectations while balancing the duties owed as an expert, experts should:

- Ensure your client appreciates your overriding duty is to the court. Make sure your client understands your independent status and appreciates what you can and cannot say.
- Be frank with the client about adverse findings as soon practicable, and any impact those findings or facts will have on your opinion.
- Avoid any temptation to inflate or exaggerate the merits of the case.
- Review your insurance position to ensure you are adequately covered for the provision of all advices.

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Patchwork or harmony? A brief overview of the present saga that awaits litigants in NSW and beyond.

Potential litigants in New South Wales are currently dealing with a plethora of changes relating to pre-litigation protocols. These protocols are essentially a series of steps that a potential litigant is required to undertake to attempt to resolve a dispute before commencing litigation. Despite the simplicity and spirit in which this requirement evolved, the recent changes in the law appears to be quite contentious and inconsistent in some jurisdictions.

United Kingdom

By way of background, before pre- litigation protocols attracted interest in Australia, they had originated in the UK and were already underway. They came about as a result of Lord Woolf's Access to Justice Report in July 1996 and were subsequently adopted in England and Wales in order to reduce the demand for court resources and facilitate dispute resolution.

From 1999, specific pre-litigation protocols came into force in the UK for disputes including personal injury, construction and engineering, defamation, professional negligence, judicial review, disease and illness, housing disrepair and possession claims. These protocols remain in force

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and generally oblige a party to undertake a series of steps to resolve a dispute without recourse to the courts and as a pre-requisite to litigation.

It has been found that over time, the introduction of pre-action protocols in the UK have been successful and led to an increase in the number of settled cases without court involvement. However, the protocols create a tension in legal policy. Depending on the nature of a dispute and the extent to which the parties attempt to resolve the dispute when complying with the protocols, it is more than likely that a greater amount of costs will be incurred before the commencement of proceedings.

Victoria

From around 2003, pre- litigation protocols in the Magistrates' Court were already being used to require parties to mediate their disputes before issuing proceedings. In March 2008, the Victorian Law Reform Commission recommended that statutory guidelines incorporating general standards of pre-action conduct be introduced and that specific pre-action protocols be developed for particular types of disputes. This law came into force on 1 January 2011 and was set out in chapter 3 of the *Civil Procedure Act 2010*.

During this time, there was a change in the Victorian state government in November 2010. Following the change in government, chapter 3 was repealed on 29 March 2011 and the regime for mandatory pre-litigation protocols was removed. The rationale behind this decision was that the pre-litigation requirements would add unnecessarily to the costs of resolving a dispute and make it more difficult for disputants to access the courts. In any event, the courts in Victoria still have the power to order parties in a dispute to consider pre-litigation processes.

New South Wales

On 2 March 2011, the amendments to the *Civil Procedure Act 2005* were proclaimed and came into force on 1 April 2011. Essentially, this new law required that "certain steps" be taken before the commencement of proceedings, as part of a new regime relating to pre-litigation protocols. Compliance with these requirements include reasonableness and making a genuine attempt to resolve or narrow the dispute.

However, this new law applies only to the District and Local Courts. The Supreme Court is exempt from the operation of the new pre-litigation procedures pending introduction of similar rules in relation to the commencement of civil proceedings in federal courts.

Interestingly, while the amendments to the *Civil Procedure Act 2005* commenced on 1 April 2011, there is a six-month transitional period which applies. The Local and District Courts, to which the transitional period applies, have not yet published any practice notes or any pro forma documents to guide parties on how to deal with the requirement to engage in pre-action protocols. The transitional period appears to be in place so that the courts can develop their own specific protocols and ascertain what

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the Federal Court proposes to do. The transitional period ends on 1 October 2011 and the changes will be effective from this date. This means that any disputes arising from 1 October 2011 will be required to comply with the amendments.

Federal Court

The Commonwealth's *Civil Dispute Resolution Act 2011* received the royal assent on 12 April 2011. At the very latest, this law will be operational from 12 October 2011, if it is not proclaimed to commence earlier. This new law similarly introduces pre-litigation requirements in disputes which may result in proceedings commencing in the federal court. It is now a requirement that to comply with the law, a person needs to take genuine steps to resolve a dispute, having regard to the person's circumstances and the nature and circumstances of the dispute.

Concluding remarks

Despite the very best intentions of the legislature, the introduction of pre-litigation requirements appears to be a patchwork at the moment. It is likely that this may start to come together more fluidly in October 2011 when both the NSW and Federal Court legislation become operational and when the Supreme Court's position becomes known.

It is important to bear in mind that reasonableness and proportionality are the key factors which will be assessed when determining if a party has complied with the requirement to undertake pre-litigation protocols before commencing proceedings. If there has been non-compliance by a party, then various sanctions may be imposed including costs orders.

The moral to this saga is that parties are now required to take genuine and reasonable steps when attempting to resolve a dispute. In any event, it is always best practice to try and resolve a potential dispute or narrow the issues in dispute with your opponent before commencing legal proceedings.

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