Schedule 1—Pre-action procedures

Note 1: See rule 1.05 (definition of ***pre-action procedures***).

Note 2: Part 1 of this Schedule sets out the pre-action procedures for financial proceedings. Part 2 of this Schedule sets out the pre-action procedures for parenting proceedings. If a proceeding involves both financial and parenting matters, both Parts must be complied with.

Part 1—Financial proceedings

1 General

(1) Each prospective party to a proceeding in the Federal Circuit and Family Court of Australia must make a genuine effort to resolve the dispute before filing an application to start proceedings by following the pre-action procedures outlined in clause 3 of this Part.

(2) There may be serious consequences for non-compliance with the pre-action procedures, including costs penalties or a stay of proceedings pending compliance.

(3) The circumstances in which the court may accept that it was not possible or appropriate for a party to follow the pre-action procedures are outlined in subrule 4.01(2).

(4) The objectives of the pre-action procedures are as follows:
  (a) to encourage early and full disclosure in appropriate proceedings by the exchange of information and documents about the prospective proceeding;
  (b) to provide parties with a process to avoid legal action by reaching a settlement of the dispute before starting a proceeding;
  (c) to provide parties with a procedure to resolve the proceeding quickly and limit costs;
  (d) to ensure the efficient management of proceedings in the court, if proceedings become necessary;
  (e) to encourage parties, if proceedings become necessary, to seek only those orders that are reasonably achievable on the evidence;
  (f) to give effect to the overarching purpose of the family law practice and procedure provisions as provided by section 67 of the *Federal Circuit and Family Court of Australia Act 2021*.

(5) At all stages during the pre-action procedures and, if a proceeding is started, during the conduct of the proceedings, the parties must have regard to the following:
  (a) the best interests of any child, including the need to protect and safeguard the child against risk or harm;
  (b) facilitating a meaningful relationship between a parent and the child, if appropriate, and the benefits of effective co-parenting;
  (c) the potential damage to a child involved in a dispute between the parents, particularly if the child is encouraged to take sides or take part in the dispute;

Authorised Version F2021L01197 registered 27/08/2021

(d) the best way of exploring options for settlement, identifying the issues as soon as possible, and seeking resolution of them;
(e) the need to avoid protracted, unnecessary, hostile and inflammatory exchanges;
(f) the impact of correspondence on the intended reader (in particular, on the parties);
(g) the need to seek only orders that are reasonably achievable on the evidence and that are consistent with the current law;
(h) the principle of proportionality and the need to control costs because it is unacceptable for the costs of any proceeding to be disproportionate to the financial value of the subject matter of the dispute;
(i) the duty to make full and frank disclosure of all material facts, documents and other information relevant to the dispute.

Note The duty of disclosure extends to the requirement to disclose any significant changes (see clause 4 of this Part).

(6) Parties must not:
(a) use the pre-action procedures for an improper purpose (for example, to harass the other party or cause unnecessary cost or delay); or
(b) in correspondence, raise irrelevant issues or issues that may cause the other party to adopt an entrenched, polarised or hostile position.

(7) The court expects parties to take a sensible and responsible approach to the pre-action procedures.

(8) The parties are not expected to continue to follow the pre-action procedures if it is not safe to do so, or if reasonable attempts to follow the pre-action procedures have not achieved a satisfactory solution.

(9) At the time of filing an application to start a proceeding or a response to that application, a party must file a Genuine Steps Certificate outlining:
(a) both:
(i) the party's compliance with the pre-action procedures; and
(ii) the genuine steps taken by the party to resolve the dispute; or
(b) the basis of any claim for an exemption from compliance with either or both the requirements referred to in subparagraphs (a)(i) and (ii).

2 Compliance

(1) The court regards the requirements set out in these pre-action procedures as the standard and appropriate approach for a person to take before filing an application in a court.

(2) If a proceeding is subsequently started, the court may consider whether these requirements have been met and, if not, any consequences for non-compliance.

(3) The court may take into account compliance and non-compliance with the pre-action procedures when it is making orders about case management and considering orders for costs (see subrule 1.33(2) and paragraphs 1.34(2)(b) and 12.15(1)(b)).

Authorised Version F2021L01197 registered 27/08/2021

(4) Unreasonable non-compliance may result in the court staying the proceeding pending compliance, or ordering the non-complying party to pay all or part of the costs of the other party or parties in the proceeding.

(5) In situations of non-compliance, the court may ensure that the complying party is in no worse position than the party would have been in had the pre-action procedures been complied with.

Note: Examples of non-compliance with the pre-action procedures include the following:
(a) not sending a written notice of proposed application;
(b) not providing sufficient information or documents to the other party;
(c) not following a procedure required by the procedures;
(d) not responding appropriately within the nominated time to the written notice of proposed application;
(e) not responding appropriately within a reasonable time to any reasonable request for information, documents or other requirement of the procedures.

3 Pre-action procedures

(1) A person who is considering filing an application to start a proceeding must, before filing the application, and only if it is safe to do so:
(a) give a copy of these pre-action procedures to the other prospective parties to the proceeding; and
(b) make inquiries about the dispute resolution services available; and
(c) invite the other parties to participate in dispute resolution with an identified person or organisation or other person or organisation to be agreed.

(2) To the extent that it is safe to do so, each prospective party must:
(a) cooperate for the purpose of agreeing on an appropriate dispute resolution service; and
(b) make a genuine effort to resolve the dispute by participating in dispute resolution.

(3) If the prospective parties reach agreement, they may arrange to formalise the agreement by filing an Application for Consent Orders.

(4) Before filing an application, the proposed applicant must give to the other party (the ***proposed respondent***) written notice (***notice of intention to start a proceeding***) of the proposed applicant's intention to start a proceeding if:
(a) there is no appropriate dispute resolution service available to the parties; or
(b) a party fails or refuses to participate in dispute resolution; or
(c) the parties are unable to reach agreement by dispute resolution.

(5) A notice of intention to start a proceeding must set out:
(a) the issues in dispute; and
(b) the orders to be sought if proceedings are started; and
(c) a genuine offer to resolve the issues; and
(d) a time (the ***nominated time***) that is at least 14 days after the date of the notice within which the proposed respondent must reply to the notice.

(6) The proposed respondent must, within the nominated time, reply in writing to the notice under subclause (4), stating whether the offer is accepted and, if not, setting out:

Authorised Version F2021L01197 registered 27/08/2021

(a) the issues in dispute; and
(b) the orders to be sought if proceedings are started; and
(c) a genuine counter-offer to resolve the issues; and
(d) a time that is at least 14 days after the date of the proposed respondent's reply within which the proposed applicant must reply.

(7) It is expected that a person will not start a proceeding by filing an application in a court unless:
(a) the proposed respondent does not respond to a notice of intention to start a proceeding; or
(b) agreement between the proposed parties is unable to be reached after a reasonable attempt to settle by correspondence under this clause.

4 Disclosure and exchange of correspondence

(1) Parties to a proceeding have a duty to make full and frank disclosure of all information relevant to the issues in dispute in a timely manner (see rule 6.01).

(2) As soon as practicable on learning of the dispute and in the course of exchanging correspondence under clause 3 of this Part, parties must exchange the following:
(a) a schedule of assets, income and liabilities;
(b) a list of documents in the party's possession or control that are relevant to the dispute;
(c) a copy of any document required by the other party, identified by reference to the list of documents.

(3) Parties must refer to the Financial Statement and rule 6.06 of these Rules as a guide for the information to provide and documents to exchange.

(4) The documents that the court considers appropriate to include in the list of documents and to exchange include:
(a) in financial proceedings (other than an application for maintenance only)—those listed in subrule 6.06(8); and
(b) in an application for maintenance only—those listed in rule 6.06(9).

(5) It is reasonable to require a party who is unable to produce a document for inspection to provide a written authority addressed to a third party authorising the third party to provide a copy of the document in question to the other party, if this is practicable.

(6) Parties must agree to a reasonable place and time for the documents to be inspected and copied at the cost of the person requesting the copies.

Note: The court will refer to Chapter 6 of these Rules as a guide for what is regarded as reasonable conduct by the parties in making these arrangements.

(7) Parties must not use a document disclosed by another party for a purpose other than the resolution or determination of the dispute to which the disclosure of the document relates, unless an exception applies under subrule 6.04(2).

(8) Documents produced by a person to another person in compliance with the pre-action procedures are taken to have been produced on the basis of an

Authorised Version F2021L01197 registered 27/08/2021

undertaking from the party receiving the documents that the documents will be used for the purpose of the proceeding only.

(9) Parties must bear in mind that an object of the pre-action procedures is to control costs and, if possible, resolve the dispute quickly.

(10) Parties must also file an undertaking as to disclosure that states that the party is aware of the ongoing duty of disclosure and has complied with this duty, to the best of the party's knowledge and ability, before the first court date (see rule 6.02).

5 Expert witnesses

(1) There are strict rules about instructing and obtaining reports from an expert witness (see Part 7.1 of these Rules).

(2) In summary:

(a) an expert witness must be instructed in writing and must be fully informed of the obligations as an expert witness (see rule 7.13); and

(b) parties should obtain expert evidence only in relation to a significant issue in dispute; and

(c) if practicable, parties should agree to obtain a report from a single expert witness instructed by both parties (see rule 7.03); and

(d) the court must grant permission to a party to adduce evidence from another expert witness on the same issue (see rule 7.08).

6 Lawyers' obligations

(1) Lawyers must, as early as practicable:

(a) advise clients of ways of resolving the dispute without starting legal action; and

(b) advise clients of their duty to make full and frank disclosure, and of the possible consequences of breaching that duty; and

(c) endeavour to reach a solution by settlement rather than start or continue legal action, subject to this being in the best interests of the client and any child; and

(d) notify the client if, in the lawyer's opinion, it is in the client's best interests to accept a compromise or settlement that, in the lawyer's opinion, is a reasonable one; and

(e) in cases of unexpected delay, explain the delay and whether or not the client may assist to resolve the delay; and

(f) advise clients of the estimated costs of legal action (see rule 12.05); and

(g) advise clients about the factors that may affect the court in considering costs orders; and

(h) give clients documents prepared by the court about:

(i) the legal aid services and dispute resolution services available to them; and

(ii) the legal and social effects and the possible consequences for children of proposed litigation; and

Authorised Version F2021L01197 registered 27/08/2021

(i) actively discourage clients from making ambit claims or seeking orders that the evidence and established principles, including recent case law, indicate is not reasonably achievable.

(2) The court recognises that the pre-action procedures cannot override a lawyer's duty to the lawyer's client.

(3) It is accepted that it is sometimes difficult to comply with a pre-action procedure because a client may refuse to take advice; however, a lawyer has a duty as an officer of the court and must not mislead the court.

(4) On application, the court may make an order for costs against a lawyer if the lawyer has failed to comply with pre-action procedures (see rule 12.15).

(5) If a client wishes not to disclose a fact or document that is relevant to the proceeding, a lawyer has an obligation to take the appropriate action; that is, to cease acting for the client.

Authorised Version F2021L01197 registered 27/08/2021