

ALTERNATIVE OPTIONS – ADR AND SETTLEMENTS

Need to advise clients of their alternative options.

Settlement

After exhausting ADR avenues, P must, 21 days before commencing proceedings, give the D written notice containing an offer to settle P's claim (R 33(2). P must provide sufficient supporting material and copies of any relevant expert reports (33(2). This is mandatory. If this rule is not complied with, the court may award costs in extreme cases (R 33(7). Settlement is an Agreement between parties to bring an end to their dispute. This agreement is enforceable as a contract. If there is a failure to abide by the settlement agreement, then a new cause of action arises for breach of contract.

1. Reasons for Settlement

List reasons for attempting settlement

Legislative Duty

- Some states have an overriding principle e.g. genuine steps statements
- *Civil Disputes Resolution Act 2011 (Cth) s 3 'The object of this Act is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted'*

Current Court Policy encourage settlement

- Case flow management perspective
- Cost implications of failure to settle
- ADR imposed by courts

2. What should you know before you settle?

What are the risks of litigation?

What is the likely outcome?

3. Ethical Duties of a solicitor in settlement *Australian Solicitors' Conduct Rules 2015 (SA)*

- Provide enough information for client to make an informed decision

- Advise on consequences of decision (agreement to settle is like a final contract)
- Ensure the client is not pressured by circumstances/family/solicitor etc.
- Record advise in writing and acceptance of offer
- Know your BATNA (best alternative to a negotiated agreement)
 - o Provide to your client alternatives of ADR
 - o **R7.2 Australian Solicitors Conduct Rules:** A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonable available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interest in relation to litigation.

Types of Settlement Offers

Two ways:

R 33 offers of settlement before action

Only done by the plaintiff

BEFORE ACTION commences

- Must be done 90 days before commencing an action for personal injury and 21 days in all other cases (R 33(2))
 - o (b) Give sufficient details of the claim
 - o (c) Exchange expert reports relevant

This section is mandatory

Defendant must reply

- (4) reply must come within 60 days for PI and 14 other days in all other cases and respond with:
 - o (a) acceptance or
 - o (b) make a counter offer with sufficient detail and supporting material to enable P to assess and inform a response
 - o (c) state liability is denied and grounds

Impact

- (7) when awarding costs the court **may** take into account
 - o (a) whether the parties have complied with their obligations

- (b) the terms of the offer/counter offer, response and if reasonable or unreasonable in circumstances

R 187 Making a formal Offer

Can be used for both a plaintiff and a defendant

This occurs when the proceedings ARE ALREADY UNDERWAY

No need for reply (other party can ignore it if they wish)

- Can be expressed as a judgment (2)(a) or a contract (2)(b)
- Filed marked as ‘formal offer’ not opened in accordance with judge or master (5)(a)
- Immediately served on the parties (5)(b)
- Can be an open offer (6)(a) include costs (6)(b) lapse after certain amount of time, no less than 14 days after service (6)(c) if a contract involving payment can stipulate time or assumed 28 days (6)(d)
- Can annex reasons why it would be unreasonable for the offer not to be accepted (6)(f)

Process of Making an Offer

Time for making, withdrawing and accepting a formal offer (188)

- (1) If no time for acceptance stipulated, cannot be accepted before 7 calendar days of trial commencement
- (2) A party make more than one formal offer
- (3) May withdraw at any time
- (4) If withdrawn within 14 days served, treated as never exists

Responding to an offer (188A)

- Must formally respond within 14 days (1) either (a) accepting (b) not accepting (c) contending offer does not comply with rule 187
- Can ask for a specific time extensions (2)(3)
- Formal response to be (4)(a) approved form (b) state that is made in accordance with this rule (c) be filed (d) served