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NEWS

Dispute resolution in a pandemic – tips and traps

The disruptions caused by the current COVID-19 pandemic have led to both legal and practical delays in people being able to recover debts and enforce their rights. Here, partner Selina Nutley sets out some key factors which have led to the delays and options for accelerating resolution.

ENFORCEMENT OF DEBTS AGAINST INDIVIDUALS AND CORPORATIONS

The Federal Government has made temporary changes to the Bankruptcy Act and the Corporations Act which mean:

- The threshold for creditors to issue either a bankruptcy notice or a statutory demand is now \$20,000—an increase from \$5,000 and \$2,000 respectively.
- The timeframe for a debtor to respond to either a bankruptcy notice or statutory demand has increased from 21 days to six months.

These changes are in place until 25 September 2020, unless extended.

ENFORCEMENT IN COURT

Despite these changes, parties can still seek to enforce their rights through the court. Most (but not all) jurisdictions in Australia have already created online registries to allow parties to electronically file documents to commence proceedings. Those jurisdictions which do not allow electronic filings allow for filing by post or various other non-contact options.

Courts across Australia have also put measures in place to continue hearings through virtual courtrooms, using technology such as Zoom. There is now a greater focus on parties agreeing consent orders or matters being determined by the court based on written submissions. Where parties cannot agree, all documents must be available electronically and submissions exchanged in advance of hearings.

VIRTUAL TRIALS

While these measures are generally sufficient to enable trials to proceed, there will likely be instances where parties or the court consider it is impractical for all of a trial to take place virtually. There are few reported decisions presently on the circumstances in which a court will agree to adjourn proceedings rather than proceed virtually. However, parties should not assume an adjournment will be granted merely because a virtual trial would impose a higher organisational burden on the

parties or have a risk of technological interruption.

Despite this, some jurisdictions, such as the County Court of Victoria, are not setting down matters for trial until early 2021 when in-person hearings should be able to resume. This will undoubtedly create a backlog of cases which will continue well into next year.

For some parties—often the party who may owe monies—a lengthy delay during this period of economic uncertainty will be welcome. However, it may place the other party in a precarious position if they were relying upon a favourable outcome in a short period.

ALTERNATIVE DISPUTE RESOLUTION

For parties looking to advance matters, given the current limitations on enforcement, it is more important than ever to explore alternative dispute resolution (ADR) processes.

Parties can choose to participate in ADR processes (such as mediation and arbitration) or may be required to do so by the terms of their contract. Many contracts contain dispute clauses requiring parties to participate in ADR which in the heat of the moment, or where easier processes are available, parties may choose to ignore. In the current environment, those clauses may represent the most cost-effective and efficient way to deal with disputes. For that reason, parties should ensure they check the provisions of the agreement in dispute and, during these uncertain times, ensure all new agreements contain effective ADR clauses.

DISPUTE CLAUSES

Here are some key points you should consider when drafting or interpreting a dispute clause:

- whether the clause sets out clearly the process to be used and whether it is a mandatory precondition to litigation
 - the terms on which the ADR will take place, with careful note to avoid agreements to agree on processes
 - the scope of the issues which can or must be addressed
 - in the case of ADR processes which allow a third party to make a decision on the dispute (such as expert determination or arbitration)—
 - whether the parties wish to be bound by the decision, or
 - whether the parties wish to be permitted to appeal the decision in court.
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CONCLUSION

If you have questions about the temporary changes to debt recovery or alternative dispute resolution processes, our [Litigation lawyers](#) can help and explain what steps you need to take.

Authors



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