

How to resolve a commercial dispute – can I commence a Court Claim?

A common misconception is that you can proceed straight to filing a Court Claim and asking a judge to make a final determination to resolve your case if you're involved in a commercial dispute. This can include a contract, building or property dispute, a debt claim or a consumer law complaint.

In South Australia, this is usually not the case.

Rather, the *Uniform Civil Rules* govern the processes and procedures relating to progress of cases in the State Courts of South Australia. These Rules also dictate certain steps that disputes must progress through before they get to Court. This pre-Court stage is referred to as the Pre-Action Steps in the *Uniform Civil Rules*.

By way of summary, the Pre-Action Steps required are:

1. Service of a Pre-Action Claim.

2. Service of a Pre-Action Response in reply to the Pre-Action Claim.
3. A Pre-Action Meeting of the parties.

Pre-Action Claim

Before filing a Claim against another person or company, you must give fair notice to that party of the legal and factual nature of your complaint against them, as well as provide an opportunity for the resolution of the dispute without needing to involve the Courts.
This notice is usually called a Pre-Action Claim.

A Pre-Action Claim is a technical legal document which needs to be drafted carefully to ensure it complies with the requirements of the Uniform Civil Rules. In a general sense, this will involve identifying the legal grounds on which you intend to sue the other party (or parties) and setting out in detail the relevant facts which support that legal cause of action. It will also include an offer to settle the dispute and propose a meeting of the parties should the offer not be accepted.

Once your Pre-Action Claim is drafted, it must be served on the other side.

Pre-Action Response

Upon receipt of a Pre-Action Claim, the responding party to the dispute has an opportunity to provide their formal reply by way of a Pre-Action Response, in most cases, within 21 days.

Assuming the offer made in the Pre-Action Claim is not accepted, similar to the Pre-Action Claim, the Pre-Action Response has certain requirements, including to:

- Set out any defence the respondent would make if the matter was litigated.
- Detail the factual basis for such defence.
- Make an offer to settle the matter.
- Respond to the meeting proposal.

If no Pre-Action Response is served within the required timeframe, you can immediately commence a Court claim against the respondent.

Pre-Action Meeting

If neither offer is accepted, the parties are obliged to meet to negotiate in good faith and attempt to resolve the dispute.

There is a significant degree of flexibility in relation to what a Pre-Action Meeting may look like. For example, in relation to a complex commercial matter, the parties may elect to hold a private

mediation facilitated by an independent third party. Alternatively, for smaller, less complex disputes, the parties may prefer a telephone conference with their lawyers.

If the dispute does not resolve at a Pre-Action Meeting, you can then file a Claim to formally commence a Court case.

Alternative Pre-Action Steps

For some disputes which will be uncontested, or are not genuinely contestable (for example, simple debt recovery matters), the Uniform Civil Rules permit an alternative Pre-Action process, called a Final Notice.

Similar to the Pre-Action Claim, this requires you to identify the factual and legal basis for your claim, however, you do not have to make an offer to the other party, nor do you have to meet with them.

The Final Notice is filed with the Court and served on the other side, who must respond to it within 21 days. If they do not respond to your satisfaction within that period of time, then you can commence a Court claim.

Why do the Pre-Action Steps exist?

The Pre-Action Steps are intended to provide a genuine opportunity for the parties to robustly discuss the issues in dispute, ideally with the view of resolving the dispute entirely. In the best-case scenario, this will alleviate the need for the parties to incur the expense, time, and stress of litigation, as well as free up the Courts to hear matters which are not capable of a cooperative and independent settlement.

While of course there will be matters that are not capable of resolution without the Court's involvement, even these cases benefit from the Pre-Action Steps, in particular, by narrowing the issues in dispute which, in turn, may reduce the time the case takes to resolve at Court, or the length of any trial (which may also reduce legal and Court costs).

What if we don't comply with the Pre-Action Steps?

The Court won't stop you from filing and serving a Claim if you haven't complied with the Pre-Action Steps. However, upon filing your claim, you must certify whether these steps have been complied with, and if they have not, the Court can list your case for an early Special Directions Hearing where it will make enquiries as to why the steps have not been complied with.

In some cases, the Court can make orders to "stay" the proceedings (that is, pause the Court case) until the parties have complied with the Pre-Action Steps.
If this occurs, the Court will usually also make an order for costs against the defaulting party. Practically, that means if you filed a Court Claim without first having filed a Pre-Action Claim, the

Court can order that you pay the other side’s legal costs relating to the Special Directions Hearing.

How can Andersons help?

Resolving a commercial dispute can be complex. If you’d like more information about commencing a Court Claim or undertaking the Pre-Action Steps, contact our commercial litigation team by calling 8238 6666 or email enquiry@andersons.com.au