CHIEF JUSTICE'S CHAMBERS
FEDERAL COURT OF AUSTRALIA
119 North Quay Brisbane Qld 4000

22 October 2010

Mr Hamish Hansford
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affair
Parliament House,
CANBERRA ACT 2600

Dear Mr Hansford

Inquiry into the Civil Dispute Resolution Bill 2010

Thank you for the opportunity of allowing the Federal Court of Australia (**Federal Court**) to contribute to the Committee's inquiry into the Civil Dispute Resolution Bill 2010 (the **Bill**). The Bill has significant ramifications for the Federal Court and for its users.

Introduction

From its establishment in 1976 the Federal Court set about establishing its place in the Australian justice system as a court of excellence, innovation and courtesy. Over three decades it has consistently embraced change, welcomed new or expanded jurisdiction and adapted existing practices and procedures for these or developed innovative approaches to meet the challenges these present. It has led the way, both in Australia and internationally, in achieving procedural reform in some significant areas

The reforms in the *Access to Justice (Civil Litigation Reforms) Act* 2009 (**Access to Justice Reform Act**) and those in the Bill are based on separate but complementary principles – the just resolution of disputes *according to law* as quickly, inexpensively and effectively as possible. Each principle is of central importance.

One crucial reform that the Access to Justice Reform Act made from 1 January 2010 was to introduce into the *Federal Court of Australia Act 1976* an overarching purpose of the civil practice and procedures provisions for the Federal Court as well as an obligation on parties in civil proceedings to conduct the proceedings (including settlement negotiations) in a way that is consistent with the overarching purpose. This change has been very well received by the users of the Federal Court and, despite the relatively short time it has operated, is already resulting in real change in the way civil litigation in the Federal Court is approached, prepared and managed.

The Federal Court is concerned that the reforms proposed in the Bill:

- are not necessary or desirable in their current form;
- are not suitable for much of the work of the Federal Court;
- will increase the cost of and delay in a significant volume of the civil litigation in the Federal Court with no corresponding benefit;
- have the potential to create tension with the overarching purpose of the Federal Court's civil practice and procedures provisions;
- use terminology which is potentially inconsistent with similar reforms adopted in other jurisdictions.

As a result, the Federal Court's concern is that for many civil matters in the Federal Court this will be at the expense of reduced accessibility, equity, efficiency and effectiveness.

Background to the Reforms

The reforms in the Bill were proposed in relation to federal courts and tribunals in September 2009 by the National Alternative Dispute Resolution Advisory Council (**NADRAC**) in its report *The Resolve to Resolve – Embracing ADR To Justice In The Federal Jurisdiction.* In that report NADRAC specifically recognised that some classes of matters may not be amenable to resolution without a court or tribunal process. NADRAC gave as one example, judicial review of many administrative decisions. In its recommendations NADRAC also proposed that federal courts and tribunals should have the power to make rules or give directions about steps that prospective parties to proceedings in that court or tribunal must take before commencing particular kinds of proceedings, including mandatory attendance at any appropriate alternative dispute resolution (**ADR**).

The Government's *Strategic Framework for Access to Justice* and *Access to Justice Report,* also published in September 2009, again specifically recognised that not all matters that appear before the courts will be suitable for pre-action protocols that were suggested should be developed in consultation with the federal courts. The example of claims in the migration jurisdiction was given and it was said that such claims have already been through extensive merits review processes and introducing additional pre-action steps is likely to extend the process and increase costs.

Suitability for the work of the Federal Court

The Bill proposes that pre-action protocols be introduced for all Federal Court matters other than 'excluded proceedings' set out in clauses 15 and 16 or prescribed by regulation. As discussed later in relation to the experience in the United Kingdom (**UK**), no one set of genuine steps can be appropriate for all cases.

The Federal Court is concerned that the protocols proposed are not suitable for much of its work, well beyond that excluded by clauses 15 and 16. The Court's experience is that ADR is most effective when used in conjunction with active case management at a time when the parties are in an informed position to properly assess their risk. When that point arises varies from case to case depending on numerous facts and matters including subject matter of the proceeding, the nature and complexity of the issues in dispute and relative strengths of the parties.

In complex litigation of the kind dealt with in Federal Court, the assessment of the best time to deploy ADR is best made by the docket Judge with responsibility for managing the matter. The Court already has the power to, and does, make orders concerning the steps a party must take once proceedings have been commenced including mandatory ADR, the form of ADR, the identity of the ADR and related matters. Of course, that power is limited to proceedings filed in the Court.

Satellite litigation and terminology

The Federal Court is also concerned that the imposition of a requirement that a party take "genuine steps" prior to formally commencing litigation will result in litigation about that issue – namely, were "the" genuine steps necessary in the particular case taken prior to formally commencing litigation – with the result that the time and cost of the litigation will simply increase. Arid disputes of this kind are to be avoided.

As the Attorney-General noted in his Second Reading Speech when introducing the Bill in the House of Representatives on 30 September 2010, Victoria has enacted legislation and New South Wales (**NSW**) is contemplating doing likewise to introduce pre-action protocols for civil litigation in those States.

Both the Victorian legislation and the recommendations under consideration in NSW adopt a 'reasonable steps' requirement. It is not clear if there is a difference between 'genuine steps' as proposed in the Bill and 'reasonable steps' as will be required in Victoria (when the legislation there commences) and contemplated in NSW. The Federal Court is concerned that any difference in terminology is likely to lead to arid disputes in interpreting comparative legislative provisions.

Impact on cost and delay and tension with overarching purpose

The Federal Court is particularly concerned that there is the very real likelihood that a legislated genuine steps requirement will increase the cost and time of litigation, contrary to the overarching purpose set out in the *Federal Court of Australia Act 1976* referred to above. In the proceedings to which the proposed Bill applies, the parties will have to pay for additional statements to be prepared and filed (either separately or as part of another document) and risk being subject to the cost and delay of interlocutory disputes under clause 11 of the Bill that have no bearing on the substantive issues in the

litigation. This disputation is even more likely if costs orders might be sought or opposed on the ground that there has been a failure to file the statement mentioned in clauses 6 and 7 of the Bill or to have taken genuine steps.

In this regard it is noted that in the far reaching *Review of Civil Litigation Costs: Final Report* in the UK published in December 2009, Lord Justice Jackson found that the pre-action protocols dealing with specific areas of civil litigation and tailored to the particular requirements of cases in these areas operated efficiently and should be retained. Lord Justice Jackson found, however, that a general protocol for all other civil litigation served no useful purpose 'because one size does not fit all'; that, in respect of large commercial claims, that general protocol had the potential to cause substantial delay and wastage of costs; and that it should be repealed.

As previously stated, the Federal Court already has the power to, and does, make orders concerning the steps a party must take once proceedings have been commenced. These steps may include mandatory mediation and other ADR processes. As also noted above this power is exercised having regard to the subject matter of the proceedings, the nature and complexity of the issues in dispute and the relative strengths of the parties. The Court will often have regard to the extent to which the parties have attempted to resolve the dispute through direct negotiation or ADR prior to it coming before a Judge.

Clarifying how the reforms will operate

The Federal Court is also concerned that the Bill:

- is not clear on how its provisions are to operate -
  - in disputes involving multiple applicants and/or multiple respondents – it is not uncommon for proceedings in the Federal Court to involve a significant number of parties. This issue is even more complicated in the context of class actions under Part IVA of the *Federal Court of Australia Act 1976*
  - where a respondent joins a third party
- may operate in relation to -
  - insolvency proceedings such as winding up applications under the *Corporations Act 2001* and Creditor's Petitions under the *Bankruptcy Act 1986*
  - proceedings under the *Administrative Decisions (Judicial Review) Act 1976*.

Alternative approach

A simpler and less expensive approach to that proposed in the Bill which the Federal Court believes is worthy of consideration would be to enact legislation requiring a person *contemplating* litigation to serve on the prospective respondent a short statement of its case which provides an adequate description of the factual and legal claim and which could stand as its statement of its case (or at least the foundation of it) in any subsequent litigation. If that step were taken, the Federal Court could be given

jurisdiction over any ADR of that "matter" and the parties would be able to access the court-annexed mediation conducted by the registrars of the Federal Court.

The Federal Court's jurisdiction would not be dissimilar to that for pre-action discovery orders.

There are numerous benefits to the parties in using court-annexed mediators – the cost to the parties of court-annexed mediation is substantially less than external mediators; unlike external mediators, the court-annexed mediators have the benefit of the Federal Court's case management powers including powers to order alternative and appropriate forms of ADR and the ability to refer matters to a judge to resolve issues if and when they arise. Any additions to the Federal Court's jurisdiction to deal with these matters would require additional funding but at a significantly reduced cost than if the pre-litigation steps to resolve a dispute were outside of the Federal Courts' control and supervision.

If appropriately drawn, such an approach would:

- provide the same incentives for disputants to explore early resolution of disputes while better controlling cost and delay;
- be more cost effective and time efficient;
- fit more appropriately with the overarching purpose of the Federal Court's civil practice and procedures provisions;
- in civil litigation in the Federal Court, provide a better balance between accessibility, appropriateness, equity, efficiency and effectiveness;
- provide more certainty for Federal Court users;
- provide better control and supervision of pre-action steps where required.

Yours sincerely

P A Keane
Chief Justice