Law Council
OF AUSTRALIA

Civil Dispute Resolution Bill 2010

Senate Legal and Constitutional Affairs Committee

28 October 2010

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Executive Summary

The Law Council of Australia welcomes the opportunity to respond by way of this submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Civil Disputes Resolution Bill 2010.

In principle, the Law Council supports law reform which has as its objectives the enhancement of access to justice and the timely, just and cost effective resolution of disputes. Furthermore, the Law Council supports, in principle, measures being taken which encourage early participation in alternative dispute resolution mechanisms. However, the Law Council has concerns with the introduction of mandatory pre-action protocols generally and with a number of specific aspects of the Bill.

The Law Council recommends that:

1. clause 4 be amended to include:

    (a) a definition of 'genuine steps' in cl 5;

    (b) a definition and/or examples of what amounts to 'responding appropriately', as required by cl 4(1)(b), in cl 5;

    (c) "or" at the end of each sub-cl (1)(a) to (g), if the intention of the Bill is that the parties are required to engage in at least one genuine step prior to instituting civil proceedings;

    (d) the words "recognising that such processes are already followed in the ordinary course of most commercial litigation prior to proceedings being commenced" at the start of each sub-cls (d) to (g);

    (e) a new cl (4)(1)(h) to provide for "engaging in any other informal alternative dispute resolution process with the other party with a view of resolving some or all of the issues in dispute"; and

    (f) a new cl 4(3) which provides: "Subsection (1) is not to be regarded by prospective parties as containing all or any prerequisite genuine steps to resolve a dispute.";

2. clause 5 be amended to include the following definitions:

    (a) genuine steps;

    (b) responding appropriately;

    (c) assistance by the lawyer (as contemplated by cl 9(b));

    (d) requirement (as contemplated by cl 9(b)); and

    (e) alternative dispute resolution, noting that it "has the same meaning as in the *Federal Court of Australia Act 1976*."

3. clause 6 be reconsidered in view of the concerns that the filing of the 'genuine steps statement' may generate additional costs for the parties.

4. clause 7 be amended to:

(a) provide in sub-clause (1) that "A respondent in proceedings who is given a copy of a genuine steps statement filed by an applicant in the proceedings must file a genuine steps statement before the first return date"; and

(b) clarify as to what procedure is expected to be followed if the respondent disagrees 'in whole or part with a genuine steps statement filed by the applicant', as per cl 7(2).

5. clause 9 be amended as follows:

(a) remove cl 9(b) from the Bill;

(b) alternatively, if the provision is to remain, it should be amended to the following:

9 Duty of lawyers to advise people of the requirements of this Act

(1) A lawyer, instructed to file initiating process, who is acting for a person required to file a genuine steps statement must:

(a) advise the person of the requirement; and

(b) assist the person to comply with the requirement.

(2) Reference to a lawyer does not include a reference to a town agent in those jurisdictions where town agents are engaged by lawyers to conduct procedural aspects of filing applications.

(c) if the provision is to remain, the lawyer should be required to certify that they have complied with their duty without that statement being considered as a waiver of client legal privilege;

(d) definition and/or examples of what constitutes assistance by the lawyer as contemplated by cl 9(b) should be included in the Bill; and

(e) definition of a 'requirement' as contemplated by cl 9(b) should be included. That is, an explanation whether the requirement is one to take 'genuine steps' to resolve a dispute contained in cl 4 or to file a 'genuine steps statement' contained in cls 6 and 7 should be provided.

6. clause 12 be amended to:

(a) include a provision which clarifies that settlement privilege is not directly or impliedly abrogated by the requirements of the Act;

(b) replace term 'may' with 'must' in cl 12(1);

(c) include a provision for recovery of costs associated with the interlocutory steps; and

(d) include a provision which gives the court discretion to award costs in cl 12 in circumstances where a client has acted contrary to lawyer's advice and where a lawyer has terminated a client retainer as a result of the client refusing to follow their advice or failure to properly instruct the lawyer.

7. clause 14 be amended to:

(a) include a new cl 14(2) which provides: “To avoid doubt, this Part does not affect any settlement privilege which exists between the parties.”; and

(b) renumber the current cl 14 as sub-clause (1).

8. clause 15 be amended as follows:

(a) to include the following circumstances as those giving the court discretion to exclude the application of the Bill:

(i) interlocutory injunctions;

(ii) creditors’ petitions for bankruptcy brought under s 43 of the *Bankruptcy Act 1966* (Cth);

(iii) creditors’ petition for winding up in insolvency brought under s 459P of the *Corporations Act 2001* (Cth);

(iv) civil proceedings involving an important test case or a public interest issue;

(v) where a person involved in a civil dispute or civil proceeding has a terminal illness;

(vi) proceedings where expert opinion is required;

(vii) where there are multi party civil disputes and civil proceedings are contemplated;

(viii) where compliance with the interlocutory requirements would cause personal or financial hardship;

(ix) where the subject matter of the dispute or proposed civil proceeding has been dealt with at arbitration pursuant to a contractual (or statutory) obligation and such arbitration was not successful, provided that the arbitrator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such arbitration despite the best efforts of the parties to resolve the dispute;

(x) where the subject matter of the dispute or proposed civil proceeding has been dealt with at mediation pursuant to a contractual (or statutory) obligation and such mediation was not successful, provided that the mediator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such mediation despite the best efforts of the parties to resolve the dispute;

(xi) claims where there already exists a legislative or industry mandated obligation to serve a notice or notices before taking action, such as contractual agreements;

(xii) civil proceedings in which additional parties are brought in subsequent to the commencement of the proceeding, for example, civil proceedings in which parties are joined pursuant to a Third Party Notice or Notice of Contribution;

(xiii) where a judicial officer determines otherwise;

(xiv) where a court makes rules or issues practice notes exempting classes of cases in accordance with proportionality.

(b) further consideration should be given to the Bill in the area of insolvency;

(c) recognition that under the *Corporations Act 2001* (Cth) applications to set aside statutory demands must be made within 21 days and there is inadequate time to comply with the protocols;

(d) removing cl 15(d), which regards appellate proceedings as excluded proceedings; and

(e) providing clarification regarding the requirements to take 'genuine steps' in matters involving expert evidence and which steps are likely to be regarded as sufficient to satisfy the requirements of cl 4.

9. the legal profession be consulted on draft regulations and that these be made publicly available before the Bill is passed.

10. if a civil proceeding is instituted in a State court and then transferred to an eligible court, the parties not be required to comply with the obligations set out in Part 2 as it would be impossible for the parties to comply as proceedings would have already been commenced;

11. if a civil proceeding is instituted in a State court where federal matters are to be heard pursuant to the Uniform Procedure Rules and the cross-vesting legislation, the parties should be required to comply with the obligations set out in Part 2 only to the extent it applies to federal matters not excluded by Part 4.

12. the Bill should provide clarification as to whether the requirements apply only to the lead applicant in representative proceedings or to each member of the class.

Finally, although the Law Council does not make any specific recommendations in relation to the appropriateness of the terminology used by the *Civil Procedure Act 2010* (Vic) (which uses term 'reasonable' steps) and the Civil Dispute Resolution Bill 2010 (Cth) (which uses term 'genuine' steps), this difference should be considered by the Committee when making its recommendations.

About the Law Council of Australia

The Law Council of Australia (**Law Council**) is the peak organisation representing the Australian legal profession on issues of national and international concern. The Law Council advises governments, courts and other federal agencies on how the law and the justice system can be improved on behalf of the profession and for the benefit of the community.

The Law Council's constituent members comprise the state and territory law societies, bar associations and, as of 2007, the Large Law Firm Group, all of which are more fully identified at **Attachment A** to this submission.

Acknowledgment

The Law Council had consulted widely with its constituent bodies, sections and specialist committees for the purpose of preparing this submission. In particular, the Law Council acknowledges the contribution of the Federal Litigation Section, Alternative Dispute Resolution Committee, Law Institute of Victoria, Law Society of South Australia, Law Society of Western Australia, Queensland Law Society, Bar Association of Queensland Inc, and South Australian Bar Association.

Background

On 30 September 2010, the Senate referred the Civil Dispute Resolution Bill 2010 (**the Bill**)[1] to the Legal and Constitutional Affairs Committee for inquiry and report (**Inquiry**).[2]

The purpose of the Bill is "to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted"[3] in the Federal Court or the Federal Magistrates Court.

General Comments

The Law Council welcomes the opportunity to respond by way of this submission to the Inquiry. In principle, the Law Council supports law reform which has as its objectives the enhancement of access to justice and the timely, just and cost effective resolution of disputes. Furthermore, the Law Council supports, in principle, measures being taken which encourage early participation in alternative dispute resolution (**ADR**) mechanisms. However, the Law Council has concerns with the introduction of mandatory pre-action protocols generally and with a number of specific aspects of the Bill which are detailed in this submission.

[1] Civil Dispute Resolution Bill 2010, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4423%22.
[2] Senate Legal and Constitutional Affairs Committee, Civil Dispute Resolution Bill 2010, http://www.aph.gov.au/senate/committee/legcon_ctte/civil_dispute_resolution_43/index.htm.
[3] Civil Dispute Resolution Bill, cl 3.

Pre-action protocols

The Law Council supports early resolution of disputes without recourse to the courts if such processes are used effectively in the right cases. Pre-action protocols are a series of steps or requirements that a potential litigant is required to undertake in an effort to resolve a dispute without recourse to the courts and as a prerequisite to litigation.[4] Such procedures have attracted interest in Australia as a way to promote access to justice, efficiency, proportionality, the utilisation of ADR and cultural change.

The Law Council notes that the National Alternative Dispute Resolution Advisory Council (**NADRAC**) in its report to the Attorney-General, *The resolve to resolve—embracing ADR to improve access to justice in the federal jurisdiction*, recommended that, among other things, that "[l]egislation governing federal courts and tribunals require genuine steps to be taken by prospective parties to resolve the dispute before court or tribunal proceedings are commenced."[5]

However, pre-action protocols are very contentious. The introduction of pre-action protocols in the United Kingdom has been controversial with 'front-loading of costs' increasing the cost of litigation.[6] In conducting the United Kingdom Costs Review, Lord Justice Jackson reported encountering "a formidable battery of conflicting arguments concerning the merits and demerits of protocols." His Lordship further noted that "the issues surrounding pre-action protocols [were] some of the most intractable questions in the Costs Review".[7]

The Law Council is concerned with the introduction of mandatory pre-action protocols generally, and particularly in connection with commercial litigation in the Federal Court and Federal Magistrates Court. The Law Council believes that resolution of certain matters without recourse to courts can be more expensive and time-consuming if not properly done, thus resulting in added costs and denial of, or delay in, access to justice.

The Victorian Supreme Court Chief Justice Warren recently noted in the course of an address at the Victorian Commercial Bar Association Reception that "[p]re-action protocols are one significant example [of the challenge of proposed reforms to civil litigation for commercial litigators and advocates]. It needs to be recalled that commercial litigation is conducted differently from most other litigation. By the time commercial litigators are ready to initiate proceedings, mostly, they have been through all the processes contemplated by proposed pre-action protocols. Indeed, in England Lord Justice Jackson in his report has recommended that pre-action protocols not apply in commercial litigation."[8] In the view of the Chief Justice, "pre-action protocols and their application is a matter that should be left to the courts and court rules made by the judges."[9]

Similarly, Justice Reeves noted in his presentation regarding the Bill that "the rejection of the existing court system; the corresponding desire to discourage access to it; and the

[4] Michael Legg and Dorne Boniface, Pre-action protocols in Australia (2010) 20 *JJA* 39, 39.
[5] NADRAC, *The resolve to resolve—embracing ADR to improve access to justice in the federal jurisdiction* (September 2009), p 7, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~NADRAC+The+Resolve+to+Resolve+Report_web.PDF/$file/NADRAC+The+Resolve+to+Resolve+Report_web.PDF
[6] Ibid at 50; H Genn, *Judging Civil Justice – The Hamlyn Lecture 2008*, 56; M Zander 'The Woolf Reforms: What's the Verdict?', in D Dwyer (ed) *The Civil Procedure Rules Ten Years On,* 418.
[7] Lord Justice Jackson, *Civil Litigation Costs Review – Final report* (December 2009), p 345.
[8] Remarks of the Honourable Marilyn Warren AC, Chief Justice Of Victoria, on the occasion of the Victorian Commercial Bar Association Reception, Supreme Court Library (6 May 2010), p 2, http://www.commercialcourt.com.au/PDF/Documents/Victorian%20Commercial%20Bar%20Reception.pdf.
[9] Ibid, p 3.

need to provide a new system of civil dispute resolution outside the court system, appear to constitute the real justifications that are offered for this pre-filling ADR regime."[10] Quoting Sir Laurence Street in his article, *Mediation and the Judicial Institution*, Justice Reeves further noted that "ADR is a valuable social mechanism for the resolution of disputes, but it is not an exercise in the administration of justice."[11]

Similar discussions are occurring in many western democracies where there is a view that "citizens as taxpayers are not willing to invest in the administration of justice. In that situation, indeed the only way of speeding up the legal process will be to divert cases to mediation. But the alternative might simply be to invest more in the administration of justice. [M]ediation can only be truly facilitative, if it is structured against the backdrop of an accessible legal system. It should not be mediation or law. It should mediation and law."[12]

As noted by Legg and Boniface, "[t]he need to comply with pre-action protocols may create a pre-action battle ground over whether a party has or has not complied with the pre-action protocol."[13] The authors further note that a number of important issues remain to be resolved such as whether the information provided pursuant to pre-action protocols will be protected by confidentiality and non-waiver of privilege in all or some circumstances; how much detail is required if the pre-action protocols engaged in are contested at this preliminary stage; and if ADR fails due to bad faith, how this can be discerned. These issues do not appear to have been addressed with adequate specificity in the Bill to provide practical guidance for legal practitioners.

The need for a tailored approach to pre-action protocols and particularly ADR within a multi-door court concept may be preferable. In 1976, Harvard Law School Professor Frank Sander in *Varieties of Dispute Processing*,[14] promulgated the theory of the "multi-door courthouse." The theory involved the prospect of disputes being attracted to a single location, where experts in a wide variety of dispute resolution processes (of which litigation is one) recommend one or more processes, simultaneously or sequentially, to the parties in dispute. Sander suggested that parties ought to be able to choose what form of dispute resolution might best fit their needs.

Parties

It would appear that the Bill was drafted on the assumption that the parties will be on equal terms. It is important to note that each party may not have similar or sufficient access to information necessary for resolution. There may be a significant imbalance in resources (for example, experts) and information access, thus making the pressures of early settlement disadvantageous to one of the parties. The Law Council does however note that the potential for imbalance in power between the parties will not only be an issue for pre-action processes, but also for matters which proceed to litigation.

[10] Justice Reeves, *Civil Dispute Resolution Bill 2010*, Queensland Law Society ADR Conference Presentation, Brisbane, 7 July 2010.
[11] Ibid.
[12] Annie de Roo and Rob Jagtenberg, Mediation in the Netherlands: Past, present, future (2002) 6.4 *Electronic Journal of Comparative Law*, http://www.ejcl.org/64/art64-8.html.
[13] Michael Legg and Dorne Boniface, Pre-action protocols in Australia (2010) 20 *JJA* 39, 55.
[14] 70 FRD 79, 111-134.

Specific Provisions of the Bill

Clause 3

Clause 3 of the Bill[15] provides that the objective of the Bill "is to ensure that, as far as possible, people take genuine steps to resolve disputes before certain civil proceedings are instituted. " The Law Council supports this objective, particularly if, as suggested in the Explanatory Memorandum of the Bill, such action will "improve access to justice by focusing parties and their lawyers on the early resolution of disputes".[16]

The Law Council notes the use of the term 'genuine' in the Bill. Specifically, cls 3 and 4 refer to 'genuine steps' and a reference to a 'genuine steps statement' is included in Part 2, cls 11, 12 and 18. The use of the term 'genuine' is to be contrasted with the term 'reasonable' currently used in s 34 of the Victorian *Civil Procedure Act 2010*.[17]

On one view, the term 'reasonable' should be used as it provides an objective determination of the action arising under the legislation. On the other hand, there exists a view that the requirement to take genuine steps is a subjective one which does not oblige the clients to be reasonable. It does however oblige them to be sincere and act in good faith. Although the Law Council does not make any specific recommendations in relation to the appropriateness of this terminology, this difference should be considered by the Committee when making its recommendations.

Clause 4

The Law Council is concerned that cl 4, which provides examples of steps that could be taken by each party to resolve a dispute is likely to introduce additional transaction costs. Furthermore, the Law Council is concerned about potential satellite litigation in an attempt to clarify the elements of this clause.

The Law Council has a number of further specific concerns with the provisions contained in cl 4:

1. No definition of what will comprise 'genuine steps'[18] is included in the Bill despite that the object of the Bill is to ensure that such steps are taken by the parties. In a Second Reading Speech of the Bill as initially introduced in June 2010, the Attorney-General defined 'genuine steps' as including "any action that a party [t]akes in order to try to resolve a matter or narrow the issues in dispute."[19] It is unclear why this or an alternative definition was not included in the Bill.

   The Explanatory Memorandum at page 3 notes that the "Bill does not require parties to take any particular specific step – the most appropriate steps to take depend on the circumstances of the particular dispute. The Bill is deliberately flexible in allowing

[15] Further references to clauses are references to clauses of the Civil Dispute Resolution Bill 2010, unless otherwise indicated.
[16] Civil Dispute Resolution Bill 2010 Explanatory Memorandum, p 2, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4423%22.
[17] Section 34 of the *Civil Procedure Act 2010* (Vic) provides that "[e]ach person involved in a civil dispute must take *reasonable steps* [emphasis added], having regard to the person's situation and the nature of the dispute…".
[18] The Law Council again notes the difference in terminology between the Victorian and Commonwealth statutes which use terms 'reasonable' and 'genuine', respectively.
[19] Civil Dispute Resolution Bill, Second Reading Speech, 16 June 2010, para [18], http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_16June2010-SecondReadingSpeech-CivilDisputeResolutionBill2010.

parties to tailor the genuine steps they take to the circumstances of the dispute." A likely consequence of this "flexible" approach is that, prior to institution of proceedings, each party will be required to make a very difficult judgment as to whether the party has taken what would be regarded as 'genuine steps' by the court. Unless it is clear what constitutes 'genuine steps', some parties may feel obliged to make concessions that they would not otherwise make to avoid a potential costs penalty or to go further than is necessary to fulfil those obligations.

2. Sub-clause (1) merely gives examples of the types of steps which might be considered. While these are said to be "examples", it is likely that these steps will be regarded by prospective litigants as de facto prerequisites and non-compliance with any of the steps would involve the claim that 'genuine steps' had not been taken. This seems inconsistent with the apparent flexibility identified in the Explanatory Memorandum noted above.

3. Clarification is needed as to whether one step, a combination of steps, or all steps set out in sub-cl (1) are required before a party may institute civil proceedings. As noted above, the Explanatory Memorandum notes that "the most appropriate steps to take depend on the circumstances of the particular dispute,"[20] however, it still remains unclear whether reference to 'appropriate steps' means a combination of steps or all steps.

4. Sub-clause (1)(a) contemplates that a prospective litigant will notify the other party of issues that "may be" in dispute. The use of phrase "may be" carries potential for confusion as to how the obligations in this clause are to be fulfilled.

5. Sub-clause (1)(b) should specify what amounts to "responding appropriately", as contemplated by this provision.

6. Clause 4(1)(c) creates a clear prospect that requests for "relevant information and documents" by a prospective respondent may cause significant delays. Consequently, it is likely that further cost will be incurred in these circumstances, contrary to the objects of the Bill.

7. Sub-clauses (1)(d) to (g) reflect processes that are ordinarily followed in the majority of commercial litigation prior to proceedings being commenced.

Recommendations

The Law Council recommends that cl 4 be amended to include:

1. a definition of 'genuine steps' in cl 5;

2. a definition and/or examples of what amounts to 'responding appropriately', as required by cl 4(1)(b), in cl 5;

3. "or" at the end of each sub-cl (1)(a) to (g), if the intention of the Bill is that the parties are required to engage in at least one genuine step prior to instituting civil proceedings;

4. the words "recognising that such processes are already followed in the ordinary course of most commercial litigation prior to proceedings being commenced" at the start of each sub-cls (d) to (g);

[20] Civil Dispute Resolution Bill 2010 Explanatory Memorandum, p 2, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4423%22

5. a new cl (4)(1)(h) to provide for "engaging in any other informal alternative dispute resolution process with the other party with a view of resolving some or all of the issues in dispute"; and

6. a new cl 4(3) which provides: "Subsection (1) is not to be regarded by prospective parties as containing all or any prerequisite genuine steps to resolve a dispute."; include of a definition of 'genuine steps' in cl 5;

Clause 5

Recommendations

The Law Council recommends that the following definitions be included:

(a) genuine steps;

(b) responding appropriately;

(c) assistance by the lawyer (as contemplated by cl 9(b));

(d) requirement (as contemplated by cl 9(b)); and

(e) alternative dispute resolution, noting that it "has the same meaning as in the *Federal Court of Australia Act 1976*."[21,22]

Clause 6

The Law Council considers that the requirement that "[a]n applicant who institutes civil proceedings in an eligible court must file a genuine steps statement at the time of filing the application",[23] as provided for in cl 6(1), is likely to generate additional cost to the parties.

As noted below in respect of cl 7(2), there exists a real risk that pre-action protocols are likely to lead to higher costs in the circumstances where there is a contest between the parties at the pre-action stages of a dispute. By providing for undefined and unlimited orders to be made for a failure to take undefined 'genuine steps' or to lodge a complying 'genuine steps statement', there is a real risk that the Bill will not enhance but inhibit or delay access to justice. The processes required by the Bill are likely to add to the costs incurred by the parties before proceedings are commenced, as they endeavour to make assessment as to what steps would qualify as genuine steps and then seek to formulate a statement that complies with the legislation.

Recommendation

The Law Council recommends that cl 6 be reconsidered in view of the concerns that the filing of the 'genuine steps statement' may generate additional costs for the parties.

[21] ADR process is defined in s 4 of the *Federal Court of Australia Act 1976* as "a procedure or service for the resolution of disputes (other than arbitration or mediation) not involving the exercise of the judicial power of the Commonwealth." The amending legislation which inserted this definition into the *Federal Court of Australia Act 1976* was s 1 of the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009*.

[22] Reference to the definition in the *Federal Court of Australia Act 1976* (Cth) would make it consistent with the amendments introduced into that Act by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth).

[23] The Law Council again notes the difference in terminology between the Victorian and Commonwealth statutes which use terms 'reasonable' and 'genuine', respectively.

Clause 7

As noted above, cl 6 imposes an obligation on the applicant who institutes proceedings to file a 'genuine steps statement' *at the time of filing the application*. However, under cl 7, the respondent is only required to file such a statement *before the hearing date* specified in the application. The Law Council submits that respondents should be required to file the genuine steps statement prior to the first return date before the court.

Furthermore, cl 7(2) contemplates that a respondent might disagree "in whole or part' with a 'genuine steps statement' filed by the applicant. It is however unclear whether it is at this stage intended that the matter will proceed to litigation in circumstances where there is a dispute between the parties as to the content of the 'genuine steps statement'. In other words, it is possible that, even before commencing proceedings in relation to the issue in dispute, the parties may now be in dispute over the 'genuine steps statement', a dispute which would not have existed but for the current legislation. There is consequently real potential that the pre-action protocols will create higher costs for the parties and that these procedures may be used as a delay tactic.

Recommendations

The Law Council recommends that cl 7 be amended as follows:

1. redraft sub-clause (1) to provide: "A respondent in proceedings who is given a copy of a genuine steps statement filed by an applicant in the proceedings must file a genuine steps statement before the first return date."; and

2. clarify as to what procedure is expected to be followed if the respondent disagrees 'in whole or part with a genuine steps statement filed by the applicant', as per cl 7(2).

Clause 9

Clause 9 provides that "[a] lawyer acting for a person who is required to file a 'genuine steps statement' must:

(a) advise the person of the requirement; and

(b) assist the person to comply with the requirement."

The Law Council is concerned that cl 9(b) extends the obligation upon a party's lawyer beyond the overarching objectives of the Bill.

Insofar as the parties intend to and instruct a lawyer to take steps which are consistent with the parties' compliance with their duty, the proposed provision adds little or nothing to the long standing duties of lawyers in relation to which they may be liable for costs for non-compliance under Part VB of the *Federal Court of Australia Act 1976* (Cth) (**Federal Court Act**).[24]

However, the provision may create conflict where the party does not accept the advice, either at all or in part. The question then arises as to the scope of the obligation upon a lawyer to "assist" a party to comply with the duty in circumstances in which a party chooses to conduct the proceeding despite the lawyer's advice.

[24] This argument has previously been raised by the Law Council in its submission to the Committee in respect of the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 Inquiry.

This would give rise to real concerns, including that:

- pursuant to cl 12(2), an order for costs may be made against the lawyer where that person has breached his or her duty under cl 9. In these circumstances, the primary evidence against the lawyer would be contained in privileged communications between the party and its legal representative; and

- in these circumstances, the lawyer may consider him or herself bound to cease to act so as not to contravene the cl 9 duty. If this leads to a party not having legal representation, the overarching intent of cl 9 may be frustrated.

In view of the fact that cl 9 adds little or nothing to the long standing duties of lawyers, the Law Council recommends that cl 9(b) be removed from the Bill so as to avoid the ambiguity.

Alternatively, if cl 9(b) is not removed from the Bill, the Law Council recommends that the lawyer be required to certify that they have complied with their duty without that statement being considered as a waiver of client legal privilege.

The Law Council further submits that the provision is drawn too widely and thus accidentally catches counsel inappropriately. A barrister may be engaged prior to filing initiating process and thus would be a "lawyer acting for a person who is required to file a genuine steps statement" under cl 9. However, counsel, if instructed by a solicitor, will not be tasked with completing the genuine steps statement. Counsel are not the advisers who are able to file the document in court registries or who could be expected to assist a person to file a document and will generally rely on their instructing solicitors to undertake the requirements of cl 9.

Finally, the Law Council is aware that in some jurisdictions, such as for instance Queensland, town agents are engaged by country practitioners for the purpose of undertaking the simple tasks of filing, serving and being an address for service of process. The Law Council submits that town agents should also be excluded from the requirements of this legislation.

Recommendations

The Law Council recommends that cl 9 be amended as follows:

1. sub-clause 9(b) should be removed from the Bill;

2. alternatively, if the provision is to remain, it should be amended to the following:

9 Duty of lawyers to advise people of the requirements of this Act

(1) A lawyer, instructed to file initiating process, who is acting for a person required to file a genuine steps statement must:

(a) advise the person of the requirement; and

(b) assist the person to comply with the requirement.

(2) Reference to a lawyer does not include a reference to a town agent in those jurisdictions where town agents are engaged by lawyers to conduct procedural aspects of filing applications;

3. if the provision is to remain, the lawyer should be required to certify that they have complied with their duty without that statement being considered as a waiver of client legal privilege;

4. definition and/or examples of what constitutes assistance by the lawyer as contemplated by cl 9(b) should be included in the Bill; and

5. definition of a 'requirement' as contemplated by cl 9(b) should be included. That is, an explanation should be provided whether the requirement is one to take genuine steps to resolve a dispute contained in cl 4 or to file a genuine steps statement contained in cls 6 and 7.

Clause 12

When awarding costs, Part 3 provides that the Court "may" have regard to whether a 'genuine steps statements' was filed, whether 'genuine steps' were in fact taken and the conduct of the parties and their lawyers generally. It is unclear how these provisions add anything further to the existing requirement to consider whether the parties have complied with their obligations under s 37N(4) of the Federal Court Act.

Clause 12(1) provides that "[i]n exercising a discretion to award costs in a civil proceeding in an eligible court, the court, Judge, Federal Magistrate or other person exercising the discretion may take account of:

(a) whether a person who was required to file a genuine steps statement under Part 2 in the proceedings filed such a statement; and

(b) whether such a person took genuine steps to resolve the dispute."

Currently, under cl 12(1) the judge "may" exercise discretion to award costs. It is not clear whether this provision was intended to be mandatory and if so reference to 'may' should be replaced with 'must'. Use of the term 'must' would also make this provision consistent with s 37N(4) of the Federal Court Act. Under s 37N(4), the Court or a Judge must take account of any failure of a lawyer to take account of the duty imposed on the party to conduct proceedings (including negotiations for settlement) in a way that is consistent with the overarching purpose,[25] or to assist the party to comply with the duty,[26] in awarding costs in a civil proceeding.

Clause 12(2) provides that "[i]n exercising a discretion to award costs in a civil proceeding in an eligible court, the court, Judge, Federal Magistrate or other person exercising the discretion may take account of any failure by a lawyer to comply with the duty imposed by section 9."

Similar obligations are included in s 37M(1) of the Federal Court Act which provides that "[t]he overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible." As noted above, obligations are also imposed on legal practitioners under s 37N(4) of the Federal Court Act.

The Law Council notes that on one interpretation of cl 12(2), the duty imposed upon the lawyer under this clause may permit the Court when determining costs to have regard to matters which would ordinarily be the subject of settlement privilege. For example, a party seeking costs might rely upon cl 12(2) to contend that the terms of a settlement offer are

[25] *Federal Court of Australia Act 1976* (Cth), s 37N(2)(a).
[26] *Federal Court of Australia Act 1976* (Cth), s 37N(2)(b).

evidence of failure by the other party to comply with its duty under s 37N(1) of the Federal Court Act in the conduct of negotiations for settlement.

Furthermore, contracts often contain provisions which require the parties to engage in prescribed methods of ADR as a precondition before either party issues proceedings. Typically, contracts require negotiations in good faith between the parties and/or mediation. Conduct during negotiations and at mediation will be protected by settlement privilege under general law, whether at common law or under statute. There is an established body of case law on the meaning and operation of such provisions.[27]

The Law Council does not support the abrogation of settlement privilege, either by express terms or by implication.

Furthermore, the Bill does not appear to make any provision for recovery of costs associated with interlocutory steps. The Law Council believes that those costs should be recoverable if the matter proceeds to court.

Finally, the Law Council submits that when considering whether to award costs under cl 12, the court should be required to consider whether:

- the client has acted contrary to lawyers' advice; and
- the lawyer has terminated a client retainer as a result of the client refusing to follow their lawyer's advice or fails to properly instruct their lawyer.

Recommendations

The Law Council recommends that cl 12 be amended as follows:

1. include a provision which clarifies that settlement privilege is not directly or impliedly abrogated by the requirements of the Act, as discussed below in relation to cl 14;
2. replace term 'may' with 'must' in cl 12(1);
3. include a provision for recovery of costs associated with the interlocutory steps; and
4. include a provision which gives the court discretion to award costs in cl 12 in circumstances where a client has acted contrary to lawyer's advice and where a lawyer has terminated a client retainer as a result of the client refusing to follow their advice or failure to properly instruct the lawyer.

Clause 14

The apparent intent of cl 14 is to preserve settlement privilege, so that a party cannot adduce evidence of communications made in the process of taking 'genuine steps'. This should be expressly provided by this provision as a self-contained clause rather than merely stating that Part 3 does not affect s 131 of the *Evidence Act 1995*.

Recommendations

The Law Council recommends that cl 14 be amended as follows:

1. a new cl 14(2) be inserted which provides: "To avoid doubt, this Part does not affect any settlement privilege which exists between the parties."; and

[27] Eg *Aiton Australia Pty Ltd v Transfield Pty Ltd* (1999) 153 FLR 236; (2000) 16 BCL 70

2. the current cl 14 should be renumbered as sub-clause (1).

Clauses 15 and 16

The definition of "excluded proceedings" in cls 15 and 16 does not include creditors' petitions for bankruptcy brought under s 43 of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) and for winding up in insolvency brought under s 459P of the *Corporations Act 2001* (Cth) (**Corporations Act**).

The comments contained in the Explanatory Memorandum regarding the purpose of the Bill do not apply to these forms of insolvency petitions. Such petitions are not what are considered to be standard civil proceedings. They are applications brought before the court to consider whether a respondent debtor is insolvent. Therefore, it is unclear what objectives will be achieved by filing a 'genuine steps statement' in either matter.

The Bill seeks to ensure that parties genuinely try to resolve a dispute before an application to the court is issued. Petitions in bankruptcy must necessarily be based upon a judgment of a court,[28] and while not considered to be a means of debt enforcement, are consequential upon a judgment by their nature, rather than an application to initiate resolution of a dispute in the manner of most civil proceedings.

Petitions to wind up a company are normally based upon failure to comply with a statutory demand. Such demands do not necessarily require a judgment, but may also be supported by an affidavit which has not been successfully set aside within the requisite 21 day period under the Corporations Act.[29] Again, by their nature, such applications are significantly different to other forms of civil proceedings. Petitions to wind up a company do not necessarily involve a resolution of dispute, but rather are a means for a creditor to have a court appoint a liquidator to a company which has, by its failure to comply with statutory notices, shown that it is insolvent within the meaning of s 95A of the Corporations Act.

Significantly, neither form of petition requires any form of ADR under the court rules. The Explanatory Memorandum does not mention either the Bankruptcy Act or the Corporations Act within clauses 15 or 16, and it is likely that these forms of application to the courts have been overlooked rather than deliberately omitted.

The omission of these Acts from the Bill is likely to create further issues for trustees in bankruptcy and court-appointed liquidators in seeking directions from the courts in proceedings which fall within the definitions of the Bill, that is, where the trustee/liquidator is the applicant and another party is the respondent. While the nature of such applications for court directions with respect to the conduct of an insolvent administration may fall within the general effect of cl 6(2)(b) of the Bill, again such applications at present do not require any form of ADR and generally take the nature of legal arguments being submitted before a Judge or Magistrate for consideration.

Accordingly, further consideration should be given to the Bill in the area of insolvency. The Law Council suggests that the legislators may wish to seek some input from the Insolvency Practitioners Association of Australia or a similar body, given that the objective of the Bill in seeking to reduce costs and increase access to justice for all might be frustrated by the imposition of extra steps in proceedings that, by their nature and current court rules governing them currently do not require ADR.

[28] *Bankruptcy Act 1966* (Cth), s 41(1).
[29] Sections 459E(3) and 459Q.

As bankruptcy proceedings and statutory demands are not excluded from the Bill (unless Regulations are made exempting these), there is likely to be an increase in the costs of litigation associated with recovery actions.

Furthermore, under the *Corporations Act* applications to set aside statutory demands must be made within 21 days and it would appear that there is inadequate time to comply with the protocols.

The Law Council further notes that, although ex parte proceedings are excluded, the Bill makes no reference to ordinary applications for interlocutory injunctions. Arguably these proceedings will be the subject of claims to exception under cl 6(2)(b) on the grounds of urgency. However, this is not clear. Regardless of this fact, the Bill will add nothing other than the risk of argument about whether a 'genuine steps statement' should still have been filed where injunctive relief is sought on an inter partes basis.

The Law Council submits that appellate proceedings in cl 15(d) should not be regarded as excluded proceedings. Arguably, at the appellate stage, the prospect of resolution may be increased rather than reduced as the cost investment, power balance and knowledge base of the parties is likely to have shifted considerably. Appellate ADR programs in the United States have shown some success.[30] It is however acknowledged that by the time a matter is before an appeal court it would be within the court case management processes.

Finally, the Law Council has concerns regarding the proper preparation of matters for early settlement when expert evidence is crucial to the assessment of the matter for resolution. The Bill is unclear as to whether the parties are required to obtain early expert evidence prior to the commencement of proceedings or access to clinical notes, for example, in medical negligence cases.

Recommendations

The Law Council recommends that cl 15 be amended as follows:

3. the following circumstances should evoke the court's discretion to exclude the application of the Bill:

    (a) interlocutory injunctions;

    (b) creditors' petitions for bankruptcy brought under s 43 of the *Bankruptcy Act 1966* (Cth);

    (c) creditors' petition for winding up in insolvency brought under s 459P of the *Corporations Act 2001* (Cth);

    (d) civil proceedings involving an important test case or a public interest issue;

    (e) where a person involved in a civil dispute or civil proceeding has a terminal illness;

    (f) proceedings where expert opinion is required;

    (g) where there are multi party civil disputes and civil proceedings are contemplated;

    (h) where compliance with the interlocutory requirements would cause personal or financial hardship;

[30] Kathy Mack, *Court Referral to ADR: Criteria and Research* (2003), 42.

(i) where the subject matter of the dispute or proposed civil proceeding has been dealt with at arbitration pursuant to a contractual (or statutory) obligation and such arbitration was not successful, provided that the arbitrator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such arbitration despite the best efforts of the parties to resolve the dispute;

(j) where the subject matter of the dispute or proposed civil proceeding has been dealt with at mediation pursuant to a contractual (or statutory) obligation and such mediation was not successful, provided that the mediator has provided the parties with a certificate that the dispute and/or proposed civil proceeding was not able to be resolved at such mediation despite the best efforts of the parties to resolve the dispute;

(k) claims where there already exists a legislative or industry mandated obligation to serve a notice or notices before taking action, such as contractual agreements;

(l) civil proceedings in which additional parties are brought in subsequent to the commencement of the proceeding, for example, civil proceedings in which parties are joined pursuant to a Third Party Notice or Notice of Contribution;

(m) where a judicial officer determines otherwise;

(n) where a court makes rules or issues practice notes exempting classes of cases in accordance with proportionality.

4. further consideration should be given to the Bill in the area of insolvency;

5. recognition that under the *Corporations Act 2001* (Cth) applications to set aside statutory demands must be made within 21 days and that there is inadequate time to comply with the protocols;

6. removing cl 15(d), which regards appellate proceedings as excluded proceedings; and

7. providing clarification regarding the requirements to take 'genuine steps' in matters involving expert evidence and which steps are likely to be regarded as sufficient to satisfy the requirements of cl 4.

Clause 17

The Law Council notes that the Bill refers to certain requirements being prescribed in the regulations. In particular, cl 17(1) provides that "[p]roceedings are excluded proceedings to the extent that they are proceedings prescribed by the regulations for the purposes of this subsection."

The Law Council is concerned that the regulation making power granted under the Bill may be too broad, as it could potentially deal with a range of excluded proceedings. If matters are addressed by way of regulations, the Law Council would like to review those regulations before making conclusive statements about the Bill. The Law Council would welcome the opportunity to provide comments on these regulations and suggests that draft regulations be made publicly available before the Bill is passed.

Recommendation

The Law Council recommends that the legal profession be consulted on draft regulations and that these be made publicly available before the Bill is passed.

Other comments

Cross-Vesting

Clause 5 defines an application as "an application (however described) by which civil proceedings are instituted."

The Law Council is concerned that in circumstances where:

- a civil proceeding was instituted in a State court and then transferred to a Federal Court or the Federal Magistrates Court; or
- a State court is exercising federal jurisdiction pursuant to the respective cross-vesting legislation,

it is unclear whether parties are:

- required to comply with the obligations set out in Part 2; and/or
- whether a failure to comply with the obligations, notwithstanding the party did not initially institute proceedings in an eligible court, will be subject to a costs order.

Recommendations

The Law Council recommends that:

1. if a civil proceeding is instituted in a State court and then transferred to an eligible court, the parties not be required to comply with the obligations set out in Part 2 as it would be impossible for the parties to comply as proceedings would have already been commenced; and/or

2. if a civil proceeding is instituted in a State court where federal matters are to be heard pursuant to the Uniform Procedure Rules and the cross-vesting legislation, the parties should be required to comply with the obligations set out in Part 2 only to the extent it applies to federal matters not excluded by Part 4.

Representative Proceedings

The Bill does not specify what is to occur in the case of multiple applicants and/or multiple respondents, such as in representative proceedings. On the current construction of the Bill, each applicant and respondent may be required to comply with the requirements, such as filing of a 'genuine steps statement'.

The Law Council believes that this issue should be addressed in the legislation to avoid any ambiguity as to whether the requirements apply only to the lead applicant or to each member of the class.

Recommendation

The Law Council recommends that the Bill should provide clarification as to whether the requirements apply only to the lead applicant in a representative proceeding or to each member of the class.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.