Australian Government
Attorney-General's Department

Access to Justice Division

10/15450

25 November 2010

Ms Christine McDonald
A/g Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald

Information on notice – Civil Dispute Resolution Bill 2010 inquiry

The Attorney-General's Department was invited by the Committee to provide comment on notice about the Table of Exclusions tabled by the Federal Court of Australia, and to provide any further information to the Committee on notice.

Purpose of the Bill

The object of the Bill is to ensure that, as far as possible, people take genuine steps to resolve their disputes before commencing litigation (clause 3). It seeks to ensure prospective parties consider what they can do to resolve their dispute by requiring them to prepare and file a statement about what, if any, steps they have taken and if not, why not. The obligation to file a statement applies to all matters (other than excluded matters).

The Bill is deliberately flexible about what steps, if any, may be taken to accommodate the needs of parties and the issues involved in a particular dispute. By allowing parties to determine the most appropriate action to take in their particular case, the Bill directly contrasts with prescriptive, mandatory pre-action protocols.

The Department appreciates the concerns that litigation disadvantages people from low income backgrounds (see Federation of Community Legal Centres Victoria [FCLCV] submission). However, because the Bill is flexible, rather than disadvantaging such people, it has been designed to better enable them to resolve disputes from a more equal position. I refer the Committee to the Department's evidence relating to the increase in legal assistance funding as part of the Access to Justice measures (L&C 13). I also note that while the Bill does not require mandatory ADR (a concern of FCLCV), voluntary participation in such processes may have significant advantages for such participants when compared to the stress, cost and delay of court proceedings – see for example the concerns of Justice Von Doussa[1], and NADRAC submission to the Committee (18 November 2010).

[1] To quote Justice Von Doussa, *'Every day you empower individuals to make their own decisions. You provide them with a greater understanding of their legal rights, as well as knowledge of the various options to implement and enforce*

Pre-action protocol/ One size fits all

The Bill is not a pre-action protocol, nor does it mandate ADR, or indeed, any particular steps. The Bill requires that parties inform the court about the steps they have taken to attempt to resolve the dispute, or if they have not taken steps, why they have not (clause 6). However, failure to lodge a genuine steps statement does not invalidate an application (clause 10(2)). This is in contrast with the lengthy and prescriptive general pre-action protocol applying in the UK, which is the subject of criticism in Lord Justice Jackson's report.[2] The Bill is deliberately intended to avoid the pitfalls of such prescriptive pre-action protocols.

Witnesses before the Committee expressed concern about pre-action protocols, and mandating particular steps that parties must take without regard to the circumstances of each matter.[3] As illustrated however, the Bill does not have this effect (clause 4(1) – steps are examples only, not mandatory, clause 4(2) – the Bill does not limit what steps parties may consider, clause 10(2) – actions may proceed where steps have not been taken or a statement lodged).

The Bill allows parties to decide for themselves what genuine steps they can take to attempt to resolve the dispute. If they consider genuine steps would not be appropriate, the Bill requires that they inform the court why that is so. For example, clause 6(2)(b) includes examples such as urgency or safety and security of a person or property. This will inform the court's subsequent case management of the matter under existing case management powers.

A number of submissions made to the Committee reinforced the flexibility of the Bill:

- Professor Tania Sourdin (Sub No.1) notes that the Bill, *"support[s] the Court based development of appropriate and tailor made guidelines for litigants and their representatives and a rejection of a 'one size fits all' pre-litigation approach that has been the subject of criticism."* (p 12)
- The Castan Centre for Human Rights Law (Sub No. 4) notes that the Bill, *"is merely directing parties to take steps to narrow issues and to endeavour resolution of disputes prior to resorting to litigation"* (p 10) and that the Bill, *"[presents] individuals with less stressful and costly modes of dispute resolution which empower them to make their own decisions with which they are likely to feel satisfied."* (p 21)

The Bill encourages parties to take steps to achieve resolution. This is widely supported.

- National Legal Aid (Sub No. 8) submits that, *"the Bill's requirement that parties take 'genuine steps'... is appropriate and has the potential to improve the early resolution of disputes."* (p 2)
- The NSW ADR Directorate of the Justice and Attorney-General Department (Sub No. 9) notes that, *"the measures ... will promote the resolution of disputes and the narrowing of issues in dispute prior to commencement of proceedings."* (p 4)

The Bill has been designed as a deliberate alternative to the UK model. Lord Justice Jackson was concerned about mandatory, prescriptive steps, but endorsed the concept of engendering a culture of

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those rights. Perhaps most important of all, you equip them with the means to defend those rights from a more equalised power base' (Castan Centre for Human Rights Law, Sub No. 4, pp 20-21).

[2] See Lord Justice Jackson's 'Review of Civil Litigation costs: Final Report' December 2009.

[3] See Evidence given to the Committee by the Federal Court of Australia on 11 Nov L&C 2 and the Law Council of Australia L&C 8.

sensible pre-action behaviour and proportionate costs. This is consistent with the approach taken in the Bill.

Satellite litigation

The Bill is designed to minimise the risk of satellite litigation. A failure to take genuine steps does not create rights in the other party and parties cannot litigate whether genuine steps were taken or sufficiently taken. Consistent with amendments made in 2009 to the *Federal Court of Australia Act 1976*, interlocutory orders cannot be appealed without leave of the court (s24(1A)). The Bill includes no justiciable obligation to take genuine steps, or any particular step. The only requirement is to file a genuine steps statement. The only provisions for judicial consideration of the issue are set out in clauses 11 and 12.

Costs

The effect of the Bill is to allow individuals to determine what steps they take, in proportion to the matter in issue. If a dispute is resolved before litigation, that will result in a significant cost saving (relative to litigation). If a case is not resolved, the issues in dispute may be narrowed and clarified prior to hearing, thereby increasing the chances of later settlement and/or reducing the length of a court hearing. It may also save time later as the court may see no need to order any further attempts at resolution.

As noted in the submission from the Castan Centre for Human Rights Law (Sub No. 4), *"significant cost and delay [is] unlikely to flow from the broad, non-prescriptive provisions of the Bill."* (p 9) Further, the Centre notes that the Bill may *"facilitate the more timely access to courts for contests incapable of resolution outside the judicial process. Litigation may also be simplified and shortened by the narrowing of issues afforded by pre-litigation steps. Such benefits would in fact enhance the right of access to court proceedings."* (p 21) Finally, the Centre submits that *"it is fair to conclude that an indirect benefit likely to flow from the kind of cultural change promoted by the Bill is the prevention of mental harm which may flow from involvement in court proceedings."* (p 19)

Consistent with the Bill's enabling of individuals to determine the steps they take, genuine steps statements need not be overly long or expensive documents. All that is needed is a brief summary to alert the court to the genuine steps that have been taken or the reasons why none have been taken. If statements become too lengthy, clause 18 allows the court to control that by limiting the length of statements, for example to no more than 1-2 pages.

Exclusions

Following extensive consultation, exclusions to the Bill were made where significant dispute resolution processes were already developed and further genuine steps would not be of assistance. The Bill is sufficiently flexible so as not to require express exclusion of additional matters. Incorporating more exclusions may focus parties on how to fit within an exclusion, rather than encouraging consideration of what genuine steps can be taken to seek to resolve the matter.

In its submission, Insolvency Practitioners Australia (Sub No. 8) stated that, *"in relation to many court actions ... for example for recovery of moneys or assets, the Bill will provide a useful regime"* (p 3), and that, *"the Bill ... would be able to accommodate the varied circumstances involving insolvency practitioners."* (p 3)

During the preparation of its *Resolve to Resolve* report, NADRAC consulted extensively on the issue of mandatory ADR and prescriptive pre-action protocols (a topical issue as Lord Justice Jackson was then in the midst of preparing his own report and had raised the issue in consultations in Australia). As a result of its consultations, NADRAC concluded that any requirement for mandatory ADR or prescriptive pre-action protocols would need to be tailored to specific fields of legal practice and that numerous exceptions would need to be made. In response to those concerns, NADRAC devised the 'genuine steps' regime as a flexible model that could be broadly applied to encourage people in dispute to attempt to resolve their dispute without the need for extensive exceptions.

If necessary, in light of experience, the regulation making power (clause 17) will permit prescription of additional exclusions. **Attachment A** provides the Department's response to the list of proposed exceptions contained in the document tabled by the Federal Court on 11 November 2010. As indicated in the Department's evidence to the Committee (L&C 19), a significant proportion of the matters included in the classes proposed for exclusion by the Federal Court, are more than 12 or 18 months old.[4] Taking genuine steps for such matters would enable more productive attempts at resolution, which even if unsuccessful, would narrow the issues in dispute and provide better information to the court at the commencement of the litigation, thus reducing the length of any subsequent proceedings.

Terminology

Some submissions raised concerns about the terminology used in the Bill. The term 'genuine' has been used as this was the term favoured by NADRAC in its report, over 'reasonableness'. Genuine is a more meaningful term to encourage parties to consider what they can do to attempt to resolve the dispute. Courts have tended to say that reasonable means 'not unreasonable', which risks being a minimal standard. Further, the Department notes that the Family Law Rules have required parties to property and parenting disputes in the Family Court to make a genuine effort to resolve disputes since 2004. The Department is not aware that the use of the term 'genuine' has created any difficulty.

Uncertainty

The Department's submission is that the terms of the Bill are sufficiently clear and leave appropriate discretion to the parties or, if a matter subsequently goes to court, the judge. Including more exhaustively drafted definitions will not increase certainty, but will make the Bill more complex and harder to read and understand. It also risks introducing a prescriptive approach that is inconsistent with the Bill's intention of enabling parties to make their own decisions about the best way to proceed.

Proposed alternative approach

The Federal Court submitted to the Committee on 11 November 2010 an alternative approach to the Bill. Any attempt to simplify pleadings deserves consideration, and while the alternative has a complementary objective to the Bill, the Department does not believe that the Court's proposal is a substitute for it. The Bill is intended to encourage a greater focus on resolution *before* parties contemplate litigation. The Federal Court's proposed alternative approach is to apply to parties already *contemplating* litigation.

[4] See page 28 of the Federal Court of Australia Annual Report 2009-2010.

I thank the Committee for the opportunity to clarify the operation of the Bill.

Yours sincerely

Matt Minogue
A/g First Assistant Secretary
Access to Justice Division

Attachment A

Response to Federal Court of Australia's list of possible exceptions

Type of case	Reason why matter should not be excluded
Administrative Law	Most administrative law cases go through the Administrative Appeals Tribunal, which falls under an already excluded category in the Bill (s15(c)). Other matters involving judicial review are suited to pre-action attempts at resolution. This is supported in Lord Justice Jackson's *Review of Civil Litigation Costs*. (p 352)
Admiralty	In his final report on the *Review of Civil Litigation Costs*, Lord Justice Jackson states that admiralty matters are suited to resolution guidance prior to commencing proceedings in court. (p 346)
Bankruptcy	NADRAC consulted broadly on mandatory ADR and pre-action protocols. Its genuine steps recommendations addressed concerns about those approaches. This flexible approach leaves considerable discretion to the parties/the judge as to what steps (if any) are appropriate. As noted by the IPA in its submission, the Bill would accommodate the varied circumstances involving insolvency practitioners. For similar reasons, it is sufficiently flexible to accommodate different bankruptcy matters.
Corporations	Based on consultation, it was concluded that the application of the Bill to certain corporations matters would be of value. If there was a particular case where genuine steps were not appropriate, those consulted advised that lodging a genuine steps statement outlining the reasons why would be a simple process.
Australian Human Rights Commission	Following consultation, it was concluded that the application of the Bill to human rights matters would be of value. Where there are reasons in a particular case for not taking genuine steps in relation to a particular issue, this can be reflected in the genuine steps statement.
Intellectual property	In circumstances where urgency is the only reason for genuine steps not being undertaken, this would remain within the scope of the Bill and parties could cite the urgent nature of the matter as a reason why steps were not undertaken (clause 6(2)(b)).
Part IVA TPA (Competition)	Proceedings for an order imposing a pecuniary penalty for a contravention of a civil penalty provision are already excluded. In relation to other trade practices matters, if there was a particular case where genuine steps were not appropriate, those consulted advised that lodging a genuine steps statement outlining the reasons (such as urgency) would be a simple process.
Patents	These disputes may include complex factual and technical issues. Some issues may benefit from attempts at discussion and resolution (genuine steps). Where there are reasons in a particular case for not taking genuine steps in relation to a particular issue, this can be reflected in the genuine steps statement.
Taxation	Most taxation cases go through the Administrative Appeals Tribunal, which falls under an already excluded category in the Bill (s15(c)). However, other taxation matters may be amendable to pre-trial discussion of the facts and issues in dispute (genuine steps).