**LAW COUNCIL OF AUSTRALIA**

**Senate Legal and Constitutional Affairs Committee Inquiry into the *Civil Dispute Resolution Bill 2010***

**Responses to Questions on Notice**

**17 November 2010**

1. During Public Hearings of the Inquiry into the Civil Dispute Resolution Bill 2010 (the Bill) on 11 November 2010, the Law Council of Australia was asked to respond to some questions on notice, which were as follows:

   (a) What does the Law Council think of the alternative pre-action procedure proposed by the Federal Court of Australia in its submission to the Inquiry?

   (b) If implemented, would it resolve the Law Council's concerns about the Bill?

   (c) What does the Law Council think about the proposed "list of exclusions" tabled by the Federal Court at the public hearings?

Alternative pre-action procedure

2. The Federal Court's proposal is that, instead of a requirement to file a "genuine steps" statement, that prospective litigants be required to serve a statement of their case on the respondent, setting out the legal and factual basis for the claim, at such time as they are 'contemplating litigation'.

3. The Law Council notes that the Court has expressed its proposal as a concept which it believes to be "worthy of consideration" but has otherwise not developed it beyond that at this stage. Given this, and the fact that there has been very little time for the Law Council to consider the Court's alternative procedure (let alone consult with the Court and other stakeholders), it is difficult to express a view about its likely utility (having regard to the stated objectives) or to form a clear view about whether it should be supported.

4. The Law Council does however support the principle behind the proposal, which is to facilitate early identification of the real issues in dispute and the earliest practicable engagement by parties in alternative dispute resolution (ADR) processes. If the purpose of the procedure is to re-open the concept of the "multi-

door court",[1] the Law Council would be pleased to explore it further with the Federal Court and the Attorney-General's Department.

5. The Law Council notes in this context (and in the relation to its submission to the Committee generally) that an important feature of the case management and other procedures of the Federal Court is the flexibility they offer to litigants, their legal representatives and the Court to tailor court processes (including the use of ADR processes) to the particular facts and circumstances of the case. It will never be appropriate to apply a "one-size-fits-all" approach to civil litigation in the Federal jurisdiction, which is a key difficulty with the proposal for a "genuine steps" statement (and the related processes) proposed under the present Bill.

6. The Law Council would welcome the opportunity to explore a range of options with the Federal Court, the Attorney-General's Department and other stakeholders to achieve the worthy objectives of the Bill in a manner which will not undermine the Court's current ability to be flexible and innovative in the application of appropriate procedures in any given case.

Exclusions list

7. The Law Council notes that the lengthy list of matters which the Federal Court considers ought to be excluded from the proposed pre-action procedures demonstrates again that a "one-size-fits-all" approach is inappropriate and likely only to generate additional and unnecessary delay and cost, contrary to the laudable objectives of the Bill.

8. The Law Council suggests that if the bill is to proceed then, rather than a list of 'exclusions', a better approach may be to identify matters for which the proposed pre-action procedure will be appropriate– i.e. a list of 'inclusions'.

9. The Law Council reiterates its earlier comments that the Court should retain the flexibility to apply appropriate procedures and in any given case. The Federal Court's list demonstrates that the appropriate timing of ADR and the actual form (or forms) of ADR employed will vary from one case to the next. For example, in some cases, expert evidence, discovery and even witness statements may be required before a party can engage productively in a mediation or other ADR

[1] In 1976, Harvard Law School Professor Frank E.A. Sander ("Varieties of Dispute Processing", 70 FRD 79 at 111-134) 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 disputants. Sander suggested that a court house ought to have many doors and that disputants ought to be able to choose what form of dispute resolution might best fit their needs.

processes. In other cases, ADR may be appropriate at an earlier stage. However, it is not possible to say with any certainty when sufficient information will be available for mediation or negotiation to be effective. A bespoke approach may be necessary in early case management. This reflects the triage process contemplated in the multi-door court theory. Again, the Law Council would be pleased to explore the multi-door court theory further with the Federal Court and the Attorney-General's Department.

Conclusion

10. The Law Council is unable to provide a concluded point of view on the Federal Court's proposed alternative procedure. Further information is necessary, as well as discussion of other alternatives.

11. The Law Council does not support the Bill in its present form and recommends that it not be passed. However, the Law Council supports the objectives behind the Bill and recommends that the Federal Court's alternative procedure (and other procedures) be given further consideration (and be the subject of proper consultation) by and between the AGD, Federal Court, Law Council and other stakeholders.

12. If the Bill does proceed, the Law Council submits that, rather than a list of exclusions, a better approach would be to formulate, in consultation with the Federal Court and the legal profession, a list of matters for which pre-action procedures will be appropriate, while permitting the Court to set the requirement aside where application of the procedures would be inappropriate.