NADRAC
National Alternative Dispute Resolution Advisory Council

18 November 2010

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
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Dear Ms Dennett

Inquiry into the Civil Dispute Resolution Bill 2010

I refer to Mr Hansford's email of 8 October 2010 inviting NADRAC to make a written submission to the parliamentary inquiry into the Civil Dispute Resolution Bill 2010. You may recall that I responded to your invitation by a letter dated 27 October 2010. In that letter I indicated that NADRAC stood by its 2009 Report '*The Resolve to Resolve*: *Embracing ADR to improve access to justice in the federal jurisdiction*', and did not wish to place additional material before the inquiry at that time.

In light of a number of other submissions now before the inquiry, NADRAC considers that it may be useful to re-state its position on various matters under consideration.

The Bill arose out of recommendations made by NADRAC in its 2009 report. In this report, NADRAC recommended that the Government introduce legislation requiring participants to take genuine steps to resolve their disputes before commencing proceedings (recommendations 2.1 – 2.11). NADRAC is pleased that the Government accepted this recommendation in introducing the Civil Dispute Resolution Bill.

I note that commentary concerning the Bill following its initial introduction has raised issues about mandatory ADR, as well as possible increased costs and time. I take this opportunity to emphasise two matters of considerable importance: first, in its 2009 Report NADRAC did not recommend the introduction of mandatory ADR; secondly, the Bill does not introduce mandatory ADR.

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As to the second point, ADR is simply an example of a genuine step a party may choose to undertake, where appropriate. What amounts to a 'genuine step' is not defined, and is up to the parties to determine within the context of their particular dispute.

NADRAC also notes that there have been concerns expressed that a 'genuine steps' obligation will result in a rise in up-front legal costs. This is often a focus of criticism of prescriptive pre-action protocols. NADRAC's report noted that prescriptive pre-action protocols, such as those in the UK (see Schedule 4 to the report), could result in high costs and delays in getting to court for litigants. Mandatory pre-action protocols could also lead to considerable (and potentially unnecessary) legal work being undertaken before matters are resolved.

Having carefully considered these matters, and the extensive consultations undertaken by it, NADRAC proposed the 'genuine steps' requirement as a flexible, alternative approach to mandatory ADR, that should not incur significant extra costs for parties. To the extent that additional costs are incurred, they are at the discretion of the parties and would therefore be proportionate to the dispute, and should be reasonable in the circumstances. By narrowing the issues in dispute through a genuine steps process, there should be a reduction in the cost of litigation, and increased efficiency in the disposition of matters by courts.

Concerns about possible delay in matters getting to court have also been raised. The aims of the measures NADRAC recommended were to help change the adversarial culture and encourage prospective litigants to turn their minds to resolution before commencing legal proceedings. If the Bill successfully changes parties' behaviour by encouraging them to take genuine steps to resolve their dispute, it may lead to successful resolution. In those cases, the Bill's impact will be to avoid unnecessary litigation and shorten the course of disputes. However, even where the dispute is not resolved there should be no significant delay, as any steps taken are at the discretion of the parties and should be proportional to their dispute. In these circumstances, the process of attempting resolution may clarify or narrow the real issues in dispute, and assist the court to deal with the matter more quickly and effectively than might otherwise have been the case.

The view is sometimes expressed that where there is a power imbalance or the parties are disadvantaged in some way, they can only get justice from a court. NADRAC understands the reasons for, but does not support, that view. Good ADR practitioners carefully assess the disputants, and will provide or refer people to processes that are appropriate to their needs. In addition, ADR practitioners, particularly mediators, can be expected to identify and address power dynamics to ensure that a participant is fully able to participate in the process, while it continues to be assessed by all as suitable. That may include terminating the process. NADRAC

has long supported the development of ADR standards, such as the industry National Mediator Accreditation Standards (see http://msb.org.au) and the legislative requirements for family dispute resolution practitioners. Those standards are increasingly supporting and promoting higher quality ADR services. Disadvantaged disputants may be much better served if they can resolve their dispute in a quick, inexpensive and safe process rather than in lengthy, stressful and costly court proceedings. It is now widely accepted that even people affected by family violence may receive greater benefit from an appropriately managed family dispute resolution process rather than a court hearing (provided the subject matter of the dispute is not the violence itself).

NADRAC thanks the Committee for the opportunity to make this brief submission, and confirms its support for the passage of the Bill.

Yours sincerely

Professor The Hon Murray Kellam AO
Chair