NSW GOVERNMENT | Justice & Attorney General

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Dear Committee Secretary

Inquiry into the *Civil Dispute Resolution Bill 2010*

Thank you for the opportunity to make a submission to this Inquiry.

This submission is made on behalf of the ADR Directorate, NSW Department of Justice & Attorney General. Any views expressed in the submission are raised for discussion purposes and do not necessarily reflect the views of the Attorney General or the NSW Government.

The ADR Directorate has been established within the Department of Justice & Attorney General to coordinate, manage and drive ADR policy, strategy and growth in NSW. The ADR Directorate has issued the *ADR Blueprint*, the NSW Attorney General's Discussion Paper, containing 19 proposals to increase and better integrate ADR across the NSW civil justice system. The ADR Directorate has also released two further discussion papers relating to pre-action protocols and standards and ADR in government.

Further information about the ADR Directorate and the *ADR Blueprint* papers is available on the ADR Directorate's website at: *http://www.lawlink.nsw.gov.au/lawlink/adr/ll_adr.nsf/pages/adr_index*

Developments in NSW

Following on from the *ADR Blueprint,* the NSW Attorney General, the Hon. John Hatzistergos MLC, has foreshadowed that he intends to initiate reforms to the *Civil Procedure Act 2005 (NSW)* to require that parties to civil disputes take reasonable steps (having regard to the person's situation and the nature of the dispute including the value of the claim and the complexity of the issues) to resolve the dispute by agreement, or, in the event the dispute cannot be resolved, to narrow the issues in dispute, prior to civil proceedings being commenced.

It is anticipated that reasonable steps will be taken to include: notifying the other person of the issues and offering to discuss them with a view to resolving the dispute; responding appropriately to any such notification; exchanging information and documents relevant to the dispute; and considering options for resolving the dispute including engaging in genuine and reasonable negotiations and/or ADR processes. These requirements for reasonable steps are broadly consistent with the examples of 'genuine steps' that could be taken to resolve a dispute under clause 4 of the *Civil Dispute Resolution Bill 2010 (Cth).*

As with the *Civil Dispute Resolution Bill 2010 (Cth*), a certification process (by way of the filing of a Dispute Resolution Statement) will be used to obtain information on what pre-litigation steps have been taken and/or why certain pre-litigation steps were not taken, with that information made available to the court to assess the reasonableness of the steps taken by the parties.

While the proposed NSW amendments will provide a flexible, non-prescriptive pre-litigation requirement, there will be scope for bespoke Pre-Action

Protocols to be developed for specific case types in Rules, Regulations and/or court Practice Notes.

The NSW approach also recognises that the general pre-litigation requirements may be unnecessary or inappropriate for certain types of proceedings and set out appropriate exemptions with further scope for additional exemptions to be prescribed in the Uniform Rules and/or the Regulations. This is consistent with Part 4 of the *Civil Dispute Resolution Bill 2010 (Cth)* entitled 'Exclusions'.

It is proposed that compliance with the pre-litigation requirements will be a factor relevant to the question of costs. However, non-compliance either with the reasonable steps or certification requirements will not invalidate any aspect of the proceedings.

Because the proposed legislative change in NSW includes a pre-litigation requirement to exchange relevant documents, protections will be built in, including provision that information obtained in accordance with the pre-litigation requirements is not to be disclosed or used otherwise than in connection with the resolution of the civil dispute or any civil proceedings arising out of the dispute.

Under the proposed amendments in NSW, legal representatives would be required to provide information to clients about the pre-litigation and certification requirements and to advise them about the alternatives to fully contested adjudication available, including ADR.

A further significant change proposed in NSW is to extend the overriding purpose of the *Civil Procedure Act 2005 (NSW),* being the just, quick and cheap resolution of the real issues, to cover pre-litigation conduct and to extend to any person who provides financial or other assistance to a party (eg insurers and litigation funders) the requirement currently binding on solicitors and barristers, that they must not, by their conduct, cause their client to be in breach of that overriding duty.

The *Civil Dispute Resolution Bill 2010 (Cth)*

The ADR Directorate accordingly welcomes the introduction of the *Civil Dispute Resolution Bill 2010 (Cth)* as being broadly consistent with the reforms being undertaken in NSW. As in NSW, it is anticipated that the measures contained in this legislative reform package will promote the early resolution of disputes and the narrowing of issues in dispute prior to commencement of proceedings.

A number of comments and submissions regarding specific provisions of the *Civil Dispute Resolution Bill 2010 (Cth)* are set out below.

Terminology – "genuine steps" versus "reasonable steps"

The Bill as drafted uses the term "genuine steps" throughout. The term "reasonable steps" is preferable as "reasonable" has a consistent and well-understood legal meaning. The term genuine would seem to introduce a subjective element which, it is submitted, makes the meaning of the provisions less clear and compliance more difficult to assess.

Furthermore, it would be preferable to have some uniformity in legislation dealing with similar subject matter across the jurisdictions. The *Civil Procedure Act 2010* (VIC) uses the term "reasonable" and the legislative changes foreshadowed by the NSW Attorney General will also use the term "reasonable".

While the *Family Law Act 1975* uses the wording "genuine", this is in the context of the "genuine effort" parties are to make when mediating parenting disputes. The contents of this Bill are more closely related in terms of subject matter (civil proceedings) to equivalent State acts such as the Victorian Act than to the *Family Law Act*, where the term "genuine" may be more appropriate for reasons related specifically to the fact that it concerns parenting disputes.

It is therefore submitted that it is preferable for the Bill replace the terms "genuine steps" with "reasonable steps".

Procedure for genuine steps certification

Clause 6(2) requires that a genuine steps statement be filed specifying (a) what steps have been taken or (b) why no steps were taken. Subsection (3) provides no genuine steps statement need be filed in "wholly excluded proceedings". Excluded proceedings are set out in cl. 15 and 16. Subclauses 15 (a)-(b) and (d)-(i) include a number of types of proceedings concerning civil penalty orders, appeals, warrants, vexatious litigants, ex parte applications and enforcement proceedings. Clause 15(c) contains a different category of excluded proceedings, being proceedings based on the jurisdiction of a number of tribunals rather than the application type. Clause 16 provides that proceedings under certain Acts are excluded and lists those Acts.

Regarding excluded proceedings under cl. 15 except from the proceedings in cl.15(c) and cl. 16, a concern is that the question of whether a particular application is wholly or partly excluded may not be clear on the face of it and may be disputed in some cases. It is submitted that, as a matter of practicality and for avoidance of doubt about whether and on what basis a party is claiming exemption from the genuine steps requirements, it is regarded as preferable to require *all* applicants (other than those in the jurisdictions excluded at cl. 15(c) and filing Applications under Acts excluded in cl. 16) to file a statement. Where appropriate, the applicant could indicate on the statement that steps were not taken because the proceedings are wholly or partly excluded and specify what category of exclusion is claimed.

No explicit requirement in the Bill for parties to take genuine steps

Clause 3 of the Bill provides the object of the Act is to ensure that (as far as possible) people take genuine steps to resolve disputes. Clause 4 provides examples of what could constitute genuine steps. Clause 6 provides that applicants instituting civil proceedings must file a genuine steps statement at the time of filing. Clauses 11 and 12 provide the court may have regard to whether a person took genuine steps to resolve a dispute for performing functions, exercising powers and awarding costs.

While Part 2 is entitled "Obligation to take genuine steps to resolve disputes before proceedings are instituted", there is no section that explicitly states that parties are obliged to take genuine steps even though that appears to be the intention. Based on the Bill as currently drafted it appears that parties are obliged only to file a genuine steps statement but they are not obliged actually to take genuine steps. Nevertheless a court may make costs and other orders as a consequence of failure to take genuine steps. This appears anomalous and it is suggested the requirement should be stated explicitly. It would also seem that cl. 9 should be amended to provide that lawyers must advise clients of the requirement to take genuine steps and not only of the requirement to file a genuine steps statement as is currently drafted.

<u>No protection for information and documents disclosed while taking genuine steps</u>

It is clear that full disclosure is a necessary precondition for settlement in most cases. Clause 4 (c) appropriately provides as an example of genuine steps "providing relevant information and documents to the other person".

However, the Bill does not contain an explicit provision protecting the confidentiality of such information and documents provided in accordance with the Bill.

At common law, a person who has obtained access to documents pursuant to a court or tribunal process is subject to an implied undertaking prohibiting use or disclosure of the material except for the purposes of the proceedings.

The amendments to the *Civil Procedure Act 2005 (NSW)* requiring pre-litigation disclosure will explicitly extend the protection and use of information and documents to disclosure made in compliance with the pre-litigation requirements contained in that Act. The *Civil Procedure Act 2010* (VIC) contains similar protections at section 35.

It is submitted a similar provision would strengthen the Bill by giving parties confidence to disclose sensitive material relevant to settlement negotiations prior to litigation being commenced. Otherwise parties may choose to commence proceedings which might otherwise have resolved by consent merely in order to ensure certainty regarding the protected status of sensitive documents.

Conclusion

The ADR Directorate, NSW Department of Justice & Attorney General, supports the objects of this Bill and the measures it contains to encourage and facilitate early negotiation and settlement. Thank you once again for the opportunity to comment on the matters referred to in this submission.

ADR Directorate, NSW Department of Justice & Attorney General,
November 2010