COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Civil Dispute Resolution Bill 2010

THURSDAY, 11 NOVEMBER 2010

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 11 November 2010

Members: Senator Crossin (Chair), Senator Barnett (Deputy Chair) and Senators Furner, Ludlam, Parry and Pratt

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Eggleston, Faulkner, Ferguson, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett and Crossin

Terms of reference for the inquiry:

To inquire into and report on: Civil Dispute Resolution Bill 2010

WITNESSES

Committee met at 9.37 am

CHAIR (Senator Crossin)—I declare open this second public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the provisions of the Civil Dispute Resolution Bill 2010. The bill was re-referred by the Senate to the committee following the election on 30 September 2010 for inquiry and report by 22 November. We have received nine submissions for this inquiry. All the submissions have been authorised for publication and have been made available on the committee's website.

I remind witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action maybe treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to be heard in private session. If a witness objects to answering a question they should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed.

The Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of that officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for that claim.

[9.39 am]

SODEN, Mr Warwick, Registrar and Chief Executive Officer, Federal Court of Australia

CHAIR—Welcome. We have received submission No. 2 from the Federal Court of Australia. Are there any alterations you need to make to that submission?

Mr Soden—No.

CHAIR—Do you want to start with an opening statement?

Mr Soden—Yes, I would like to make an opening statement. I would like to reinforce some of the issues mentioned in the submission of the court. The first issue is that the bill proposes that pre-action protocols be introduced in all Federal Court matters other than the excluded proceedings set out in clauses 15 and 16 or those matters subsequently prescribed by regulation. The Federal Court is very concerned that the protocols proposed are not suitable for much of its work, well beyond the matters excluded by clauses 15 and 16. Moreover, the Federal Court is very concerned that the imposition of the requirement that a party take genuine steps prior to formally commencing litigation will result in litigation about that issue—that is, were the genuine steps necessary in the particular case taken prior to formally commencing litigation? That may well produce the result that the time and cost of litigation will simply increase when those issues become in dispute. Arid disputes of that kind must be avoided. The other issue in relation to the potential for arid disputes is the difference in the proposed terminology. The Victorian and New South Wales proposals talk about reasonable steps; this bill talks about genuine steps.

The other matter that we are concerned about is that, in the proceedings to which the proposed bill applies, the parties will simply have to pay the cost of the additional statements to be prepared and filed. There is a risk that they would be subject to the cost and delay of interlocutory disputes under clause 11 of the bill that, again, would have no substantive bearing on the real issues in dispute. That type of disputation or litigation is even more likely if costs orders are sought or might be opposed on the grounds that there has been a failure to file the statement or, alternatively, that genuine steps have not been taken.

The other issue we are concerned about is that there is some lack of clarity in particular areas. For example, it is simply not clear how the provisions would operate in relation to disputes involving multiple applicants or multiple defendants—and of course it is not uncommon for proceedings in the Federal Court to involve a significant number of parties. A good example is the class action proceedings commenced in our court. It is also unclear how these proposals may operate in relation to insolvency proceedings such as, in particular, winding-up applications under the Corporations Act or creditors' petitions under the Bankruptcy Act. The court, in its submission, did propose an alternative approach, and that approach is clear in the Chief Justice's letter.

There is, we believe, an issue that is easy to foresee. We are often burdened in the court with querulous litigants. Some of these are unrepresented people. It is very easy for us to foresee that that type of litigant will focus on a problem with the genuine steps that might have been taken or might not have been taken, and it is very easy for us to foresee that issue, being an arid dispute, being taken right through the appellant process by a querulous litigant. Unrepresented querulous litigants are not going to be deterred by the risk of adverse costs orders made in relation to those proceedings. It is our experience that they are unlikely to be in a position to be able to pay those costs, so the burden of that problem will fall to a respondent. That, again, will add to the costs of litigation for those respondents.

We also mention in our report the report of Lord Justice Jackson, the *Review of Civil Litigation Costs*. He makes the very important point that 'a general protocol for all civil litigation served no useful purpose because one size does not fit all'. In that respect we think that there is a collection of actions to which the genuine steps ought to be excluded, and they include actions like: admiralty, bankruptcy, corporations, human rights, intellectual property, part IV of the Trade Practices Act, which are competition cases, and patents and taxation. I have brought along for the assistance of the committee a document that sets out, in respect of those matters I have mentioned, the types of issues involved in the actions and why they should be exempt from a requirement for a genuine steps statement to be taken.

The other part of the document I wish to table sets out in an explanatory way how the alternative procedure we propose would actually work, compared to the procedures concerning pre-action protocols and genuine steps statements in the proposed bill. That is a document I would like to table, please.

CHAIR—That is accepted, thank you.

Mr Soden—That concludes my opening statement, Madam Chair. Again, thank you for the opportunity for me to be able to be here today.

CHAIR—Thanks very much. That example you gave to us about a person who might represent themselves and will simply just tie up the process in trying to prove what is a genuine step or take forever to fight their case by fighting the process of the case, would that be a different scenario if genuine steps was reasonable steps?

Mr Soden—I am hesitating because often these querulous litigants are not deterred by those types of differences. One of the problems about the difference, if a difference remains, is that it is going to be likely that there will be litigation looking at the comparisons of the different legislation, and that itself would be an arid issue. So I do not think in respect of querulous litigants that the difference between a reasonable step and a genuine step will deter them because, as I said, they are not going to be at risk of adverse cost orders because they just do not pay them.

CHAIR—If there were not provisions in the bill to have genuine steps identified or defined, what would you have instead? What would you substitute for that—what is the alternative?

Mr Soden—Our submission is that the genuine steps or reasonable steps requirement should be the exception rather than the rule and, as Lord Jackson said, should be case specific. That is not what the bill proposes. If there is going to be a reasonable steps requirement, those steps should be specific to the different types of cases. As he found in his report, they work where they are specific, they do not work where they are not specific.

CHAIR—I see. Senator Barnett.

Senator BARNETT—I am absolutely puzzled, quizzical, because I really appreciate your submission and the views you have contributed to the committee. The first question is: have you consulted or been consulted by the department with respect to this bill because the points you make seem to be quite persuasive?

Mr Soden—I think it is fair to say that the draft of the bill was really the first time we saw the details of the proposal. So, no, we were not specifically consulted—I am not aware that anyone in the court was specifically consulted about the proposals that were intended to be put in the bill.

Senator BARNETT—With the bill as it is currently written, you believe there is a probability or indeed a high probability of more litigation and therefore higher costs to litigants based on the fact that there would be litigation as to what is the definition of 'genuine steps'. Is that your view, based on the way the bill is currently written?

Mr Soden—That is the general thrust of our submission, but perhaps a little bit more detailed. If every applicant and every respondent has to file a 'genuine steps' related document in addition to what they presently have to do, and if they engage a lawyer for that purpose, that is going to be an additional cost.

Senator BARNETT—But that is not your sole or main concern, is it? Your concern is that litigation may then flow as to whether that has been achieved or not in each case.

Mr Soden—We see a substantial risk of arid litigation flowing from whether or not genuine steps were taken or whether or not a 'genuine steps' statement was or should have been filed.

Senator BARNETT—Based on what you know of the Victorian arrangements, have they found that what you suggest might happen here at the federal level is the case in Victoria? If not, why not?

Mr Soden—As I understand it, that legislation has not commenced. It is proposed to commence, but I do not think it has actually commenced yet. So it is probably too early to tell.

Senator BARNETT—But it is clearly based on the use of different words, as in 'reasonable steps' rather than 'genuine steps'. We had evidence in Victoria when we were down there on the merits of using the words 'reasonable steps' rather than 'genuine steps'. Do you think that is significant? Which do you prefer?

Mr Soden—I think the significant issue is that there is a difference. Where there is a difference, you are going to get an issue arising, possibly in interlocutory disputes, about whether not there have been genuine steps. That will lead to an examination of the comparisons in the legislation to try and determine what are or are not genuine steps. About 'reasonable steps': 'reasonable' is a very well-used term in the law. Some might say it is probably an objective term, whereas 'genuine', from my perspective, may be more subjective. A test

of whether something is genuine or not to different people might mean different things, whereas 'reasonable' at law might be more easy to determine.

Senator BARNETT—I agree with that statement entirely. I agree with your analysis there for sure. In terms of common-law precedent, 'reasonable steps' is well known and accepted and, as you say, it is pretty much accepted as to its definition, in both state and federal courts.

Mr Soden—I would agree. I think there is a better understanding at law of what 'reasonable' means. From my experience, I do not think there has been an examination of what 'genuine' might mean in relation to 'reasonable'.

Senator BARNETT—What we do know is that 'genuine' is a newer term, which is to be defined in law, at least in the common law, in the years ahead.

Mr Soden—One of the problems I personally foresee is with a querulous litigant's view of what the opposing party might have done. It is easy to see how they would have a very different view from their opponent about what is genuine, as compared to what we might say is a genuine step. I think there is just a huge risk of these arid disputes arising because of the requirement and because of the differences proposed between reasonable and genuine.

Senator BARNETT—Is it fair to say that you support consistency in each and every case wherever possible?

Mr Soden—That is a general principle that we as a court have really focused upon—if not consistency, at least harmony.

Senator BARNETT—Indeed. So you support consistency, but in this case would you prefer, all things being equal, the use of the word 'reasonable' rather than 'genuine'?

Mr Soden—I think, if there were a requirement, it would be better if it were 'reasonable' rather than 'genuine'.

Senator BARNETT—You have tabled this list, which you have used in your opening remarks about the extensions. We have had evidence, I think from the submission of the Insolvency Practitioners Association. Are you saying that the list of exemptions should be broadened?

Mr Soden—We are saying that these are the cases that are examples of where a genuine steps requirement would be a waste of time and money and not necessary.

Senator BARNETT—My point is that, under the bill, to satisfy your view that this would be a waste of time is it not correct that these areas should then be included in the bill as exclusions from requirements to satisfy the genuine steps test?

Mr Soden—If there is to be a bill with exclusions, we would say that these are the types of cases that should be excluded.

Senator BARNETT—Are insolvencies included on this list?

Mr Soden—In a general sense, yes. You will see that bankruptcies and corporations actions by liquidators and receivers under the Corporations Act are subject to statutory obligations concerning investigations et cetera.

Senator BARNETT—Going back to your letter, which is the letter from the Chief Justice—**CHAIR**—May I ask a question, just to follow up there.

Senator BARNETT—Yes.

CHAIR—Rather than have exceptions—you have outlined for us the current case management and how it occurs, you have outlined for us what is proposed under the bill and you have then outlined for us the changes that you believe need to occur. Is it a bit of a compromise between what there is now and what is proposed?

Mr Soden—Yes. The submission of the court proposes an alternative approach which requires, in essence, an exchange of statements pre litigation and giving the power of the court to undertake an ADR of that matter.

CHAIR—Yes, but your proposal on the third page does not go to exemptions for certain areas, does it?

Mr Soden—No. It explains in more detail how our alternative approach would work.

CHAIR—Okay. So, for this list of cases that would be excluded, would you still see your preferred method go hand in hand with excluded matters, or would you not need the excluded matters then?

Mr Soden—What we are saying is that those matters we say ought to be excluded are not going to be the kinds of matters that will be subject to the alternative approach as a general rule.

CHAIR—Okay. Thank you, Senator Barnett.

Senator BARNETT—It was helpful to clarify that. I was just moving to the alternative approach set out in your letter on pages 4 and 5 and item 3 of your tabled document. Would you walk us through that because, really, what you are saying is that you would prefer that this part of the bill or this bill not proceed in its current form and that this alternative approach take its place.

Mr Soden—That is the proposal, Senator.

Senator BARNETT—I want to drill down into that and be specific with you. Are you saying that the bill needs to be amended to enable you and us to go down the alternative approach road? What would that require? Does it require an amendment to this bill or that we should throw it out altogether and put forward another one? I understand your alternative approach is to give you more flexibility to case manage on a case-by-case basis the matter before the court. So, firstly, can you outline for us that approach? Secondly, how would we make that happen if we were to go down that track? Is it an amendment to this bill or is it a whole new bill?

Mr Soden—We are not specific about whether there should be a completely separate bill. We provided it as an alternative, as an example of the concerns that we have with the proposed bill. I think it would be for others to come to a conclusion about whether the alternative would be included in the bill or whether it would be a complete alternative to the bill. We do not make a submission in relation to that.

Senator BARNETT—But you do not have the legal authority to undertake this alternative approach currently?

Mr Soden—No, we do not, because in essence it is not a matter before the court. The court does not have jurisdiction until an application is commenced. We are saying, 'Move forward by this approach'—the ability of the court to become involved in a matter, to take advantage of the ability of the judges and others within the court to focus on the issues and apply our internal ADR processes where appropriate.

Senator BARNETT—Before the matter officially commences?

Mr Soden—That is right.

Senator BARNETT—And they would do that by forwarding a statement of its case, as you refer to it.

Mr Soden—Yes, which could become the ultimate case, but it might not. Our experience is that if we get hold of a matter early and case manage it under our case management provisions, and a matter is referred to ADR as a result of that process, often it will settle. If it does not settle, the issues are refined and the case goes on to hearing in a much more truncated version than if it is not touched.

Senator BARNETT—I would be interested in the views of the Law Society and the department and others as to the merit of your alternative approach, as to whether it would create more opportunities for litigation in due course, for dispute about this so-called statement of its case. What opportunities are there for the whole thing to unravel and create a litigious quagmire? Or do you think that is not likely?

Mr Soden—With early control of litigation, which is something our court has done since inception, every matter that is commenced in our court—apart from those dealt to finality by registrars, and that includes some of the bankruptcy and corporations insolvency cases—is allocated to a judge on the day it is filed. As a result of our active case management procedures, we have a very close look at and a control of cases for the purpose of identifying the best way to manage them, the best way to refine the issues, the best way to apply alternatives in various ways. The essence of what we are saying is: give us that type of jurisdiction early, through the statement of the case process that we are suggesting. The statement of the case process is the kind of issue that we have found, in fast-track proceedings, is a way of avoiding the cost and time-consuming complications of pleadings, responses and that sort of thing. In essence, it gets people to focus very early on what the case is and what the elements of it are. It helps the court manage the case and helps them with reduction in cost and time.

Senator BARNETT—I appreciate your evidence. It seems to be quite persuasive at first instance. We will no doubt need to get the views of the department in response to yours. Do you have any other third-party supporters of this approach, like the Law Society or anybody else?

Mr Soden—To be frank, we have not consulted others. This is our view. The view has been made public. It is for others to comment about it. There is one final issue that I should mention. One of my personal concerns

in this area is that the requirement in the bill for a 'genuine step' statement to be filed when a proceeding is commenced is going to be another addition to the requirements for litigants in person. There are consequences potentially for them with a defective 'genuine step' statement or no statement. The bill also provides that the failure to file a statement will be a matter for the court to decide the result of. There are issues that will have to be worked through in relation to whether or not an application will be accepted at the counter if it does not include a 'genuine step' statement. I just think that for, litigants in person and the concept of access to justice, it is not a barrier but it is another issue that they have to deal with and another issue that puts them at risk.

CHAIR—I have a few things to clarify. What is wrong with the current case management process?

Mr Soden—I would not say there is anything fundamentally wrong. The new active case management powers that the court has enables us to more strenuously focus on the just, quick and inexpensive way in which those proceedings are to be disposed. That obligation is also on the practitioners. We are not saying that the present system is broken per se.

CHAIR—Why do you believe there is a perceived need for change?

Mr Soden—I think it is fair to say that there is no argument with the proposition that there should be greater efforts by some in taking steps to resolve matters before litigation is commenced. There is no doubt that that is a reasonable proposition.

CHAIR—Currently, don't the courts or the judges have the power to order that or direct the parties to do that?

Mr Soden—Not unless a proceedings is commenced before the court. It has no sanction available to it in relation to what has been done prior to the commencement.

CHAIR—So what you are putting to us is that the proposals encompassed in this genuine steps process are perhaps too extreme or too onerous and that the bill needs to pull back a bit?

Mr Soden—In essence, we say it is too broad, it is too all encompassing. As Lord Jackson found in his inquiry, published in December last year, there should be requirements as an exception rather than the rule.

CHAIR—You have probably had a chance to read the transcripts of the Melbourne hearing. Concerns were put to us about litigants who would be disadvantaged by this new process, by this obligation and the impost this may then have on, for example, legal centres.

Mr Soden—I did read those submissions. I agree; I think there is risk. The bill proposes that the court be given the power to make rules in relation to the form and content of the genuine step statement. We have not got there yet in our thinking of what our requirements may be as to the form and content. But if you go back to what I said earlier, that is another requirement that a disadvantaged person—let us say a person who cannot afford legal representation—will have to deal with, in addition to the requirements as to what they need to put in their application in the first place. We are not in a position to give litigants in person advice about what they should or should not put in their genuine step statement. Our rules would not enable us to give a litigant in person the legal advice that they would not get about what should be in a genuine step statement and the risk of what they say or do not say or the risk of not filing it. So I think there is potential risk to the disadvantaged.

CHAIR—So, conversely, is there also a risk to somebody who wants to either get to the court quickly or delay their case as long as possible to manipulate the genuine steps process that is outlined?

Mr Soden—I think there is a risk more to those who want to commence proceedings very quickly, because the lack of a genuine step statement or the lack of failing to take genuine steps or reasonable steps could be, as I said, an issue that the respondent takes up.

CHAIR—So what is the point of having it then? It is not optional, is it?

Mr Soden—We are saying it is not optional for the majority of cases. There are some specific exclusions. We say that, if there are going to be specific steps, they should be case specific rather than general.

CHAIR—All right. This is my final question. I want to get an explanation or a view from you about how you see that this will work in complex cases, where there might be multiple litigants or applicants.

Mr Soden—I cannot imagine how it will work in complex cases. In the absence of any guidance at this stage, I think it is going to be extremely difficult in the complex cases, and I imagine that the genuine steps statement could be quite detailed, quite complex, quite long and possibly quite expensive.

Senator BARNETT—I have a very quick supplementary question. The Law Council say that they want the regulations to be made public before the bill is passed. Do you think that the regulations could empower your court to do what you would like it to do in terms of the alternative dispute resolution mechanism?

Mr Soden—I do not think that power would be available from regulations, and I suspect the Law Council's concern is about what types of cases are going to be excluded by the regulations.

Senator BARNETT—Thank you.

CHAIR—I have one more question. I want to get clarification on the record about how we got to this stage where somehow we have a view that the current process for case management is not suitable or not efficient. That must have been a view formed. There has been no consultation with the Federal Court, and the Law Society would probably say the same when we get them this afternoon. How did we get to a situation where we have such an extreme process in a bill that people have reservations about? You, I assume, were not consulted and had no input into this legislation.

Mr Soden—It arises, of course, from the NADRAC recommendations. I think it is fair to say that the policy behind those recommendations is that there ought to be an encouragement for people to resolve their disputes before they commence litigation, and you could not argue with that proposition.

CHAIR—No, but when NADRAC came up with that suggestion was there not then an attempt amongst the major players to say: 'How do you see this being practically put into place? How do you see this now being transferred into legislation?'

Mr Soden—Not prior to the release of the bill. I can say that, in the context of the NADRAC report, there is a provision in that report—I do not have it close to hand—where it talks about the exception of cases and about the court having the power to make rules in relation to exceptions. That is not in the bill. The exceptions are now subject to what is in the bill and potentially what would be in regulations.

CHAIR—How does this bill then stack up against the strategic framework for access to justice that the Attorney-General released last year?

Mr Soden—That is probably a question you need to ask the Attorney-General's Department. To be frank, I just have not looked at that issue.

CHAIR—Can you tell us who was represented on NADRAC?

Mr Soden—I do not have that list; I am sorry. I cannot remember all the names. I should, but I cannot remember the names off my head.

CHAIR—That is okay. Perhaps the Law Council might remember.

Mr Soden—There have been some changes. I am not sure that the people that were there at the time are still the same people.

CHAIR—We do not have any other questions—there are only two of us today—but I think you have been able to give us some answers to questions that are important. Thank you very much for your time today.

Mr Soden—Thanks for the opportunity.

[10.14 am]

EMMERIG, Mr John, Federal Litigation Executive, Law Council of Australia

PARMETER, Mr Nick, Director, General Policy, Law Council of Australia

CHAIR—Welcome. We have your submission with us, which is numbered No. 6 for our purposes. We have decided as a committee that we will stop at 10.30 this morning and have an extended morning tea because of Remembrance Day. Do you have an opening statement?

Mr Emmerig—Yes, we have some brief comments. I should indicate at the start that, while I am here for the Law Council, my day job is as a partner at Blake Dawson. I am a litigation partner. It has been suggested that it might be useful to indicate that I have practised in the area for 22 years. I have been on the Federal Court Liaison Committee with the Federal Court judges for the last 10 years. My main areas of practice are commercial litigation, class actions and trade practices litigation. Over the years, I have done personal injury, defamation and a range of other areas. That is said really to indicate that some of the comments made today will draw on that experience, to the extent I can do so in answering questions.

The Law Council appreciates the opportunity to appear today and appreciates the opportunity to make a submission. We are happy to deal with any questions the senators have in relation to the submission. There are some points of emphasis that I would like to make at the start. The first is that the Law Council strongly supports the objective—it is highly commendable—of the concept of timely, just and cost-effective resolution of matters. It seems to the Law Council that that is a point on which nobody could really take any serious dispute. That said, we have, as the submission indicates, reservations about mandatory pre-action protocols generally for federal jurisdiction. That is the first point of emphasis. There are several elements to that perspective. The first one is an access-to-justice point. We do have a concern about any step of this kind being introduced that provides a prequalification to accessing courts, and particularly one which we see for the majority of federal litigation matters will not be potentially helpful, will aggravate costs and will increase delay.

The other point about the general thrust of the bill is that, to the extent that pre-action procedures or protocols of the kind proposed here are being proposed for use in civil litigation, we would suggest to you that experience shows that this one-size-fits-all approach does not tend to be an effective way to proceed. I only caught the end of the engagement that just occurred with the representative from the Federal Court. I heard reference to Lord Justice Jackson's report. From my perspective that really is a very useful starting point. The UK has, since the Woolf reforms in the late nineties, used these pre-action protocols, albeit in a more prescriptive form. But Lord Justice Jackson is quite clear in his most recent review, which I think is a well-considered review and certainly a very well-consulted review, that these one-size-fits-all approaches just do not really work for litigation. They have the risk and practice of aggravating costs.

They create, and this is the last thing I think anybody wants, satellite litigation. Satellite litigation is the term he uses in the report. It is essentially litigation where there are arguments around the pre-action protocols. That is the last thing anybody wants but it is what will prospectively happen. We could potentially see added here another layer of dispute and litigation which could be used for strategic purposes to disadvantage particular litigants in litigation. So we have a lot of sympathy for the views expressed by Lord Justice Jackson in his report.

As I say, we have a general concern about pre-action protocols or steps of the nature proposed here. There is experience, I have to say to you, of them being of some use in certain styles of cases: personal injury cases, professional negligence cases, rent cases, housing cases and debt recovery cases. There are cases where these can add value based on the empirical evidence. But these are not the cases that tend to occupy the Federal Court's main jurisdiction. So in that regard we think, if this is to progress forward subject to the qualification that I mentioned earlier, there really is a need to think more broadly, we would suggest, about the matters that are included in exclusions. So, broadly speaking, we do not see merit in this applying to commercial litigation. We do not see it being sensible to apply it to insolvency and bankruptcy, and the submission refers to interlocutory injunctions. There are a number of other examples. So if this were to proceed forward a substantially enhanced exclusion list would be one matter that we would advocate strongly.

I will also make the point about smaller cases, and I did look at the transcript of your earlier proceedings. We do have some sympathy as to, and share the concerns that were raised by, those who appeared before you previously, about the impact on smaller litigants or less well resourced litigants, as a result of the proposed

genuine steps requirements. I have mentioned the concerns about the disputes that may occur around compliance with these genuine steps prerequisites and the satellite litigation. But I would also add that really the modern concepts that are proposed in this legislation are very much alive already in the legal community and are very much present in a number of other important pieces of legislation or government policy guidelines. Obviously, part VB of the Federal Court Act is well known to you as is the court's power to compel mandatory ADR once it comes into the court's jurisdiction through 53A. Even from another perspective, looking at the Commonwealth as a litigant—and it is a major litigant in the Federal Court—it has a mandatory obligation to look at ADR under the legal services directions, as you would be aware. There is a strong flavour of the need for the just, efficient and effective resolution of litigation. The moment you enter the court's door you know that you must do it. You, as a solicitor, have a duty and you, as a party to the action, have a duty to behave in that manner and achieve that goal. It drives the thinking before the court matter arises. So in many ways we understand the spirit of what is being proposed: you have a recommendation from NADRAC that says it is a good idea to put in place some procedures to compel people to look at ADR. I have no doubt people have looked carefully at the Jackson report and seen that the problem with having prescriptive lists of pre-action steps is that it has not proven to be a very successful way forward and has aggravated costs and created other problems. So this is a compromise. We understand the intent. We just do not think it delivers the outcome that is ultimately desired.

I will make one final point. I have seen reference in the second reading speech to flexibility and so on. Again, the objective is highly desirable and highly commendable, but flexibility in this game leads to uncertainty; uncertainty leads to cost; uncertainty leads to argument. If you choose a fixed list of pre-action protocols, we think it will produce the outcomes that have occurred in the UK. If you leave it the way it is at the moment, we think it is going to produce satellite litigation and those other problems I mentioned earlier, and it will not be particularly productive. It could be a case of it being useful for some matters, but being very much a situation where the tail is wagging the dog. Against that context, we would probably prefer either to see this not proceed in its current form or, we would suggest, a very substantial enhancement of the exclusion list.

CHAIR—Mr Parmeter, do you want to add to that?

Mr Parmeter—No, thank you.

Senator BARNETT—Mr Emmerig, thank you very much for your very persuasive opening remarks and for the Law Council's submission. Have you read the Federal Court submission?

Mr Emmerig—No, I have not. It was literally handed to me on the way in.

Senator BARNETT—You heard the back end of it on the way in. Can I draw that submission to your attention? It would be appreciated if you and the Law Council could review it and, in particular, the Federal Court's alternative approach where they argue for a flexible approach—a view, I think that you also take. They have also tabled today a list of further exclusions from that pre-action protocol. I would be interested in the Law Council's views in response to that list—whether you agree, disagree or wish to add to it. Would you please take all that on notice? Their list seems to be consistent with at least some of your opening remarks and I am particularly interested in the Law Council's response to their alternative approach.

Mr Emmerig—Yes.

Senator BARNETT—It seems to me, and I do not want to mischaracterise what they say, the Federal Court have a similar view to your own with respect to the need for a flexible, case-by-case approach. They can see merit, in certain cases, for the approach that the government is taking in this bill, but they have recommended a long list of exclusions and they have recommended what they call a 'statement of its case' which would be set out and forwarded to parties in advance of litigation. I would be interested in your views on that. Finally, I would be interested in your views on the need for consistency when it comes to either 'genuine steps' definition or 'reasonable steps' definition and I would like your thoughts on the merits of one over the other, bearing in mind the Victorian legislation.

Mr Emmerig—Yes, thank you for those comments. In relation to the Federal Court proposal, we will come back to you. We will take that on notice as you proposed. In relation to 'genuine' versus another formula, we are strongly of the view that 'genuine' is not the best way forward. 'Reasonable' is a better way forward, subject to my earlier comments that we would prefer not to have these pre-action steps in any event. But 'reasonable' allows one to apply well-established principles of objectivity in the assessment. 'Genuine' requires a very subjective inquiry. How does one really penetrate behind a piece of correspondence to

determine whether it was a genuine attempt? That would be our submission on that last point. But in relation to the other matters, and being mindful of the time, we will certainly come back to you with some comments around the Federal Court's proposal.

Over the last decade, I think we have seen, with the Federal Court and all the courts around the country, quite a landmark shift in the way litigation and disputes are resolved. It used to be the case that all litigation went in through the front end and there was a set list of procedures and time lines and so on. You just followed the list and did this step and then that step and so on. Case management, particularly in the Federal Court and in the Federal Magistrates Court, is very much alive and there are creative solutions coming through these days to drive early resolution. In some ways it is performing surgery on a patient that is already cured.

I am not suggesting it is perfect. Case management is a growing and evolving thing and it needs to be tailored to particular cases, but there are some extremely creative solutions coming through. In this regard, because a court has sufficient power already to refer a matter out to ADR once it comes through the court's door, for me there is a very strong and powerful argument to say that it is a nice idea but, to be frank, it is just not the right solution.

Senator BARNETT—Was the Law Council consulted prior to the bill's public release?

Mr Parameter—No, I am not aware that we were.

CHAIR—Your submission makes quite a number of suggested amendments—in fact, quite a number of comprehensive suggested amendments, to me—all based on the fact that you believe 'genuine steps' needs to be defined. Or is your preference that it be replaced with 'reasonable steps'?

Mr Emmerig—The latter. The style of submission that is being proposed is this: we indicate at the front that we have a concern about the whole process and we emphasise that we think, if it has to go forward, 'reasonable' should replace 'genuine'. But, if that argument also is not successful, then we have sought to be as constructive as possible in trying to work with the current text and offering solutions that might allow it to have less vice than we would otherwise perceive in its current form. We do not want to give the impression that, by making the detailed suggestions that we have made on particular clauses, we are keen to adopt or see this bill go forward in its current form.

CHAIR—I understand. If it were changed to 'reasonable steps', would some of your amendments need to be as specific or as detailed as they are?

Mr Emmerig—No, not at all.

CHAIR—That would change the nature of what you are suggesting, as well, in your recommendations?

Mr Emmerig—That would change the nature of some of the recommendations, yes.

CHAIR—You will probably have read some of the evidence from Melbourne.

Mr Emmerig—Yes.

CHAIR—I asked questions of Mr Soden about how it may disadvantage some parties, particularly those who need to access assistance through legal aid services. Do you have any comments you want to provide to us about that?

Mr Emmerig—We think you have raised an important point, Senator. We agree entirely with the concern that there is a real potential for adverse impact on those in such a position. I am sure the last thing anybody wants is more barriers to people having access to courts—and they should have access to courts—which are linked to costs. We would say strongly that costs should not be a barrier for access to justice. I think that was really what underpins the theme of some of the comments made by those who made submissions to you. But the question you asked, and the point you raised, I think is really quite difficult.

CHAIR—You think the new requirements are too prescriptive.

Mr Emmerig—I think so.

CHAIR—How do you see this working with multiple litigants or in complex cases?

Mr Emmerig—I indicated earlier I practise in class actions. I lead our firm's class-action practice and have been involved in many multiple-party cases over the years—complex cases around the country.

These proposed genuine steps are unnecessary because in major cases there is always some form of engagement before proceedings are filed. The style of engagement varies depending on the nature of the matter. In relation to class actions or other major proceedings, we raised in our submission that there is an

uncertainty, particularly with the class actions or representative proceedings, as to whether the requirement for genuine steps of engagement between the parties extends to just the representative party or to all members of the class. If it were the later, that would add an enormous cost to class action litigation.

Other practical issues are going to arise. For example, in clause 4 there is reference to examples of genuine steps, such as providing relevant information and documents and so on. In many of cases on major matters, to compile and present that information is difficult. You cannot just write to someone and say: 'I've got a hundred million dollars or a billion dollar claim against you. Please pay it.' The other side would want to see a range of material to start a sensible discussion in relation to the matter. To front end all of this for complex litigation is not practical. To be frank, all of the commercial discussion that need to occur usually occur before the cases start. Litigation is usually the last resort. People do not usually go there first of all. Most litigation lawyers in my experience advise parties to seriously pursue the alternatives before they go to court. Obviously in some cases you have to go to court.

But the biggest problem with major litigation, complex cases, class actions and so on will be the costs. Those costs will produce precisely the problem that Lord Jackson referred to. There is a very useful quote on pages 345 to 336 of the Lord Justice Jackson report from one of the UK law societies. It makes precisely the point that in these large cases this stuff already occurs automatically. These steps add no value and are not needed. If you made it mandatory, people could start playing games with what constitutes genuine steps at the front end of the action. That will front load a lot of the costs and potentially produce undesired outcomes.

CHAIR—Your other recommendations are pretty self-explanatory. I want to talk to you about the regulation-making power in the bill. You think it is too broad and you think that at the very least the legal profession should be consulted on the regulations before they are drafted. Your preference is to amend the bill rather than have regulations to look at.

Mr Emmerig—It is very much a lawyer's argument, I am afraid. It is all layered. The first layer is that we do not like it. The second layer is that if we have to have it we would like 'reasonable' instead of 'genuine'. The third layer is that we would like a range of other changes made even if that were to occur. The fourth one is that, as I have mentioned before, we would like to an expansion of exclusions, as well as other things that are dealt with in the submission. I emphasise that the submission should stand in full force, in effect. The fifth layer is that, regarding the regulations, we—like all lawyers—would like to see the detail before we commit to anything. In this case, it makes a big difference whether certain areas of litigation are excluded or not—it really does. The cost implications are quite substantially. The problem is trying to find hardcore evidence. The best thing is the Jackson review, because it is the product of the Woolf reforms, the protocols that have been in place for the better part of a decade. To the extent that there is empirical data, it is in there. To the extent that there is colloquial evidence, it is in there also. We would adopt it—with the qualifications that I have made earlier, which include that there is experience around the country that these things have been useful for personal injuries and like matters.

CHAIR—Finally, is the Law Council on the resolution advisory council, NADRAC?

Mr Emmerig—I will confer with my colleague.

CHAIR—I suppose the department will be able to answer this for us, but I am wondering whether other witnesses know who constitutes NADRAC.

Mr Parmeter—I will have to take that on notice, but the Law Council does have an ADR committee and there may be some members of that that are closely connected with members of NADRAC as well. But I am not aware that the Law Council itself has a standing—

CHAIR—We will ask the department about that anyway but I was wondering whether you would have been quasi-involved in this through any involvement through NADRAC. It does not seem to be the case.

Mr Emmerig—I cannot answer your question directly but I do recall that there was at least one meeting between the Law Council and NADRAC, I believe in relation to access to justice. But we can take that on notice and clarify the position.

CHAIR—That was probably in the lead-up to them coming up with recommendations.

Mr Emmerig—It c well have been. I just do not recall.

CHAIR—It precedes the formulation of this legislation, then.

Mr Emmerig—Yes, it would be my suspicion, but we will confirm that. I do not wish to mislead the senators.

CHAIR—There are questions Senator Barnett has asked you if you would not mind taking on notice.

Mr Parmeter—We are happy to do that.

CHAIR—We need those comments back fairly quickly. Maybe Tuesday of next week, I am afraid; we need to table this report on 22 November. You need to wind back and give us three or four days to go through our processes where I see the chair's draft before I give it to my colleagues.

Mr Parmeter—Tuesday would give you sufficient time?

CHAIR—That would be great.

Mr Emmerig—I should emphasise that we are at your disposal if there are any further questions you would like us to respond to.

CHAIR—The secretary is telling me that we can provide you with the Federal Court's information.

Mr Parmeter—Will that tabled information be on the website? We can get it from there.

CHAIR—Or we can give you a pack before you leave, which will make it easier.

Mr Parmeter—Thank you.

CHAIR—Thank you very much for your time and for your submission. We much appreciate the Law Council's wisdom and the time you actually take to look at this legislation. I cannot say it often enough, that it really does assist us to seriously consider some of the implications in these bills, and I do appreciate the Law Council's work.

Mr Emmerig—They are generous comments, Senator, and we very much appreciate it.

Mr Parmeter—We rely very heavily on the generosity of our practitioners in the field, like John, to volunteer their time.

CHAIR—We acknowledge that and I guess I want to put that acknowledgement on the public record and ask you to take that back. We will stand adjourned until 11.30.

Proceedings suspended from 10.43 am to 11.44 am

BERESFORD-WYLIE, Ms Serena, Acting Assistant Secretary, Justice Policy Branch, Access to Justice Division, Attorney-General's Department

BUCCO, Ms Ashe, Acting Senior Legal Officer, Attorney-General's Department

MINOGUE, Mr Matthew, Acting First Assistant Secretary, Access to Justice Division, Attorney-General's Department

CHAIR—Welcome. We will resume our public hearing of the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the Civil Dispute Resolution Bill 2010. Would you like to make a short opening statement?

Mr Minogue—Thank you. I will make a short statement to put the bill in the context of the access to justice strategic framework, which you raised this morning. We are certainly happy and prepared to then work through the submissions and evidence given by other witnesses this morning and on previous occasions. In terms of where the bill fits and its purpose, the bill itself states that its objective is to 'encourage genuine attempts to resolve matters before they go to court'. That is part of the access to justice framework that the government adopted, or it is certainly consistent with that. By way of background, the access to justice framework was adopted by government in 2009 as the way that it could improve access to justice across the broader civil justice system. The idea behind it was that access to justice is not that meaningful if all you are talking about is access to a court or access to a lawyer, because that is not how most people experience justice or a lack of access to justice. So the strategic framework essentially covers the civil justice system in the broader sense.

Some of the issues that came out of the work that we did in that inquiry relate to things like a basic lack of information, a lack of understanding about where to go for assistance and what to do. That picked up a lot of the research that had been done, particularly by the Law and Justice Foundation in New South Wales but also by other jurisdictions and countries, about unmet legal need. So what the framework encourages the government to do—and it does this at the front-end-stage—is look at access to justice principles, which are accessibility, appropriateness, equity, efficiency and effectiveness, and drill down beneath those in terms of some methodologies, such as: information, enabling people to understand their position and the options they have in deciding what to do; action, being intervening early to prevent legal problems from occurring and escalating; a triage concept of enabling matters to be directed to the most appropriate destination for resolution; providing fair and equitable pathways to outcomes for legal issues, and proportionate cost was a significant principle through that—a lot of the issues that senators have been discussing this morning are core issues within the framework; resilience of individuals in the community and the justice system itself; and social inclusion, doing things that are directed to making a difference.

The reason I say that is that it actually does address some of the issues that have been raised both this morning and in submissions, about disadvantage and lack of access to legal advice. The bill is part of a range of measures under the access to justice framework, and the framework will continue. Specific measures will come and go, but they are all aligned within that general framework, and that was really the point behind the government's decision.

The bill is not the only measure being implemented—a whole range of other measures have been. These include measures like the Access to Justice website, which is a locational device where people can find access to legal services in their area, particularly legal aid legal assistance and community legal services, including other state services such as financial counselling and crisis and women's issues. There are the significant increases to legal assistance expenditure that were made in the last budget. For the record, over four years there is an additional $92.3 million for legal aid, just under $35 million for Indigenous legal aid, $26.8 million for community legal services and the continuing funding for prevention of family violence legal services.

But it is not just the addition of the money. Because the states and territories signed up to the access to justice principles in the November 2009 meeting of the Standing Committee of Attorney-Generals, SCAG, they have also adopted those. That influenced the negotiation of the new national partnership agreement for the delivery of legal aid services. Consistent with the framework, what they did was put the emphasis on early intervention, early advice and early opportunities to resolve matters before they get entrenched in competing assertions of legal rights and litigation.

Just by way of example, the performance measures that the states have signed up to include a 25 per cent increase in the total number of legal services, a 30 per cent increase in the number of early intervention legal

services, and development of information and referral strategies to ensure comprehensive access to information and seamless referral to services for upfront assistance and advice to prevent matters from escalating—or, indeed, where issues have crystallised into a legal issue, to give them access to early legal advice and assistance before we get to the back end, which is litigation. That is the context where the bill fits. It fits in with that broader range of measures, including access to legal advice and overcoming disadvantage.

I will address some comments that were made. In terms of consultation, I do not want to leave the committee with the impression that there was not consultation on the recommendations or the bill; that is not the case. NADRAC undertook extensive consultation in the preparation of its report, and I should state for the record that NADRAC includes a range of people with significant expertise in these areas. One, of course, was Mr Soden, who was a witness here this morning. At the time of these recommendations being reported to the Attorney, NADRAC included a trial and appellate court judge of the Supreme Court of Victoria, Murray Kellam. It included a magistrate from Queensland, a federal magistrate, three QCs and two academics in relation to alternative dispute resolution. In terms of involvement with the Law Council, NADRAC met with the Law Council through the preparation of its report—and I will discuss the content of those discussions—and members also include two members of Law Council subcommittees and a former president of the Law Council. So the level of involvement and engagement was quite deliberate and quite strong.

In terms of the way those consultations went, the proposition that was put out was: what were stakeholders' views about a mandatory ADR requirement? I should say that I am not a member of NADRAC, but my branch in the department looks after NADRAC, so I actually participate in the meetings.

CHAIR—Mr Minogue, where do we find who is a member of NADRAC?

Mr Minogue—In the NADRAC report *The resolve to resolve*, which contains those recommendations, the members are listed, but I am certainly happy to provide that information to the committee.

CHAIR—So they were hand-picked individuals rather than—

Mr Minogue—No, this is a standing council. Members are appointed for a term. They look at a range of—

CHAIR—So they are individual members; they do not represent—for example, you do not say to the Law Society, 'Give me a nominee'?

Mr Minogue—That is right. There is not a Law Council person on it.

CHAIR—They are individual members.

Mr Minogue—They are. They are in their personal capacity, but obviously they bring their experience to the views that they formulate and develop for government. The comment I want to make in terms of how those consultations went is that they were in the context of mandatory ADR. The strong feeling from stakeholders was that mandatory ADR was neither helpful nor appropriate, particularly in the light of the UK experience of Lord Justice Jackson—and I will want to talk about Lord Justice Jackson's report a little later. The proposal that NADRAC put to government was not mandatory ADR. It was not about prescription. In fact, it consciously sought to address the concerns that had been raised by stakeholders and indeed had been raised by Lord Justice Jackson. When you go through Lord Justice Jackson's report, he does not say it in these terms but the tenor of where he is getting to, I would put to the committee, is actually something very like the bill before the Senate at the moment.

CHAIR—Mr Minogue, in between NADRAC's recommendation and the formulation of this bill, who did the department consult with?

Mr Minogue—I will respond to that by saying that the bill reflects the recommendations of NADRAC, so—

CHAIR—Yes, but my question to you was: in between recommending or reflecting the NADRAC recommendations, who did you talk to in formulating the legislation before us?

Mr Minogue—The existence of this policy approach was certainly raised with the Law Council through regular Law Council—

CHAIR—No, the actual content of the legislation.

Mr Minogue—Yes. The content is the NADRAC recommendation. By raising the fact that the government was going to legislate to implement the recommendation, people were aware that that was going on. In particular, the Federal Court was consulted since the beginning of this year. The NADRAC recommendation came out in December—

Ms Beresford-Wylie—Earlier, It was provided to the Attorney-General at the end of September and in October or early November it was public.

Mr Minogue—In October-November 2009 it was published. The matter was first raised with Federal Court in February this year. Drafting instructions were sent to the deputy registrar in March. It is an iterative process. More detailed proposals were provided to the Court in April. Formal transmission of the draft bill was provided in May. There was a range of correspondence between the Attorney and the Chief Justice when there was a draft bill.

Senator BARNETT—Before it was public or after?

Mr Minogue—Before.

CHAIR—Not to the Law Council?

Mr Minogue—A draft was not provided to the Law Council.

CHAIR—Only to the Chief Justice or to Mr Soden as the registrar and the CEO?

Mr Minogue—Mr Soden would have had access to it and it was also provided to the deputy registrar.

Senator BARNETT—What was the response from the Chief Justice and the Federal Court?

Mr Minogue—It is not for me to disclose the Chief Justice's response, but it is fair to say it was certainly not inconsistent with the view his submission has put.

Senator BARNETT—You are saying it was not inconsistent with the submission that we have received and that was made today?

Mr Minogue—I am saying it is consistent with that submission. Their views were consistent.

CHAIR—A disagreement with the legislation?

Mr Minogue—Yes, in the sense that they did not think it was necessary or desirable. That is the formula they have used, as I think they used in their submission today.

Senator BARNETT—Likewise, what did the Law Council say?

Mr Minogue—We did not consult on the detail of the bill with the Law Council following the release of the NADRAC recommendations. The purpose of the NADRAC process was to consult with all stakeholders and when government received that report, it was decided to implement it.

Senator BARNETT—The only party you consulted with was the Federal Court regarding the bill?

Mr Minogue—No, there was certainly significant consultation within government and government agencies certainly would have consulted their stakeholders.

Senator BARNETT—Which government agencies?

Mr Minogue—All departments, including agencies such as Customs and the Australian Taxation Office.

Senator BARNETT—Why did you not consult with the Law Council?

Mr Minogue—As I have said, the bill implements the recommendation that was the subject of significant consultation.

Senator BARNETT—Let us face it, their view is not inconsistent with the Federal Court's and they have expressed views on the record today in their submission. I want to get it on the record whether you consulted with them about the draft bill. I am not interested in NADRAC. Regarding the draft bill, did you consult with the Law Council?

Mr Minogue—No, they were not provided with a copy of the bill.

CHAIR—Do you want to add anything further ?

Mr Minogue—The point I was going to make was simply that the proposal that was recommended to government sought to address the concerns that had been raised and the UK experience with prescriptive pre-action protocols. My final comment in opening, although I have gone further than that, is that the bill is not about mandatory ADR; it is not prescreptive. In my submission, a fair reading of the bill will quickly allay concerns because it is not prescriptive; it is illustrative. In fact, there is a slight inconsistency between submissions saying 'define "respond" appropriately' and 'define this, define that' and concerns about increasing prescription and satellite litigation.

CHAIR—Can you point to the section of the bill that will convince us it is not prescriptive?

Mr Minogue—Certainly. The obligation in the bill is to file a genuine steps statement.

CHAIR—You must file a genuine steps statement?

Mr Minogue—Clause 6.1—

CHAIR—That is prescriptive and mandatory—is it not?

Mr Minogue—Subclause 10 of the bill also states:

(2) A failure to file a genuine steps statement in proceedings does not invalidate the application instituting the proceedings, a response to such an application or the proceedings.

So the bill is very deliberate. It is expressed as 'must file a genuine steps statement' but the failure to do so does not invalidate proceedings. That is quite a deliberate policy choice. This also addresses the satellite litigation concern, because all of the issues about the adequacy or otherwise of a statement, or the adequacy or otherwise of the genuine steps that may or may not have been taken, will be exercised by the court's existing case management powers. The point I would like to submit to senators is that this bill is a continuum of the court's existing powers. It brings those matters forward a step further so that when matters commence the court has more information. If the court does not have more information because people have not filed a genuine steps statement or the content of that statement is not what the court wants, the court can do what it does today, which is say, 'Well, parties or representatives, how did we come to this situation? What have you done to resolve the dispute? I am either satisfied with what you have done, so let's not muck around, let's get this matter listed for hearing, or I am not satisfied you have done enough, so, rather than devote limited judicial time and resources, I want you to go away and either take steps to resolve it or narrow the issues.' So the bill actually assists the court in the exercise of its case management powers. The Law Council representatives this morning spoke quite positively, in my submission rightly so, about the court's case management powers under 5B of the Federal Court Act. This complements those powers. It does not undermine them, there is no inconsistency.

CHAIR—Why is it in 6(1) that an applicant who institutes civil proceedings in an eligible court must file—must file—a genuine steps program? It does not say may or has an option to or is not obliged to or must file a genuine steps statement except see the exclusion clause in section 10.

Mr Minogue—The reason for that is both a drafting one and a policy one. It is not meant to be without effect. We certainly want the bill to have effect. We want people to actually undertake genuine steps. But the obligation on them is to file a statement. The reason why it is separated, and the saving is in clause 10 is that it is a preservation, it is a non-invalidity provision. We do not want people to escape the obligation but what we do say is we do not want this to become a barrier to people accessing courts or pursuing litigation.

CHAIR—So what if 90 per cent of people choose to not file a genuine steps statement?

Mr Minogue—The remedy for that is in the court's existing case management powers. The court can say, 'We are not satisfied,' and Jackson himself talks about a few robust judicial decisions will actually shift the—

CHAIR—What if the courts just say, 'Well, they haven't bothered to file it, so we will use our existing procedures.'

Mr Minogue—That is a hypothetical position. We expect—

CHAIR—No, it is not. According to Mr Soden today, they would prefer their existing provisions.

Mr Minogue—The position is that the obligation will be to file a genuine steps statement. Matters will not be invalid or applications will not be invalid if people do not. In terms of judges exercising case management powers, I think I would refer to the evidence of the Law Council that different judges case-manage differently. Some have very creative and innovative solutions. Some judges are very aggressive is probably not the right word but robust case managers, others less so. There might well be a range of different responses, but I do not think I could agree with the proposition that judges will simply wave the thing away and make it meaningless.

CHAIR—You are making it meaningless by making it optional.

Mr Minogue—No, it is not optional.

CHAIR—If people decide to not file a genuine steps statement, deliberately decide not to do that, I am assuming the default position is that the Federal Court will use their existing case management procedures.

Mr Minogue—They will. If people have not taken genuine steps they will have to tell the court why no steps were taken. One of the reasons—and this is only an example; it is not limited, and the bill clearly says that it is not a limited factor—is urgency. That was a concern raised this morning. That urgency issue is

addressed in the bill. It is essentially of the access to justice discussion that some witnesses have been having. The bill does not prevent and does not seek to prevent people from accessing a court. What it does is have the effect of turning people's minds to resolution prior to filing. That is our evidence. The more that people are focused on resolution, the fewer matters go to court. We know that most matters do not go to court. Of those matters that do go to court, the information in a genuine steps statement will be of advantage to both the parties and the court in the later case management function. If some parties do not file their genuine steps statement or the court wants more information about what actions have been taking to resolve the issues in dispute, then the court can ask for that. The example of it being either/or is one that does not reflect the intention—or indeed in our submission the effect—of the bill. What it does illustrate is that there is a continuum and information about what steps have been taken to resolve a dispute will assist the resolution of disputes in any event. That is a good. For those matters that cannot be resolved, it will either narrow the issues in dispute, which is a positive, or inform the court about what actions have been taken so that the case-managing judge is in a better position from day one about what case management decisions that they need to make.

Senator BARNETT—I am not convinced, quite frankly. I have just perused the NADRAC report. There is recommendation in chapter 2 that says:

> Pre-action requirement for prospective applicants
>
> A prospective applicant must, unless impracticable, take genuine steps to resolve a dispute before commencing proceedings in a federal court or tribunal by:

Then it sets out the details. It also sets out the exceptions, which are quite extensive, in fact. They include factors such as:

> ... urgency, undue prejudice, safety, security, the subject matter of the dispute, public interest factors and whether the dispute is essentially the same as has been previously before the same court or tribunal.

To characterise the bill as reflecting exactly the recommendations of NADRAC might be pushing it a little far. We all support the objective of alternative dispute resolution and keeping costs down and so on and so forth. We all support that. The matter is how we achieve that. We have received advice from the Federal Court that I want to go into. Do you want to respond before I do?

Mr Minogue—The recommendation that I was referring to is recommendation 2.11, which says:

> The legislation require parties to a proceeding in a federal court or tribunal to lodge with the court or tribunal a statement:
>
> —that they have taken genuine steps to resolve the dispute before commencing the proceedings
>
> —that they have considered the services available outside the court or tribunal which may assist them to resolve the dispute, or issues in dispute
>
> —that they obtained advice about estimated costs, costs exposures and timeframes for the proposed proceedings
>
> —setting out what ADR processes they have engaged in, if any, and
>
> —if they have not attended an ADR process, or taken other genuine steps to resolve the dispute, the reasons why they did not do so.

That is the recommendation that the bill implements.

Senator BARNETT—Yes. But there are many recommendations in the NADRAC report. That is one that you have picked up.

Mr Minogue—My submission is that that is what the bill does. It is the 'genuine steps' bill.

Senator BARNETT—We have talked about what seems to be an incongruity between section 6.1 and clause 10.2. The chair has asked you some questions about that, so I do not plan to pursue that much further. What I would like to ask you about is the Federal Court suggestion regarding their alternative approach. What do you say to their alternative approach? You have read their submission and you heard them this morning. What do you say about that?

Mr Minogue—I think that is an approach that comes from the court's experience of case management and in that context has to be considered very seriously. I would not characterise it as an alternative to this bill. In essence, what that proposition is about—

Senator BARNETT—They prefer it to this bill.

Mr Minogue—Yes, and I do not characterise it as a substitution for the bill. It is actually, I suspect, complementary to the bill. What that is about is a better way to do pleadings; it is a better way to actually

initiate litigation. This is before litigation; this is turning your mind to resolution before litigation. I would also caution—

Senator BARNETT—But their submission is to do exactly that—to deal with the matter before litigation, and they have suggested a statement of its case.

Mr Minogue—That is right—the case for litigation, which they say will then become the basis of the case as pleaded. To the extent that they are saying there is a better, more efficient way to have obligations for pleadings, I think that is to be applauded and deserves serious consideration. The caution I would have, though, is that because they are talking about giving the court jurisdiction over these artificial matters, before a matter has actually commenced, that is precisely satellite litigation. That is exactly what that is. If you say, 'The court will not now determine substantive matters that are commenced but matters simply contemplating litigation'—and that is the phrase they use: contemplating litigation—the court will have this whole quasi jurisdiction where parties will game the prescriptive requirements they are talking about. And let us go to that, because I think we do need to talk about Lord Jackson and what is prescriptive and what is not.

Senator BARNETT—I am trying to work out whether you support their alternative approach as set out in their submission and as put to us by Mr Soden this morning, or whether you do not support it.

Mr Minogue—I support it as something worthy of consideration. I think there are risks in it in terms of satellite litigation. I do not agree that it is a substitution for what the bill is attempting to do.

Senator BARNETT—Okay. If you want to comment on Lord Jackson, go ahead, but I want to ask you about the exemptions. They tabled a list of exemptions this morning.

Mr Minogue—I will be guided by you, Senator.

Senator BARNETT—Let us go to the exemptions. We have this document that was tabled this morning. They say that the exemptions in the bill are far too narrow and they have recommended these other areas: admiralty, bankruptcy, corporations, HREOC, intellectual property, part IV of the Trade Practices Act, competition, patents and taxation. I am wondering whether you had a look at that during the break and you have a view on those. Might I also say that the Law Council of Australia seemed to say—I do not want to mischaracterise their views—that they supported the thrust of where the Federal Court was going in terms of broadening the exemptions. They named corporations, bankruptcy and a few other areas. What is your response to that?

Mr Minogue—I have only just been given this document now so my comments will be guided by that.

Senator BARNETT—I am happy for you to take it on notice.

Mr Minogue—Let us work through the list. Administrative law is already exempt to the extent that the bill excludes proceedings that appeals from a merits review tribunal, which is what they are talking about. If something has gone through the AAT or another merits review tribunal, the bill excludes that. So that is covered.

Matters in admiralty potentially involve significant sums and complex issues. Perhaps one way to address that—

Senator BARNETT—We probably do not have time to go through each one. I am happy for you to take this on notice. I would like you to address each particular item that they have set out and give us a response.

Mr Minogue—On admiralty, Lord Justice Jackson endorses what is called the *Admiralty and Commercial Courts Guide*, which talks about procedures pre action. Basically what Lord Justice Jackson is about is proportionality and parties not throwing ridiculous effort at a pre-filing stage. That is the Law Council's concern and I think we are all coming to the same objective.

Senator BARNETT—I think we are supporting the thrust of Lord Jackson. Everybody appears to be supporting that. We are interested in the bill and whether these should be excluded. I want to know whether you support that or not.

Mr Minogue—Lord Justice Jackson endorses requirements for exchange of correspondence and key dates in issue to enable the other party to understand and investigate the allegations. Some meaningful exchange of information prior to commencing action is recognised and endorsed by Lord Justice Jackson, so to that extent we would not agree that admiralty should be removed. We do not agree that bankruptcy should be removed. That is an issue that was raised during our consultation processes, both within government and with the Federal Court. I would refer the committee to the submission of the Insolvency Practitioners Association. They

made two comments that I would put to the committee. One was about the issues raised by the Federal Court. I do not want to mischaracterise it, but they were not convinced that they were an issue. They also said the bill is 'flexible' and 'light touch'—I think those were the words they used—so that covers the concerns that they were raising. Also, because there are not particular mandatory pre-action steps, the bill covers the situations that parties want to do. In fact, I would refer the committee to a comment in the Law Council's submission that it is up to the parties to determine in what way to resolve a dispute. I would endorse that entirely. That is what the bill enables. I would also make the point in relation to bankruptcy—

Senator BARNETT—Mr Minogue, seriously, we have got the submission from the Insolvency Practitioners Association. I do not want to mischaracterise their submission. It is on the public record. It appears to me that they recommend that there be an exclusion.

Mr Minogue—That is not my reading of it, Senator.

Senator BARNETT—I am happy for you to take that on notice, but it depends how we read this document.

Mr Minogue—They say:

We … anticipate that the Bill if enacted would be able to accommodate the varied circumstances involving insolvency practitioners.

In the last substantive paragraph, they say:

We do say that in relation to many court actions by practitioners, … the Bill will provide a useful regime and in that respect we support it.

So on bankruptcy we share a view.

I should also draw attention to the regulation-making power, which can exclude further matters. My submission in relation to recommendations is that, if experience shows that there are areas of jurisdiction that should properly be considered for further exclusion, then those considerations can be had in light of experience. So our submission is that you do not need to exempt everything upfront.

In relation to Corporations Law, again we sought advice—internally, I should say—from the bankruptcy policy people in the department, and both bankruptcy and corporations were seen to be areas in which, because the bill is flexible, there were no particular problems with them remaining in the bill.

Senator BARNETT—Mr Minogue, could I cut in for a moment. We are a bit tight on time. We are about halfway through the list. I have a number of other questions. I am happy for you to take on notice your response to those matters. The Law Council are taking on notice their response to the matters set out by the Federal Court. You can say that you disagree and you will give us the reasons in due course—I am happy for you to say that—but we have got other matters we need to cover in this bill and we are limited by time. Are you happy to proceed accordingly?

Mr Minogue—I am, but can I quickly say that human rights, intellectual property, competition and patents are all matters that, if you look at the Federal Court annual report, they have a significant proportion of those matters that are more than 12 or 18 months old. So they are matters where better information upfront—which is what the bill is about—could actually assist in resolution.

Senator BARNETT—So therefore they are not to be excluded. That is your view.

Mr Minogue—That is right. Unless the experience is that it is not working—

Senator BARNETT—That is your view. That is fine. I just want to get your view and, if you want to add to it on notice, I am happy for you to back it up. You have got a couple of heavyweight stakeholders that have a different opinion from yours.

Mr Minogue—We do; I accept that.

Senator BARNETT—What about taxation?

Mr Minogue—In relation to taxation matters, again most taxation decisions go through the Administrative Appeals Tribunal, so they would be excluded, because matters on appeal from the AAT are excluded from the bill.

Senator BARNETT—So that should not be excluded. Would clause 10(2) allow some of these matters to be dealt with accordingly? Rather than having an exclusion, would 10(2) assist your argument to say, 'We're not going to have a 'genuine steps' statement here because it is tricky and so on?' Would that help you? Does that support your argument?

Mr Minogue—I would not say 10(2) in itself. The more substantive provisions that do, though, are in clause 6(2)(b). What it talks about are the steps that have been taken or the reasons why no steps were taken. If people have actually done what the Law Council says and have negotiated and consulted with each other before filing, it is not very difficult to say that that is what you have done. The judge then becomes possessed of that information. If they have not done those things, the bill expressly allows them to say why they have not done that. It talks about urgency. The other provision I would refer to—and this is important—is the provision empowering the court itself to make provision in relation to:

(a) the form of genuine steps statements;

(b) the matters that are to be specified in genuine steps statements;

(c) time limits ...

Senator BARNETT—Where is that?

Mr Minogue—That is in clause 18 of the bill. That is an empowering provision that gives the court, in my submission, exactly what it is concerned about. If people are concerned about costs, the court could say: pages should be no more than two pages long; statements should be no more than two pages long. If they are concerned about a particular jurisdiction, they can particularise that as required for a specific protocol. The concerns, in my submission, are addressed in the bill.

CHAIR—Chapter 9 of the NADRAC report discusses the benefits that appropriately drafted dispute resolution clauses can offer. The chapter warns:

... poorly drafted clauses can lead to protracted and complex legal disputes concerning their interpretation or effectiveness ...

It goes on to say:

... a model clause as a template that may be used voluntarily, either fully or partially in a contract, or as a starting point ...

Their report provides a model ADR clause. Why was that not adopted as the basis for the legislation?

Mr Minogue—The legislation is not about mandatory ADR. It is not saying—

CHAIR—Neither is this. They are saying:

NADRAC concludes that it should provide a model clause as a template that may be used voluntarily ...

My question to you is: why did you not pick up that model clause as a template that can be used voluntarily?

Mr Minogue—I am not sure I follow. How would we legislate a model clause? Has NADRAC published its model clause?

CHAIR—Yes. It is an attachment to their report.

Mr Minogue—Yes. So this information is out there.

CHAIR—What I am saying to you is: can you shed any light as to why you did not use the model clause or the intent of the model clause that NADRAC provided in their report rather than going down this route. The bill is vastly different to the model clause and the intent of the model clause in the NADRAC report. I am trying to get a handle on why the legislation does not reflect—I do not believe—what NADRAC essentially wanted.

Mr Minogue—With respect, I would disagree. NADRAC, in recommending the legislation, did not recommend the model clause as part of that legislation.

CHAIR—Show me in the report where they do that.

Mr Minogue—Where they recommend the legislation?

CHAIR—Yes.

Mr Minogue—I referred to it previously.

CHAIR—Why would they include it—

Mr Minogue—It is a separate recommendation.

CHAIR—Where is that, though? Why would they include a model clause in their report if they did not intend you to use that?

Mr Minogue—NADRAC would like to see effective ADR clauses used in contracts that establish ADR procedures. The bill is addressing a different issue, which is not about mandatory ADR. To the extent that

people defied taking genuine steps that involved ADR, that ADR process would be facilitated by an ADR practitioner, and the relationship between the practitioner and the parties would be governed by a contract. That is where effective clauses become relevant. But it is a different thing from legislating for genuine steps, which was a separate recommendation of NADRAC. I might have confused the committee, but I am not suggesting that the bill implements every recommendation that NADRAC made in its *Resolve to resolve* report. I am saying that the bill implements the recommendation for genuine steps legislation.

CHAIR—I cannot see where they are inconsistent. You are saying to me they are inconsistent, but, when I look at this draft model clause, that draft model clause seems to be an attempt to have genuine and/or reasonable steps between the parties prior to litigation. I am still confused as to why this model clause is not used rather than your genuine steps procedure. I know what you are saying; I am saying something different.

Mr Minogue—I am certainly not suggesting they are inconsistent. They are directed to different ends and if people undertake mediation as one of the genuine steps you would expect that the proper contractual basis would be informed of this.

CHAIR—Informed by what? You are saying informed by this—

Mr Minogue—Informed by the NADRAC publication which is made available to the ADR communities—practitioners, lawyers, representative associations—

CHAIR—In what instance would you use this model ADR clause then?

Mr Minogue—Where the parties choose to contract to undertake mediation.

CHAIR—Okay. So why can't you put that in this legislation?

Mr Minogue—Because that would be mandating ADR, which is exactly what the Federal Court and the Law Council are concerned about, which is exactly what the bill does not do. It does not prescribe mediation.

CHAIR—You are saying that clause 10 is the let-out clause.

Mr Minogue—No, we are saying that it is a flexible approach for the parties in considering what steps they can genuinely take to resolve a dispute to best suit their circumstances including the circumstances such as urgency or other reasons why genuine steps were not possible or appropriate. If they choose to undertake mediation or another form of ADR, that process would be governed by the contract that establishes that. I am in a position of difficulty, because the question seems to be directed at why we are not being more mandatory about the terms on which parties contract.

CHAIR—No, I am asking: why are you not being more flexible about the way in which the mediation could be handled by using the model clause as your basis?

Mr Minogue—I do not think that we could be more flexible, with respect, Senator. The bill leaves it to the parties to determine what steps they should take to resolve their dispute and, in terms of taking those steps, certainly mediation and ADR are elements. The contractual basis for that—

CHAIR—You are failing to convince me that that is the case. When I look at the wording in the legislation, that the parties 'must'—and everywhere you look it has got the word 'must'—and you are hanging the let-out clause and the let-out clause is 10(2) in section 8.

Mr Minogue—There is no let-out in that sense. The flexibility is because the bill does not prescribe or define what 'genuine steps' are.

CHAIR—That is the problem, isn't it?

Mr Minogue—It leaves it to the parties.

CHAIR—Everyone who has come before us says, firstly, that is the first problem. But secondly, an applicant must file a 'genuine steps' statement—must.

Mr Minogue—Yes, they must file a genuine steps statement. They must say what they have done.

CHAIR—It is mandatory, other than your let-out clause, 10(2)—you must do it, but 10(2) is your let-out clause.

Mr Minogue—You must file a statement informing the court of the genuine steps you have taken or not taken, and the reasons why you have not taken them, if you have not.

CHAIR—That is mandatory.

Mr Minogue—But the steps you actually have to take—

CHAIR—That is mandatory, yes?

Mr Minogue—Yes, the lodgement of the statement is. But the content of it, the steps you actually take—

CHAIR—I am not talking about the content, I am talking about the fact that people are mandated in lodging a genuine steps statement.

Mr Minogue—They have to lodge a genuine steps statement.

CHAIR—Right. Yet 'genuine steps' is not defined.

Mr Minogue—It is not prescribed, that is right.

CHAIR—Why not?

Mr Minogue—Because the experience from the UK and from stakeholders like the Federal Court and the Law Council is that prescribing specific steps does not work. It is actually counterproductive. It is far better to leave it to the parties themselves to attempt to resolve their disputes and so the parties themselves can undertake the steps that they deem appropriate to attempt to resolve their dispute. Where the discipline, if you like, comes into it, is where a matter is filed, if a matter is filed. If genuine steps are taken and the matter is resolved then the court will never know of it. Where a matter is filed, the court becomes informed on the very day that the application is lodged of what steps parties have taken to resolve the dispute.

If the court is satisfied that parties have taken steps to resolve the dispute but have been unable to do so—and so it would be costly and duplicative to undertake further processes to attempt to narrow the issues—it can set it down for hearing and costs are minimised. If it is not satisfied that the parties have done enough to narrow the issues in dispute it can order more things to be done under its case management powers, as it can do today.

CHAIR—I am not entirely convinced I see that flexibility in this legislation.

Mr Minogue—The legislation does not mandate what steps you have to take—that is the flexibility.

CHAIR—Hmm. Okay.

Senator BARNETT—I am still at a loss to understand the conflict between clause 6 and clause 10(2). We have talked about clause 6, and the chair has been quizzing you on that. Clause 10(2) sets out pretty clearly that a failure to file does not invalidate. You have said that pretty consistently through your evidence. You do not have to set out any reasons, there is no evidence behind the failure; it is simply a failure to file. Isn't that an argument against itself? By clause 10(2) aren't you arguing against the mandating of the'genuine steps' statement in clause 6?

Mr Minogue—No. What the bill does not do is give rise to satellite litigation, which is the concern that I think has been evidenced before the committee but is not a position I agree with. The reason it does not encourage or enable satellite litigation is that the bill does not create rights in another party. If I do not take genuine steps, you do not have any greater rights than you would have today. What it does do is enable the court to better exercise its case management powers by knowing what parties have done or what they have not done. In my submission there is no conflict between the provisions. There is an obligation to file a genuine steps statement which reflects what you have done or, if you have not done anything, why you have not. That is better information for the court. The content of the statement, the steps you undertake, is at the discretion of the parties. That is the very flexibility that the court and the Law Council say they want, and they say it is what good lawyers will actually advise their clients to do.

The reason the preservation from invalidity does not have more powerful sanctions attached to it is that that would then become a battleground for 'you didn't file a genuine steps statement' or 'you didn't take genuine steps' or a whole host of satellite strategic litigation which we do not want. The arena, if you like, for testing whether sufficient steps were taken to resolve a dispute is not in an argument about genuine steps; it is actually in the case management provisions that the court already has, because the court can say, 'I'm satisfied that you guys have done enough and this matter is ready for hearing, let's go on, costs are saved,' or, 'I'm not satisfied that you've done enough, so I will exercise my case management powers now to order you to do more.' In my submission, the bill enables the court to have better information to better exercise its case management powers and give greater flexibility to applicants.

Senator BARNETT—Being devil's advocate: if the Law Council were sitting here and the Federal Court were sitting here, what would they say about clause 10(2)?

Mr Minogue—The only thing I think they could say, Senator, is that it says that—

Senator BARNETT—It is a get-out clause.

Mr Minogue—matters can proceed without filing a genuine steps statement. It does not mean the bill is powerless. What I am saying is that the bill expressly says that this bill is in addition to any other powers of the court and the court already has those powers in its case management provisions in 5B.

Senator BARNETT—All right. Let's move on to a couple of other areas. Do you agree with the merit of consistency across jurisdictions—federal, state—in terms of genuine steps and/or reasonable steps?

Mr Minogue—The NADRAC report goes into the reasons it preferred 'genuine' rather than 'reasonable'. I will not rehearse those. I am obviously not in a position to concede 'genuine' or 'reasonable'. The government's position is that 'genuine' is the better term. My concern—

Senator BARNETT—But what is your view?

Mr Minogue—When judicial decisions talk about 'reasonable' they generally turn it around and say, 'It means not unreasonable,' which is a pretty minimum qualification. I think 'genuine' is a more meaningful term in terms of capturing the objective of 'What can I do; what have I done to resolve this dispute,' rather than, 'It's not unreasonable for me to just dash it off and tick the box.' Having said that—

Senator BARNETT—Do you realise that it might be genuine but actually not reasonable. It depends on your view of the threshold. Mr Soden from the Federal Court expressed his view quite clearly, as did the Law Council, and, it seems to me that, one, they support consistency, and, two, they support 'reasonable' rather than 'genuine'.

Mr Minogue—They did. NADRAC articulated its reasons for 'genuine'. At that stage, we did not have the Victorian legislation, and New South Wales has announced, as of last night, that it is introducing its own legislation along similar lines—

Senator BARNETT—Along similar lines to Victoria?

Mr Minogue—Yes.

Senator BARNETT—Using 'reasonable'?

Mr Minogue—Both using 'reasonable'.

Senator BARNETT—I have not seen that and I am sure the committee will get access to it.

Mr Minogue—Obviously, consistency has some force. I cannot make a concession on that. That is a policy decision for government, but I accept the argument.

Senator BARNETT—What about the issue of complex cases? Clearly Mr Soden was very strong in the view that this is just not going to work for complex cases.

Mr Minogue—I would make two comments in relation to that. One is that it is always a matter for the parties themselves to determine what genuine steps they should take, but there is also the power in the rules of court in relation to the form of a statement, the matters to be specified and time limits. Let's talk about complex litigation and then talk about class actions. Complex litigation that is not a class action is the very situation where it encourages people to attempt to resolve the dispute or narrow the issues, and that is precisely what the bill is encouraging people to do. It is not just the bill saying this or NADRAC saying this. Litigators say this, law reform commissioners say this, chief justices say this. It is not an unusual or difficult proposition.

Senator BARNETT—Not the Chief Justice of the Federal Court, I suspect.

Mr Minogue—Everyone encourages resolution before litigation.

Senator BARNETT—I suspect Mr Soden is expressing a view on behalf of the court.

Mr Minogue—My submission is that the evidence was that resolution before litigation is to be preferred wherever possible. I am not saying he used those words, but I would be surprised if that—

Senator BARNETT—None of us disagree with that objective. I am just asking you the question regarding complex—

Mr Minogue—That is my point. In relation to the rules of the court, the court has an express power under the bill in relation to the form and content of a genuine steps statement. For example, in complex litigation, it can control that. I might come back to Lord Justice Jackson because there are issues there.

Senator BARNETT—We are very tight on time, Mr Minogue. You will have to be brief in your answer, please.

Mr Minogue—In relation to class-action litigation, it would be perfectly permissible and appropriate for the court to say that the lead plaintiff, the one who commences the application, should make the substantive genuine steps statement, saying, 'What can I have done to attempt to resolve the dispute?'Any other plaintiffs who join that class could simply refer to or adopt that statement. I am not saying that the court should make those rules, but it is eminently conceivable that the court has the power to do that.

In relation to commercial litigation, if I may, what Lord Justice Jackson was talking about—and I am pleased that people referred to that—was a prescriptive pre-action protocol. He said that, when you get to the level of prescription, one size does not fit all. The protocol he was talking about is a 17-page protocol that has quite detailed requirements that what has to be provided, when it has to be provided, and defendants having to put in an acknowledgement, a response and a reply. It is big. What his report goes on about, and all the comments that he makes—I do not think this is selective reading—go to: 'For commercial litigation, parties will usually have already attempted to resolve their dispute.' The genuine steps statement needs to say that. He specifically endorses the *Admiralty and commercial court guide* that I have referred to that says: 'The letter of claim should be concise and sufficient to explain the claim and dates to enable the other side to understand and investigate the allegations.' The complexity is exactly what Lord Justice Jackson is addressing.

Senator BARNETT—Do you—

Mr Minogue—In my submission, Senator, if I may, the bill gives effect to the tenor of Lord Justice Jackson's report that you move away from complexity and prescription and you leave it to the parties. A proper reading of Lord Justice Jackson's report supports the flexible approach taken in the bill.

Senator BARNETT—So you support the submission of the Law Council that the one-size-fits-all approach is not the way to go?

Mr Minogue—Yes.

Senator BARNETT—My final question relates to the smaller litigants, unrepresented litigants and those who are into vexatious litigation. What about the impact on those litigants?

Mr Minogue—There are several matters in response to that: the bill not being rolled out on its own but being part of the comprehensive access to justice reforms; the substantial increase in legal assistance funding, as I have referred to; the specific obligations on legal assistance providers to give greater effect to early intervention, more advice and upfront assistance; and better referral to appropriate legal and non-legal support services. So that fills that gap.

I would also refer to the submission from, I think, the Castan Centre for Human Rights Law. I am trying to remember the quote but, essentially, what it said is that—and they use the term, 'without putting too fine a point on it'—litigation is traumatic and is a risk to the mental health of almost everyone involved. So the bill, to the extent that it encourages resolution before litigation, as well as the legal assistance measures that have already been put in place, actually supports disadvantaged litigants.

Senator BARNETT—Thank you.

CHAIR—We do have to close the hearings, Mr Minogue. I do not know whether there is anything else you want to provide to this committee to assist us in our deliberations once you have reviewed the transcript. Thank you for your attendance today. In relation to our inquiry into the Civil Dispute Resolution Bill 2010, the committee is adjourned.

Committee adjourned at 12.42 pm