MAKING AN ATTEMPT TO RESOLVE DISPUTES BEFORE USING COURTS?

WE ALL HAVE OBLIGATIONS

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> *Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will be business enough.*
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> *Abraham Lincoln 'Notes for a Law Lecture' July 1, 1850, p. 81*

INTRODUCTION

Whilst there is little argument that a modern democratic State must provide its citizens with access to dispute resolution processes and Courts founded on the rule of law, is it also reasonable to expect that citizens should be obliged to attempt to resolve their civil disputes before accessing Courts provided by the State?

This question has surfaced in recent months as the debate over pre litigation or pre filing obligations in respect of Alternative or Appropriate Dispute Resolution processes (ADR) and obligations in respect of negotiation has intensified. Requirements that some disputants, in some jurisdictions, use ADR before commencing Court proceedings are not new. In recent years, industry, government, private organisations and individuals have developed dispute resolution processes and systems to encourage the early and effective resolution of disputes outside the court and tribunal system. In selected jurisdictional areas, statutory or other contractual obligations requiring the use of ADR have prevented disputants from accessing certain Courts unless they are able to demonstrate that they have used an ADR process or that they fall within a recognized category of exception. The most comprehensive scheme of this nature has been established in the family dispute sector and has been the subject of extensive evaluation.

However, two recent Bills at the Federal and State level seek to take the obligations further and extend the obligations to litigants in civil proceedings who might otherwise been immune to pre litigation requirements. Notably, litigants of this type may have previously

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accessed ADR after filing proceedings in a Court and used forms of ADR that have been either court annexed or court related. The draft legislation indicates a significant policy shift from Courts providing or referring litigants to dispute resolution processes (commonly envisaged in the multi door court model devised in the 1970's), to disputants being required to use dispute resolution processes before court entry is possible with ADR being provided at a range of levels and at different times both outside and within the Courts (defined as the more modern multi option dispute resolution model).

In addition, the legislation has coincided with significant shifts in terms of judicial understanding and even use of ADR processes and increased requirements to act in a 'reasonable manner' that have been imposed upon those engaged in litigation. Increasingly courts are setting new behavioural standards for litigants, would be litigants and their representatives. Each of these changes can be considered both from the perspective of basic societal obligations and can also be considered from the perspective of obligations upon the state to provided dispute settlement processes.

LEGISLATION IMPOSING OBLIGATIONS

The two Bills, one at the Federal level – the Civil *Dispute Resolution Bill (2010) (Cth)* and one at the state level – *Civil Procedure Bill 2010 (Vic)* essentially require that disputants take 'genuine steps' (Cth) or 'reasonable steps' (Vic) to resolve their differences before commencing litigation in respect of a range of civil disputes. The definition of genuine steps in the Commonwealth Bill is not prescriptive and requires that litigants, who wish to commence proceedings, file a 'genuine steps statement.' The requirements in the 'genuine steps statement' are modeled on the recommendations in the National Alternative Dispute Resolution Advisory Council (NADRAC) 'Resolve to Resolve' Report.[2]

The Commonwealth Bill states (Section 4) that:

> "Section 4 Genuine steps to resolve a dispute
> (1) Examples of steps that could be taken by a person as part of taking genuine steps to resolve a dispute with another person, include the following:
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> (a) notifying the other person of the issues that are, or may be, in dispute, and offering to discuss them, with a view to resolving the dispute;
> (b) responding appropriately to any such notification;
> (c) providing relevant information and documents to the other person to enable the other person to understand the issues involved and how the dispute might be resolved;
> (d) considering whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process;

[2] NADRAC, '*The Resolve to Resolve- Embracing ADR to Improve Access to Justice in the Federal Jurisdiction'* Commonwealth of Australia (2009)

(e) if such a process is agreed to:

(i) agreeing on a particular person to facilitate the process; and

(ii) attending the process;

(f) if such a process is conducted but does not result in resolution of the dispute—considering a different process;

(g) attempting to negotiate with the other person, with a view to resolving some or all the issues in dispute, or authorising a representative to do so.

(2) Subsection (1) does not limit the steps that may constitute taking genuine steps to resolve a dispute."

In contrast, in Victoria the draft legislation is part of a much broader scheme of overarching obligations that bind courts, lawyers and litigants to a more 'reasonable' standard of behaviour. The Victorian Bill also specifically sets out pre litigation requirements:

"Section 34 Pre-litigation requirements

(1) Each person involved in a civil dispute must take reasonable steps, having regard to the person's situation and the nature of the dispute--

(a) to resolve the dispute by agreement; or

(b) to clarify and narrow the issues in dispute in the event that civil proceedings are commenced.

(2) For the purposes of this section, reasonable steps include, but are not limited to—

(a) the exchange of appropriate pre-litigation correspondence, information and documents critical to the resolution of the dispute;

(b) the consideration of options for resolving the dispute without the need for civil proceedings in a court, including, but not limited to resolution through genuine and reasonable negotiations or appropriate dispute resolution."

In addition, The Victorian Bill specifies that relevant documents must be disclosed and that non disclosure could constitute a contempt of court (Section 35).

Each of these legislative responses has been based on series of reports that have highlighted the usefulness of ADR processes. However, the Victorian Bill clearly has a wider ambit and is focused more particularly on the reform of the civil litigation system and the articulation of obligations of all those within the system. This is perhaps unsurprising given that that the Victorian Bill and policy responses have emerged after consideration of the Victorian Law

Reform Commission (VLRC) Report[3] that was focused on civil justice reform whilst the Commonwealth response has been informed by a more specific ADR focus and extensive pre existing litigation reforms already present at the Commonwealth level.

To some extent, the draft legislation in each area has also been informed by the work of NADRAC as well as regulatory changes in the ADR sector[4]. The NADRAC Report specifically considered the use of pre action protocols and reviewed and considered concerns that although pre action protocols would reduce the number of disputes progressing into the litigation system, such reforms could also potentially lead to the front loading of costs.

In the United Kingdom, it has been suggested that lawyers' costs can increase as a result of pre litigation protocols as lawyers may undertake significant amounts of work before commencing proceedings.[5] Notably most pre action work in the UK does not usually involve ADR processes but lawyer – lawyer negotiations. The most recent UK report on this issue (the Jackson Review) found that "there was a high degree of unanimity that the specific [pre action] protocols serve a useful purpose."[6] . It was also noted that earlier use of ADR in the UK could decrease pre action costs.[7]

The Jackson Review found that some lawyers were front loading costs as a result of the protocols and were running up costs by in effect serving draft pleadings and extensive documentation on one another and by not considering the principles of proportionality in terms of pre action costs incurred in certain types of matters.[8] It is for this reason that the Jackson Review recommended abandoning an overarching protocol in favour of specific

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[3] Victorian Law Reform Commission, *Civil Justice Review Report* (Victorian Law Reform Commission, Melbourne, March 2008).

[4] These changes include the adoption of self and industry regulated mediation accreditation under the National Mediator Accreditation Scheme that has operated from 1 January 2008.

[5] At 28, referring to R Jackson, *Review of Civil Litigation Costs*, Preliminary Report, May 2009 at p 1.

[6] R Jackson, *Review of Civil Litigation Costs*, Final Report, February 2010 at 345.

[7] See R Jackson, Review of Civil Litigation Costs, Final Report, February 2010 at xxii. Lord Jackson notes that: "There are ten pre-action protocols for specific types of litigation. By-and-large they perform a useful function, by encouraging the early settlement of disputes, which thereby leads (in such cases) to the costs of litigation being avoided. I recommend that these specific protocols be retained, albeit with certain amendments to improve their operation (and to keep pre-action costs proportionate).
6.2 On the other hand, the Practice Direction – Pre-Action Conduct, which was introduced in 2009 as a general practice direction for all types of litigation, is unsuitable as it adopts a "one size fits all" approach, often leading to pre-action costs being incurred unnecessarily (and wastefully). I recommend that substantial parts of this practice direction be repealed. Were this to occur, however, it would not give carte blanche to claimants to whom no specific protocol applied to act unreasonably, e.g. by commencing proceedings with no prior warning to the defendant of the claim or the nature of the claim. Cost sanctions will apply to curb unreasonable behaviour.
6.3 Alternative dispute resolution (chapter 36).
Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be."

[8] R Jackson, *Review of Civil Litigation Costs*, Final Report, February 2010 At p 350.

protocols and considered that in the Commercial arena the protocol had not worked effectively as lawyers had created lengthy and substantial (and costly) pre action letters. Lord Jackson suggested that the new Commercial Courts Guide that stressed inexpensive and concise pre action letters would be more helpful.

In addition, the Jackson Review favoured retaining the protocols in many areas as they had worked 'effectively' and led to many settlements. At the same time Lord Jackson noted that:

> 'The repeal of the general protocol will not absolve parties from the obligation to conduct sensible pre-action correspondence. It has always been the case (both before and after the introduction of the CPR) that a claimant who begins contentious proceedings without giving appropriate notice to other parties, and appropriate opportunity to respond, is at risk as to costs. This will remain the position. For the avoidance of doubt, however, I propose that the PDPAC should contain a simple provision along the following lines:
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> > "In all areas of litigation to which no specific protocol applies there shall be appropriate pre-action correspondence and exchange of information."'[9]

The Jackson Report recommendations, are somewhat similar to the recommendations of NADRAC although, in keeping with the robust and more developed ADR environment that is present in Australia, the Australian approaches refer specifically to ADR. In addition, in Australia there has been a clearer endorsement of the notion that pre action requirements should be non specific and determined by the judiciary. In effect, compliance under the draft Federal and Victorian legislation will be determined by Judges and the guiding principles relate to a consideration of either 'reasonableness' or 'genuineness.' A central theme in the Australian response has been that the determination of what is reasonable or genuine should be conducted by Judges. Chief Justice Warren in Victoria, Australia has noted:

> "Ultimately pre-action protocols and their application is a matter that should be left to the courts and court rules made by the judges."[10]

It is clear that what is meant by 'reasonable' or 'genuine' may require some judicial oversight to prevent excessive front end cost loading. In addition, it is also the case that in Victoria principles relating to 'proportionality' have been used in the legislation in terms of the overarching obligations to contain litigation and pre litigation costs. In determining reasonableness or even 'genuineness', it is probable that a Judge in either jurisdiction may consider that proportionality principles are relevant and could require, for example, that in

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[9] R Jackson, Review of Civil Litigation Costs, Final Report, February 2010 At p 355.
[10] M Warren, Remarks on the Occasion of the Victorian Commercial Bar Association Reception Supreme Court, 6 May 2010 at http://www.commercialcourt.com.au/PDF/Documents/Victorian%20Commercial%20Bar%20Reception.pdf (accessed 29 July 2010)

many matters "..costs should not exceed the lesser of 5% of the value of the claim or $10,000." [11] In addition, Judges in Victoria will also doubtless consider the additional overarching obligations in the legislative framework.

In addition, there is capacity for Rules of Court and for Victorian and Commonwealth Courts to provide for more specific requirements. For example, in the Commonwealth Bill, at Section 8 the following is noted:

> "A genuine steps statement must comply with any additional requirements specified in the Rules of Court of the eligible court (see section 18) in which the statement is filed."

And at Section 18:

> "Rules of Court made under the *Federal Court of Australia Act 1976* or the *Federal Magistrates Act 1999* may make provision for or in relation to the following:
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> (a) the form of genuine steps statements;
> (b) the matters that are to be specified in genuine steps statements;
> (c) time limits relating to the provision of copies of genuine steps statements."

THE COURT SYSTEM AS A LAST RESORT

In introducing the Victorian Bill the Attorney - General indicated that the "Bill's intention is to give real meaning to the saying that '*litigation should be a measure of last resort*'." [12] The Attorney General also noted that:

> "Courts play an important role in adjudicating civil disputes and procedural rights and that role should, of course, continue. But as a public resource, courts must be used responsibly. Parties should not abuse their right of access to the courts by unnecessarily tying up court resources, thereby preventing others from accessing justice. A well-resourced litigant should not be able to use their power to play tactical games and draw out litigation until the other party is forced into an unfair settlement or withdraws.

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[11] See M Legg and D Boniface, Pre-action Protocols in Australia, (2010) 20 Journal of Judicial Administration, 39 at 51.

[12] Second Reading Speech, *Civil Procedure Bill* 2010 (Vic) 24 June 2010 at p 2607 see http://tex.parliament.vic.gov.au/bin/texhtmlt?form=jVicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMBLY&speech=4248&activity=Second+Reading&title=CIVIL+PROCEDURE+BILL&date1=24&date2=June&date3=2010&query=true%0A%09and+(+activity+contains+'Second+Reading'+)%0A%09and+(+hdate.hdate_3+=+2010+)%0A%09and+(+hdate.hdate_2+contains+'June'+)%0A%09and+(+hdate.hdate_1+=+24+)%0A%09and+(+house+contains+'ASSEMBLY'+)%0A (accessed 29 July 2010).

> This bill will curtail such behaviour and arm the courts with the power to prevent such conduct.
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> Parties should be encouraged to resolve their disputes by agreement, and where they require court intervention, the bill will ensure they adhere to appropriate standards of conduct. The result will be a more accessible civil justice system for those parties who need adjudication by the courts."[13]

At the Commonwealth level, the Commonwealth Attorney- General noted that:

> "The *Civil Dispute Resolution Bill* is all about seeking to resolve disputes at the most appropriate level. It encourages parties to resolve their disputes at the earliest possible opportunity, and to do so outside of the courts – promoting a move away from the often stressful, expensive adversarial culture of litigation."[14]

Each Bill is therefore founded upon the notion that disputants ought to attempt to resolve their disputes outside the court system and use the court system as a 'last resort'. Whilst neither Bill requires that disputants use an ADR process before commencing litigation, ADR use is clearly one factor that will be considered when assessing whether disputant conduct has been reasonable or genuine.

Pre litigation requirements to use ADR are not new in Australia. The diversion of disputes from the court or tribunal setting is encouraged by a number of different processes and in a number of jurisdictional areas Courts and Tribunals are already considered to be a 'last resort' option if ADR processes have not resulted in a settlement of a dispute.

By far the largest pre-litigation scheme that imposes mandatory attendance at a dispute resolution process operates in the family dispute area in Australia. Initiatives that have been phased in since 2006 (under the *Family Law Act 1975* (Cth)) represent a significant change in family law.[15] The explanatory memorandum to the *Family Law Amendment* (*Shared*

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[13] Second Reading Speech, *Civil Procedure Bill* 2010 (Vic) 24 June 2010 at p 2606 see http://tex.parliament.vic.gov.au/bin/texhtmlt?form=jVicHansard.dumpall&db=hansard91&dodraft=0&house=ASSEMBLY&speech=4248&activity=Second+Reading&title=CIVIL+PROCEDURE+BILL&date1=24&date2=June&date3=2010&query=true%0A%09and+(+activity+contains+'Second+Reading'+)%0A%09and+(+hdate.hdate_3+=+2010+)%0A%09and+(+hdate.hdate_2+contains+'June'+)%0A%09and+(+hdate.hdate_1+=+24+)%0A%09and+(+house+contains+'ASSEMBLY'+)%0A (accessed 29 July 2010).

[14] See Second Reading Speech, Civil Dispute Resolution Bill 2010 (Cth) at http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_16June2010-SecondReadingSpeech-CivilDisputeResolutionBill2010 (accessed 29 July 2010).

[15] See the *Family Law Amendment* (*Shared Parental Responsibility) Act 2006* (Cth), Revised Explanatory Memorandum (2006) p 1.

Parental Responsibility) Act 2006 notes that "this is a key change to encourage a culture of agreement making and avoidance of an adversarial court system".[16]

The *2006* amending Act required compulsory dispute resolution, pursuant to Subdiv E of Div 1 of Pt VII of the *Family Law Act*. Section 60I provides for compulsory attendance at family dispute resolution in a range of circumstances, prior to lodging an application with the court. The requirement for compulsory certificates of family dispute resolution as a prerequisite for the filing of all new parenting matters (subject to certain exceptions) came into force on 1 July 2007.

Disputants are also advised that:

> "When applying to the court, you will need to provide information to demonstrate that one of the exceptions applies to you."[17]

At the Federal level, there are also other examples of mandatory pre-litigation schemes. The National Native Title Tribunal (NNTT) facilitates the making of agreements among Aboriginal and Torres Strait Islander people, governments, industry and others whose rights or interests may co-exist with native title rights and interests.

In State jurisdictions there are other requirements that ensure that courts are used as a 'last resort.' For example, in South Australia legislation can require parties in civil disputes to notify one another of a claim before the initiating process is filed. [18] Other State legislation requires mandatory attendance at some form of ADR session as a pre-condition to litigation.[19] The legislation often requires different reporting standards and notice periods. Many States have legislation in a number of different areas to prevent court proceedings being commenced without a mediation occurring.

For example, The *Farm Debt Mediation Act 1994* (NSW) provides that a mediation must occur before a creditor can take possession of property or other action under a "farm mortgage". Similarly, the *Retail Leases Act 1994* (NSW) provides for the mediation of retail tenancy disputes. Under that legislation court proceedings cannot be commenced until a certificate has been provided by the Registrar of the Retail Tenancy Disputes Unit or a court has satisfied itself that the dispute is unlikely to be resolved by mediation.[20] Similar legislation operates in Victoria under the *Retail Leases Act 2003* (Vic) which provides that a dispute about

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[16] *Family Law Amendment* (*Shared Parental Responsibility) Act 2006* (Cth), Revised Explanatory Memorandum (2006) p 20.

[17] See www.familyrelationships.gov.au/fdr#q2 (accessed 24 April 2008).

[18] See *Supreme Court Civil Rules* (SA) r 33... Under the rule, parties in most matters are required to serve unfiled process on another party 90 days before filing in a court.

[19] For example, *Family Law Act 1975* (Cth), s 79(9); *Retail Leases Act 1994* (NSW), Pt 8; *Farm Debt Mediation Act 1994* (NSW); Supreme Court Practice Direction No 4 (Qld).

[20] *Retail Leases Act 1994* (NSW), s 68(2).

compensation cannot be dealt with at the Victorian Civil and Administrative Appeals Tribunal unless a mediation has been undertaken.

The *Legal Profession Act 1987* (NSW) specifically provides for disputes between clients and legal practitioners to be referred to mediation; participation by the parties in mediation is voluntary.[21] The *Strata Schemes Management Act 1996* (NSW) provides for the mandatory mediation of strata scheme disputes prior to any application being made to the registrar for an order concerning the dispute.[22] In addition, an extensive array of dispute resolution schemes exist that are mandatory for 'members' but not consumers and apply to disputes in the insurance, banking and other sectors. Membership of such schemes can form part of mandatory licensing requirements and members are not permitted to litigate without first using the schemes.

The new Bills differ from these various schemes in that they seek to create a series of overarching requirements for prospective litigants rather than creating an additional set of piecemeal provisions (such as those that currently exist in relation to selected categories of civil litigation). The Bills also represent a shift that is part of an ongoing evolution in terms of how justice, the courts and ADR are perceived. This shift has occurred over the past decade and is based on the view that justice and effective dispute resolution can be achieved and can occur outside the court system.

This perspective has not been driven solely by policy makers. Many Judges and Courts have also promoted this view. For example, in his opening address to the National Access to Justice and Pro Bono Conference in 2006 the former Chief Justice of Australia, the Hon. Murray Gleeson AO, said:

> "Access to justice has a much wider meaning than access to litigation. Even the incomplete form of justice that is measured in terms of legal rights and obligations is not delivered solely, or even mainly, through courts or other dispute resolution processes. To think of justice exclusively in an adversarial legal context would be a serious error."[23]

The maturity of the existing pre litigation schemes, ADR process options, their success and their impact on disputing behaviour and the number of disputes within the court litigation system over the past decade have supported the development of this view and an eagerness to embrace more developed pre litigation arrangements.

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[21] *Legal Profession Act 1987* (NSW), ss 144 and 145.

[22] *Strata Schemes Management Act 1996* (NSW), s 125.

[23] The Hon. Murray Gleeson AO, Chief Justice, High Court of Australia, *Opening Address*, National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006, p. 1, http://www.hcourt.gov.au/speeches/cj/cj_11aug06.pdf (accessed 29 July 2010).

MULTI DOOR V MULTI OPTION CIVIL JUSTICE

The notion that our litigation system and related broader ADR system can be designed and improved to promote choices in dispute resolution has been the subject of discussion for almost 40 years. In the United States the suggestion was often framed in language that referred to "multi-door systems". The multi-door court option focuses on "in court" referral to ADR processes and attracted interest in the United States from the 1970s and 1980s. At that time, Professor Sander[24] suggested that cases could be referred to appropriate forums (or "doors") for resolution or determination after entry into the court system:

> "One might envision by the year 2000 not simply a courthouse but a dispute resolution centre, where the grievant would first be channelled through a screening clerk who would then direct him/her to the process, or sequence of processes, most appropriate to his/her type of case."[25]

It was envisaged that the one main dispute resolution centre to which disputants would go would be within the Court and that the centre would have an intake or screening officer who would diagnose the dispute and refer the disputants to one of a variety of dispute resolution processes. Each case would be individually assessed and referred to a process on the basis of its particular characteristics. Further, each "door" of the "multi-door courthouse" would represent one of the dispute resolution options to which parties may be referred, whether that be mediation, evaluation, arbitration, conciliation or adjudication.[26]

In some ways, the development of the multi door model in the 1970's was related to the confusion that existed at that time if disputants wanted to access the newly developing ADR processes outside the Courts. For example, even in May 1997 Judge Earl Johnson of the California Court of Appeal stated:

> "At present, it is almost accidental if community members find their way to an appropriate forum other than the regular courts. Since these forums are operated by a hodgepodge of local government agencies, neighbourhood organisations and trade associations, citizens must be very knowledgeable about community resources to locate the right forum for their particular dispute."[27]

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[24] Address by F Sander, Bussey Professor of Law at Harvard University, *National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (7-9 April 1976), reprinted in the Pound Conference 70 FRD 79, 111 (1976).

[25] R Reuben, ''The Lawyer Turns Peacemaker'' (1996) *American Bar Association Journal* 1.

[26] L Ray and A Clarke, ''The Multi-door Courthouse Idea: Building the Courthouse of the Future ... Today''(1985) 1(17) *Ohio State Journal on Dispute Resolution* 7.

[27] A Thrush, ''Public Health and Safety Hazards versus Confidentiality: Expanding the Mediation Door of the Multi-door Courthouse'' (1994) *Journal of Dispute Resolution* 235 at 237, referring to Judge Earl Johnson of the California Court of

It is clear that the "multi-door" approach was closely linked to the concept of the "multi-door courthouse" and it assumed that the referral of disputes would take place with the court at the epicentre of the referral system.

This approach, with the Court as the epicentre of dispute resolution, is no longer appropriate in Australia particularly given that the vast bulk of disputes are referred, resolved and settled away from the court and tribunal system and before litigation has commenced.

A more modern approach that responds to the more evolved ADR system within Australia and the increasingly sophisticated understanding of ADR options, as well as the availability of referral information on the internet, could be referred to as a 'multi option' response. The multi-option systemic approach supports external ADR agencies and processes so that awareness levels about process availability are raised. ADR Standards, brochures, websites and government bodies such as NADRAC assist with this. Many existing mandatory pre-litigation approaches support this pathway which supports dispute resolution outside of the court and tribunal system. The multi option approach also assumes that dispute resolution processes will continue to be used in respect of litigated matters.

The draft legislation, drawing on the success of the extensive industry based and other pre litigation ADR schemes adopts this more modern approach to dispute resolution and assumes that the Court is not at the centre of dispute resolution. Rather the Court has an integral and pivotal role in policing obligations and adjudicating, managing and resolving the more intractable disputes.

CHANGING COURT PERSPECTIVES ON OBLIGATIONS

As noted above, Courts will increasingly be required to assess whether disputants have acted 'reasonably', genuinely or even in a proportionate manner in respect of their pre litigation activities. Courts are well placed to conduct this assessment and most Judges and Courts now have considerable experience of ADR and a well developed and evolving understanding about litigant and lawyer obligations within Courts.

Recently Courts have also shown a readiness to engage in developing broader principles that would be relevant in the pre litigation area. For example, recently, Pembroke J in *Thomas v SMO* [2010] NSWSC 822, considered issues relating to obligations by those involved in Court proceedings:

> "Duty to Court
> 19 It is common for some litigants to want to use their evidence as an opportunity to unburden themselves in unmanageable detail of the many facts which have preoccupied them in the years preceding the hearing of their case. But a fair hearing

Appeals, who addressed the problem of accessibility at the National Conference on Minor Dispute Resolution in New York in May 1977.

of their case can be seriously hindered by such unfiltered outpourings. That is why, among other things, counsel have a duty to the court which is additional to their duty to the party whom they represent. This duty is a legal duty, not merely a rule of practice or etiquette.....

20 The efficient hearing of a large or complex case requires recognition of that duty and sensible co-operation and sound judgment on the part of the Bar.....
The coming years may see principles emerge to guide judicial intervention against evils – the waste of time and money – that result from unhelpful or excessive tenders of both oral and documentary evidence.....
But whether or not legal principles capable of dealing with these evils emerge, there must be an ethical duty on counsel to abstain from excessive tenders. Lord Hoffmann said that counsel "should not waste time on irrelevancies even if the client thinks that they are important."

21 For those reasons, a strictly adversarial approach to the presentation of a party's case must sometimes be tempered. Counsel's duty to the court requires them, where necessary, to restrain the enthusiasms of the client and to confine their evidence to what is legally necessary, whatever misapprehensions the client may have about the utility or the relevance of that evidence. In all cases, to a greater or lesser degree, the efficient administration of justice depends upon this co-operation and collaboration. Ultimately this is in the client's best interest. It is more likely to ensure that a just result is reached - sooner and with less expense."

The emerging judicial view that litigants and their representatives have obligations, when litigating, to co operate and collaborate, to temper a strict adversarial approach, and avoid the needless waste of time and money, suggests that Courts are also well placed to develop pre litigation guidelines and articulate what behavior and conduct may be reasonable, genuine and appropriate (and proportionate) in the pre litigation setting.

CONCLUSION

The two Bills are representative of a continued evolution in ADR process use within Australia and represent and acknowledge the changing role of the Courts in accommodating the modern Australian dispute resolution environment. This ADR environment, which includes accredited ADR practitioners, is markedly different from the environment that exists in the UK and the US (where mandatory litigation referral to ADR is often still controversial).

In addition, the approaches in each of the Bills support the Court based development of appropriate and tailor made guidelines for litigants and their representatives and a rejection of a 'one size fits all' pre litigation approach that has been the subject of criticism.

Each Bill also sets out civil disputant obligations to attempt to be 'reasonable' that will routinely require 'would be' litigants to take steps to resolve their differences before accessing the Court system. This approach of articulating obligations is not unlike the articulation of obligations through the extensive treaty obligations that exist at the international level that require States to do their utmost to attempt to resolve their differences. The Bills, and the obligations that they set out, are reflective of a developed and civilized society where obligations that apply to individuals, organizations and professionals are considered, revised and articulated in response to changes within the society. In this case, the modern obligations reflect the more modern system of dispute resolution that now exists in respect of civil disputes within Australia and the basic notion that citizens should consider and if possible use dispute resolution options (including negotiation) before commencing an adversarial battle.