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Civil Dispute Resolution Bill 2010

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Law and Bills Digest Section

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Civil Dispute Resolution Bill 2010

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House: House of Representatives

Portfolio: Attorney-General

Commencement: Part 1: on Royal Assent

Parts 2–5: a day to be fixed by proclamation—however, if any provision does not commence within a period of six months from the day of Royal Assent, it commences on the day after that six month period.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills home page, or through http://www.aph.gov.au/bills/. When bills have been passed they can be found at the ComLaw website, which is at http://www.comlaw.gov.au/.

Re-introduction of the Bill

The Civil Dispute Resolution Bill 2010 (the Bill) was first introduced into the 42nd Parliament and lapsed on the proroguing of Parliament in July 2010. It was re-introduced in the first week of the 43rd Parliament with no significant amendments.

Purpose

The purpose of the Bill is to ensure that parties to civil proceedings in the Federal Court and Federal Magistrates Court take 'genuine steps' to resolve their disputes *before* proceedings commence, thereby encouraging the early resolution of civil disputes and consequently, improving access to justice.[1]

1. Explanatory Memorandum, Civil Dispute Resolution Bill 2010, p. 2. "Genuine steps' is a term given its ordinary meaning in the circumstances of any particular dispute: see NADRAC, *The resolve to resolve—embracing ADR to improve access to justice in the federal jurisdiction*, September 2009, p. 31, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~NADRAC+The+Resolve+to+Resolve+Report_web.PDF/$file/NADRAC+The+Resolve+to+Resolve+Report_web.PDF.

Background

NADRAC's report

The Bill draws on recommendations made by the National Alternative Dispute Resolution Advisory Council (NADRAC) in its report to the Attorney-General, *The resolve to resolve—embracing ADR to improve access to justice in the federal jurisdiction*, published in September 2009.[2]

On 13 June 2008, the Attorney-General asked NADRAC to inquire into the use of alternative dispute resolution (ADR) in civil proceedings, and in particular, to consider the following:

- whether mandatory requirements to use ADR should be introduced
- other changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process
- the potential for greater use of ADR processes and techniques by courts and tribunals to enhance court and tribunal process, including by judicial officers, and
- whether there should be greater use of private and community based ADR services and how to ensure that such services meet appropriate standards.[3]

In its report, NADRAC recommended that, among other things:

> Legislation governing federal courts and tribunals require genuine steps to be taken by prospective parties to resolve the dispute before court or tribunal proceedings are commenced.[4]

Note, however, that NADRAC acknowledged that this recommendation would not necessarily apply to all tribunals nor to all types of tribunal proceedings.[5] The proposed provisions in the Bill do not apply to tribunals.[6]

2. NADRAC, *The resolve to resolve*, op. cit.
3. See NADRAC, *ADR and civil proceedings reference*, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_ADRandCivilProceedingsReference
   ADR is a general term referring to processes other than litigation, used to assist people to resolve various disputes—it is important to note that there are different types of such processes and particular types of ADR processes suit particular types of disputes. For further information about the meaning of ADR, see NADRAC, *What is ADR?*, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADR
4. NADRAC, *The resolve to resolve*, op. cit., p. 7. For a copy of NADRAC's recommendations regarding the taking of genuine steps, see Appendix 1 of this Digest.
5. NADRAC, *The resolve to resolve*, op. cit., p. 7.
6. The definition of 'eligible court' in clause 5 of the Bill refers only to the Federal Court of Australia and the Federal Magistrates Court.

NADRAC

NADRAC, established in October 1995, is a non-statutory body funded by the Attorney-General's Department, which gives the Attorney-General policy advice on developing extra-judicial ways to resolve or manage disputes.[7]

The establishment of NADRAC arose following the report by the Access to Justice Advisory Committee chaired by the Hon. Justice Sackville (the Advisory Committee).[8]

Access to justice

Issues relating to cost efficiencies of and access to the federal court system have been on the agenda of various federal governments over quite some time.[9]

In fact, the Bill is part of a suite of relatively recent reforms relating to access to justice in the federal court system, such as the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009*.[10]

Access to justice reviews

Access to Justice Advisory Committee (1994)

In 1993, the Attorney-General and the Minister for Justice commissioned the Advisory Committee to provide advice on a range of measures that the Commonwealth could take to improve access to justice.

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7. NADRAC, *The resolve to resolve*, op. cit., p. 15. See also NADRAC, *About NADRAC*, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/About_NADRAC
8. Access to Justice Advisory Committee, *Access to justice: an action plan*, *1994*. For further information about this report, see Attorney-General's Department, *A strategic framework for access to justice in the federal civil justice system*, Report by the Access to Justice Taskforce, Attorney-General's Department, September 2009, p. 6, viewed 6 October 2010, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~A+Strategic+Framework+for+Access+to+Justice+in+the+Federal+Civil+Justice+System+-+Report+of+the+Access+to+Justice+Taskforce.pdf/$file/A+Strategic+Framework+for+Access+to+Justice+in+the+Federal+Civil+Justice+System+-+Report+of+the+Access+to+Justice+Taskforce.pdf
9. See, for example, comments made in Attorney-General's Department, *Federal civil justice system strategy paper*, December 2003, pp. 2–9 and 296–316, viewed 6 October 2010, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~9+FULL+STRATEGY+PAPER.pdf/$file/9+FULL+STRATEGY+PAPER.pdf
10. For information about the federal courts system in Australia and policy commitments to improving access to justice, see the Bills Digest for the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*: S Scully, *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, Bills digest, no. 14, 2009–2010, 11 August 2009, Parliamentary Library, Canberra, pp. 3–5 and 8–9, viewed 6 October 2010, http://www.aph.gov.au/library/pubs/bd/2009-10/10bd014.pdf

The Advisory Committee took a broad view of access to justice and looked at a range of court based and non-court based issues, including regulation of the legal services market, legal aid, ADR, court fees, case management, legislation and provision of information. In addition, the Advisory Committee made broad recommendations in some areas. For example, ADR specific recommendations included that:

- a range of ADR options should be available to courts, and
- ADR programs and issues should be the subject of further study.[11]

In its response to that report, the Federal Government agreed that further improvements to the justice system by using ADR and other ways of resolving disputes be encouraged.[12]

Australian Law Reform Commission (1999)

In September 1997, the then Attorney-General commissioned the Australian Law Reform Commission (the ALRC) to review the federal civil litigation system, of which a report was tabled in Parliament on 17 February 2000.[13]

The ALRC was asked to consider 'the need for a simpler, cheaper and more accessible legal system', with particular attention to issues relating to matters including excessive costs and delay. One of the matters that the ALRC was asked to consider was the use of court-based and community alternative dispute resolution schemes.

In its report, the ALRC states:

> The Commission acknowledges the importance of ADR as a tool in resolving cases quickly, less expensively and to the satisfaction of parties. However, the Commission also cautions against uncritical acceptance of ADR as a panacea for all ills of litigation, much in the same way that tribunals were intended to provide the `solution' to litigation problems in the 1970s. The Commission makes some targeted recommendations aimed at ensuring that the benefits of ADR are realised but it is not taken to substitute for appropriate adjudication.[14]

In addition, the ALRC noted that:

> ... there is no optimal time for ADR referral which would cover all cases. It is possible for ADR processes to be prescribed too early in the history of a dispute -- before the parties are ready to

11. Attorney-General's Department, *A strategic framework for access to justice in the federal civil justice system*, op. cit., p. 6.
12. Attorney-General's Department, *The Justice Statement*, May 1995, Chapter 2, viewed 6 October 2010, http://www.austlii.edu.au/austlii/articles/scm/jcontents.html
13. Australian Law Reform Commission, *Managing justice: a review of the civil justice system*, no. 89, February 2000, viewed 6 October 2010, http://www.austlii.edu.au/au/other/alrc/publications/reports/89/tor.html#Heading3
14. Ibid., 'Executive Summary', viewed 6 October 2010, http://www.austlii.edu.au/au/other/alrc/publications/reports/89/Exesum.html

> settle -- or too late, when significant litigation costs may have been incurred and there are limited monetary or personal cost savings to make settlement through ADR attractive for parties.
>
> ...
>
> courts and tribunals need to be flexible in streaming and referring cases to ADR.[15]

Government's federal civil justice system strategy

In its paper, *Federal civil justice system strategy paper* published in December 2003 (the Government's strategy paper), the then Government agreed that:

> ADR is increasingly being accepted as a mainstream method of dispute resolution. If used appropriately, ADR can lead to cheaper, quicker, less stressful and more flexible dispute resolution, and allow the parties greater control over the process. Expanding the range of ADR initiatives available to resolve federal civil disputes is encouraged. However, ADR will not be appropriate in all circumstances, and should not be regarded as a universal cure-all.[16]

One of the recommendations that the Government made was that the federal courts consider how feasible it would be to implement pre-action procedures encouraging parties to conduct themselves in a manner that would facilitate settlement before proceedings are filed.[17]

In addition, the Government recognised that lawyers have a responsibility to maximise the chances of their clients' disputes being resolved in a realistic manner. The Government had stated that while many lawyers were already playing an important role in guiding their clients towards a satisfactory settlement of disputes that might otherwise result in litigation, it could not yet be said that this was the case across the board.[18]

The Government consequently supported amendments to the *Federal Court of Australia Act 1976* to:

> (a) impose an obligation on the Court and legal practitioners to consider whether to advise the parties of the ADR options available to them to resolve the dispute, and
>
> (b) require the Court to advise the parties to use an ADR method if the Court considers it may help the parties to resolve the dispute.[19]

15. Ibid., 'General issues - practice, procedure and case management', Chapter 6, viewed 6 October 2010, http://www.austlii.edu.au/au/other/alrc/publications/reports/89/ch6.html
16. Attorney-General's Department, *Federal civil justice system strategy paper*, op. cit., p. vi. For a further discussion about the role of ADR in federal court proceedings, see also ibid., Chapter 5 (Resolving disputes at the lowest appropriate level).
17. Ibid., p. vii.
18. Ibid., p. 130.
19. Ibid., p. 138.

It is noted that as a result of amendments proposed in the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009*, section 37M of the Federal Court of Australia Act now provides that the overarching purpose of civil practice and procedure provisions is to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible. According to section 37N of the Federal Court of Australia Act, parties to civil proceedings in the Federal Court must conduct the proceedings consistently with that overarching purpose and parties' lawyers must assist them to comply with that obligation. In addition, the Federal Court has been given certain powers to enforce these obligations.[20]

Committee consideration

As previously noted, this Bill had first been introduced into the 42nd Parliament. That original Bill had been referred to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for inquiry and report by 30 July 2010.[21] However, the Committee decided to discontinue the inquiry following the dissolution of the 42nd Parliament on 19 July 2010.[22]

It is noted that the Senate Scrutiny of Bills Committee had also reviewed the original Bill and decided not to make any comment on it.[23]

Upon re-introduction of the current Bill, it was again referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 20 November 2010.[24]

Position of major interest groups

Submissions made to NADRAC, in *The resolve to resolve* inquiry, do cover key aspects of what is being proposed in the Bill, albeit in relation to ADR specifically. These include:

- mandatory ADR
- pre-action ADR, and
- the role of lawyers and ADR.[25]

20. See, for example, *Federal Court of Australia Act 1976* subsections 37N(3)-(4) and sections 37P and 53A.
21. Details of the inquiry are at: http://www.aph.gov.au/senate/committee/legcon_ctte/civil_dispute_resolution/index.htm
22. See Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Civil Dispute Resolution Bill 2010*, viewed 6 October 2010, http://www.aph.gov.au/senate/committee/legcon_ctte/civil_dispute_resolution/report/index.htm
23. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, no. 7 of 2010, 23 June 2010, p. 2, viewed 6 October 2010, http://www.aph.gov.au/senate/committee/scrutiny/alerts/2010/d07.pdf
24. Australia, Senate, *Hansard*, 30 September 2010, pp. 102 and 105.
25. See, for example, NADRAC, *The resolve to resolve*, op. cit., pp. 23, 29–30 and 115.

It is noted that NADRAC did not specifically address cost sanctions for lawyers in its issues paper and that while some submissions to NADRAC's inquiry generally addressed cost sanctions for parties who fail to comply with requirements to participate in ADR, those submissions did not specifically address the issue of cost sanctions for lawyers involved.[26]

Mandatory ADR

NADRAC noted that while several stakeholders advocated mandatory ADR as a means of achieving cultural change away from a litigation-focus,[27] most submissions did not support mandatory ADR.[28]

For example, the Federation of Community Legal Centres (Vic) Inc. stated that:

> ... mediation is inappropriate in cases where there is a significant power imbalance between the parties. Such a power imbalance might arise due to one party's lack of English language or literacy skills, unfamiliarity with the legal system, disability, mental illness, age, gender, low income or financial dependence upon the other party.
>
> We strongly oppose the introduction of mandatory ADR in cases involving violence. To compel parties to engage in mediation, in these circumstances, may be traumatic for the non-violent party and may appear to legitimise the aggressor's violent behaviour. In many cases, the non-violent party would be significantly disadvantaged in attempting to negotiate with the aggressor.[29]

Although some submissions supported the view that disputes could often be resolved early with minimal legal preparation,[30] others, such as the Law Institute of Victoria, cautioned that:

> ... pre-action protocols can impose a costly barrier to entry to litigants, and that the protocols may impact upon the fundamental democratic right of a citizen to take a claim to Court.[31]

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26. See, for example, Chief Justice of the District Court of Western Australia, *Submission in response to the NADRAC issues paper on alternative dispute resolution in the civil justice system*, pp. 8 and 12, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Submission+-+District+Court+of+WA.PDF/$file/Submission+-+District+Court+of+WA.PDF; Law Council of Australia, *Re: inquiry into alternative dispute resolution in the civil justice system*, pp. 8 and 14, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(966BB47E522E848021A38A20280E2386)~NADRAC+Submission+-+Law+Council+of+Australia.PDF/$file/NADRAC+Submission+-+Law+Council+of+Australia.PDF
27. See, for example, the submission by Mr Michael Redfern, (Consultant, Russell Kennedy) in NADRAC, *The resolve to resolve*, op. cit., p. 23.
28. NADRAC, *The resolve to resolve*, op. cit., p. 23.
29. Federation of Community Legal Centres (Vic) Inc., *Submission to NADRAC*, May 2009, p. 6, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)~NADRAC+Submission+-+Attachment+-+Federation+of+community+legal+centres.pdf/$file/NADRAC+Submission+-+Attachment+-+Federation+of+community+legal+centres.pdf
30. See, for example, submissions by Mr Michael Redfern (Consultant, Russell Kennedy) and Mr John Walker (IMF) in NADRAC, *The resolve to resolve*, op. cit., p. 29.

Note, however, that the Australian Government Solicitor made the distinction that although:

> AGS does not favour initiatives or changes which mandate the *use* of ADR, either before or during proceedings ... Mandatory *consideration* of ADR does not give rise to the same concerns.[32]

Pre-action ADR

There are varying opinions about introducing pre-action ADR.

Some submissions do not support the idea of requiring pre-action ADR. As the Australian Government Solicitor stated:

> The suggestion that ADR must take place before litigation is instituted is, in AGS's view, unlikely to prove practical.
>
> ...
>
> More fundamentally, any requirement that ADR must be undertaken before accessing a court might, in respect of federal courts (established under Chapter III of the Constitution), involve an interference with the judicial power of the Commonwealth under Chapter III. The requirement may be seen as impeding access to the court to determine a dispute.[33]

However, other submissions expressed support for limited pre-action ADR—in other words, acknowledging that in particular cases, ADR is not appropriate and that the party/parties should be able to be exempted from complying with such a requirement. For example, the Chief Justice of the Supreme Court of Victoria stated:

> ... proceedings may be commenced with short or no prior notice because a limitation period is about to expire, or when seeking an urgent injunction to prevent the disposal of assets.
>
> ...

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31. Law Institute of Victoria, *NADRAC enquiry into alternative dispute resolution in the civil justice system*, p. 11, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)~NADRAC+Submission+-+Attachment+-+Law+Institute+Victoria.pdf/$file/NADRAC+Submission+-+Attachment+-+Law+Institute+Victoria.pdf. See also the submission by the Federation of Community Legal Services (Vic) Inc.: Federation of Community Legal Centres (Vic) Inc., *Submission to NADRAC*, op. cit., pp. 4-5.
32. Australian Government Solicitor, *Submission to NADRAC*, 29 May 2009, p. 5, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)~NADRAC+Submission+-+Attachment+-+Australian+Government+Solicitor.pdf/$file/NADRAC+Submission+-+Attachment+-+Australian+Government+Solicitor.pdf
33. Ibid.

> In some instances, there is reluctance to engage in negotiation or mediation before the court processes of pleading and discovery are complete, so that parties are able to receive informed legal advice.[34]

The conduct of lawyers and ADR

The role of lawyers involved in ADR has also been an issue raised in several submissions.

On the one hand, there is a belief that lawyers could be made more aware of ADR services and would benefit by further training in ADR.[35]

Yet, there are others who believe that although the legal professional culture may have been a barrier to using ADR in the past, it is much less of an issue now.[36] In fact, the NSW Bar Association goes as far as stating:

> barristers have embraced ADR and that is an important part of legal practice. This has been facilitated by the existence of Rule 17A, and also by Rule 74 of the Bar Rules which includes forms of ADR in the definition of "Barristers' Work", involving representing parties or as an ADR practitioner.[37]

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34. Chief Justice of the Supreme Court of Victoria, *Alternative dispute resolution in the civil justice system*, p. 5, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)~NADRAC+Submission+-+Attachment+-+Chief+Justice+of+Victoria.pdf/$file/NADRAC+Submission+-+Attachment+-+Chief+Justice+of+Victoria.pdf
See also Chief Justice of the District Court of Western Australia, op. cit., pp. 8 and 11; Chief Justice of the Federal Court of Australia, *NADRAC Enquiry into ADR and civil proceedings*, p. 15, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)~NADRAC+Submission+-+Attachment+-+Fed+Court+of+Australia.pdf/$file/NADRAC+Submission+-+Attachment+-+Fed+Court+of+Australia.pdf; Law Institute of Victoria, op. cit., p. 9.
35. See, for example, National Legal Aid, *Re: NADRAC enquiry into ADR and civil proceedings*, p. 6, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Submission+-+National+Legal+Aid+-+PDF.PDF/$file/Submission+-+National+Legal+Aid+-+PDF.PDF
See also Australian Government Solicitor, op. cit., p. 4 (opportunities to increase knowledge about ADR at undergraduate and continuing legal education levels); Law Council of Australia, op. cit., p. 7 (supports initiatives to launch a campaign targeted specifically at regular users of the civil justice system, and a statutory requirement for lawyers and courts to provide information about ADR to disputants); Public Interest Advocacy Centre, *Alternative dispute resolution in the civil justice system*, p. 3, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)~NADRAC+Submission+-+Attachment+-+Public+Interest+Advocacy+Centre.pdf/$file/NADRAC+Submission+-+Attachment+-+Public+Interest+Advocacy+Centre.pdf (if lawyers are to be involved in ADR, they must be adequately trained to do so).
36. See, for example, Chief Justice of the District Court of Western Australia, op. cit., p. 10.
37. NSW Bar Association, *NADRAC issues paper - alternative dispute resolution in the civil justice system*, p. 7, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)~NADRAC+S

Similarly, it has been pointed out that, in some jurisdictions, lawyers are already obliged to advise clients about alternatives to litigation[38] and already have adequate access to ADR training.[39] However, some, such as the Law Institute of Victoria and the NSW Bar Association, do not support 'unnecessary regulation or compulsion' of lawyers.[40]

Financial implications

The Bill is not expected to have any direct financial impact on the Government.[41]

Key provisions

It should be stated at the outset that the Bill is not simply about ADR. Instead, it is about ensuring that potential litigants take 'genuine steps' to attempt to resolve the dispute before commencing civil proceedings, of which ADR is only one of several considerations.

Part 1

Part 1 of the Bill, commencing on Royal Assent, sets out the object of the Act and provides examples of what would constitute 'genuine steps' to resolve a dispute, among other matters.

Under **clauses 3-5** of the Bill, the Bill aims to ensure that, as far as possible people take genuine steps to resolve disputes *before* civil proceedings are instituted in the Federal Court or the Federal Magistrates Court (the Court).

As the Explanatory Memorandum states:

> The formulation 'genuine steps' was recommended by the National Alternative Dispute Resolution Advisory Council (NADRAC) in its report, *The Resolve to Resolve - Embracing ADR to*

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ubmission+-+Attachment+-+NSW+Bar+Association.pdf/$file/NADRAC+Submission+-+Attachment+-+NSW+Bar+Association.pdf

38. See, for example, Law Council of Australia, op. cit., p. 4. See also, as examples of existing obligations: Law Society of NSW, *Professional Conduct and Practice Rules*, Advocacy Rule 17A, viewed 6 October 2010, http://www.lawsociety.com.au/idc/groups/public/documents/internetcostguidebook/026327.pdf; Law Institute of Victoria, *Professional and Conduct Practice Rules 2005*, Rule 12.3, viewed 6 October 2010, http://www.liv.asn.au/PDF/Practising/Ethics/2005ConductRules.aspx
39. However, see, for example, Law Society of NSW, *Re: NADRAC enquiry into alternative dispute resolution and civil proceedings*, p. 2, viewed 6 October 2010, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(712B446AA84F124A6F0833A09BD304C8)~NADRAC+Submission+-+Attachment+-+Law+Society+of+NSW.pdf/$file/NADRAC+Submission+-+Attachment+-+Law+Society+of+NSW.pdf (although lawyers are becoming more familiar with ADR, there is a gap in expertise and experience which should be addressed).
40. Law Institute of Victoria, op. cit., p. 8. See also NSW Bar Association, op. cit., p. 7.
41. Explanatory Memorandum, op. cit., p. 3.

> *improve access to justice in the federal jurisdiction* (November 2009). 'Genuine steps' was preferred over formulations such as 'good faith' or 'genuine effort'. These concepts are more subjective and may undermine the confidentiality of ADR processes, and, in situations where there is a power or financial imbalance, could lead to injustice by causing some parties to feel they have to make concessions.[42]

Clause 4 provides examples of genuine steps that a person could take to resolve a dispute with another person, which include (but are not limited to):

- notifying that other person of the issues, or possible issues, in dispute
- offering to discuss those issues with them to try and resolve the dispute
- responding 'appropriately' to such notification
- giving the other person relevant information and documents to enable that person to understand what is in dispute and how it might be resolved
- trying to negotiate with the other person, either personally or through a representative, with a view to resolving some or all of the issues in dispute, and
- considering whether other means of resolving the dispute, including using ADR, may assist in resolving the dispute.

Comment

The list reflects flexibility in allowing parties or prospective parties to tailor the genuine steps they take to the particular circumstances of their dispute. There is no mandatory obligation for pre-action ADR per se.
The Explanatory Memorandum states:

> This is to ensure that the focus is on resolution and identifying the central issues without incurring unnecessary upfront costs, which has been a criticism of compulsory pre-action protocols.[43]

Part 2

Part 2 of the Bill deals with the mechanics of the obligation to take genuine steps to resolve disputes before civil proceedings are commenced in the Court.

Under **clause 6** of the Bill, an applicant who commences civil proceedings in the Court must file a genuine steps statement *at the time of filing the application*.[44] Such statement must specify the steps taken in an attempt to resolve issues in dispute between the applicant and the respondent in

42. Ibid., p. 4. See also NADRAC, *The resolve to resolve*, op. cit., p. 31.
43. Explanatory Memorandum, op. cit., p. 5.
44. An 'applicant' in proceedings means a person who commences the proceedings: **clause 5** of the Bill (Definitions).

the proceedings.[45] However, if no such steps were taken, the statement must specify the reasons for that, which may include the urgency of the proceedings and the possible impact(s) on the safety or security of a person or property of taking such steps.

Comment

This provision reflects recognition that, in some circumstances, it may be necessary to commence proceedings urgently and that it may be necessary to consider the safety of people in cases involving violence, as mentioned earlier.

As the Explanatory Memorandum states:

> Where a matter must be dealt with urgently a person may not be in a position to undertake genuine steps. This may be because a limitation period will expire or an urgent action is required.
>
> ...
>
> Where the safety or security of a person or property would be compromised, for example, where a party considers that giving notice of proceedings is likely to lead to that person disposing of assets to frustrate the proceedings, this is a reason that may be given for not having taken genuine steps before instituting the proceedings. However, once initiated, a court will have the discretion to use its powers to consider the suitability of the matter for certain steps to be undertaken.[46]

The obligation to file a genuine steps statement would not apply in wholly excluded proceedings (see **clauses 15–17** below). Although a genuine steps statement would have to be filed in relation to partially excluded proceedings, the statement would not have to relate to those parts of the proceedings that are excluded proceedings.

Under **clause 7**, the respondent in proceedings who is given a copy of the applicant's genuine steps statement must also file a genuine steps statement *before the hearing date specified in the application*. In this case, the respondent's genuine step statement must either:

- state whether the respondent agrees with the applicant's genuine steps statement (wholly or partially), or
- if not, specify what the respondent disagrees with and reasons for the disagreement.

According to the Explanatory Memorandum:

> This promotes resolution and encourages a move away from an adversarial approach to litigation. Prospective parties will know that steps they took or did not take will be put before

45. A 'respondent' in proceedings means a person against whom the proceedings are commenced: **clause 5** of the Bill (Definitions).
46. Explanatory Memorandum, op. cit., p. 9.

> the court if action is ultimately commenced. Importantly, the court will be in a better position to manage the matter using existing case management powers.
>
> For example, if genuine steps have been taken and have resulted in issues being identified and positions clarified, a court may be in a better position to decide that court ordered mediation would impose unnecessary costs and delay. Early listing for hearing will be the best and most cost efficient and just outcome. Alternatively, if a court is not satisfied with the steps already taken, further case management directions may be appropriate to ensure parties explore options for resolving or narrowing the dispute.[47]

Genuine steps statements must comply with the Rules of the Court in relation to the Court in which the statement is filed (**clause 8**).[48]

In addition, **clause 9** imposes an obligation on lawyers acting for the applicant or respondent, to advise the person of the requirements under the Act and to assist the person to comply with those requirements.[49] It is noted that, in relation to lawyers, NADRAC recommended that:

> Legislation require legal practitioners to provide a prospective party to proceedings in federal jurisdiction with:
>
> — information about the requirement to take genuine steps to resolve the dispute before commencing court or tribunal proceedings
>
> — information about the services available outside the court or tribunal which may assist the person in resolving the dispute
>
> — information about the advantages of resolving the dispute without commencing court or tribunal proceedings and the benefits of ADR processes
>
> — an estimate of the lawyer's costs
>
> — an estimate of the costs of other parties for which the litigant may be liable if unsuccessful in the proceedings, and
>
> — an estimate of the timeframe for proceedings, including for its commencement and conclusion.[50]

Whilst not as detailed as NADRAC's recommendation, **clause 9** is, arguably, consistent with that recommendation.

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47. Ibid., p. 8. See also **Part 3** of the Bill (Powers of the Court).
48. See also **Part 5 clause 18** of the Bill (Rules of Court).
49. See also **Part 3 subclauses 12(2)** and **(3)** (the Court's discretion to take account of a lawyer's failure to comply with these obligations when exercising its discretion to award costs in civil proceedings; and if a lawyer is ordered to bear costs personally, that lawyer's inability to recover the costs from his or her client). References to 'the Act' are references to the *Civil Dispute Resolution Act 2010* when enacted.
50. NADRAC, *The resolve to resolve*, op. cit., Rule 2.10, pp. 9–10.

Clause 10 makes it clear that these requirements under **Part 2** are in addition to and not instead of requirements imposed by any other Act and that a failure to file a genuine steps statement would not invalidate the application to commence proceedings, any defence to such application, nor the proceedings itself.

Part 3

Part 3 relates to the Court's powers in relation to parties' and lawyers' obligations in relation to taking genuine steps to resolve issues in dispute.

Clause 11 provides that, when performing its functions or exercising its powers in relation to civil proceedings, the Court has discretionary power to take account of:

- whether a person who had to file a genuine steps statement under **Part 2** had, in fact, done so, and
- whether such person actually took genuine steps to resolve the dispute.[51]

Under existing case management practices, the Court can then consider how to proceed in a particular case. As the Explanatory Memorandum states:

> The genuine steps statement gives the court more information about the steps that the parties have taken before commencing proceedings. This allows the court to utilise its existing case management provisions to manage proceedings where appropriate, including its active case management powers and its powers of summary dismissal.
>
> Some examples of the types of orders a court might make where it is not satisfied that genuine steps have been taken include:
>
> □ referring the dispute or parts of the dispute to mediation, arbitration, or other ADR processes that have not already been undertaken by the parties (with consent where required)
>
> □ nominating an ADR practitioner where parties cannot agree on an ADR practitioner
>
> □ setting time limits for the doing of anything, or the completion of any part of the proceeding
>
> □ dismissing the proceeding in whole or in part
>
> □ striking out, amending or limiting any part of a party's claim or defence
>
> □ disallowing or rejecting any evidence, and

51. An example of the court's powers in relation to civil proceedings is its power to give directions about practice and procedure in a civil proceeding, which includes awarding costs against a party to the proceeding: see *Federal Court of Australia Act 1976* section 37P.

 ordering a party to produce to it a document in the possession, custody or control of the party.[52]

Subclause 12(1) gives the Court a similar discretion to take into account whether a party was required to take genuine steps and whether such steps were taken when awarding costs in the civil proceeding.

Subclauses 12(2) and **(3)** relate to a lawyer's duty under **clause 9** to advise clients of the genuine steps requirements and to assist them in complying with those requirements. **Subclause 12(2)** provides that a lawyer's failure to comply with that duty may be taken into account by the relevant decision maker when exercising a discretion to award costs in the civil proceeding. If a lawyer fails to comply with the **clause 9** requirement and if the lawyer is ordered to bear costs personally, **subclause 12(3)** provides that the lawyer cannot recover those costs from his or her client.

Clause 13 makes it clear that these powers of the Court are in addition to any other powers of the Court, under the Act or any other legislation.

It is noted that under **clause 14**, **Part 3** does not permit disclosure of confidential settlement negotiations under section 131 of the *Evidence Act 1995*.

Section 131 of the Evidence Act provides:

> Evidence is not to be adduced of:
>
> (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
>
> (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

Consequently, settlement privilege would continue to apply to any communications between the parties when taking genuine steps to try and resolve their dispute(s).

Comment

This should allay concerns about the confidentiality of settlement negotiations in that:

> The confidentiality of discussions, negotiations or ADR is not in issue as the requirement to provide a genuine steps statement does not require or authorise parties to seek to adduce evidence of confidential negotiations. This is crucial, as the confidentiality of such discussions and ADR processes is generally seen as one of the reasons why they can be effective; allowing

52. Explanatory Memorandum, op. cit., pp. 11–12.

parties to discuss issues frankly with a view to resolution, rather than having to assert rights and protect positions.[53]

Part 4

Part 4 of the Bill relates to the types of proceedings that would be excluded from the operation of the Act.

Clause 15 lists certain kinds of proceedings which would be excluded proceedings, including:

- proceedings for an order imposing a pecuniary penalty for contravention of a civil penalty provision (civil penalty provisions are meant to address situations where the seriousness of the misconduct requires punishment and would be inappropriate for resolution by taking genuine steps)[54]
- proceedings relating to a decision of, or a decision that has been subject to review by, certain tribunals including:
  - the Administrative Appeals Tribunal
  - the Australian Competition Tribunal
  - the Migration Review Tribunal
  - the Refugee Review Tribunal, and
  - the Social Security Appeals Tribunal (where matters have already been subject to a merits review by such external merits review tribunals, parties would have already been able to take genuine steps to resolve issues in dispute and a further requirement is considered to be unnecessary)[55]
- proceedings in the appellate jurisdiction of the Court (in such circumstances, in general, parties would have had earlier requirements to take genuine steps to resolve issues in disputes when commencing primary proceedings)[56]
- ex parte proceedings (proceedings in which an application to commence proceedings is made by one party in the absence of the other party, often without notice, which is considered to make genuine steps requirements impracticable),[57] and
- proceedings to enforce an enforceable undertaking (parties would have already negotiated the terms of an undertaking which is in place and so, a further genuine steps requirement to enforce that undertaking is not considered to be beneficial).[58]

53. Ibid., p. 8.
54. Ibid., p. 13.
55. Ibid., p. 14. Including proceedings relating to decisions of certain tribunals in the list of 'excluded proceedings' for the purposes of the Bill is consistent with NADRAC'S comments regarding tribunals, as mentioned above: see above note 5.
56. Explanatory Memorandum, op. cit., p. 14.
57. Ibid.
58. Ibid., p. 15.

Clause 16 sets out excluded proceedings, which are proceedings under specific Acts, or under regulations made under those Acts. These Acts include:

- the *Australian Citizenship Act 2007* (this Act prescribes citizenship criteria and decision makers must refuse to grant citizenship if those criteria are not satisfied—not possible to negotiate citizenship if applicants do not meet the criteria)[59]
- the *Family Law Act 1975* (this Act has various voluntary and mandatory pre-trial dispute resolution options available to parties)[60]
- the *Native Title Act 1993* (this Act and subordinate legislation is said to sufficiently regulate native title dispute resolution)[61], and
- the *Proceeds of Crime Act 1987* and *Proceeds of Crime Act 2002* (the aims of these Acts are to ensure people who commit crimes against the Commonwealth do not benefit from the proceeds of committing those crimes and to enable law enforcement authorities to trace such proceeds—it would not be considered appropriate to undertake genuine steps in these circumstances).[62]

Clause 17 provides that, in addition to the above-mentioned types of proceedings that would be excluded proceedings, regulations may prescribe additional excluded proceedings in various ways.

As the Explanatory Memorandum states:

> The requirements in this Bill may not be appropriate in all circumstances. A number of instances have already been identified and are listed in clauses 15 and 16. However, given the multitude of matters that come before the Federal Court and Federal Magistrates Court, it is conceivable that a certain type of matter or a particular provision of an Act may not be suitable for the genuine steps requirement to be applied to it. The regulation-making power allows a timely exclusion if a need for such an exclusion is identified.
>
> ...
>
> The purpose of the Regulations is to ensure that the requirement to file a genuine steps statement is not applied where it would be inappropriate to impose the requirement. Regulations could not be used to impose a condition or obligation, require a certain action be taken, or otherwise require any specific action on the part of a person.[63]

Comment

The provisions in Part 4 of the Bill are further recognition that genuine steps obligations may be either unwarranted or inhibitive in particular circumstances.

59. Ibid.
60. Ibid., p. 16.
61. Ibid.
62. Ibid.
63. Ibid., p. 17.

Part 5

Part 5 of the Bill contains provisions relating to the Rules of Court, as well as the Governor-General's regulation-making power under the Act.

Under **clause 18**, the relevant Rules of Court may provide for or in relation to:

- the form of genuine steps statements
- the matters to be specified in such statements, and/or
- time limits relating to providing such statements.

Clause 19 provides for the usual Governor-General's regulation-making power in relation to the Act.

Concluding comments

Proposed provisions in the Bill are consistent with NADRAC's report.

In addition, as mentioned earlier, the Bill proposes that ADR is simply one of several examples of what constitutes taking genuine steps in trying to resolve a dispute before commencing litigation and proposed provisions in the Bill should allay concerns expressed specifically in relation to ADR in submissions to the NADRAC inquiry.

Appendix 1—NADRAC's recommendations regarding 'genuine steps'

The following information is taken from NADRAC, *The resolve to resolve—embracing ADR to improve access to justice in the federal jurisdiction*, September 2009, viewed 23 June 2010, pp. 7–10, http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~NADRAC+The+Resolve+to+Resolve+Report_web.PDF/$file/NADRAC+The+Resolve+to+Resolve+Report_web.PDF

Chapter 2 – Encouraging Greater Use of ADR

Pre-action requirement

2.1 Legislation governing federal courts and tribunals require genuine steps to be taken by prospective parties to resolve the dispute before court or tribunal proceedings are commenced.

Pre-action guidelines

2.2 Legislation require prospective litigants to have regard to the following pre-action guidelines in determining what genuine steps may be appropriate.

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:

— considering whether the dispute may be resolved at an early stage by discussion of the issues with the prospective respondent either directly or in a process facilitated by another person

— sending to the other prospective party at the earliest opportunity a notice of dispute which clearly but briefly outlines the issues in dispute, references any pertinent information or documents (including information as to whether the prospective applicant is insured and whether the prospective litigation is to be funded or supported by a third party), attaches copies of any documents considered necessary for resolution *and only those documents*, offers to further discuss the dispute and proposes how that discussion will be conducted ie in writing, by telephone or in person or by using an appropriate ADR process

— where an offer to use an ADR process is accepted by the prospective respondent or respondents, quickly agreeing on the identity of the ADR practitioner and the terms of his or her appointment and agreeing with the ADR practitioner the rules applicable to the ADR process (if any), and minimum attendance eg agreement to attend at least one session

— where the dispute does not resolve by correspondence, direct discussion or use of an appropriate ADR process, sending to the prospective respondent a notice of intention to proceed with the application, specifying the legal issues in dispute, the orders to be sought, any further relevant documents and again offering to negotiate

— attempting to negotiate or authorising a representative(s) to negotiate a settlement of the legal case whether directly with the prospective respondent or in a process managed by a third person, and

— if the dispute does not resolve, considering whether a different ADR process may be preferable to litigation such as conciliation, early neutral evaluation or arbitration and, if so, offering to participate in such a process.

Pre-action requirement for prospective respondents

Each prospective respondent to an application for orders from a court or tribunal must, unless impracticable, take genuine steps to resolve the dispute as soon as possible by:

— on receipt of the notice of dispute, considering whether the dispute may be resolved at an early stage by discussion of the issues with the prospective applicant either directly or in a process facilitated by another person

— responding to the notice of dispute at the earliest opportunity identifying any disagreement as to the issues in dispute, referencing any pertinent information or documents (information includes whether the prospective respondent(s) are insured and whether any prospective litigation is to be funded or supported by a third party) not mentioned in the notice of dispute, attaching copies of any additional documents considered necessary for resolution *and only those documents*, indicating a willingness to further discuss the dispute and proposing how that discussion will be conducted ie in writing, by telephone or in person or by using an appropriate ADR process

— where an offer to use an ADR process is accepted, suggesting an appropriate ADR practitioner or practitioners, and when agreement is reached as to the appropriate practitioner, quickly agreeing with the ADR practitioner and the prospective applicant the terms of his or her appointment, the rules applicable to the ADR process (if any), and minimum attendance eg agreement to attend at least one full session

— where the matter does not resolve by correspondence, direct discussion or use of an appropriate ADR process, responding to the prospective applicant's notice of intention to proceed, identifying any disagreement as to the legal issues in dispute, the orders to be sought, any further relevant documents and agreeing to continue to negotiate

— attempting to negotiate or authorising a legal representative(s) to negotiate a settlement of the legal case whether directly with the prospective respondent or in a process managed by a third person, and

— if the dispute does not resolve, considering whether a different ADR process may be preferable to litigation such as conciliation, early neutral evaluation or arbitration and, if so, offering or agreeing to participate in such a process.

Exceptions

2.3 Legislation set out factors that may be taken into account by prospective litigants in determining the application of the guidelines including 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.

Available court orders

2.4 Legislation provide that where a prospective party considers that the other party has not provided the information necessary to enable the dispute to be resolved, the court or tribunal may order that the information be provided.

2.5 Legislation provide that where prospective parties cannot agree on a dispute resolution practitioner to conduct an ADR process, an application may be made to the court or tribunal for an order, nominating either (i) an ADR practitioner within the court or tribunal to conduct the ADR process at a fee commensurate with a fully recoverable 'user pays' service or (ii) a body outside the court or tribunal that will nominate an appropriate practitioner.

Adverse costs orders

2.6 Legislation empower courts and tribunals[2] to make an adverse costs order against a party, whether successful or not, if the party has not taken what the court or tribunal considers to be genuine steps to resolve the matter before commencing proceedings. The court or tribunal would have regard to compliance by the parties with the steps set out in clause 2.2 in making such an order.

2.7 Legislation provide that the costs covered by such an order may be calculated from the date of the first notice of dispute or from the time the claimant otherwise advised the other prospective party of the claim.

Powers of courts and tribunals

2.8 Legislation provide that federal courts and tribunals have the power to make rules or give directions about steps that prospective parties to proceedings in that court or tribunal must take before commencing particular kinds of proceedings, including mandatory attendance at any appropriate ADR process.

2.9 Legislation ensure that judges or tribunal members may, at any time during court or tribunal proceedings, order a party to attend a facilitative or advisory ADR process without the parties' consent. The parties' consent would continue to be required for determinative processes such as arbitration.

Obligations on legal practitioners

2.10 Legislation require legal practitioners to provide a prospective party to proceedings in federal jurisdiction with:

— information about the requirement to take genuine steps to resolve the dispute before commencing court or tribunal proceedings information about the services available outside the court or tribunal which may assist the person in resolving the dispute

— information about the advantages of resolving the dispute without commencing court or tribunal proceedings and the benefits of ADR processes

— an estimate of the lawyer's costs

— an estimate of the costs of other parties for which the litigant may be liable if unsuccessful in the proceedings, and

— an estimate of the timeframe for proceedings, including for its commencement and conclusion.

Obligations on parties

2.11 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.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.