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Civil Dispute Resolution Bill (Cth) 2010

It has often been said that protracted and expensive litigation makes access to justice difficult, stressful and often unattainable. With the hope of moving the focus from the expensive adversarial culture of litigation, on 16 June 2010, Attorney General Robert McClelland introduced the Civil Dispute Resolution Bill (**Bill**) into parliament.

The driver behind the focus of the Bill is the requirement that litigants take genuine steps to resolve their dispute prior to initiating any application in the Federal Courts.

Background

The objective of the Bill is to encourage parties to litigation to attempt to resolve their disputes outside of the courts. By doing this, the Bill seeks to improve access to justice by focusing parties and their lawyers on the early resolution of disputes.

What does the Bill require parties to do?

The Bill requires parties to, as far as possible, take genuine steps to resolve a civil dispute before proceedings are commenced in the Federal Court or the Federal Magistrates Court. The Bill does not set out what specific procedures would constitute genuine steps. It is deliberately flexible.

- Clause 4 of the Bill provides examples of things a person may do as part of taking genuine steps to resolve a dispute. These include:
- notifying a person of the issues in dispute, or issues that may be in dispute, and offering to discuss them with a view to resolving the matter;
- responding appropriately to any notification given by a person;
- providing relevant information and documents to the other person to enable them to understand the issues and how the dispute could be resolved;
- considering whether the dispute can be resolved by a process facilitated by another person, such as alternative dispute resolution (more below);
- if a resolution process is agreed to between the parties:
 - agreeing on a particular person to facilitate the process and attending the process;
 - if a resolution process does not result in the resolution of the dispute, considering a different process; and
- attempting to negotiate with the other person with a view to resolving some or all of the issues in dispute, or authorising a



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representative to do so.

Alternative Dispute Resolution (ADR)

What constitutes a genuine step will vary depending on the circumstances of the case. In some cases, different forms of ADR may be an appropriate genuine step for parties to consider.

Some forms of ADR involve an impartial person assisting those in a dispute to resolve the issues between them or narrow the issues in dispute. Forms of ADR include mediation, conciliation and arbitration.

The Bill requires parties to inform the court of the genuine steps they have taken to try to resolve the dispute. With this information, the court will be able to use its existing case management tools when directing how the matter should proceed. If a court is not satisfied with the steps already taken, then the court will be in a position to make directions appropriate to compel the parties to explore alternative options for resolving (or at least narrowing) the dispute.



Importantly, the confidentiality of discussions, negotiations or any ADR undertaken by the parties remains intact.

Who does the Bill apply to?

Parties to the dispute

An applicant initiating civil proceedings in the original jurisdiction of the Federal Court or Federal Magistrates Court will be required to file a genuine steps statement at the time of filing their application. The genuine steps statement must detail what steps the parties have taken to resolve their dispute or, if they have not taken any steps, the reasons why.

Parties will not be required to take any specific procedure; rather, what is appropriate will turn on the circumstances of the particular matter.

Upon receipt by a respondent of an applicant's genuine steps statement, they too must file one with the court before the hearing.

Examples of the types of orders a court may make if it not satisfied that genuine steps have been taken by the parties, include:

- referring the dispute or parts of the dispute to ADR;
- 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

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

After taking into account the genuine steps (or lack of) undertaken by the person to resolve the dispute, the court can exercise its discretion to award costs against a party under the Bill if it is not satisfied the party has taken genuine steps in the circumstances.

Duties of Lawyers

Under the proposed Bill, lawyers will also be under an obligation to advise their clients of the requirements under the Bill and assist them in complying with those requirements.

As such, lawyers have the responsibility of explaining to their client the importance of taking genuine steps prior to commencing any legal action and what genuine steps may be deemed appropriate in the circumstances, as well as advising on compliance requirements under the Bill.

The court also has the power under the Bill to consider whether or not a lawyer has complied with their duties when exercising its discretion to award costs.

Where a lawyer is in breach of their obligations under the Bill by failing to advise their client of the genuine steps requirement or does not help them to comply, the court can order costs against a lawyer and the lawyer will not be able to recover those costs from their client.

Exceptions

The Bill will apply to all civil proceedings initiated in the Federal Courts,



other than certain matters excluded; for example, where the subject matter is inappropriate (ie civil penalty proceedings and proceedings brought by the Commonwealth in connection with a criminal offence), or if there are already specific mandatory pre-action steps that would make further steps inappropriate (such as under the Family Law Act 1975).

There are also specific Acts of parliament which are excluded on the basis that they already establish a dispute resolution process and where taking genuine steps is not appropriate. These include the:

- *Australian Citizenship Act 2007*
- *Child Support (Registration and Collection) Act 1988*
- *Fair Work Act 2009*
- *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*
- *Family Law Act 1975*
- *Migration Act 1958*
- *National Security Information (Criminal and Civil Proceedings) Act 2004*
- *Native Title Act 1993*
- *Proceeds of Crime Act 1987*
- *Proceeds of Crime Act 2002*

Impact

Should the proposed Bill become law, parties will need to turn their mind to making genuine attempts at settling the dispute prior to any civil proceeding being initiated in the Federal Courts. The benefits of doing so for parties will mean that disputes might be resolved earlier and without the burdensome expense of taking a dispute through the

court.

ADR processes offer parties the opportunity to, at the very least, identify the issues in dispute and take some 'ownership' in the ultimate outcome by reaching a negotiated settlement, rather than leaving their fate in the hands of the court.

Given the deliberately flexible nature of the Bill, what constitutes appropriate genuine steps will turn on the circumstances of the case and parties should seek the advice of their legal practitioners early on to avoid costs orders being made against them or having the claim thrown out or dismissed by the court.

All legal practitioners will need to be acquainted with the requirements under the Bill to help clients comply with their obligations.

Whether from the viewpoint of parties, their lawyers or judicial officers, the Bill will have a significant impact on the way disputes are handled. The proposed laws will shift the focus of disputes (at least at first instance) away from the courtroom and towards pre-issue settlement negotiations and dispute resolution processes.

Whether the Bill is ultimately passed will not be known until after the outcome of the federal election.

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