

# Compulsory ADR before starting Federal Court proceedings?

by Katrina Chambers

Potential litigants and their advisers should be aware of proposed changes to the law that will require applicants to take certain steps before civil proceedings are commenced in the Federal Court or the Federal Magistrates Court.

The *Civil Dispute Resolution Bill 2010* (Cth) was introduced to the House of Representatives in June 2010, and has since been referred to the Commonwealth Senate Legal and Constitutional Affairs Committee. That Committee is due to report on 30 July 2010.

As drafted the bill applies to all civil proceedings in the Federal Court or the Federal Magistrates Court with the exception of certain 'excluded matters' that include appeals, *ex parte* proceedings and matters that relate to a decisions of certain tribunals, such as the Copyright Tribunal, the Australian Competition Tribunal and the Administrative Appeals Tribunal.

The object of the legislation is to ensure that parties take 'genuine steps' to resolve disputes before civil proceedings are instituted.

Lawyers are required to advise clients about their obligations, and provide assistance with compliance. This includes filing a 'genuine steps' statement at the time of filing an initiating application.

The draft bill provides the following examples of the steps that could be taken to resolve a dispute:

- Providing notification of the issues in dispute and offering to discuss them with a view to resolving that matter.
- Responding appropriately to any

notification given by another party.

- Providing relevant information and documents to enable the other party to understand the issues and how the dispute could be resolved.
- Considering whether the dispute could be resolved by another process such as Alternative Dispute Resolution (ADR).
- If a resolution process is agreed to between the parties:
  - agreeing on a particular party to facilitate the process; and
  - attending the process.
- If the resolution process does not result in the resolution of the dispute, considering a different process.
- Attempting to negotiate with the other party with a view to resolving some or all of the issues in dispute, or authorising a representative to do so.

The Explanatory Memorandum for the bill includes the following examples of ADR processes:

- Mediation
- Conciliation
- Expert Appraisal
- Early Neutral Evaluation
- Arbitration

An applicant's 'genuine steps statement' must specify:

- The steps that have been taken to try and resolve the issues in dispute between the

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applicant and the respondent.

- If no steps were taken, the reasons why, which may include the urgency of the proceedings or whether, and the extent to which, the safety or security of any person or property would have been compromised by taking such steps.

A respondent in proceedings must also file a genuine steps statement before the hearing date specified in the application. The respondent's genuine steps statement must:

- State whether the respondent agrees with the genuine steps statement filed by the applicant.
- If the respondent disagrees with the applicant's genuine steps application, specify the respects in which the respondent disagrees.

Genuine steps statements must also comply with any additional rules of the relevant court. For example, the court may make rules specifying additional information to be included in a genuine steps statement, or a different time for the filing of a genuine steps statement.

While a failure to file a genuine steps statement in proceedings will not invalidate the application or the proceedings, the court may have regard to the genuine steps requirements in performing the court's functions and exercising its powers. For example, a court might make an order referring the dispute to ADR, dismissing proceedings or striking out all or part of a claim or defence. Importantly, the filing of a genuine steps statement will also be relevant with respect to the exercise of a court's discretion to award costs.

We will keep you informed of further developments. In the meantime, if you have any questions or require any assistance in relation to disputes or litigation, please contact Katrina Chambers, David Watt or Harry Nicolaidis.



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