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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**CIVIL DISPUTE RESOLUTION BILL 2010**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Robert McClelland MP)

## **Abbreviations used in the Explanatory Memorandum**

ADR	Alternative Dispute Resolution
Bill	Civil Dispute Resolution Bill 2010
Federal Court	Federal Court of Australia
Federal Court Act	<i>Federal Court of Australia Act 1976</i>
Federal Magistrates Act	<i>Federal Magistrates Act 1999</i>
Rules of Court	Federal Magistrates Court Rules 2001
	Federal Court of Australia Court Rules 1979

# CIVIL DISPUTE RESOLUTION BILL 2010

## GENERAL OUTLINE

This Bill encourages the resolution of civil disputes outside of the courts and seeks to improve access to justice by focusing parties and their lawyers on the early resolution of disputes.

This Bill seeks to ensure that, as far as possible, parties take ‘genuine steps’ to resolve a civil dispute before proceedings are commenced in the Federal Court or the Federal Magistrates Court. When commencing proceedings in a court, parties are required to file a statement saying what steps they have taken to resolve their dispute or, if they have not taken any steps, the reasons why. The Bill gives examples of reasons why steps might not be taken, including urgency, or where the safety of a person or security of property is compromised. The court can take into account the failure to take steps when exercising its existing case management directions and costs powers.

The Bill does not require parties to take any particular specific step – the most appropriate steps to take depend on the circumstances of the particular dispute. The Bill is deliberately flexible in allowing parties to tailor the genuine steps they take to the circumstances of the dispute.

The genuine steps statements provide additional information for the court about attempts that have been made to resolve the dispute. Based on this information, the court can make orders and directions under its existing case management powers, and consider compliance with the requirement and the extent of any steps taken in awarding costs.

Lawyers are also under an obligation to advise their clients of the requirement and assist them to comply.

The Bill applies to all civil proceedings other than excluded matters under Part 4. Matters are excluded if the subject matter is inappropriate, for example a civil penalty proceeding and related matters, or if there are already specific mandatory pre-action steps that would make further steps inappropriate, such as under the *Family Law Act 1975*. Further, matters that have already been considered by a statutory tribunal are excluded, such as the Administrative Appeals Tribunal, Migration Review Tribunal or Veteran’s Review Board.

The Bill draws on recommendations of the National Alternative Dispute Resolution Advisory Council (NADRAC) in its report, *The Resolve to Resolve - Embracing ADR to improve access to justice in the federal jurisdiction* (November 2009).

The Bill complements the *Access to Justice (Civil Litigation Reforms) Act 2009* which amended the *Federal Court of Australia Act 1976* to impose an overarching purpose to facilitate the just resolution of disputes according to law, and as quickly, inexpensively and efficiently as possible. It also complements existing case management powers contained in Part 6 of the *Federal Magistrates Act 1999*.

The Bill is a further step to support a cultural change in civil dispute resolution away from adversarial litigation.

### **FINANCIAL IMPACT**

There is no direct financial impact on Government revenue from this Bill.

# CIVIL DISPUTE RESOLUTION BILL 2010

## NOTES ON CLAUSES

### PART 1 – Preliminary

#### Clause 1 – Short title

1. Clause 1 is a formal provision specifying the short title as the *Civil Dispute Resolution Act 2010*.

#### Clause 2 – Commencement

2. Part 1 of the Bill commences on the day it receives Royal Assent.
3. Parts 2 to 5 of the Bill commence on a day to be fixed by proclamation. The information in the commencement table further provides that if any of the provisions do not commence within the period of 6 months from Royal Assent, they will commence on the day after that period.

#### Clause 3 – Object of Act

4. Clause 3 provides that the object of the Bill is to ensure, as far as possible, that people take genuine steps to resolve their civil dispute before instituting proceedings in an eligible court.
5. Other sections of the Bill qualify the object to the extent that taking steps before instituting proceedings is not appropriate in some cases, for example as set out in subsection 6(2)(b), where the safety of a person or security of property may be compromised by taking such steps.
6. 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 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.<sup>1</sup>
7. The overall aims of the Bill, as reflected in the object, are:
  - to change the adversarial culture often associated with disputes
  - to have people turn their minds to resolution before becoming entrenched in a litigious position, and
  - where a dispute cannot be resolved, ensuring that if a matter does progress to court, the issues are properly identified, ultimately reducing the time required for a court to determine the matter.

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<sup>1</sup> See page 31 of the NADRAC report

#### Clause 4 – Genuine steps to resolve a dispute

8. The Bill does not prescribe specific steps to be undertaken. Rather, it is intentionally flexible to enable parties to turn their minds to what they can do to attempt to resolve the dispute. 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.
9. Clause 4 provides examples of things a person may do as part of taking genuine steps to resolve a dispute. These include:
  - a) 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
  - b) responding appropriately to any notification given by a person
    - The steps set out in paragraphs (a) and (b) help to identify the interests of the parties at an early stage. In some cases, this will be sufficient to resolve a dispute, while in other cases it will assist to identify where other steps might be pursued to resolve the dispute. An interests based approach can often lead to more effective and lasting resolution than negotiations for settlement based on asserting competing views of legal rights once action has commenced.
  - c) providing relevant information and documents to the other person to enable them to understand the issues and how the dispute could be resolved
    - Timely access to information can often lead to the early resolution of disputes and often results in lower costs. This has been cited as a key opportunity for improvement to the justice system.<sup>2</sup>
  - d) considering whether the dispute can be resolved by a process facilitated by another person, such as alternative dispute resolution
  - e) if a resolution process is agreed to between the parties:
    - i. agreeing on a particular person to facilitate the process, and
    - ii. attending the process
  - f) if a resolution process does not result in the resolution of the dispute, considering a different process
    - Paragraphs (d) to (f) encourage a facilitated process for resolving a dispute, such as an ADR process. The benefits of ADR include a less adversarial process, early resolution of disputes and identification of issues, ownership of the outcomes for parties, flexible remedies and proportional cost where early resolution is achieved.

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<sup>2</sup> See page 35 of the NADRAC report and page 96 of the Access to Justice Taskforce report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*.

- g) attempting to negotiate with the other person with a view to resolving some or all of the issues in dispute, or authorising a representative to do so.
- 10. The examples listed do not limit the steps that could constitute taking genuine steps, as noted by subsection 4(2). Further, the examples do not limit when genuine steps should be taken. Nothing in the Bill prevents a party who has taken genuine steps but has been unable to resolve the dispute, from taking further genuine steps.
- 11. The most appropriate steps to be taken will vary depending on the circumstances of each dispute. Parties can consider what genuine steps are appropriate in their particular case.

*Alternative dispute resolution*

- 12. As noted at paragraph 8, what constitutes a genuine step will vary depending on the circumstances of the case. In many cases, some form of ADR would be a genuine step appropriate for parties to consider.
- 13. ADR is an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them or narrow the issues in dispute. ADR may also include approaches that enable participants to prevent or manage their own disputes without outside assistance.
- 14. There are a range of ADR processes available to disputants, and the level of assistance from the impartial person varies between the different processes. Table 1 outlines examples of ADR processes.<sup>3</sup>

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<sup>3</sup> As set out in NADRAC's *Glossary of ADR Terms*.

**Table 1 – examples of ADR processes**

**Mediation:** the participants identify the issues in dispute, develop options, consider alternatives, and endeavour to reach an agreement with the assistance of a mediator. The mediator has no determinative role, but may advise on the process of mediation.

**Conciliation:** the participants identify the issues in dispute, develop options, consider alternatives, and endeavour to reach an agreement with the assistance of a conciliator (who may have professional expertise in the subject matter). A conciliator advises on the matters in dispute and options for resolution, but does not make a determination.

**Expert appraisal:** an appraiser, chosen on the basis of their expert knowledge, investigates the dispute and provides advice on the facts, desirable outcomes, and the means by which these may be achieved.

**Early neutral evaluation:** the participants present arguments and evidence to a dispute resolution practitioner who makes a determination on the key issues in dispute and most effective means of resolving the dispute, without determining the facts of the dispute.

**Arbitration:** Arbitration is used where parties have agreed on that method to resolve their dispute. The participants, together with the arbitrator, agree upon the procedures to be used. These are usually more flexible than court proceedings. Participants present arguments and evidence to an arbitrator who makes a determination.

15. Where ADR is appropriate, it may not lead to resolution in every case. In this situation, undertaking genuine steps, such as participation in ADR, may narrow the issues in dispute and lead to a more effective and efficient court hearing. ADR may not be appropriate in every case.

#### **Clause 5 – Definitions**

16. Several terms are defined in clause 5:

- “applicant” is defined as the person who institutes the proceedings.
- “application” is defined as an application (however described) by which civil proceedings are instituted. This is intended to cover all the methods by which a matter can be commenced in the Federal Court and Federal Magistrates Court including by way of an application, statement of claim or affidavit.
- “civil penalty provision” is defined as a civil penalty provision however described. A civil penalty provision is a provision that carries a financial penalty, and is set out in a similar way to an offence, but enforced by civil proceedings that are subject to the procedures and rules of evidence, and are subject to proof on the balance of probabilities.



- “Commonwealth authority” is defined as a body corporate established for a public purpose by or under a law of the Commonwealth.
- “eligible court” is defined as the Federal Court of Australia and the Federal Magistrates Court. Through this definition, the Bill applies only to proceedings in those courts.
- “excluded proceedings” is defined as proceedings that have been excluded from the Bill as outlined in Part 4.
- “genuine steps statement” is defined as a statement filed by an applicant or a respondent under sections 6 and 7. This statement sets out what steps a person has taken to resolve a dispute prior to the commencement of proceedings.
- “lawyer” is defined as having the same meaning as in the *Federal Court of Australia Act 1976*. This means a person enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory.
- “respondent” is defined as the person against whom proceedings are instituted.

## **PART 2 – Obligation to take genuine steps to resolve disputes before proceedings are instituted**

17. The key elements of Part 2 are the obligations on applicants and respondents to inform the court of genuine steps they have taken to try to resolve the dispute. 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 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.
18. 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.
19. The Bill does not force parties to abandon legal claims, or force settlement. It encourages parties to think broadly about their dispute and consider options for resolution.
20. 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 parties to discuss issues frankly with a view to resolution, rather than having to assert rights and protect positions.

## **Clause 6 – Genuine steps statement to be filed by applicant**

21. Subsection 6(1) requires an applicant instituting civil proceedings in the original jurisdiction of the Federal Court or Federal Magistrates Court to file a genuine steps statement at the time of filing an application.
22. As noted at Paragraph 12, what constitutes a genuine step will differ depending on the circumstances of each case.
23. Subsection 6(2) provides that a genuine steps statement must specify:
  - a) the steps that have been taken to try to resolve the dispute, or
  - b) the reasons why no steps were taken.
24. The Bill provides that factors such as urgency, or whether the safety or security of any person or property would have been compromised are examples of reasons why steps may not have been taken.
25. 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. Subsection 6(2) provides that this must be explained in the genuine steps statement.
26. 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.
27. Some public interest factors, for instance regulatory agencies seeking to prevent certain action from being taken in order to protect the public, may be an example of where the circumstances of the dispute mean that taking genuine steps would not be appropriate.
28. Similarly, pursuing a test case may constitute a reason why a judicial determination may be required and limit the extent of genuine steps that can be taken. However, even in such cases, there is often a benefit in parties taking steps to confine the dispute and come to an agreement about the scope of the evidentiary issues.
29. Subsection 6(3) makes it clear that a genuine steps statement does not need to be filed for excluded matters. These matters are outlined in Part 4 of the Bill.
30. Where a part of a matter is excluded through Part 4, but other parts of a matter are not, subsection 6(4) provides that a genuine steps statement must be filed only in connection with the part of a dispute that is not excluded.

### **Clause 7 – Genuine steps statement to be filed by respondent**

31. Subsection 7(1) requires a respondent who receives an applicant's genuine steps statement to also file a genuine steps statement with the court. This must be filed before the hearing date specified in the application subject to any rules of court. Under the rule making power in Clause 8, the court may make rules specifying a different timeframe for filing of the respondent's genuine steps statement.
32. Subsection 7(2) requires that the respondent's genuine steps statement to indicate whether the respondent:
  - a) agrees with the applicant's statement, or
  - b) disagrees with all, or a part, of the applicant's statement, and the reasons why.

### **Clause 8 – Genuine steps statement must comply with Rules of Court**

33. Clause 8 provides that a genuine steps statement must comply with any additional requirements in the Rules of Court. For example, in a particular type of matter, the court may wish to prescribe that parties file their statement at a particular time or that a certain type of form be completed for a certain category of matter. The court has specific powers to make rules on the matter (see clause 18). A court may also make rules requiring the parties to include in a statement information about whether a specific type of step has been taken, and if not, the reasons why that step was not taken. This gives the court flexibility to determine the most effective way to have the information contained in a genuine steps statement put before it.

### **Clause 9 – Duty of lawyers to advise people of the requirements of this Act**

34. Clause 9 recognises that parties and their lawyers all have an important role in encouraging genuine steps. Lawyers are required to advise their clients of the requirement to file a genuine steps statement and assist them to comply with that obligation. This is consistent with section 37N(2) of the Federal Court Act and section 24 of the Federal Magistrates Act.
35. If, for example, a legally represented person wanted to commence legal proceedings without seeking to resolve the matter, their lawyer will be obliged to explain that their client is required to file a genuine steps statement outlining the steps they have taken or identify the reasons what such steps were inappropriate. A lawyer could advise their client of how to take genuine steps, noting the examples in the Bill but also inviting their client to consider their own options.
36. Where a lawyer fails to advise their client of the requirement or does not assist them to comply, as required under section 9, subsection 12(2) provides that costs may be awarded against a lawyer.
37. This duty is important to ensure that parties and their lawyers focus on the real issues in dispute and attempt to resolve them as quickly and efficiently as possible.

### **Clause 10 – Effect of requirements of this Part**

38. Subsection 10(1) notes that the requirements in Part 2 of the Bill are in addition to requirements imposed by any other Act, and not instead of those requirements.
39. Subsection 10(2) provides that proceedings are not invalidated by the failure of a person to file a genuine steps statement.
40. This provision ensures that the genuine steps requirement operates to enhance prospects for early resolution outside of court without imposing a barrier to justice which would disproportionately affect people without access to legal advice or resources. It also ensures that examples of genuine steps in section 4 are not seen as prescriptive.
41. If a party fails to provide a genuine steps statement, the court can consider this in the context of its case management of the matter. This is appropriate and avoids satellite litigation about the validity of the proceeding on the basis of whether genuine steps were or were not taken or the sufficiency of those steps. These matters will not become substantial disputes in their own right.

### **PART 3 – Powers of a court**

#### **Clause 11 – Court may have regard to genuine steps requirements in exercising powers and performing functions**

42. Clause 11 provides that the court may take into consideration the genuine steps that have been taken by a person when it is exercising its powers or performing its functions.
43. Subsection 11(1)(a) enables the court to take into account whether a genuine steps statement has been filed by a person in accordance with Part 2. Subsection 11(1)(b) enables the court to take into account the genuine steps taken by a person to resolve the dispute.
44. 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.
45. 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
- ordering a party to produce to it a document in the possession, custody or control of the party.

### **Clause 12 – Exercising discretion to award costs**

46. Clause 12 enables the court to take account of any failure to comply with the requirements of Part 2 of the Bill (whether or not a genuine steps statement has been filed) when exercising its discretion to award costs against a person or a lawyer. Courts currently have powers to make disciplinary costs orders where costs have been incurred improperly or without reasonable cause.
47. Subsection 12(1)(a) provides that the court may take into consideration whether or not a genuine steps statement has been filed when exercising its discretion to award costs against a person. Subsection 12(1)(b) enables the court to take into account the genuine steps taken by a person to resolve the dispute in awarding costs.
48. Subsection 12(2) enables the court to consider whether or not a lawyer complied with their duty under section 9 when exercising its discretion to award costs against the lawyer.
49. For cases where the court has ordered that the lawyer bear costs personally under subsection 12(2), subsection 12(3) provides that a lawyer must not recover costs from its client through contracts about the payment of their fees or in any other way. The purpose of this is to ensure that lawyers take responsibility for their own failure to comply with their duty under section 9 of the Bill.
50. The intention of clause 12 is to bring about a cultural change in the conduct of litigation so that parties are focused on resolving disputes as early as possible.

### **Clause 13 – Powers are in addition to powers under other Acts**

51. Clause 13 provides that the powers given to the court by this Part are in addition to, and not instead of, its existing powers. This section clarifies that this Bill is not intended to limit the powers of the court to manage proceedings on a case-by-case basis. For example, if a dispute is not resolved through genuine steps and proceedings are commenced, the court would exercise its existing case management powers under Part VB of the Federal Court Act and Part 4 of the Federal Magistrates Act.

### **Clause 14 - Relationship with section 131 of the Evidence Act**

52. Importantly, the power of the court to consider such matters allows the court to be informed of what steps parties have undertaken. As clause 14 provides, it does

not permit disclosure of confidential settlement negotiations under section 131 of the *Evidence Act 1995* and the settlement privilege continues to apply.

## **Part 4 – Exclusions**

### **Clause 15 – Proceedings of certain kinds are excluded proceedings**

53. The Bill applies to all matters of general federal law other than where an exclusion applies. Clause 15 sets out categories of proceedings which are excluded, while exclusions for actions under specific laws are set out in clause 16.
54. In certain cases, undertaking genuine steps is either not practicable or appropriate. The exclusions in clause 15 have been made on that basis. The exclusions are:
- a) Proceedings for an order imposing a pecuniary penalty for a contravention of a civil penalty provision
    - Proceedings brought for the contravention of a civil penalty provision are analogous to criminal proceedings and are brought where a penalty is sought to be enforced. Civil penalty provisions are intended to address situations where the seriousness of misconduct requires punishment, and as such, are not appropriate for resolution by way of genuine steps.
  - b) Proceedings brought by the Commonwealth or a Commonwealth authority for an order connected with a criminal offence or the possible commission of a criminal offence or a contravention or possible contravention of a civil penalty provision
    - The taking of genuine steps would not be appropriate where regulators seek an order in a proceeding that is directly related to a criminal offence or civil penalty contravention. An example of such an order would be an injunction to stop a person who has engaged or is engaging, or prevent someone who is proposing to engage, in any conduct that is or would be in contravention of a criminal offence or civil penalty provision.
  - c) Proceedings that relate to a decision of, or a decision that has been subject to review by the:
    - i. Administrative Appeals Tribunal
    - ii. Australian Competition Tribunal
    - iii. Copyright Tribunal
    - iv. Migration Review Tribunal
    - v. Refugee Review Tribunal
    - vi. Social Security Appeals Tribunal
    - vii. Veterans' Review Board
    - viii. A body prescribed by the regulations

- Where matters have already been subject to merits review by external merits review tribunals, opportunities to undertake genuine steps will have already been available to the parties and a further requirement is not necessary. In some cases, conciliation or a similar process may have been undertaken as part of the merits review process. For the Competition and Copyright Tribunals, an extensive process between parties will also have been undertaken.
- d) Proceedings in the appellate jurisdiction of an eligible court
- Where a matter is being appealed from an earlier decision of the Court, the parties will generally already have been subject to the genuine steps requirement before commencing the primary proceedings.
- e) Proceedings arising from the exercise of a power to compel a person to answer questions, produce documents or appear before a person or body under a law of the Commonwealth
- f) Proceedings in relation to the exercise of a power to issue a warrant, or the exercise of a power under a warrant
- The use of covert, coercive, and investigative powers of law enforcement and regulatory agencies will not be subject to the genuine steps requirement. The exercise of such powers is for a regulatory purpose and generally does not signify a dispute in the relevant sense.
  - In the case of a challenge to the use of covert, coercive, or investigative powers, the primary challenge is likely to be the lawfulness of the exercise of the power, such as a notice to produce documents or a telecommunications interception warrant. The matters are inherently connected to law enforcement and regulation and genuine steps would generally not be appropriate.
- g) Proceedings that are, or relate to, proceedings in which the applicant or the respondent has been declared a vexatious litigant under a law relating to vexatious litigants
- In circumstances where a party to a dispute has been declared vexatious, the obligation to lodge a genuine steps statement will not arise as it would be inappropriate to take any pre-action steps that might extend the proceedings.
- h) Ex parte proceedings
- An application made ex parte is made by one party only (or may be made by an interested person who is not a party) in the absence of the other party, and is often made without notice. This makes the undertaking of genuine steps between parties impracticable.

- i) Proceedings to enforce an enforceable undertaking
  - o Where an undertaking is in place, parties will have already negotiated the terms of the undertaking. Therefore, expecting parties to undertake genuine steps to enforce the agreement would not be beneficial.

**Clause 16 – Proceedings under certain Acts are excluded proceedings**

55. Certain Acts of Parliament already establish significant dispute resolution processes where further genuine steps would not be of assistance. In other cases, certain legislation is not appropriate for the requirement to file a genuine steps statement.

56. Clause 16 provides that proceedings under the following Acts are excluded from the Bill:

a) *Australian Citizenship Act 2007*

- o The *Australian Citizenship Act 2007* prescribes detailed citizenship criteria, and decision-makers are required to refuse to grant citizenship if those are not satisfied. ADR is generally inappropriate because it is not possible to negotiate citizenship if applicants do not meet the criteria.

b) *Child Support (Registration and Collection) Act 1988*

- o Under this Act, the Child Support Agency has power to enforce a child support debt. Enforcement action is only taken after substantial debt has arisen and other means to recover the debt have been exhausted. Undertaking further genuine steps would be inappropriate. These matters come before the Federal Magistrates Court and the Family Court. As the Family Court is not defined as an eligible Court under section 5, it would not be appropriate to apply the requirement in the Federal Magistrates Court. Further, the *Child Support (Registration and Collection) Act 1988* states that the *Family Law Act 1975* (Family Law Act) and Rules apply to child support enforcement proceedings as if it had been brought under the Family Law Act. As the Family Law Act is also exempt, it would be inappropriate for the Bill to apply.

c) *Fair Work Act 2009*

d) *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

- o Particular Fair Work proceedings are already subject to ADR requirements, including proceedings under Part 3-1 (General protections), Part 6-2 (Dealing with disputes) and Part 6-4 (Additional provisions relating to termination of employment).
- o Other parts of the *Fair Work Act 2009* and *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* regulate the



conduct of employers, employees and other relevant parties through the use of civil penalty provisions.

e) *Family Law Act 1975*

- The *Family Law Act 1975* has a comprehensive system of pre-trial options available to parties. Parties are encouraged and in some cases, required to undertake certain steps before a matter can be determined by a court. For example, people must attempt family dispute resolution before filing an application for orders relating to children unless an exception applies. Given that the issue of pre-trial steps is already significantly covered by the *Family Law Act 1975*, the Bill will not apply to family law matters.

f) *Migration Act 1958*

- The *Migration Act 1958* prescribes detailed visa criteria, and decision makers are required to refuse to grant a visa if those are not satisfied. ADR is generally inappropriate because it is not possible to negotiate to give an applicant a visa if they do not meet the criteria.

g) *National Security Information (Criminal and Civil Proceedings) Act 2004*

- The object of the *National Security Information (Criminal and Civil Proceedings) Act 2004* is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security. It outlines the way such information should be dealt with and is not appropriate for genuine steps.

h) *Native Title Act 1993*

- In the native title system, applicants must file their claim with the Federal Court in order to obtain important procedural rights under the *Native Title Act 1993*. It is the filing of the claim that sets off the process necessary to determine these rights, including notification to other parties that the claim has been filed and mediation. The *Native Title Act 1993* and subordinate legislation sufficiently regulate native title dispute resolution.

i) *Proceeds of Crime Act 1987*

j) *Proceeds of Crime Act 2002*

- The objectives of the *Proceeds of Crime Acts 1987* and *2002* ensure that people are not able to derive any proceeds or benefits from committing offences against the laws of the Commonwealth and that to enable law enforcement authorities are able to effectively to trace such proceeds, benefits and amounts. Therefore, undertaking genuine steps would not be appropriate.

## **Clause 17 – Proceedings prescribed by the regulations are excluded proceedings**

57. Clause 17 provides that regulations may prescribe matters to be excluded proceedings.
58. Subsection 17(2) provides that regulations made to exclude matters from the Bill may specify:
- a) the nature of the matters;
  - b) the subject matter of the matters;
  - c) the Act or provision under which the matters arise.
59. 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.
60. If a type of proceeding were to be excluded under the Regulations, a person would not be required to file a genuine steps statement in connection with that type of proceeding. 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.

## **PART 5 – Other matters**

### **Clause 18 – Rules of Court**

61. Clause 18 enables rules of court to be made about:
- a) the form of genuine steps statements
  - b) the matters that are to be specified in genuine steps statements, and
  - c) time limits relating to the provision of copies of genuine steps statements.

### **Clause 19 – Regulations**

62. Clause 19 enables regulations to be made prescribing matters that are required or permitted under this Bill, or matters that are necessary or convenient for giving effect to or carrying out this Bill.
63. Paragraph 33 under clause 8 has more detail about how the rules power might be used.