Self-determination not litigation

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Court resources are scarce. This is a universal truth, although no one seems to have cracked the code that will solve the problem.
The answer may be as simple as alternative dispute resolution. Sensible commercial parties have always engaged in ADR and more and more jurisdictions around the world are promoting a culture where you can't expect your day in court until you have tried to sort out your dispute yourself.

But can ADR really be forced on to potential litigants?

Although ADR has been promoted in different ways in different countries, the aim has always been the same – to reduce legal costs, increase efficiency, bring about a cultural change and free up limited court resources.

Each jurisdiction's policies and procedures have had a common theme – to try to force parties to resolve their own disputes, including by:

• filing statements that outline what steps the parties have taken to resolve the dispute;
• limiting the circumstances in which a party can reject an invitation to mediate;
• requiring parties to disclose critical documents early; and
• ordering parties to participate in non-binding ADR.

Places like Hong Kong, the United Kingdom and, indeed, various Australian state courts have followed a 'practice directions' approach. Australia's Federal Government, on the other hand, has decided to adopt a legislative option.

In response to key recommendations made by the National Alternative Dispute Resolution Advisory Council in its 2009 report The Resolve to Resolve , Australia's Federal Government introduced the Civil Dispute Resolution Bill into the Parliament on 16 June 2010.

The Bill proposes that any applicant commencing proceedings in the Federal Court or Federal Magistrates Court in relation to a civil dispute (with some exceptions) and any respondents to those proceedings must file a 'Genuine Steps Statement'.

The applicant's Statement must include the steps taken to try to resolve the dispute, or why no steps have been taken. The respondent's Statement must either agree with what applicant has stated, or disagree and provide reasons.

While the Bill does not explicitly define what constitutes a 'genuine step', it does set out a number of examples, including notifying the other party of the dispute, offering to discuss the dispute, providing information and documents, considering ADR and attending ADR.

Lawyers who do not advise their client of the requirement to file a Statement may have a costs order awarded against them.

Mandated ADR has been around for a long time, but it still hasn't been universally adopted. There is always the argument that there will be no genuine change, no cultural shift, and that the parties will simply 'go through the motions' because the law says that they must. There is also the risk that costs will be 'front-loaded' rather than result in a genuine cost savings.

Australia's Civil Dispute Resolution Bill has not been enacted yet, and given the current 'hung' Parliament we are facing, it may be some time before we know if legislation can be used effectively to address perceived inefficiencies in the civil justice system.

But then again, perhaps we will know sooner than we think, because the Australian state of Victoria is set to go down the legislated path. Its Civil Procedure Bill 2010 (Vic) is more prescriptive than Federal Government's proposed Civil Dispute Resolution Bill and its pre-litigation requirements include, as a bare minimum, exchanging critical documents early and considering options for ADR.

The Victorian Bill also introduces a new 'overarching purpose' for Victorian Courts – to 'facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute'. Furthermore, new standards of conduct, called 'overarching obligations', aim to further the administration of justice in relation to civil proceedings.

In the end, so-called 'pre-action protocols' are just another step along the continuum of forcing parties to resolve disputes themselves. The real question is: can legislation and practice directions change the cultural behaviour of litigation, or are we barking up the wrong tree?