Law Council
OF AUSTRALIA

Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

Senate Legal and Constitutional Affairs Committee

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Introduction

The Law Council of Australia welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Inquiry into the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* (the Bill).

The Bill amends the *Federal Court of Australia Act 1976* to strengthen and clarify the case management powers of the Federal Court in an attempt to encourage more efficient civil litigation. It also changes the appeals pathways for civil proceedings, and alters the powers of judicial officers of the federal courts, particularly the heads of each federal court.

The Law Council broadly welcomes the reforms which are the subject of the Bill. It is clearly an attempt by the government to encourage more efficient and cost effective civil litigation, and that is a laudable and non-contentious aim.

The concept of 'mega-litigation' has in recent times drawn attention to the impact that private disputes can have on the courts and the strain that such litigation can impose on the scarce public resources required to fund the court system.[1]

The costs of lengthy and inefficient litigation are carried not only by the parties themselves but also by taxpayers who fund the operation of the justice system. Judicial salaries, court officer and registry staff salaries, and court premises costs are incurred unnecessarily by litigation that is not efficient or cost effective. If inefficient litigation monopolises court resources then those that cannot afford protracted litigation are prevented from accessing the justice system.

Ultimately costs should be keep in proportion to the relief being sought, which means that disputes need to be resolved economically. As Justice Sackville pointed out after presiding over the C7 case, "Once this proposition is accepted, it follows that the courts have a responsibility to manage and control litigation, especially mega-litigation, in accordance with the principle of proportionality".[2]

The Law Council recognises that the traditional system of adversarial justice, in which pre-trial procedures are left entirely in the hands of the parties, is no longer considered an efficient model of dispute resolution. It is now well accepted that courts and judges have a role in actively participating in and managing this process. Yet there remain a minority of cases in which litigants may attempt to exploit the procedures available to them, such as discovery, to achieve an advantage regardless of cost or proportionality.[3] Case management procedures, ADR and other proposals all have all have a role to play in improving the efficiency of litigation.

Despite this general support, the Law Council believes there are certain aspects of the Bill that require further consideration. These issues are identified below.

Section 37M

The Law Council does not object to clarifying the overarching purpose of civil litigation as not only the just resolution of disputes according to law, but also the resolution of those disputes as quickly, inexpensively and efficiently as possible.

[1] See, for example, Justice Ronald Sackville, *The C7 Case: A Chronicle of a Death Foretold*, paper presented to the New Zealand Bar Association International Conference, Sydney, August 2008.
[2] Ibid.
[3] Ibid.

Section 37(1) overcomes the concern that has been raised about the Federal Court's powers to actively case manage following the decision in *State of Queensland v J L Holdings Pty Ltd.*[4] This case has resulted in judges being more cautious about the need to efficiently manage the court's overall workload due to a restrictive interpretation of what is in the interests of justice.

The Federal Court should be able to case manage unfettered by the potential restrictions imposed by *J L Holdings*. The Court needs stronger case management powers to fetter the ability of parties to invoke *J L Holdings* when case management discipline has the potential to disadvantage them. The Law Council therefore supports the clarification of the overarching purpose of civil litigation as including the efficient resolution of disputes.

Section 37N(2)

Section 37N extends the obligation to adhere to the overarching purpose to a party's legal representative. While the Law Council supports this proposition generally, care must be taken in its expression in the Bill.

Subsection 37N(2)(a) requires a legal representative to "take account of" the duty imposed on a party to act consistently with the overarching purpose. Such an obligation upon a legal representative of a party is considered to be an appropriate imposition that balances the application of the overarching purpose, and its public objectives, and the individual rights and objectives of a party.

Subsection 37N(2)(b) extends the obligation upon a party's legal representative beyond the appropriate balance. That subsection requires the legal representative to "assist the party to comply with the duty".

Insofar as a party intends to and instructs a legal representative to take steps which are consistent with the party's compliance with its duty, the proposed provision adds little or nothing to the long standing duties of legal practitioners.

The provision, however, may create conflict where, after a legal representative has properly taken account of the duty [in compliance with s37(2)(a)] and advised the party accordingly, the party does not accept the advice either at all or in part. The question then arises as to the scope of the obligation upon a legal representative to "assist" a party to comply with its duty in circumstances in which a party chooses to conduct the proceeding in a manner which may not be in compliance with the duty imposed upon the client.

This circumstance may then in turn create difficult issues. Namely:

- Pursuant to s37N(5), an order for costs may be made against a legal representative where that person has breached his or her duty under s37N(2)(b). In giving consideration to such an order for costs in the circumstances that have been identified, the enquiry would necessarily be directed to the privileged communications between the party and its legal representative.

- In the circumstances that have been outlined, a legal representative may consider him or herself bound to cease to act so as not to contravene the s37N(2)(b) duty. If the application of the overarching principle leads to a party not having legal representation, the application of the overarching principle itself may be frustrated.

[4] (1997) 141 ALR 353.

At paragraph 25 of the Explanatory Memorandum, the application of the s37N(2)(b) duty is explained by reference to the types of circumstances that are least likely to lead to the difficulties which are contemplated above.

Section 37N(4)

The proposed provision requires the Court to take account of any failure of a party to comply with its duty under s37N(1) or any legal representative of a party to comply with its duty under s37N(2). The Law Council broadly supports the proposed provision, subject to the following qualification.

The duty imposed upon a party under s37N(1) expressly applies to the conduct of a party in negotiations for settlement of the matter which is the subject of the dispute.

On one view, the application of s37N(4) may permit the Court when considering the question of costs to have regard to matters which would ordinarily be the subject of settlement (or without prejudice) privilege.

For example, a party seeking costs might rely upon s37N(4) to contend that the terms of a, or series of, settlement offers put by a party evidences that party's failure to comply with its duty under s37N(1) in the conduct of negotiations for settlement.

The Law Council does not support the abrogation of the settlement privilege, and particularly does not support any abrogation by implication.

Section 37P(3)(c)

The existing powers of a trial judge to control the hearing are important and they should be used by the Court with a view to achieving the overarching purpose. For example, the Court has existing power to control the length and content of cross examination of some or all witnesses as necessary during trial.

The proposed s37P(3)(c) goes beyond such control of proceedings as it gives the Court a general and plenary power to limit the number of witnesses who may be called to give evidence or the number of documents that may be tendered.

This power would affect in a more fundamental way the manner in which a party, through its legal representatives, determines is the best way to present its case. In the adversarial system, decisions of this type are the prerogative of the parties.

The Law Council considers that a plenary power to limit witnesses or documentary evidence is undesirable. One example of potential injustice which may result from interference with the volume of evidence by the proposed power is where it interferes with the approach taken by a party to discharging an onus of proof. In other words, a limit imposed under s37P(3)(c) may prevent a party from leading relevant evidence which is available to it but with the consequence that it does not establish the facts for which it contends.

The object of the provision appears to be to encourage the efficient disposition of a hearing by controlling the volume of evidence.

The fundamental rule that only relevant evidence is admissible, coupled with the power of the Court to prevent abuse or vexation, is an existing and more appropriate tool for the control of the volume of evidence at a hearing.

The Law Council therefore suggests that:

- a power such as that proposed in s37P(3)(c) might better be expressed as one that can only be exercised with the consent of the parties; or
- there be no such power, but there be provision for cost consequences if a party unnecessarily prolongs a hearing by leading patently unnecessary evidence.

Section 24(1AAA)

The proposed subsection 24(1AAA) excludes appeals in respect of the specified categories of decisions by a Single Judge in the original jurisdiction of the Court. The Law Council broadly supports the proposition that there be some categories of decision which cannot be appealed.

However, it is undesirable that decisions in respect of security for costs be excluded from appeal. Decisions of this type cannot properly in all cases be determined as "minor interlocutory decisions", which is how the decisions in s24(1AAA) are described at paragraph 82 of the Explanatory Memorandum.

A decision that an applicant provide security for costs may have profound consequences for that party. Equally, a decision refusing an order for the provision of security may leave a respondent exposed to a significant risk in respect of its ability to recover its costs if it is successful in the proceeding. It is not unusual for applications for security for costs to be the subject of a strong contest between the parties.

The existing requirement that an appeal in respect of a decision granting or refusing security for costs is by leave provides sufficient protection against appeals which would unnecessarily delay the proceeding.

Schedule 3 - Judicial responsibilities

The Law Council is again broadly in favour of these amendments, which broaden the responsibilities and powers of the head of each of the federal courts to assist with the management of the workload of the Courts.

The one possible exception to this support relates to the new s21B(1A)(b) of the *Family Law Act 1975* and the equivalent amendments to the Federal Court and Federal Magistrate Court Acts. These amendments allow a Chief Judge to temporarily restrict a judge to non sitting duties. From the perspective of the administration of the court, the amendments appear to be an effective way to ensure, for example, that there is not undue delay in the delivery of reserved judgments.

However, allowing a Chief Judge the power to prevent a judge from hearing and determining cases could potentially compromise judicial independence if the power is misused. The Law Council would not support an amendment that sacrifices judicial independence for administrative convenience, and potentially amounts to interference in the exercise of Chapter III judicial power or compromises the independence of the judiciary.

A simple amendment to this section clarifying that the power should only be used to allow a judge to deal with a backlog of cases would remove this potential problem.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.