Australian Government

Attorney-General's Department

Access to Justice Division

16 September 2009

Mr Peter Hallahan
Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

I am writing in relation to the hearing of the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 on 27 August 2009.

In response to a question about subsection 21B(1A) of the Bill which clarifies and strengthens the powers of the Chief Justice of the Federal Court, I commented (in relation to the equivalent provisions being inserted into the *Family Law Act 1975* and *Federal Magistrates Act 1999*) that 'My understanding is that during consultations on the Bill the Family Court and the Federal Magistrates Court had indicated support for these amendments' (at page 17 of Hansard).

I would like to clarify that, in relation to the Family Court, this understanding is based on the fact that all of the issues raised by the Family Court during consultation have been addressed in the Bill as introduced.

I would also like to provide some additional information to the Committee on provisions of the Bill discussed at the hearing and raised in submissions.

The Law Council of Australia has submitted that the duty to conduct all aspects of the proceedings, including settlement negotiations, consistently with the overarching purpose may abrogate the settlement privilege if the Federal Court has to inquire into the way settlement negotiations were conducted when determining whether to make a cost order for failure to act consistently with the overarching purpose.

For the overarching purpose to achieve the intended aim of changing the way parties approach the resolution of disputes, it is important that it applies to all aspects of the proceedings. The settlement privilege is provided for both at common law and in section 131 of the *Evidence Act 1995*. However, the privilege "applies only to genuine negotiations, bona fide attempts to reach a settlement of a dispute..."[1] In addition, the *Evidence Act* specifically provides that evidence of settlement negotiations may form a basis for an order for costs against a party – subsection 131(2)(h). Parties who are making a bona fide attempt to reach a settlement are likely to be acting

[1] Odgers, Uniform Evidence Law, Lawbook Co 2009, p 666.

consistently with the overarching purpose. The Court's power to award costs is discretionary and it will be up to the Court to determine how this discretion will be exercised. The Courts discretion "reflects the Court's policy of encouraging litigating parties to undertake genuine settlement negotiations and to consider seriously offers of settlement."[2]

The Law Council also submitted that it would be 'undesirable that decisions in respect of security for cost be excluded from appeal'. The removal of the right to appeal decisions in respect of security of cost will ensure the efficient administration of justice by reducing delays caused by appeals from these decisions.

During the hearing the Department and the Federal Court took questions on notice from the Committee. I attach copies of the answers.

I apologise for the lateness in providing this information to the Committee. If you wish to discuss this further, please do not hesitate to contact me on 6141 4180.

Yours sincerely

Matt Minogue
Assistant Secretary
Justice Improvement Branch

[2] *ACCC v Blackon White* [2002] FCA 1605, para 6. See also *Silver Fox Pty Ltd v Lenards* (No 3) [2004] FCA 1570