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30 April 2009

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100, Parliament House
Canberra ACT 2600

Dear Mr Hallahan

Inquiry into Australia's Judicial System and the Role of Judges

I refer to the current inquiry by the Standing Committee on Legal and Constitutional Affairs into Australia's judicial system and the role of judges and enclose a brief submission.

The submission provides some basic factual information about the Court's practices in relation to the issues being considered by the Committee. I would be pleased to attend before the Committee to clarify or expand upon the matters mentioned in the submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Warwick Soden', with a long horizontal line extending to the right.

**Warwick Soden
Registrar and Chief Executive Officer**

Federal Court of Australia Submission - inquiry by the Standing Committee on Legal and Constitutional Affairs into Australia's judicial system and the role of judges

A. The procedure for appointment and method of termination of judges

The new arrangements for the appointment of Federal Court Judges which were introduced in mid 2008 have been welcomed by the Federal Court and appear to be working well.

The method of termination is that prescribed by the Constitution. The Federal Court has no comments to make about it.

B The term of appointment, including the desirability of a compulsory retirement age, and the merit of full-time, part-time or other arrangements

The Federal Court does not wish to comment on these issues, but would want to be given the opportunity to consider and comment upon any proposed changes.

C Jurisdictional issues, for example, the interface between the federal and state judicial system.

There is a large jurisdictional overlap between all the superior courts of Australia in civil matters and jurisdictional disputes have become rare. The cross-vesting scheme together with the broad scope of the Federal Court's accrued jurisdiction plays an important role in integrating the system.

The jurisdictional overlap provides a choice between federal and state judicial systems. But there is a degree of inconsistency in the current approach where there is concurrent jurisdiction under federal legislation. In intellectual property matters, for example, there is an appeal from the Supreme Courts of the states to the full Federal Court. That is designed to ensure consistency of the jurisprudence in those cases. It might be thought appropriate, on the basis of developing a consistent rational and principled approach to the question of conferring Commonwealth jurisdiction on Commonwealth and/or State and Territory courts that, the similar approach be taken in other federal areas, such as admiralty.

As a general principle, and in the interests of consistency, the administration of Commonwealth law should primarily be undertaken by Commonwealth courts.

The current court fee structures (prescribed by regulations in all jurisdictions) offer a wide variation of court fees for like matters in different jurisdictions. This variation may be an incentive to commence in one jurisdiction rather than another and, notwithstanding the desirability of producing consistency in Commonwealth jurisdiction, could have the adverse effect of matters being dealt with in various State jurisdictions, rather than federal jurisdiction simply because of variations in court fees.

The Federal Court should be given all of the jurisdiction in sections 75 and 76 of the *Constitution*. Section 39B of the *Judiciary Act 1903* presently confers on the Federal Court much, but not all, of this jurisdiction. A clear and comprehensive conferral, as in subsection 39(2) of the *Judiciary Act* (which gives State courts jurisdiction over the matters listed in sections 75 and 76, subject to exceptions listed in section 38), would make the jurisdictional foundation of the Court clear and coherent. It would make the civil jurisdiction of the Court fully coordinate with the federal civil jurisdiction exercisable by the State and Territory courts under sections 75 and 76 of the *Constitution*. It would remove the anomalous situation that currently exists whereby the Federal Court has less federal civil jurisdiction than that of the State and Territory courts.

The recent suggestions about a national judiciary and the assumption that state judges might work in the federal jurisdiction could not be achieved without constitutional reform. While there is no immediate impediment to federal judges working in state judicial systems, it cannot happen in a reciprocal arrangement under present constitutional provisions. There are many instances of Federal Court judges holding commissions as members of the Supreme Courts of the Territories and, occasionally, as acting judges of State courts. For example, most recently a Federal Court judge undertook some criminal trial work in the Supreme Court of South Australia.

D the judicial complaints handling system

Proposals for any judicial complaints system necessarily involve issues that go to the very core of the constitutional principles of the separation of powers embodied in Chapter III of

the Constitution. These issues must be kept very firmly in mind and are unlikely to have easy or clear answers.

In April 2002 the Federal Court adopted a judicial complaints handling protocol. Information about the protocol is available on our website. Similar protocols have been adopted by the Family Court and the Federal Magistrates Court. For ease of reference, a copy of the protocol is attached.

Federal Court of Australia

JUDICIAL COMPLAINTS PROCEDURE

Judges, like all other citizens, are subject to the law, but the need to protect judicial independence in the interests of the whole community means that, in respect of their judicial conduct, they cannot be subject to direct discipline by anyone else, except in the extreme cases of proved misbehaviour or incapacity. In those circumstances, and in those only, a judge may be removed from office by the Governor-General upon a request from both Houses of the Parliament.

Judges are accountable through the public nature of their work, the requirement that they give reasons for their decisions and the scrutiny of their decisions on appeal. (With rare exceptions, all court hearings are open to the public and can be reported in the news media and nearly all judgments of the Court are available to the public through the internet.)

This complaints procedure does not, and cannot, provide a mechanism for disciplining a judge. It does, however, offer a process by which complaints by a member of the public about judicial conduct can be brought to the attention of the Chief Justice and the judge concerned and it provides an opportunity for a complaint to be dealt with in an appropriate manner.

For constitutional reasons, the participation of a judge in responding to a complaint is entirely voluntary. Nevertheless, it is accepted that a procedure for complaints can provide valuable feedback to the Court and to its judges and opportunities to explain the nature of its work, correct misunderstandings where they have occurred and, if it should fall short of judicial standards, to improve the performance of the Court.

Complaints about delay

A party may express concerns or complaints about delay in the delivery of a judgment. In such a case a party can send a letter to the president of the bar association or the law society in the State or Territory in which the case was heard and request that the president take up the matter with the Chief Justice. The president will then convey the concern or complaint to the Chief Justice without identifying which party complained. The Chief Justice will look into the matter and, if appropriate, take it up with the judge concerned. Complaints of this nature can also be made directly by letter addressed to the Chief Justice.

The Court aims to deliver all judgments promptly and has set a target of three months from the date the case is last heard or the last submission is received. Most judgments are delivered in much less than three months, but sometimes they take longer, particularly in complex cases. Longer target dates apply in native title cases, most of which are very complex.

Complaints about cases that could be dealt with on appeal or by prerogative writ

Parties who are concerned about the result of a case or about any other matter in connection with the case that is capable of being raised in an appeal should consider whether or not to appeal to the Full Court of the Federal Court. There are time limits for appeals and parties

need to act promptly. In general, only a Full Court of three judges (or occasionally five) can set aside or change a decision made by a single judge. The Chief Justice has no power to interfere with any decision made by a single judge and complaints about the result of a case are generally outside the scope of the complaints procedure. A similar situation exists in respect of any matter that is or was capable of being raised by a prerogative writ under s 75(v) of the Constitution.

If a complaint is received about matters that are, or were, capable of being dealt with by an appeal to a Full Court or by a prerogative writ, the Chief Justice will write to the person who has made the complaint advising that person that the matter cannot be dealt with under the complaints procedure.

Complaints about judicial conduct

A complaint about judicial conduct must be made by letter addressed to the Chief Justice. It must identify the complainant, the judge about whom the complaint is made and the judicial conduct about which the complaint is made. Judicial conduct, for the purposes of this procedure, means conduct of a judge in court or in connection with a case in the Federal Court, or in connection with the performance of a judge's judicial functions.

If the Chief Justice receives such a complaint he will first make sure that the complaint is about judicial conduct. He will make sure that the complaint is not about the result of the case or about something else that was capable of being raised in an appeal to the Full Court or by prerogative writ and therefore outside the scope of the complaints procedure.

If the Chief Justice considers that the complaint is about judicial conduct, he will then determine whether, on its face, the complaint has substance. If it appears that it might have substance, the complaint will be referred for a response to the judge whose conduct is in question. The Chief Justice may also make further enquiries to determine the seriousness of the complaint.

The role of the Chief Justice in relation to a complaint is to determine how to deal with a complaint appropriately.

The Chief Justice, or the Registrar on his behalf, will acknowledge a letter of complaint and advise the complainant of the outcome of the complaint. If the Chief Justice considers that dealing with the complaint might have an adverse affect on the disposition of a matter currently before the Court he may defer dealing with the complaint until after the determination of that matter.

In the event that the Chief Justice is unavailable to deal with a complaint or it is inappropriate for him to do so, the procedure will apply with the next most senior available judge acting in place of the Chief Justice.