THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

30 July 2009

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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Dear Senators

Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

The NSW Young Lawyers' Civil Litigation Committee (the Committee) comprises young lawyers, either under the age of 36 or in their first five years of practice and law students, all of whom practice or have an interest in civil litigation.

The Committee has had the opportunity to read and consider the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* (**the Bill**) and is pleased to enclose its submissions in response to Schedule 1 of the Bill concerning proposed reforms to civil litigation case management.

Should you have any questions, please do not hesitate to contact me.

Yours sincerely,

NSWYL Civil Litigation Committee

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Civil Litigation Committee

Submissions in response to the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*

30 July 2009

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The Committee has had the opportunity to read and consider the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (the Bill) and is pleased to provide its submissions in response to Schedule 1 of the Bill concerning proposed reforms to civil litigation case management.

Section 20A - Power of the Court to deal with civil matters without an oral hearing

The Committee acknowledges that the majority of the powers set out in this proposed section are to some extent already in existence in corresponding legislation throughout the Australian jurisdiction and it is open for the Court or a Judge to make orders of the sort envisaged by the Bill.

In the Committee's view, there is a concern that the imprecise nature of the powers prescribed in the proposed section 20A will have an adverse effect on the conduct of civil litigation. The proposed provision permits the Court or a Judge to deal with a matter "either with or without the consent of the parties" (emphasis added). The Committee is concerned that the provision does not expressly provide whether the Court or a Judge can make an order without prior notice to the parties and in circumstances where the parties have not been afforded the opportunity to make submissions in relation to an order for an oral hearing.

To avoid any confusion, and for abundant clarity, the Committee submits that the phrase "without the consent of the parties" in the proposed subsection 20A(2) should be qualified to ensure that all parties are aware of the manner in which a section 20A order

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will be made and whether the intent of the legislation is to allow the parties the opportunity to address the Court or a Judge with regard to the section 20A order prior to it being made.

The Committee suggests that subsection 20A(4) be inserted on the following or similar terms:

> *20A(4) Prior to the Court or a Judge making an order under subsection 20A(2), the Court or a Judge must provide the parties with an opportunity to make written or oral submissions.*

Section 37M – The overarching purpose of civil practice and procedure provisions

The centrepiece of the reforms proposed by the Bill appears to be the introduction of the 'overarching purpose' in civil litigation. This principle is similar to a provision that has been part of the Civil Procedure Act 2005 (NSW) since its inception (and which in turn has antecedents in the old Supreme Court Rules 1970 (NSW) dating back to the 1980s and beyond).

The Bill identifies a number of objectives that fall within the 'overarching purpose' principle, including the resolution of disputes at a cost proportionate to the importance and complexity of the matters in dispute and the disposal of all proceedings in a timely manner.

The Federal Court, parties to proceedings and their lawyers are expected to observe the 'overarching purpose' and the Bill envisions:

1. requiring the Federal Court to interpret the court rules and exercise its powers in the way that best promotes the 'overarching purpose';
2. expanding judicial case management powers through the inclusion in the Bill of examples of directions the Federal Court can make such as setting time limits and limiting the number of witnesses in proceedings and documents tendered in evidence; and
3. reminding parties to civil proceedings, as well as their lawyers, to conduct proceedings in accordance with the 'overarching purpose'.

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Potential cost sanctions for non-compliance with the duty to act in accordance with the 'overarching purpose' are also incorporated. They are intended to focus the minds of the parties, and their lawyers, on what is really at stake in a case, as well as reduce delays and tactical measures used by parties that can slow the process of resolving disputes.

The key objective of the Bill, in the Committee's view, appears to assist with promoting cultural change in the conduct of litigation. Further, the Committee is of the view that the Bill seeks to overcome the restrictive interpretation by the courts of what is meant by the concept "in the interests of justice" following the High Court's decision in *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 (**JL Holdings**).

The focus of the High Court's decision in JL Holdings was the need to balance the ability of the courts to actively manage cases with the just determination of issues between the parties. The Committee supports the introduction of the 'overarching purpose' within litigation in the Federal sphere.

Though not radical, the Committee submits that this reform is necessary to bring Federal litigation in line with similar changes which have occurred in various Australian jurisdictions such as:

1. the recent introduction of Federal Court Practice Note 17 on the use of technology in litigation;
2. the extension of the Federal Court's Fast Track regime (or 'rocket docket') from Melbourne to other capitals;
3. the New South Wales Supreme Court general division practice note 7 on the use of technology and the revision of New South Wales Supreme Court equity division practice note 1 on case management ; and
4. the creation of a new commercial court in Victoria directed at the more innovative and efficient conduct of commercial cases.

Section 37N – Parties to act consistently with the overarching purpose

Section 37N of the Bill requires parties to conduct civil proceedings consistently with the overarching purpose and obligates lawyers to resolve disputes "as quickly, inexpensively and efficiently" as possible. In the Committee's view, this obligation is a welcome

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addition to the federal administration of justice and appears to be a de facto fusion with the *Uniform Civil Procedure Rules 2005* (NSW) (**UCPR**).

Subsection 37N(1) provides:

> *"The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose".*

In the Committee's view, there is a degree of uncertainty over the proposed section's practical application. However, it is evident from subsection 37N(2) that lawyers obligations to act consistently with the overarching purpose are mandatory in nature.

The Committee submits that the requirement that lawyers must assist the party to facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible seeks to rectify the current shortcomings at Federal level under the provisions of the *Federal Court of Australia Act 1976* (Cth) and the *Federal Magistrates Act 1999* (Cth).

The Committee is concerned with how the parameters of subsection 37N(2) will be interpreted by Federal courts. It appears that lawyers will bear the evidentiary burden of demonstrating how and to what extent they took "account" of the duties imposed by the Bill.

In the Committee's view, a practical implication of paragraph 37N(2)(b) to "assist the party to comply with the duty" may be the obligation to assist the client in narrowing the issues in dispute as early as possible. However, the Committee is mindful that there is uncertainty concerning how and to what degree the duty will arise and be expected to be implemented.

The Committee submits that the obligations could also see the advent of uniform, streamlined time periods for parties to take and advise of their instructions at all stages of the proceedings. A common plight and cause of delay is practitioners "lip service" to "taking instructions", "detailed instructions" or "revised instructions" from clients. If parties were scrutinized by the courts in this respect, a more consistent timeline in which these practices could be streamlined would serve as a useful application of the new

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measures. This would assist lawyers in satisfying the requirements the court may place on a lawyer in subsection 37N(3) concerning estimates of duration and cost of proceedings. The Committee considers that this would assist litigants in becoming fully informed.

Subsection 37N(3), although discretionary in nature, allows the court to adopt a greater 'watchdog' role over lawyers. The Committee notes that this subsection does not deviate from the present requirements imposed upon lawyers under the *Legal Profession Act 2004* (NSW) and the *Legal Profession Regulation 2005* (NSW). However, the Committee submits that these requirements are usually only of importance as a punitive measure, after the fact. Under subsection 37N(3) the court is empowered to safeguard the overarching purpose throughout the conduct of the proceedings, including at interlocutory stages, which will serve to increase the level of public scrutiny of lawyers at case management stage. The Committee submits that full and frank disclosure of costs and time estimates to litigants is conducive to promoting an efficient civil litigation regime within the Federal sphere.

The Committee notes that proposed subsection 37N(4) mirrors subsection 56(5) of the *Civil Procedure Act 2005* (NSW) whereby the Court may exercise its discretion to take into account any failure to comply with the preceding subsections 56(3) or (4) of the *Civil Procedure Act*. The proposed subsection 37N(4) does not permit a discretionary approach and a Court or Judge "must take into account any failure to comply". The use of the term "must", in the Committee's view, creates an element of compulsion as the Court or a Judge will be required, in each and every case, to consider whether each party has complied with subsections 37N(1) and (2). The Committee submits that this obligation would unduly increase the time needed to consider and formulate an award of costs and create a burden on the Court's time.

Further, given the compulsive nature of the proposed section, the Committee is of the view that it is likely that parties will wish to make submissions in relation to any perceived breach of subsections 37N(1) or (2), which in turn could lead to unregulated and possibly unfounded allegations of one party against another party and further drawn out litigation in regards to the award of costs.

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Section 37P – Power of Court to give directions about practice and procedure in a civil proceeding

The Committee supports the introduction of the overarching purpose of the civil practice and procedure provisions set out in the Bill. In relation to section 37P, the Committee is of the view that the section effectively clarifies and confirms the powers of the court to implement evolving principles of 21st century case management which currently apply in various Australian jurisdictions.

The Committee also makes the following comments in respect of specific aspects of this proposed section:

1. It should be made clear that the powers the court may exercise in connection with subsection 37P(2) should be in the context of and have regard to the matters set out in paragraph 37N(2)(e), namely that such directions and orders are made in the context of and having regard to 'the importance and complexity of the matters in dispute';
2. Likewise it should be clear that the powers of the court in respect of subsection 37P(2) should also be exercised having regard to the matters set out in paragraph 37N(2)(a), namely such directions and orders be made in the context of and having regard to 'the just determination of all proceedings before the court';
3. In making any order or direction in accordance with subsections 37P(2) and (3) a party's legal representative should be expressly entitled to make submissions and place evidence before the Court to assist the Court in determining what practice and procedure directions are appropriate; and
4. Where parties to a proceeding agree and consent to particular proposed directions and orders for the further conduct of a proceeding before the court, the Court should have due regard to such consent as a relevant consideration in determining the appropriate practice and procedure directions.

Section 43(3) – Costs

The Committee observes that the current section 43 of the *Federal Court of Australia Act 1976* (Cth) has been interpreted to provide the Court with a broad discretion to award

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costs. The general rule is that costs should follow the event: *Hughes v Western Australian Cricket Association Inc* (1986) ATPR ¶40-748; *DSE (Holdings) Pty Ltd v InterTAN Inc* [2004] FCA 1251; (2004) 51 ACSR 555.

The proposed subsection 43(3), especially when combined with proposed subsection 37N(4) and paragraphs 37P(6)(d) and (e), will affect the exercise of the costs discretion.

The Committee notes that the proposed subsection 43(3) commences with the words "Without limiting the discretion of the Court or a Judge in relation to costs" and uses the word "may" with respect to the orders listed in paragraphs 43(3)(a) to (g). To a large extent, the Committee submits that those orders reflect the current exercise of the discretion.

However, the Committee also submits that the codification of those orders has the potential to increase their apparent importance, and, in particular, may have the effect of increasing the possibility of appeal from a costs decision on the basis that a judge did not consider one of the factors implicit in the potential orders listed in paragraphs 43(3)(a) to (g) inclusive. This is particularly so in light of the fact that those potential orders are listed but the general rule is not. The Committee favours a provision which explicitly states that the general rule should be that costs should follow the event.

The Committee notes that the *Civil Procedure Rules 2003* (UK) (**the UK CPR**) include a broad discretion as to costs (r 44.3). This has resulted in a fact-based approach to costs which has increased uncertainty with respect to awards: Adrian Zuckerman, Zuckerman on Civil Procedure: Principles of Practice (2nd ed, 2006, Thomson (Sweet & Maxwell): London) at [26.56]. It has been observed that this uncertainty has, in turn, increased the amount of satellite litigation as to costs: Zuckerman (above) at [26.1].

Current judicial culture as to costs is likely, in the Committee's view, to influence the interpretation of proposed subsection 43(3) and associated provisions. The Committee has observed that courts in the UK were moving towards the fact-based approach to costs found in the UK CPR before those rules were enacted: Zuckerman (above) at [26.39]. Further, the Committee is of the view that cases such as JL Holdings show that Australian courts tend to interpret case management legislation in a manner which is strongly influenced by common law principles. The Committee submits that it is likely

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that this will result in an interpretation of proposed subsection 43(3) which is similarly influenced by the common law, such that proposed subsection 43(3) will be interpreted as subject to the general rule that costs follow the event.

Further, the Committee notes that a statement of the general rule is no guarantee that courts cannot and will not have a broad discretion in relation to costs. Like r 42.1 of the UCPR, the Committee notes that r 44.3(2)(a) of the UK CPR includes a statement of the general rule that costs should follow the event (although it is immediately qualified in r 44.3(2)(b), which is different from the statement of the rule in r 42.1 of the UCPR).

The Committee submits that some caution should be exercised given the UK experience and that discretion as to costs should not be expressed in an unlimited manner. The Committee submits that a strong statement of the general rule that costs should follow the event, as there is in the UCPR, should be included in the Bill to limit the discretion as to costs.

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