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Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

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Law and Bills Digest Section

Contents

Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

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Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (the Bill) proposes to amend the *Federal Court of Australia Act 1976* (Federal Court Act), *Family Law Act 1975* (Family Law Act) and *Federal Magistrates Act 1999* (Federal Magistrates Act).

The Bill proposes to amend the Federal Court Act in relation to case management powers and appeals processes for civil proceedings in the Federal Court of Australia (the Federal Court) in an effort to ensure efficient administration of such proceedings.

The Bill also proposes to amend the Federal Court, Family Law and Federal Magistrates Acts in relation to powers of the Chief Judges and Chief Magistrates of the respective Courts in effectively administering the business of those Courts and in managing judicial health and education services.

Background

Federal courts

Together with the High Court of Australia (the High Court),[1] the Federal, Family and Federal Magistrates Courts are the principal federal courts in Australia.[2]

1. The High Court is the highest court in Australia, established in 1901 by section 71 of the Commonwealth Constitution. For information about the role of the High Court, see High Court of Australia, *About the court – role of the court*, viewed 21 July 2009, http://www.hcourt.gov.au/about_01.html

Federal Court of Australia

The Federal Court was established by the Federal Court Act and started operating on 1 February 1977.[3] It sits in each state and, whenever necessary, in the Australian Capital Territory and Northern Territory.[4]

The Federal Court is constituted by a Chief Judge and other federal judges appointed under the Federal Court Act, in accordance with Chapter III of the Commonwealth Constitution.[5]

Its original jurisdiction is conferred by Commonwealth laws and includes matters such as:

- corporations
- tax
- trade practices, and
- industrial relations.[6]

In addition, the Federal Court hears appeals from:

- single Judges of the Federal Court
- non-family law decisions of the Federal Magistrates Court, and
- certain decisions of the state and territory Supreme Courts.

For information about its original and appellate jurisdictions, see Attorney-Generals Department, *The courts – the federal judicature*, viewed 21 July 2009, http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalsystemandjustice_TheCourts; High Court of Australia, *About the court – operation of the court*, viewed 21 July 2009, http://www.hcourt.gov.au/about_03.html

2. For further general information about the Australian court system, see Attorney-Generals Department, *The courts – the federal judicature*.

3. Attorney-Generals Department, *The courts – the federal judicature*; Federal Court of Australia, *The court*, viewed 21 July 2009, http://www.fedcourt.gov.au/aboutct/aboutct.html

4. Attorney-Generals Department, *The courts – the federal judicature*.

5. Federal Court of Australia, *The court*.

6. Attorney-Generals Department, *The courts – the federal judicature*.

Family Court of Australia

The Family Court hears family law and child support disputes, and hears appeals from decisions relating to such matters, in all states and territories within Australia except in Western Australia.[7]

Federal Magistrates Court of Australia

The Federal Magistrates Court was established by the Federal Magistrates Act and started operating in July 2000.[8] The Court is constituted of the Chief Federal Magistrate and federal magistrates appointed under the Federal Magistrates Act, in accord with Chapter III of the Commonwealth Constitution.[9]

It was established to deal with the less complex matters arising under family and other federal laws, including:

- consumer protection, and
- workplace relations.[10]

The aim of the Federal Magistrates Court was to reduce the workloads of the Federal and Family Courts, by providing a more simple and accessible alternative to taking action in those Courts.[11] However, as mentioned below, it should be noted that the Government intends to abolish the Federal Magistrates Courts altogether as part of an overall federal court restructure to reduce litigation costs and facilitate faster resolution of disputes.[12]

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7. Attorney-Generals Department, *The courts – the federal judicature*. As to the organisational structure of the Family Court, see Family Court of Australia, *Organisational structure of the Family Court of Australia*, viewed 21 July 2009, http://www.familycourt.gov.au/wps/wcm/resources/file/eb9582058ccf839/ORGchart_June2009.pdf

   For information about the Chief Judge, other Judges and their responsibilities, see Family Court of Australia, *Judges and judicial registrars*, viewed 21 July 2009, http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Organisation/Judges/

8. See Attorney-Generals Department, *The courts – the federal judicature*; Federal Magistrates Court, *Introduction to the Federal Magistrates Court of Australia*, viewed 21 July 2009, http://www.fmc.gov.au/html/introduction.html

9. Federal Magistrates Court, *Introduction to the Federal Magistrates Court of Australia*.

10. Attorney-Generals Department, *The courts – the federal judicature*.

11. See Federal Magistrates Court, *Introduction to the Federal Magistrates Court of Australia*.

12. See, for example: ABC News, *Federal Magistrates Court to be scrapped*, 5 May 2009, viewed 10 August 2009, http://www.abc.net.au/news/stories/2009/05/05/2561347.htm

    See also notes 18–21 below.

The use of alternative dispute resolution

The Bill proposes that certain alternative dispute resolution (ADR) processes be used in federal civil proceedings as a means by which disputes may be resolved more cost-effectively and efficiently.

ADR is a general term referring to processes other than litigation, used to assist people to resolve various disputes.[13] It is important to note that there are different types of such processes and particular types of ADR processes suit particular types of disputes.

It is noted that on 13 June 2008, the Attorney-General asked the National Alternative Dispute Resolution Advisory Council (NADRAC) to inquire into the use of ADR in civil proceedings, and in particular, to consider the following:

- whether mandatory requirements to use ADR should be introduced
- other changes to cost structures and civil procedures to provide incentives to use ADR more and to remove practical and cultural barriers to the use of ADR both before commencement of litigation and throughout the litigation process
- the potential for greater use of ADR processes and techniques by courts and tribunals to enhance court and tribunal process, including by judicial officers, and
- whether there should be greater use of private and community based ADR services and how to ensure that such services meet appropriate standards.[14]

NADRAC is due to report by 30 September 2009.

Federal court system reform

Issues relating to cost efficiencies of and access to the federal court system have been on the agenda of various federal governments over time.[15]

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13. For further information about the meaning of ADR, see National Alternative Dispute Resolution Advisory Council, *What is ADR?*, viewed 21 July 2009, http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADR

14. See National Alternative Dispute Resolution Advisory Council, *ADR and civil proceedings reference*, viewed 21 July 2009, http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/AboutNADRAC_NADRACProjects_ADRandCivilProceedingsReference

15. See, for example, comments made in Attorney-General's Department, *Federal civil justice system strategy paper*, December 2003, pp. 2–9 and 296–316, viewed 22 July 2009,

For example, in September 1997, the then Attorney-General requested that the Australian Law Reform Commission (the ALRC) review the federal civil litigation system, of which a report was tabled in Parliament on 17 February 2000.

The ALRC was asked to consider 'the need for a simpler, cheaper and more accessible legal system' with particular attention to issues relating to matters including excessive costs and delay. Specific matters about which the ALRC was asked to consider included:

- civil litigation and administrative law procedures in civil code jurisdictions
- the procedures and case management schemes used by courts and tribunals to control the conduct of proceedings that come before them
- the relationship between courts and tribunals
- mechanisms for identifying the issues in dispute
- means of gathering, testing and examining evidence
- the use of court-based and community alternative dispute resolution schemes
- the significance of legal education and professional training to the legal process
- the training, functions, duties and role of judicial officers as managers of the litigation process
- appellate court processes.[16]

As part of this review, the ALRC examined various federal courts and tribunals, including the Federal and Family Courts. Although somewhat dated, the ALRC report continues to be pertinent in relation to attempts to improve the efficiency of the federal civil court system.[17]

In addition, in the course of time since its inception, the Federal Magistrates Court has become the largest federal court in Australia, in terms of both filings and judicial

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http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~9+FULL+STRATEGY+PAPER.pdf/$file/9+FULL+STRATEGY+PAPER.pdf

16. Australian Law Reform Commission, *Managing justice: a review of the civil justice system*, no. 89, February 2000, viewed 21 July 2009, http://www.austlii.edu.au/au/other/alrc/publications/reports/89/tor.html#Heading3 (the ALRC report)

17. As to comments and recommendations made in the ALRC report, see Australian Law Reform Commission, *Managing justice: a review of the civil justice system*, viewed 24 July 2009, http://www.austlii.edu.au/au/other/alrc/publications/reports/89/

officers.[18] Concerns were expressed about the Federal Magistrates Court's governance and resourcing, such as duplication of services and litigants' confusion as to where to commence proceedings.[19]

Consequently, the Attorney-General's Department, in consultation with Des Semple, conducted a review of family law services provided by both the Family and Federal Magistrates Courts. On 28 November 2008, the Attorney-General, Robert McClelland, released a report and consultation paper about reforming such services.[20]

Current policy framework

On 5 May 2009, the Attorney-General, Mr Robert McClelland, announced a restructure of the Federal Courts with the objective of improved access to justice.[21]

Mr McCllelland introduced the Bill into Parliament on 22 June 2009, which is part of the Government's agenda to improve access to justice.[22]

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18. Attorney-General's Department, *Improving access to justice-a better framework for federal courts*, November 2008, p. 4, viewed 10 August 2009, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Consultation+paper+on+Review+-+November+2008.pdf/$file/Consultation+paper+on+Review+-+November+2008.pdf

19. Attorney-General's Department, *Improving access to justice-a better framework for federal courts*, p. 4.

20. Attorney-General, *Improving Australia's federal court system*, Media release, 28 November 2008. For information about the findings and recommendations of the review, see D Semple and Attorney-General's Department, *Future governance options for federal family law courts in Australia-striking the right balance*, August 2008, viewed 21 July 2009, http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Report+on+future+governance+of+federal+family+courts+in+Australia+-+November+2008.pdf/$file/Report+on+future+governance+of+federal+family+courts+in+Australia+-+November+2008.pdf (the report); Attorney-General's Department, *Improving access to justice-a better framework for federal courts* (the consultation paper).

21. Attorney-General, *Rudd government to reform federal court*, Media release, 5 May 2009, viewed 21 July 2009, http://www.ag.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2009_SecondQuarter_5May2009-RuddGovernmenttoReformFederalCourts

22. For information about the status of the Bill, see Parliament of Australia, *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, viewed 21 July 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=;group=;holdingType=;id=;orderBy=priority,title;page=;query=Dataset%3AbillsCurBef%20SearchCategory_Phrase%3A%22bills%20and%20legislation%22%20Dataset_Phrase%3A%22billhome%22%20Portfolio_Phrase%3A%22attorney-general%22;querytype=;rec=0;resCount=

In light of the long-term concerns regarding access to justice and the costs of litigation in the federal court system, as mentioned above, the question remains of why the Government has introduced this Bill now?

It is noted that in his second reading speech, Mr McClelland referred to relatively recent high profile cases in which legal costs were enormous.[23] As an example, he quoted Justice Sackville's statement in the C7 case:

> It is difficult to understand how the costs incurred by the parties can be said to be proportionate to what is truly at stake, measured in financial terms. In my view, the expenditure of $200 million (and counting) on a single piece of litigation is not only extraordinarily wasteful, but borders on the scandalous.[24]

It is also noted Justice Sackville estimated that the legal costs spent on that case was about $200 million, describing the case as an example of 'mega-litigation'.[25]

Importantly, it is argued that parties to litigation only contribute a portion of the total costs, with public monies being spent on the remaining amount.[26] The Government states that it wants to ensure that public resources spent on federal litigation is proportionate to the issues in dispute.[27]

Other legislation introduced as part of the federal justice system reform includes the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008 was introduced on 3 December 2008: see Parliament of Australia, *Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008*, viewed 22 July 2009, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;db=;group=;holdingType=;id=;orderBy=priority,title;page=4;query=Dataset%3AbillsCurBef%20SearchCategory_Phrase%3A%22bills%20and%20legislation%22%20Dataset_Phrase%3A%22billhome%22;querytype=;rec=12;resCount=; see also M Coombs, *Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008*, Bills digest, no. 88, 2008–09, Parliamentary Library, Canberra.

23. *Bell Group Ltd (in liquidation) v Westpac Banking Corporation [No 9]* [2008] WASC 239; *Seven Network Ltd. v News Ltd.* [2007] FCA 1062 (the C7 case).

24. R McClelland, 'Second reading speech: Access to Justice (Civil Litigation Reforms) Amendment Bill 2009', House of Representatives, *Hansard*, 22 June 2009, p. 6732. See also *Seven Network Ltd. v News Ltd.* [2007] FCA 1062 at [10] per Sackville J.

25. *Seven Network Ltd. v News Ltd.* [2007] FCA 1062 at [2]–[8] per Sackville J.

26. R McClelland, 'Second reading speech: Access to Justice (Civil Litigation Reforms) Amendment Bill 2009', op. cit., p. 6732.

27. Explanatory Memorandum, Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, p.1.

Committee consideration

The Bill, itself, has been referred to the Senate Legal and Constitutional Affairs Legislation Committee (the Legislation Committee) for inquiry and report by 17 September 2009.[28]

In addition, the Senate Legal and Constitutional Affairs References Committee (the References Committee) is currently conducting inquiries into both:

- access to justice, and
- Australia's judicial system and the role of judges.[29]

The References Committee must report on both inquiries by 17 August 2009.

It is noted that two of the Terms of References for the References Committee's inquiry into access to justice includes:

- the costs of delivering justice, and
- what can be done to reduce the length and complexity of litigation, and to improve efficiency.[30]

Stakeholder comments

As at 7 August 2009, only one substantive submission had been posted onto the website of the Legislation Committee's inquiry into the Bill itself—by the Law Council of Australia (the Law Council).[31]

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28. For details of the inquiry, see Senate Standing Committee on Legal and Constitutional Affairs (Legislation), *Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 [Provisions]*, viewed 16 July 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/civil_litigation/index.htm.

29. For more information about these inquiries, see Senate Standing Committee on Legal and Constitutional Affairs (References), *Inquiry into access to justice*, viewed 31 July 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/access_to_justice/index.htm; Senate Standing Committee on Legal and Constitutional Affairs (References), *Inquiry into Australia's judicial system and the role of judges*, viewed 31 July 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/judicial_system/index.htm

30. Senate Standing Committee on Legal and Constitutional Affairs (References), *Inquiry into access to justice*, viewed 10 August 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/access_to_justice/info.htm

31. See Senate Standing Committee on Legal and Constitutional Affairs (Legislation), *Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 [Provisions]*, viewed 21 July 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/civil_litigation/submissions.htm

The Law Council generally welcomes the reforms, which are the subject of the Bill, stating that:

> 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.
>
> 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.[32]

However, the Law Council points out that there are certain provisions in the Bill that should be considered further, which include:

- **proposed paragraph 37N(2)(b)**: requiring a legal practitioner to assist clients to comply with the overarching purpose of the litigation extends the obligation on legal practitioners beyond acceptable limits and potentially creating difficulties, which could effectively frustrate the whole aim of the overarching purpose
- **proposed subsection 37N(4)**: application of this provision could effectively enable the Court to consider matters ordinarily the subject of settlement privilege, thereby impliedly abrogating that privilege
- **proposed paragraph 37P(3)(c)**: this provision exceeds the acceptable level of control by the Court by fundamentally affecting the way a party, through its legal representatives, makes decisions about the best way to present its case, which the Law Council believes is the prerogative of parties in adversarial proceedings
- **proposed subsection 24(1AAA)**: decisions about security of costs are not 'minor interlocutory decisions' and should be subject to appeal, as such decisions could have profound consequences for parties to proceedings, and
- **proposed paragraph 21B(1A)(b) *Family Law Act* and related proposed provisions in the Federal Court and Federal Magistrates Court Acts**: enabling the Chief Judge to restrict a Judge to non sitting duties potentially interferes with the exercise of

32. Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation) Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, 31 July 2009, viewed 7 August 2009, https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=7b3dff8c-0f27-42fa-aca8-f870d7a95cee

Chapter III judicial powers; and may compromise judicial independence if that power is misused.[33]

While several other submissions have been received in relation to the inquiries undertaken by the References Committee, these generally relate more narrowly to the terms of reference of those inquiries, as opposed to the provisions in the Bill itself.[34]

Financial implications

The Government states, in the Explanatory Memorandum, that there would not be any direct financial impact on Government revenue from the amendments proposed in the Bill.[35] However, it does not stipulate, in its financial impact statement, what cost savings are expected from the proposed amendments.

Key issues

The key issues in the Bill are:

- improving case management and appeal procedures in the Federal Court by increasing efficiencies and reducing costs, while maintaining the just resolution of disputes, and
- ensuring judicial performance and standards.

Main provisions

There are three Schedules in the Bill, which deal with:

- case management
- jurisdiction and appeals, and
- judicial responsibilities.

33. For further detail on the Law Council's concerns, see Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation) Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, pp. 4–6.

34. Copies of those submissions are available at Senate Standing Committee on Legal and Constitutional Affairs (References), *Inquiry into access to justice*, viewed 31 July 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/access_to_justice/submissions.htm; Senate Standing Committee on Legal and Constitutional Affairs (References), *Inquiry into Australia's judicial system and the role of judges*, viewed 31 July 2009, http://www.aph.gov.au/senate/committee/legcon_ctte/judicial_system/submissions/sublist.htm

35. Explanatory Memorandum, op. cit., p. 5.

Schedule 1 – Case management

Schedule 1 contains amendments to the Federal Court Act relating to case management and procedural reforms.

Item 5 proposes to **insert new section 20A** into the Federal Court Act, relating to the Federal Court's power to deal with particular civil proceedings without oral hearings, in exercising its original jurisdiction.[36]

The effect of **proposed section 20A** is that if the Federal Court or a judge of that Court is satisfied that:

- the matter is frivolous or vexatious
- the issue(s) on which determination of a matter depends has been authoritatively decided in case law, or
- an oral hearing would not significantly help with the determination of a matter because there is no issue of fact relevant to determining the matter and written submissions can adequately deal with the legal arguments,

the Federal Court or Judge may deal with the matter without an oral hearing.

Comment

It is noted that the Explanatory Memorandum states that this amendment would enable the Federal Court to resolve civil disputes by simply dealing with papers in situations where the just resolution of matters can be achieved by the fastest, cheapest and most efficient way possible.[37] This would be consistent with the proposed overarching purpose of civil practice and procedure as discussed below.

Item 6 proposes to **insert new sections 37M–37P** into the Federal Court Act, specifically dealing with case management in civil proceedings.

Proposed subsection 37M(1) provides that the overarching purpose of civil practice and procedure provisions is to facilitate the just and legal resolution of disputes as quickly, cheaply and efficiently as possible.[38]

According to **proposed subsection 37M(2)**, this includes, but is not limited to:

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36. As to the Federal Court's original jurisdiction, see *Federal Court of Australia Act 1976* sections 19 and 20.

37. Explanatory Memorandum, op. cit., p. 7.

38. For the meaning of 'civil practice and procedure provisions', see **proposed subsection 37M(4)**

- the efficient and timely disposal of proceedings in the Federal Court's caseload and
- the cost of resolving a dispute would be proportionate to the complexity and importance of the matter.

Comment

It is noted that the Government describes **proposed section 37M** as 'the centre-piece of the case management reforms', aimed at overcoming what was considered as being the 'restrictive interpretation by the courts of what is in the interests of justice after the High Court's decision in *Queensland v J L Holdings Pty Ltd*.[39]

In that case, involving an application by the defendant to amend its defence, the majority of the Court stated:

> Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion.[40]

It is also noted that Justice Kirby, in a separate judgment, also stated:

> Whilst taking all of the considerations relevant to the circumstances of the case into account, the judge must always be careful to retain that flexibility which is the hallmark of justice. New considerations for the exercise of judicial discretion in such cases have been identified in recent years. But the abiding judicial duty remains the same. A judge who ignores the modern imperatives of the efficient conduct of litigation may unconsciously work an injustice on one of the parties, or litigants generally, and on the public. But a judge who applies case management rules too rigidly may ignore the fallible world in which legal disputes arise and in which they must be resolved.[41]

It is noted that the question of whether such interpretation by the High Court is 'restrictive' or, in fact cautionary, remains open to debate. It may yet be arguable that certain proposed amendments in the Bill, relating to case-management, may have potential to frustrate the just resolution of disputes.

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39. Explanatory Memorandum, op. cit., p. 9; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146.
40. *Queensland v J L Holdings Pty Ltd*.
41. *Queensland v J L Holdings Pty Ltd*.

Proposed section 37N provides for requirements on both parties to conduct proceedings in a way consistent with that overarching purpose and on the parties' lawyers to assist their clients in complying with those requirements. Failure to comply with these requirements will be considered by the Court or Judge in exercising discretion to award costs in the proceedings. In addition, if a lawyer fails to comply with his or her obligations under **proposed subsection 37N(2)** and costs are awarded against that lawyer personally, the lawyer must not recover those costs from the client.

Comment

The Explanatory Memorandum states that it is important that everyone involved in litigation focuses in the real issues in dispute as well as resolving those issues as quickly as possible.[42] Examples of conduct that might be considered to breach these requirements include:[43]

- *unreasonably* refusing to participate in ADR
- *unreasonably* rejecting a settlement offer of part or all of the proceeding and
- pursuing issues that have no real prospect of success.

However, it is noted that terms such as *unreasonably* are prone to subjective and inconsistent interpretation.

In addition, the Law Council's concerns regarding **proposed subsections 37N(2)** and **(4)** should be noted at this point.[44]

It should also be noted that ADR is not always conducive to a just resolution of a dispute and that the success of ADR processes depends on how those processes are implemented.[45] However, the Bill does not provide any detail on the implementation of ADR.

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42. Explanatory Memorandum, op. cit., p. 9.
43. Explanatory Memorandum, op. cit., p. 10.
44. Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation) Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, op. cit., pp. 4–5.
45. Note that, interestingly, the Bill proposes to define an ADR process as specifically excluding arbitration and mediation: see **item 1** of **Schedule 1** of the Bill. For discussion as to the disadvantages of ADR generally, see, for example, Public Interest Advocacy Centre, *Submission to NADRAC Inquiry into ADR in the civil justice system*, 22 May 2009, viewed 17 July 2009, http://www.piac.asn.au/publications/pubs/PIAC%20Submission%20to%20NADRAC%20Inquiry%20into%20ADR.pdf

Proposed section 37P enables the Federal Court to give directions about the practice and procedure to be followed in a civil proceeding or part thereof. Such directions may include:

- requiring tasks to be completed
- setting deadlines for completion of tasks
- place limits on the evidence submitted, such as limiting number of witnesses called or documents tendered; and limiting the length of submissions made
- varying or revoking previous directions made and
- whether to refer the matter for arbitration or mediation.

Failure by a party to comply with such direction may result in the Court or Judge making such orders as:

- dismissing all or part of the proceedings
- striking out, amending or limiting a part of the party's claim or defence and
- awarding costs against the non complying party.

Comment

The Law Council's concerns regarding **proposed paragraph 37P(3)(c)** should be noted at this point.[46]

Item 7 proposes to **insert new subsection 43(3)** into the Federal Court Act, setting out what the Court or Judge may do in relation to costs. This includes:

- awarding costs at various stages of a proceeding
- making different awards of costs in relation to different parts of the proceeding
- awarding costs to a party regardless of whether that party is successful in the proceeding
- awarding costs against a party's lawyer personally
- ordering that costs awarded are to be assessed on an indemnity basis or otherwise.

Item 8 proposes to **replace section 49** in the Federal Court Act. The effect of this proposed amendment is that where judgment is reserved in a proceeding and the Judge who heard the proceeding either alone or as part of a Full Court prepares his or her judgment but is unavailable to publish that judgment, it may be published by another Judge authorised by the Judge who had prepared the judgment.

46. Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation) Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, op. cit., pp. 5–6.

Item 9 proposes to enable the Court to refer proceedings or part thereof for arbitration, mediation or an ADR process in accordance with the Rules of the Court.

Items 10 and **11** propose consequential amendments clarifying that such referrals to mediation and ADR processes would not require parties' consent.

Comment

As mentioned earlier, the success of ADR processes, including mediation, depends on how those processes are implemented. The importance of parties' consent to ADR has been the subject of debate. It would be interesting to ascertain NADRAC's opinion on this issue in its forthcoming report.

Schedule 2

Schedule 2 contains proposed amendments to the Federal Court Act relating to both Federal Court jurisdiction, as well as the process of appeals to and from the Federal Court.

Jurisdictional matters

Items 1–**4** and **6**–**10** propose to **amend section 20** of the Federal Court Act, effectively providing that interlocutory matters, as set out in subsections 20(3) and (5), must be heard and determined by a single Judge instead of a Full Court, unless:

- otherwise directed by a Judge or
- the application for the interlocutory matter is made in a proceeding already assigned to a Full Court and the Full Court decides it is appropriate that it hear and determine the application.

Items 5 and **11** propose to **amend subsections 20(4)** and **(6)** of the Federal Court Act, to the effect that the Federal Court Rules would be able to provide that, in the circumstances listed in subsections 20(3) and (5), an oral hearing may be dispensed with, irrespective of parties' consent.

Appeals process

Item 12 proposes to **amend paragraph 24(1)(a)** of the Federal Court Act, whereby only judgments of a single Judge, exercising the Federal Court's original jurisdiction, would be appealable to the Court. Currently, judgments of a single Judge, exercising both the Federal Court's original and appellate jurisdictions, are appealable to the Court.

The Explanatory Memorandum states that this amendment would reduce the Court's workload and making it consistent with the appeal process for Full Court decisions.[47]

47. Explanatory Memorandum, op. cit., p. 16.

It is noted that **item 29** proposes to **amend section 33** of the Federal Court Act so that judgments of a single Judge, exercising the Federal Court's appellate jurisdiction, would still be appealable to the High Court, with leave.

The amendment proposed by **item 12** above would render current subsection 24(1AAA) of the Federal Court Act unnecessary. Consequently, **item 13** proposes to **replace subsection 24(1AAA) with a new subsection 24(1AA)**, which provides that there would be no appeal from specific interlocutory decisions of a single Judge exercising the Court's original jurisdiction.

Comment

It is noted that the Explanatory Memorandum states that this amendment would reduce delays caused by such appeals, thereby ensuring the efficient administration of justice.[48] However, the Law Council's concern regarding **proposed subsection 24(1AA)**, in relation to security of costs, is particularly pertinent.[49] This proposed amendment highlights how streamlining processes could have the potential to adversely affect 'access to justice'.

Item 14 proposes to **insert new subsections 24(1B)–(1E)** in the Federal Court Act. With amended **paragraph 24(1)(a)** and **new subsection 24(1AA)**, subsection 24(1A) would have the effect that interlocutory decisions of a single Judge exercising the Court's original jurisdiction, other than those specified in **new subsection 24(1AA)**, would be appealable to the Court with leave.

Amendments proposed by **item 14** provide that existing subsection 24(1A) would be subject to **proposed subsection 24(1C)**, which provides that leave to appeal would not be required for appeal of an interlocutory judgment of a single Judge exercising the Court's original jurisdiction, presumably other than interlocutory decisions specified in **new subsection 24(1AA)**, where such interlocutory judgment affects someone's liberty or is part of contempt of court proceedings. However, it is noted that **proposed subsection 24(1E)** provides that the absence of an avenue of appeal from an interlocutory judgment of the Court would not prevent:

- a party from founding an appeal from a final judgment in the proceeding on the interlocutory judgment, or
- the Court from considering the interlocutory judgment when determining an appeal from the final judgment in the proceeding.

48. Explanatory Memorandum, op. cit., p. 17.

49. Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation) Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, op. cit., p. 6.

Comment

It is somewhat unclear whether **proposed subsection 24(1E)** would apply to interlocutory matters specified in **new subsection 24(1AA)**. On the face of the Bill itself, it appears that it could. However, the Explanatory Memorandum describes the interlocutory matters in **new subsection 24(1AA)** as being *minor procedural decisions for which there should be no avenue of appeal*.[50]

Items 15 and **16** propose amendments to **subsections 25(1A)** and **(1AA)** respectively of the Federal Court Act.

Item 15 proposes to delete the current presumption that appeals from the Federal Magistrates Court, except for migration judgments, are heard by the Full Court unless the Chief Justice[51] considers that it is appropriate for the appeal to be heard by a single Judge.

Item 16 proposes that, henceforth, all appeals from the Federal Magistrates Court (not only migration judgments), would be heard either by a single Judge; or the Full Court if a Judge considers that it is appropriate for the appeal to be heard by the Full Court.

Items 18–24 propose amendments to **subsections 25(2)–(2C)** in terms similar to those proposed by **items 4–11** to **section 20** as discussed above.

Items 25 and **28** propose to **amend subsection 25(5)** and **paragraph 26(2)(a)** in the Federal Court Act so that appeals from the judgement of a court of summary jurisdiction, as well as where such a court states a case or reserves a question concerning a matter in relation to which an appeal would lie, must be heard by:

- a single Judge or
- the Full Court if a Judge considers it appropriate for it to be heard by a Full Court.

Item 29 proposes to **amend subsection 33(2)** of the Federal Court Act. It is noted that existing subsection 33(2) already provides that appeals from judgements of single Judges exercising the original jurisdiction of the Federal Court are not appealable to the High Court. **Proposed subsection 33(2)** would mean that judgements of single Judges exercising the appellate jurisdiction of the Federal Court would still be appealable to the High Court.

However, it is noted that **item 12** proposes to amend **paragraph 24(1)(a)** of the Federal Court Act, whereby judgments of a single Judge exercising the Federal Court's original jurisdiction would be appealable to the Federal Court itself (see above).

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50. Explanatory Memorandum, op. cit., p. 17.

51. 'Chief Justice' refers to the Chief Justice of the Federal Court of Australia. As to the responsibilities of the Chief Justice, see *Federal Court of Australia Act 1976* section 18A.

Item 32 proposes to **insert new subsections 33(4A)–(4C)** into the Federal Court Act, so that judgments from certain interlocutory matters heard by:

- the Full Court exercising the Court's original jurisdiction and
- either a single Judge or the Full Court exercising the Court's appellate jurisdiction,

would not be appealable to the High Court.

Comment

In relation to **item 32**, the Explanatory Memorandum states that such interlocutory matters:

> involve minor procedural decisions for which there should be no avenue of appeal. The removal of the right to appeal will ensure the efficient administration of justice by reducing delays caused by appeals from these decisions.[52]

However, it is noted that **proposed new subsection 33(4C)** provides that in such circumstances:

- a party may found an appeal from a final judgment in the proceeding on the interlocutory judgment or
- the High Court may take into account the interlocutory proceeding in determining an application for special leave to appeal, or an appeal itself , from a final judgment in the proceeding.

This is a similar amendment as that proposed in **item 14** in relation to **proposed subsection 24(1E)**.

Schedule 3

Schedule 3 contains proposed amendments to the Family Law, Federal Court and Federal Magistrates Acts, relating to judicial responsibilities. The proposed amendments are generally similar across the three Acts.

Items 1, **2**, **8**, **9** and **11** propose to amend subsections 21B(1), 15(1) and 12(1) of the Family Law, Federal Court and Federal Magistrates Acts respectively. These proposed amendments provide that the Chief Judge is responsible for ensuring the *effective*, orderly and expeditious discharge of the respective Court's business.

Items 3, **10** and **12** propose to insert new provisions to the Family Law, Federal Court and Federal Magistrates Acts respectively, which would have the effect of empowering the Chief Judges of the respective Courts to make particular management decisions, such as:

52. Explanatory Memorandum, op. cit., p. 24.

- which Judge(s) would constitute the Court/Full Court in particular matters
- assigning caseloads, classes of cases or functions to certain Judges and
- restricting Judges to non-sitting duties.

In addition, the Chief Judge would have to ensure that Judges of the respective Court have access to (or reimbursement for the costs of) certain health and educational services.

Comment

The Law Council's concern regarding the Chief Judge or Justice being able to temporarily restrict a Judge/Justice to non-sitting duties is particularly relevant.[53]

It is also noted that **items 6** and **7** propose to **insert new subsections 22(2AAA)** and **6(3)** into the Family Law and Federal Court Acts respectively. These proposed provisions would enable Judges of the respective Courts to be assigned to particular locations when appointed to the Court. The assignments would not be able to be permanently changed to another location without the consent of the Attorney-General, the respective Chief Judge and the Judge in question.

Importantly, **items 5**, **6**, **7**, **10** and **13** propose new provisions to the Family Law, Federal Court and Federal Magistrates Acts, which would give legal protection and immunity to the Chief Judge of the Court in undertaking those management responsibilities. In addition, the Chief Judge's decisions made when undertaking those management responsibilities would not fall within the jurisdiction of the Federal Court with respect to section 39B of the *Judiciary Act 1903*.[54]

Concluding comments

Reducing the costs associated with resolving disputes in the Federal Court and improving court procedures would greatly improve access to justice in matters within the jurisdiction of the Court.

In general, the proposed amendments in the Bill would go some way in working toward those goals. However, the extent to which certain proposed amendments achieve those goals remains open to further consideration and debate.

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53. See Law Council of Australia, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs (Legislation) Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, op. cit., p. 6.

54. Subsection 39B(1) of the *Judiciary Act 1903* provides that the Federal Court's original jurisdiction includes jurisdiction relating to matters in which the following writs are sought against a Commonwealth officer: mandamus (directing that the officer does a certain thing), prohibition (preventing the officer from doing a certain thing) or injunction (stopping a current or future action for a specific time).

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