Senate Legal and Constitutional Legislation Committee:

Inquiry into the provisions of the Migration Litigation Reform Bill 2005

A joint submission prepared by

QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE

and

SOUTH BRISBANE IMMIGRATION AND COMMUNITY LEGAL SERVICE

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EXECUTIVE SUMMARY

The Queensland Public Interest Law Clearing House (QPILCH) and South Brisbane Immigration and Community Legal Service (SBICLS) have serious concerns about the impact of the *Migration Litigation Reform Bill 2005*, and urge the committee to reject the bill in its current form.

We are disappointed that the government has again sought to address perceived problems of unmeritorious litigation by placing further barriers and restrictions on the judicial process, rather than addressing the structural reasons behind the problem, which include:

- Improving the quality of primary decision making;
- Improving the quality, independence and transparency of the migration tribunals, particularly the Refugee Review Tribunal;
- Increasing the availability of legal advice and assistance from experienced migration agents and lawyers, particularly on a pro bono basis; and
- Restoring the discretion once vested in immigration officers to grant visas to individuals with strong humanitarian or compassionate grounds for remaining in Australia.

Re the imposition of absolute time limits on judicial review of migration decisions:

We share the concerns of numerous legal centres, academics, and statutory agencies that were documented in the committee's June 2004 report into provisions of *the Migration Amendment (Judicial Review) Bill 2004* in relation to the constitutional validity of imposing non-discretionary, absolute time periods for judicially reviewing migration decisions. We note the irony of introducing a bill which contains so many contentious provisions inviting judicial scrutiny, when the expressed purpose of the bill is to reduce litigation.

Re jurisdiction of the courts:

- We have no in-principle objection to the Federal Magistrates Court becoming the main forum for primary judicial determinations in migration matters, provided:

  (a) The court retains a discretion to transfer more complex cases to the Federal Court; and

  (b) The court is adequately resourced to cope with the increased workload, and there is regular monitoring of timelines from commencement of proceedings to a final determination (the handing down of a judgement, not conduct of a hearing).

- In relation to the High Court's power of remittal:

  (a) The court must retain the power to hear oral argument in appropriate cases prior to remittal;

(b) The new scheme proposed by s.476B could avoid "double-handling" by granting the High Court a discretion to remit to the Federal Court in appropriate cases.

- The Federal Court must retain the power to exercise its appellate jurisdiction by a Full Court in appropriate cases.

- Where an applicant can demonstrate a compelling case for judicial review of a primary decision (such as a loss of merits review rights for reasons beyond their control), that jurisdiction should be exercised by the Federal Magistrates Court.

Re broadened powers of summary judgment:

The existing powers of summary dismissal currently available to the courts are more than adequate to deal with unmeritorious litigation, and are significantly under-utilised by the government. If the government contends that these existing powers of summary dismissal need to be widened and made more "flexible", it must:

(a) Specifically identify the types of cases it intends to target (which clearly go beyond those summarised in this submission);

(b) Demonstrate why such cases would not meet the current requirements for summary dismissal; and

(c) Justify how the interests of justice are served by having such cases disposed of without the benefit of a full hearing.

Until it can do so, those parts of the bill which introduce new powers of summary dismissal should be rejected.

Re liability for legal costs:

The provisions relating to personal liability for legal costs are highly ambiguous, needlessly broad, and have significant potential to discourage lawyers from representing and assisting deserving applicants with complex or uncertain cases, particularly when legal services are required on a pro bono basis.

We do not believe the scheme will have the predicted impact of reducing unmeritorious litigation. Rather, it will simply increase the number of unrepresented applicants and reduce the preparedness of advocates to become involved in borderline cases - the very cases where they are most needed.

We urge the committee to reject the bill in its current form.

1. INTRODUCTION

1.1 The Queensland Public Interest Law Clearing House (QPILCH) is a community based assessment and referral centre for public interest litigation undertaken on a pro bono basis. QPILCH draws on the resources of the wider legal profession - private firms, government, corporate lawyers, university law schools and the community sector – to assist those who are the most disadvantaged and marginalised.

1.2 The South Brisbane Immigration and Community Legal Service (SBICLS) is the only legal agency in Queensland specialising in refugee and migration law. SBICLS works with volunteers to provide free legal advice, assistance and community education to disadvantaged people. It advocates in cases of most need before the Department of Immigration, review tribunals and, on occasions, to judicial review. The Service has a demand that far exceeds its resources and takes on only those highest priority cases with most merit.

1.3 Since mid-2003, QPILCH and SBICLS have worked together on the "Refugee and Immigration Legal Support (RAILS) Project". The primary goal of the RAILS project is to increase private sector participation in refugee and migration cases on a pro bono basis.

Preliminary comments on the bill

1.4 The *Migration Litigation Reform Bill 2005* ("the bill") introduces a package of legislative changes designed to address the "large volume of judicial review proceedings, unmeritorious litigation and delays" which are "very costly and are placing strains on the courts and the migration system more generally"[1]. Some of the measures contained in the bill are sensible and pragmatic, and we have no difficulty supporting them. Others are, however, of deep concern.

1.5 We concur that a number of judicial review applications currently brought before the courts are unmeritorious, and that this has negative impacts upon both the courts and other applicants using the judicial system. We are, however, disappointed that the government has again sought to remedy these matters by placing further barriers and restrictions on the judicial process, rather than addressing the structural reasons behind the problem.

1.6 Many of those structural causes were identified in submissions and evidence to the Migration Litigation Review, and again to this committee during its inquiry into the *Migration Amendment (Judicial Review) Bill 2004*[2]. Numerous organisations and individuals submitted that the government should determine empirically *why* so many applications for judicial review are made, rather than relying upon unfounded and generalised assumptions that all unmeritorious applicants are deliberately manipulating the system so as to extend their stay in Australia. They urged the government to focus on the structural and systemic issues which, if properly addressed, would reduce the motivation for litigation. These included:

[1] Explanatory Memorandum to the *Migration Litigation Reform Bill 2005* at p.1
[2] Report, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, Senate Legal and Constitutional Legislation Committee, June 2004

- Improving the quality of primary decision making;

- Improving the quality, independence and transparency of the migration tribunals, particularly the Refugee Review Tribunal;

- Increasing the availability of legal advice and assistance from experienced migration agents and lawyers, particularly on a pro bono basis; and

- Restoring the discretion once vested in immigration officers to grant visas to individuals with strong humanitarian or compassionate grounds for remaining in Australia.

These matters continue to be ignored.

1.7 We also express our disappointment that the government continues to refuse to release the findings of the Migration Litigation Review for public comment and debate, notwithstanding the urging of this committee in June 2004 for the government to do so prior to seeking any further legislative amendments[3].

1.8 We have formulated our response to the bill under the following categories:

- Constitutionality and time limits for commencing proceedings
- Jurisdiction of the courts
- Summary dismissal
- Liability for legal costs

2. CONSTITUTIONALITY AND TIME LIMITS FOR COMMENCING PROCEEDINGS

2.1 One of the major objectives of the bill is to implement amendments which were first proposed by the government in the *Migration Amendment (Judicial Review) Bill 2004* ("the previous bill")[4]. These include:

(a) Re-instating the application of time limits to judicial review of migration decisions;

(b) Granting the Federal Magistrates Court, the Federal Court and the High Court exclusive jurisdiction in relation to migration decisions; and

(c) Denying access to review of primary (that is, departmental) decisions.

2.2 The bill seeks to achieve these reforms by amending various provisions of the Migration Act 1958 ("MA"). In essence, the bill applies time limits for commencing proceedings, as well as jurisdictional limitations upon the courts, in relation to a "*migration decision*". Item 11 defines this term to mean:

[3] Report, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, Senate Legal and Constitutional Legislation Committee, June 2004 at [3.25]

[4] The *Migration Amendment (Judicial Review) Bill 2004* lapsed with the prorogation of the 40th Parliament in November 2004

a privitive clause decision; or
a purported privitive clause decision; or
a non-privitive clause decision.

2.3 A new s.5E is to be inserted into the MA, which defines "*purported privitive clause decision*" (see Item 14). The term is specifically designed to cover decisions which would be void at law for jurisdictional error. The combined effect of the amendments is an attempt to overcome the decision of the High Court in *Plaintiff S157/2002 v Commonwealth*[5], at least in relation to procedural aspects of migration litigation.

2.4 The constitutionality of these provisions has already been considered by this committee in the context of the previous bill[6]. We do not intend to replicate that process. We do note, however, that with the exception of DIMIA, all submissions received by the committee unanimously opposed that bill, and raised serious concerns regarding *inter alia* the constitutionality of attempts to place a non-discretionary, absolute time bar on judicial review, particularly in the High Court. Notwithstanding, the committee recommended that the previous bill proceed, with one amendment. That amendment has been adopted by the government in the current bill, and ensures that time limits only begin to run from the date a person actually receives notification of a decision in their case, as opposed to deemed notification under the MA.

2.5 In our submission, the amendment referred to above does not remotely address the concerns expressed in the submissions to the committee's previous inquiry. Indeed, the Labor Senators agreed to support the previous bill despite their expressed reservations as to its constitutional validity. While we will not spend further time on a matter which has already been examined in detail by the committee, we do note the irony of introducing a bill which contains so many contentious provisions inviting judicial scrutiny, when the expressed purpose of the bill is to reduce litigation.

2.6 While we share the reservations expressed by the contributors to the previous Senate inquiry, in order to address the merits of the remaining proposals contained in the bill, we will assume its constitutional validity where relevant.

3. JURISDICTION OF THE COURTS

3.1 The bill seeks to institutionalise the Federal Magistrates Court as the dominant forum for primary judicial determinations in migration matters. It achieves this by removing most of the Federal Court's original jurisdiction in this regard, and mandating that the High Court must remit the bulk of migration matters to the Federal Magistrates Court. The Federal Court retains an appellate role.

Primary jurisdiction

3.2 A new s.476 of the MA grants original jurisdiction to the Federal Magistrates Court in migration matters, save for specific exceptions: namely, primary

[5] *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2
[6] Report, *Provisions of the Migration Amendment (Judicial Review) Bill 2004*, Senate Legal and Constitutional Legislation Committee, June 2004

decisions (discussed further below); decisions of the Administrative Appeals Tribunal on review pursuant to section 500; decisions made by the Minister personally pursuant to sections 501-501C; and certain non-reviewable decisions specified in s.474(7). The court is granted the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution. Previously, the court's jurisdiction derived from s.39B of the *Judiciary Act 1903*[7]. As s.39B mirrors the relief available under s.75(v), nothing of substance appears to turn on this.

3.3 By operation of the new s.476A of the MA, the Federal Court's original jurisdiction in migration matters is almost completely removed, save for:

- Proceedings transferred to the Federal Court from the Federal Magistrates Court pursuant to s.39 of the *Federal Magistrates Act 1999*;
- Decisions of the Administrative Appeals Tribunal on review pursuant to section 500 of the MA;
- Decisions made by the Minister personally pursuant to sections 501-501C of the MA; and
- Certain non-privitive clause decisions.

3.4 As with the Federal Magistrates Court, the Federal Courts limited original jurisdiction is expressed to be identical to that available under 75(v).

3.5 The High Court has its original jurisdiction in all migration matters pursuant to 75(v) of the Constitution – there is no attempt to limit this jurisdiction via the extended definition of "privitive clause decision" – and retains it powers of remittal under s.44 of the *Judiciary Act 1903*. However, a new s.44(4) of that Act provides that the High Court may remit a matter, or any part of a matter, without an oral hearing. Furthermore, a new s.476B of the MA prevents the High Court from remitting any migration matters to any court other than the Federal Magistrates Court where that court has jurisdiction under s.476. The High Court can only remit to the Federal Court in the limited cases of decisions pursuant to s.500-501C of the MA, set out in 3.3 above.

3.6 We have no in-principle objection to the Federal Magistrates Court becoming the main forum for primary judicial determinations in migration matters, subject to the following provisos:

(c) The Federal Magistrates Court was only ever intended to deal with less complex migration cases. It is critical that the court retains a discretion to transfer more complex cases to the Federal Court, on its own motion or by application brought by one of the parties to the proceedings. This appears to be the case, as the bill leaves intact the court's power to transfer proceedings under s.39 of the *Federal Magistrates Act 1999*;

(d) If the bill is to achieve its aims of improving the efficiency of migration litigation and decreasing delay, then the Federal Magistrates Court must be appropriately resourced to cope with the increased workload. Regular

[7] see *Migration Act 1958*, s.483A (to be repealed by the bill)

monitoring of timelines from commencement of proceedings to a final determination must be undertaken (final determination being the handing down of a judgement, not conduct of a hearing). The court has a considerable family law caseload, and anecdotal evidence suggests that, in some registries, final hearing dates in migration matters are now being delayed until 2006.

3.7 In relation to the High Court's power of remittal, we make the following comments:

(c) Although we see merit in the High Court being able to remit matters on the papers, we would be concerned if the court did not continue to have power to hear oral argument in appropriate cases prior to remittal. The discretionary language of the new s.44(4) of the *Judiciary Act 1903* appears to reserve this power;

(d) The rationale behind s.476B of the MA (which mandates remittal of migration matters to the Federal Magistrates Court in all but a few specified cases) is set out in the Explanatory Memorandum to the bill at paragraph 16:

> "Generally, the High Court, if it remits migration cases filed in its original jurisdiction, remits these cases to the Federal Court. The Federal Court may, in turn, transfer these matters to the FMC. This has led to unnecessary double-handling of migration cases."

In our submission, the new scheme proposed by s.476B potentially creates a new kind of "double-handling". That is, the section compels the High Court to remit a matter to the Federal Magistrates Court even if it is a matter which the Federal Magistrate would, in all likelihood, transfer to the Federal Court under s.39 of the *Federal Magistrates Act 1999*. This could be avoided by granting the High Court a discretion to remit to the Federal Court in appropriate cases.

Appellate jurisdiction

3.8 The primary change wrought by the bill in relation to appeals is the new s.25(1AA) of the *Federal Court of Australia Act 1976*. The change is limited to migration matters, and provides that appeals in such cases are to be heard by a single judge of the Federal Court.

3.9 As with the shift in primary jurisdiction, we have no in-principle objection to this amendment as long as the Federal Court retains the power to exercise its appellate jurisdiction by a Full Court in appropriate cases. S.25(1AA)(b) preserves this discretion, and no amendments have been made to the court's power under s.25(6) to refer a case stated or question of law to the Full Court.

3.10 We note that the new s.486D of the MA – which applies to proceedings in all of the courts discussed above – requires applicants to disclose at time of commencement of proceedings whether any other judicial review actions have been brought in relation to the decision under review. The section does not provide any consequences for non-compliance, and is, on its face, benign. Whilst we acknowledge such disclosure could assist the courts, it is important that applicants are made fully aware of, and understand, the obligation imposed by the

provision. We assume that the method of disclosure will be by incorporation into prescribed court forms

Review of primary decisions

3.11 Our main concern with the jurisdictional aspects of the bill relate to the review of "primary decisions". The term is defined by s.476(4) of the MA as follows:

> **primary decision** means a privitive clause decision or purported privitive clause decision:
> (a) that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or
> (b) that would have been so reviewable if an application for such review had been made within a specified period.

In other words, "primary decision" means departmental decisions which attract merits review rights, irrespective of whether those rights have been exercised or not.

3.12 Section 476 is the provision of the MA which grants original jurisdiction to the Federal Magistrates Court in migration matters, and sub-section(2)(a) excludes jurisdiction in relation to "primary decisions". Furthermore, the extension of the definition (for the purposes of the section only) to include "purported privitive clause decisions" seeks to ensure a complete exclusion of review by the Federal Magistrates Court, even where there has been jurisdictional error. Since the Federal Court has no jurisdiction in relation to these matters, and as the High Court is precluded by s.476B from remitting matters to the Federal Magistrates Court if the court does not have jurisdiction, the end result is that all review of primary decisions must be retained by the High Court.

3.13 The availability of merits review rights is a factor which would normally dissuade a court from granting relief in judicial review proceedings, and we are not advocating a departure from that principle. Nevertheless, there are undoubtedly occasions where a person's access to merits review is lost for reasons beyond their control. For example, there have been numerous cases of postal services delivering decision notifications to incorrect addresses (but not in a way which prevents the deemed notification provisions of the MA from operating), and also of migration agents and lawyers failing to lodge review applications within time. Since neither the Migration Review Tribunal nor the Refugee Review Tribunal have discretion to extend the time for lodgement of applications for review, in such cases, the only avenue for relief available to an applicant is judicial review of the primary decision. The lack of discretion at these two tribunals represents another structural issue which if addressed could prevent the need for judicial review in some cases.

3.14 In our submission, it is appropriate and in keeping with the objectives of the bill that, where an applicant can demonstrate a compelling case for judicial review of a primary decision (such as a loss of merits review rights for reasons beyond their control), that jurisdiction should be exercised by the Federal Magistrates Court.

4. SUMMARY DISMISSAL

4.1 The bill introduces new summary judgment provisions for the High Court, Federal Court and Federal Magistrates Court. The provisions apply universally to *all* proceedings commenced in those courts (not just migration matters), and represent a significant shift away from the legal principles which have traditionally governed summary dismissal of actions. They require rigorous and careful scrutiny.

4.2 In relation to the High Court, a new s.25A is to be introduced into the *Judiciary Act 1903* which provides as follows:

> (1) The High Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
> (a) the first party is prosecuting the proceeding or that part of the proceeding; and
> (b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.
>
> (2) The High Court may give judgment for one party against another in relation to the whole or any part of a proceeding if:
> (a) the first party is defending the proceeding or that part of the proceeding; and
> (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.
>
> (3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:
> (a) hopeless; or
> (b) bound to fail;
> for it to have no reasonable prospect of success.
>
> (4) This section does not limit any powers that the High Court has apart from this section.

The Federal Court and Federal Magistrates Court are given identical powers.[8]

4.3 In order to understand the significance of these amendments, it is necessary to look at the existing summary dismissal provisions available to the courts, and the legal principles which have been developed to guide their application.

The rules governing summary judgment

4.4 The High Court, the Federal Court and the Federal Magistrates Court already possess significant powers to deal with unmeritorious litigation summarily. Those powers are contained in the *High Court Rules 2004* at 27.09.4 and 27.09.5; the *Federal Court Rules* Order 20, rule 1 and 2; and the *Federal Magistrates Court Rules 2001* Rule 13.07 and 13.10. The full text of those provisions is set out in Schedule A to this submission.

[8] see new s.31A to be inserted into *Federal Court of Australia Act 1976* and new s.17A to be inserted into *Federal Magistrates Act 1999*.

4.5 Although the language varies slightly between them, in essence, these provisions give the courts power to deal summarily with actions where:

- No reasonable cause of action/defence to the action, is disclosed;
- The proceeding or claim for relief is frivolous or vexatious; or
- The proceeding or claim for relief is an abuse of the process of the court.

4.6 The leading case on this issue is *Dey v Victorian Railways Commissioners*[9]. In *Dey*'s case, the High Court had to consider whether a primary judge had acted properly when he summarily dismissed an action for wrongful death brought by a widow against the former employer of her deceased spouse. The success of the action turned upon the legal question of whether an award made under the (then) *Workers' Compensation Act 1928* prevented, in the circumstances of that case, the widow or infant children of the deceased worker from proceeding under the *Wrongs Act 1928* (Lord Campbell's Act) for damages. Then Chief Justice Latham made the following observations:

> "26. The question remains whether an order should have been made for the dismissal of the action against the widow. No evidence could affect the decision upon this point. The relevant facts are indisputable, as the learned judge said. But it is argued that if a case involves any question of difficulty the summary procedure of dismissing an action as vexatious should not be applied. In the present case there is nothing frivolous about the action, but if a court is of opinion that the plaintiff cannot succeed there is every reason for protecting a defendant from vexation by the continuance of proceedings which must be useless and futile. The contention of the appellant really is that procedure under Order XIVA or Order XXV., rule 4, or under the inherent jurisdiction of the court for dismissing an action at an early stage, should be used only in easy cases. I do not agree with this view where there is opportunity for full argument and full consideration of the question raised……If, as a result of argument, the court reaches a clear decision which could not be altered by any evidence which could be adduced at the trial, then it is proper in the interests of both parties to dismiss the action instead of allowing the parties to incur completely useless expense."

4.7 In the same case, Dixon J held:

> "13. The application is really made to the inherent jurisdiction of the court to stop the abuse of its process when it is employed for groundless claims. The principles upon which that jurisdiction is exercisable are well settled. A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend

[9] *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62

upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."

4.7 The principles espoused in *Dey*'s case were reviewed at length by Barwick CJ some 15 years later in the case of *General Steel Industries Inc. v Commissioner for Railways (NSW)*[10]. It is worth quoting from His Honour's judgment at some length:

> "8. The plaintiff rightly points out that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied that it has the requisite material and the necessary assistance from the parties to reach a definite and certain conclusion. I have examined the case law on the subject…It is sufficient for me to say that these cases uniformly adhere to the view that the plaintiff ought not to be denied access to the customary tribunal which deals with actions of the kind he brings, unless his lack of a cause of action - if that be the ground on which the court is invited, as in this case, to exercise its powers of summary dismissal - is clearly demonstrated. The test to be applied has been variously expressed; "so obviously untenable that it cannot possibly succeed"; "manifestly groundless"; "so manifestly faulty that it does not admit of argument"; "discloses a case which the Court is satisfied cannot succeed"; "under no possibility can there be a good cause of action"; "be manifest that to allow them" (the pleadings) "to stand would involve useless expense".
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> 9. At times the test has been put as high as saying that the case must be so plain and obvious that the court can say at once that the statement of claim, even if proved, cannot succeed; or "so manifest on the view of the pleadings, merely reading through them, that it is a case that does not admit of reasonable argument"; "so to speak apparent at a glance".
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> 10. [After quoting from Dixon J. in *Dey*'s case with approval] Although I can agree with Latham C.J. in the same case when he said that the defendant should be saved from the vexation of the continuance of useless and futile proceedings…in my opinion great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

4.8 The courts have also held that the term "abuse of the process of the Court" has a wide connotation. While it is often applied to a proceeding instituted for a collateral or improper purpose, the term has wider import:

> "...it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance,

[10] *General Steel Industries Inc. v Commissioner for Railways (NSW)* [1964] HCA 69

> proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail."[11]

4.9 The High Court's insistence that summary judgment be reserved only for clear cases does not mean that exercise of the power is limited to easy or simple cases which are clearly, on the face of the proceedings, unmeritorious, or which fail to plead a legally recognisable cause of action or defence. Rather, each case requires careful analysis to determine whether a trial in the matter is effectively futile, *and can therefore be justly dispensed with*. Summary dismissal is available even in complex and "intricate" cases if a court is satisfied that no evidence led at trial could alter the outcome. If, however, a court determines that there remain issues either of fact or law which warrant further investigation before a verdict can be confidently reached, then summary judgment is inappropriate. It will not, ordinarily, be appropriate to dismiss a proceeding summarily that is even arguably justifiable[12].

4.10 Perhaps an apt way of putting the test is that, if a court is satisfied that no matter what is adduced at hearing it will have no choice in the decision it ultimately makes, *then dispensing with the normal processes of justice will not result in an injustice*. If however, it is clear that the court will be required to exercise its judgment and determine a preference – either for one view of the facts, or for one legal argument over another – then justice requires the court to withhold that determination until both parties have had the opportunity to fully present their case. In the words of Bennett J:

> "...proceedings will not be dismissed summarily merely on the ground that it appears, at the hearing of the motion, that the claim may fail."[13]

4.11 It must be remembered that the summary dismissal process results in the striking out of an action or defence without the benefit of any of the court processes which have been designed to ensure that there is a fair and complete hearing. A motion for summary judgment is brought prior to the completion of discovery and interrogatories, and without any evidence in chief or cross-examination of witnesses. Whilst some of these litigation processes are absent in judicial review applications, the amendments proposed by the bill have universal application to all civil proceedings conducted in both the Federal Courts and the High Court. In migration matters, summary dismissal applications are brought at the first return date before the court, and are determined without the court having access to departmental or tribunal files, or transcripts of tribunal proceedings.

4.12 The legal principle that only the clearest of cases should be determined without the benefit of a full hearing pays heed to Barwick CJ's warning in the *General Steel* case – that great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case.

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[11] *Walton v Gardiner* (1993) 177 CLR 378, per Mason CJ, Deane and Dawson JJ at 393

[12] Moran v Minister for Land & Water Conservation for the State of New South Wales [1999] FCA 1637 per Wilcox J. at [45]

[13] Spotwire Pty Ltd v Visa International Service Association Inc & Anor [2003] FCA 762 per Bennett J at [10]

Effect of the amendments proposed by the bill

4.13 At 4.2 above, we set out in full the text of the new provisions which will grant additional powers of summary dismissal to the High Court, the Federal Court and the Federal Magistrates Courts. Sub-section (4) of those provisions makes it clear that the new power is to be in addition to, and not in substitution for, those which already exist in the rules of court (see 4.4 and Schedule A).

4.14 The language employed in subsections (1) and (2) of the new provisions is uncontroversial – "no reasonable prospect of successfully prosecuting/defending" a proceeding – and would, on their own, invoke the legal principles set out in *Dey*'s case and *General Steel*. However, subsection (3) is a legislative repudiation of those very principles. We repeat it here:

> (3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:
> (a) hopeless; or
> (b) bound to fail;
> for it to have no reasonable prospect of success.

4.15 The Explanatory Memorandum to the bill describes the government's intention as follows:

> "22. …Subsection 31A(3) provides that for the purposes of giving summary judgement, a proceeding or part of a proceeding, or a defence to a proceeding or part of a proceeding, need not be hopeless or bound to fail for it to have no reasonable prospect of success. This moves away from the approach taken by the courts in construing the conditions for summary judgement by reference to the 'no reasonable cause of action' test, in *Dey v Victorian Railways Commissioners*…and *General Steel Industries Inc v Commissioner for Railways (NSW)*…These cases demonstrate the great caution which the courts have exercised in regard to summary disposal, limiting this to cases which are manifestly groundless or clearly untenable.
>
> 23. Section 31A will allow the Court greater flexibility in giving summary judgement and will therefore be a useful addition to the Court's powers in dealing with unmeritorious proceedings."

4.16 What "greater flexibility" is proposed? It can be reasonably extrapolated from the language of the provision that a court is to be empowered to summarily dispose of a proceeding even where there is *some* hope, and *some* prospect, of success. *Dey*'s case determined that only unarguable cases should be summarily dismissed. If the principles of *Dey*'s case are to be rejected, then the logical conclusion is that some arguable cases are also now to be summarily dealt with. That is, a court will be able to finally determine a matter without the benefit of a full hearing *even where the possibility exists that a full hearing could persuade the court to a different view*. Such a position is, in our submission, not just a rejection of the guiding principles laid down by the High Court, but a complete departure from the philosophical framework which underscored the development of those principles.

4.17 The new provisions also have the potential to be self-defeating. It is quite conceivable that judges – faced with a motion to summarily dismiss an action

which still remains arguable to some extent - will require an increased level of legal argument and evidentiary material, such that the advantage of summary proceedings becomes lost. The whole purpose of summary judgment is to save both the court and the parties the time and costs of litigating hopeless positions. If lowering the bar for summary dismissal means that courts will require greater investigation into the merits of a case before being prepared to dismiss, then the entire notion of summary judgment will be perverted. It is prudent to reflect on the words of Lord Woolf MR:

> "Useful though the [summary judgment] power is…it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial….The proper disposal of an issue [by summary judgment] does not involve the judge conducting a mini trial, that is not the objection of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."[14]

4.18 A further consideration is the extent to which the courts will be prepared to summarily dismiss actions which remain arguable on their face, when the applicant or defendant is self-represented. We have significant concerns that enactment of the new provisions could lead to an increase in Order 80 referrals by the Federal Court (and comparable referrals by the Federal Magistrates Court)[15] in circumstances where – particularly where migration and refugee matters are concerned – there are already insufficient numbers of experienced practitioners participating in those schemes.

4.19 Given the potentially wide ramifications of the proposed amendments, we believe it is incumbent on the government to demonstrate their necessity. Why are the existing powers of summary dismissal inadequate? What types of cases are being "missed" which the government believes warrant summary disposal?

4.20 While the amendments apply to all civil proceedings conducted in the relevant courts, our analysis is confined to migration and refugee matters. In our submission, a review of summary judgments in migration cases reveals an under-utilisation by the government of existing powers, rather than any deficiency in the nature of the power itself.

Use of existing summary judgement provisions in migration cases

4.21 As far as we have been able to ascertain, the government rarely seeks summary dismissal of migration cases in the Federal Court, notwithstanding its expressed concerns about "high levels of unmeritorious migration litigation"[16]. Since 1999, we have found only four cases where the Minister sought summary dismissal, and the Minister was successful in three of those cases. Briefly they covered:

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[14] In *Swain v Hillman* [2001] 1 All ER 91, as cited by Holmes J in *CSR Ltd v Casaron Pty Ltd* [2002] QSC 021 at [14]

[15] *Federal Court Rules* Order 80 provides for a Court appointed scheme of referrals for pro bono legal assistance. An almost identical scheme operates in the Federal Magistrates Court by authority of Part 12 of the *Federal Magistrates Court Rules 2001*

[16] see Explanatory Memorandum to the bill at p.1

- An application to review a decision by the Refugee Review Tribunal which was not supported by any evidence at all: "While on the face of the assertion made in the application there may be a cause of action disclosed, a consideration of the background indicates that the proceeding is frivolous."[17]
- Where a Tribunal had refused to accept an application for review as being validly lodged: "there is no arguable case that the application was a valid application such that the Minister's delegate made an error of law in determining that the application could not be considered."[18]

- Where an application on its face disclosed no particulars of alleged errors of law: "No error of law on the part of the MRT is disclosed by the application or the accompanying affidavit which could possibly grant relief under s 39B of the Judiciary Act.."[19]

4.22 In the remaining case, the Minister was unsuccessful in obtaining summary judgement purely because the immigration department's own computer records were ambiguous, leading Carr J to determine that a triable issue remained on foot.[20]

4.23 In the Federal Magistrates Court, applications for summary dismissal of migration cases appear to have been brought more frequently (and very successfully) by the Minister. While we have not been able to undertake an exhaustive review of those cases, a good cross-section reveals that matters were summarily dismissed in circumstances where:

- An applicant at no time provided to the Court any information whatsoever as to why the orders sought by the applicant should be granted[21];

- An applicant sought to relitigate grounds which had already been dismissed in earlier proceedings[22];

- Material before the court was found to be insufficient to provide an arguable basis for the application[23];

- An application to the Tribunal had not been made within the permissible time frame and there was no discretion in the Tribunal to treat the application as valid[24]; and
- As a matter of law, the MRT had clearly lacked any jurisdiction to review the decision in question.[25]

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[17] Per Emmett J in *NBGZ v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1337 at [10]
[18] Per Hely J in *NACO v Minister for Immigration & Multicultural Affairs* [2002] FCA 474 at [13]
[19] Per Hely J in *Niu v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 654 at [17]
[20] *Xie v Immigration Department* [1999] FCA 365 at [22]
[21] *See SZAXN v Minister for Immigration* [2003] FMCA 560, *Ahmad v Minister for Immigration* [2004] FMCA 376, *SZBMN v Minister for Immigration* [2005] FMCA 116
[22] See *MZWJE v Minister for Immigration* [2005] FMCA 1090, SZDNU *v Minister for Immigration* [2004] FMCA 884, *SZCVO v Minister for Immigration* [2004] FMCA 603
[23] See *M120 v Minister for Immigration* [2004] FMCA 335
[24] See *E Chhuon v Minister for Immigration* [2004] FMCA 72

4.24 In our submission, the cases profiled above demonstrate that the existing summary judgment powers of the courts operate extremely effectively to dispose of vexatious and grossly unmeritorious proceedings. Since the language of the relevant provisions in the *Federal Court Rules* is identical to that in the *Federal Magistrates Court Rules*, there is every reason to believe that the Minister would be equally successful in having comparable actions summarily dealt with by the Federal Court.

4.25 The government asserts that the courts need "greater flexibility" to dismiss cases summarily, and yet it cannot adduce any evidence to show that the courts have been frustrated or hampered by their existing powers. The Minister cannot point to a string of failed attempts to have the courts summarily dispose of cases which ultimately proved unmeritorious. To the contrary, the Minister has barely attempted to use the existing provisions, despite enjoying high rates of success whenever summary dismissal is pursued.

4.26 It is, in our submission, the apparent under-utilisation of the existing summary dismissal procedures - rather than any inadequacy in the powers themselves - which has contributed to the problem of grossly unmeritorious cases proceeding to a full hearing.

Our position

4.27 In short, if the government contends that the courts' existing powers of summary dismissal need to be widened and made more "flexible", it must:

(d) Specifically identify the types of cases it intends to target (which clearly go beyond those summarised above);

(e) Demonstrate why such cases would not meet the current requirements for summary dismissal; and

(f) Justify how the interests of justice are served by having such cases disposed of without the benefit of a full hearing.

4.28 Until it can do so, those parts of the bill which introduce new powers of summary dismissal should be rejected.

5. LIABILITY FOR LEGAL COSTS

5.1 Following on from the proposed extension of summary judgment powers is the introduction of a new Part 8B to the MA. Unlike summary dismissal, these provisions apply only to migration litigation. In essence, the new Part 8 sets up a scheme of personal liability for legal costs against persons who "[encourage] the initiation or continuation of unmeritorious migration litigation"[26].

5.2 We will not reproduce the new Part in its entirety, however, the key provisions are as follows:

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[25] See *Chen v Minister for Immigration* [2004] FMCA 860
[26] See Explanatory Memorandum to the bill at p.2

486E Obligation where there is no reasonable prospect of success

(1) A person must not encourage another person (the ***litigant***) to commence or continue migration litigation in a court if:

(a) the migration litigation has no reasonable prospect of success; and

(b) either:

(i) the person does not give proper consideration to the prospects of success of the migration litigation; or

(ii) a purpose in commencing or continuing the migration litigation is unrelated to the objectives which the court process is designed to achieve.

(2) For the purposes of this section, migration litigation need not be:

(a) hopeless; or

(b) bound to fail;

for it to have no reasonable prospect of success.

(3) This section applies despite any obligation that the person may have to act in accordance with the instructions or wishes of the litigant.

486F Cost orders

(1) If a person acts in contravention of section 486E, the court in which the migration litigation is commenced or continued may make one or more of the following orders:

(a) an order that the person pay a party to the migration litigation (other than the litigant), the costs incurred by that party because of the commencement or continuation of the migration litigation;

…

(2) If the court, at the time of giving judgment on the substantive issues in the migration litigation, finds that the migration litigation had no reasonable prospect of success, the court must consider whether an order under this section should be made.

(3) An order under this section may be made:

(a) on the motion of the court; or

(b) on the application of a party to the migration litigation.

…….

5.3 The proposed scheme creates an alarming threat for lawyers acting in refugee and migration cases. We are particularly concerned at:

- The scheme's potential to act as a disincentive for members of the profession to act in refuge and migration cases, particularly on a pro bono basis; and

- The extent to which the amendments will adversely impact upon the capacity of the community legal services sector to provide advice and assistance in litigious migration cases.

5.4 The language and intent of the new Part 8B are fraught with ambiguity, and raise serious concerns.

"No reasonable prospects of success"

5.5 The proposed s.486E duplicates the definition of "reasonable prospects of success" contained in the new summary judgment powers discussed above, with all the attenuate uncertainty arising from that terminology. Under the section, it is

not enough that the litigation has some prospects of success. The difficulty will be in relation to the frequent cases where a practitioner forms the opinion that there are prospects of success, but that it is more likely than not that the application will fail, or where it is difficult to say what the outcome will be. We are certainly aware of cases where, for good reason, practitioners considered their clients had a reasonably strong case, but who subsequently found flaws in their arguments exposed by the arguments of their opponent or the reasoning of a judge.

5.6 It is difficult to know how lawyers will be able to advise and otherwise act in many migration cases without the fear of exposure to a costs order, despite having a genuine belief that the litigation has reasonable prospects of success. Only recently, in *D'Orta Ekenaike v. Victoria Legal Aid,* McHugh J noted that:

> "The administration of justice demands fearless and independent advocates who are not hampered in the discharge of their role by the need to consider whether their conduct might be actionable."[27]

5.7 A lawyer's view that a case that has reasonable prospects of success may vary significantly from the view of a Federal Magistrate who has the advantage of argument from both sides and who is considering the merits of the case in retrospect.

5.8 The great irony, and tragedy, of the proposed scheme is that it will discourage representation in borderline or difficult cases – *the very cases that most require skilled advocacy* – and achieve very little in the way of reducing grossly unmeritorious litigation, given that our analysis of a large number of cases reveals the overwhelming majority of applicants in unmeritorious cases are self-represented.

5.9 In our submission, the scheme as currently proposed has considerable potential to deprive deserving applicants of access to legal representation and assistance, without any significant corresponding reduction in problem litigation. The undesirability of such a situation was recently reflected upon by a member of the House of Lords in *Medcalf v Mardell*[28]*:*

> "Unpopular and seemingly unmeritorious litigants must be capable of being represented without the advocate being penalized or harassed, whether by the executive, the judiciary or by anyone else. Similarly, situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest."

"Proper consideration to the prospects of success"

5.10 Section 486E(1)(b)(i) raises equally problematic concerns. A person will only be in breach of the obligation not to encourage "unmeritorious" litigation if they do not give "proper consideration to the prospects of success". A lawyer will only be able to counter this proposition by adducing evidence - oral or written - of the actual consideration they gave to a case. Accordingly, a lawyer who wishes to

[27] *D'Orta Ekenaike v. Victoria Legal* Aid [2005] HCA 12 per McHugh J at [192]
[28] *Medcalf v Mardell* [2002] UKHL 27, 27 June 2002, [52] per Lord Hobhouse.

escape culpability under s.486E will be compelled to violate legal professional privilege. The inevitability of such action is clearly contemplated by s.486H.

5.11 In the case of *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer C* [29], seven justices of the High Court stressed that legal professional privilege is not merely a rule of substantive law - it is an important common law right or immunity. As Kirby J stated:

> "[85] …In so far as this Court has dealt with the topic of legal professional privilege…it has consistently emphasised the importance of the privilege as a basic doctrine of the law and a 'practical guarantee of fundamental rights', not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings. It has been increasingly accepted that legal professional privilege is an important civil right to be safeguarded by the law. Of course, derogations appropriate to the needs of a democratic society may be contemplated. However, vigilance is required against accidental and unintended erosions of the right.
>
> [86] Legal professional privilege is also an important human right deserving of special protection for that reason…."

5.12 The High Court's emphasis on the special nature of legal professional privilege stems from the negative impact which an erosion of privilege has on the nature of advice lawyers give to their clients, and on the willingness of clients to speak frankly and openly with their lawyers. It is not, in our submission, a protection which should be dispensed with lightly, particularly when the benefits of doing so are dubious at best.

5.13 A further difficulty with s.486E(1)(b)(i) is that the Explanatory Memorandum at [55] states that the provision is only intended to target advisers who "know or should have known" that a case could not succeed. Is the provision aimed purely at advisers who act *mala fides*, or is it also intended to capture incompetence? Will an adviser's bona fide opinion as to the prospects of a case - even if the court disagrees with it - be sufficient to take the adviser outside the scope of the section?

Time of application

5.14 It is important to note that the potential liability for costs created by s.486F is not limited to matters which have been summarily dismissed. This is implicitly acknowledged by s.486F(2). Accordingly, ss.486E and 486F together contemplate and permit a scenario where the Minister does not feel a case warrants summary dismissal - and thus no motion for same is brought - and yet, having ultimately secured a judgment in her favour, the Minister can seek to have a decision about summary dismissal made retrospectively with the benefit of hindsight. If, prior to a full hearing, the Minister was reluctant to argue that a case had no reasonable prospects of success, how can the government fairly penalise the other party's lawyer for being equally circumspect?

[29] *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer C* [2002] HCA 49

5.15 Furthermore, notwithstanding the government's assurances that the Commonwealth is subject to a requirement to act as a "model litigant"[30], it would be unsurprising if the Minister routinely made applications for costs against lawyers pursuant to the proposed clause 486F(3) whenever an application is dismissed, particularly against lawyers who regularly appear in migration cases and who may act in some cases that have political undertones. There is no sanction against a party making an unmeritorious application for costs against a lawyer:

> "Applications involving attacks on the professional conduct of the opposing lawyers could become rather too tempting an option, particularly for well-funded litigants. And a lawyer who is prepared to take on a speculative action, perhaps one which appears to have some real justice, might be unduly timorous if the risk run is not merely non-payment of the speculative lawyer's costs, but also an order that the lawyer pay personally the costs of the winning side."[31]

Certification

5.16 The new s.486I provides that a lawyer must not commence migration litigation unless the lawyer certifies in writing that there are reasonable grounds for believing that the proceedings have reasonable prospects of success. Again, the Explanatory Memorandum assures us at [74] that:

> "This certification requirement is similar to the requirement for certification under the legislation in other jurisdictions, such as under Part 11, Division 5C of the NSW Legal Profession Act 1987 in relation to a claim or defence of a claim for damages. Court Rules may also require lawyers to certify that pleadings have a proper basis (see eg Federal Court Rules, Order 11, rule 1B)."

We will look at those other provisions later in this submission. For the moment, it is sufficient to point out that neither of these examples exist in the legislative context of a broadened (and ambiguous) summary dismissal jurisdiction.

5.17 The proposed legislation does not appear to contemplate the scenario where a lawyer's view of the proceedings changes subsequent to giving the certification. For example, *particularly if strict time limits are imposed*, migration proceedings must often be commenced prior to an applicant's file becoming available under Freedom of Information legislation, and before a transcript of tribunal proceedings can be prepared. It is quite possible that a lawyer's view of the merits of an application will change throughout the progress of the case as more information comes to light. If a client's case is perceived to weaken, will the lawyer be obliged to withdraw their representation, notwithstanding the resulting prejudice to the client? Does the lawyer have to withdraw the certification previously given? Again, we are concerned that the effect of the amendments will be to discourage the availability of legal representation and assistance at least at the initial stages of court proceedings, in situations where a lawyer has not previously acted for the applicant. The potential for manifest injustice to occur,

[30] See Explanatory Memorandum to the bill at [64] to [65]
[31] *Wasted Costs Orders Against Lawyers in Australia*, Hon. Bill Pincus QC and Linda Haller, unpublished paper

and for the courts to be increasingly burdened with self-represented applicants, is self-obvious.

5.18 There will be many situations in which an application will not have reasonable prospects of success, but where the litigation is nevertheless justified. For example, under the proposed amendments most applications will have to be brought in the Federal Magistrates Court. If a point has been decided by a single judge of the Federal Court then the application must fail before the Federal Magistrate, no matter how dubious may be the reasoning of the judge. There have been cases in which even the High Court has changed its mind, but where one party was bound to fail at all levels up to the High Court. The recent High Court decision of *NAGV and NAGW of 2002 v MIMIA*[32], which overturned literally hundreds of Federal Court decisions, amply demonstrates that point. No lawyer will be able to give the certification required in s.486I that litigation has a reasonable prospect of success in such a case. As a result, it is quite possible that a consequence of the legislation will be to stymie jurisprudential development in refugee and migration law.

5.19 In commenting upon the effect of provisions in NSW legislation which impose liability upon lawyers for costs in actions which have no reasonable prospects of success, Messrs Goudkamp observed:

> "… it seems likely that the prohibition will effectively bring judicial reconsideration of existing precedents pertaining to damages to an end… For instance, how often will claims be commenced in the face of an unfavourable precedent even though there is some chance of a favourable development of the law, perhaps only after an appeal to the High Court?"[33]

"Persons" who "encourage", "commence" or "continue"

5.20 The breadth of application of s.486E is staggering. The obligation imposed by the section is not limited to lawyers on the record in court proceedings. It will extend to "advice only" services, no matter how preliminary. It is not even limited to lawyers (apart from the ban on recovering professional fees). How far is the net to be thrown? Will the obligation extend to interpreters and translators who assist with the preparation of court documents? Will it catch community groups who raise funds to assist with litigation costs? Will it make an employee of a legal service or a law firm personally responsible for undertaking work for which they have been directed to perform by their employer.

5.21 The intended reach of the provisions to lawyers others than those on the record in the litigation is explicitly acknowledged at [57] of the Explanatory Memorandum to the bill, which speaks of enabling the courts to make a personal costs order against an adviser "promoting litigation behind the scenes". How will the courts establish whether someone "promoted litigation behind the scenes"? Will a court,

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[32] *NAGV and NAGW of 2002 v MIMIA* [2005] HCA 6

[33] Thomas Goudkamp and James Goudkamp, *An Outline of the Civil Liability Act 2002*, August 2002 *Law Society Journal* 46, 48. Similar arguments were made in submissions referred to in Louis Schetzer and Judith Henderson, *Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*, Law and Justice Foundation of New South Wales, August 2003, 43.

or the Minister, be interrogating unsuccessful applicants about the legal advice or assistance they received in relation to the proceedings?

5.22 An example which highlights the potential injustice of the scheme is the practice of some community legal centres - which may not have the resources to actually represent people in litigation - to nevertheless provide self-represented applicants with some legal assistance, such as reviewing pleadings and affidavits, or giving general advice on court procedure. The amendments proposed by the bill will make this practice extremely risky unless the centre concerned first undertakes a complete review of all material in relation to the case, and satisfies itself that the litigation has reasonable prospects of success. This is virtually impossible where telephone advice is given which may be the only way in which many people in regional areas can access specialist migration advice. This can only lead to a decrease in the level of legal assistance provided to applicants, which in turn will impact upon the quality of material available to the courts when making decisions.

5.23 The situation is made even more uncertain by the legislation's adoption of the term "encourage" in relation to migration litigation. What type of activity constitutes encouragement? Will it include providing people with court forms and assisting them to prepare fee waiver applications?

"Comparable" jurisdictions

5.24 Finally, as noted in 5.16, in the Explanatory Memorandum at [75] the government draws comparisons between certain provisions in the new Part 8B of the MA and Division 5C of the *NSW Legal Profession Act 1987* (which is limited to claims or defence of a claim for damages). Although the NSW legislation also provides for costs orders against lawyers in actions without reasonable prospects of success, the comparison is not entirely appropriate for the following reasons:

- The NSW legislation does not utilise the broadened concept of unmeritorious claims which Part 8B seeks to introduce. Rather, it adopts the traditional, and well understood doctrine of a case being hopeless or bound to fail; and

- Section 198K of that Act specifically excludes preliminary advice work from the scope of Division 5C.

5.25 Even then, the NSW Act has been controversial and provoked Barrett J recently to warn:

> "… the *Legal Profession Act* should not, in my opinion, be presumed to intend that lawyers practising in New South Wales courts must boycott every claimant with a weak case. A statutory provision denying to the community legal services in a particular class of litigation cannot be intended to stifle genuine but problematic cases. Nor do I see the statutory provisions as intended to expose a lawyer to the prospect of personal liability for costs in every case in which a court, having heard all the evidence and argument, comes to a conclusion showing that his or her client's case was not as strong as may have appeared at the outset to be.

> The legislation is not meant to be an instrument of intimidation, so far as lawyers are concerned."[34]

Our position

5.26 There is a lot more that can be said about the insidious consequences of the proposed provisions, including that they cut across the "cab rank rule" for barristers and create a conflict of interest between lawyer and client whenever the Minister seeks a costs order against the lawyer. The provisions are highly ambiguous, potentially far-reaching, and have significant potential to decrease the community's access to quality and specialised legal advice in deserving cases.

5.27 We are strongly of the view that the new Part 8B to the MA should be rejected in its entirety.

6. CONCLUSION

6.1 We again express our disappointment that, in seeking to address the perceived problem of unmeritorious litigation, the government has ignored the structural and systemic issues which contribute to the problem. Instead, the government has increased barriers to accessing the judicial system, and introduced a draconian system of punishing lawyers.

6.2 The provisions relating to summary dismissal and personal liability for costs are highly ambiguous, needlessly broad, and have significant potential to discourage lawyers from representing and assisting deserving applicants with complex or uncertain cases, particularly when legal services are required on a pro bono basis.

6.3 We urge the committee to reject the bill in its current form.

Yours faithfully

Nitra Kidson
RAILS Project coordinator, QPILCH

Robert Lachowicz
Coordinator, SBICLS

This submission was prepared with the assistance of Daryl Rangiah (Barrister-at-law) and Linda Haller (Lecturer, Centre for Public, International and Comparative Law, TC Beirne School of Law, University of Queensland)

Their contributions are acknowledged and appreciated.

[34] *Degiorgio v Dunn* (No 2) [2005] NSWSC 3 per Barrett J at [27]

SCHEDULE A

Existing summary dismissal provisions

HIGH COURT RULES 2004

27.09 Summary disposition

……..

27.09.4 Where a proceeding generally, or any claim in a proceeding:

(a) does not disclose a cause of action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the Court

the Court or a Justice may stay the proceeding or a claim made in the proceeding or may give judgment in the proceeding or in relation to a claim made in the proceeding.

27.09.5 Where a pleading:

(a) does not disclose a cause of action or defence;

(b) is scandalous, frivolous or vexatious;

(c) may prejudice, embarrass or delay the fair trial of the proceedings; or

(d) is otherwise an abuse of the process of the Court;

the Court or a Justice may order the whole or part of the pleading be struck out or amended.

27.09.6 On application by a defendant who has filed an appearance the Court or a Justice may at any time give judgment for that defendant against the plaintiff if the defendant has a good defence on the merits.

27.09.7 Where a plaintiff, being required to file a Statement of Claim, fails to do so the Court or a Justice may order that the proceeding is dismissed for want of prosecution.

FEDERAL COURT RULES

ORDER 20 RULE 1
Summary judgment

(1) Where, in relation to the whole or any part of the applicant's claim for relief, there is evidence of the facts on which the claim or part is based, and:

(a) there is evidence given by the applicant or by some responsible person that, in the belief of the person giving the evidence, the respondent has no defence to the claim or part; or

(b) the respondent's defence discloses no answer to the applicant's claim or part;

the Court may pronounce judgment for the applicant on that claim or part and make such orders as the nature of the case requires.

(2) Where the Court pronounces judgment against a party under this rule, and that party claims relief against the party obtaining the judgment, the Court may stay execution on, or other enforcement of, the judgment until determination of the claim by the party against whom the judgment is directed to be entered.

(3) The Court in any application under this rule may give such directions, whether for amendment of the pleadings or otherwise, as may be thought fit.

ORDER 20 RULE 2
Frivolity

(1) Where in any proceeding it appears to the Court that in relation to the proceeding generally or in relation to any claim for relief in the proceeding:

(a) no reasonable cause of action is disclosed;

(b) the proceeding is frivolous or vexatious; or

(c) the proceeding is an abuse of the process of the Court;

the Court may order that the proceeding be stayed or dismissed generally or in relation to any claim for relief in the proceeding.

(2) The Court may receive evidence on the hearing of an application for an order under subrule (1).

FEDERAL MAGISTRATES COURT RULES 2001

RULE 13.07 Disposal by summary judgment

(1) This rule applies if, in a proceeding:

(a) in relation to the whole or part of a party's claim there is evidence of the facts on which the claim or part is based; and

(b) either:

(i) there is evidence given by a party or by some responsible person that the opposing party has no answer to the claim or part; or
(ii) the defence or reply to the claim discloses no answer to the claim or part.

(2) The Court may give judgment on that claim or part and make any orders or directions that the Court considers appropriate.

(3) If the Court gives judgment against a party who claims relief against the party obtaining the judgment, the Court may stay execution on, or other enforcement of, the judgment until determination of that claim.

RULE 13.10 Disposal by summary dismissal

The Court may order that a proceeding be stayed, or dismissed generally or in relation to any claim for relief in the proceeding, if it appears to the Court that:

(a) no reasonable cause of action is disclosed in relation to the proceeding or claim for relief; or

(b) the proceeding or claim for relief is frivolous or vexatious; or

(c) the proceeding or claim for relief is an abuse of the process of the Court.