

# Chapter 2

## Overview of the Bill

2.1 This chapter briefly outlines the main provisions of the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Bill), being amendments to the *Federal Court of Australia Act 1976*, *Family Law Act 1975* and the *Federal Magistrates Act 1999* in respect of:

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

### **Case management**

2.2 The Bill will make changes to the *Federal Court of Australia Act 1976* (Act), amending Part III Division 1 (Original Jurisdiction) and Part VI (General), and inserting new Part VB (Case management in civil proceedings), to strengthen and clarify the case management powers of the Federal Court of Australia (Federal Court).

2.3 The Explanatory Memorandum states that these amendments are aimed at ensuring the proportionate use of public resources in civil proceedings, thereby providing access to justice (defined as the quick, efficient and fair resolution of civil disputes) for all court users.<sup>1</sup>

### ***Original jurisdiction***

2.4 Proposed section 20A will give the Federal Court the power to deal with civil matters without an oral hearing (either with or without the consent of the parties) when exercising its original jurisdiction and if satisfied that:

- the matter is frivolous or vexatious; or
- the issue or issues on which determination of the matter depends have been decided authoritatively in the case law; or
- determination of the matter would not be significantly aided by an oral hearing because:
  - there is no real issue of fact relevant to determination of the matter; and
  - the legal arguments in relation to the matter can be dealt with adequately by written submissions.<sup>2</sup>

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1 Explanatory Memorandum, p. 3.

2 Schedule 1 Item 5

2.5 The Explanatory Memorandum states that this provision will allow the Federal Court to deal with matters 'on the papers' where this will lead to just resolution of a dispute by the quickest, least expensive and most efficient method, consistent with proposed section 37M, which creates an overarching purpose.<sup>3</sup>

***Case management in civil proceedings***

2.6 Schedule 1 Item 6 of the Bill will create new Part VB, dealing with case management in civil proceedings. Its central provision will be proposed section 37M:

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:

(a) according to law; and

(b) as quickly, inexpensively and efficiently as possible.<sup>4</sup>

2.7 The inclusive objectives of the overarching purpose are set out in the Bill:

- the just determination of all proceedings before the Federal Court;
- the efficient use of the judicial and administrative resources available for the purposes of the Federal Court;
- the efficient disposal of the Federal Court's overall caseload;
- the disposal of all proceedings in a timely manner;
- the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.<sup>5</sup>

2.8 These provisions are intended to: assist judges with the confident application of active case management powers; ensure the Federal Court considers broader aims than the interests of justice between the parties; and clarify that case management is a relevant consideration in the attainment of justice. They are also intended to remind litigants that costs should be proportionate to the matter in dispute, particularly in so-called mega-litigation.<sup>6</sup>

2.9 Proposed section 37N will impose a duty on parties to civil proceedings, and their lawyers, to conduct the proceeding (including negotiations for settlement of the dispute) in a way that is consistent with the overarching purpose:

The duty is important to ensure that everyone involved in litigation is focussing on the real issues in dispute and resolving them as early and quickly as possible. If the parties conduct settlement negotiations and/or

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3 Explanatory Memorandum, p. 8.

4 Proposed subsection 37M(1); and Schedule 1 Item 4

5 Proposed subsection 37M(2)

6 Explanatory Memorandum, pp 4 & 9. Also, see *State of Queensland v J L Holdings Pty Ltd* (1997) 141 ALR 353 which the EM states has created a restrictive judicial interpretation of what is in the interests of justice, and has made judges more cautious about considering the need to effectively and efficiently manage the court's overall workload: see p. 3.

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participate in alternative dispute resolution with this goal in mind, they may not need to proceed to a hearing.<sup>7</sup>

2.10 The Federal Court must take into account any failure to comply with the statutory duty when exercising its discretion to award costs in a civil proceeding. The Explanatory Memorandum provides examples of the type of conduct that the Federal Court might consider to be a breach of this duty:

- unreasonably refusing to participate in conciliation, mediation, arbitration or other alternative dispute resolution opportunities;
- failing to act in good faith in attempting to resolve or narrow issues in the proceedings;
- unreasonably rejecting an offer of settlement of part or whole of the proceedings; or
- pursuing issues in the proceeding that had no reasonable prospect of success, including vexatious or frivolous issues.<sup>8</sup>

2.11 A personal costs order may also be made against a lawyer who, when required by the Federal Court, fails to provide his or her client with an estimate of the likely duration of the proceeding, or part thereof, and the likely amount of costs in the proceeding, including party-party costs.<sup>9</sup>

2.12 The Bill will give the Federal Court discretion to make directions about the practice and procedures to be followed in civil proceedings. A non-exclusive list of possible directions is set out in proposed subsection 37P(3), for example: setting time limits for the doing of anything; providing for submissions to be made in writing; limiting the length of submissions; or referring a matter to alternative dispute resolution.

2.13 Failure to comply with a Federal Court direction may result in such order or further direction as the Federal Court thinks appropriate, for example:

- dismissal of the proceeding in whole or in part;
- striking out, amending or limiting any part of a party's claim or defence;
- disallowance or rejection of evidence;
- awarding costs against a party;
- ordering that costs awarded against a party are assessed on an indemnity basis or otherwise.<sup>10</sup>

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7 Explanatory Memorandum, p. 10. Also, see Schedule 1 Item 3

8 Explanatory Memorandum, p. 11; and proposed subsection 37N(4)

9 Proposed subsections 37N(2) & (5)

10 Proposed subsections 37P(5) & (6). The Explanatory Memorandum notes that directions under proposed section 37P are likely to be made at the interlocutory stage of proceedings, and as such, cannot be appealed without leave: see section 24.

2.14 In concluding remarks, the Explanatory Memorandum refers to similar case management legislation implemented in NSW (*Civil Procedure Act 2005 (NSW)*), and notes that:

The present amendments will complement the Court's existing use of the docket system (where one judge is assigned to manage each case) and will improve access to justice.<sup>11</sup>

### **General**

2.15 Section 43 of the Act concerns the types of costs orders that may be made by the Federal Court (excluding criminal law proceedings). The Bill proposes to amend that provision, inserting a new subsection (3) to specify the extent of this judicial discretion, including:

- making an award of costs at any stage in a proceeding, whether before, during or after any hearing or trial;
- making different awards of costs in relation to different parts of the proceeding;
- ordering the parties to bear costs in specified proportions;
- awarding a party costs in a specified sum;
- awarding costs in favour of or against a party whether or not the party is successful in the proceeding;
- ordering a party's lawyer to bear costs personally;
- ordering that costs awarded against a party are to be assessed on an indemnity basis or otherwise.<sup>12</sup>

2.16 These amendments will codify various judicial powers relating to costs, either at law or under the Rules of Court, for example, Order 62 Rule 9 regarding the awarding of costs against a lawyer personally.

2.17 Under the Bill, section 49 of the Act will be repealed and replaced. The new section 49 would allow, in certain circumstances, reserved judgements in both criminal and civil matters to be made public by a judge other than the judge who presided over the proceeding:

The purpose of this amendment is to avoid unnecessary cost, delay and inconvenience that may arise where a Judge is not able to deliver his or her judgment at a time and date that is otherwise convenient to the parties.<sup>13</sup>

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11 Explanatory Memorandum, p. 4.

12 Proposed subsection 43(3). Also, see proposed subsections 37N(4)-(5) regarding costs for breach of the duty to act consistently with the overarching purpose and proposed paragraphs 37P(6)(d)-(e), regarding costs for failure to comply with a direction.

13 Explanatory Memorandum, p. 13. Also, see Schedule 1 Item 8; and section 75 of the *Federal Magistrates Act 1999*

2.18 The Bill will also repeal and replace subsection 53A(1), allowing the Federal Court to refer proceedings, or any part of them or any matter arising out of them, to an arbitrator, mediator or suitable person for resolution by an alternative dispute resolution process. Alternative dispute resolution might include processes such as conciliation, neutral evaluation or case appraisal. Only referrals to arbitration, which effect binding decisions require the consent of the parties.<sup>14</sup>

### **Jurisdiction and appeals**

2.19 The Bill will also amend Part III Division 1 (Original Jurisdiction) and Division 2 (Appellate and related Jurisdiction), and Part IV (Appeals to the High Court) of the Act, to streamline the Federal Court's appeals pathways for civil proceedings, and provide the Federal Court with greater flexibility in dealing with appeals and related applications.

#### ***Original jurisdiction***

2.20 At present, subsection 20(2) requires interlocutory matters, as specified in subsections 20(3) and 20(5), coming before the Federal Court from a tribunal or authority to be heard by a Full Court.

2.21 Proposed subsection 20(2A) will effect the necessary changes to allow:

...the Court to decide if one of the interlocutory matters...would be more appropriately dealt with by a single Judge, rather than convening a Full Court for a minor procedural matter.<sup>15</sup>

2.22 The Explanatory Memorandum emphasises that the Federal Court alone will decide whether an application for an order is to be heard by a single judge or the Full Court,<sup>16</sup> a theme repeated several times in relation to other provisions of the Bill.

2.23 The Act presently allows a single judge or Full Court to exercise certain powers in relation to an appeal from an authority or tribunal under subsection 20(2). The Bill proposes to insert a reference to subsection 20(1A), allowing the provision to apply to all matters in the Federal Court's original jurisdiction determinable by the Full Court.<sup>17</sup>

2.24 In exercising its original jurisdiction, the Act gives the Federal Court certain powers, for example: joining or removing a party; or making an order that an appeal be dismissed for want of prosecution. Schedule 2 Items 7 & 8 will enable a single

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14 Schedule 1 Items 1, 9 & 10

15 Explanatory Memorandum, p. 14. Also, see *Defence Force Retirement and Death Benefits Authority v Lokan* (QUD 288 of 2007). Note that minor amendments are also made to subsection 20(2) by Schedule 2 Item 1.

16 Explanatory Memorandum, pp 14-15. Also, see Schedule 2 Items 3 & 4 I; and *Thomas Borthwick & Sons (Pacific Holdings) Ltd v Trade Practices Commission* (1988) 18 FCR. A similar amendment is made to subsections 20(5), 25(2), (2B) & (5) & 26(2) by Schedule 2 Items 10, 18, 23, 25 and 28.

17 Schedule 2 Item 6. Also, see *Defence Force Retirement and Death Benefits Authority v Lokan* (QUD 288 of 2007)

judge sitting in Chambers or in open court, or a Full Court, to give directions in its original jurisdiction under proposed subsection 37P(2). This is in addition to the Federal Court's generic ability to give directions about conduct of a matter.<sup>18</sup>

### ***Appellate and related jurisdiction***

2.25 Paragraph 24(1)(a) of the Act provides that the Full Court has jurisdiction to hear and determine appeals from the judgements of a single judge exercising either original or appellate jurisdiction. The Bill will amend this provision by limiting the avenue of appeal to judgements of a single judge exercising original jurisdiction only:

This ensures that the appeal pathway for single Judge decision in the appellate jurisdiction is consistent with the appeal pathway for Full Court Decisions, as there is no avenue for decisions of a Full Court to be appealed within the Court. This amendment is intended to reduce the workload of the Court by removing an unnecessary layer of appeal from decisions of single Judges exercising appellate jurisdiction.<sup>19</sup>

2.26 There will still be an avenue of appeal from judgements of a single judge exercising appellate jurisdiction. The Bill will amend Part IV subsection 33(2) of the Act to provide that these judgements can be appealed to the High Court of Australia with special leave to appeal.<sup>20</sup>

2.27 Proposed new subsection 24(1AA) will replace section 24(1AAA), providing that, in relation to certain interlocutory decisions, there is no appeal to the Full Court from the judgement of a single judge exercising original jurisdiction:

These interlocutory matters involve minor procedural decisions for which there should be no avenue of appeal. The removal of the right to appeal for these types of matters will ensure the efficient administration of justice by reducing delays caused by appeals from these decisions.<sup>21</sup>

2.28 Schedule 2 Item 14 of the Bill inserts four new subsections, the cumulative effect of which is to clarify interlocutory judgments appeal rights and reduce costs currently incurred in litigating these matters.<sup>22</sup>

2.29 At present, there is a statutory presumption that appeals from the Federal Magistrates Court, excepting migration judgments, are to be heard by the Full Court, unless the Chief Justice considers that it is appropriate for the appeal to be heard by a single judge. The Bill will reverse this presumption, reflecting 'current practice', and

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18 Explanatory Memorandum, p. 16; and Schedule 2 Item 9. Note: the Explanatory Memorandum erroneously refers to Schedule 2 Item 8 as the proposed insertion of new paragraph 20(5)(da). There are similar provisions in the Bill for the Federal Court's appellate jurisdiction: see Schedule 2 Items 21 & 22; and subsection 25(2B).

19 Explanatory Memorandum, p. 17; and Schedule 2 Item 12. This amendment renders subsection 24(1AAA) superfluous.

20 Schedule 2 Items 29-31

21 Explanatory Memorandum, p. 18; and Schedule 2 Item 13 of the Bill.

22 Explanatory Memorandum, p. 18; and Schedule 2 Item 14 of the Bill. Also, see *Jefferson Ford Pty Ltd v Ford Motor Company of Australia Limited* [2008] FCAFC 60

omit the word 'migration', allowing a single judge to hear and determine all appeals from the Federal Magistrates Court, unless otherwise appropriate.<sup>23</sup>

2.30 The Act provides that a single judge can state any case or reserve any question concerning a matter with respect to which an appeal would lie to the Full Court, and the Full Court has jurisdiction to hear and determine the case or question. Under Schedule 1 Item 12 of the Bill, this would only apply to single judges exercising original jurisdiction. Schedule 2 Item 26 therefore 'rectifies' subsection 25(6) of the Act, providing:

...that a single Judge can refer a difficult question to a Full Court in all circumstances, even when there is no avenue of appeal to the Full Court. This will assist the Court in dealing with novel cases and will provide an important safeguard in relation to the amendments being made by item 12...This also addresses the existing inconsistency where single Judge decisions in the appellate jurisdiction cannot be appealed to the High Court, though Full Court decisions in the appellate jurisdiction can be appealed.<sup>24</sup>

2.31 In general, interlocutory decisions of a Full Court in the Federal Court's original jurisdiction are appealable with leave to the High Court of Australia. However, the Explanatory Memorandum states that a few interlocutory decisions in the original jurisdiction 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.<sup>25</sup>

### ***Appeals to the High Court of Australia***

2.32 Schedule 2 Item 32 of the Bill will amend section 33 of the Act, inserting three new subsections to provide that there is no appeal to the High Court of Australia from a number of specified interlocutory decisions of the Full Court in the Federal Court's original jurisdiction, and both a single judge and the Full Court in the Federal Court's appellate jurisdiction:

- proposed subsection 33(4A) specifies the relevant interlocutory decisions for the Federal Court's original jurisdiction;
- proposed subsection 33(4B) specifies the relevant interlocutory decisions for the Federal Court's appellate jurisdiction; and
- proposed subsection 33(4C) allows interlocutory decisions made in the course of a matter to be listed as one of the grounds in an application for special leave to appeal the Federal Court's final decision.<sup>26</sup>

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23 Schedule 2 Items 15 & 16; and Explanatory Memorandum, p. 19. Also, see subsections 25(1A) & 25 (1AA).

24 Explanatory Memorandum, pp 22-23. Also, see subsection 25(6) of the Act and Schedule 2 Item 26 of the Bill. This amendment renders part subsections 33(2) & (4) superfluous.

25 Explanatory Memorandum, p. 24. These comments apply equally to the Court's appellate jurisdiction.

2.33 Schedule 2 amendments will apply in relation to proceedings, appeals and related applications, and cases stated or questions reserved commenced on or after commencement of Schedule 2 of the Bill.<sup>27</sup>

### **Judicial responsibilities**

2.34 The Bill will amend also the Act, the *Family Law Act 1975* and the *Federal Magistrates Act 1999* to clarify the powers of their judicial officers, especially the heads of each federal court.

#### ***Family Law Act 1975***

2.35 The Bill will amend Part IV Division 2 (the Family Court of Australia) of the *Family Law Act 1976*.

2.36 Subsection 21B of the *Family Law Act 1976* currently provides that the Chief Judge is responsible for ensuring the orderly and expeditious discharge of the business of the Family Court of Australia. Schedule 3 Item I of the Bill will 'broaden' this responsibility to also ensure the effective discharge of the Family Court of Australia's business:

The purpose of this amendment is to make it clear that it is the responsibility of the Chief Judge to manage issues that impact upon the effective running of the Court, which might include judicial performance issues, in order to ensure that the resources of the Court are used and allocated appropriately and that Judges can manage their workloads and deliver judgments in a timely manner.<sup>28</sup>

2.37 Part of subsection 21B will be omitted by the Bill, and replaced by Schedule 3 Item 3, which will insert proposed subsection 21B(1A) into the *Family Law Act 1976*. This subsection would elaborate upon the general responsibilities of the Chief Judge by providing examples of what actions the Chief Judge may take to fulfil these responsibilities, such as: assigning particular caseloads, classes of cases or functions to particular judges; temporarily restricting a judge to non-sitting duties; or ensuring appropriate access to annual health assessments, short-term counselling services, and judicial education:

This [latter] amendment supports and encourages the retention of systems that are already in place at the Court and is flexible enough to allow the Chief Judge to ensure that the type of assistance that best meets a Judge's needs is available.<sup>29</sup>

2.38 The Bill will insert two subsections into section 21B (Arrangement of the business of the Court) of the *Family Law Act 1976*:

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26 Schedule 2 Item 32

27 Schedule 2 Item 33

28 Explanatory Memorandum, p. 25; and Schedule 3 Item

29 The Explanatory Memorandum provides examples of what non-sitting duties might constitute: see pp 26-27.



- proposed subsection 21B(4) clarifies that in exercising, or assisting in the exercise of, the functions or powers set out in new paragraph 21B(1A)(a) the Chief Judge and the Deputy Chief Judge will have the same protection and immunity as he or she has in judicial proceedings of the Family Court of Australia; and
- proposed subsection 21B(5) will amend the application of section 39B of the *Judiciary Act 1903*, providing that the Federal Court will not have jurisdiction with respect to the specified powers in proposed subsection 21B(1A) of the *Family Law Act 1976*.<sup>30</sup>

2.39 The Bill will also insert subsections into section 22 (appointment, removal and resignation of judges) of the *Family Law Act 1976*, including:

- 22(2AAA), which will require a commission of appointment to assign a judge to a particular location;<sup>31</sup> and
- 22(2AAB), which will clarify that the Chief Judge, in deciding whether to consent to a judge sitting in another location on a permanent basis, will have the same protection and immunity as he or she has in judicial proceedings of the Family Court of Australia.

### ***Federal Court of Australia Act 1976***

2.40 The Bill will amend Part 2 Division 1 (Constitution of the Court) of the Act.

2.41 Schedule 3 Items 7, 8, 9, and 10 propose similar amendments to the Act, as for Schedule 3 Items 1, 2, 3, 5 and 6 in the *Family Law Act 1976* (see paras 2.35-2.39 above).

### ***Federal Magistrates Act 1999***

2.42 The Bill will amend Part III (Jurisdiction of the Federal Magistrates Court) of the *Federal Magistrates Act 1999*.

2.43 Schedule 3 Items 11, 12 and 13 also propose similar amendments to the *Federal Magistrates Act 1999*, as for Schedule 3 Items 1, 3 and 5 in the *Family Law Act 1976* (see paras 2.35-2.39 above).

2.44 The amendments to be made by Schedule 3 of the Bill, apart from the assignment of judges to particular locations, apply in relation to judges and federal magistrates whether appointed before or after the commencement of the amendments.<sup>32</sup>

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30 Schedule 3 Item 5. Also, see Schedule 3 Item 6 making similar provision for the Attorney-General and Chief Judge under proposed section 22(2AAA). Section 39 of the *Judiciary Act 1903* provides that the original jurisdiction of the Federal Court of Australia includes jurisdiction with respect to any matter in which a writ of mandamus, prohibition or an injunction is sought against an officer of the Commonwealth.

31 Explanatory Memorandum, p. 28.

32 Schedule 3 Item 14

**Judicial review**

2.45 Schedule 3 Part 2 Item 15 proposes to insert three new paragraphs into Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* excluding certain decisions of the head of court from judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. These exclusions relate, for example to: the assignment of caseloads or functions to particular judges or federal magistrates; the restriction of judges or federal magistrates to non-sitting duties; or decisions about the location at which a judge or federal magistrate will be permanently located:

Any decisions under these provisions still carry the protection inherent in the wording of the relevant enabling section that decisions must be made subject to appropriate consultation. Review by the High Court under section 75(v) of the Constitution will also remain.<sup>33</sup>