The Senate

# Legal and Constitutional Affairs Legislation Committee

## Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 [Provisions]

September 2009

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|---|---|---|
| Suite S1. 61 | Telephone: | (02) 6277 3560 |
| Parliament House | Fax: | (02) 6277 5794 |
| CANBERRA ACT 2600 | Email: | legcon.sen@aph.gov.au |

# TABLE OF CONTENTS

# RECOMMENDATIONS

**Recommendation 1**

**3.90 The committee recommends that the government clarify the operation and purpose of proposed 37N(1) of the *Federal Court of Australia Act 1976* (Schedule 1 item 6 of the Bill).**

**Recommendation 2**

**3.91 The committee recommends that proposed paragraph 24(1AA)(c) of the *Federal Court of Australia Act 1976* (Schedule 2 item 13 paragraph (c) of the Bill) be deleted.**

**Recommendation 3**

**3.92 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.**

# Chapter 1
# Introduction

## Purpose of the Bill

1.1 On 25 June 2009, the Senate referred the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Bill) to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 17 September 2009.

1.2 The Bill amends the *Federal Court of Australia Act 1976*, the *Family Law Act 1975* and the *Federal Magistrates Act 1999*, and makes related amendments to the *Administrative Decisions (Judicial Review) Act 1977*.

1.3 The purpose of the Bill is threefold: to amend the *Federal Court of Australia Act 1976* to strengthen and clarify the case management powers of the Federal Court of Australia (Federal Court), ensuring more efficient civil litigation; to streamline the Federal Court's appeals pathways for civil proceedings; and to clarify the powers of judicial officers in the Federal Court, the Family Court of Australia and the Federal Magistrates Court.

1.4 A key objective of the reforms, as stated in the Explanatory Memorandum, is to effect a cultural change in the conduct of litigation, so that, in addition to the just resolution of disputes, the following considerations are prominent:

- focussing the Federal Court, parties and their lawyers' attention on resolving disputes as quickly and cheaply as possible;
- reducing the costs of litigation;
- allocating resources in proportion to the complexity of the issues in dispute;
- avoiding unnecessary delays; and
- management of the Federal Court's judicial and administrative resources as efficiently as possible.[1]

## Conduct of the inquiry

1.5 The committee advertised its inquiry in *The Australian* on 30 June 2009 and 1 July 2009, and details of the inquiry, the Bill and associated documents were placed on the committee's website from 27 June 2009. The committee also wrote to 74 organisations and individuals inviting written submissions by 31 July 2009.

1.6 The committee received 6 submissions, which are listed in Appendix 1 and available online at http://www.aph.gov.au/senate/committee/legcon_ctte/index.htm.

1.7 The committee held a public hearing in Melbourne on 27 August 2009.

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1 Explanatory Memorandum, p. 3.

1.8 A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the Hansard transcript are available through the internet at http://www.aph.gov.au/hansard.

## Acknowledgement

1.9 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

## Scope of the report

1.10 Chapter 2 provides an overview of the Bill. Chapter 3 discusses the key issues raised in submissions and evidence.

## Notes on references

1.11 References in this report are to individual submissions as received by the committee, not to a bound volume. References to Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard.

# 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.[1]

### *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.[2]

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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.[3]

***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.[4]

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.[5]

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.[6]

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.

participate in alternative dispute resolution with this goal in mind, they may not need to proceed to a hearing.[7]

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.[8]

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.[9]

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.[10]

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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.[11]

***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 an indemnity basis or otherwise.[12]

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.[13]

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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.[14]

## 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.[15]

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,[16] 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.[17]

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 l; 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.[18]

***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.[19]

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.[20]

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.[21]

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.[22]

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.[23]

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.[24]

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.[25]

***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. [26]

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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.[27]

## 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.[28]

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.[29]

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 dues 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*.[30]

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;[31] 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.[32]

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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.[33]

33 Explanatory Memorandum, p. 31; and Schedule 3 Item 15

# Chapter 3
## Key Issues

3.1 During the course of the inquiry, the committee heard that submitters and witnesses broadly supported the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Bill). Particular provisions were nonetheless singled out for comment, and the following key issues are addressed in this chapter:

- Case management:
  - oral hearings;
  - the overarching purpose;
  - the duty to act consistently;
  - practice and procedural directions; and
  - costs orders
- Jurisdiction and appeals:
  - single judge interlocutory decisions in the original jurisdiction
- Judicial responsibilities:
  - temporary restriction to non-sitting duties

### Case management

3.2 Without exception, submitters and witnesses endorsed the concept of case management as a method by which civil proceedings can be made quicker, more efficient and more fairly resolve disputes.

3.3 The Federal Court of Australia (Federal Court) submitted that the relevant amendments – Schedule 1 – will enhance its capacity to manage actively the conduct of civil proceedings,[1] and the Law Council of Australia (Law Council) stated that this important case management role is now well accepted.[2]

3.4 As indicated in the Explanatory Memorandum, the decision of the High Court of Australia (High Court) in *State of Queensland v J L Holdings Pty Ltd* (JL Holdings) provided part of the rationale for the Schedule 1 amendments.[3] During the course of this inquiry, that case was distinguished in another High Court decision, *Aon Risk Services Australia Limited v Australian National University* (Aon).[4]

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1 Federal Court of Australia, *Submission 4*, p. 1

2 Law Council of Australia, *Submission 2*, p. 3.

3 (1997) 141 ALR 353; and Explanatory Memorandum, p. 3.

4 [2009] HCA 27 (5 August 2009)

3.5 The committee notes however the broader rationale for the enhancement of the Federal Court's case management powers, particularly the key objective of effecting a cultural change in the conduct of civil litigation.

3.6 In its evidence, the Federal Court considered that the Bill will support a cultural change by focussing on 'the quick and inexpensive logic as the goal by which all works shall be done':

> You heard in the past many concerns about the costs of the proceedings consuming the value of the issue in dispute or being more than the value of the issue in dispute, and that raised that whole concept about proportionality, that the proceedings ought to be proportional to the issues in dispute. It is that shift which helps and facilitates what I would describe as active case management logic.[5]

3.7 The Federal Court added also that the Bill will send a powerful message from the Parliament on behalf of the Australian community about its expectations as to how the justice system is to operate. At present, the federal courts are publicly funded, and lengthy litigation can 'tie up' these courts' limited resources. The Federal Court testified that:

> If those resources are consumed under the access to justice criteria by a few in very long and tedious proceedings, that will deny access to many because the resources are not available to permit access to all those other people where the resources have been consumed by a few...There is no doubt that the direction that we are taking in terms of focusing on efficient and [in]expensive will provide greater access to many people who probably now are not getting access because (1) it is too slow and (2) it is too expensive for them.[6]

3.8 The Attorney-General's Department (Department) agreed that the Bill will increase access to justice for the Australian community, telling the committee that:

> It has never been the case that parties have an entitlement to Rolls Royce justice. They have an entitlement to justice, and the protections are there for that…The bill does very much put into play how the court deals with your case and his case and her case, and your own assessment of how important your case is will not dictate the carriage of your matter.[7]

3.9 Schedule 1 aims primarily to ensure the proportionate use of public resources in civil proceedings.[8] Most submitters and witnesses broadly supported these amendments but considered certain aspects of Schedule 1 worthy of further

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5 Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 11.

6 Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 11.

7 Mr Matthew Minogue, Assistant Secretary, Justice Improvement Branch, Attorney-General's Department, *Committee Hansard*, Melbourne, 27 August 2009, pp 15, 18 & 21.

8 Explanatory Memorandum, p. 3.

consideration: oral hearings; the overarching purpose; the duty to act consistently; practice and procedural directions; and costs orders.

### *Oral hearings*

3.10 The Bill proposes to 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 of certain conditions.[9]

3.11 Whilst acknowledging that the relevant provision – proposed section 20A – codifies existing powers, the NSW Law Society, Young Lawyers (NSW Young Lawyers) remained concerned with the imprecise nature of the prescribed powers. Its submission questioned whether the Federal Court or a judge can make an order without prior notice to the parties and in circumstances where the parties have not been given an opportunity to make submissions in relation to an order for an oral hearing.

3.12 The NSW Young Lawyers suggested that the Bill be amended to ensure that all parties are aware of the manner in which a section 20A order would be made, and clarify whether parties will be given an opportunity to address the Federal Court or a judge with regard to making of such an order.[10]

### *The overarching purpose*

3.13 The Bill will create an overarching purpose for the civil practice and procedure provisions of the *Federal Court of Australia Act 1976* (Act), that is, the just resolution of disputes according to law in the quickest, most inexpensive and efficient manner as possible.[11]

3.14 The Department urged the committee to bear in mind that the overarching purpose will be the 'touchstone' governing how the powers to be conferred by the Bill are expected to be exercised: 'There is an obligation on both the court and the parties and legal representatives involved in the matter to have regard to that.'[12]

3.15 The Law Council and NSW Young Lawyers considered that the relevant provision – proposed section 37M – will clarify (and strengthen) the Federal Court's powers to case manage actively following the High Court's decision in J L Holdings.[13] As indicated above, this consideration is arguably redundant.

3.16 The Australian Network of Environmental Defender's Offices (ANEDO) argued however that the provision is not responsive to the needs of less well resourced

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9 Proposed section 20A

10 NSW Law Society, Young Lawyers, *Submission 3*, pp 1-2.

11 Proposed section 37M. This principle is similar to subsection 56(1) of the *Civil Procedure Act 2005* (NSW).

12 Mr Philip Kellow, Deputy Registrar, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 9.

13 Law Council of Australia, *Submission 2*, p. 4; and NSW Law Society, Young Lawyers, *Submission 3*, p. 3.

litigants, limiting the Bill's capacity to improve access to justice. ANEDO noted that, in contrast to rule 1.1(2)(c) of the *Civil Procedure Rules* (UK) and section 57(1)(d) of the *Civil Procedure Act 2005* (NSW), the non-exclusive objectives of the overarching purpose contain no reference to the parties' financial resources and/or any imbalance between them.

3.17 ANEDO suggested that proposed section 37M is not appropriate where one party is an individual, small business or small NGO, and recommended that proposed paragraph 37M(2)(e) be amended to make express reference to the financial position of the parties as a relevant factor.[14]

***The duty to act consistently***

3.18 The Bill will impose a duty on parties to civil proceedings, and their lawyers, to conduct the proceedings (including settlement negotiations) in a manner consistent with the overarching purpose (duty).[15]

3.19 Submissions and evidence regarding the relevant provision – proposed section 37N – focussed specifically upon the practical application and cost consequences of the statutory duty, that is, proposed subsections (2), (3) and (5).

*Regarding a party's lawyers*

3.20 The Law Council generally supported the extension of the duty to a party's lawyers – proposed subsection 37N(2) – but cautioned that proposed paragraph 37N(2)(b) does not strike an appropriate balance between the application of the overarching purpose and its public objectives, and the individual rights and objectives of a party.

3.21 Proposed subsection 37N(2) states:

> (2) A party's lawyer must, in the conduct of a civil proceeding before the Court (including negotiations for settlement) on the party's behalf:
>
> (a) take account of the duty imposed on the party by subsection (1); and
>
> (b) assist the party to comply with the duty.

3.22 The Law Council argued that proposed paragraph (b): serves no purpose when a client complies with the duty; but may create conflict where a client partially or wholly rejects his or her lawyer's advice formulated after consideration of the duty:

> The question then arises as to the scope of the obligation upon a legal representative to "assist" a party to comply with its duty in circumstances in which a party chooses to conduct the proceeding in manner which may not be in compliance with the duty imposed upon the client.[16]

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14 Australian Network of Environmental Defender's Offices, *Submission 6*, pp 4-5.

15 Proposed section 37N

16 Law Council of Australia, *Submission 2*, p. 4; and NSW Law Society, Young Lawyers, *Submission 3*, p. 5.

3.23 Similarly, the Cape York Land Council Aboriginal Corporation submitted that such a situation might be complicated by the unique role played by Native Title Representative Bodies, which have additional obligations under native title legislation.

3.24 The Cape York Land Council Aboriginal Corporation suggested that the proposed provision requires further clarification or limitation (to take account of the particular complexities of the native title system), and the Law Council agreed, more broadly, that proposed paragraph (b):

> …ought to be qualified by words such as 'subject to the instructions of the client' so that the section recognises that the duty of the lawyer is to advise the client about it and do what they can, but ultimately the lawyer will not be in breach of that duty if in fact the client gives instructions to act in a different way.[17]

3.25 Alternately, or in addition, the Law Council proposed that the 'vague' and 'general' word 'assist' could be clarified by either adding a paragraph (c) or renumbering subsection 37N(2) with a new paragraph (b): 'Advise the client how to comply with the duty.'[18]

3.26 The Federal Court acknowledged the Law Council's concerns, agreeing with NSW Young Lawyers that the proposed provision has been more positively drafted than analogous state/territory provisions, for example, section 57 of the *Civil Procedures Act* (NSW). The Federal Court opined:

> It may well be that something needs to be done to accommodate those concerns. The danger is not to provide the potential for any wiggle room or abuse of that whereby situations may possibly be constructed where a practitioner never becomes responsible for the conduct because it is always done in accordance with instructions.[19]

3.27 The Department did not consider that the problematic word 'assist' requires definition, and expressly rejected the Law Council's preferred amendment to the Bill (see para 3.24 above):

> The purpose of describing the overarching purpose in terms of both obligations on parties and an obligation to take account of that obligation and to assist the client to comply with that obligation for the lawyers was to make sure that the case management principles were as comprehensive as possible. If the obligation was only on the parties and the lawyer had this get-out-of-jail card, if you like, of being able to say, 'I was instructed to do it a certain way,' it would very much disempower the provisions…Under their professional rules now lawyers already have obligations to assist

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17 Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, pp 3 & 4-5; Law Council of Australia, *Submission 2*, p. 5; and Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 1.

18 Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, p. 5.

19 Mr Philip Kellow, Deputy Registrar, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 10; and NSW Law Society, Young Lawyers, *Submission 3*, p. 4.

> clients to understand their rights and obligations…they are not new issues for them to face.[20]

*Regarding costs orders*

3.28 The Bill will require the Federal Court to take into account any failure to comply with the duty to act consistently with the overarching purpose when exercising its discretion to award costs in a civil proceeding.[21]

3.29 NSW Young Lawyers noted that the relevant provision – proposed subsection 37N(4) – mirrors subsection 56(5) of the *Civil Procedure Act 2005* (NSW), except for its mandatory nature. Its submission argued that a mandatory obligation would:

- unduly increase the time needed to consider and formulate an award of costs, creating a burden on the Federal Court's time; and
- allow parties to make submissions in relation to any perceived breaches of the duty, leading to 'unregulated and possibly unfounded allegations of one party against another party and further drawn out litigation in regards to the award of costs.'[22]

3.30 Similarly, while the Law Council also generally supported proposed subsection 37N(4), it argued that the duty to act to consistently with the overarching purpose should not apply to settlement negotiations (proposed subsection 37N(1), Schedule 1 item 6). These negotiations are normally the subject of settlement or 'without prejudice' privilege. According to the Law Council, the Federal Court's need to enquire into the settlement negotiations could abrogate the settlement privilege, a possibility to which the Law Council was staunchly opposed.[23]

*Regarding personal costs orders*

3.31 The Bill will specifically provide for the making of a personal costs order 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.[24] This is in addition to the Federal Court's general discretion to make costs orders (see para 3.**54** below).

3.32 NSW Young Lawyers submitted that the relevant provision – proposed subsection 37N(3) – would assist litigants in becoming fully informed, noting that, in NSW at least, the provision does not deviate from existing professional requirements.

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20 Mr Matthew Minogue, Assistant Secretary, Justice Improvement Branch, Attorney-General's Department, *Committee Hansard*, Melbourne, 27 August 2009, p. 16.

21 Proposed subsection 37N(4)

22 NSW Law Society, Young Lawyers, *Submission 3*, p. 5.

23 Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, p. 3; and Law Council of Australia, *Submission 2*, p. 5.

24 Proposed subsections 37N(3) & (5)

In its view, proposed subsection 37N(3) is conducive to promoting an efficient federal civil litigation regime.[25]

3.33 In contrast, and more broadly, the Law Council argued that the possibility of personal costs orders creates conflict between a lawyer and his or her client. The Law Council intimated that the issue of personal costs orders might more appropriately not be dealt with in the Bill:

> Once it gets to the point of there being a suggestion that lawyers should pay there really is a conflict between the lawyer and the client. If it is accepted that the party has breached this obligation and has not acted in a way that is consistent with the overarching purpose then the question really is: is it the client's fault or the lawyer's fault? It is our suggestion that that ought not to be fought out in the arena with the other party present and hearing the intimacy of the dealings between the lawyer and the client; that ought to be dealt with as a separate matter with the other party not participating.[26]

### *Practice and procedural directions*

3.34 The Bill proposes to give the Federal Court discretion to make directions about the practice and procedures to be followed in civil proceedings, including a non-exclusive list of possible directions.[27]

3.35 Submissions and evidence raised directions regarding limitations on the number of witnesses, and referral to arbitration, mediation and alternative dispute resolution (ADR) as matters of concern.

*Limitations on the number of witnesses*

3.36 Proposed paragraph 37P(3)(c) will give the Federal Court discretion to make directions limiting the number of witnesses who may be called to give evidence (or the number of documents that may be tendered in evidence).

3.37 The Law Council opposed this 'undesirable' provision in Bill, first arguing that it would go beyond controlling proceedings, and give the Federal Court a general and plenary power:

> This power would affect in a more fundamental way the manner in which a party, through its legal representatives, determines is [sic] the best way to present its case. In the adversarial system, decisions of this type are the prerogative of the parties.[28]

3.38 In support of its argument, the Law Council cited a decision of the Full Court in *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* in which Justices Hill, Finkelstein and Emmett held:

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25 NSW Law Society, Young Lawyers, *Submission 3*, p. 5.

26 Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, p. 3.

27 Proposed subsections 37P(2)-(3)

28 Law Council of Australia, *Submission 2*, p. 5.

> The learned primary Judge seems to be of the opinion that a court has authority to decide which witnesses a party may call. This is not correct. It is for a party and his lawyers to decide what evidence is to be called in support of that party's case, and it is not a function of the court to become involved in that process.[29]

3.39 Coupled with a party's prerogative, the Law Council told the committee that there are natural limitations which apply to the number of witnesses that a party will call:

> If a party calls too many witnesses on the same point then, firstly, there is increased risk that there will be a conflict between those witnesses—that is a natural disincentive to a party calling too many witnesses—and, secondly, there is the time and cost that the party will incur in doing that.[30]

3.40 In addition, the Law Council expressed concern regarding when a judge might impose a limitation under proposed paragraph 37P(3)(c), particularly in the 'dynamic and organic' context of civil proceedings:

> A limit imposed under s37P(3)(c) may prevent a party from leading relevant evidence which is available to it but with the consequence that it does not establish the facts for which it contends.[31]

3.41 The Federal Court however rejected that the provision would result in any injustice. Representatives referred to the Docket System (whereby a judge is allocated responsibility for a case for its duration), stating that this endows judges with in-depth knowledge of proceedings before the Federal Court:

> It would be rare for the court to engage a crude number count and say that you are allowed five witnesses each, or such an approach. It would be done very much in the context of the case and the issues that really do need to be agitated and established.[32]

3.42 Emphasising the importance of case management, the Department agreed with the Federal Court on this point, conceding that 'were a judge not intimately involved in the case from its beginning in the court all its way through, the Law Council's concerns might be better founded.'[33]

3.43 The Federal Court referred also to existing Rules of Court – namely Order 42 rule 4A – which essentially provide for judicial powers similar to that proposed in paragraph 37P(3)(c). Its view was that:

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29 *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at para 80

30 Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, p. 2.

31 Law Council of Australia, *Submission 2*, p. 5; and Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, pp 2-3.

32 Mr Philip Kellow, Deputy Registrar, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 9; and Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 10.

33 Mr Matthew Minogue, Assistant Secretary, Justice Improvement Branch, Attorney-General's Department, *Committee Hansard*, Melbourne, 27 August 2009, p. 14.

> A legislative provision of this kind would make it very clear and unambiguous that the court has such a power. But the key issue would be how the court exercises that power, and it is not a power to be exercised willy-nilly, for want of a better description.[34]

3.44 The Federal Court emphasised that there is no suggestion that the provision will override extant rules of evidence and other legislative provisions regarding the conduct of proceedings:

> So it is not a power that would be used to exclude evidence that would otherwise be admissible. It is more taking on the situation that arises particularly where expert evidence is necessary. Rather than having eight experts giving evidence on the one point, it is sufficient to have one expert give evidence on that point.[35]

*Whether to amend the 'plenary' power*

3.45 As indicated above, submissions and evidence differed on the potential effect of proposed paragraph 37P(3), and consequently, the arguments extended to whether the provision ought to be amended.

3.46 The Law Council strongly supported retention of trial judges' existing powers to control hearings, including extant rules of evidence and the power to prevent abuse or vexation (such as adverse costs orders):

> Judges do have power via cost orders to impose a very substantial disincentive on parties who do call too many witnesses or tender too many documents. Judges can make cost orders against parties for the unnecessary calling of witnesses, even if the party is successful. They can make those orders on an indemnity basis rather than the normal party-party basis. In an extreme case where it is the lawyer's fault they can make an order against the lawyer personally. It is our submission that it is more appropriate that judges use those powers as disincentives combined with the natural disincentives to control the number of witnesses and the number of documents that are called and tendered.[36]

3.47 Accordingly, the Law Council recommended that**:**

> a power such as that proposed in s37P(3)(c) might better be expressed as one that can only be exercised with the consent of the parties; or

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34 Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 8.

35 Mr Philip Kellow, Deputy Registrar, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 9.

36 Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, p. 3; and Law Council of Australia, *Submission 2*, p. 6.

> there be no such power, but there be provision for cost consequences if a party unnecessarily prolongs a hearing by leading patently unnecessary evidence.[37]

3.48 The Law Council preferred the second proposal however the Federal Court's evidence indicated that its existing powers are not adequate to limit the number witnesses who may be called to give evidence or the number of documents that may be tendered in evidence. A representative told the committee:

> I do not believe [costs orders are] the remedy for a whole lot of ills caused by too many witnesses and too many documents. It certainly does not remedy the loss of time. It certainly does not remedy the overall costs to all concerned. It penalises the person who has to pay the costs, who might not be the person to make the decision about the number of witnesses to call. …Judges are not going to tell practitioners how to run their case completely. But we believe there needs to be a power to be exercised in those circumstances where it is appropriate and desirable to do so.[38]

3.49 These factors are in addition to: potentially impecunious parties (from whom costs cannot be recovered); the reality that costs orders return 50 – 80 per cent only of actual costs; and the fact that litigation is a traumatic experience for many litigants.[39]

3.50 NSW Young Lawyers agreed with the Federal Court, submitting that proposed paragraph 37P(3)(c) is an effective clarification and confirmation of the Federal Court's power to 'implement evolving principles of 21st century case management.'[40]

*Arbitration, mediation and alternative dispute resolution*

3.51 A second concern raised in submissions was that of court-ordered referral to arbitration, mediation and ADR. Under the Bill, this is an alternative to the non-exclusive directions.[41]

3.52 ANEDO submitted that ADR is likely to be less successful in public interest litigation than it would be in private litigation: the plaintiff often has no financial interest in the litigation; and the defendant may be unwilling or unable to give the sought after remedy:

> In such cases, compulsory ADR is likely to merely add to the time and expense of proceedings which would already be prohibitive for many public interest clients.[42]

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37 Law Council of Australia, *Submission 2*, p. 6; and Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, p. 5.

38 Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, pp 8-9; and Mr Philip Kellow, Deputy Registrar, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 9.

39 Mr Matthew Minogue, Assistant Secretary, Justice Improvement Branch, Attorney-General's Department, *Committee Hansard*, Melbourne, 27 August 2009, p. 15.

40 NSW Law Society, Young Lawyers, *Submission 3*, p. 6.

41 Proposed subsections 37P(4) and 53A(1)

3.53 Consequently, ANEDO suggested that the Federal Court be required to take a certain consideration into account as a prerequisite to exercising the power to be given under the relevant provisions – proposed subsections 37P(4) and 53A(1) – namely the public interest nature of civil litigation, as compared with private litigation.[43]

***Costs orders***

3.54 The Bill will clarify the types of general costs orders which may be made within the Federal Court's discretion.[44] Submissions and evidence regarding the relevant provision – proposed subsection 43(3) – were limited, but presented two diametrically opposed views.

3.55 On the one hand, NSW Young Lawyers submitted that the provision largely reflects the current exercise of the discretion. However, it qualified its support on the basis that codification increases the significance of costs orders which might in turn increase appeals from a costs decision (on the basis that the judge did not consider one of the specified options).

3.56 To avoid the problem, NSW Young Lawyers favoured instead a provision setting forth the general rule regarding costs (that costs follow the event). Its view was that proposed subsection 43(3) is likely to be interpreted in accordance with this common law principle in any event, but that its recommendation is broader while remaining discretionary.[45]

3.57 In contrast, ANEDO vehemently opposed the general rule regarding costs:

> The problem with this rule is that it produces a significant amount of uncertainty about who will ultimately pay the costs of the legal action and in what amount. Given the high cost of litigating in the Federal Courts, especially against well resourced corporations like developers and government agencies, this uncertainty has a significant deterrent effect… The spectre of potentially hundreds of thousands of dollars in costs incurred by respondents will deter most public interest litigants from bringing a case, even where the prospects of success are very strong.[46]

3.58 ANEDO submitted that the Federal Court has been slow to recognise and reluctant to facilitate public interest litigation so far as costs orders are concerned. It submitted that the Bill ought to go further and expressly authorise the making of public interest litigation costs orders. In particular, it recommended that the Bill define a 'public interest proceeding' and expressly require judges to make public interest costs orders in public interest proceedings.[47]

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42 Australian Network of Environmental Defender's Offices, *Submission 6*, p. 6.

43 Australian Network of Environmental Defender's Offices, *Submission 6*, p. 6.

44 Proposed subsection 43(3)

45 NSW Law Society, Young Lawyers, *Submission 3*, pp 7-8.

46 Australian Network of Environmental Defender's Offices, *Submission 6*, p. 6.

47 Australian Network of Environmental Defender's Offices, *Submission 6*, pp 8-9.

## Jurisdiction and appeals

3.59 Amendments in Schedule 2 aim 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.

3.60 The Federal Court submitted that the proposed reforms will eliminate unnecessary litigation (by removing legislative inconsistencies), and support the efficient conduct of appeals (by allowing a greater role for single judges in the resolution of interlocutory matters).[48]

3.61 However, other submissions and evidence, while not contesting these outcomes, expressed concern regarding the treatment of security for costs applications.

### *Security for costs applications*

3.62 The Bill proposes to limit the types of interlocutory decisions which can be appealed to the Full Court from the judgement of a single judge exercising original jurisdiction.[49]

3.63 The Law Council broadly supported the proposition that there be some categories of decision which cannot be appealed, but disagreed with the Explanatory Memorandum's description of security for costs applications as 'minor procedural decisions':

> A decision that an applicant provide security for costs may have profound consequences for that party. Equally, a decision refusing an order for the provision of security may leave a respondent exposed to a significant risk in respect of its ability to recovers its costs if it is successful in the proceeding. It is not unusual for applications for security for costs to be the subject of a strong contest between the parties.[50]

3.64 ANEDO expressed similar concerns, particularly in the context of public interest litigation where many environmental litigants are poorly resourced.[51]

3.65 Both ANEDO and the Law Council strongly supported retention of the right to appeal by leave for security for costs decisions (proposed subsection 24(1AA), Schedule 2 item 13 paragraph (c)), with the former also suggesting that the Bill amend the Act to include a presumption against granting an order for security for costs in public interest litigation.

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48 Federal Court of Australia, *Submission 4*, p. 1; and Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 7.

49 Proposed subsection 24(1AA)

50 Law Council of Australia, *Submission* 2, p. 6; Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, p. 4; and Explanatory Memorandum, p. 18.

51 Australian Network of Environmental Defender's Offices, *Submission 6*, p. 10.

## Judicial responsibilities

3.66 The Bill will amend 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. According to the Explanatory Memorandum, these amendments – contained in Schedule 3 – are intended to clarify existing powers.[52]

3.67 Most submissions and evidence broadly supported the Schedule 3 amendments, the exception being the Federal Court itself, which told the committee:

> We did not seek those provisions, we did not ask for them and we do not think they are necessary.[53]

3.68 The provision which excited most comment was that enabling the Chief Justice, Chief Judge or Chief Federal Magistrate to temporarily restrict a judge or federal magistrate to non-sitting duties.[54]

3.69 Submissions and evidence questioned whether the provision would compromise judicial independence. The Law Council, for example, stated:

> The Law Council would not support an amendment that sacrifices judicial independence for administrative convenience, and potentially amounts to interference in the exercise of Chapter III judicial power or compromises the independence of the judiciary.[55]

3.70 It suggested amending the Bill to specify that the power could only be used to allow a judge or magistrate to deal with a backlog of cases. In evidence, the Law Council could not foresee any other reason that ought to justify a judge or magistrate's removal, especially in view of other circumstances being catered for in the Bill.[56]

3.71 The Department however drew the committee's attention to the Explanatory Memorandum, which details a range of circumstances which would be covered by the amendments:

> …essentially things like undertaking further research, judicial education, further education on other areas—for example, that could be in preparation for a judge moving to a new panel or a new area of expertise or undertaking particular project work in an area of interest to the court ..Judges do other non-judicial functions to assist the operation of the court. That can be research, project work, outreach to communities or international work—all

52 Explanatory Memorandum, p. 25.

53 Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 11.

54 Schedule 3 Items 3, 10 & 12

55 Law Council of Australia, *Submission 2*, p. 6.

56 Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, pp 4 & 5-6; and Law Council of Australia, *Submission 2*, p. 6.

> those types of things—so there are other non-judgment writing issues that this provision would also apply.[57]

3.72 The Department did not believe it necessary to set out these other circumstances in the Bill on the bases that: the proposed provision does not empower the Chief Justice to interfere with the independence of an individual judge; and section 15 of the Act limits the Chief Justice's powers to the orderly and expeditious discharge of the business of the Federal Court only.[58]

3.73 The committee notes however that Schedule 3 of the Bill also encompasses the Family Court of Australia and Federal Magistrates Court, whose positions with respect to the Bill were not readily ascertainable.

## Committee view

3.74 A key objective of the Bill is to effect a cultural change in the conduct of civil litigation, including improved access to justice in the Federal Court of Australia. The committee supports this objective and commends the Australian Government's recent initiatives in this regard.

3.75 The Bill will enhance the Federal Court of Australia's capacity to manage actively the conduct of civil proceedings, and will focus all persons involved in civil proceedings before the court on the overarching purpose of civil litigation: the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

3.76 During the course of the inquiry, the committee heard that submitters and witnesses broadly supported the Bill. Particular provisions were nonetheless singled out for comment, and the committee responds to those comments as follows.

3.77 In relation to oral hearings, the committee considers that proposed subsection 20A(2) sufficiently identifies the circumstances in which the Federal Court of Australia may deal with a matter 'on the papers'. In such circumstances, allowing the parties any further opportunity to make submissions would be both unnecessary and inconsistent with the objectives of the Bill.

3.78 The Australian Network of Environmental Defender's Offices identified parties' financial positions as a relevant factor in civil proceedings. The non-exclusive objectives clause – proposed subsection 37M(2) – will enable the Federal Court of Australia to take this factor into account should a particular case merit such consideration.

3.79 In relation to proposed subsection 37N(1), neither the Explanatory Memorandum nor evidence from the Attorney-General's Department offered any specific justification for the inclusion of settlement negotiations in the duty to act

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57 Mr Matthew Minogue, Assistant Secretary, Justice Improvement Branch, Attorney-General's Department, *Committee Hansard*, Melbourne, 27 August 2009, p. 17; and Explanatory Memorandum, p. 26.

58 Mr Matthew Minogue, Assistant Secretary, Justice Improvement Branch, Attorney-General's Department, *Committee Hansard*, Melbourne, 27 August 2009, p. 17.

consistently with the overarching purpose. The committee understands that such negotiations are sometimes used to impede proceedings. However, the committee is not persuaded that this traditional legal privilege should be so readily eliminated from the *Federal Court of Australia Act 1976* without adequate explanation, and if the government wishes to persist with this change, a full justification should be provided.

3.80 The committee agrees that proposed paragraph 37N(2)(b) could be better drafted. Both the Law Council of Australia and the Federal Court of Australia highlighted interpretive problems with the provision, contrasting it with analogous state/territory legislation. The committee urges the Attorney-General's Department to further examine and consider the relevant provisions of that legislation to identify how proposed paragraph 37N(2)(b) might be drafted to address all concerns raised before the committee.

3.81 The committee did not receive sufficient information to form a view regarding an appropriate forum for the determination of personal costs orders (proposed subsection 37N(3)). However, in relation to costs orders under proposed subsection 37N(4), the committee endorses the provision as it stands. While failure to act consistently with the overarching purpose must be considered by the Federal Court of Australia in the making of a costs order, the making of any such order remains discretionary. For that reason, the committee does not accept that the provision will unduly increase any burden on the court.

3.82 The Law Council of Australia argued that proposed paragraph 37P(3)(c) would grant the Federal Court of Australia a plenary power to limit the number of witness who may be called to give evidence. The committee accepts evidence from the Federal Court of Australia that it would judiciously exercise the proposed power and in an informed manner, consistent with the objectives of the Bill and with regard to rules of evidence and other legislative requirements.

3.83 The Bill will allow the Federal Court of Australia to consider whether a matter be referred to arbitration, mediation or alternative dispute resolution. Whether or not successful in resolving the dispute, the committee views the provisions as consistent with the legislative objectives, noting also that proposed subsection 37P(4) remains discretionary.

3.84 For both this inquiry and the committee's inquiry into *Access to Justice*, a great deal of information has been received on the topic of public interest litigation and costs orders regimes. The committee understands that there is a perceived need for legislative reform, and the (limited) evidence to this inquiry specifically recommended mandated public interest litigation costs orders. The committee is reluctant to eliminate the judicial discretion afforded by section 43 of the *Federal Court Act 1976*. For that same reason, the committee declines also to recommend codification of the general rule regarding costs.

3.85 Another key objective of the Bill is to streamline the Federal Court of Australia's appeals pathways for civil proceedings, and provide the court with greater flexibility in dealing with appeals and related applications. This will no doubt

eliminate some unnecessary litigation and enhance the role of single judges in the resolution of interlocutory matters on appeal.[59]

3.86 Submissions and evidence broadly supported the proposed amendments, except so far as security for costs applications were concerned. The Law Council of Australia and Australian Network of Environmental Defender's Offices noted that security for costs orders impact on the continued conduct of litigation and are of such import that they should remain appealable. The committee agrees.

3.87 The third key objective of the Bill is to clarify the powers of judicial officers in the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court.

3.88 While submissions and evidence, again, broadly supported these amendments, the committee notes that the Federal Court of Australia, and possibly also the other federal courts, did not seek or view the amendments as necessary. Be that as it may, the committee heard specific criticisms of the temporary restriction to non-sitting duties provisions only.

3.89 Essentially, the Law Council of Australia viewed the provisions as potentially interfering with judicial independence in contravention of the Constitution. The Attorney-General's Department did not consider it necessary to amend the relevant provisions, and the committee considers it sufficient that the enabling legislation circumscribes the powers of the head judicial officers

**Recommendation 1**

**3.90 The committee recommends that the government clarify the operation and purpose of proposed 37N(1) of the *Federal Court of Australia Act 1976* (Schedule 1 item 6 of the Bill).**

**Recommendation 2**

**3.91 The committee recommends that proposed paragraph 24(1AA)(c) of the *Federal Court of Australia Act 1976* (Schedule 2 item 13 paragraph (c) of the Bill) be deleted.**

**Recommendation 3**

**3.92 Subject to the above recommendations, the committee recommends that the Senate pass the Bill.**

**Senator Trish Crossin**

**Chair**

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59 Federal Court of Australia, *Submission 4*, p. 1; and Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 7.

# ADDITIONAL COMMENTS BY LIBERAL SENATORS

1.1 Liberal senators do not agree with certain findings of the majority members in the committee's report into the provisions of the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Bill).

## Case management

### *The duty to act consistently and parties' lawyers*

1.2 In relation to proposed subsection 37N(2), the Law Council of Australia warned that proposed paragraph (b) does not strike an appropriate balance between the application of the overarching purpose and its public objectives, and the individual rights and objectives of a party. Instead, the Law Council of Australia suggested that proposed subsection 37N(2) be qualified with the insertion of the phrase, 'subject to the instructions of the client', where appropriate.[1]

1.3 Liberal senators note that other submissions and evidence – namely, the Federal Court of Australia and NSW Law Society, Young Lawyers – acknowledge the Law Council of Australia's concerns, and also that, in at least this regard, the Bill is not consistent with comparable provisions in other jurisdictions (for example, sections 56 & 57 of the *Civil Procedure Act 2005* (NSW).

1.4 The majority members of the committee urge the Attorney General's Department to further examine and consider the relevant provisions of state/territory legislation however, Liberal senators consider this response insufficient.

**Recommendation 1**

**1.5 Liberal senators recommend that proposed subsection 37N(2) be amended to recognise that lawyers' obligations under proposed section 37N(2) are subject to the instructions of the client.**

### *Practice and procedural directions*

1.6 Proposed paragraph 37P(3)(c) will give the Federal Court discretion to make directions limiting the number of witnesses who may be called to give evidence (or the number of documents that may be tendered in evidence). The Law Council of Australia described the proposed paragraph as 'undesirable', persuasively arguing that

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1 Mr Malcolm Blue QC, Director, LCA, *Committee Hansard*, Melbourne, 27 August 2009, pp 3 & 4-5; Law Council of Australia, *Submission 2*, p. 5; and Cape York Land Council Aboriginal Corporation, *Submission 5*, p. 1.

it would give the Federal Court of Australia an unjustifiable plenary power.[2] It suggested that:

> a power such as that proposed in s37P(3)(c) might better be expressed as one that can only be exercised with the consent of the parties; or
>
> there be no such power, but there be provision for cost consequences if a party unnecessarily prolongs a hearing by leading patently unnecessary evidence.[3]

1.7 Liberal senators note a recent decision of the Full Court in *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* which lends support to the Law Council of Australia's arguments,[4] and consider that the Law Council of Australia 's proposals are meritorious.

**Recommendation 2**

**1.8 Liberal senators recommend that proposed paragraph 37P(3)(c) be deleted or alternately, paragraph (c) be amended so that the provision commences with the words, 'With the consent of the parties'.**

## Judicial responsibilities

1.9 The Federal Court of Australia, one of three federal courts affected by the Bill, told the committee:

> We did not seek those [Schedule 3] provisions, we did not ask for them and we do not think they are necessary.[5]

1.10 Liberal senators refer in particular to Schedule 3 items 3, 10 and 12 of the Bill, which enable the head judicial officer to temporarily restrict a judge or federal magistrate to non-sitting duties in the Federal Court of Australia, Family Court of Australia, or Federal Magistrates Court of Australia.

1.11 The Law Council of Australia bluntly stated:

> The Law Council would not support an amendment that sacrifices judicial independence for administrative convenience, and potentially amounts to interference in the exercise of Chapter III judicial power or compromises the independence of the judiciary. [6]

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2 Law Council of Australia, *Submission 2*, p. 5.

3 Law Council of Australia, *Submission 2*, pp. 5-6.

4 *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at para 80

5 Mr Warwick Soden, Registrar & CEO, Federal Court of Australia, *Committee Hansard*, Melbourne, 27 August 2009, p. 11.

6 Law Council of Australia, *Submission 2*, p. 6.

1.12 Liberal senators cannot put the case any better, other than to add that the proposed plenary provisions were unnecessary, unjustifiable and unworthy of Liberal senators' support.

**Recommendation 3**

**1.13 Liberal senators recommend that Schedule 3 items 3, 10 and 12 of the Bill be reconsidered with a view to the addition of appropriate terms and conditions circumscribing the proposed power.**

**Senator Guy Barnett** **Senator Mary Jo Fisher**

**Deputy Chair**

# APPENDIX 1

# SUBMISSIONS RECEIVED

| Submission Number | Submitter |
|---|---|
| 1 | Western Australian Bar Association |
| 2 | Law Council of Australia |
| 3 | NSW Young Lawyers Civil Litigation Committee |
| 4 | Federal Court of Australia |
| 5 | Cape York Land Council Aboriginal Corporation |
| 6 | Australian Network of Environmental Defender's Offices |

## ADDITIONAL INFORMATION RECEIVED

1 Answers to Questions on Notice - Provided by the Attorney-General's Department on Wednesday 15 September 2009

2 Correspondence regarding evidence given at public hearing on Thursday 27 August - Provided by the Attorney-General's Department on Wednesday 15 September 2009

# APPENDIX 2

## WITNESSES WHO APPEARED BEFORE THE COMMITTEE

**Melbourne, Thursday 27 August 2009**

BLUE, Mr Malcolm, QC, Director
Law Council of Australia

KELLOW, Mr Philip, Deputy Registrar
Federal Court of Australia

MACKAY, Ms Anita, Acting Principal Legal Officer, Justice Improvement Branch
Attorney-General's Department

MEAGHER, Mr Joseph, Senior Legal Officer, Federal Courts Branch
Attorney-General's Department

MINOGUE, Mr Matthew, Assistant Secretary, Justice Improvement Branch
Attorney-General's Department

SODEN, Mr Warwick, Registrar and Chief Executive Officer
Federal Court of Australia

TRENT, Ms Kimberlee, Acting Principal Legal Officer, Federal Courts Branch
Attorney-General's Department