COMMONWEALTH OF AUSTRALIA

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

THURSDAY, 27 AUGUST 2009

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 27 August 2009

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Marshall

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Feeney, Fisher, Barnett and Marshall

Terms of reference for the inquiry:

To inquire into and report on: Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

WITNESSES

Committee met at 9.19 am

ACTING CHAIR (Senator Barnett)—This is a hearing for the Legal and Constitutional Affairs Legislation Committee inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009. This inquiry was referred to the committee by the Senate on 25 June, for report on 17 September. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to the committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

[9.20 am]

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

Evidence was taken via teleconference—

ACTING CHAIR—Good morning, Mr Blue. Thank you for being there. The Law Council of Australia has lodged a submission with the committee which has been labelled submission No. 2. Do you wish to make any amendments or alterations to that submission?

Mr Blue—No.

ACTING CHAIR—I invite you to make an opening statement, at the conclusion of which I will invite members of the committee to ask questions. Thank you again for being available today.

Mr Blue—Thank you. The Law Council is the peak body for Australian lawyers. It represents over 50,000 members through every law society and every bar association throughout Australia. The council is grateful for the opportunity to provide evidence to this inquiry. In general terms, the Law Council welcomes the reforms which are the subject of the bill. The bill is clearly an attempt by the government to encourage more efficient and cost-effective civil litigation, and that is a laudable and non-contentious aim. It is now well accepted that courts and judges have a large role to play in actively managing and participating in the litigation process. Case management procedures, ADR and other proposals all have a role to play in improving the efficiency of litigation.

Notwithstanding that general support, the Law Council believes that there are four aspects of the bill that require further consideration and submits that each of those four provisions ought to be amended. I will now address those four provisions specifically.

The first is section 37P. This is addressed on page 5 of the Law Council's submission. Section 37P gives the court power to give directions about practice and procedure in a civil proceeding. Again, the Law Council broadly welcomes that provision but has a concern about one aspect of that provision, and that is subsection (3)(c), which provides that the court may give a direction limiting the number of witnesses who may be called to give evidence or the number of documents which may be tendered in evidence. The Law Council believes that it is undesirable that a court give those types of directions.

If I can amplify that, firstly, I refer the committee to a decision of the full court of the Federal Court in a case called Hospitality Group Pty Ltd v Australian Rugby Union Ltd, which was a decision in 2001 reported at volume 110 of the Federal Court Reports on page 157. At page 179, Justices Hill and Finkelstein, with whom Justice Emmett agreed, referred to what the trial judge had said. Paragraph 79 states:

> The learned primary Judge acknowledged that "*it is generally correct*" that a judge has no discretion to reject admissible evidence. But he went on to say that "*it does not follow that a party will always be allowed to tender all the evidence that it desires. The essence of case management, both before and at trial, is that the general demands of justice may result in limits (including time limits) being placed upon the presentation of evidence, including the form of that evidence*".

The full court went on to say:

> There are two significant errors evident in these reasons. In the first place, 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 …

And they cite two decisions of the English court of appeal. The second error, incidentally, is not material to the present point.

We would like to point out that there are natural limitations in any event that will 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. It needs to be borne in mind that there are already some natural disincentives to parties calling too many witnesses.

Another point that we submit needs to be borne in mind is: at what point is the judge to make this determination limiting the number of witnesses? If the determination is made too early then it will be difficult for the judge to make the determination because the judge will not have enough information about what the

issues are and how the parties propose to prove their case and, indeed, it could result in increased time and costs in the time that would be needed to be expended for the judge to acquire all of that knowledge and, in any event, it may well be premature. On the other hand, if it occurs at trial then it may be practically too late for that sort of determination to be made. We see there being a difficulty as to the time at which the limitation would be imposed. In addition to that, cases are always dynamic and organic—they change as the trial is conducted; issues that one thinks unimportant become important at the trial and vice versa—so it would be difficult in advance to stipulate the number of witnesses that ought to be called on an issue.

In addition, there is a real risk that the judge might become involved in prejudging the case. If a judge has to get enough appreciation of the issues and so on in order to make a decision about how many witnesses a party should call then is the judge forming a view about what the issues are and the merits of the issue in order to do that? That is undesirable. It is desirable that at the trial itself the judge have an open mind about the case.

We also have the concern that the judge is tending to then descend into the arena. As the full court has said, the area of witnesses is traditionally a matter for the parties and counsel. The judge is tending then to descend into the arena and taking a position—perhaps as an advocate of time-saving albeit, but nevertheless descending into the arena with the parties.

The final point we would like to make about that is that 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.

The second section about which the Law Council is concerned is proposed section 37N. The Law Council broadly support this proposed section, but we have three concerns. The first is that proposed subsection 2(b) requires a lawyer to assist the party to comply with the party's duty, which is the primary duty to conduct the proceeding in a way that is consistent with the overarching purpose. Our concern is that a lawyer can give advice to a client about how the client should act to comply with the duty, but ultimately ordinarily the lawyer is bound to comply with the client's instructions. It is our suggestion, therefore, that proposed subparagraph (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. We have amplified that in the submission about some of the difficulties that might otherwise arise.

The second concern about proposed section 37N is that it extends to include negotiations for settlement. Both proposed subsections (1) and (2) extend to that. Ordinarily negotiations for settlement will be the subject of settlement privilege or without prejudice privilege and they will not be able to be given in evidence later in court. That is for very good public interest reasons. Our concern is that this proposed section might be taken to involve an abrogation of that privilege, so that the details of negotiations could be given before court with the other party alleging that the party in question had not acted reasonably in the negotiations for settlement. We see that as being undesirable.

In any event we do not see that there is any real work for those words to do because a court does have power, and we support this, to order that parties go to mediation if they do not want to, so the court can direct that the parties do negotiate—but you can lead a horse to water but you cannot make it drink. We submit that that is really as far as the court can or needs to go—to be able to direct parties to participate in negotiations for settlement—but that the section ought not to go further.

The third concern about the proposed section is that proposed subsection (5) provides that a court may order that a lawyer bears the cost personally if the lawyer fails to comply with the lawyer's duty under subsection (2). Similarly, the court can make a cost order under subsection (3) against the party themselves. We accept that it will be appropriate in some cases that orders are made against lawyers personally—and that already occurs—but 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.

Those are our suggestions in relation to that section. The other two suggestions we make I can put quite quickly. In schedule 2 it is proposed that there be no appeal from certain types of orders. We broadly support that, but we do not support it in respect of security for costs because that can have a very major effect on the litigation. If an order is made, it can effectively stifle the litigation. If the order is not made then that involves no protection for the defendant. We submit it is appropriate to leave that to still requiring the leave of the full court to appeal—so it will not be an appeal as of right—but it ought not to be shut out absolutely.

Our final concern is about schedule 3 at subsection 1AA of subsection 15(1), for example in respect of the Federal Court—there are similar provisions for the other two courts—which provides that the Chief Justice may temporarily restrict a judge to non-sitting duties. If that is for the purpose of the judge writing reserve judgments then we agree and applaud it, but we submit that that ought to be inserted expressly so that it is not just a plenary power for the Chief Justice to restrict the judge to non-sitting duties. That would involve risks of interference with judicial independence. That is the opening statement that the Law Council would like to make.

ACTING CHAIR—Thank you very much for that, Mr Blue. I appreciate your comprehensive overview of your concerns and your recommendations for reform. Could we go to the first one that you have suggested, regarding subsection 37P(3)(c).

Mr Blue—Yes.

ACTING CHAIR—This is set out at page 5 and 6 of your submission. I have just been having another look at it. Really, your key point is that it is the prerogative of the parties in terms of the number of documents tendered or witnesses called. That is the key concern that you have. You made the point that cases are dynamic and organic and, in any event, judges have power, by cost orders, re the calling of unnecessary witnesses and, I presume, the tendering of unnecessary documents or whatever.

Mr Blue—Yes; that is correct.

ACTING CHAIR—Is that a fair summary?

Mr Blue—It is; yes.

ACTING CHAIR—I just wanted to get a clarification in my own mind of your concerns. The second concern is about subsection 37N(2)(b), which flows from 37N(2)(a)—because one leads to the other.

Mr Blue—Yes.

ACTING CHAIR—This is an issue where the solicitor is assisting the party to abide by the duty, and you are recommending an amendment. Amendments are set out on page 6 in dot point format at the top of your submission. Can I just confirm that? And if that is so, are you happy for those amendments to be passed as they are set out in your submission?

Mr Blue—What page was that?

ACTING CHAIR—It is page 5, I think, of your submission. At the bottom of the page you say:

The Law Council therefore suggests that—

And at the top of page 6 you have two dot points:

• 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.

Mr Blue—I think that is addressing 37P. I thought you were addressing 37N now.

ACTING CHAIR—Sorry, I crossed over. I think I am okay about 37N(2)(b). I have got the point. You wanted to make 37N(2)(b) subject to the instructions of the client.

Mr Blue—Yes.

ACTING CHAIR—Do you have a specific wording for that?

Mr Blue—Perhaps I will give you two proposals. One is that you insert, before the word 'assist', the words 'subject to the client's instructions'.

ACTING CHAIR—Right.

Mr Blue—The alternative—or perhaps this could be in addition—would be to add (c)—or renumber this as (b)—'Advise the client how to comply with the duty.'

ACTING CHAIR—It really gets back to your definition of 'assist' doesn't it?

Mr Blue—Yes.

ACTING CHAIR—The judge might interpret the word 'assist' in a certain way and you might interpret it in another way. Then you are in queer street.

Mr Blue—That is precisely it. 'Assist' is a very vague and general word. So we are seeking for it to be made more specific. As you say, it could be interpreted in quite different ways if it is left in that general form.

ACTING CHAIR—I have got you there, no problem. Thanks for that. I just want to go to 37P(3)(c) and this amendment. Which is the amendment—is it at the top of page 6?—that you are suggesting would fix that problem?

Mr Blue—Yes. I think ideally we would suggest the second dot point, which really is simply to delete (c) altogether; or, alternatively, to insert the words at the beginning, 'With the consent of the parties, limit the number,' et cetera.

ACTING CHAIR—How important an issue is this, do you think?

Mr Blue—To us, that is actually the most important of the four issues that I have raised. We do regard that as the most important.

ACTING CHAIR—You make the point that the judge has discretion, in any event, to order costs for unnecessary—

Mr Blue—Either calling unnecessary witnesses or tendering unnecessary documents. I have seen judges exercise that in respect of documents where parties did tender too many documents and the judge ordered that the plaintiff who did that had to pay the other side's costs, even though the plaintiff won the case.

ACTING CHAIR—I will come back to the third one in a minute, but your final heading is 'Schedule 3—Judicial responsibilities', under which we see:

These amendments allow a Chief Judge to temporarily restrict a judge to non sitting duties.

You want to further constrain that—is that right?

Mr Blue—That is right.

ACTING CHAIR—Can you just explain the importance of that.

Mr Blue—We imagine the purpose of that is that if a judge gets behind in writing judgements then they might be told, 'You are not sitting for the next month or two because all you are doing is writing judgements,' and we agree with that. We agree that it is very important that judgements come out promptly. So, if that is the purpose, that is fine, but our concern is that if it is a plenary power to restrict a judge then—ordinarily judges ought to be rotated and broadly ought to hear a similar number of cases as the other judges do. We are concerned that there should not be power to simply restrict—to send one judge to the reserves bench, if you like, and so the judge is not hearing cases, which might be for other reasons, other than the need to catch up on a backlog of work.

ACTING CHAIR—Can you just flesh out what the other reasons might be. Are there any other terms and conditions that should apply to this plenary power if they go ahead with this plenary power for the chief judge? I take your point that they might say, 'It is to make sure that the judge catches up on all the work that needs to be done—all the casework and so on,' but are there any other checks and balances that need to be imposed to provide some sort of limitation on this plenary power?

Mr Blue—Well, we would suggest that, if the limitation is that it is for the purpose of catching up on a backlog of work—or some words to that effect, better expressed—that would be all that would be needed.

ACTING CHAIR—My question is: are there any other reasons why the chief judge may recommend or request a temporary removal of a judge from sitting duties?

Mr Blue—No other reasons that ought to justify the judge's removal. We are just concerned that if a judge might—well, it is hard to foresee what the reasons might be. But if there were any other reasons that a judge were removed it would be undesirable.

ACTING CHAIR—Well, yes, I presume there are adequate arrangements for the health and welfare of the judge if that it is in question.

Mr Blue—Yes.

ACTING CHAIR—That is taken into account, is it?

Mr Blue—Yes, absolutely. And that fits with (B) which provides for annual health assessments et cetera.

ACTING CHAIR—Sure. Going back to your final recommendation regarding schedule 2, can you just outline your concerns with that again for me, please.

Mr Blue—Yes. Security for costs—so towards the beginning of a case, if the plaintiff is not going to be able to pay the defendant's costs then the defendant is likely to seek an order that the plaintiff provide security for costs, and the court then makes a decision along well-recognised principles where it takes into account whether that will stultify the litigation, whether the plaintiff's impecuniosity is due to the defendant's conduct, allegedly, et cetera.

That is a very important decision for the parties because if in fact it will stultify the litigation it could be a final result because the plaintiff will not be able to go on with the case; they will not be able to provide security. On the other hand, if the court refuses it, then it has a very important effect on the defendant because the defendant will not recover its costs, even if it wins the case. So because of this importance and the potential that it might dictate the de facto end of the case, our submission is that it ought not to be said that the decision of the judge at first instance will always be final, that there ought never to be an appeal from that decision. Our submission is that the position ought to be as it is at the moment, which is that leave is needed. Because it is an interlocutory decision at the moment, you cannot appeal as of right to the full court, but leave is needed, and it ought still to be needed, to appeal from such a decision. It ought not to be foreclosed absolutely, as this bill would do.

ACTING CHAIR—Thank you for that. In summary, you are supporting the legislation, you support the overarching objectives, subject to these four recommendations that you have made.

Mr Blue—That is correct.

ACTING CHAIR—As there are no further questions, thank you for being on the line today. I hope we have not kept you over your due time.

Mr Blue—No. I will be in court on time.

ACTING CHAIR—Thanks again.

[9.46 am]

KELLOW, Mr Philip, Deputy Registrar, Federal Court of Australia

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

ACTING CHAIR—Welcome. It is good to see you at one of our committee hearings again. The Federal Court has lodged a submission, which the committee has numbered 4. Do you wish to make any amendments or alterations to that submission?

Mr Soden—No.

ACTING CHAIR—I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr Soden—I would like to make an opening statement, thank you. As stated in the Chief Justice's letter of 24 July this year, which is our submission to this committee, the court supports the amendments set out in schedules 1 and 2. The amendments set out in schedule 1 will enhance the court's capacity to manage actively the conduct of proceedings before it. In many ways they are the culmination of a range of case management initiatives that the court has implemented over the last few years, starting with the introduction of the individual docket system—now as long ago as 1998—and the setting of performance targets which the court reports against each year.

Other case management initiatives have included: the extensive use of assisted dispute resolution; the significant reforms to the rules of discovery in 1999; the use of technology in proceedings before the court and, more recently, the implementation of streamlined procedures for proceedings in relation to taxation, patents and admiralty; the successful pilot of a fast-track list in the Victoria registry during 2007 and 2008 which resulted in the implementation of the fast-track directions on a national basis in April 2009; and the introduction of a practice note and related material setting out the court's expectations for, and providing guidance on, the management of electronic information in the litigation process, both pre-trial and at trial, which is efficient and minimises unnecessary costs. In May 2009 the Chief Justice issued a notice to practitioners and litigants on case management and the individual docket system which affirmed the court's commitment to the resolution of disputes as quickly, inexpensively and efficiently as possible. A copy of that notice was provided to the committee as an attachment to our submission.

During 2008 the court engaged in discussions with the Attorney-General's Department about the legislative reforms now under consideration. These discussions were informed by concerns about the extent of the court's power to actively case manage, particularly in the light of the High Court decision in JL Holdings, which was recently considered in another High Court matter—the name of the case now escapes me—which qualified JL Holdings to some extent. If that name comes back to me during the course of this evidence, I will mention it. There are other examples of a similar kind to this legislation which can be found in the New South Wales Civil Procedure Act, which, like these proposals, sets out a clear and overarching purpose. The name of that High Court case is Aon Risk Services and Australian National University, and that judgment was delivered as recently as 5 August. That qualified JL Holdings, but up until that High Court decision JL Holdings was thought to impose limits on the extent of case management powers the court could exercise.

The court supports these amendments and the statement in the bill's explanatory memorandum that:

A key objective of the reforms is to bring about a cultural change in the conduct of litigation so that, at the same time as resolving disputes justly, the following considerations are at the forefront:

- focussing the 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 Court's judicial and administrative resources as efficiently as possible.

In relation to the appeal reforms, a significant proportion of the court's work is in its appellate jurisdiction. As the amount and complexity of this work has increased, the court has sought legislative reforms to ensure that the avenues or pathways for appeal are not a source of collateral litigation, which can often lead to significant additional costs and delay while the substantive issues in dispute remain unresolved, and that the court has the necessary flexibility in relation to how it should be constituted when dealing with appeals and related applications. The amendments set out in schedule 2, we believe, will streamline the appeal pathways and provide the flexibility sought by the court. In essence, we support these provisions.

ACTING CHAIR—Thanks very much for that introductory statement. I suppose we are not surprised to hear your response to the legislation. To kick it off, can you give us an analysis or summary of your understanding of the powers of the court following JL Holdings and Queensland 1997, further examined in Aon Risk Services Australia and the Australian National University, 5 August 2009?

Mr Soden—I don't think I will be able to do justice to both those cases, but the essence of JL Holdings was thought to be that the court or a judge could not use case management procedures to the detriment of a party where it might be unjust to do so. In JL Holdings, the circumstances were that an application for adjournment very late, I think it was, was refused. I cannot remember the reasons for that application. I think it might have been, from memory, an application to amend pleadings—yes, it was an application to amend pleadings. The trial judge—who, interestingly, was Justice Kiefel of our court at the time—refused the application to amend and proceeded with the trial. On appeal, ultimately to the High Court, the then High Court held that it was unjust to not allow that amendment.

In the recent case that I mentioned, the High Court essentially said that JL Holdings was not a precedent to say that judges and courts did not have the power to make those kinds of decisions in relation to the case management context and went on and made some clarifications about the extent of the powers the courts and judges had to make it clear that they do have those powers to be exercised in a broad way. That is really the big difference.

ACTING CHAIR—At the end of the day, increased efficiency and cost effectiveness does not always equate to a better justice outcome or a fairer outcome for the parties involved. This is the tension we have with the legislation before us. We have to try to balance getting cost-effective, efficient case management in the court systems with ensuring the objective of justice in each case. Is that a fair analysis, in your view?

Mr Soden—That is a fair analysis, but that is the same issue that confronts the courts and judges in every case.

ACTING CHAIR—Of course. Can we go to the Law Council's concerns. They support the overarching objective and they support the general bill but they have had four concerns. I think you may have heard some of them during the evidence this morning with Mr Blue. Can we just address each of those. I would be keen to get any response that you might have on proposed section 37P(3)(c) on the power to call witnesses and documents being the prerogative of the parties, noting that the case is dynamic, organic and that this is a concern to the Law Council. Do have a response to their concerns?

Mr Soden—I will make some comments about that first and then I will ask Mr Kellow to give you some more details. First of all, we actually have a rule in place at the moment that enables the judges to do exactly what this provision provides. I think it is fair to say the view in the court is that 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. It would have to be exercised very carefully, as it is now with the existing rule.

I can give you a good example of the kind of issue it is intended to address. It is often the case that you hear people complain about an excess number of witnesses being used to make a particular point where only one or two might have been required. It just does not seem right for the court to not have a clear power to say at an appropriate time, 'You only need two people, who you have already produced evidence from, to make that point. You do not need another two or three witnesses to make the same point.' This is particularly the case in the area of expert evidence.

ACTING CHAIR—Sure, but, just as a devil's advocate, the Law Council say that the judge can in any event order costs against a party if they believe there is an unnecessary calling of witnesses. What do you say to that?

Mr Soden—That, I do not believe, is 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. So costs is not a complete remedy to the problem.

Senator FEENEY—I assume, then, in this hypothetical trial where too many witnesses have been called to make a point, you are talking about the witnesses giving evidence and making a point that is uncontested. You are obviously not talking about a feature of a jury trial, for instance, where I guess we all have to accept that from the defendants and the prosecutors the argument is put in a particular way—I hesitate to describe it as theatrics—to emphasise—

Mr Soden—Yes, and 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. To be clear, we do not have any jury trials at this stage in the Federal Court, so we are talking about civil proceedings. Most of the evidence that is given in proceedings before our court is documentary evidence—affidavit evidence. But I would ask Mr Kellow to refer particularly to the existing rule and add any other comments that he thinks appropriate.

Mr Kellow—I might just make a few broad comments. One is that these amendments only apply to the court's civil jurisdiction, so the case management principles or legislation will not be used in the court's new criminal jurisdiction which will come to it with the passage of the legislation currently before the Senate. I think consideration of all the points made by the Law Council and the other submissions to the inquiry needs to be put in the context of the overarching purpose, which is the just resolution of the disputes. That is really the touchstone when looking at how all of these powers will 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. The High Court, in its recent decision in Aon, observed that what will actually lead to the just resolution will ultimately depend on the circumstances of each case, and that is the flexibility that one really wants and that is the touchstone of active case management in courts these days.

As Mr Soden mentioned, the Federal Court has already had rules concerning the limitation of witnesses and documentary evidence in proceedings. Order 42, rule 4A in the Federal Court rules has actually been there since 1998, so it is quite a longstanding rule that has been used to varying degrees. But we are not alone. There are similar provisions in most of the superior courts in Australia, including in New South Wales under section 62 of their Civil Procedure Act. There are similar rules in Queensland, South Australia and the ACT in their rules of court. The Victorian Law Reform Commission, in its recent inquiry that reported last year, has recommended that similar powers be given to the courts in Victoria in a legislative framework. So it does seem to be a fairly widely recognised and important power for courts to have in terms of the management of proceedings. It will be a matter for the courts and jurisprudence to evolve, but at this stage there is no suggestion that the provision will override the provisions of the Evidence Act and other legislative provisions dealing with evidence and 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. It is those sorts of areas where sometimes parties can be a little bit excessive in their approach to litigation.

The High Court, in Aon, did make some observations about the adequacy of costs as compensation. There is, I think, quite a useful paragraph in the judgment of the majority, paragraph 113. I will just read that onto the record. The judges said:

> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.

So there are a range of factors as to the extent to which the public could support lengthy trials which may involve repetitious evidence which does nothing to really progress or resolve the matter. Costs orders may to some extent compensate the party who has had to endure the longer-than-necessary trial, but they do not compensate the public purse for having expended judicial and other resources on that matter. Certainly the High Court, in its decision, has recognised that costs are not always an adequate compensation in these situations.

The other thing I would say about these provisions is that they have to be understood within the overall framework of case management. The fast-track directions which the court introduced earlier this year are premised on the early identification of issues and how they are to be established. The Law Council's point about the extent to which judges are in a position to limit witnesses or other evidence is true, assuming that the judge knows nothing or knows too much. The precept is to have the parties engaged, identify the actual issues in dispute, establish what evidence may be required to prove it if there are forensic issues and they cannot be established by agreement or some sort of consensual statement of agreed facts, and shape the case accordingly. I think 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. So the fears of the Law Council are probably not entirely well

placed. I think the other arrangements for managing cases will provide the context in which these sorts of directions might be given.

Mr Soden—Can I make a clarification on that point. Unlike most other superior courts in Australia, the Federal Court operates the docket system. That means on the day the case is commenced it is allocated to the judge who will hear the trial, if it needs a trial. More often now it is the case that the judge manages the case before a trial date is set. So a judge in that arrangement is clearly in a very good position to understand the issues in dispute and what sort of evidence is likely to be required to establish or not prove the issue. In that broad context the judge is in the best position to allocate the necessary time to the trial and has the power to make directions concerning the number of witnesses or the length of documents. By comparison, in many other places it is often the case that the judge is allocated the trial on the day of the trial and has not been involved in the preparation of that matter and is not in a position until the trial starts to know what the issues are or to have any idea of the kinds of witnesses to be called. You can understand that the practitioners would have some legitimate concerns about what the judge might do in those circumstances. That is not how we work.

ACTING CHAIR—Do these amendments apply to just the Federal Court, or do they apply to the Federal Magistrates Court and the Family Court?

Mr Kellow—The amendments at this stage are to the Federal Court of Australia Act, so they only apply to proceedings before the Federal Court.

ACTING CHAIR—Why do you think that is?

Mr Kellow—That is probably a matter for the department.

ACTING CHAIR—We will ask the department. I want to get a brief response on two three of the other recommendations—firstly, section 37N(3)(b) and the concern about assisting the party to abide by their duties, and the Law Council's concerns that it should be subject to the client's instructions. Can you see their concerns, and what is your response to them?

Mr Kellow—We can understand the concerns. To some extent it is a matter of how the provision has been drafted. There are analogous provisions in other legislation—for example, section 57 of the New South Wales Civil Procedure Act. I think the difference in drafting is that in the bill before the federal parliament it has been cast as a more positive obligation on practitioners. 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. There needs to be overarching supervision of all the participants in the litigation process. I am not suggesting that that actually might happen but it is always possible that, where you start having qualifications, people might take advantage of them.

ACTING CHAIR—Possibly, but they have a persuasive case, as far as I can see to date—and we can ask the department. But subclause (a) states:

... take account of the duty imposed on the party—

to act consistently with the overarching purpose, and subclause (b) requires the legal representative to:

... assist the party to comply with the duty.

How does a judge or anybody define 'assistant'? It could mean different things to different people. This is the concern that the Law Council has that it should be subject to the instructions of the party.

Mr Soden—We can understand that concern. I do not think we have a ready answer for it, other than to say it did not appear to us to be a matter of significant concern when we saw the bill and it did not prompt us to express a concern about that provision. But we do understand what is being said and there might be some further explanation from the department about how they think that ought to be approached.

ACTING CHAIR—Finally, what is your response to this concern about having a temporary restriction on judges so that they cannot fulfil sitting duties?

Mr Soden—In our submission to this committee in relation to the legislation, in the letter from the Chief Justice we supported schedules 1 and 2.

ACTING CHAIR—Noted. That is your response?

Mr Soden—Yes, please.

ACTING CHAIR—Can we tie you down? Does that mean you do not support schedule 3, that you are ambivalent to it or that it could be improved? It gives the chief judge, some might say, awesome power to temporarily restrict a judge to non-sitting duty. That is significant power and there is no qualification attached to it.

Mr Soden—I think I am at liberty on behalf of the court to say we did not seek those provisions, we did not ask for them and we do not think they are necessary.

ACTING CHAIR—Okay, that is adequate for me.

Senator FEENEY—In your opening statement, you described the merits of the proposed legislation and, you said something to the effect that they would facilitate or encourage cultural change. Could you elaborate on that point?

Mr Soden—In essence, it will reinforce the cultural change that has started, is occurring and is increasing for everyone involved in proceedings before the court to be focusing on the quick and inexpensive logic as the goal by which all work shall be done. In that sense that is the cultural change from what it might have been in the past—

Senator FEENEY—Is that the shift to case management, virtually?

Mr Soden—It is not only case management; it is the results of case management. That means there is a refining of the issues, a minimisation of the time and a focus on inexpensive procedures, compared to what people saw in the past where there might have been unlimited time to focus on an issue and justice prevailed at no regard to the ultimate cost. 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, which is the judges getting involved very early in the case—making decisions about what needs to be done, by whom and for how long—to minimise the time and the cost and produce a quick and inexpensive result, rather than leaving it to the parties to get into litigation mode, do everything that they think might be necessary to prove or disprove a particular point when, through early active case management those issues or those points may never be necessary to spend time or money on.

Mr Kellow—I would add two things there. Firstly, I think it has been suggested from the New South Wales experience that having statements of overarching purpose and the like in legislation is a very powerful message from parliament on behalf of the community about its expectations as to how the justice system should operate. I think the other key element—and it really builds on the work that the court has been doing in recent years in a number of the practise notes and other documents it has been issuing to guide proceedings, for example, in the patents list and admiralty and taxation—is that the efficient disposition of matters is not solely a matter for courts to impose some sort of active case management parameters; it is really a matter for all parties to be concerned about. The notions of meet and confer, early identification of issues and a general air of cooperation within the parameter of protecting and advancing one's clients' interests, have really become prevalent tools for achieving the just resolution of matters far more quickly and efficiently and economically. I think this legislation really reinforces that this is an expectation of the community and it is something to the advantage of all the participants in the justice system.

Senator FISHER—As the chair observed—and you have commented on it—quick, simple and inexpensive justice is not of itself and of necessity access to justice. Indeed, in some individual cases it could be argued that it is justice denied. Is there a place, notwithstanding that, for accepting that in a particular case there may be increased emphasis given to, say, case management to achieve efficient and fast dealing with a litigious issue for a particular applicant? Is there a case for that, if you were to bear in mind that that may increase the prospects—indeed, is likely to in a resources sense—of better access to justice for everybody else, for other litigants in the pool and potentially in the pool? Is there ever a case for something less than access to ideal justice—if there is such a thing—for one litigant if that provides greater and better access to justice for others?

Mr Soden—Yes. Let me elaborate.

Senator FISHER—Please.

Mr Soden—I think it is now well understood that there are finite resources available from the community to its publicly funded justice system, particularly the courts. 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. I believe there is no doubt that the direction that we are taking in terms of focusing on efficient and 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, and the faster and less expensive procedures will provide more access to more people.

That is a balance that always has to be struck, because, on the other hand, there is no more important case than your own case before the court. It is a very carefully managed balance that we are seeking, and these provisions, we believe, will help us produce that balance by enabling us to manage some of the excesses which are there to be brought back to enable more to come into the system. From our perspective, that has to be a better access to justice overall.

Senator FISHER—I guess part of what you are saying is that justice and access to it do not, of themselves, have agreed meanings; the interpretation can vary from litigant to litigant and probably court to court?

Mr Soden—There is no doubt that the definition of justice of the people who use the system might be different from a lawyer's definition of justice, particularly when what might be provided is a just outcome that the person does not think is fair.

Senator FISHER—So is some access to justice better than no access to justice? To turn it on its head a bit, is some justice better than no justice?

Mr Soden—I have to agree with that.

Senator FISHER—Where do you think the bill goes in terms of striking the balance? You have suggested it shifts towards potentially looking after more people—access to justice for a limited few at what might be their expense. Where do you think the bill puts the line?

Mr Soden—I think you would look at the overarching purpose that the bill provides—inexpensive, quick and efficient. If those goals are achieved, as the bill seeks to do and which we think it will help, those goals will, we believe, provide greater access to justice.

Senator FISHER—Thank you.

ACTING CHAIR—To wrap up questioning about the case load, is there currently a backlog? What is the extent of the backlog? The whole purpose of this bill is to improve case management, and I assume it is based on current concerns regarding backlogs. Can you outline for the committee the extent of the backlog?

Mr Soden—Our submissions and all of the suggestions we made to the department, most of which are now incorporated in this legislation, were not driven from a position of solving a backlog or solving delays. We have in our court a target of 18 months for the disposition of all cases and we report annually on how we achieve that. From memory, we are running at about 95 per cent. If there is a five per cent difference it is a few cases and they usually have legitimate reasons. So we are not approaching it from the basis that there is a big problem that needs to be solved; we are really approaching it on the basis that there are improvements that can be made.

ACTING CHAIR—Do you have the current status regarding the average duration of a case? Has that gone up or down in the last three years? I am happy for you to take it on notice.

Mr Soden—I should give you a little bit of information to assist. There are different types of cases in court and we have different time goals for different types of cases. A good example is migration appeals, which are in the Full Court jurisdiction exercised by one judge. We set a target of 90 days for the disposition from commencement to completion. That is including the reserve judgment. We meet that target in almost all of those cases. So you could say the average for migration appeals is 90 days, which is very quick. On the other hand, there are native title cases, and the average for those is not quick. When I last looked at the figures, the median are in the 12-month range from commencement to disposition.

ACTING CHAIR—Okay. If you are happy to take on notice to provide to the committee a summary of the category of cases, the targets that you have, the average and the change over the last one to three years, that would be useful so that we can get our heads around the extent of the targets and the cases before the court.

Mr Soden—If you agree, it would be easiest for me to provide to this committee the very comprehensive collection of information in our statistics that will soon be published in our annual report.

ACTING CHAIR—All right. That would be fine. You can see where we are coming from.

Mr Soden—Yes.

ACTING CHAIR—So if you can satisfy those requests that would be great. Thanks again for being here today.

Mr Soden—It is a pleasure, as always.

[10.26 am]

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

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

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

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

ACTING CHAIR—I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by minister and should be accompanied by a statement setting out the basis for the claim.

I now welcome officers from the department. Thanks for being here. Thanks for waiting patiently this morning and no doubt listening to the other witnesses. I invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Mr Minogue—I will not make an opening statement as such. The government's position in relation to the proposal is reflected in the bill, the Attorney's second reading speech and the explanatory memorandum. We very much endorse the evidence provided by the Federal Court this morning, and indeed the Law Council, in the sense of seeking to change the culture of litigation and taking measures to improve the case management of matters, the disposition of matters and the objective of achieving justice at a much more proportionate cost than current litigation tends to exhibit. Other than that, I will not make any opening comments. We are happy to address any issues that the committee might wish to go to.

ACTING CHAIR—Thanks for that. You have been here this morning and you have heard some of the views and concerns expressed, including from the Law Council. I would like to take you through some of their concerns and seek a response to them.

Mr Minogue—Certainly.

ACTING CHAIR—Firstly, I want to look at section 37P(3)(c), regarding the power to call witnesses and tender documents. The view has been put that it is the prerogative of the parties. They noted that all litigation is organic and dynamic and can change during a trial. They also noted that judges already have the power to order costs with respect to the frivolous, vexatious or unnecessary calling of witnesses or tendering of documents. They put some pretty persuasive arguments. How would you respond to those concerns?

Mr Minogue—I think the concerns are fair to the extent that they put them. The concern I would have, though, is that leaving it to the parties to consent to how litigation is conducted is moving away from the case management perspective. In relation to the Federal Court's evidence this morning about the concerns as to what position a judge or the court is in to make those types of assessments, I think were a judge not intimately involved in the case from its beginning in the court all the way through, those concerns might be better founded. But in the context of the Federal Court at least, where the docket system applies, the judge really does have an appreciation of not just the number of witnesses but what the issues are and how the parties are attempting to resolve those issues.

The position that the bill is trying to reflect is that a court is a forum for resolving disputes. It is resolving disputes according to law, but it is about resolving disputes. Adjudication and determination according to law is the judicial function. The court is not there for other strategic purposes, it is for the resolution of the dispute. So the parties have an obligation to identify what the dispute is about and how they propose to resolve it. Armed with that information, a judge is in a much better position to make an assessment about what might be required. But I do not think there is any expectation that judges would routinely set limits, and that also needs to be borne in mind. That is not the expectation that the government has. Indeed, that is consistent with the

evidence of the court. So it is a power there to be used to achieve the overarching objectives, but not to the disadvantage or injustice of parties in any particular case.

The discussions of these types of subjects, case management, access to justice and those types of things, talk about the balance that the committee was discussing earlier this morning, particularly in terms of whether at one extreme you go for Rolls Royce justice—which is a term that Chief Justice Martin of the Western Australian Supreme Court uses—or you seek to achieve just outcomes in other cases. 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. I think that theory still applies here.

The point I would make about costs is that in addition to the Aon case comments about costs there are other references in other cases that costs do not fix everything. There are sound reasons why there is an assumption that costs do not fix it in all cases or are not an appropriate remedy in all cases. In addition to those indicated by the Federal Court this morning, other reasons are potentially impecunious parties from whom you cannot recover costs but also the reality that costs, by the analyses that have been done, return between 50 and 60, at maximum about 80, per cent of what it actually cost you. So even on the purely financial measure an award of costs might be a penalty to one party but it is certainly not full compensation for the other party, and I think that needs to be borne in mind. Apart from that, there are also the time issues that are used and the fact that litigation is a terribly traumatic experience for a lot of litigants, if not all. The time element is not going to be remedied by an award of costs, and there are the public costs that are involved as well.

ACTING CHAIR—Thank you. You mentioned the Aon case. Could you give us your understanding and summary of that case, either now or on notice. I know it was on the 5 August, but it seems to be a very significant case regarding the matters at hand and it is a follow-up to the JL Holdings case. Can you do that now or notice?

Mr Minogue—Essentially, that case was an opportunity for the High Court to have a look at the JL Holdings case, as previously decided. What the majority in the Aon case held was that the JL Holdings case, which is said to have had a 'chilling effect on case management'—that is the quote that gets referred to, but I cannot source that offhand—

ACTING CHAIR—Is that referred to in the judgment?

Mr Minogue—I am not saying that it is referred to in this judgment, but in terms of the academic literature—

ACTING CHAIR—That is how it is characterised?

Mr Minogue—Yes, that is right. It was seen that judges would be very reluctant to push for the exercise of case management powers in the environment where JL Holdings was seen to set the scene because there was a risk of it being overturned on appeal. The majority said that JL Holdings was not based on any thorough consideration of the principles involved. So that is the basis on which they distinguished it. In paragraph 111, the majority said that:

Statements in *J L Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants.

That brings up that other broader access to justice question, I suspect. It goes on:

Such statements—

that is, the earlier JL Holdings statements—

should not be applied in the future.

A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.

I think the court there was saying justice requires an opportunity to state your case fairly and properly but the measure of that is not purely within the party's own assessment.

ACTING CHAIR—So you would see that judgment as supporting the legislation before us?

Mr Minogue—Very much so.

ACTING CHAIR—Can we move to a couple of the other recommendations—firstly, proposed section 37N(2). Proposed subsection (2)(a) talks about the requirement of a legal representative to take account of the duty imposed on a party to act consistently with the overarching purpose. Then proposed subsection (2)(b) requires the legal representative to assist the parties to comply with their duty. The Law Council, I think persuasively, put the argument that the word 'assist' could be viewed by a judge in one way and by somebody else in another way. Do you have a response to the concerns that have been raised about that proposed subsection?

Mr Minogue—We do. I must admit our position is that we do not see that that does cause particular concerns. It is true that 'assist' has not been defined in any more detail, but our submission is that it does not require definition. The overarching purpose is defined in relatively clear terms. Lawyers are very practised at statutory and other legal obligations that they have to have regard to. It is part of their ethical and professional obligations. So I would not see—

ACTING CHAIR—Would you be unhappy with the insertion of the words 'subject to the instructions of the client'? That is really their key point.

Mr Minogue—We would not support that. There are a couple of reasons for that. 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. You could foresee situations where a lawyer, without being too cynical about it, could get into much more difficulty, I would suspect, in terms of questions like, 'What was the advice given and what was the purpose of the advice? Did they ground proper instructions?' and all those kinds of things. I think a much clearer way is to actually say, 'The parties have an obligation to comply with this overarching purpose. Lawyers, take account of that and assist them to do that.'

The other comment I would make in response to that is that under their professional rules now lawyers already have obligations to assist clients to understand their rights and obligations, but it is limited in some circumstances to permitting the client to give proper instructions. I would refer the committee to the New South Wales Barristers' Rules, which are just one example. Clause 17 says:

A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations … sufficiently to permit the client to give proper instructions, particularly in connexion with any compromise of the case.

So that is a situation where you do have the reference back to the purpose of the obligation to advise the client: it is to enable them to give proper instructions. But that does not actually take you to the extent of having regard to the overarching obligation to resolve matters as quickly, efficiently and justly as possible. So I think that to base it on clients' instructions would leave a significant gap in the effectiveness of the regime.

Senator FEENEY—But then what problem are we fixing? What do the words accomplish? You have described how these professional obligations exist elsewhere.

Mr Minogue—I suppose I say that for two reasons. One is that it is not correct to say that these will be new issues in terms of the balance that lawyers will need to address. My submission is that they are not new issues for them to face. But then I say that, because the bill is attempting to really reinforce a culture change in litigation away from a strictly adversarial approach to one where the purpose of litigation is for the resolution of a dispute either through adjudication or through mediation, arbitration or other ADR mechanisms, that is the next step the government is trying to get to with the bill. That is a maturation or development of the judicial process, if you like. I would also refer the committee to the New South Wales provisions which came in in 2005, which on our submission impose higher obligations on professionals, because—

ACTING CHAIR—Is that section 57?

Mr Minogue—Section 56. The overriding purpose there is to facilitate the just, quick and cheap resolution of the real issues in proceedings. A party is under a duty to assist the court to further those overriding proceedings. But then subsection (4) states:

A solicitor or barrister must not, by his or her conduct, cause his or her client to be put in breach of the duty identified …

So that is a higher obligation. It is saying, 'By your conduct'—and conduct would include omission—'do not put your client in breach.' This is a more moderate and, we submit, realistic obligation. It is, 'Take account of that duty and assist your party to comply with that duty.' But there is no suggestion that the lawyer is the guarantor for the client and that, if the client is hell bent on frustrating the overarching purpose, a lawyer who

does their best to keep them in compliance would become the guarantor for the conduct of their client. But they do have an obligation themselves to participate in the resolution of the matter, consistent with the overarching purpose.

ACTING CHAIR—Perhaps I could move to the next point if that is convenient—that is, the issue regarding schedule 3, where the Chief Judge is allowed to temporarily restrict a judge to non-sitting duties. That is a plenary power with no conditions or restrictions whatsoever, and the Law Council had particular concerns about that, saying that there should be at least some restriction to ensure that the objective is to meet the needs of the court—that is, to complete their work on judgments that may not have been handed down. Likewise, the Federal Court, in a gentle way, advised the committee that they supported schedules 1 and 2 and not necessarily schedule 3. Would you like to respond to those concerns?

Mr Minogue—Thank you, Senator. In relation to those matters, the powers are consistent with powers that I think are already in the Family Court. Yes, they already apply in the Family Court and the Federal Magistrates Court, so they are not new powers.

Can I withdraw that, Senator. The powers are essentially about the management of the court by the Chief Justice. It is part of that essential function. The problem with the Law Council submission that it be expressly limited, however elegantly described, to the writing of judgments or the knocking-off of a backlog would be too limited. The range of circumstances that the explanatory memorandum indicates in paragraph 153 are 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. You might be aware that 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 those types of things—so there are other non-judgment writing issues that this provision would also apply.

ACTING CHAIR—I will interpose there and welcome Senator Marshall to the hearing. I have two questions on that. If that is the case, why not say so in the bill rather than relying on an explanatory memorandum? Can we start with that question.

Mr Minogue—My response to that is that it would not be necessary to say that in the bill. At one level the explanatory memorandum does assist in the interpretation of the bill, but it is not a provision that of itself empowers a Chief Justice to interfere with the independence of an individual judge. That would still remain and this provision would not overcome that. The main area is in the part relating to judicial responsibility. That provision takes its context in those areas of the Federal Court legislation that deal with the constitution of the court and the arrangement of the court business. This is a subsection that would apply in relation to the Chief Justice's existing power, and indeed their responsibility, to ensure the orderly and expeditious discharge of the business of the court. That is what the power is referenced to. If it were exercised for some other purpose, be it a punitive or some other nefarious purpose—

ACTING CHAIR—Where is this?

Mr Minogue—It is section 15 of the Federal Court of Australia Act. Essentially, it is a power that is already limited to the orderly and expeditious discharge of the business of the court, and so any powers under that can only be exercised with a legitimate purpose relating to that head of power.

ACTING CHAIR—Notwithstanding it is a very broad, general power. My second question is: does this apply to the Federal Magistrates Court and the Family Court in civil matters, as we are looking at here in the Federal Court?

Mr Minogue—Yes. There are provisions in the bill that would make similar amendments to both the Family Court and the Federal Magistrates Court.

ACTING CHAIR—Is that section 21B(1A)?

Mr Minogue—That is right.

ACTING CHAIR—So it does not apply currently to those two courts, but the amending legislation that we are looking at, the bill we are looking at, will make those amendments.

Mr Minogue—It will make those amendments. My understanding is that during consultations on the bill the Family Court and the Federal Magistrates Court had indicated support for these amendments.

ACTING CHAIR—But the Federal Court did not?

Mr Minogue—I have heard the court's evidence this morning, yes.

ACTING CHAIR—Thank you for that. As a final catch-all question in terms of caseload and backlog, can you provide some evidence to the committee with respect to the current status of the caseload and backlog?

Mr Minogue—We would very much be relying on the Federal Court for the production of those statistics as well, but I can certainly talk to Mr Soden and Mr Kellow. The department works closely with the court to be kept informed of where things are at.

ACTING CHAIR—What about the Family Court and the Federal Magistrates Court?

Mr Minogue—In a similar vein, we can provide those.

ACTING CHAIR—If you could with respect to the latter two. Please feel free to liaise with the Federal Court. They are going to respond with regard to the current arrangements and status over the last couple of years.

Mr Minogue—Certainly, we can do that.

ACTING CHAIR—Thank you very much indeed.

Senator FEENEY—In the evidence given to us by the Law Council of Australia they used the term 'mega-litigation'. That summons up the image of well-funded and determined litigants basically engaging in a whole range of cases against one another in various jurisdictions. Can you give us any insight into what extent this stereotype is a real problem and can you give us any insight into what extent this proposed legislation is seeking to come to terms with a changed environment in terms of the litigation courts are faced with?

Mr Minogue—Certainly. Thank you. I suppose there are two headline cases of mega-litigation. One is the Bell Resources case in Western Australia and one would be the C7 case in the Federal Court. They are extreme examples; they are certainly not everyday. I am not in a position to give evidence about what constitutes a long case. Those cases were extraordinarily long, occupying in one case, I think, 200 sitting days. In the other case it was two years, although they probably equate to about the same. To some extent I think one is enough. Tying up a judge and a court for a year or two effectively catches not just the judge. The opportunity cost is that that judge is not available to do other things, and there is the financial cost of resourcing a judge and the associated staff and the court room for litigation of that magnitude. There is a real problem, but I would not want to overstate it by saying, 'The problem is really the C7 and Bell type cases.' They are real and they do occur, but litigation is used for a whole host of purposes. That is legitimate, but a court is not the forum for all those other purposes; it is about dispute resolution. The culture change that the bill and other measures are attempting to lead and to reinforce is that when you get to court you are there to resolve the dispute and you are there to resolve it according to law as quickly as possible. That is what is being tried to be achieved.

In terms of how the bill might assist those extreme cases, I think that is quite a good example in a way. The judges felt that they did not have enough capacity to control the number of documents being tendered and the number of witnesses being called. The judge in the C7 case described it as bordering on scandalous. To the extent that a judge feels the capacity to actually control that litigation and still achieve a just outcome puts into issue the fact that all the parties there were acting in accordance with the instructions of their clients. All of them were directing to the just resolution of the dispute, being an adjudication at law, but at what cost?

Senator FEENEY—And following the rules of the court.

Mr Minogue—Exactly. But I think the difference there is that the rules of the court permit judges to exercise certain powers but without the clear statement of legislative authority for a judge to push the parties a little bit more than they might feel comfortable to actually test what is required and why.

And I think 'Why?' is an important question, too. Why do you need 10 witnesses to prove that? I think that is an important question. To give that capacity in the Federal Court Act, the primary legislation, we think is an important advance that actually will give judges more power to resolve those really entrenched disputes. But, having said that, not everything is suitable for ADR. We do not want to pretend that. Some matters really do need the final judicial adjudication and determination of rights according to law, and there is no suggestion that that should not happen. I think what this bill and the measures under it seek to achieve is that those matters that require the final adjudication by a judge will get there quicker and other matters that may not require that, or where parties can be assisted to come to a resolution either of the whole matter or by coming to agreement on the real issues in dispute and how they are to be proved or otherwise will assist all parties, including the public—who ultimately funds the judicial system.

Senator FEENEY—I want to turn briefly to the question of schedule 3. I want to make some remarks and invite you to respond. It seems to me that perhaps the genteel stereotype of the once upon a time head of jurisdiction was the first amongst equals and matters were resolved with a level of perhaps egalitarianism. But today it seems to me that the head of jurisdiction has a whole lot of very serious and significant management responsibilities and accountabilities which require the head of jurisdiction to play a far more decisive, managerial role than perhaps once prevailed. We can see, certainly from the parliament, how heads of jurisdiction are required to report and be accountable for the performance of their jurisdiction on a whole range of fronts. In that vein, I am untroubled by schedule 3 and the proposition to give chief judges or, in this case, a chief judge, greater power, but I wonder how you might respond to my remarks in terms of the changed role of a head of jurisdiction.

Mr Minogue—I think that is probably a consequence of courts being self-administering and managing their own budgets, as much as anything. The alternative to that would be that departments of state managed court budgets and then departments are accountable for how court resources are used. I suspect there would be no-one putting their hand up to say that that would be an improved way to do it. In terms of court administration itself, I think what that leads to is a much more sophisticated capacity of courts to administer themselves, and I think that is something that benefits attorneys-general, parliaments and the courts themselves.

Senator FEENEY—And, hopefully, the taxpayer.

Mr Minogue—Precisely. One of the difficulties in terms of accountability for courts is how far they go with that. There is a real tension between management and accountability and performance management, or perceptions of performance management and judicial independence. I think that is something that everyone is very sensitive to. In terms of courts discharging those accountability functions, while I suspect some courts or some people in courts do not like moves to more accountability or drilling the accountability down below measures of what comes in and what goes out and how it takes, I think courts are much better able to develop much better and more sensitive, realistic and meaningful measures of performance than departments would be. I think departments would be measuring it in terms of ins and outs and costs per unit—which is pretty crude and would not have the sophistication that courts have. So, while I acknowledge that courts and some in courts are uncomfortable with those responsibilities, I think courts are much better placed to do it in a meaningful way, and that will ultimately benefit all.

Senator FEENEY—I have certainly discovered in my brief time as a senator that they do not have any trouble articulating why more funding might be appropriate. Thank you very much. I have no further questions.

Senator FISHER—This follows on from Senator Feeney's line of questioning. With the greater powers to case manage, if you like, that come to the boss of the jurisdiction, does the bill, in your view, implement greater accountability in terms of reporting on the use of those greater powers and the progress with that?

Mr Minogue—The bill itself does not provide particular accountability requirements on a judge or a chief judge to report in relation to that, but the success or otherwise of those measures would be reportable in the overall accountability obligations of the court.

Senator FISHER—In an annual report or something?

Mr Minogue—In an annual report.

Senator FISHER—And how else?

Mr Minogue—Primarily in an annual report, but also in terms of the rate of disposition of particular matters, but also—

Senator FISHER—Which would be part of the figures in an annual report?

Mr Minogue—That is right, but also, because you would be making conscious decisions, the sorts of things that I think we would like to see being developed over time would be a better capacity to identify and measure the effectiveness and cost-effectiveness of the different alternatives that have been used. For example, were a judge to refer matters to ADR, I think we would be quite interested to see whether that did actually resolve the dispute. Does ADR resolve disputes earlier? Does it resolve them more efficiently? Does it resolve them more cost-effectively for the court and the parties? At the moment, it is very difficult to make those assessments. Intuitively, we work on the basis that they do because matters that go to hearing are very costly in terms of the representational costs, the party costs and the court costs. A lot of matters settle just before hearings, so you get the situation where there are a lot of sunk costs already incurred, then you get settlement on the steps of the

court. That might save the hearing fees and the cost of barristers for the week of hearing, but a lot of the preparation costs have already been incurred. So we would expect case management to lead to matters that are going to be settled anyway being settled far more deliberately and far earlier, and that will lead to cost savings all around.

Senator FISHER—Okay. You have said there is nothing in the bill that increases accountability that would come arguably with these increased powers. I think I have understood you to be suggesting, however, that this is what you expect to happen, coming out of case management. I have also heard you reflect on, effectively, management 101, which is that you cannot manage what you cannot measure. That is not to say that you cannot measure the effect of these powers, is it? You are more saying that at this stage they are not there; they need to be reported on so then they can be measured and evaluated?

Mr Minogue—Yes, that is right. The bill does not prescribe performance measures for these new powers. We would expect the court to share the same interests we would in terms of what works and what does not work as well.

Senator FISHER—But you are saying that the bill does not contain any specific requirements to report on the outcomes of the use of these measures as well?

Mr Minogue—No.

Senator FISHER—Should it not? What is the point in trying to do something if a third party cannot have a look at how it is going?

Mr Minogue—I suppose there are several answers to that. The court already has existing obligations to report—and we can get the relevant sections of the court's responsibility there. The courts already had existing responsibilities to report on their functions and operations, and this would be an element of those. I would be a little concerned about a suggestion that a judge, in the exercise of powers in any particular case, should report in an individual sense, for a management purpose, how that case was resolved. How that case was resolved will be a matter of public record anyway; that is not the problem, but—

Senator FISHER—It would be the process outcome, not the substantive outcome, that would be reported upon.

Mr Minogue—That is right. So what we would like to see develop is measures that allow you to assess quite meaningfully what processes were adopted. Was there a change in how cases were being managed? What seemed to work, and what seemed to work for what cases? As the Federal Court was saying this morning, there are different cases within the court's jurisdiction. The same powers will not work in relation to each of those. For example, in administrative law litigation, where it is against government and you usually have comprehensive statements of reasons, the scope for discovery would not be as high as in other litigation, so you would not expect any meaningful measure of discovery powers coming from administrative law litigation. I think you would need to develop measures that have regard to what worked for particular—

Senator FISHER—Or horses for courses.

Mr Minogue—Exactly. I think that is something we would see being developed over time. But you are correct: the bill does not say 'and judges shall report exercise of powers 1, 2 and 3 in accordance with the prescribed form' or something like that. We are not going to that level of detail.

Senator FISHER—To the extent that you say, 'Yes, but they would report under existing requirements on this, this and this and they would report by this mechanism and that mechanism—for example, the annual report'—and you might want to take this on notice, can you inform the committee of the extent to which the existing legislative requirements or other underpinning requirements on the boss of the court would (a) compel and/or (b) encourage reporting on progress of the case management measures implemented by the bill? So I mean the extent to which the existing law and existing requirements would either compel or encourage reporting to that end. Can you provide the committee with that on notice, in some detail?

Mr Minogue—I will take that on notice if I can, yes.

Senator FISHER—Heads of other bodies of a sort—including you guys—front before the estimates committees. Should the bosses—and I have no doubt they would be absolutely horrified by the proposition—in exchange for being given these new powers front up to estimates committees to talk about how they are enjoying them? I am being fickle. I mean to talk about the effectiveness of them.

Mr Minogue—The Chief Justice does not but the Chief Registrar, Mr Soden, does.

Senator FISHER—Yes. I am talking about the judicial officers themselves, obviously.

Mr Minogue—I think there might be an issue about that.

Senator FISHER—Are there other non-departmental—and this is probably not a question for you, actually; it is probably a broader question—or statutory agency heads who front up to estimates?

Mr Minogue—There are, but not in their capacity as a judicial officer.

Senator FISHER—No. I understand that.

Mr Minogue—For example, Ms Branson, as President of the Australian Human Rights Commission, now attends, as do the other commissioners. But they do not attend in a judicial capacity. I think that is the essential difference.

Senator FISHER—But they are not judicial, are they?

Mr Minogue—Indeed, no. That is the point.

Senator FISHER—There is, of course, a special place for judicial-judicial.

ACTING CHAIR (Senator Feeney)—Indeed.

Senator FISHER—Thank you.

ACTING CHAIR—No further questions?

Senator FISHER—Chair!

ACTING CHAIR—Yes. We got some real management in!

Senator FISHER—I could play with you, Chair!

ACTING CHAIR—Are there any further questions? My humble responsibility is to suspend proceedings.

Senator FISHER—Chair, if I may. I think you were present in the room when I asked the previous witnesses about where the bill draws that line in the sand between potentially, in the view of an individual litigant or a small group of litigants, compromising what might be their access to justice in the interests of the greater good of providing greater access to justice for more of the people more of the time.

ACTING CHAIR—The needs of the many outweigh the needs of the few?

Senator FISHER—You have added the 'outweigh' word, Senator Feeney, but that is the sense of it. I mean the extent to which the bill could arguably compromise what might be regarded by the few as their interest but for the benefit of others.

Mr Minogue—The bill does attempt to give some indication of that, not just in terms of the statement in clause 37M(1) about what the overarching purpose is but also, in subclause (2), by listing indications of that. It says:

… the overarching purpose includes the following objectives:

(a) the just determination of all proceedings before the Court;

(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;

(c) the efficient disposal of the Court's overall caseload;

(d) the disposal of all proceedings in a timely manner;

(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

I think that very much puts into play the fact that it is not just about my perception of the importance of my case, but about the court balancing the responsibility that it has for all litigants. In terms of my own view of how important my case is, if I can afford 100 witnesses, I want them on and I want to keep doing this until I get the result I want. I think that is an extreme example, but that is not justice, in any event. It goes back to what I said: the court is about resolving the dispute according to law. There are certainly private benefits to the courts—that is, the resolution of the dispute between the parties—but there are public benefits as well, and those public benefits go to confidence in the judiciary and confidence in the rule of law.

So I think the submission would be 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. I think that is consistent with the move away from the strict adversarial approach which most jurisdictions in Australia are starting—New South Wales most clearly with its reforms, but certainly all courts. And, certainly, most chief justices speak in terms of achieving this objective I have

referred to. There is Chief Justice Wayne Martin in Western Australia, but Chief Justice Spigelman in New South Wales talks in similar terms. Victoria have had their Cashman law report in terms of civil justice there. So it is a move that is going on, and I think is consistent with the Aon High Court case, about parties being able to bring their disputes to court. But, in terms of the discharge of the judicial function, that is not up to the parties any more; that is up to the judge, and we think that is an appropriate position to be in.

Senator FISHER—Okay. Thanks, Mr Minogue.

CHAIR—As there are no more questions, thank you very much to the department for attending today and providing evidence. It is much appreciated.

Committee adjourned at 11.12 am