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
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> (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

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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

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.