

# ADDITIONAL COMMENTS BY LIBERAL SENATORS

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

## Case management

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

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

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

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

## Recommendation 1

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

### *Practice and procedural directions*

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

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

it would give the Federal Court of Australia an unjustifiable plenary power.<sup>2</sup> It suggested that:

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

there be no such power, but there be provision for cost consequences if a party unnecessarily prolongs a hearing by leading patently unnecessary evidence.<sup>3</sup>

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

## Recommendation 2

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

## Judicial responsibilities

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

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

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

1.11 The Law Council of Australia bluntly stated:

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

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

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

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

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

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

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

**Recommendation 3**

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

**Senator Guy Barnett**  
**Deputy Chair**

**Senator Mary Jo Fisher**

