The Senate

Standing Committee on Legal and Constitutional Affairs

Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008 [Provisions]

February 2009

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ABBREVIATIONS

Family Law Act	*Family Law Act 1975*
FCA Act	*Federal Court of Australia Act 1976*
ICSID Convention	*Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1966*
International Arbitration Act	*International Arbitration Act 1974*
New York Convention	*Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*
UNCITRAL Model Law	*UNCITRAL Model Law on International Commercial Arbitration*

RECOMMENDATIONS

Recommendation 1

3.21 The committee recommends that the Senate pass the Bill.

CHAPTER 1

INTRODUCTION

Background

1.1 On 4 December 2008, the Senate referred the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008 (Bill) to the Senate Standing Committee on Legal and Constitutional Affairs (committee) for inquiry and report by 17 February 2009.

1.1 The primary purpose of the Bill is to improve the conduct of business in the federal courts through several measures. It also aims to clarify and expand the jurisdiction of the Federal Court of Australia under the *International Arbitration Act 1974* (International Arbitration Act). Finally, it seeks to respond to the decision of the Full Court of the Family Court of Australia in *Black v Black [2008]* FamCAFC 7 (Black v Black), where the Court applied a strict compliance test in relation to certain technical requirements for binding financial agreements made under the *Family Law Act 1975* (Family Law Act).

1.2 Key aspects of the Bill include proposed amendments to several Acts, including:

- the *Federal Court of Australia Act 1976* (FCA Act), to allow the Federal Court to refer a proceeding, or one or more questions arising in a proceeding, to a referee for report. The Bill would also amend the FCA Act to allow a single Federal Court judge to make an interlocutory order in the original or appellate jurisdiction of the Court in a matter otherwise required to be heard and determined by a Full Court.

- the International Arbitration Act to give the Federal Court concurrent jurisdiction with state and territory supreme courts for matters arising under Parts III and IV of the Act, which deal with the *UNCITRAL Model Law on International Commercial Arbitration* (the UNCITRAL Model Law), and the *Convention on the Settlement of Investment Disputes Between States and Nationals of other States 1965* (ICSID Convention). The amendments also seek to clarify the Federal Court's existing jurisdiction for matters arising under Part II of the Act (giving effect to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*).

- the FCA Act, Family Law Act, *Native Title Act 1993* and *Administrative Appeals Tribunal Act 1975*, to remove the current restrictions on Chief Justices and Presidents acquiring an interest in land for the purposes of the *Lands Acquisition Act 1989*.

- the *Public Order (Protection of Persons and Property) Act 1971* to allow an authorised, non-judicial officer of the Federal Court to make an order specifying

that certain premises are 'court premises' for the purposes of the Act. The purpose is to ensure that the areas in which authorised officers are able to exercise powers under the Act in the interests of security are readily identifiable to authorised officers and the public.

- the Family Law Act, to relax certain technical requirements that must be strictly satisfied for financial agreements and termination of financial agreements to be binding. These amendments respond to the concerns about the binding financial agreement provisions of the Act that have arisen following the decision of the Full Family Court in Black v Black. The Family Law Council has confirmed that amendments are required to restore confidence in the binding nature of these agreements.[1]

Conduct of the inquiry

1.2 The committee advertised the inquiry in *The Australian* newspaper on 17 December 2008, and invited submissions by Monday 12 January 2009. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 50 organisations and individuals.

1.3 One submission, from the Family Law Section of the Law Council of Australia, was received.

1.4 The committee then wrote to and received a response from the Attorney-General, the Hon Robert McClelland MP, in relation to issues raised in the Law Council's submission.

1.5 No public hearings were held.

Acknowledgements

1.6 The committee thanks the Law Council of Australia for their submission and officers of the Attorney-General's Department for their assistance.

1 A copy of this advice from the Family Law Council was provided to the committee by the Attorney-General's Department.

CHAPTER 2

OVERVIEW OF THE BILL

2.1 This chapter sets out the main provisions of the Bill.

Schedule 1 – Federal Court Powers

2.2 Proposed section 4 inserts a definition of 'referee' into section 4 of the FCA Act which sets out how particular terms in the Act are to be interpreted. This allows for the insertion of a new section – 54B – to provide the Court with the power to refer a proceeding or questions arising in a proceeding to a referee. Policy considerations related to this provision are discussed further below.

2.3 Items 2 - 5 in Schedule 1 allow for a single Judge of the Federal Court to make interlocutory orders pending or after the determination of the matter by the Full Court. This removes the present requirement for interlocutory orders coming before the Court from a tribunal or authority other than a Court which is constituted by a Judge of the Court or of another court created by the parliament, or by members who include a Judge of the Court or of another court created by the parliament, to be made by the Full Court.

2.4 This measure is designed to improve the efficiency of the Federal Court by removing the requirement for the Full Court to hear interlocutory applications. It is consistent with existing provisions in the Act and is intended to improve the Court's efficiency by removing the requirement for a Full Court to be convened for interlocutory matters.[1]

2.5 Item 6 deals with proposed section 54A which provides for the Court to refer questions to a referee, described at paragraph 2.2 above. This is to be done by a Court order and includes a proceeding in the Court or one or more questions that arise in a proceeding before the Court. Referring a proceeding or a question to a referee is to be subject to the Federal Court Rules.

2.6 Proposed subsection 54A(3) provides the Court with discretion to adopt, vary, reject or make any other orders it thinks fit in respect of any of the matters referred to the referee. This ensures the Court is not bound by the views or findings of the referee.

2.7 Proposed section 54B, also dealt with by item 6, provides the same protection and immunity for referees as is provided to Judges, and is consistent with the protection to mediators and arbitrators appointed under section 53C of the FCA Act.

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1 Interlocutory applications allow a party or person to ask the Court for any order other than the final judgment sought in an existing proceeding.

2.8 The explanatory memorandum states that the definition of referee is intended to be broad.[2]

2.9 Item 7 provides a broad power for the making of Rules of Court to deal with the use of referees, including the payment of fees, time limits, and the appointment of Judges or other officers of the Court as referees. These rule making powers are consistent with other Court rule making powers.

2.10 Item 8 allows for the amendments to be applied to all matters before the Court regardless of whether they were commenced on or before the commencement date.

2.11 A press release from the Attorney-General, the Hon Robert McClelland MP, states that the aim of these provisions is to assist judges reduce delays and costs associated with litigation on the basis that Judges can seek technical advice or expertise with this new mechanism rather than having to spend time gaining the in-depth knowledge required to form a view about complex and technical matters.[3] The Family Court of Australia and the Federal Magistrates Court already employ family consultants to assist families and to give expert opinion to the Court by way of oral evidence or family report.

2.12 The provisions that allow for the appointment of referees to assist the Court and who are appointed by the Court are similar to existing provisions in Commonwealth legislation that provide for the use of assessors to assist the Court take evidence and run proceedings.[4]

2.13 Provisions that allow for the appointment of referees are not intended to remove the ability of parties to present their own evidence, but they do give the Court an additional option for informing itself about matters before it.

Schedule 2 – *International Arbitration Act 1974*

2.14 The International Arbitration Act regulates international commercial arbitration in Australia and implements Australia's obligations under a range of international instruments, including:

- by implementing the UNCITRAL[5] Model Law;
- providing for the recognition and enforcement of international arbitration agreements and foreign arbitral awards consistent with the *Convention on the*

2 *Explanatory Memorandum*, Item 1: Section 4, page 4.

3 The Hon Robert McClelland, Attorney-General, Press Release, 3 December 2008.

4 Provisions related to the use of assessors are contained in the *Native Title Act 1993* and the *Patents Act 1903.*

5 United Nations Commission on International Trade Law.

Recognition and Enforcement of Foreign Arbitral Awards 1958[6] (the New York Convention); and

- implementing the ICSID Convention, to which Australia is a party.

2.15 The proposed amendments give the Federal Court concurrent jurisdiction with state and territory supreme courts.

2.16 Item 1 amends subsection 3(1) of the International Arbitration Act, the definition of court in the Act, to clarify that the Federal Court has concurrent jurisdiction with state and territory supreme courts to enforce foreign arbitral awards.

2.17 Consistent with item 1, item 2 inserts a new subsection 8(3) to clarify that the foreign award may be enforced by the Federal Court as if the award had been made by the Federal Court.

2.18 Item 3 amends the Act to allow for the Federal Court to perform functions under the UNCITRAL Model Law and will have the effect of allowing the Court to appoint arbitrators, terminate an arbitrator's mandate, review an arbitral tribunal's award and set aside an arbitral award.

2.19 Item 4 amends section 35 of the International Arbitration Act to give the Federal Court concurrent jurisdiction with state and territory supreme courts under Article 54 of the ICSID Convention. Article 54 of the ICSID Convention imposes obligations on parties to the Convention to recognise and enforce awards made under the Convention. It also provides that an award may be enforced by the Federal Court as if the award had been made by the Federal Court.

2.20 These provisions expand the jurisdiction of the Federal Court, providing an additional option for parties wishing to initiate proceedings under this Act. The current position is that the state and territory supreme courts have jurisdiction under all parts of the Act. The Federal Court only has jurisdiction under Part II, which relevantly provides for the enforcement of foreign arbitration agreements and arbitral awards consistently with the New York Convention.

2.21 The amending Bill would clarify the Court's existing jurisdiction under Part II of the Act as well as giving the Federal Court jurisdiction under Parts III and IV of the Act. Part III sets out rules applicable to international arbitrations taking place in Australia, including by implementing the UNCITRAL Model Law, while Part IV gives effect to the ICSID Convention.

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6 Australian Treaty Series 1975 No 25, entry into force for Australia on 24 June 1975. Available at: http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/dfat/treaties/1975/25.html?query="foreign%20arbitral%20awards

Schedule 3 – Land Acquisition

2.22 Items 1 – 4 repeal and replace provisions in the following Acts which prevent Chief Justices and Presidents of relevant courts and tribunals from acquiring interests in land and therefore from being able to negotiate and execute leases on their own behalf.

- *Administrative Appeals Tribunal Act 1975;*
- *Family Law Act 1975;*
- *Federal Court of Australia Act 1976;* and
- *Native Title Act 1993.*

2.23 The items clarify that the existing requirement for the relevant Chief Justice or President to seek the Attorney-General's approval to enter into contracts that exceed the prescribed amount (currently $1 million) is retained.

2.24 Item 5, the saving of regulations, is a technical provision that preserves the existing regulations prescribing maximum contractual amounts that court and tribunal heads may enter into.

2.25 These items allow courts and tribunals to negotiate and execute leases on their own behalf and are designed to provide heads of courts and tribunals sufficient power to manage their own affairs while still retaining the requirement to get Ministerial approval to enter into contracts in excess of the prescribed amount.

Schedule 4 – Court premises

2.26 Item 1 amends section 13A of the *Public Order (Protection of Persons and Property) Act 1971* to expand the definition of 'court premises' so that areas other than normal court rooms can be designated for a particular period as court rooms. This clarifies where court authorities can exercise their powers.

2.27 Item 2 provides for the insertion of proposed section 13AA to allow for an authorised court official to make a written order specifying particular premises are court premises. This proposed section makes it clear that the official has to be satisfied that the premises will be used as court premises, provides for premises to be designated on a permanent and temporary basis, for notice to be given to persons who are likely to be affected by such orders and for the way in which this notice is to be given.

2.28 These items are designed to meet the security requirements of court proceedings, ensure that areas in which authorised officers can exercise powers are readily identifiable, and provide flexibility when the Court is hearing native title matters on country.

Schedule 5 – Binding financial agreements

Part 1 – financial agreements

2.29 The items in this schedule largely respond to the decision in Black v Black, a decision of the Full Family Court which held on appeal that a financial agreement made under the Family Law Act did not meet the strict requirements that a statement be annexed to the financial agreement evidencing that the parties had received independent legal advice in relation to all matters set out in the relevant provision. The Full Court held that *strict compliance* with the provision was required in order for the financial agreement to be binding.

2.30 Financial agreements of this type are commonly referred to as 'pre-nuptial agreements'. Amendments discussed below are proposed in order to secure the validity of existing financial agreements and to give certainty to contracting parties.

2.31 The Bill also addresses concerns about possible inconsistencies that may occur in relation to third parties being excluded from financial agreements. In 2000, financial agreement provisions were introduced to the Family Law Act and replaced 'maintenance agreements'. In maintenance agreements it was clear that there could be third parties to the agreements, for example someone other than the parties to the relationship such as creditors or trustees who may have an interest in the property or assets of the parties. Following the 2000 amendments, there was some concern that the provisions did not explicitly recognise the possibility of third parties to financial agreements.

2.32 This situation was addressed in the *Family Law Act Amendment (De Facto Financial Matters and Other Measures) Act 2008* where the definition of 'spouse party' was broadened for the purposes of financial agreements made under Parts VIIIA and VIIIAB of the Family Law Act.

2.33 Part VIIIA of the Family Law Act allows married persons to enter into agreements as to the division of property in the event of a marriage ending. Agreements can be entered into either before, during or after marriage. On 10 November 2008, the Federal Parliament passed the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, which introduced a new Part VIIIAB to the Family Law Act to deal with de facto financial matters. These matters were previously dealt with exclusively by state courts under state law however the new Part VIIIAB puts these matters under the jurisdiction of the Family Court and the Federal Magistrates Court.

2.34 These amendments did not apply to termination agreements. The Bill seeks to ensure that the broadened definition of 'spouse party' applies to both financial and termination agreements for married and de facto couples, thereby allowing third parties to be included in such agreements. These amendments are not related to the Full Court's decision in Black v Black but seek to apply the same arrangements for financial and termination agreements to both married and de facto couples.

2.35 Item 1 of Schedule 5 clarifies that a termination agreement under Part VIIIA of the Family Law Act between parties to a marriage can include another person or persons as a party to the agreement.

2.36 Items 2, 3 and 4 relax the requirements for evidence that a spouse party to a financial agreement has obtained independent legal advice when entering into such agreements. At present the Family Law Act, through sections 90G(1)(b) and 90G(1)(c), requires a statement that the spouse party to whom the agreement relates has been provided with independent legal advice from a legal practitioner as to the effect of the agreement on their rights and the advantages and disadvantages to that party. This statement must be contained in an annexure to the agreement along with a certificate by the legal practitioner providing the advice, stating that the advice has been given.

2.37 Item 2 will amend this requirement so that before signing the agreement each spouse party is required to be provided with independent legal advice about the effect of the agreement on their rights and the advantages and disadvantages of such an agreement. They must also be provided with a signed statement by the legal practitioner stating that the advice was given to the party.

2.38 Item 4 removes the requirement that the original agreement is given to one of the spouse parties and a copy be given to each of the other parties.

2.39 Item 3 is a minor technical amendment as a consequence of the proposed repeal of section 90G(1)(e).

2.40 Items 5 – 7 mirror the amendments proposed at items 2 - 4 by applying the same requirements for spouse parties to obtain legal advice in relation to termination agreements made under section 90J of the Family Law Act.

2.41 Item 8 clarifies the application of these amendments and makes it clear that they will apply to financial agreements and termination agreements that have been made on or after 27 December 2000, the date of commencement of the provisions that were inserted into the Family Law Act that allowed for financial agreements to be made. Subitem 2 provides that the amendments won't apply to an agreement that is the subject of a court order setting aside the agreement.

Part 2 – financial matters relating to de facto relationships

2.42 Item 9 mirrors the proposed amendment at Item 1 of Schedule 5 (refer paragraph 2.35 above) and clarifies that a termination agreement under Part VIIIAB of the Family Law Act can include another person or persons as a party to the agreement.

2.43 Items 10 - 12 amend section 90UJ of the Family Law Act which deals with requirements to obtain independent legal advice in relation to Part VIIIAB financial agreements. These amendments mirror those described at paragraphs 2.36 – 2.39 and will have the same effect in relation to financial agreements made between de facto couples.

2.44 Items 13 - 15 amend section 90UL of the Family Law Act dealing with the termination of Part VIIIAB financial agreements and will have the same effect made by items 5 - 7 except that they apply to financial agreements between de facto couples.

2.45 Item 16 amends section 90UM of the Family Law Act which deals with the setting aside of financial agreements and termination agreements. The grounds for setting aside these agreements are the same for parties to a marriage as they are for parties to a de facto relationship with one exception. Section 90UE provides for the continued operation of written agreements made by de facto couples under the de facto financial law of a non-referring State covering property settlement or spouse maintenance matters if the couples later satisfy a geographical connection with a referring state or territory.

2.46 Item 16 replaces the existing subsection 90UM(5) with a provision to allow the court to set aside a Part VIIIAB financial agreement covered by section 90UE if the agreement was not made in compliance with the requirement for parties to be provided with independent legal advice about the effect of the agreement on their rights and the advantages and disadvantages.

2.47 Item 17 deals with the application of amendments made by items 10 – 15. The amendments will apply to agreements made on or after the day of commencement of item 1 to Schedule 1 of the *Family Law Act Amendment (De Facto Financial Matters and Other Measures) Act 2008,* except where the court has made an order setting aside an agreement.

Commencement

2.48 Clause 2 of the Bill provides for commencement of the Act. Sections 1 to 3 and Schedules 1, 2, 3 and 4 commence on Royal Assent. Schedule 5, items 2 to 8 provides for commencement on the day after Royal Assent.

2.49 The commencement of Schedule 5 item 1 and Part 2 of the current Bill relating to binding financial agreements are dependent on the commencement of Schedule 1, item 1 of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*. This Act was assented to on 21 November 2008 but as yet item 1 of Schedule 1 has not commenced. Item 1 of Schedule 1 is due to commence on a single day to be fixed by Proclamation, or on 22 May 2009, whichever occurs first.[7]

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7 Moira Coombs, *Federal Justice System Amendment (Efficiency Measures) Bill (No.1) 2008,* Bills Digest, 3 February 2009, No. 88, 2008–09, p. 3.

CHAPTER 3

KEY ISSUES

3.1 The committee received one submission from the Law Council of Australia. This submission was made on behalf of the Council's Family Law Section.

3.2 The submission focuses on the amendments proposed in Parts 1 and 2 of Schedule 5 designed to relax the technical requirements in relation to evidence that spouse parties have to provide when entering into financial agreements. While not part of the current inquiry's terms of reference, the submission also recommends consistency between the legal formalities required for binding financial agreements and child support agreements as well as the restructuring and renumbering of the Family Law Act.

3.3 As only one submission was received, this chapter focuses on proposed amendments to the Family Law Act in Schedule 5 of the Bill.

Issues raised in Law Council's submission

3.4 The submission states that the policy intent of the Bill related to the requirements for evidencing that legal advice has been sought by both parties to a financial agreement is not met by the amendments. The Law Council's submission contends that the way in which the amendments to sections 90G and 90J[1] of the Family Law Act have been drafted, dealing with what needs to be satisfied in order for financial agreements to be made and terminated, creates the potential for disputes to arise that have to be resolved by the Court. This is of course contrary to the intent of the provisions which are designed to allow parties to make agreements without having to use the Court.

3.5 The submission notes that Part VIIIA of the Family Law Act was introduced to allow parties to resolve property and maintenance issues by way of private agreement, providing for greater choice and a more efficient and less costly means of dispute resolution than resort to the Family Court. Prior to the introduction of these provisions, for agreements between parties to be binding they had to be approved by a Judge.[2]

3.6 Part VIIIA allows parties to agree and implement their own agreements and their termination without involving the Court. A key reason for requiring parties to evidence that they have received advice on the legal effect of the agreement before

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1 These amendments are mirrored in Part 2 of Schedule 5 of the Bill dealing with financial agreements between de facto couples and therefore the Law Council's comments in relation to Part 1 of Schedule 5 apply equally to the mirrored provisions in Part 2

2 Family Law Council of Australia, *Submission no. 1,* p.5.

concluding it is that it can only be set aside by the Court in limited circumstances. "The effect of a binding agreement is to extinguish the jurisdiction of the Court in relation to the subject matter of the agreement…".[3]

3.7 The submission endorses the requirement in sections 90G and 90J that before signing the agreement, a spouse party be provided with independent legal advice about the effects of the agreement on the rights of that party and supports the requirement for a legal practitioner to provide a signed statement confirming that the advice was provided to the party.

3.8 The submission states that the drafting of the amendments to sections 90G and 90J has been done in such a way that conflates the following elements:

1. The requirement for the legal advice to be given; and

2. The requirement that the statement of the legal practitioner be provided before the agreement is signed by the party.

3.9 The Law Council suggests that this gives rise to a potential dispute about the order in which the various steps occur and the possibility that the agreement can be found to be invalid if the advice is given prior to signature but the legal practitioner's statement is not provided to the spouse party until after the agreement has been signed.

> If, as is clearly the case, the intention is to have written confirmation that the required advice has been provided before the agreement is signed, it should not matter whether the statement confirming this is signed before, after, or at the same time as the agreement.[4]

3.10 Rather than relaxing the requirements in relation to evidence of independent legal advice when entering agreements or their termination, the submission states that the amendments add a new hurdle of the signed statement of advice having to be provided to the party before the agreement is signed by that party while the policy objective should be to have evidence that the advice has been given.[5]

3.11 The Attorney-General has responded to the committee by stating that the requirement to obtain a statement evidencing receipt of independent legal advice prior to the signature of an agreement ensures that parties will not be left in an uncertain situation about the binding nature of the agreement which has the potential to occur if it were open to spouse parties to obtain such a statement before, during or at the same time as signing the agreement. It provides a clear direction to spouse parties to obtain legal advice *before* signing an agreement.

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3 Law Council of Australia, *Submission No 1,* page 5.

4 Law Council of Australia, *Submission No 1,* page 5.

5 Law Council of Australia, *Submission No 1,* page 6.

3.12 The submission also raises issues related to the validity of existing agreements. Item 8 of schedule 5 is designed to ensure that the amendments related to financial agreements apply to agreements made on or after 27 December 2000. The submission states that the way in which the amendments are drafted means that they will have to conform to the requirements of the amending provisions.[6]

3.13 The Attorney-General has indicated that he has asked his Department to consider this issue.

3.14 The submission raises several other issues not strictly related to the inquiry's terms of reference but related to the Family Law Act.

3.15 The submission provides information on a number of areas that the Family Law Section of the Law Council believes will improve the operation of the Family Law Act and states that these have been raised with the Attorney-General. The submission advises that the Law Council has previously recommended that these issues be dealt with at the same time as the current amendments.[7]

3.16 The submission also recommends that the *Child Support (Assessment) Act 1989* be amended to ensure that the requirements for child support agreements are consistent with the amendments discussed above in relation to financial agreements in the Family Law Act.

3.17 As this Act is administered by the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA), amendments to this Act are the responsibility of the Hon Jenny Macklin MP. The committee understands that officers in the Attorney-General's Department are liaising with officers of FAHCSIA to consider the Law Council's suggestion.

3.18 Restructuring and renumbering of the Family Law Act is also recommended by the Family Law Council on the basis that the Act is "so unwieldy as to be impenetrable even to trained lawyers".[8]

3.19 The Committee has previously recommended the renumbering of the Family Law Act in its report of August 2008 on the Family Law Amendment (De Facto Financial Matters and Other Measures) Bill 2008 and has been advised by the Attorney-General that this is being considered in accordance with Government priorities and resources.

3.20 The committee looks forward to advice from the Attorney-General on matters raised in the Law Council's submission that are under consideration by the Government.

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6 Law Council of Australia, *Submission No 1,* page 6.

7 Law Council of Australia, *Submission No 1,* page 8.

8 Law Council of Australia, *Submission No 1,* page 8.

Recommendation 1

3.21 The committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Law Council of Australia

ADDITIONAL INFORMATION RECEIVED

1 Correspondence from the Attorney-General's Department regarding the submission from the Law Council of Australia. Received 11 February 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

No public hearings were held for this inquiry