

## **SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

### **Submission**

#### **Federal Circuit and Family Court of Australia Bill 2018 Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018**

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In general terms, I support the Government's proposals contained in these two Bills, but with some proposed amendments. I make various recommendations below.

No doubt, most of the argument about this Bill will be on the proposed restructure of the Courts. However, I would like to draw the Committee's attention to many sections of the Bill which introduce new powers and impose new obligations that have great potential to improve the efficiency of the courts and to reduce the delays in getting matters to trial that need a hearing. This will in turn reduce the costs of litigation for the parties. Some of these changes were proposed by Brian Knox SC and I in submissions to the Government, later published in the *Australian Law Journal*: P Parkinson, P & B Knox, 'Can There Ever Be Affordable Family Law?' (2018) 92 *Australian Law Journal* 458.

Whatever the future of the larger court reform proposals, it would be highly desirable if these reforms could be enacted as soon as possible. They are consistent with the proposals contained in the Australian Law Reform Commission's Discussion Paper concerning its review of the family law system, so there is no need to wait until that review is completed before enacting these provisions.

For ease of reference, I will refer to the Federal Circuit and Family Court of Australia Bill 2018 as "the Court Bill" and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2018 as the "Consequential Amendments Bill".

#### **The Merger of the Two Courts**

I have no difficulty with these proposals. The mistake was ever to have two courts exercising almost parallel jurisdiction in family law in the first place.

To some extent the merger of the two courts has already occurred, with the announcement in September 2018 that the Hon Justice Will Alstergren will be Chief Justice of the Family Court and also Chief Judge of the Federal Circuit Court from December 2018. He will endeavour to introduce a common set of rules and processes.

*Will the Family Court be abolished?*

Unquestionably, this was the Government's intention when it made the announcement in May 2018. The intention was that no new judges would be appointed to Division 1, and once the last of them retires or resigns, there would be no need to have two Divisions. Effectively the entire court would then have the same status as the Federal Circuit Court does now.

The decision to phase out the Family Court seems to have rested, to some extent, on some hastily conducted analysis by Price Waterhouse Coopers, making claims about the efficiency of the two courts. I consider that while the data may be correct, its interpretation of that data was seriously flawed in many respects.

There are certainly some problems in the Family Court – in particular unconscionable delays by certain judges in completing judgments. However, the problems in that regard are probably worse in the Federal Circuit Court. Generalisations about the efficiency of the two courts should be avoided. There are extremely hard-working judges in both courts. In both courts, there are judges who are not coping with their very heavy workloads and the difficult cases they must hear. As in all courts, some judges work harder than others; some manage their caseloads better than others. This is true of the Federal Court of Australia and the various State courts. Singling out the Family Court of Australia for criticism, without proper and sophisticated analysis of all relevant data, drawing upon expert interpreters, is problematic.

While the rhetoric from the Government initially indicated an intention to phase out the Family Court, this is not what the legislation says. The legislation refers to the 'merger' of the two courts. This is reflected in section 8 of the Court Bill which provides:

(1) The federal court known immediately before 1 January 2019 as the Family Court of Australia is continued in existence as the Federal Circuit and Family Court of Australia (Division 1).

(2) The federal court known immediately before 1 January 2019 as the Federal Circuit Court of Australia is continued in existence as the Federal Circuit and Family Court of Australia (Division 2).

The change of direction is no doubt attributable to a number of factors. First, the potential loss of specialisation was one of the main criticisms made of the Government's proposals. I share those concerns. Secondly, the youngest of the current Family Court judges will not retire until 2038 if she continues on to the age of 70. Thirdly, it seems that the need for specialist appeal judges in family law has been recognised, although nothing in the Bill requires this. Division 1 could provide a preparation and testing ground for eventual promotion to the Appeal Division in the Federal Court. Finally, there has been a recognition that if Division 1 were abolished,

there would still be a need for well-qualified judges to hear the really major property cases and very complex parenting cases, some of which can occupy a substantial amount of one judge's time. In other words, there is still a justification for a superior court to hear some family law matters, just as there is for a superior court to hear some commercial matters. Outgoing Chief Justice John Pascoe recognised as much in his speech to the National Family Law Conference in Brisbane and in his farewell ceremonial sitting in October. It is simply not the case that all the Federal Court's workload is more complex and takes more time than all of the Family Court's workload. The need for a superior court in family law matters is probably more justified than in industrial relations, migration, and other such matters that fall within the workload of the Federal Court.

Given the uncertainty about the future of Division 1, it would be desirable to specify a minimum size for this Division.

Recommendation 1: The legislation should specify a minimum number of judges to be appointed at all times to Division 1 of the proposed court.

*Will there still be a specialist judiciary?*

Section 11 of the Court Bill preserves the requirement of specialisation in Division 1, replicating s.22 of the *Family Law Act*. The Bill also introduces a new requirement for Division 2 appointments. Section 79(2) of the Bill provides:

A person is not to be appointed as a Judge unless:

- (a) the person has been enrolled as a legal practitioner (however described) of the High Court, or a Supreme Court of a State or Territory, for at least 5 years; and
- (b) the person has appropriate knowledge, skills and experience to deal with the kinds of matters that may come before the Federal Circuit and Family Court of Australia (Division 2).

Much depends how seriously governments take the statutory criteria and the extent to which they value experience in family law and knowledge of such matters as family violence and child abuse.

However, the statutory criteria for selection of judges have in the past proved ineffective. Over the last thirty or more years, appointments have been made to the Family Court that cannot reasonably be said to satisfy even the most generous interpretation of the provision in s.22 of the *Family Law Act*.

Section 22 requires that the Government only appoint people who "by reason of training, experience and personality", are suitable persons to deal with matters of family law. The conjunctive 'and' suggests that to be qualified for appointment, the person must have training beyond that generally required for admission to practice as a lawyer and have substantial experience in family law. These are objective and independently verifiable requirements.

Even with the criteria for appointment in the new Bill, governments may continue to appoint judges that do not satisfy the statutory criteria. That said, it is better to have these provisions in the Bill than not. While Governments ignored s.22 of the Family Law Act at times in making appointments to the Family Court, for the most part, appointees were experienced family lawyers. This has not been the case for appointees to the Federal Circuit Court, even though most of the workload is in family law and they must deal with some very difficult parenting cases involving family violence, drug and alcohol abuse and mental illness.

People who come before the courts with issues or disputes that are of the greatest importance to them deserve to have judges hearing their case who are highly qualified to determine the kinds of dispute that will come before the court to which they are to be appointed.

The system introduced by Robert McClelland, as Attorney-General, involved expressions of interest for judicial appointment and at least some form of scrutiny of candidates before deeming them to be suitable. This did not eliminate appointments based on considerations other than suitability and merit, but it was a more transparent system than one in which the selection process was entirely hidden from view and could be perceived as being political in nature.

It is important that the public, and in particular the legal profession, has confidence in the quality of the federal judiciary. An independent judicial appointments commission would be a much more effective means of achieving this than the current system.

<p>Recommendation 2: The Government should seek agreement with the Opposition on an independent Judicial Appointments Commission for all federal courts and tribunals.</p>
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### *The Appeal Division in the Federal Court*

The proposal is that a new Family Law Appeal Division in the Federal Court of Australia will hear all appeals in family law matters from the FCFCFA (and some appeals from the Family Court of Western Australia). This is in the Consequential Amendments Bill.

As the Attorney-General indicated in his Brisbane speech, the intention is that appeals from Division 1 will be heard normally by a three member bench while appeals from Division 2 will ordinarily be heard by a single appeal judge unless the issues in the case warrant consideration by a larger appellate bench. This is contained in the Consequential Amendments Bill.

This is back to the future. It is precisely how appeals operated before the Federal Magistrates Court became the Federal Circuit Court. The change to have three member benches in all appeals against final orders from a Circuit Court judge arose because it was considered that the status of the Circuit Court as equivalent to a District Court in NSW, warranted ordinarily having a three member appellate bench of superior court judges to hear the appeal. That is, the elevation of the magistrates to become judges required an increase in the number of judges

providing appellate scrutiny for each decision. The Government has evidently decided that in a choice between concerns about the status of the FCC judges and the need for greater productivity to reduce delays, the latter consideration should dominate. I agree. There are ways of ensuring that cases which appear likely to involve significant issues of law or practice going beyond the immediate matter at hand, will be heard by a larger appellate bench.

*Will appeals in family law be heard by non-specialists?*

It is understood that the Government recognises the need to appoint at least some specialists to sit on family law appeals, whether from the existing members of the Appeal Division of the Family Court of Australia or otherwise. This recognition is welcome. However, it is anomalous that while there are requirements for suitability in relation to trial judges, the Consequential Amendments Bill is silent on the qualifications necessary for appointment to the Family Law Appeal Division of the Federal Court.

Recommendation 3: That the Consequential Amendments Bill provide that, to be appointed, members of the Family Law Appeal Division should have at least five years' experience as a judge hearing cases under the Family Law Act or otherwise be suitable for appointment by reason of their training and experience in family law, to determine appeals in such matters.

Where three member appeal benches, or even five member benches, are required, it seems probable that some non-specialist judges will join the appellate bench. They may come from a great range of backgrounds – commercial law, intellectual property, maritime law, migration and industrial relations, to name but a few areas. There are some advantages in this potentially. These judges may bring helpful, fresh perspectives and a new rigour to decision-making. Even discretionary decisions must be based on clear and agreed principles, which take as their starting point the intentions of Parliament and which faithfully interpret the statute. The Full Court of the Family Court has not always found it easy to maintain an agreed and coherent jurisprudence that can assist people to resolve their own disputes in the shadow of the law.

Another advantage is that a broader range of judges will gain some knowledge of family law. It is not at all uncommon for High Court judges to be drawn from the ranks of the Federal Court. The lack of expertise in the High Court in family law has inhibited its capacity to supervise properly the work of the Full Court of the Family Court and to resolve conflicting and irreconcilable lines of authority in the Full Court's case law.

Of course, there are risks as well. That said, the jurisprudence in England has survived extensive input from non-specialist judges at appellate level. It is no longer the case (as it once was) that a majority of judges sitting on an appeal in a family law matter should have had experience in the Family Division of the High Court. One difference is that three members of the Supreme Court of the United Kingdom, including the President, are specialist family lawyers.

It should be noted that the Consequential Amendments Bill makes special provision for twomember appeal courts. This is as an amendment to the Federal Court Act.

*Will there be one Chief Justice and one Deputy Chief Justice for the court?*

The Bill creates a strict line of demarcation between the two Divisions and largely replicates the existing structure of the two courts within the one entity. Now in practice, the same person, The Hon. Justice Will Alstergren, has been appointed to be both Chief Justice of the Family Court and Chief Judge of the Circuit Court, and will hold these positions in the new structure. However, conceptually they are distinct roles in the Bill.

This is clear from sections 9 and 10 of the Court Bill. Section 9(2) is as follows:

The Federal Circuit and Family Court of Australia (Division 1) consists of the following:

- (a) a Chief Justice;
- (b) a Deputy Chief Justice;
- (c) such Senior Judges and other Judges as from time to time hold office in accordance with this Act.

(The reference to senior judges is very odd since the last of them retired about 20 years ago and I understand there is no intention to recreate the distinction between senior judges and judges).

Section 10(2) goes on to say:

The Federal Circuit and Family Court of Australia (Division 2) consists of the following:

- (a) a Chief Judge;
- (b) a Deputy Chief Judge;
- (c) such other Judges as from time to time hold office in accordance with this Act.

The new Chief Justice is to be known as “the Honourable Chief Justice Alstergren of the Federal Circuit and Family Court of Australia (Division 1)” but also as “His Honour Chief Judge Alstergren of the Federal Circuit and Family Court of Australia (Division 2)”. This is a *Mikado* sort of title and is best avoided.

Recommendation 4: The reference to senior judges in s.9(2) of the Court Bill be deleted.
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Recommendation 5: The Bill be amended so that where one person holds both the office of Chief Justice and Chief Judge, he or she will be known as the Chief Justice of the Federal Circuit and Family Court of Australia. The same should apply to the Deputy Chief. Alternatively, this nomenclature should be left to regulation or custom.
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*Will it be lawful to have one person holding both positions?*

Recommendation 5 presupposes that it is lawful for the one person to be both Chief Justice of Division 1 and Chief Judge of Division 2. However, if the Bill is passed in its present form, a plain reading would suggest that such a joint appointment would be unlawful. This is because s.55 of the Court Bill requires the Chief Justice to consult with the Chief Judge:

**55 Chief Justice to achieve common approaches with the Federal Circuit and Family Court of Australia (Division 2)**

For the purposes of ensuring the efficient resolution of family law or child support proceedings, the Chief Justice must work cooperatively with the Chief Judge with the aim of ensuring:

- (a) common rules of court and forms; and
- (b) common practices and procedures.

The Chief Judge is under a similar duty: see s.183.

It is lawful currently for the one person to be both Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court. However, without removing these provisions, his Honour Justice Alstergren would need to relinquish his position as Chief Judge before the date of proclamation of the Act and another judge be appointed to head Division 2.

Recommendation 6: Unless the Government intends that the offices of Chief Justice and Chief Judge be held by separate persons, s.55 and 183, and any other sections which presuppose two different office-holders should be deleted.

*Rule-making powers*

A concerning aspect of the Bill is that section 56 vests the power to make Rules of Court for Division 1 in the Chief Justice, not in the judges as a group. Section 184 vests a similar power in the Chief Judge. Traditionally, rules have had to be agreed upon by a majority of judges and experience has shown judges take the rule-making responsibility very seriously.

Proper consultation and deliberation is particularly important in seeking to formulate a common set of rules and procedures for the Court. Several judges have enormous experience of what works and what doesn't in managing the court's workload. There is a risk that if one person has the decision-making power to determine the rules and procedures of the Court, particularly someone without long judicial experience in the matters coming before the Court, then sub-optimal procedures may result and there may even be unworkable elements. Furthermore, there is a risk that the hard-working and experienced judges of both courts will feel disempowered and disenfranchised by the lack of a say in matters fundamental to their work.

These risks can be avoided, of course, by proper consultation – for example, acting on advice from a Rules Advisory Committee consisting of experienced and respected judges (see s.124, Family Law Act). However, there seems no reason why the rule-making power for this Court should be any different from any other court.

Recommendation 7: The power to make Rules of Court should either be vested in the Chief Justice and Chief Judge, with support from a majority of the other judges in each Division, or in a majority of judges (see ss.123 and 124 of the Family Law Act).

*Will there be a single point of entry?*

I understand that this is the intention, but the Bill is not structured in this way. The Bill provides for each Division to be able to transfer cases to the other Division. However, a transfer from Division 1 to Division 2 requires the written approval of the Chief Judge. Conversely, a transfer from Division 2 to Division 1 requires the written approval of the Chief Justice. Judges will be able to make interlocutory orders pending that written approval. Rules of Court will provide criteria for determining whether a matter should be transferred.

Both the Chief Justice and the Chief Judge are given the power to delegate the conferral of written approval to another judge.

Recommendation 8: The Bill should provide that all matters commence in Division 2 unless (a) the parties agree that the case should be heard in Division 1 and a judge of Division 2 (in chambers) agrees to the transfer; or (b) the Division 2 judge orders the transfer, after giving the parties an opportunity to be heard.

## **Other features of the Court Bills**

While the focus of discussion is likely to be on the ‘big picture’ issues in terms of the merger of the two courts, other parts of the Bill are significant. For ease of reference, I will use examples from the Division 2 part of the Bill, although similar provisions apply to Division 1.

### *Accrued jurisdiction*

Section 107 appears to give quite a broad power to determine all issues in dispute between the parties.

#### **Determination of matter completely and finally**

In every matter before the Federal Circuit and Family Court of Australia (Division 2), the Court must grant, either:



- (a) absolutely; or
- (b) on such terms and conditions as the Court thinks just;

all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by a party in the matter, so that, as far as possible:

- (c) all matters in controversy between the parties may be completely and finally determined; and
- (d) all multiplicity of proceedings concerning any of those matters may be avoided.

Furthermore, both Division 1 and 2 judges will have jurisdiction in law and equity. These are sensible provisions.

### *Power of summary dismissal*

The Court is given a broad power to dismiss either an applicant's case or a defence.

#### **111 Summary judgment**

(1) The Federal Circuit and Family Court of Australia (Division 2) may give judgment for one party against another in relation to the whole or any part of a proceeding if:

- (a) the first party is prosecuting the proceeding or that part of the proceeding; and
- (b) the Court is satisfied that the other party has no reasonable prospect of successfully defending the proceeding or that part of the proceeding.

(2) The Federal Circuit and Family Court of Australia (Division 2) may give judgment for one party against another in relation to the whole or any part of a proceeding if:

- (a) the first party is defending the proceeding or that part of the proceeding; and
- (b) the Court is satisfied that the other party has no reasonable prospect of successfully prosecuting the proceeding or that part of the proceeding.

(3) For the purposes of this section, a defence or a proceeding or part of a proceeding need not be:

- (a) hopeless; or
- (b) bound to fail;

for it to have no reasonable prospect of success.

(4) This section does not limit any powers that the Federal Circuit and Family Court of Australia (Division 2) has apart from this section.

This largely replicates the new s.45A of the Family Law Act introduced by the Family Law Amendment (Family Violence and Other Measures) Act 2018. There is surely no need for both.

**Recommendation 9:** The Government should resolve whether s.111 of the Court Bill is needed given the enactment of s.45A of the Family Law Act.

## *Specialisation*

Section 112(2)(b) provides in part:

In discharging the Chief Judge’s responsibility, the Chief Judge:

- (a) must promote the objects of this Act; and
- (b) may, subject to this Chapter and to such consultation with Judges of the Federal Circuit and Family Court of Australia (Division 2) as is appropriate and practicable, do all or any of the following:
  - (i) make arrangements as to the Judge who is to constitute the Court in particular matters or classes of matters;
  - (ii) without limiting the generality of subparagraph (i)—assign particular caseloads, classes of cases or functions to particular Judges;
  - (iii) temporarily restrict a Judge to non-sitting duties;

This is a significant provision. It is likely to signal increased specialisation within the Federal Circuit Court or Division 2, as it will become. This is not an issue in Sydney, where FCC judges typically have either a family law caseload or a general federal one, and almost none of the judges do both. By way of contrast, in Melbourne, all judges do everything.

This is supported by s.114:

### **Exercise of powers of General and Fair Work Divisions of the Federal Circuit and Family Court of Australia (Division 2)**

- (1) A Judge who is assigned to a Division of the Federal Circuit and Family Court of Australia (Division 2) must exercise, or participate in exercising, the powers of the Court only in that Division, except as set out in subsection (2).
- (2) The Chief Judge may arrange for a Judge who is assigned to a particular Division of the Federal Circuit and Family Court of Australia (Division 2) to exercise, or participate in exercising, the powers of the Court in the other Division if the Chief Judge considers that circumstances make it desirable to do so.
- (3) To avoid doubt, a Judge who is not assigned to either Division of the Federal Circuit and Family Court of Australia (Division 2) may exercise, or participate in exercising, the powers of the Court in either Division.

That is, judges who are appointed to the General or Fair Work Divisions will ordinarily be allowed only to hear cases within their Division.

These are sensible changes. So also is the possibility of a move away from the docket system. Section 112(2)(b) allows the Chief Judge to “assign particular caseloads, classes of cases or functions to particular Judges.” Experience shows that some judges find it difficult to write judgments in a timely way. One Federal Circuit Court judge has apparently had a judgment

outstanding for five years, and regularly takes a long time to deliver other judgments. Other judges have a very large number of reserved judgments outstanding for more than three months.

Conversely, other judges are particularly good at case management and might excel in the early direction of cases with a view to achieving a resolution without going to hearing.

### *Power to limit written documents and oral argument*

Section 149 provides:

#### **149 Limits on length of documents**

(1) The Federal Circuit and Family Court of Australia (Division 2) or a Judge may give directions about limiting the length of documents required or permitted to be filed in the Court.

(2) Subsection (1) has effect subject to the Rules of Court.

Section 154 provides:

#### **154 Limits on the length of oral argument**

(1) The Federal Circuit and Family Court of Australia (Division 2) or a Judge may give directions about limiting the time for oral argument in proceedings before the Court.

(2) Subsection (1) has effect subject to the Rules of Court.

Section 155 similarly provides for limitations on the length of written submissions. These are sensible provisions.

### *Case management*

The Bill incorporates into family law provisions concerning case management and the duties of practitioners that have long been a feature of the law applied in the Federal Court and in state and territory courts.

The *Federal Court of Australia Act 1976* is an example. Amendments made to this legislation by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* impose quite strict duties to assure the timely resolution of disputes at a cost proportionate to the amount at stake. Of particular importance in this legislation is Part VB on case management. Section 37M provides an overarching purpose for case management and s.37N(1) provides:

The parties to a civil proceeding before the Court must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

Section 157 of the Court Bill makes similar provision in relation to the work of the FCFCA.

#### **157 Overarching purpose of civil practice and procedure provisions**

(1) The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:

- (a) according to law; and
- (b) as quickly, inexpensively and efficiently as possible.

Note 1: See also paragraphs 5(a) and (b).

Note 2: The Federal Circuit and Family Court of Australia (Division 2) must give effect to principles in the *Family Law Act 1975* when exercising jurisdiction in relation to proceedings under that Act.

(2) Without limiting subsection (1), the overarching purpose includes the following objectives:

- (a) the just determination of all proceedings before the Federal Circuit and Family Court of Australia (Division 2);
- (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.

(3) The civil practice and procedure provisions must be interpreted and applied, and any power conferred or duty imposed by them (including the power to make Rules of Court) must be exercised or carried out, in the way that best promotes the overarching purpose.

(4) The *civil practice and procedure provisions* are the following, so far as they apply in relation to civil proceedings:

- (a) the Rules of Court;
- (b) any other provision made by or under this Act or any other Act with respect to the practice and procedure of the Federal Circuit and Family Court of Australia (Division 2).

An illustration of the problem that this will correct is the Full Court decision in *Holden & Wolff* [2014] FamCAFC 224. The case concerned the practice in the Federal Circuit Court of review of deputy registrars' decisions. In this case, the deputy registrar rejected an application for shortlisting of an application. In accordance with the normal practice, this was done on the papers filed by the applicant, without notice to the respondent and without providing reasons. The application did not have sufficient evidence of urgency. This is a common occurrence, because decisions of this kind involve the allocation of scarce judicial resources amongst all the cases in the registry.

When the applicant sought judicial review of that decision it was dealt with in chambers in the same way. The application was rejected. This was overturned by the Full Court which held, applying the Federal Circuit Court Rules, that judicial review of the deputy registrar's decision had to occur in open court with an oral hearing. As was noted by Watts J in *Kassis & Kassis*

[2014] FamCA 1067, that impacts upon the speed with which other cases can be heard. A hearing to determine whether there should be an expedited interim hearing takes time away from the judge to hear substantive matters (including other interim applications).

Had s.157 of the Court Bill been in effect, reference might have been made to the need of the judge to consider all the cases in the list and not merely some kind of procedural fairness to one particular litigant. It is obvious that if an application for short listing needs to be ventilated in open court with an oral hearing, then the early listing of this might prejudice the position of other litigants with more urgent matters.

Section 158 goes on to impose corresponding obligations on the parties and their lawyers in the light of s.157.

**158 Parties to act consistently with the overarching purpose**

(1) The parties to a civil proceeding before the Federal Circuit and Family Court of Australia (Division 2) must conduct the proceeding (including negotiations for settlement of the dispute to which the proceeding relates) in a way that is consistent with the overarching purpose.

(2) A party's lawyer must, in the conduct of such a proceeding before the Federal Circuit and Family Court of Australia (Division 2) (including negotiations for settlement) on the party's behalf:

- (a) take account of the duty imposed on the party by subsection (1); and
- (b) assist the party to comply with the duty.

(3) The Federal Circuit and Family Court of Australia (Division 2) or a Judge may, for the purpose of enabling a party to comply with the duty imposed by subsection (1), require the party's lawyer to give the party an estimate of:

- (a) the likely duration of the proceeding or part of the proceeding; and
- (b) the likely amount of costs that the party will have to pay in connection with the proceeding or part of the proceeding, including:
  - (i) the costs that the lawyer will charge to the party; and
  - (ii) any other costs that the party will have to pay in the event that the party is unsuccessful in the proceeding or part of the proceeding.

Note: Paragraph (b)—in relation to a family law or child support proceeding, the Federal Circuit and Family Court of Australia (Division 2) may make an order as to costs under section 117 of the *Family Law Act 1975* if the Court is of the opinion that there are circumstances that justify it in doing so.

(4) In exercising the discretion to award costs in a civil proceeding, the Federal Circuit and Family Court of Australia (Division 2) or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).

(5) Without limiting the exercise of that discretion, the Federal Circuit and Family Court of Australia (Division 2) or a Judge may order a party's lawyer to bear costs personally.

(6) If the Federal Circuit and Family Court of Australia (Division 2) or a Judge orders a lawyer to bear costs personally because of a failure to comply with the duty imposed by subsection (2), the lawyer must not recover the costs from the lawyer's client.

Section 159 is also important:

**159 Power of the Federal Circuit and Family Court of Australia (Division 2) to give directions about practice and procedure in a civil proceeding**

(1) The Federal Circuit and Family Court of Australia (Division 2) or a Judge may give directions about the practice and procedure to be followed in relation to a civil proceeding, or any part of such a proceeding, before the Court.

(2) Without limiting subsection (1), a direction may:

- (a) require things to be done; or
- (b) set time limits for the doing of anything, or the completion of any part of the proceeding; or
- (c) limit the number of witnesses who may be called to give evidence, or the number of documents that may be tendered in evidence; or
- (d) provide for submissions to be made in writing; or
- (e) limit the length of submissions (whether written or oral); or
- (f) waive or vary any provision of the Rules of Court in their application to the proceeding; or
- (g) revoke or vary an earlier direction.

(3) If a party fails to comply with a direction given by the Federal Circuit and Family Court of Australia (Division 2) or a Judge under subsection (1), the Court or Judge may make such order or direction as the Court or Judge thinks appropriate.

(4) In particular, the Federal Circuit and Family Court of Australia (Division 2) or Judge may do any of the following:

- (a) dismiss the proceeding in whole or in part;
- (b) strike out, amend or limit any part of a party's claim or defence;
- (c) disallow or reject any evidence;
- (d) award costs against a party;
- (e) order that costs awarded against a party are to be assessed on an indemnity basis or otherwise.

(5) Subsections (3) and (4) do not affect any power that the Federal Circuit and Family Court of Australia (Division 2) or a Judge has apart from those subsections to deal with a party's failure to comply with a direction.

These powers, taken together, have great potential to tackle some of the more egregious misbehaviour of some practitioners in the course of litigation.

### **How radical are the changes to the court structure?**

Given that, to date, the merger of the two courts has attracted a lot of opposition from the legal profession and some judges, it is appropriate to ask how radical are the changes and what are the major objections.

There has been almost constant debate about the best structure for the delivery of justice in family law cases over the last 20 years or so. It has been widely recognised that having two courts with different rules and processes, but almost the same jurisdiction, is far from optimal.

The roles of the two existing courts are not clearly differentiated, yet they have taken quite different approaches to the resolution of family disputes. These represent differences of philosophy, and not just different types of caseload.

To deal with these issues, the first Rudd government commissioned a review of the future of the two courts from Des Semple, a former Chair of the Family Law Council, in conjunction with the Attorney-General's Department. The Report was released in November 2008 (Des Semple and Associates and the Attorney-General's Department, *Future Governance Options for Federal Family Law Courts in Australia: Striking the Right Balance* (Attorney-General's Department, Canberra, 2008).) It identified the goals of reform as being:

- an integrated system which ensures that cost-effective, quick and efficient procedures are retained for shorter and simpler matters
- increased efficiency in the allocation of resources across the family law system and therefore better use of those resources
- a single court with family law specialists, and
- removing confusion among litigants in relation to the appropriate judicial level to handle their matters.

The Report recommended that there be one Family Court, and that the Federal Magistrates Court be abolished, with its magistrates being absorbed either into the Family Court or the Federal Court. It explained in more detail that there should be two separate judicial divisions serviced by a single administration (paras 112-13):

The Superior and Appellate Division of the Court would hear the most complex and lengthy cases, as well as appeals. The number of justices in the Superior and Appellate Division would be reduced over time as judges retire to around 25, based on current family law

workloads in the Family court and FMC. This reduction provides opportunity to create greater distinction in the level of work being undertaken by the two Divisions. The appointment of all justices in the Superior and Appellate Division as appellate justices is consistent with the current appeal arrangements in the Federal Court. The General Division would hear most first instance matters. The Chief Justice would manage across both Divisions and not be directly responsible for either. The head of the General Division would be responsible for ensuring that the existing service culture, expeditious handling of matters, and effective case management procedures of the FMC be maintained and enhanced.

The Court would be serviced by a single administration, including corporate and financial services, headed by a CEO. All administrative staff would report to the CEO, who would assist the Chief Justice to manage the Court and allocate resources across Divisions in consultation with the division heads. The CEO's responsibilities would include, in consultation with the heads of the two Divisions, putting in place a transparent and equitable mechanism for allocating judicial support resources to both Divisions based on the complexity and number of matters handled.

The Government introduced a Bill in 2010 to implement these reforms, but it lapsed when the election was called that year.

It is useful to compare and contrast the approaches of the Rudd Labor government and the Coalition respectively. The similarities are much greater than the contrasts. Both governments sought to have one court exercising family law jurisdiction, involving a single point of entry. Whereas the Labor government proceeded by announcing that the Federal Magistrates Court would be abolished, the Coalition government announced that the Family Court would be abolished.

Much of what Semple proposed has already been achieved - and more. There is now one CEO for all the federal courts. The government has now effectively combined the roles of Chief Justice of the Family Court and Chief Judge of the Federal Circuit Court. The reforms proposed by Semple are not dissimilar from the current proposals with two differences:

1. The appellate division work is to be placed within the Federal Court.
2. All of the current jurisdiction of the Federal Circuit Court is to be absorbed into the new court. The Federal Court will not have lower tier judges.

If the Government recognises the need for a sufficient quantity of appeal judges who really are amply qualified by reason of training and experience to sit in the Appeal Division of the Federal Court, then as far as family law jurisdiction is concerned, there may not be all that much difference from the Semple proposals – except that neither court is abolished.

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**November 22<sup>nd</sup> 2018**