SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Submission

Federal Circuit and Family Court of Australia Bill 2019

Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019

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Recommendations

1. The Government should seek agreement with the Opposition on an independent Judicial Appointments Commission for all federal courts and tribunals.

2. All recommendations to Cabinet for judicial appointments under this legislation, and consequent recommendations to the Governor-General, should contain a detailed statement of how, and to what extent, the person nominated satisfies the statutory criteria, together with an account of the selection process used to test such suitability.

3. The Government should consider appointing at least three suitable judges from the Federal Court to hold joint appointments if they are willing to serve in an appellate capacity to hear family law matters.

4. Section 11 should be amended to provide that subsection 2(b) does not apply to judges of the Federal Court of Australia who are given joint commissions.

5. Section 117 should be amended to the effect that: A [Division 2] Judge has the recreation and long service leave entitlements that are determined by the Remuneration Tribunal, provided that these be no less than the entitlements of judges in Division 1.

6. The reference to senior judges in s.9(2) of the Court Bill be deleted.

7. 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. Alternatively, this nomenclature should be left to regulation or custom.

8. Unless the Government intends that the offices of Chief Justice and Chief Judge be held in future by separate persons, any sections which presuppose two different office-holders should be deleted.

9. Section 45A of the Family Law Act should be repealed or ss. 46 and 143 deleted from the Bill.

Introduction

For the avoidance of doubt, this is a personal submission and not made on behalf of the Law School at the University of Queensland.

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.

It is highly desirable that these reforms be enacted as soon as possible. They are consistent with the proposals contained in the Australian Law Reform Commission's Report concerning its review of the family law system.

For ease of reference, I will refer to the Federal Circuit and Family Court of Australia Bill 2019 as "the Court Bill" and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 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 appointment of the Hon Justice Will Alstergren as Chief Justice of the Family Court and also Chief Judge of the Federal Circuit Court from December 2018. He is endeavouring 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, 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 policy has clearly been abandoned now. Despite the earlier rhetoric of no new appointments to the Family Court, there were in fact a substantial number of such appointments in the lead-up to the May 2019 election. 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 the commencement day 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 the commencement day 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. Secondly, the youngest of the current Family Court judges will not retire until 2038 if she continues on to the age of 70. Thirdly, 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. 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.

Will there still be a specialist judiciary?

Section 11 of the Court Bill preserves the requirement of specialisation in Division 1, substantially replicating s.22 of the *Family Law Act.* Similar requirements apply in relation to Division 2 appointments for those judges who will sit in family law and child support matters. Whether in Division 1 or for judges in Division 2 sitting in family law matters, the relevant criterion is that:

> by reason of knowledge, skills, experience and aptitude, the person is a suitable person to deal with family law matters, including matters involving family violence.

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.

While these provisions are welcome, the reality is that Governments have not infrequently ignored the statutory criteria entirely. 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*. They have not necessarily been unwise appointments; some have worked out quite well, while others have not. However, there is no point in having statutory requirements if the Government is going to ignore them and if it advises the Governor-General to make unlawful appointments (as in my view successive governments have done). Doing so brings the law into disrepute. It also puts the Governor-General in a difficult position since he or she is constitutionally required to act on the advice of ministers.

Section 22 of the Family Law Act currently 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.

The new criteria for appointment in the Bill are in some ways more stringent than s.22, and in other ways less so. Under the proposed new test, the judge must have 'knowledge' and 'skills', rather than training. He or she must have 'aptitude' rather than 'personality'. These are sensible changes. The more stringent requirement is that the person is "a suitable person to deal with…matters involving family violence". This means that in order for an appointment to be lawful, it must reasonably be considered that the person has knowledge about matters relevant to decision-making in family law matters, including an understanding of family violence, and arguably other sorts of knowledge on which they will need to draw frequently, including a basic understanding of child development, drug and alcohol addiction, mental illness and child sexual abuse.

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 matter.

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.

Judicial appointments are one of the very few areas of our society in which principles of merit-based appointments do not apply. Instead, the process (if such it could be termed) is riddled

with opportunity for appointments based upon personal friendships, political allegiances and considerations which would, in other contexts, constitute a breach of anti-discrimination laws.

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. What form it would take is another matter. There have been reported problems with the English model. Australia would have the advantage, in designing such a system, of being able to learn from the experience of other jurisdictions with a similar history of governmental appointments to the judiciary.

Recommendation 1: The Government should seek agreement with the Opposition on an independent Judicial Appointments Commission for all federal courts and tribunals.
Recommendation 2: All recommendations to Cabinet for judicial appointments under this legislation, and consequent recommendations to the Governor-General, should contain a detailed statement of how, and to what extent, the person nominated satisfies the statutory criteria, together with an account of the selection process used to test such suitability.

The Appeal Division in the Federal Court

The Bill provides that appeals from Division 2 judges will be heard by a single Division 1 judge unless the issues in the case warrant consideration by a larger appellate bench.

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.

Involvement of Federal Court judges in hearing family law appeals

A strength of the proposals in the 2018 Bills that the Appeal Division for family law matters be located in the Federal Court was that it would allow for at least some judges who are not

family law specialists to sit on some family law appeals. Federal Court judges come from a great range of backgrounds – commercial law, intellectual property, maritime law, migration and industrial relations, to name but a few areas. 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 there (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.

The capacity to include Federal Court judges on appeals could be delivered by making a few joint appointments. However, to do this would require an exception to be created to the provision in section 11 that any judge must be suitable for appointment by reason of knowledge and skills in relation to family law, including an understanding of family violence. The exception could be drafted relatively simply.

Recommendation 3: The Government should consider appointing at least three suitable judges from the Federal Court to hold joint appointments if they are willing to serve in an appellate capacity to hear family law matters.
Recommendation 4: Section 11 should be amended to provide that subsection 2(b) does not apply to judges of the Federal Court of Australia who are given joint commissions.

The terms and conditions of the judges

A major source of complaint from judges of what is now called the Federal Circuit Court is that their terms and conditions are so much less favourable than judges of the Family Court, notwithstanding that the two courts have almost the same jurisdiction and the cases heard in the two Courts do not greatly differ in character or complexity. Children's cases in both courts involve very difficult issues concerning child protection, domestic violence, mental illness and drug and alcohol abuse. An anecdotal observation is that litigants in the Family Court are often

much better off financially, and are more expensively represented. That can account for the greater length of some trials in the Family Court which ought to have been settled, or resolved more quickly than they are.

The merger of the two courts provides an opportunity to address some of the legitimate concerns and complaints of the Federal Circuit Court judges. Let's assume that the Government has no appetite for making any changes to pension entitlements, and will continue to leave it to the Remuneration Tribunal to set rates of remuneration. There is still the issue of recreation leave and long service leave entitlements. These judges work very long hours under conditions of enormous stress, but their leave entitlements are much less than the Family Court or the Federal Court. They get one-quarter of the long service leave that the Family Court judges do. They have 25 per cent less annual holidays. Even if there is a pay differential, there is a compelling case for leave entitlements to be the same.

For these reasons, I recommend an amendment to s.117 to achieve parity in terms of leave entitlements.

Recommendation 5: Section 117 should be amended to the effect that: A [Division 2] Judge has the recreation and long service leave entitlements that are determined by the Remuneration Tribunal, provided that these be no less than the entitlements of judges in Division 1.

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. 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) Two Deputy Chief Judges;
>
> (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 6: The reference to senior judges in s.9(2) of the Court Bill be deleted.

Recommendation 7: 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. Alternatively, this nomenclature should be left to regulation or custom.

Consulting with oneself

Various sections of the Bill require the Chief Justice to consult with the Chief Judge. Section 70 provides:

> **Chief Justice to achieve common approaches to case management 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 common approaches to case management.

The Chief Judge is under a similar duty (s.193). Section 75 gives the Chief Justice a similar obligation in relation to common rules and forms.

It is clear from another part of the Bill that the one person can hold both offices – and currently does. This makes ss.70, 75, 193 and 216, somewhat absurd. It would be better to delete the provisions. The effect is achieved by the proposed harmonisation of the Rules of Court and for two years, the Chief Justice has the final say over these Rules. The Bill, in s.5, makes it one of the objects of the Act to achieve such common approaches, and the Chief Justice and Chief Judge respectively "must" promote the objects of the Act (see e.g. s.47), so these duties to work cooperatively are in any event unnecessary.

Recommendation 8: Unless the Government intends that the offices of Chief Justice and Chief Judge be held in future by separate persons, any sections which presuppose two different office-holders should be deleted.

Rule-making powers

Traditionally, Rules of Court have had to be agreed upon by a majority of judges and experience has shown judges take the rule-making responsibility very seriously. This Bill makes an exception, but it is a once-off exception, since the Chief Justice's power to make rules has a sunset clause of two years.

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 43, and its equivalent in relation to Division 2 of the Court (s.139), 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 1), 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. Sections 46 and 143 are in similar terms. Section 143 provides:

> **143 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: Section 45A of the Family Law Act should be repealed or ss. 46 and 143 deleted from the Bill.

Specialisation

Section 47(2)(b) provides in part:

In discharging the Chief Justice's responsibility, the Chief Justice:

(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 1) 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;…

A similar provision applies to Division 2 (s.144). It is likely to signal increased specialisation within the Federal Circuit Court or Division 2, and may indicate increased specialisation in Division 1 also. 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 FCC judges do everything.

This is supported by s.146:

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 144(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. There have been judges in both the Family Court and the FCC in the recent past who have taken several years to deliver judgments. They really aren't suited for trial work. This section allows other responsibilities to be found for them. They might, for example, 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 182 provides:

182 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 187 provides:

187 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 188 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.

Sections 67 and 190 of the Court Bill makes similar provision in relation to the work of the FCFCA.

> **190 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.190 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.

Sections 68 and 191 goes on to impose corresponding obligations on the parties and their lawyers in the light of the overarching purpose provisions. Section 191:

191 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 192 (and its Division 1 equivalent) is also important:

192 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 a streamlined administrative structure for 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. First, neither court is abolished. Secondly, 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.

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