

# Chapter 2

## Key issues

2.1 Submissions received by the committee supported the bill's objective to improve the financial sustainability of the federal courts. However, some submitters expressed concern about the following matters:

- the lack of constraints on the exercise of power by the Federal Court CEO;
- the immediate lack of funding for the federal courts; and
- employment terms and conditions.

### Corporate services and the Federal Court CEO

2.2 The Family Court of Australia's submission raised concern over the Federal Court CEO's proposed role in relation to corporate services.<sup>1</sup> The Family Court argued that the bill would make the CEO of the Federal Court entirely responsible for corporate services and, in that capacity, the CEO would not be answerable to any head of jurisdiction, including the Federal Court.<sup>2</sup>

2.3 The Family Court stated in particular that information technology plays a vital role in the operations of the court in relation to its services to the public.<sup>3</sup> The submission stated that information technology includes:

..the Court's case management system (Casetrack) and the Commonwealth Law Courts Portal, which is an e-filing and information facility vital to the operation of the Court and to the litigants. The Portal includes listings of when cases are to be heard and when steps are to be taken, recording of time spent in Court, recording of applications and affidavits that have been filed. Casetrack also provides the data which forms the basis for statistical analysis of all the filings and the kind of matters being dealt with, including whether they are parenting or property proceedings and whether family violence allegations form part of applications. The latter is particularly important because much research is done around family violence and its prevalence in matters filed.<sup>4</sup>

2.4 The Family Court regarded it as very important that it retain 'some control' over its information technology system, and was concerned that the bill did not allow that to occur.<sup>5</sup>

2.5 The Family Court further raised concern over the exercise of power by the CEO. The submission noted that the CEO of the Federal Court would be given the

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1 Family Court of Australia, *Submission 2*, p. [1].

2 Family Court of Australia, *Submission 2*, pp [1–2].

3 Family Court of Australia, *Submission 2*, p. [2].

4 Family Court of Australia, *Submission 2*, p. [2].

5 Family Court of Australia, *Submission 2*, p. [2].

power to do 'all things necessary or convenient' for the purpose of providing corporate services.<sup>6</sup> According to the Family Court, there would be no constraints on the exercise of that power other than to consult with the heads of jurisdictions of the three courts and the two other CEOs, and a failure to consult would not affect the validity of a decision.<sup>7</sup>

2.6 The submission stated that the only genuine constraint on the exercise of power was in relation to decisions which had the effect of imposing an expenditure obligation on any of the courts in regard to administrative affairs of the court.<sup>8</sup> The Family Court was concerned that there was otherwise no constraint on decision making, and no criteria for how decisions would be made.

2.7 It further stated:

Nor is there any provision for governance arrangements between the heads of jurisdiction, the Chief Executive Officers of the Family Court and the Federal Circuit Court and the Chief Executive Officer [of the Federal Court] as to how a particular policy may be conceived, proposed and implemented. No board-like structure, where the relevant heads of jurisdiction can discuss policy or other matters which might affect the exercise of the Chief Executive Officer's powers, is provided for in the Bill.<sup>9</sup>

2.8 The submission argued that it was an unusual form of corporate management to have the CEO of one court responsible for corporate services of the other two courts with no accountability, requirement for transparency or an overseeing body to set policy.<sup>10</sup> While there were overarching general obligations under the PGPA Act, the Family Court was concerned that 'they are not supported by any specific provisions in the bill which would give assistance as to how those general obligations are met'.<sup>11</sup>

2.9 The Family Court suggested that the bill be amended to require that two of the three heads of jurisdiction must agree on any decision that would affect the operating processes of the courts, and that any expenditure over \$500,000 must be communicated to the heads of jurisdiction in writing with reasons for the decision reached.<sup>12</sup> The submission suggested that the heads of jurisdiction of the three courts meet at least once per year with their respective CEOs to set policy for the coming 12 months. Further, any dispute between heads of jurisdiction about policy which

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6 Family Court of Australia, *Submission 2*, p. [2].

7 Family Court of Australia, *Submission 2*, p. [2].

8 Family Court of Australia, *Submission 2*, pp [2–3].

9 Family Court of Australia, *Submission 2*, p. [3].

10 Family Court of Australia, *Submission 2*, p. [3].

11 Family Court of Australia, *Submission 2*, p. [4].

12 Family Court of Australia, *Submission 2*, p. [4].

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could not be resolved should be adjudicated by the Attorney-General in consultation with the three heads of jurisdiction.<sup>13</sup>

2.10 The department advised that it was expected that the Family Court CEO and Federal Circuit Court CEO would work closely with the Federal Court CEO to ensure that the delivery of corporate services was tailored to each court's needs, and in relation to matters that affected the administrative entity as a whole.<sup>14</sup> The department pointed out that mechanisms existed in the bill to ensure consultation between the Federal Court CEO, the heads of jurisdiction and the other CEOs for decisions relating to corporate services.<sup>15</sup> The department stated that details relating to corporate services and consultation requirements would be set out in a memorandum of understanding (MOU) between the three courts.<sup>16</sup>

2.11 The department further outlined that although the courts would be within a single administrative entity, the bill would provide clarity and control for each court in relation to its budget allocation. Each court would have its own budget outcome statement, and appropriations acts would set an allocation for each outcome within the entity.<sup>17</sup> The bill contained provisions that would prevent the Federal Court CEO from spending funds on outcomes to which they were not assigned.<sup>18</sup> The Federal Court CEO would also be prevented from imposing an expenditure obligation on the courts when exercising corporate services powers and functions without the consent of the relevant head of jurisdiction or, where agreement could not be reached, the Attorney-General.<sup>19</sup> The department highlighted that these provisions were inserted following consultation with heads of jurisdiction and would provide certainty to the courts in relation to their budgets.<sup>20</sup>

### **Funding the courts**

2.12 The Law Council of Australia (Law Council) welcomed the reinvestment of the proposed savings generated by the bill in the courts, as consistent with the objective of sustainable long term funding of the federal courts.<sup>21</sup>

2.13 The Law Council remained concerned, however, about the immediate lack of judicial resources in the Family Court and Federal Circuit Court and the delay before the savings accrued from the passage of the bill would come into effect. The Law Council highlighted that judges in these courts were under significant pressures due to

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13 Family Court of Australia, *Submission 2*, p. [5].

14 Attorney-General's Department, *Submission 3*, p. 7.

15 Senator the Hon Nigel Scullion, *Senate Hansard*, 2 December 2015, p. 77.

16 Attorney-General's Department, *Submission 3*, p. 7.

17 Attorney-General's Department, *Submission 3*, p. 9.

18 Attorney-General's Department, *Submission 3*, p. 9.

19 Attorney-General's Department, *Submission 3*, p. 9.

20 Attorney-General's Department, *Submission 3*, p. 9.

21 Law Council of Australia, *Submission 4*, p. 3.

increasing workloads, the stressful nature of high-conflict proceedings and the failure to fill judicial vacancies as they occurred.<sup>22</sup>

2.14 The Law Council was of the view that the Federal Circuit Court should be a particular focus of the reinvestment from the bill. The Council argued that in order to discharge the workload the Federal Circuit Court already had, and the additional and increasing workload arising from the courts' expanding jurisdiction, including family law, industrial law and migration matters, the increased funding for the Federal Circuit Court and the appointment of additional judges in each jurisdiction was critical.<sup>23</sup>

2.15 The Law Council believed that the provision in the bill of a separate CEO to support the Chief Judge of the Federal Circuit Court in the administration of that court, and safeguarding its discrete budget appropriation, were both necessary and appropriate measures if the court was to meet its objectives.<sup>24</sup>

2.16 The Community and Public Sector Union (CPSU) highlighted that the bill was focused on restructuring the courts to reduce costs rather than addressing the bigger challenge of the funding crisis facing the courts. The submission stated that the Federal Circuit Court and Family Court had been struggling with inadequate funding for some time and while the courts received \$22.5 million in additional funding over four years in the 2015–16 Budget, they were still facing a blowout in expenses of \$75 million by 2017–18.<sup>25</sup>

2.17 The CPSU argued that rather than focusing on restructuring the courts, the government needed to address chronic funding shortfalls and provide proper levels of resourcing to the courts.<sup>26</sup>

### **Employment terms and conditions**

2.18 The CPSU raised a further concern, that the merger may result in amalgamated corporate services staff facing relocation or redundancy.<sup>27</sup> The CPSU also suggested an amendment to the bill that would ensure all staff were employed under the Federal Court Enterprise Agreement, to ensure that staff in the merged structure were employed under one set of terms and conditions.<sup>28</sup>

2.19 The department in its submission highlighted that the bill contained transitional provisions which would preserve the courts' existing enterprise agreements until a new agreement came into operation for the single administrative entity.<sup>29</sup>

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22 Law Council of Australia, *Submission 4*, p. 3.

23 Law Council of Australia, *Submission 4*, p. 5.

24 Law Council of Australia, *Submission 4*, p. 4.

25 Community and Public Sector Union, *Submission 1*, p. 2.

26 Community and Public Sector Union, *Submission 1*, p. 2.

27 Community and Public Sector Union, *Submission 1*, p. 2.

28 Community and Public Sector Union, *Submission 1*, p. 2.

29 Attorney-General's Department, *Submission 3*, p. 9.

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## **Committee view**

2.20 The committee welcomes the merger of the courts into a single administrative entity. While submitters offered various proposals with a view to improving the legislation, all acknowledged the need to place the courts on a sustainable funding footing over the long term. With savings arising from the efficiencies to be reinvested back into the courts, the bill would leave the courts far better placed to deliver services to litigants.

2.21 The committee has considered the concerns raised by submitters, including those relating to transparency and accountability between the courts under the new arrangements. The committee notes that details relating to corporate services matters and effective consultation between the three courts are to be set out in an MOU, which would provide for the appropriate management of corporate services. The committee encourages the three courts to continue working expeditiously toward an MOU which will meet the needs and circumstances of all.

2.22 To ensure that the new arrangements are working effectively and that the sustainability of the courts' workloads and financial situations is improving, the committee would welcome a review of the legislation by the Attorney-General's Department one year after its implementation, in consultation with the three courts. Such a review would allow the department to advise the government if any refinement of the bill or the arrangements was required.

## **Recommendation 1**

**2.23 The committee recommends that the bill be passed.**

**Senator the Hon Ian Macdonald  
Chair**

