



## Jurisdiction of the Federal Magistrates Court Legislation Amendment Bill 2005

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## **Jurisdiction of the Federal Magistrates Court Legislation Amendment Bill 2005**

**Date introduced:** 7 December 2005

**House:** Senate

**Portfolio:** Attorney-General

**Commencement:** The Bill's formal provisions commence on Royal Assent. The substantive amendments commence 28 days after Royal Assent.

### **Purpose**

The Bill expands the existing jurisdiction of the Federal Magistrates Court (FMC).<sup>1</sup>

### **Background**

#### Introduction

The Federal Magistrates Court is a lower level, Chapter III Commonwealth court. It was established by the *Federal Magistrates Act 1999* and held its first sittings in July 2000. Jurisdiction is conferred on the court by a variety of Commonwealth statutes that cover areas including administrative law, bankruptcy, consumer protection, copyright, family law and child support, human rights and equal opportunity law, migration and privacy law. Its jurisdiction was initially conferred by the *Federal Magistrates (Consequential Amendments) Act 1999* and is shared with two superior Commonwealth courts – the Family Court of Australia and the Federal Court of Australia.

As at 30 June 2005, there were 31 federal magistrates. Provision was made in the 2005-06 federal budget for funding of two more federal magistrates to deal with family law matters. While in previous years 80% of the FMC's work was in family law matters, in 2004-05, more than 30% of the court's work was in general federal law matters (mostly migration cases) and the balance was family law.<sup>2</sup>

When he foreshadowed the establishment of a federal magistracy, then Attorney-General Williams said that its advantages would include a less formal judicial culture, more streamlined procedures and reduced costs for litigants.<sup>3</sup>

Although it is been in operation for only a short time, a number of reviews of the FMC have been carried out and consideration has been given to conferring additional jurisdiction on it. Some of these review and proposals are briefly mentioned below.<sup>4</sup>

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## **2001 Consultation Paper – Treasury and Attorney-General’s Department**

In August 2001, the Treasury and the Attorney-General’s Department produced a consultation paper entitled *A Proposal to Extend the Jurisdiction of the Federal Magistrates Service to Corporate Insolvency Matters and Certain Consumer Protection Matters*.

The Consultation Paper proposed a number of extensions to the FMC’s jurisdiction. It is referred to and endorsed by an interdepartmental review of the FMC so a description of the jurisdiction proposed in the Consultation Paper is provided below.

### **Review of the Federal Magistrates Service (FMS Review)**

An interdepartmental review of the FMC covering the period 1 July 2000 to 30 June 2002 was completed in 2003. The review team consisted of officers from the Attorney-General’s Department, the Department of Prime Minister and Cabinet, and the Department of Finance and Administration. Its terms of reference were to review the operation of the FMC and ‘report on jurisdiction, workload, arrangements for the allocation of judicial and other resources, appropriate level of ongoing funding, and effectiveness.’<sup>5</sup>

The review concluded that the FMC:

- was ‘meeting its objective of providing a quick and accessible forum for litigants involved in less complex family law and other general federal law disputes ...’<sup>6</sup>
- was ... ‘making a valuable contribution to an improved federal civil justice system ...’<sup>7</sup>
- had met its objective of enabling ‘... the Family and Federal Courts to focus on more difficult matters ...’<sup>8</sup>
- had met its objective of operating ‘...as informally as possible, consistent with the discharge of judicial functions ...’<sup>9</sup>, and
- was ‘facilitating improved access to justice in regional areas’ through its circuits.<sup>10</sup>

At the time of the review the Government was considering the conferral of a number of additional areas of jurisdiction on the FMC that had been proposed by the 2001 Consultation Paper. They included:

- less complex areas of corporate insolvency (Chapter 5 of the *Corporations Act 2001*)
- consumer protection matters in relation to financial services under the *Australian Securities and Investments Commission Act 2001*, and
- matters under the manufacturers’ liability provisions in Part VA of the Trade Practices Act.

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Consideration was also being given by the Government to the Consultation Paper proposal that the monetary limit for the FMC in its Trade Practices Act jurisdiction should be increased from \$200,000 to \$750,000.<sup>11</sup>

The FMS Review made a number of recommendations aimed at improving the operation of the FMC and its position in the federal justice system. It also recommended that:

... after the Government's current proposals to give the ... FMS additional general federal law jurisdiction are implemented, consideration be given to the ... FMS proposal for it to have concurrent jurisdiction with lower level State courts in trade practices matters, including jurisdiction over unconscionable conduct and other unfair practices as well as consumer protection matters.<sup>12</sup>

In other words, it endorsed the Consultation Paper proposals for additional jurisdiction.

### **Advisory Council on Intellectual Property**

The Advisory Council on Intellectual Property (ACIP)<sup>13</sup> has issued a series of papers examining whether the FMC should be given jurisdiction in patent, trade marks and designs. In July 2001 it produced an issues paper on the *Extension of the Jurisdiction of Patent, Trade Mark and Design Matters to the Federal Magistrates Service*.<sup>14</sup> This was followed by a discussion paper in July 2002<sup>15</sup> and a report in November 2003.<sup>16</sup> ACIP's report made a number of recommendations. Included among them were that the FMC should have concurrent jurisdiction with the Federal Court in patent, trade mark and design matters. In a press release dated 19 February 2004, the Parliamentary Secretary to the Minister for Industry, Tourism and Resources said that the Government would consider the report.<sup>17</sup>

### **Report of the Senate Economics References Committee**

Another report which touched on FMC jurisdiction was the March 2004 report of the Senate Economics References Committee on *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*. In order to increase access to justice by small business, the Committee recommended that:

... the jurisdiction of the Federal Magistrates Court be extended to enable it to deal with Misuse of Market Power (s.46 and s.46A, where cases rely upon s.83), Contravention of Industry Codes (s. 51AD) and Unconscionable Conduct (Part IVA). (recommendation 17).

In June 2004, the Government responded that:

... legislation should be amended to enable the Federal Magistrates Court to consider proceedings relating to Part IVA and Part IVB. However, the Government considers that section 46 and section 46A cases are likely to raise issues that are complex and that are more appropriately considered by the Federal Court.<sup>18</sup>

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## **Exposure Draft - Federal Magistrates Court Legislation Amendment Bill 2004**

In December 2004, the Government released an Exposure Draft of a Federal Magistrates Court Legislation Amendment Bill 2004 for public comment by 25 March 2005.<sup>19</sup>

The Exposure Draft included provisions:

- increasing monetary damages able to be awarded under Divisions 1 and 1A of Part V of the Trade Practices Act (up from \$200,000 to \$750,000), and
- conferring jurisdiction in less complex corporate insolvency matters under the *Corporations Act 2001*.

It also provided for:

- conferral of jurisdiction on the FMC in any matter arising under Part VA of the TPA (Liability of manufacturers and importers for defective goods) in respect of which a civil proceeding is instituted by a person other than the Minister or the Australian Competition and Consumer Commission
- conferral of jurisdiction on the FMC in matters arising under Subdivision D, Division 2 of Part 2 of the ASIC Act, which deals with consumer claims in relation to financial services. The amendment will enable the FMC to hear consumer claims raising issues under both the TPA and the corresponding provisions of the ASIC Act
- conferral of jurisdiction on the FMC in matters arising under Part 3 of the ASIC Act (Investigations and information-gathering) in its application in relation to an investigation of a contravention of Subdivision D, Division 2 of Part 2, and
- a \$750,000 monetary limit on awards of damages by the FMC under the consumer protection provisions of the ASIC Act.<sup>20</sup>

Explaining the proposal to give some corporate insolvency jurisdiction to the FMC under the Corporations Act, the Exposure Draft Explanatory Memorandum stated:

It was always the Government's intention that the FMC would deal with a wide range of lower level work of the Family Court and Federal Court, including suitable corporations law matters. Conferral of Corporations Act jurisdiction was not pursued in 1999 when the FMC was being established because of the uncertainty concerning the corporate law regulatory scheme which resulted from the High Court's decision in *Re Wakim*. With the reestablishment of the constitutional foundations of the corporations law regime in 2001, it was again possible to consider conferral of the jurisdiction on the FMC.

Chapter 5 (External administration) of the Corporations Act deals with the external administration of bodies corporate. It includes Divisions on various kinds of administration, most of which involve dealing with corporations in financial difficulty or insolvency, for example, receivership and liquidation.

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The proposed amendments to the Corporations Act do not remove any State/Territory jurisdiction and the transfer provisions under the Corporations Act will apply to facilitate transfers of matters between the FMC and other courts with jurisdiction under the Act, to ensure that corporate insolvency matters are dealt with in the most appropriate forum.

The Bill will provide further opportunities for litigants to take advantage of the streamlined and accessible forum offered by the FMC to resolve disputes in less complex corporate insolvency and other general federal law matters.<sup>21</sup>

## **Main Provisions**

### **Schedule 1 - Jurisdiction over trade practices**

At present, the FMC has jurisdiction to determine civil claims under Divisions 1 and 1A of Part V of the Trade Practices Act. This includes consumer protection provisions dealing with unfair trade practices and product safety and product information provisions. The maximum amount that can be awarded by the FMC for loss or damage is \$200,000.

**Item 1 of Schedule 1** adds the following areas to the FMC's trade practices jurisdiction: unconscionable conduct (Part IVA), industry codes (Part IVB), pyramid selling (Division 1AAA of Part V), actions against manufacturers and importers of goods (Division 2A of Part V), and liability of manufacturers and importers of defective goods (Part VA). The FMC will not have jurisdiction where proceedings are instituted by the Minister or the Australian Competition and Consumer Commission.

**Item 2** provides that the amendments apply to matters irrespective of whether they arise before or after the commencement of the Schedule.

**Item 4** increases the amount of monetary damages that can be awarded by the FMC from the present amount of \$200,000 to \$750,000 in relation to Parts IVA, IVB, V and VA.

The increase in the jurisdictional monetary limit responds to proposals made in the 2001 Consultation Paper and the FMS Review and was adopted in the 2004 Exposure Draft Bill.

Various increases in the FMC's trade practices jurisdiction were proposed by the 2001 Consultation Paper, the FMS Review, the 2004 Senate Committee report and the Government response to that report. The 2004 Exposure Draft Bill provided for an increase in trade practices jurisdiction. The current Bill includes those areas previously proposed and contains some additional trade practices jurisdiction.

### **Schedule 2 - Jurisdiction in proceedings transferred from the Family Court or Federal Court**

**Items 1 and 2 of Schedule 2** give the FMC jurisdiction that it would not otherwise have in matters transferred to it by the Family Court. The Explanatory Memorandum points out

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that such matters might include matrimonial property proceedings where the value of the property exceeds the FMC's current jurisdictional limit under section 45A of the *Family Law Act 1975* of \$700,000.

**Item 3** gives the FMC jurisdiction that it would not otherwise have in matters transferred to it by the Federal Court. The Explanatory Memorandum gives as an example proceedings under section 86AA of the Trade Practices Act where the FMC's jurisdictional limit on the award of damages would be exceeded.

**Item 4** provides that the amendments in **Schedule 3** apply to proceedings commenced before, on or after the commencement of the Schedule.

The FMS Review made a general recommendation that the issue of transfers be given further consideration by the Government.<sup>22</sup>

### **Schedule 3 - Jurisdiction over certain admiralty actions**

Admiralty jurisdiction is concerned with maritime matters including damage to ships and cargoes, collisions at sea and seamen's wages.

**Item 1** of **Schedule 3** amends the *Admiralty Act 1988* to confer jurisdiction on the FMC in *in personam* matters relating to maritime claims and claims for damage to ships. *In personam* actions are actions directed at and enforceable against another person. This jurisdiction is already conferred on the Federal Court, and State and Territory courts invested with federal jurisdiction. **Item 2** applies this amendment to matters arising before, on or after the commencement of **Schedule 3**.

**Item 3** allows the FMC, like other courts invested with admiralty jurisdiction to transfer proceedings to another court invested with admiralty jurisdiction.

**Item 4** allows the Federal Court and State Supreme Courts to remit matters commenced as actions *in rem* to the FMC. Consequentially, **item 5** confers jurisdiction on the FMC in relation to matters so remitted. These amendments apply to proceedings commenced before, or after the commencement of **Schedule 3**. Actions *in rem* are actions directed at and enforceable against property – in admiralty jurisdiction this would include actions enforceable against ships and cargoes.

FMC jurisdiction in admiralty actions was not considered by any of the reviews referred to in this Digest nor was provision for them contained in the 2004 Exposure Draft Bill.

### **Schedule 4 – Jurisdiction over appeals against departure prohibition orders**

The *Child Support (Registration and Collection) Act 1988* enables the Child Support Agency to make an order preventing a child support debtor from leaving Australia in prescribed circumstances. This is called a departure prohibition order (or DPO). A person

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aggrieved by such an order can appeal to the Federal Court of Australia. The court has power to either dismiss the application or set the order aside.

**Item 1 of Schedule 4** will enable the FMC to hear appeals against departure prohibition orders.

As is presently the case with appeals against decisions of the Federal Court about departure prohibition orders, appeals from decisions of the FMC will lie to the Full Federal Court and not the Family Court (**items 3 and 4**).

Investing the FMC with jurisdiction over DPO appeals was not considered by any of the reviews referred to in this Digest nor was provision for them included in the 2004 Exposure Draft Bill.

## **Concluding Comments**

There are substantial differences in the jurisdiction conferred on the FMC under the 2004 Exposure Draft Bill and the Bill as introduced into Parliament. The 2004 Exposure Draft gave the FMC consumer protection jurisdiction under the Australian Securities and Investments Commission Act and some corporate insolvency jurisdiction under the Corporations Act. In early 2005 in response to a question asked by Senator Ludwig during an Estimates Committee hearing, the Government stated that it was proposing to extend the jurisdiction of the FMC as set out in the Exposure Draft.<sup>23</sup> However, Australian Securities Investments Commission Act and Corporations Act jurisdiction are not included in the Bill presently before Parliament. These areas of jurisdiction are still under review.

The 2005 Bill also includes additional areas of jurisdiction not contained in the Exposure Draft – for instance, some additional trade practices matters, admiralty actions and appeals from departure prohibition orders. The second reading speech explains that the admiralty ‘...jurisdiction is ... appropriate for the Federal Magistrates Court as State and Territory lower level courts also have this jurisdiction.’<sup>24</sup> Similarly, the second reading speech points out in relation to departure prohibition orders that the FMC already has other jurisdiction under the Child Support (Registration and Collection) Act and that DPOs do not generally raise complex issues.<sup>25</sup> The conferral of the additional areas of jurisdiction was apparently subject to consultation with the FMC.

A further issue in which the Parliament may be interested is the recommendation made by the Advisory Council on Intellectual Property in 2003 that the FMS be given jurisdiction in patents, trade marks and designs. The ACIP report is still being considered by the Government.

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On the general question of how much of an increase in FMC jurisdiction should be conferred at any one time, the following comment in the FMC's most recent annual report may be relevant. It also touches on the issue of FMC resourcing.

Notwithstanding the growth in judicial numbers during 2004-05, the Court remains very busy and expects a further increase in its workload. In addition there are significant areas of jurisdiction appropriate to the work of the Court yet to be conferred. As noted in the *Federal Civil Justice System Strategy Paper* issued by the Attorney-General's Department in December 2003, change in the size and workload of the federal courts needs to occur incrementally.<sup>26</sup>

Finally, there is the question of resourcing of the FMC and whether current resources will adequately cope with the additional jurisdiction conferred by the Bill. The Explanatory Memorandum states that the '... amendments are not expected to have any significant financial impact.'<sup>27</sup>

## Endnotes

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- 1 The Federal Magistrates Court is also referred to as the Federal Magistrates Service.
- 2 Federal Magistrates Court of Australia, *Annual Report 2005-06*. The court's annual reports are electronically available at: <http://www.fmc.gov.au/pubs/html/annual.html>
- 3 Attorney-General The Hon Daryl Williams AM QC MP 'Federal magistracy to be established', *News Release*, 8 December 1998.
- 4 Other examinations of the FMC include the Australian National Audit Office report, Client Service in the Family Court of Australia and the Federal Magistrates Court, Audit Report No. 46, 2003/2004.
- 5 Explanatory Memorandum, p. 4.
- 6 *Review of the Federal Magistrates Service*, p. 5. For an electronic copy of the review go to attachment no. 56 on the following page:  
[http://www.aph.gov.au/senate/committee/legcon\\_ctte/estimates/sup\\_0304/ag/index.htm](http://www.aph.gov.au/senate/committee/legcon_ctte/estimates/sup_0304/ag/index.htm)
- 7 *ibid.*
- 8 *ibid.*, p. 6.
- 9 *ibid.*, p. 7.
10. *ibid.*
- 11 These matters were included in a Consultation Paper issued by the Treasury and Attorney-General's Department on 27 August 2001. Referred to in Attachment F of the FMS Review.
- 12 FMS Review, *op. cit.*, p. 8.
- 13 ACIP advises the Minister for Industry, Tourism and Resources.

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- 14 Electronic copy at [http://www.acip.gov.au/fms\\_submissions/IssuesPaper.PDF](http://www.acip.gov.au/fms_submissions/IssuesPaper.PDF)
- 15 Advisory Council on Intellectual Property, *Should the Jurisdiction of the Federal Magistrates Service be Extended to Include Patent, Trade Mark and Design Matters?* Discussion Paper, July 2002 – electronic copy at:  
<http://www.acip.gov.au/library/FMS%20Discussion%20Paper.PDF>
16. Advisory Council on Intellectual Property, *Should the Jurisdiction of the Federal Magistrates Service be Extended to Include Patent, Trade Mark and Design Matters?* Report, November 2003, electronic copy at: [http://www.acip.gov.au/fms\\_submissions/finalreport.PDF](http://www.acip.gov.au/fms_submissions/finalreport.PDF)
17. Warren Entsch MP, Parliamentary Secretary to the Minister for Industry, Trade and Resources, Media Release, ‘IP Rights and the Federal Magistrates Service’, 19 February 2004, 04/038. Electronic copy at: [http://www.acip.gov.au/fms\\_submissions/mediarelease.PDF](http://www.acip.gov.au/fms_submissions/mediarelease.PDF)
18. Government Response to the Senate Inquiry into the Effectiveness of the Trade Practices Act in Protecting Small Business, June 2004, p. 16.
- 19 The Exposure Draft Bill and explanatory memorandum are available on the Treasury website at: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=942>)
- 20 Senate Legal and Constitutional Legislation Committee, Attorney-General's Department, Estimates Hearing, Output 1.1, Question No. 2, answer to questions asked by Senator Ludwig on 14 February 2005.
- 21 Exposure Draft Explanatory Memorandum, Jurisdiction of the Federal Magistrates Court Legislation Amendment Bill 2004, pp. ii-iii.
- 22 See recommendation 2.
- 23 Senate Legal and Constitutional Legislation Committee, Attorney-General's Department, Estimates Hearing, Output 1.1, Question No. 2, answer to questions asked by Senator Ludwig on 14 February 2005.
- 24 Senate, *Hansard*, Second Reading Speech, Jurisdiction of the Federal Magistrates Court Legislation Amendment Bill 2005, 7 December 2005, p. 8.
- 25 *ibid.*, pp. 8–9.
- 26 Federal Magistrates Court of Australia, *op. cit.*, p. 5. Eight new federal magistrates were appointed in 2004-05.
- 27 Explanatory Memorandum, p. 1.

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