



**FEDERAL MAGISTRATES COURT OF AUSTRALIA**

**Submission to the  
Senate Legal and Constitutional Legislation Committee**

**Inquiry into the provisions of the Federal Magistrates  
Amendment (Disability and Death Benefits) Bill 2006**

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**Executive Summary**

The Federal Magistrates Court's role, jurisdiction and workloads are increasing. The Court is evolving to reflect this. The development of the remuneration and entitlements of Federal Magistrates is a part of this evolution. The Court welcomes and is pleased to see measures to improve the disability and death entitlements of Federal Magistrates.

It is the view of the Court that all judicial officers should be treated equally in respect of disability and death entitlements. The Court submits that the simplest way to achieve equality in this matter is to include Federal Magistrates in the operation of the *Judges' Pensions Act 1968 (Cth)*. However, in the absence of this, other improvements to achieve better entitlements for Federal Magistrates are welcome. The Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 ("Bill") seeks to make a number of improvements in the entitlements of Federal Magistrates.

However, the Court considers that some changes to the Bill are required to more fully assist in the development of appropriate remuneration and entitlements for Federal Magistrates.

In particular, the Court submits that:

- (a) the age limitations in the Bill should be amended to align with the appointments of Federal Magistrates, that is, the age restrictions should be amended from 65 years to 70 years (Federal Magistrates being appointed until 70 years of age);
- (b) the amount of death benefits payable to eligible spouses and eligible children is inadequate and should be equivalent to the pension and superannuation entitlements of a retired disabled Federal Magistrate;

## **Introduction**

The Federal Magistrates Court was created under the *Federal Magistrates Act 1999*. It is a federal court under Chapter III of the Constitution. Since its creation, its role in the Australian judicial system, its jurisdiction and consequently its workload have all increased dramatically. It currently has jurisdiction in areas of administrative law, bankruptcy, child support, copyright, family law, human rights, migration, national security, privacy, trade practices and workplace relations with jurisdiction to be given shortly in relation to admiralty law. [Appendix 1](#) provides a jurisdictional history of the Federal Magistrates Court.

In recognition of this continuing evolution of the Court, the Court is developing further its practices, procedures and systems. This will ensure that the Court continues to provide high quality simple and accessible dispute resolution.

Just as the Court's practices, procedures and systems are developing to deal with the Court's growing role, so too the remuneration and entitlements of its Federal Magistrates are developing. This process of development recognises both the high level of performance being achieved by Federal Magistrates and the need to ensure that the Court is able to continue to do so. [Appendix 2](#) provides some indicators as to the quantity, timeliness, quality and cost effectiveness of the Court. The Federal Magistrates Amendment (Disability and Death Benefits) Bill 2006 ("Bill") is part of that process of developing the remuneration and entitlements of Federal Magistrates.

## **General Comments on the Bill**

Currently, there is no entitlement payable to a Federal Magistrate on disability grounds or in the event of death. This is in contrast to the entitlements enjoyed by judges of the High, Federal and Family Courts who have access to pensions in the event of disability or death. It is the view of the Court that all judicial officers should be treated equally in respect of disability and death entitlements. The Court submits that the simplest way to achieve equality in this matter is to include Federal Magistrates in the operation of the *Judges' Pensions Act 1968 (Cth)*. However, in the absence of this, other improvements to achieve better entitlements for Federal Magistrates are welcome. The Bill seeks to make a number of improvements to the entitlements of Federal Magistrates.

It is of note that the entitlements of Federal Magistrates are also inferior to those enjoyed by their public service staff, who have access to one of the Commonwealth defined benefit superannuation schemes and their related disability and death benefits.

## **Comments on Specific Provisions of the Bill**

The Bill proposes the insertion of a new Division 2 in Part 2 of the *Federal Magistrates Act 1999*. In brief, new sections 9A, 9B and 9C provide for a Federal Magistrate to be certified as a retired disabled Federal Magistrate, receive an entitlement to a pension and entitlements to certain superannuation contributions. Section 9D provides for death benefits for Federal Magistrates and retired disabled Federal Magistrates.

The Court has concerns in relation to three aspects of the provisions. The first relates to the age limitations in the sections. The second relates to the amount of death benefits payable to a Federal Magistrate's or a retired disabled Federal Magistrate's eligible spouse or eligible children. The third relates to the definition of "eligible spouse".

### **Age limitations on entitlements**

Whilst Federal Magistrates hold office until they attain the age of 70 years, the new sections are expressed only to operate in respect of Federal Magistrates and retired Federal Magistrates who have not attained the age of 65 years.

Specifically:

- (a) section 9A provides that the Minister may only certify a Federal Magistrate as a retired disabled Federal Magistrate if the Federal Magistrate has not attained the age of 65 years;
- (b) section 9B provides that a retired Disabled Federal Magistrate is only entitled to a pension until he or she attains the age of 65 years or dies, whichever occurs first;
- (c) similarly, section 9C provides that a retired disabled Federal Magistrate is only entitled to a Commonwealth superannuation contribution until he or she attains the age of 65 years or he or she dies, whichever occurs first; and
- (d) section 9D only provides death benefits where a Federal Magistrate or a retired disabled Federal Magistrate who has not attained the age of 65 dies.

It is difficult to see the reasoning for limiting these entitlements to Federal Magistrates and retired disabled Federal Magistrates who have not attained the age of 65 years. On its face, this approach appears to be discriminatory against Federal Magistrates and retired disabled Federal Magistrates between the ages of 65 and 70. This approach also appears to contradict the worthwhile objective of encouraging participation in employment by persons older than 65 years of age.

The Court is of the view that the age limitations in each of sections 9A, 9B, 9C and 9D should be amended to age 70.

### **Amount of death benefits**

Section 9D provides for the amount of death benefits payable to an eligible spouse or eligible children to be equivalent to the amount of Commonwealth superannuation contributions the Federal Magistrate would have been entitled to if the Federal Magistrate had not died or retired as a retired disabled Federal Magistrate during the period between the death of the Federal Magistrate or retired disabled Federal Magistrate and the date they would have attained the age of 65 years. Under current arrangements, the Commonwealth makes a superannuation contribution payment to Federal Magistrates of an amount equal to 13.1% of salary. Federal Magistrates are not permitted to be members of public sector superannuation schemes.

The Court is of the view that the amount payable should be equivalent to the pension and superannuation entitlements the Federal Magistrate or retired disabled Federal Magistrate would have received up until the age of 70 years.

### **“eligible spouse” – same sex relationships**

Section 9E provides a number of relationship definitions, including definitions for “eligible spouse” and “marital relationship”. The Court notes that these definitions do not make provision for same sex relationships.

### **Conclusion**

The Court welcomes improvements in the remuneration and entitlements of Federal Magistrates, such improvements being necessary parts of the evolution of the Federal Magistrates Court. The Court’s submission on the Bill seeks to ensure that those improvements are fair, equitable and appropriate to the important role played by Federal Magistrates in Australia’s system of justice.

The Court appreciates the opportunity to make a submission to the Committee in relation to the Bill and would be pleased to provide further information to the Committee regarding this submission.

**John H Pascoe, AO**  
**Chief Federal Magistrate**

**FEDERAL MAGISTRATES COURT JURISDICTIONAL HISTORY**

***FEDERAL MAGISTRATES ACT 1999***

This Act, assented to on 23 December 1999, created the Federal Magistrates Court (FMC):

- as a federal court under Chapter III of the Constitution;
- as a court of record and a court of law and equity;
- consisting of justices who are styled the Chief Federal Magistrate and Federal Magistrates;
- with jurisdiction vested in it by express provision in laws made by the Parliament, as well as by the application of section 15C of the *Acts Interpretation Act*;
- with power to determine matters before it completely and finally and to make orders, including interlocutory orders, and to issue writs of all kinds as it considers appropriate; and
- with the same power to punish contempts of its power and authority as possessed by the High Court of Australia.

***FEDERAL MAGISTRATES (CONSEQUENTIAL AMENDMENTS) ACT 1999***

This Act, also assented to on 23 December 1999, conferred general federal law jurisdiction on the FMC in the following areas:

- applications under the *Administrative Decisions (Judicial Review) Act 1977*;
- appeals from the Administrative Appeals Tribunal which are transferred by the Federal Court to the Federal Magistrates Court;
- matters arising under the *Bankruptcy Act 1966*;
- applications under the *Human Rights and Equal Opportunity Commission Act 1986*; and
- matters arising under divisions 1 and 1A of part V of the *Trade Practices Act 1974*, being the consumer protection provisions of that Act (although the Court's power to award monetary damages in this jurisdiction was limited to \$200,000).

This is significant jurisdiction in general federal law.

In family law where jurisdiction was originally proposed to be very narrow this Act conferred the following on the FMC:

- applications for dissolution of marriage;
- family law property disputes where the property in dispute was worth less than \$300,000, or where the property in dispute is worth more than this and both parties consent to the matter being heard by a Federal Magistrate;
- parenting orders providing for the residence of a child where the parties consent to a Federal Magistrate hearing the matter; and
- parenting orders providing for other matters such as contact, maintenance and specific issues, whether or not the parties consent to a Federal Magistrate hearing the matter.

This Act also conferred on the FMC jurisdiction under the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988*.

#### ***FAMILY LAW AMENDMENT ACT 2000***

This Act, assented to on 29 November 2000 soon after the establishment of the Court significantly extended its jurisdiction in family law in that it:

- amended the *Family Law Act 1975* to confer on the FMC original jurisdiction in proceedings relating to residence of a child.

#### ***PRIVACY (PRIVATE SECTOR) ACT 2000***

This Act, assented to on 21 December 2000:

- invested the FMC with the jurisdiction to enforce determinations of the Privacy Commissioner, and private sector adjudicators.

#### ***JURISDICTION OF THE FEDERAL MAGISTRATES SERVICE LEGISLATION AMENDMENT ACT 2001***

This Act, assented to on 21 October 2001:

- amended the *Migration Act 1958* to give jurisdiction to the FMC in matters under Part 8 of the Migration Act for judicial review of certain decisions made under that Act.

This meant that the Federal Magistrates Court had effectively the same jurisdiction as the Federal Court to deal with these matters at first instance.

### ***FAMILY LAW AMENDMENT REGULATIONS 2001***

This amendment to the Family Law Regulations inserted Regulation 12AC to increase the threshold, with effect to proceedings instituted from 1 January 2002, of the FMC jurisdiction in family law property disputes from \$300,000 to \$700,000 and beyond with consent.

### ***COPYRIGHT AMENDMENT (PARALLEL IMPORTATION) ACT 2002***

This Act, assented to on 15 April 2003:

- invested the FMC with jurisdiction over civil copyright matters under the *Copyright Act 1968*. In particular, matters arising under Parts V, VAA, IX and section 248J of the *Copyright Act 1968*.

### ***MIGRATION LITIGATION REFORM ACT 2005***

This Act, assented to on 15 November 2005:

- directed migration matters to the FMC.
- provided for the High Court to remit migration matters direct to the Federal Magistrates Court.

This meant that the Federal Magistrates Court was effectively the exclusive jurisdiction to deal with these matters at first instance subject to appeal to the Federal Court.

### ***ANTI-TERRORISM ACT (NO 2) 2005***

This Act, assented to on 14 December 2005 conferred concurrent jurisdiction on each of the Federal Court, Family Court and FMC:

- includes provision for control orders to be issued by the FMC to limit a person's movement, association or activities if the court decides the restraint will substantially assist in preventing a terror attack.

### ***WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) ACT 2005***

This Act, assented to on 14 December 2005:

- confers jurisdiction on the FMC to hear unlawful termination claims as well as conferring a number of enforcement powers (eg freedom of association breaches, agreement making breaches, industrial action, unfair contracts, breach of terms and conditions, sham independent contracting arrangements and notice provisions and related breaches).



***JURISDICTION OF THE FEDERAL MAGISTRATES COURT LEGISLATION  
AMENDMENT BILL 2005***

This Bill was passed in the Senate on 1 March 2006 and in the House of Representatives on 30 March 2006 but has not yet received Royal Assent but has yet to be passed in the House of Representatives. On assent it will:

- confer on the FMC jurisdiction in any matter transferred to it by the Federal Court or the Family Court, regardless of whether that matter may otherwise be within the jurisdiction of the FMC;
- confer on the FMC jurisdiction in *in personam* actions under the *Admiralty Act 1988*;
- confer on the FMC extended jurisdiction under the *Trade Practices Act 1974* to include matters under Part IVA (unconscionable conduct), Part IVB (industry codes), Divisions 1AAA (pyramid selling) and 2A (actions against manufacturers and importers of goods) of Part V and Part VA (liability of manufacturers and importers for defective goods);
- increase from \$200,000 to \$750,000 the monetary limit on damages the FMC can award in proceedings under the Trade Practices Act;
- confer on the FMC jurisdiction over appeals against departure prohibition orders made under the *Child Support (Registration and Collection) Act 1988*

***FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL  
2005***

This Bill was passed in the House of Representatives 2 March 2006 but has yet to be passed in the Senate. If passed it will:

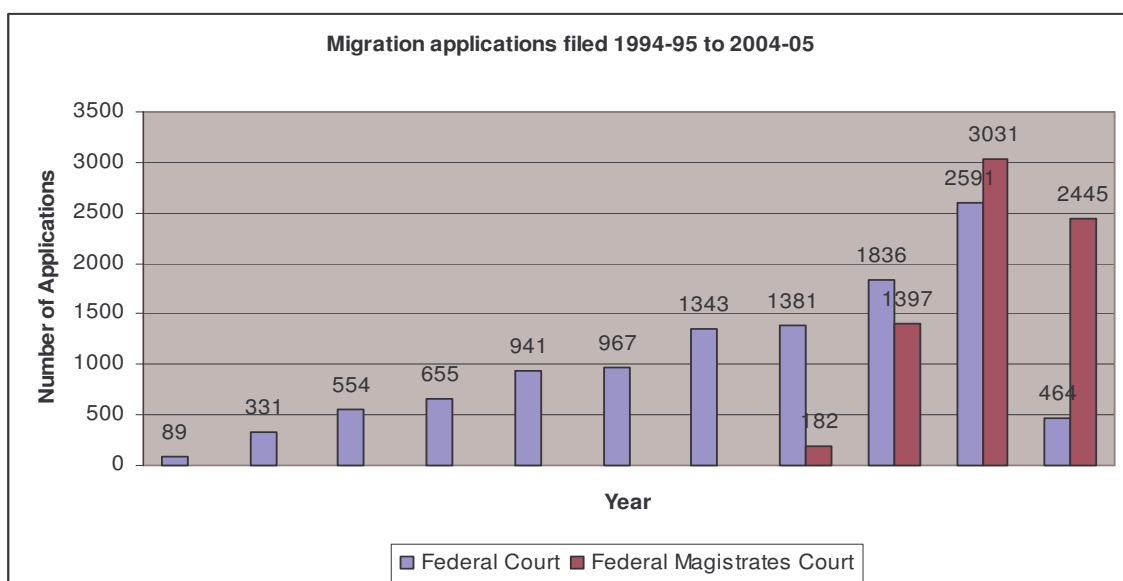
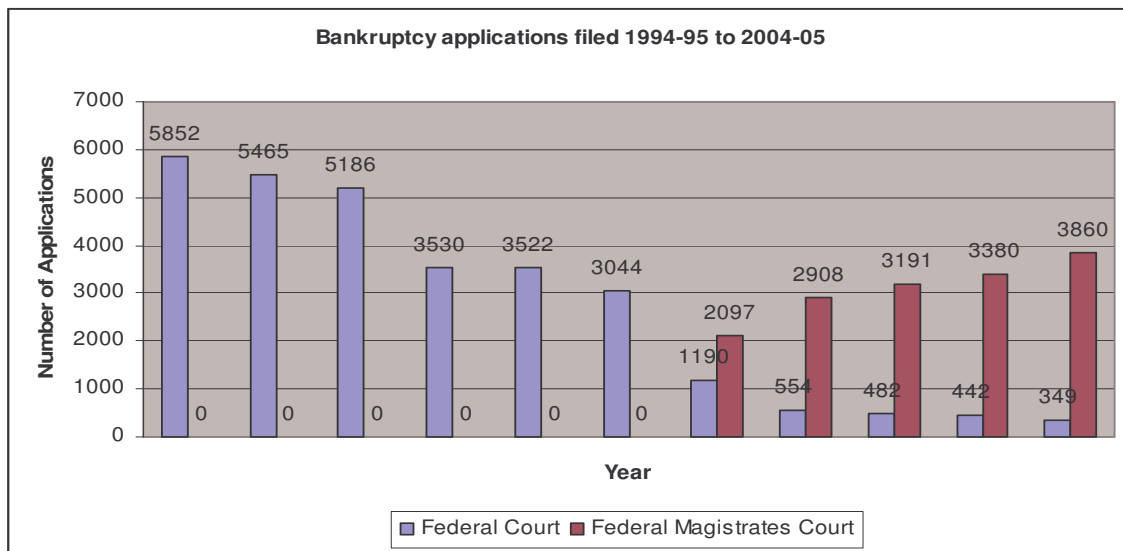
- allow the FMC to exercise unlimited jurisdiction in family law property matters concurrent with the Family Court.

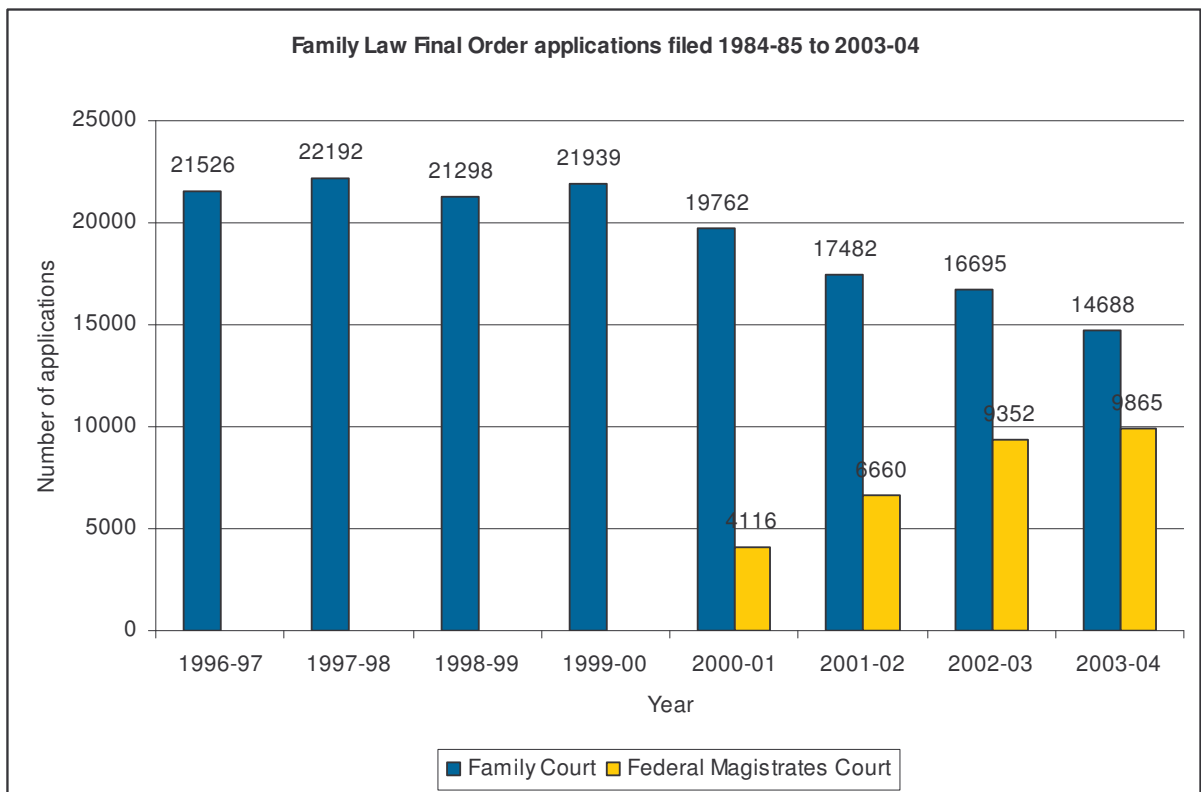
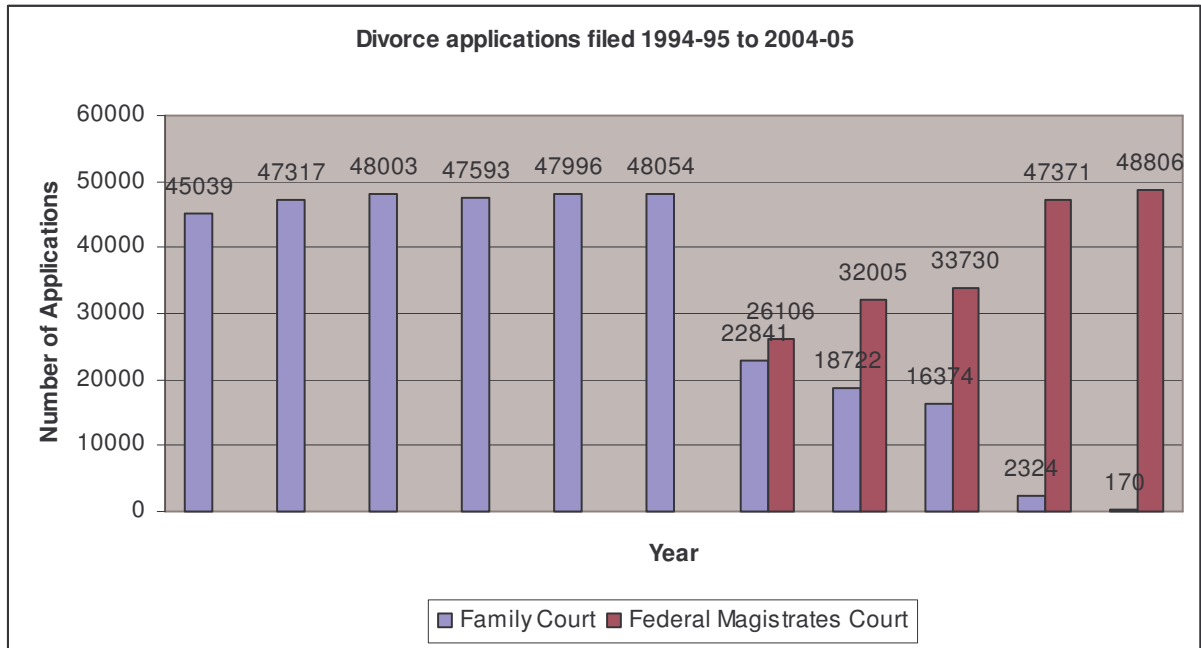
**Federal Magistrates Court Performance indicators**

*Quantity indicators*

The court is now managing the highest volume of federal civil justice cases, with the fewest number of judicial officers. Most bankruptcy, federal human rights and family law applications are now filed in the Federal Magistrates Court. The *Migration Litigation Reform Act 2005* means, effectively, that the Federal Magistrates Court is now the exclusive jurisdiction to deal with these matters at first instance subject to appeal to the Federal Court. The Federal Magistrates Court received approximately 60% of general federal law filings nationally, and around 50% of family law filings (nearly 100% of divorce filings) in 2004-05. The charts below put the growth in the workload of the court in some historical perspective.

**Workload Indicators**





### *Timeliness indicators*

The overwhelming majority of applications are completed within 6 months from filing (and divorce applications generally within 8 weeks). The court is producing almost 90% of judgments *ex tempore* on the day of the final hearing, or shortly thereafter. That is, the majority of the courts clients are receiving timely decisions once their matter has been heard.

### *Quality indicators*

One of the key indicators of performance of all courts relates to the maintenance of judicial independence, with all the consequences that flow from that concept, including the focus on delivering quality judgements, the freedom and necessity to conduct matters as the judicial officer considers appropriate and according to law, and respect for the rights of parties before the court. The Federal Magistrates Court was established on the basis that it was to be simpler, faster and less expensive for clients. Federal Magistrates need to balance the competing expectations of high volume and quality while upholding judicial independence.

Despite the growth in workload, there are indications that the quality of work of Federal Magistrates has been maintained. These indicators are in summary:

#### Client satisfaction high

- Since its establishment, the court has commissioned two surveys of the legal profession on client satisfaction. In summary, those surveys showed that around 94% of practitioners rate the service by the court as good, very good or excellent. Complaints are received in less than 1% of cases.

#### Ratio of appeals upheld stable

- Another possible indicator of quality is appeal rates. While the number of appeals of Federal Magistrates Court decisions has increased due to an expanded jurisdiction, in both family law and general federal law there has been no significant variation in the number of appeals upheld compared to before the court was established. From a productivity perspective, most appeals from federal magistrates are generally heard by a single judge (constituting the full court) - thus representing a savings of judicial resources on the part of the appeal court.

#### Maintaining a 'better practice' case management system in a high volume court

- The Court continues to manage a docket case management system despite the high volume of cases. The modified docket system, which is generally regarded as better practice (see ALRC report 'Managing Justice' 1999), provides increased accountability in managing matters through the court. The Court maintains control over time taken to resolve matters and the cost of representation by exercising strong judicial control of proceedings – the intention is to limit the range of issues that will be the subject of a hearing to those essential to decide the case according to law and to limit the number of occasions where the parties or their representatives have to come to court.

The same Federal Magistrate generally has supervision of the proceedings at all stages from the first court date to the final hearing. While a docket system is used in the Federal Court, there are extra challenges in maintaining a docket system in a high volume court such as the Federal Magistrates Court. Nevertheless, the court continues to provide this service as a benefit to clients and considers the system to be one of the positive features of the court's operations.

Many practitioners have also spoken highly of the work of the Federal Magistrates Court, anecdotally indicating that the Court is cheaper and faster for clients than other courts. An article by Arthur Moses is provided at [Appendix 3](#) to indicate as much. This is further reinforced by the Court Administration chapter in the recent Productivity Commission *Report on Government Services 2006*.

#### *Cost effectiveness indicators*

A small survey of family law practitioners in 2004 indicated that approximately 72% believed litigating in the Federal Magistrates Court was less expensive for their clients compared with litigating in the superior courts. The majority of those respondents indicated that litigating in the court was 10-30% less expensive.

While matters heard in the Federal Magistrates Court may be inherently less complex, respondents rated other factors such as simpler rules and procedures, the general approach of Federal Magistrates to the case, and fewer case events, as being more significant factors in contributing to lower costs for clients.

A Profmark Consulting Pty Ltd survey in 2005, commissioned by the Court found that:

- In family law matters a cost saving of up to 30% was reported by 91% of respondents, with a further 8% reporting a saving of up to 50%;
- In general Federal law matters a cost saving of up to 30% was reported by 92% of respondents, with a further 8% reporting a saving of up to 40%; and
- 87% of respondents rated the overall service excellent or good.

These figures indicate a dramatic improvement in cost to the client over the 2004 survey. The court is also continuing to review its rules and procedures to streamline the management of cases. For example, new rules have been introduced for migration matters that will further streamline procedures ensuring that non meritorious cases are weeded out at an early opportunity and meritorious cases heard promptly.