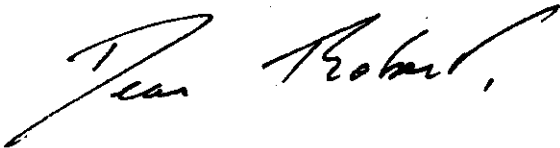


# DF Jackson QC

26 November 2008

The Hon Robert McClelland MP  
Attorney-General  
Robert Garran Offices  
3-5 National Circuit  
BARTON ACT 2600



Having been Chairman of the Constitutional Commission's Advisory Committee on the Australian Judicial System in 1986-7 I was interested to read the Department's paper – *Improving access to justice – a better framework for federal courts*.

The title of the paper is in a sense broader than its content because the Semple paper to which it directs attention is concerned with the position of the Family Court and, in relation to family law, the Federal Magistrates Court. It is clear – see para 142 of the Semple Report – that issues about the structure of federal courts overall were outside the terms of reference.

What troubles me about the proposals in the Semple Report is that, if implemented, they will once again offer only a partial solution to the problems created by having two parallel superior federal courts, the Federal Court and the Family Court, with separate jurisdictions, judges, staff and registries, and on the other hand a Federal Magistrates Court which has a jurisdiction across both the areas on which the Federal and Family Courts have jurisdiction, with that Court again having its own staff and registries, but being to some degree in competition with the Family and Federal Courts for resources.

Seven Wentworth  
126 Phillip Street Sydney NSW 2000  
Tel 61 2 8224 3009 Fax 61 2 9233 1850 DX 399  
email [jacksonqc@sevenwentworth.com.au](mailto:jacksonqc@sevenwentworth.com.au)

Practice Manager and  
Chief Clerk: Andrew Laughlin  
Tel 61 2 8224 3001 Fax 61 2 9233 1849 DX 399  
email [laughlin@sevenwentworth.com.au](mailto:laughlin@sevenwentworth.com.au)

Surely the simple solution is to have simply federal courts:

- (a) the Federal Court of Australia incorporating the present Family Court;
- (b) a renamed Federal Magistrates Court, having a status equivalent to that of a State District or County Court. [Suitable nomenclature can be difficult, but for present purposes may I rename it the "Commonwealth Court".]

Such a scheme could be implemented by appointing the current Family Court judges as judges of the Federal Court, and giving to the Federal Court the jurisdiction which it is desired for the future that the Family Court would have if the Simple proposals are implemented. If thought desirable, there could be a Family Law Division of the Federal Court.

So far as the two courts are concerned:

- (a) What is required as to *jurisdiction* is that there be a clear legislative statement of the jurisdiction of each court. To the extent that that jurisdiction might be concurrent, there needs to be power in the Federal Court to remit matters to the Commonwealth Court, and also power to take to itself matters in the Commonwealth Court when the interests of justice so require. (There are other ways of resolving such issues where the jurisdiction is concurrent.)
- (b) So far as *procedures* are concerned, may I say two things. *First* as occurs now in the State courts with *Uniform Civil Procedure Rules*, they should be the same for the Federal Court as for the Commonwealth Court. *Secondly* there may well be a need for those rules, or other procedures to differ in respect of family law matters, but there is nothing surprising in rules of court and practice directions etc making separate provision for particular types of cases.
- (c) So far as registries and staff are concerned, I fail to see why the Federal and Commonwealth Courts could not have the same registries and staff.

The only suggestion I have heard against such a proposal is an anecdotal one to the effect that "the Federal Court judges would be against it", but such a view – right or wrong, worthy or unworthy – would be significantly reduced in effect by the fact that it is intended, at least by the attrition of retirements, to reduce the number of Family Court judges very significantly in any

event. Of course there would be some implementation and “teething” issues, but they are all capable of resolution. There will always be problems in any restructuring.

I have written because I think that the implementation of the current proposal loses a significant opportunity to “grasp the nettle” and to create a simple, and perfectly workable and flexible, two-level structure of federal courts below the High Court.

**D.F. Jackson Q.C.**