



FEDERAL MAGISTRATES COURT OF AUSTRALIA

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The Hon Robert McClelland MP  
Attorney General  
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*By email to: fedcourtsconsultation@ag.gov.au*

Dear Attorney,

**CONSULTATION ON THE REVIEW OF FUTURE GOVERNANCE OPTIONS FOR  
FEDERAL FAMILY LAW COURTS IN AUSTRALIA**

These comments are made on behalf of the Federal Magistrates Court of Australia (the FMC) by me as Head of Jurisdiction in response to the Recommendations made in the Report of the Review, Future Governance Options for Federal Family Law Courts in Australia – Striking the Right Balance (“the Semple Report”). My comments are made after widespread consultation within the FMC but do not represent any unanimous view of Federal Magistrates.

**Background to the Court’s Family Law Jurisdiction**

Family law disputes have been a significant social issue in the Australian community for many years. The fact that so many families resort to litigation produces a significant personal cost to those families and social cost to the community.

By 1999 it was clear that the Family Court of Australia (FCoA) was not able to cope with its workload. It was against this background that the FMC was established.

The establishment of the FMC was seen as a significant step toward the goal of providing ‘Australians with user-friendly, affordable options for resolving their disputes.’<sup>1</sup> It has evolved so as to allow the FCoA to focus upon matters requiring the attention of a Superior Court Judge and appeals. The FMC, on the other hand, is able to focus upon all of the other matters without the need to provide the structures and processes needed for the FCoA. In effect, the FMC is a dedicated court focused on the vast bulk of family law matters that do not require the attention of a Superior Court Judge and which are properly characterised as work of a District Court level in the state judicial systems.

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<sup>1</sup> The Hon Daryl Williams, Attorney-General, Second Reading Speech, *Federal Magistrates (Consequential Amendments) Bill 1999, Federal Magistrates (Consequential Amendments) Act 1999*, 20 October 1999.

The *Federal Magistrates Act 1999* included three important objects:

- (a) to operate as informally as possible in the exercise of judicial power;
- (b) to develop and use streamlined procedures; and
- (c) to encourage appropriate dispute resolution procedures.

The Court commenced operation with only twelve Federal Magistrates, and limited jurisdiction (\$300,000 in property cases and no jurisdiction to make final custody orders without consent of the parties).

The success of the Court in meeting the objects set by parliament has led to the Court being given jurisdiction that is virtually concurrent with the FCoA, and the appointment of many additional Federal Magistrates. There are presently over sixty Federal Magistrates.

By the end of the 2007/08 financial year, the FMC was dealing with over 80% of family law applications (in some registries more than 90% of applications are filed in the FMC), almost all divorces and almost all child support applications, and family law enforcement applications. The Court is disposing of more than 85% of applications within 6 months, and over 95% of applications within twelve months.

It is important to recognise that this is work previously undertaken by Judges of the FCoA who as a result of the transition in work between the Courts are now able to concentrate on those matters requiring the attention of a Superior Court Judge.

#### **Background to the General Federal Law Jurisdiction of the Court**

The Court was originally given jurisdiction in a restricted number of areas, concurrent with the Federal Court of Australia (FCA). The most important in terms of workload were bankruptcy and human rights (or more accurately unlawful discrimination). The Court also handled trade practices disputes up to \$200,000 and some judicial review of administrative decisions.

The first major expansion of the work of the Court occurred in 2001 when migration was added. This involved a very substantial increase in workload so that the three Federal Magistrates originally appointed to hear general Federal law matters were supplemented by new appointments of practitioners with relevant skills. Migration remains the predominant area of work for those Federal Magistrates in Sydney who do exclusively general Federal law. Amendments to legislation have provided for all migration matters, with minor exceptions, to commence in the FMC.

Over the eight years of the Court's life additional jurisdiction has been granted, including admiralty, copyright, privacy, national security and, importantly workplace relations. The Court's trade practices jurisdiction has been extended to equal that of the District Courts and now includes s.46 of the *Trade Practices Act 1974*. There are nine Federal Magistrates in Sydney dedicated to this work and one Federal Magistrate in WA. In other states the volume of work is smaller and undertaken by Federal Magistrates who also undertake family law work. This is particularly important in smaller registries such as Canberra where the efficient disposition of matters requires resident Federal Magistrates to sit across all areas of the Court's jurisdiction.

The Court values its ability, through its docket system, to case-manage matters to meet the needs of the parties. Matters are able to be listed for hearing as soon as the parties are ready before the Federal Magistrate who has case-managed the matter since filing.

Through its Rules, the Court is able to make event based costs orders which has resulted in a negligible number of costs disputes in fully litigated cases.

General Federal law Federal Magistrates are presently assisted in the provision of Court-assisted ADR by use of the FCA Registrars and many cases are resolved without the necessity for a trial at great saving to litigants in time, cost and emotion. This 'culture' of the Court is essential to its success and Federal Magistrates are committed to its retention whatever structure is adopted for the future.

As CFM I have recently created general Federal law panels in respect of some of the more specialised jurisdictions, such as admiralty, copyright and matters under the *Trade Practices Act 1974*. Those panels work cooperatively with the FCA's mirror panels and Federal Magistrates regularly attend the FCA further education seminars run by the various Justices of the FCA who head these panels. Matters are cooperatively transferred between the FMC and the FCA in these areas where appropriate.

### **Overall Evolution of the Court**

The FMC is now very different to the court established in 1999. It is important that this change is recognised and the FMC does not remain a captive of its history.

In his independent review of the work undertaken by the Federal Magistrates the Honourable Barry Hungerford QC found as follows;

*99. Overall, during the seven-year period of the Court's operation there have been significant increases to work requirements. Those increases have been more marked during the last two or three years as the Court has developed and absorbed the quite extraordinary expansion of its jurisdiction.*

*100. From an initial court of a somewhat summary type of jurisdiction it has grown to become the basic trial court in the exercise of federal judicial power. Its jurisdiction is concurrent with the superior Federal Court and Family Court, albeit it is directed to deal with the less complex matters in an efficient and effective way so as to free the superior courts to focus on the more complex matters requiring a superior court judge.*

*101 The Court has matured and developed into its stated role with the nature of the work being equivalent to the intermediate courts of the state and territories rather than to magistrates courts of summary jurisdiction.*

### **The Semple Review recommendations**

Although the Semple Report did not accept the Court's submission as to the preferred option of retaining a court of broad jurisdiction at District Court level, it is pleasing that the report recognises the culture of the Court and places significant emphasis on the preservation of this culture and work ethic within a new structure.

The Court accepts that any decision is ultimately a matter for Government.

### **Future Structure and Preservation of the Culture of the Court**

#### **(a) Family Law**

The Court has an extremely busy workload in family law and, if the Semple recommendations are accepted, most Federal Magistrates are likely to be part of a new division of the FCoA. There

is clear consensus in the Court that if its culture is to be preserved within a two tier FCoA it must be established as a separate division in which the following elements are legislatively established:

- This Court, as an independent division;
- An independent Head of Division with responsibility for day-to-day management and governance arrangements;
- Control of its own rules;
- Appropriate representation on any overall management body; and
- Appeals from the general division will be dealt with by a Full Court (within the Appeals division) as is currently the case.

Similarly, steps should be taken to ensure the preservation of the FMC's docket system and to provide transparency in funding between the two Divisions of the new FCoA (preferably with a formula based on relevant workload).

**(b) General Federal Law**

I note that the Semple Review was primarily concerned with the best arrangements for the delivery of family law services. The FMC has not had the same opportunity to explore options with the FCA as to the best structure for delivery of general Federal law services to the Australian community and accepts that a number of options may be available.

From my preliminary discussions with the FCA, it appears they favour the retention of the FMC as a separate Court which will be renamed. Those Federal Magistrates with significant experience in general Federal law would remain members of that court. The court would be administered by the FCA administration.

There is, in my view, much to commend a separate court at District Court level below the FCA given the unique position of the FCA both internationally and in relation to State Supreme Courts. It would achieve the objectives I have discussed in relation to court culture (and perhaps is more likely to do so than the divisional model proposed in the Semple Report which can only conceivably work with strong guarantees of independence).

If however, the recommendations of the Semple Review in relation to the creation of a new division in the FCA are accepted, appointment to the new division of the FCA should, subject to workload and the efficient deployment of resources, be offered to those Federal Magistrates currently undertaking general Federal law work exclusively and to those Federal Magistrates who are suitably qualified for this work.

Given the smaller number of Federal Magistrates involved, governance arrangements may differ from those in the FCoA but it is important that Federal Magistrates should retain control of matters filed in their division through the docket system whereby each Federal Magistrate is responsible for the speedy progress of matters in his or her docket from filing through to trial.

Any change should not alter the fundamental character of the FCA but should maintain a clear distinction between the Justices of the FCA and the judicial officers in the new division. It should also preserve and enhance the current intermediate level jurisdiction and distinct case management procedures that exist in the FMC.

I am committed to working with the FCA in moving forward to ensure the best outcome for general Federal law.

### **Name of Court**

#### **(a) Family Law**

If there is to be one federal court dealing with family law applications the FMC considers that it is important that the name be descriptive of the Court's work, and be reasonably distinctive whilst recognising that it is in effect a new court. The name 'Family Court' or 'Australian Family Court' seems the simplest and most appropriate for the Court. The second tier of the Court should be called the trial division.

It is the Court's submission that there should be a new and separate Act establishing the merged 'Court' and setting out the details of its operation, including divisions. This has the dual benefits of making it clear it is a new court and also of separating the operations of the Court from family law generally.

#### **(b) General Federal Law**

There seems to be no reason to change the name of the Federal Court of Australia.

### **New Procedures**

I note that there is no criticism of the practices or procedures of the FMC and the Court would wish to retain its current practices and procedures as identified elsewhere in this submission. Federal Magistrates are generally of the view that the docket system and streamlined rules developed in the FMC are a particularly effective method of ensuring the timely and efficient resolution of matters. The docket system provides for cases to be docketed to individual Federal Magistrates at the outset, so that in most cases the parties will always be before the same Federal Magistrate.

The present Rules allow flexibility for individual judicial officers to direct and manage the proceedings in ways that best suit the individual litigant in the context of the particular dispute. This autonomy allows individual Federal Magistrates to deal with cases in ways that best meet the needs of litigants in the context of the particular dispute, whilst balancing workload issues. Federal Magistrates are concerned that careful attention be paid to the tension between standardisation and the importance of meeting the individual needs of families and allowing sufficient flexibility for Federal Magistrates to manage their individual dockets.

### **Case Load Divisions**

The senior division of a combined court for family law matters should deal only with appeals and the very limited number of first instance matters which genuinely warrant determination by a Superior Court Judge.

All other matters should be dealt with in the trial or general division.

All matters should be initially filed with the trial division. The Chief Justice should have the power to transfer a matter from the trial division in consultation with the head of that division where it is considered to warrant a hearing before a Superior Court Judge.

In a combined FCA the channelling of work to and between divisions can be dealt with through Rules of Court and Practice Notes.

### **Description of Judicial Officers**

The work presently being undertaken by Federal Magistrates has been found, in an independent review, to be at a level at least equivalent to that of a District Court Judge in the State judicial systems. Many Federal Magistrates hear cases transferred from State Magistrates as a result of the complexity of the cases. There has been much confusion among litigants in some areas who associate the title "Magistrate" with the work undertaken by the State Magistrates in the arrest, traffic and drug courts. There is also evidence that this confusion worries many litigants, especially indigenous litigants.

In addition, there has been considerable concern expressed in rural and regional circuit locations that the current title of members of the Court downgrades the importance of the Court's work in these communities.

The title that is generally understood by the community as describing the work being done by Federal Magistrates is that of 'Judge'. This is also consistent with the overall recognition of members of the Court as Chapter III Justices and the fact that internationally, family and general Federal law work of the type heard in the FMC is well recognised as District Court level work.

The use of the title 'Judge' combined with the existence of a separate division in both the FCA and the FCoA should ensure that there is no confusion with the Justices of the senior divisions in each Court.

### **Dual Commissions**

Federal Magistrates appointed to date have been appointed to sit in all areas of the Court's jurisdiction. Where workload permits some Federal Magistrates have chosen to sit only in family law or general Federal law. This is particularly the case in NSW. In other Registries a number of Federal Magistrates successfully sit in a number of areas of the Court's jurisdiction. This has been seen a strength of the Court especially in ensuring the efficient deployment of resources (including rural and regional circuits). Many Federal Magistrates have enjoyed the opportunity to work in diverse areas and have done so effectively and efficiently.

Given the imbalance in the volume of family law work as against the Court's general Federal law work it is recognised that some Federal Magistrates who currently undertake some general Federal law work may be appointed to the new division of the FCoA. If practicable, these Federal Magistrates should have the opportunity to take up dual commissions in recognition both of the terms of their original appointment and their contribution to the general Federal law work of the FMC. In smaller registries, where there is no FCA Judge, dual commissions will be necessary if all of the matters before the Court are to be dealt with efficiently. I recognise however that for dual commissions to work in any practical sense would require the development of workable protocols with the support of the Chief Justices of the FCA and FCoA.

### **Services needed**

In family law, the Court recognises the important role played by many organisations in settling disputes before they come before the Courts. It supports closer links between these organisations and the Court.

In general, the Court believes more time is needed to assess the effectiveness of the new Family Relationship Centres and other support services. It is considered critical however that these services are readily available to all regardless of geographic location.

Within the Court structure it is critically important that sufficient resources are available to ensure that family consultants are available at an early stage. Without proper resources at an operational level, delay, inefficiency and dissatisfaction on the part of litigants becomes more likely.

Although not part of the review, there is also a need for proper handover and supervision facilities to be available for the children of separated parents who are presently in conflict if on-going conflict is to be minimised.

In general Federal law the Court considers it is well supported by the FCA in carrying out its work. Given the smaller number of Federal Magistrates (one in some Registries) a physical environment which encourages collegiate interaction between both divisions of the FCA is desirable.

#### **General comments**

A large number of Federal Magistrates expressed support for the recommendations of the Semple Report subject to satisfactory resolution of issues of independence, work value and resourcing.

In the Court's submission to the review it was the unanimous view of all Federal Magistrates that the Court should remain independent. This remains the view of some Federal Magistrates.

There is also concern that alternative structures for the federal courts have not received detailed consideration. If alternative structures were to be considered the FMC would wish to play a constructive role in the process.

Common to all views is the importance of maintaining the culture of the Court, in particular its independent governance, docket system of case management and Rules especially within the FCoA where there will be a large number of judicial officers in the new division.

#### **Conclusion**

The Court recognises that it is the responsibility of Government to provide access to both family law services and general Federal law in the most efficient and effective way and will work cooperatively with the Government, the FCA and the FCoA to ensure that any change is successful.

I am proud of the outstanding service that Federal Magistrates have provided to the Australian community, and I am confident that whatever decision Government makes as a result of the Semple Review the Court will continue its efforts to provide an effective service to all members of the Australian community regardless of geographic location or economic circumstances.

I look forward to ongoing consultation with this Court as the new structures evolve.

Yours sincerely,

John H Pascoe  
Chief Federal Magistrate