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Submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012

7 December 2012

Introduction

I welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's ("the Committee") Inquiry into the Courts and Tribunals Legislation Amendment (Administration) Bill 2012 ("the Bill"). I confirm the Bill was referred to both the Committee for inquiry and report by 25 February 2013 and the House of Representatives Standing Committee on Social Policy and Legal Affairs for inquiry and report by 5 February 2013.

This submission is made by me in my role as Chief Justice of the Family Court of Australia ("the FCoA"), in consultation with the FCoA's Law Reform Committee. I have also discussed the contents of this submission with Chief Executive Officer ("CEO") of the FCoA, who is also Acting CEO of the Federal Magistrates Court ("the FMC"), and he is in agreement with my comments. I have also consulted with the Chief Federal Magistrate. I wish to emphasise however that the views contained in this submission are my own and may not necessarily reflect the views of all of the other members of the Court.

I am aware that the Federal Circuit Court of Australia Legislation Amendment Act 2012 received Royal Assent on 28 November 2012 and commences upon a day fixed by Proclamation or within 6 months of receiving Royal Assent. Upon commencement, that Act will have the effect of changing the name of the FMC to the Federal Circuit Court of Australia ("the FCCA"). For the purpose of this submission, I will refer to the Federal Magistrates Court, abbreviated to "FMC".

I am generally supportive of the intent of the Bill, which insofar as the FCoA and FMC are concerned, amends the *Family Law Act 1975* (Cth) ("the FLA") and the *Federal Magistrates Act 1999* (Cth) ("the FMA") to facilitate the merger of the administrative functions of those two Courts. I have considered Schedule 2 of the Bill from the perspective of how effectively it achieves that objective and I have several comments of a technical nature in that regard. I also have a query with respect to the transitional provisions.

First I have two observations of general application that I wish to make. Before I do so however, as a preliminary matter I wish to confirm that the Acting CEO of the FMC commenced in that position on 25 November 2008, not 2009 as stated in paragraph 12 of the Explanatory Memorandum to the Bill.

General comments

Use of nomenclature and the definition of "Chief Judge" and "Chief Judge of the Federal Circuit Court of Australia"

Unlike the *Federal Court of Australia Act 1976* (Cth), which since 1996 has styled the head of that Court as "Chief Justice" and which contains a definition of "Chief Justice" in the general definitions section of the Act (section 4), the FLA, in the definitions section to Part IV, still refers to the head of the Family Court as the "Chief Judge" (section 20).

In section 21(3), the FLA provides that the Court consists of:

> (a) a Chief Judge, **who shall be called the Chief Justice of the Court**;
> (b) a Deputy Chief Judge, who shall be called the Deputy Chief Justice of the Court; …
> (emphasis added)

By this means, it seems to me, the legislature recognised that the appropriate terminology for the head of jurisdiction of a superior court of record is "Chief Justice'.

Why the definition in section 20 was not amended to accord with that in the Federal Court of Australia Act is not known to me. But the issue now arises, given the nomenclature of the head of jurisdiction of the renamed FCCA, namely "Chief Judge".

As members of the Committee would be aware, one of the amendments made by the Federal Circuit Court of Australia Legislation Amendment Act 2012 is to change the existing definition of "Chief Federal Magistrate" and references to that office in the FMA, as amended, to that of "Chief Judge". Thus, if no changes are made, one head of jurisdiction will be described in the legislation as "Chief Judge" and the other as "Chief Judge of the Federal Circuit Court of Australia".

To appreciate that the Chief Judge of the Family Court is called the Chief Justice, one would have to know of the provision in section 21(3) and, without that specific knowledge, it is unlikely that the section would attract attention.

Although the FCoA is a superior court of record (see section 21(2) of the FLA) with equivalent status to the Federal Court and exercises a broad appellate jurisdiction with respect to decisions of the FMC/FCCA, the retention of the term "Chief Judge" for the Chief Justice, especially in combination with the phrase "Chief Judge of the Federal

Circuit Court" as appears for example in items 8 and 10-14 inclusive of the Bill, creates the distinct impression that the FCoA and the FCCA are at the same level ie. at that of a district court. It may also lead to an inference that there is some difference between the FCoA and the Federal Court.

I see this Bill as a timely and appropriate vehicle through which to address an important issue of long standing, and in the process eliminate any confusion around the respective status of the FCoA and FCCA in the federal judicial hierarchy which particularly may arise from the renaming of federal magistrates as judges. I strongly recommend that the FLA be amended in the same way as the Federal Court of Australia Act was amended in 1996, although in the case of the FLA an amendment to the definition of "Deputy Chief Judge" as "Deputy Chief Justice" will also be required. In other words, the substantive nomenclature should appear in the general definitions section (section 4), rather than simply by reference to what the Chief Judge and the Deputy Chief Judge "shall be called".

I also suggest that the Bill be amended to define the office of "Chief Judge" in section 4 of the FLA as the Chief Judge of the Federal Circuit Court. That would obviate the need to refer in subsequent sections to the "Chief Judge of the Federal Circuit Court" and reference to both positions throughout the FLA would then only need to be to the "Chief Justice" and "Chief Judge". Given that the FLA is already complex and unwieldy, any opportunity for simplification of terminology should, in my view, be seized.

In summary therefore, I recommend that the Bill be amended so that it:

i) Amends section 4 of the FLA to include a definition of "Chief Justice" in similar terms to that contained in the Federal Court of Australia Act.
ii) Amends section 4 of the FLA to include a definition of "Deputy Chief Justice" as the Deputy Chief Justice of the Family Court of Australia.
iii) Amends section 4 of the FLA to include a definition of "Chief Judge" as the Chief Judge of the Federal Circuit Court of Australia.
iv) Amends section 20 of the FLA to repeal the existing definition of "Chief Judge" and "Deputy Chief Judge".
v) Amends sub-sections 21(3)(a) and (b) of the FLA to provide that the FCoA consists of:
    (a) a Chief Justice of the Court;
    (b) a Deputy Chief Justice of the Court; and… .
vi) Consequentially amends existing references to "Chief Judge" and "Deputy Chief Judge" in the FLA so that they refer to "Chief Justice" and "Deputy Chief Justice" as appropriate.
vii) Refers to the "Chief Judge" (as defined in section 4 of the FLA) instead of the "Chief Judge of the Federal Circuit Court".

[Note: Section 21(3)(c) might usefully be amended to omit reference to Judge Administrators and Senior Judges, as these positions are no longer held by members of the FCoA.]

Clarity of achievement of purpose in the Explanatory Memorandum

It occurs to me that the Explanatory Memorandum could be improved as an aid to comprehension and construction if, at an early stage, it stated in general terms how facilitating the merger of the administrative functions of the two Courts is to be achieved. I say this because when perusing the Bill a question arose for me as to whether the proposed new section 38F(4) should refer to both the FCoA and the FCCA. The purpose of this amendment is to provide that any terms and conditions of the CEO's appointment in respect of matters not covered by the FLA must be determined by the Chief Judge (Chief Justice) and the Chief Judge of the FCCA (Chief Judge).

After considerable deliberation I have satisfied myself that this is unnecessary. This is because, currently, the terms and conditions of appointment of the CEO of the FMC are contained in Schedule 2 of the FMA. The terms and conditions of appointment of the CEO of the FCoA are contained in Part IVA of the FLA. Specific amendments contained in the Bill (discussed below), as I understand them, are designed to incorporate Schedule 2 of the FMA into Part IVA of the FLA, so that the terms and conditions of appointment of the CEO of both Courts are solely contained in one Act. The Bill goes on to repeal Schedule 2 after making those amendments.

That this is something that the Bill is seeking to achieve is not made manifest in the Explanatory Memorandum. In my view, the Explanatory Memorandum requires revision so that its purpose is clear. A short paragraph would suffice, in the following terms or similar:

> *At present, the terms and conditions of appointment of the CEO of the Federal Magistrates Court are contained in Schedule 2 of the FMA. Those of the CEO of the Family Court are contained in Part IVA of the FLA. Specific amendments made by the Bill seek to incorporate Schedule 2 in Part IVA of the FLA, with the intended effect that the terms and conditions of appointment of the CEO of the Family Court of Australia and the Federal Circuit Court of Australia are contained in one Act only, the FLA. The Bill then repeals Schedule 2 of the FMA. The repeal of Schedule 2 relates only to terms and conditions of appointment and does not otherwise affect any of the duties, functions or powers of the CEO of the Federal Circuit Court of Australia.*

I suggest this paragraph, or one similarly expressed, could be inserted between the existing paragraphs 13 and 14 of the Explanatory Memorandum, as the new paragraph 14.

I now wish to turn to specific comments on the Bill. These are directed towards:

- definitions;
- differences in certain existing terms and conditions of employment of the CEO of the FCoA under the FLA as compared with the existing terms and conditions of employment of the CEO of the FMC under the FMA, which the Explanatory Memorandum does not acknowledge or discuss; and
- transitional provisions.

Specific comments – definitions

Item 1, section 4 – definitions: definition of "appropriate officer"

The purpose of this amendment is to clarify that the reference to the CEO in the definition of "appropriate officer" refers to the CEO of the FCoA and the FCCA. The amendment otherwise preserves the current definition of "appropriate officer". I note that this definition is limited to the use of the term "appropriate officer" as contained in Division 5 of Part III of the FLA. I understand that Division 5 of Part III of the Act was repealed as a result of the passage of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and thus the current definition, as preserved by the Bill, is defective. Whether by an amendment in this Bill, or by way of a statute law revision bill or a bill making miscellaneous amendments to the FLA, this anomaly requires rectification.

Specific comments – terms and conditions of employment of the CEO

In the discussion below I note differences between the current terms and conditions of the CEO of the FCoA as compared with the CEO of the FMC and discuss the possible implications of effectively applying the terms and conditions in the FLA to the newly created position of CEO of the FCoA and FCCA. Although the Explanatory Memorandum refers on occasion to the proposed amendments to section 38 being the same as or equivalent to those contained in Schedule 2, many of those in my view are not.

For the purpose of this exercise I have undertaken a comparison of the FLA and Schedule 2 of the FMA in light of the proposed amendments contained in the Bill. I appreciate that some of my comments pertain to sections of the FLA that are not sought to be amended by the Bill as currently drafted. I nevertheless thought it worthwhile to identify where there is a lack of strict conformity between the FLA and the FMA, particularly in light of the proposed repeal of Schedule 2 of the FMA by virtue of item 23 of the Bill.

The provisions are discussed in the order in which they appear in the Bill, and otherwise sequentially if not the subject of amendment.

Subsection 38F(1) – terms and conditions of appointment of the CEO

The Bill does not seek to amend this subsection; however its equivalent in item 1 of Schedule 2 of the FMA is sought to be repealed.

Currently, item 1 of Schedule 2 states that the CEO is to be appointed by the Governor-General for a period not exceeding five years. Item 1 of Schedule 2 is silent as to whether a right of reappointment exists. However, section 38F(1) of the FLA explicitly states that the CEO is "eligible for reappointment". Therefore, in repealing item 1 of Schedule 2, the Bill will have the effect of conferring a right of reappointment on the CEO of the FCCA which arguably did not exist with respect to the CEO of the FMC.
I note there is no reference to this matter in the Explanatory Memorandum.

Item 11, subsection 38G(2) – leave of absence

The purpose of this amendment is to provide for leave of absence by the CEO, other than recreational leave, with the agreement of the Chief Judge (Chief Justice) and Chief Judge of the FCCA (Chief Judge). The Explanatory Memorandum states that "amended subsection 38G(2) is equivalent to item 5(2) of Schedule 2 of the Federal Magistrates Act."

On my reading of the two provisions, that is not in fact the case. Under section 38G(2) of the FLA, the approval of the Attorney-General is required for any grant of leave and the terms and conditions of the granting of such leave. Item 5(2) of Schedule 2 of the FMA requires only that the Chief Federal Magistrate determine the terms and conditions of any grant of leave in writing. The approval of the Attorney-General is not required.

Therefore, the effect of the amendment would appear to be to impose an obligation on the Attorney-General that does not currently exist and which arguably could make any grant of leave to the CEO of the FCCA more onerous than that which currently exists for the CEO of the FMC.
I note that there is no discussion of this issue in the Explanatory Memorandum.

Section 38H – resignation

The Bill does not seek to amend this subsection; however its equivalent in item 6 of Schedule 2 of the FMA is sought to be repealed.

I note that item 6 of Schedule 2 of the FMA provides that the CEO's resignation must be given to the Governor-General in writing. Item 6(2) states that the resignation takes effect on the day upon which it is received by the Governor-General or on a later day if so specified in the letter of resignation.

Section 38H of the FLA does not contain any provision with respect to when a resignation becomes effective. It merely provides that the CEO may resign by providing the Governor-General with a signed notice of resignation.

Item 12, subsection 38J(1) – outside employment of CEO

The purpose of this amendment is to provide that the CEO should not engage in paid employment, other than as the CEO, without the approval of the Chief Judge (Chief Justice) and the Chief Judge of the FCCA (Chief Judge). The amendment is described in paragraph 67 of the Explanatory Memorandum as merging two provisions – section 38J(1) and item 3 of Schedule 2 – but not changing the existing prohibition on the CEO engaging in paid employment without approval from both heads of jurisdiction.

Although it would not seem to be of any great moment, I note that item 3 of Schedule 2 of the FMA refers to the "approval" of the Chief Federal Magistrate whereas subsection 38J(1) of the FCoA instead refers to "consent".

Section 38K – termination of appointment

The Bill does not seek to amend this section; however its equivalent in item 7 of Schedule 2 of the FMA is sought to be repealed. I note that item 7(2) of Schedule 2 states:

> The Governor-General **may** terminate the appointment of the Chief Executive Officer if:
> (a) the Chief Executive Officer:
> (i) becomes bankrupt; or
> (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
> (iii) compounds with his or her creditors; or
> (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
> (b) the Chief Executive Officer is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
> (c) the Chief Executive Officer engages, except with the Chief Federal Magistrate's approval, in paid employment outside the duties of his or her office; or
> (d) the Chief Executive Officer fails, without reasonable excuse, to comply with clause 2.
> (emphasis added)

Section 38K of the FLA, while set out differently, is effectively expressed in the same terms, with one important exception. That is, the Governor-General is **required** to terminate the CEO's employment in the above circumstances. It is not a permissive

provision and it does not afford the Governor-General any discretion as to termination of the CEO's employment in circumstances where the Governor-General is satisfied that the offending conduct has occurred.

It seems to me that the CEO of the FCCA is arguably at a disadvantage as compared with the CEO of the FMC insofar as he or she will not be able to rely upon the possible exercise of discretion in his or her favour in the event that any of the conditions in subsection 38K(2) are satisfied. I note that the Explanatory Memorandum contains no discussion of this matter.

Further, subsections 38K(3), (4), (5) and (6), which concern the retirement of the CEO from office on the grounds of incapacity if the CEO consents to do so and retirement on the grounds of invalidity after a certificate has been given under the *Superannuation Act 1976* (Cth), are not currently contained within Schedule 2 of the FMA at item 7 or elsewhere.

It is not immediately apparent how significant this issue is. I had hoped to obtain a sense of this from a perusal of the Explanatory Memoranda accompanying the Bills which made the relevant amendments. I note that subsection 38K(3) was inserted by section 13 of the *Courts and Tribunals Administration Amendment Act 1989* (Cth); subsections 38K(4) and (5) by the *Superannuation Legislation (Consequential Amendments and Transitional Provisions) Act 1992* (Cth); and subsection 38K(6) by the *Superannuation Legislation Amendment (Trustee Board and Other Measures) (Consequential Amendments) Act 2008* (Cth). Unfortunately, despite undertaking a thorough search of ComLaw and the website www.aph.gov.au, I cannot locate the Bills and Explanatory Memoranda for the first two Acts. The Explanatory Memorandum for the Superannuation Legislation Amendment (Trustee Board and Other Measures) (Consequential Amendments) Bill 2007 is available but is of no assistance in seeking to elucidate the import of the insertion of the new section. I am therefore regretfully unable to assist the Committee further at this time, save for pointing out the lack of consistency between the two provisions.

Item 14, section 38M – acting CEO

I note that section 38M of the FLA and item 9 of Schedule 2 of the FMA permits the appointment of an acting CEO. The Bill seeks to amend section 38M to require that any acting appointment be made by the Chief Judge (Chief Justice) and Chief Judge of the FCCA (Chief Judge) in writing. The requirement for the appointment to be in writing is consistent with the existing section 38M. However, item 9 of Schedule 2 does not explicitly require that the appointment be in writing. That item merely provides that the appointment be made by the Chief Federal Magistrate. The Bill seeks to repeal item 9 of Schedule 2 and thus it appears to me that any time an acting appointment to the office of CEO is made, it will be required to be in writing.

I observe that section 33A of the *Acts Interpretation Act 1901* (Cth) applies to acting appointments and refers to an "instrument of appointment".

Item 16, subsection 38S(2) – annual report

I note that the Explanatory Memorandum states that subsection 38S(2) is being repealed but records that subsection 38S(1) is being retained. I suggest that it may be helpful, for the sake of clarity, to include reference to the fact that the amendment is not designed to affect subsection 38S(3), which is also being retained. That subsection requires the Attorney-General to table a copy of the annual report in each House of Parliament as soon as practicable.

Specific comments – transitional provisions

As indicated above, section 38M of the FLA and item 9, Schedule 2 of the FMA concern acting appointments to the office of CEO. The incumbent CEO of the FMC is acting in that capacity. Item 27 of the Bill pertain to things done by or in relation to the Chief Executive Officer. I note that the office of acting Chief Executive Officer is not specifically referred to and I raise for the Committee's consideration whether it would be necessary or prudent to do so. I say this because as the FLA and FMA themselves distinguish between appointments as CEO and as acting CEO, and indeed the *Acts Interpretation Act 1901* (Cth) contains specific provisions relating to the appointment, remuneration and termination of acting appointments, it is arguable that substantive and acting appointments are distinguishable. Self evidently it is critical that anything the acting CEO has done since his appointment in November 2008, and anything done in relation to him, is taken to have been done by or in relation to the CEO of the FCoA and the FCCA.

Conclusion

Please do not hesitate to let me know if the Committee wishes to receive oral evidence on any aspect of this submission.

Diana Bryant AO
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