



CHIEF JUSTICE'S CHAMBERS
FEDERAL COURT OF AUSTRALIA
305 WILLIAM STREET
MELBOURNE VIC 3000

11 February 2009

The Hon Robert McClelland MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General

Discussion Paper: "Improving Access to Justice – A Better Framework for Federal Courts, November 2008"

I am writing in response to the recommendations made by the *Report of the Review of Future Governance Options for Federal Family Law Courts in Australia* ("the Review").

This submission addresses the recommendation of the Review to create a "division" within the Federal Court to deal with federal law matters of the type presently dealt with by the Federal Magistrates Court.

For reasons that I will explain, I do not support the recommendation and it is opposed by the judges of the Federal Court. I believe, however, that all the objectives that the recommendation seeks to attain can be achieved in another way that would have many positive aspects and would not have the detrimental consequences that I see occurring if the recommendation were adopted in its present form.

I should say at the outset that my opposition to the recommendation has nothing to say about the appropriateness of establishing a separate division within the Family Court to provide family law services within one cohesive organisation. As the consultation paper *Improving Access to Justice* (November 2008) makes plain, the recommendations of the Review were focussed upon the revision of family law services and not upon matters of general federal law.

Essentially, my concern is that the unprecedented establishment within a superior trial and appellate court of a "magistrates division" in the manner proposed would challenge the qualities that underpin the Federal Court's reputation by making it too large and by joining, in the one organisation, two courts that have relevantly different functions and different positions within the judicial system.

The Federal Court's high reputation, nationally and internationally, as a superior trial and appellate court of general federal jurisdiction in civil cases is closely linked with its reputation as a collegial and harmonious group of judges focused on maintaining and developing the quality of the work undertaken within the Court over the past

30 years. This distinctive collegial culture would, unquestionably in my view, be put at risk by any substantial enlargement of the Federal Court and by what would in effect be an amalgamation of two courts having very different functions.

Likewise, the distinctive culture of the FMC would be put at risk were it to form part of an amalgamated body.

My concern, and that of the judges of the Federal Court, is that because a need has been shown to investigate and change the way in which family law services are delivered in Australia, and an attractive model proposed for the coordinated delivery of those services, the structure and integrity of both the Federal Court and the FMC may be altered in a way that undermines the positive qualities of both. This concern is heightened because the terms of reference of the Review did not directly address the Federal Court at all and its Report gave only passing attention to the implications of its recommendations for the Federal Court.

Nevertheless, on the assumption that the recommendations of the Review in relation to the delivery of family law services are accepted and many members of the FMC appointed to a division of the Family Court as judges, there is obviously a need to address how the general federal law jurisdiction of the FMC would, in the future, be exercised.

It is in this context that I suggest that any structural changes to the federal judiciary in relation to general federal law matters should satisfy three objectives:

- The revised structure should operate as efficiently and as economically as possible.
- The culture of expedition and “get the job done” informality that has developed in the FMC in its general federal law work should be preserved and fostered.
- The revised structure should have the minimum impact on the many positive qualities of the Federal Court that have developed over the life of that court.

The proposed model

The model I propose is very straightforward and achieves all three objectives including, within the first objective, the elimination of the administrative duplication that led to difficulties between the FMC and the Family Court of Australia.

I propose that the FMC be retained and be constituted by those judicial officers who are presently members of that court who do not take commissions in the Family Court of Australia. It would remain a separate court but, importantly, all the administrative support would be provided by the Federal Court. The Registrar and Chief Executive Officer of the Federal Court could also be the Registrar and Chief Executive Officer, for relevant legal purposes, of the FMC. Similarly, statutory arrangements presently in place where Registrars of the Federal Court are also Registrars of the FMC could continue.

Budgetary responsibility would lie with the Federal Court’s administration.

The FMC could be renamed. One appropriate name might be the Federal Districts Court. Another might be the Federal Intermediate Court. The judicial officers who remained members of that Court could be given the title “Judge”.

Within the retained court there should be a judicial officer responsible for day-to-day judicial administration and arrangements should be put in place, both formal and informal, to ensure that the needs of the judges of the renamed FMC were met by the administrative support provided by the Federal Court.

In the short term, it may be desirable that the jurisdiction of the FMC should remain unchanged but I would hope that, eventually, the two courts would jointly develop a proposal for ensuring that there was an appropriate division of jurisdictional arrangements.

Economy and efficiency

I now address the three objectives referred to earlier, the first of which concerns economy and efficiency.

Since soon after the establishment of the FMC there has been a Memorandum of Understanding between that Court and the Federal Court. Under the Memorandum of Understanding much of the administrative support provided to the FMC was provided by the Federal Court. The district registries of the FMC were co-located with the district registries of the Federal Court and the registry staff were employees of the Federal Court.

As the FMC grew, its independent administrative infrastructure expanded but that expansion was substantially directed to the provision of family law services.

If the FMC is now retained to exercise jurisdiction in general federal law matters, the experience to date demonstrates that all personnel servicing the FMC could be employed by the Federal Court so that the corporate services of the Federal Court (in relation to such matters as human resources, finance, IT support and property management) would support both Courts, without duplication. Importantly, the corporate services provided to the FMC would include those shared by the Federal Court and the Family Court. This would ensure significant savings when compared with the situation that emerged with the enlargement of the administrative infrastructure of the FMC.

The culture of the Federal Magistrates Court

The FMC was established with the objective of providing "Australians with user-friendly, affordable options for resolving their disputes". The FMC has successfully established a culture that meets this objective, as its popularity with the profession tends to demonstrate.

While the subject matter of cases in the FMC in the area of general federal law broadly corresponds with that of the Federal Court, in truth the cases are quite different. They are more straightforward and generally involve minimal technical complexity and for those reasons can often be dealt with more expeditiously and at lower cost to the litigants and the community.

This has been the environment in which the culture of the FMC has developed. Doubtless this culture, which is universally accepted as appropriate having regard to the nature of the FMC's jurisdiction, emerged from an autonomous Court able to determine its own rules, to adopt more flexible practices and to respond to the needs of litigants and the community. It can best be preserved and fostered in an autonomous Court in which all judicial officers are focused on meeting the objective

of providing a user-friendly and affordable option and are not influenced by considerations appropriate to litigation of an entirely different type. Moreover, the managerial support that would be provided by the Federal Court's administration (which has a national and international reputation of innovation, procedural reform and the establishment of modern business practices) would be likely to foster the further development of the procedural culture of the FMC.

Effect on the Federal Court

A recent and comprehensive investigation of the federal judiciary was undertaken by the Australian Law Reform Commission resulting in its Final Report (published in January 2000 -- Report No 89) on the *Review of the Federal civil justice system*. It described the Federal Court as "a world-class civil court". It said in the Report (at 1.105 and following):

The Federal Court, for example, plays a pivotal role in relation to various sectors of economic activity. It creates and maintains formal and informal rules which keep business transaction costs low, defines and protects rights (including intellectual property rights), gives force to contractual agreements, influences private commercial dispute resolution, ensures the security of property, helps to regulate markets (including capital and labour markets) and ensure competition, and scrutinises the behaviour of public officials and the quality of legislation.

Some economic theory now posits that key institutions, including the courts, may be as important in the working economy as the three factors in classical economic theory: money, people and resources. Researchers have documented the link between effective judicial management of intellectual property cases and the amount and kinds of technology transfer and direct investment in a country.

*Corporate lawyers and in-house counsel consulted by the Commission were emphatic in their view that law and legal services are a key export, and that an efficient court and legal system is part of what makes Australia competitive in the Asia-Pacific region and beyond. In summarising our consultations leading to the publication of DP 62, the Commission reported that **there has been consistent praise for the Federal Court as a "world-class civil court"**. The Commission believes that the independence, integrity, and quality of the Federal civil justice system are matters of comparative advantage in the region, which government and industry should promote strongly in seeking foreign investment and in positioning Australia as a regional finance centre and corporate headquarters. (my emphasis)*

The Federal Court has achieved this reputation in part by reason of its size, which is not so large as to impair its collegiate spirit, and partly because of its national character. Its reputation depends upon a complex interaction of factors which foster a culture of coherence and excellence and a common commitment to the work of a national superior trial and appellate court.

In the conduct of its general federal law work the FMC has, as I have noted, successfully established a culture that promotes the particular objectives of a first tier court. As a separate court it would continue to do so.

My proposal allows for the culture of both courts to continue to thrive in a way that suits their distinctive objectives and roles.

In many ways this mirrors the proposal for a separate division but with the critically important difference that under my proposal the two courts would remain judicially distinct.

Conclusion

I, and the judges of the Federal Court, recognise that if the Government adopts the recommendations of the Review about the future judicial structure for the exercise of family law jurisdiction, there is a need to address how the general federal law work of the FMC would be performed.

The Review shows quite clearly that that question was not the subject of detailed substantial consultation with the Federal Court or the subject of any detailed analysis. The implications of introducing a "Magistrates Court Division" into the Federal Court have simply not been explored and they are certainly not easy to predict.

A positive aspect is that the Federal Court and the FMC have always worked together cooperatively and harmoniously. It would be bad policy to risk destabilising a good working relationship without careful consideration and very good reason and bad policy to put at risk, by amalgamation, the distinctive qualities of each Court. The model that I have proposed would maintain the distinct reputations of each Court, would maintain their distinctive features, would maintain the good relationship between them, and would avoid the risk of duplication of administrative resources. With the goodwill that one would expect from all parties, it would also be likely to enhance the efficient allocation and disposition of the work of both Courts.

I would, of course, value the opportunity of discussing these issues with you and of answering any queries that you may have.

Yours sincerely

MEJ BLACK
Chief Justice