

Dear Commissioners

Re Productivity Commission Draft Report - Access to Justice Arrangements (April 2014)

You have invited comments on this draft inquiry report.

As you point out in the overview to the draft report *...This inquiry has been prompted in large part by concerns that the civil justice system is too slow, too expensive, too complicated and too adversarial - these concerns have been reflected in many of the submissions received.* It is however pleasing to note that you also indicate that *...while this might describe some aspects of the system; such broad based characterisations fail to capture the diversity and indeed strengths of Australia's civil justice system.*

The Federal Circuit Court aims to dispose of matters in a timely manner. The clearance rate of the Court is one to be proud of. However, the Court, like all public institutions is feeling the impact of reduced public spending. Imminent judicial retirements and budget constraints will make it more difficult for the Court to meet such performance targets.

It is pleasing that the draft report highlights the importance of individual docket management as the FCC considers that overall a docket case management system provides for more efficient management of matters and promotes earlier settlement.

The following comments in Attachment A are provided in respect of recommendations and information requests of relevance:

Steve Agnew
Executive Director Court Services
Federal Circuit Court of Australia
26 May 2014

Chapter 8: Alternative dispute resolution

Information Request 8.1

The Commission seeks feedback on whether there is merit in courts and tribunals making mediation compulsory for contested disputes of relatively low value (that is, up to \$50,000)

What are examples of successful models of targeted referral and alternative dispute resolution processes that could be extended to other types of civil matters or to similar types of matters in other jurisdictions?

The Commission also seeks feedback on the value of extending requirements to undertake alternative dispute resolution in a wider variety of family law disputes

Response

Consistent with its statutory obligation, the FCC places significant emphasis on dispute resolution processes and recognises the benefits of ADR. At the first court event, the Judge will make an assessment as to whether the matter is a suitable one for a dispute resolution process, and make an early identification of the issues in dispute.

Mediation is the dispute resolution process usually adopted to resolve disputes in general federal law proceedings. The Court is able to order mediation with or without the consent of the parties while an order for arbitration can only be made with the consent of the parties (see ss. 34, 35 *Federal Circuit Court of Australia Act 1999*). Most mediations are conducted by Registrars who have no advisory or determinative role. Mediation is considered to fulfil a dual function of not only potentially settling and finalising the matter but also as a means by which the parties can be assisted to identify and reduce the issues in dispute, or to eliminate procedural arguments. Accordingly, early mediation is encouraged by the Court.

In family law matters there is a greater range of dispute resolution processes including:

- family counselling
- family dispute resolution
- post separation programs
- conciliation and joint conferences
- non-privileged appointments with family consultants;
- family reports.

Family law dispute resolution services are provided both internally and externally via family consultants employed by the court, private psychologists and social workers, and community based providers. Some services are confidential and others are non-privileged/ reportable. In addition, the *Family Law Act 1975* now requires parents to attempt to resolve parenting issues through family dispute resolution before they file an application for a parenting order.

The Court adopts an individual docket system with the aim of:

- narrowing of issues;
- fewer events;
- better identifying cases suitable for ADR procedures; and
- enabling the judicial officer to take an active role in the management of the case with the aim of promoting settlement as the preferred outcome.

In addition the Court is utilising administered funds to provide a new range of family law dispute resolution services in an innovative way providing access to these services to litigants in rural and regional locations where services are limited. In addition there are referrals in appropriate financial matters to private mediation in addition to conciliation conferences conducted by Registrars of the Court.

The docket system facilitates individual judicial case appraisal and is seen as an essential component of the case management process of the Court. It recognises the individual needs of the matter in dispute and allows the judicial officer the flexibility of adopting a dispute resolution process most appropriate for the case.

As a Court with extensive jurisdiction spanning family and general federal law jurisdiction, we note the wider relationship focus that ADR must play in family law proceedings, and caution against seeking to emulate processes adopted in such proceedings as a template for civil litigation generally.

Of real significance in all areas of the jurisdiction is the importance of early case evaluation by a judicial officer and a commitment to 'up-front' individual docket management. Draft recommendation 11.4 is welcomed as it endorses the utilisation of an individual docket system.

Chapter 11 Court processes

Draft Recommendation 11.1

The Federal Circuit Court operates an individual case management docket that allows judges of the Court to manage matters from first court date to disposition. The first listing of each matter is before the judge to which the matter has been allocated.

At the first court date a judge may make orders or directions in relation to a matter in accordance with Federal Circuit Court Rule 10.01 (3) including orders in relation to:

- Defining of issues
- Discovery and inspection of documents
- The hearing of evidence at hearing (including the use of video or telephone links).
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Although the Federal Circuit Court does not have a designated fast track, accommodation is made for the early listing of matters which are assessed as being urgent. These matters are managed on an individual basis by the docket judge in accordance with their particular needs.

Judges have full control over the progress of matters from first court date to disposition. This allows them to ensure that parties are only required to attend events that will progress matters towards

resolution. Case management in the Federal Circuit Court is not process driven so litigants are not required to attend unnecessary events.

It should be noted the FCC is not a court of pleadings however in general Federal Law matters pleadings can be useful as not every case is suitable to proceed on affidavits alone.

Draft recommendation 11.4

The Federal Circuit Court supports recommendation 11.4 and notes that the Court has operated an individual docket system of case management since its inception in 2000.

The Court recognises the value of judicial led case management that ensures each matter only participates in events that will assist in its resolution. Judges practice differential case management having regard to the particular needs of each matter ensuring that litigants are not required to attend unnecessary events thus reducing costs.

Applications filed in the Federal Circuit Court are in most instances allocated directly to a judge's docket where the judge manages the matter from first court date to disposition. Urgent matters are filed regularly and are accommodated with an early listing before a judge. The urgent matters do not form a discrete list but are managed individually in accordance with their needs.

Draft recommendation 11.7

Federal Circuit Court Rule 10.01 (3) allows for the docket judge to make orders in respect to the early discovery and inspection of documents, inspections of real property admissibility of documents. The capacity for these orders to be made on the first court date ensures the early exchange of critical and relevant documents.

The docketed judge is able to tailor the orders made on the first occasion to accommodate the specific requirements of each individual case, as standard directions may not be appropriate in every matter.

Draft recommendation 11.7

Court rules and practice notes should facilitate and promote the consideration by courts and parties of the option of the early exchange of critical documents, drawing on the practice direction used in the Supreme Court of Queensland's Supervised Case List.

The sort of document exchange provided for by Practice Directions 10 (http://www.courts.qld.gov.au/data/assets/pdf_file/0016/130507/sc-pd10of2011.pdf) and 11 (http://www.courts.qld.gov.au/data/assets/pdf_file/0020/150266/sc-pd11of2012.pdf) of the QSC is not necessarily appropriate for smaller matters and it would be inappropriate to make it a standard direction in our court.

Draft recommendation 17.1

The Federal Circuit Court circuits to 33 locations across Australia in addition to sitting in 14 city locations. The Court makes good use of telephone and video technologies providing a greater level of access to justice particularly to those litigants in rural and regional Australia. As noted in this recommendation the Court conducts procedural hearings when it is appropriate by telephone or video. This assists in having matters prepared for circuits and for the Court to better utilise the time spent at circuit locations. This

also reduces the number of times litigants need to personally attend at a court location thus reducing their costs.

The Court is currently preparing processes to standardise the manner in which litigants or legal practitioners apply to attend by telephone or video. This work is being undertaken following consultation with rural and regional legal practitioners. The court expects that this process will provide clarity particularly to unrepresented litigants.

An issue that requires further consideration is the lack of suitable telephone or video equipment on occasions. In some rural and regional locations there are no suitable video facilities and telephone reception for people relying on mobiles can be poor. The poor facilities can on occasions limit the Courts capacity to extend these services.

Information Request 11.2

The Commission seeks information on whether discovery has different access to justice implications for different types of litigation which require particular consideration

In the FCC interrogatories and discovery are not allowed unless a Judge declares that it is appropriate in the interests of the administration of justice (see section 45 *Federal Circuit Court of Australia Act 1999*).

There was some concern expressed about disclosure obligations in FCC family law property matters. The issues around discovery differ in general federal law and family law. In general federal law parties generally discover informally or use subpoenas or orders to produce and rarely are issues raised in relation to the section 45 restriction. Rarely is a formal declaration for discovery in family law property matters made. Formal discovery is cumbersome, time consuming and therefore an expensive process and there is utility in a provision such as section 45. It is our belief that section 45 does not prevent the court making rules providing for a general duty of disclosure. However section 45 prevents the Court from making a rule that provides for any form of disclosure or informal discovery if such disclosure is compelled by the instigation of another party (as opposed to the court compelling disclosure as is the case with the duty to provide full and frank disclosure in property matters pursuant to rule 24.03).

Chapter 12 Duties on Parties

Information Request 12.6

The Commission seeks feedback on the best way to respond to vexatious litigants and litigation. Could reform that focuses on early intervention with more graduated responses to manage vexatious litigants reduce negative impacts? Should the bar be lowered in terms of the type of behaviour that attracts a response from the justice system? Do jurisdictions need to make available a publicly searchable register of orders against vexatious litigants.

The federal courts have existing general statutory and other powers to deal with vexatious litigants. Recent statutory amendments implement model statutory provisions which do not detract from the wide general powers of the courts to prevent the commencement of proceedings. There is a new provision whereby a person may apply for a certificate advising whether or not an individual has been the subject of a vexatious proceedings order. It is envisaged that such certificates will be sought by persons who may wish to seek a vexatious proceedings order against that person in another court. The FCC rarely declares a litigant vexatious but does, not infrequently need to rely on general or injunctive powers in order to inhibit parties who have already sought relief from filing further applications. Similarly the Court has extensive summary dismissal powers and will exercise these in appropriate cases.

The FCC does not have a register of the names of people declared to be vexatious litigants. One difficulty with the recording of such orders in the context of the migration jurisdiction is that section 91X of the *Migration Act 1958* prohibits the publication of the name of applicants seeking review of protection visa determinations. Such orders are difficult to identify on the case management system as it also records not only vexatious litigants but also orders made restraining litigants from filing without leave or decisions made refusing to accept documents which appear on their face to be an abuse of process or frivolous, scandalous or vexatious. The Court has been consulted about the possibility of a national register and has identified these concerns. As noted, there is provision for a person to apply for a certificate advising whether or not an individual has been the subject of a vexatious proceedings order.

Chapter 13: Costs awards

Draft Recommendation 13.2

In the Federal Circuit, Magistrates, District and County courts, costs awarded between parties on a standard basis should be set according to fixed amounts contained within court scales. Scale amounts should vary according to:

- *the stage reached in the trial process*
- *the amount that is in dispute*

...

Fixed scales of costs should reflect the typical market costs of resolving a dispute of a given value and length. Data collection and analysis should be undertaken to periodically update these amounts and categories

Response

This recommendation is one that the Federal Circuit Court (FCC) has already adopted

The following are features of the FCC cost regime:

- Unless the court otherwise orders, the appropriate scale for a party-party costs order (other than bankruptcy proceedings) is the event based model as set out in Schedule 1 (see Rule 21.10);
However, the court has a general discretion in relation to costs and can depart from the event-based scale. It can award costs according to the scale set by the Family Court (family law) or the Federal Court (general federal law) or otherwise set an amount it considers appropriate in the circumstances;
- There is no provision for taxation of costs if an order is made in accordance with Schedule 1. Taxation of costs is only possible when costs are fixed in accordance with the Family Court or Federal Court scales;
- There are no rules regulating the fees to be charged between lawyers and clients;
Note there is provision for an advocacy loading if the employment of an advocate is certified as reasonable (Rule 21.16).

Information for litigants is available on the Court's website as follows:

http://www.federalcircuitcourt.gov.au/pubs/html/costs_fl.html

http://www.federalcircuitcourt.gov.au/pubs/html/costs_gfl.html

Some earlier cases on the operation of the cost regime

PRATT & ORS v LATTA & ANOR (No. 2) [2002] FMCA 43

COSTS - consideration of the operation of the Federal Magistrates Court scale of costs – enforcement and taxation of costs under the Federal Magistrates Court Rules considered.

<http://www.austlii.edu.au/au/cases/cth/FMCA/2002/43.html>

COLAN v LUXON & ANOR (NO 2) [2002] FMCA 90

COSTS - consideration of the operation of the Federal Magistrates Court scale of costs

<http://www.austlii.edu.au/au/cases/cth/FMCA/2002/90.html>

Overall conclusions

Event based costs are a means by which lump sum fees are applied for stages of a matter. From the early 1990's a number of reports, including the Access to Justice Statement, Williams Report, and the Australian Law Reform Commission Report on Managing Justice all recommended the introduction to the event based scales. Legal Aid already has event based scales.

It was anticipated that the event based cost regime adopted by the Federal Circuit Court (which was originally the Federal Magistrates Court) would attract some criticism. This was due to the fact that the regime introduces an event based scale for party-party costs (other than for bankruptcy and divorce). Being the first federal court to introduce such a regime there was an understandable degree of apprehension as to whether the level of fees set for each event (or stage) would be adequate and whether the regime would detract from applications being filed in the Court. Establishing a mechanism for setting the events and the appropriate amounts posed difficulties. This was particularly so in view of the shared jurisdiction of the Court (with both the Family Court and the Federal Court) and the desirability for some degree of parity with the scales set by those other courts.

While acknowledging the desirability for some degree of consistency with the other courts, it was nevertheless decided that an event based scale was more appropriate for a court such as the FCC and was seen to provide a greater degree of transparency for litigants.

In reality there have been few criticisms of the event based scale. Early in 2001, the Attorney-General's Department established a Working Group to examine the feasibility of event based scales more generally. The profession have, in the past, raised concerns about the introduction of an event based model and the fear that it may operate as a default solicitor/client cost scale if there is no costs agreement or evidence of what a reasonable charge should be. The profession generally considers such regimes too arbitrary, and not being able to keep pace with market charges, and are not reflective of the costs actually incurred.

The FCC cost rules do not seek to regulate solicitor and client costs. Judges take the view that solicitor client costs are commercial transactions and should not be subject to regulation by the Court. They are more appropriately the subject of the legal professional conduct rules and/or legislation that applies in the state or territory where the lawyer practices. Note however that the FCC Rules do make provision for costs orders to be made against a lawyer for 'undue delay, negligence, improper conduct or other misconduct or default'.

It can be difficult to set an appropriate level of cost for each stage and the amount to be included in the scale for each event. Accordingly the FCC cost rules include a general discretion to depart from the event based scale in any individual case. If a higher scale is considered appropriate in the particular matter the Court can apply the scale set down by the Family Court (family law matter) or the Federal Court (general federal law matter), or otherwise fix an amount it considers appropriate in the circumstances. In relation to bankruptcy matters, the Federal Court scale applies as a matter of consistency.

If costs are fixed in accordance with the event based scale there is no role for taxation or assessment. In the event of uncertainty or disagreement about the application of the Scheduled fee to a particular case, then the matter can be brought back before the Judge for clarification. Taxation is only appropriate when the event based model is not applied in a particular case but costs are fixed in accordance with the Family Court or Federal Court scales and no agreement can be reached. In those instances the matter can then be referred to a Registrar for taxation according to those rules (see Rule 21.11)

It is expected that the FCC may review both

- the items or events specified in the schedule; and
- the amounts prescribed for those items/ events

The issue of counsel's fees may need to be considered as in all other courts, counsel's fees are dealt with as disbursements.

However there is a general view that the cost regime adopted by the event based model is a useful one.