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Attorney-General's Department

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**Submission to the Standing Committee on
Legal and Constitutional Affairs –
Courts Administration Legislation
Amendment Bill 2015**

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1. Introduction

This submission is made to the Senate Standing Committee on Legal and Constitutional Affairs on behalf of the Attorney-General’s Department, as the Department that prepared the *Courts Administration Legislation Amendment Bill 2015* (the Bill) currently before the Committee for consideration.

The Bill implements the measure, announced as part of the Government’s 2015-16 Budget, to merge the corporate services functions of the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia (Federal Circuit Court) with those of the Federal Court of Australia (Federal Court) and will bring the three courts into a single administrative entity. Crucially, all of the savings generated from this merger will be reinvested in the courts. In this way, the Bill will contribute to placing the courts on a sustainable funding footing over the longer term, leaving them better placed to deliver services to litigants.

The Bill’s primary objective is to facilitate the delivery of administrative efficiencies through implementing the merger of the courts’ corporate services and the creation of a single administrative entity. Importantly, it does so in a manner that preserves the judicial and functional independence of each court.

2. Imperative for reform

2.1 Budgetary context

The merger of the courts’ corporate services is underpinned by a clear and pressing budgetary imperative to place the courts on a financially sustainable footing over the longer term. The Family Court and Federal Circuit Court, in particular, are facing ongoing deficits and significant budgetary pressures.

At the time of handing down the 2015-16 Budget, the combined projected deficit of the courts was \$44.2 million over the forward estimates, based on a 0.5 per cent increase in staff costs (refer figure 1). Carrying a projected deficit of this magnitude is not feasible.

Without additional changes, the courts could not maintain current service levels to Australian litigants.

Figure 1. Combined projected deficit over the forward estimates

Court (0.5% increase in staff costs)	2015-16	2016-17	2017-18	2018-19	Total (\$m)
Family Court and Federal Circuit Court	-8.6	-11.3	-12.5	-12.0	-44.4
Federal Court	0.3	0.2	0.2	-0.6	0.2
Total	-8.2	-11.1	-12.3	-12.6	-44.2

The Family Court and the Federal Circuit Court were provided with an additional \$26.1 million in funding over four years in the 2012-13 Budget, which ensured that they were able to operate within their budget for 2012-13. However, the financial position of the Family Court and Federal Circuit Court continued to deteriorate despite this significant additional funding injection.

The 2013-14 Annual Reports of the Family Court and the Federal Circuit Court referred to ongoing budgetary pressures, with forecasted significant deficits over the forward years of the budgetary period. Their

underlying result for the 2013-14 financial year was a \$0.6 million loss and for the 2014-15 financial year a loss of \$4.7 million.

Within this budgetary context, a number of reports and reviews have considered the performance, funding and operation of the courts, providing a strong evidence base for the Government's 2015-16 Budget measure to merge the corporate services functions of the courts.

The 2012 Skehill *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio* considered there was merit in the idea of amalgamating the corporate services functions of the courts. This idea has more recently been recommended in the 2014 National Commission of Audit *Towards Responsible Government*, and the 2014 KPMG review into the performance and funding of the federal courts.

A key focus for such reviews has been the financial difficulties exhibited by the courts, particularly the Family Court and the Federal Circuit Court. In this context, the need for reform to place the courts on a financially sustainable footing over the longer term is manifest.

2.2 Other measures to support the financial sustainability of the courts

In addition to the merger of the courts' corporate functions, a number of other changes from the 2015-16 Budget measure *Streamlining and Improving the Sustainability of Courts* will help support the courts achieve financial sustainability, including:

- injecting an additional \$22.5 million into the courts over four years from 2015-16
- exempting the portion of the courts' appropriation used to fund judges' salaries from the application of the efficiency dividend (generating a combined save for the courts of \$13.0 million over four years from 2015-16), and
- \$30 million for critical maintenance works for court buildings. The responsibility for this work falls with the Department of Finance.

As provided in the 2015-16 Budget, the cost of this measure was to be met through additional revenue of \$87.4m over four years from changes to general federal law fees and family law fees. Changes to general federal law fees commenced on 1 July 2015 and will be implemented as projected. Regulations implementing changes to family law fees were disallowed by Parliament in June and August 2015. However, despite the disallowance, the courts' funding injection is guaranteed.

In combination, the package of measures from the 2015-16 Budget are critical to helping ensure the courts are financially sustainable by 2018-19. The package is designed to help avoid cuts to services, including regional registry closures and the non-replacement of judges.

To further reinforce this solid foundation to ensure their financial sustainability, the federal courts were also exempted from the one-off efficiency savings to specific agencies in the Attorney-General's Portfolio that was announced as part of the 2015-16 mid-year economic and fiscal outlook (MYEFO). This is an important

exclusion given this measure will achieve significant savings across various other agencies in the portfolio of \$69.7 million over four years.¹

2.3 Merger of courts' corporate functions

The Bill will merge the corporate service functions of the courts from 1 July 2016. These services will be jointly managed by the Federal Court Chief Executive Officer (CEO) for all three courts.² Further detail is set out below (refer 3.2.3).

The merger is a key element of the reform package. Given the grave financial circumstances of the Family Court and the Federal Circuit Court, funding injections and efficiency dividend relief alone are not sufficient to ensure long term financial sustainability for the courts. To achieve sustainability, the Government considers it essential that realistic savings and efficiencies are derived from within the system. Axiomatic in the Government's consideration of court budgetary pressures is that frontline services need to be maintained. While this is ultimately a decision for the courts, the Government considers that in a tight fiscal environment, a continuing focus on all court administration practices is vital, not limited to operating efficiencies to be derived from shared services.

The merger is expected to generate savings of \$9.4 million over the six financial years to 2020-21 and \$5.4 million annually after this time. Crucially, these savings are not to be returned to Government but will be reinvested in the courts' core business, critical to helping ensure their financial sustainability into the future. The merger will also provide the opportunity for further economies of scale and organisational agility.

The Government has emphasised that all agencies must strive for more efficient administration, particularly given the prevailing constrained economic conditions. Merging the courts' corporate services is consistent with the drive toward to efficiencies from shared corporate services more broadly across government. The 2015-16 MYEFO included an announcement that the Government will achieve net savings of \$40.9 million over three years from 2016-17 by consolidating the provision of transactional and other common services to a small number of shared service centres within Australian Government agencies.³ It is important to note, however, that savings from this measure will be redirected by the Government to repair the Budget and to fund policy priorities. Conversely, as noted above, the savings from the courts' corporate services merger will be retained by the courts.

3. Key elements of the legislation

3.1 Independence of the courts

The Bill maintains the protection of the judicial and functional independence of the courts in accordance with the Constitution, while promoting their effective management.

Each head of jurisdiction will retain responsibility for the arrangement of the business of the relevant court, each court will maintain its separate and distinct judiciary, and there will be no changes to the courts' jurisdiction. This will ensure there is very little change to the front end services of the courts: heads of

¹ http://www.budget.gov.au/2015-16/content/myefo/download/10_AppendixA_Expense.pdf

² At present, the legislative title for this role in the Federal Court is 'Registrar'.

³ http://www.budget.gov.au/2015-16/content/myefo/download/10_AppendixA_Expense.pdf

jurisdiction continue to have full control over the management of their courts' judicial business, including matters such as the assignment of particular matters or classes of matters to particular judges and any restriction of judges to non-sitting duties.

Heads of jurisdiction will also retain responsibility for managing the administrative affairs of their respective courts, although this will exclude corporate services. Heads of jurisdiction will continue to be assisted in this regard by their own CEO.

On one level, the merger of the courts' corporate services could be seen as largely akin to the historical running of the courts administration by the Attorney-General's Department prior to the courts becoming self-administering in the latter part of the last century. This is still the centralised approach taken in many state jurisdictions. That approach gave heads of jurisdiction legislative responsibility for the arrangement of business of the courts, but not for administrative affairs. This was reflected in the *Family Law Act 1975* in force at the time, which provided that '(t)he Chief Judge is responsible for ensuring the orderly and expeditious discharge of the business of the Court'.⁴

There is an important difference between the corporate services model in the Bill and the historical model: the Bill provides for corporate services to be provided by the courts, rather than a government department. In this way, it preserves the self-administering nature of the courts within legislative and budgetary obligations placed on government entities.

The courts' independence from each other will be safeguarded through each court having responsibility for its own management, its own budget allocation and its own independent CEO. The separate and independent standing of each court will be further supported through replacing the position of joint CEO of the Family Court and Federal Circuit Court with a separate CEO for each court.⁵ This will ensure each head of jurisdiction has a dedicated CEO to assist in managing the administrative affairs of his or her respective court. The Bill also contains provisions that will limit the use of funds intended for each court on another part of the administrative entity⁶, without the consent of the relevant head of jurisdiction or the Attorney-General.

The Bill also contains provisions to ensure the Federal Court CEO, as the accountable authority under the *Public Governance, Performance and Accountability Act 2013* (the finance law), makes relevant delegations to the Family Court CEO and the Federal Circuit Court CEO, in relation to the administrative affairs of their respective courts (excluding corporate services).⁷ The Federal Court CEO will need to make the appropriate delegations in order to fulfil the purposes of the administrative entity under the finance law.

3.2 Governance structures

3.2.1 Federal Court CEO

The Federal Court CEO will have four key roles within the entity, including:

⁴ Subsection 21B(1) of the *Family Law Act 1975* (9th edition, consolidated to 15 July 1988).

⁵ Sections 96A-96J of the *Federal Circuit Court of Australia Act 1999*, to be inserted by item 9 of Schedule 3 of the Bill.

⁶ Section 18ZD of the *Federal Court of Australia Act 1976* (Federal Court Act), to be inserted by item 43 of Schedule 1 of the Bill.

⁷ Section 18ZB of the Federal Court Act, to be inserted by item 43 of Schedule 1 of the Bill.

- similarly to the other CEOs and, as at present, assisting the Federal Court Chief Justice with the management of the administrative affairs of the Federal Court and holding the role of most senior registrar in the Federal Court
- continuation of assisting the National Native Title Tribunal President with the management of the administrative affairs of the Tribunal
- ultimate responsibility for the management of the courts' joint corporate services and for delivering the projected efficiencies from corporate services, and
- overall responsibilities for the courts entity as the administrative head for the purposes of the finance law and the *Public Service Act 1999*.

Although the Federal Court CEO will be the head of the administrative entity, he or she will be under a statutory obligation to make financial and staffing delegations to the other CEOs to facilitate their assistance of heads of jurisdiction with the management of their respective courts.

3.2.2 Family Court CEO and Federal Circuit Court CEO

The Bill separates the role of the CEO of the Family Court and Federal Circuit Court into two separate statutory positions, one that relates to each of the courts. This addresses concerns expressed about the current situation where the Chief Justice of the Family Court and the Chief Judge of the Federal Circuit Court are required to share a CEO.

The Family Court CEO and Federal Circuit Court CEO will continue to have statutory functions in relation to assisting their heads of jurisdiction with the management of the administrative affairs of their courts. In practice, it is also expected that they will work closely with the Federal Court CEO in relation to ensuring the delivery of corporate services is tailored to each court's needs and in relation to matters that affect the administrative entity as a whole. Details relating to corporate services and consultation requirements would be set out in a memorandum of understanding.

The Bill will also amend the CEO roles associated with the Federal Circuit Court and Family Court to combine them with the role of Principal Registrar (effective 1 July 2016 and 1 January 2018 respectively). This reflects the practice at both the Federal Court and High Court, where it has worked as an efficacious model. It would create consistency between the federal courts and allow for the appointment of a person with appropriate legal as well as management and administrative expertise to the combined roles.

Amendments will also be made to a small number of acts to change the title of the Federal Court Registrar to 'Chief Executive Officer and Principal Registrar', abbreviated to 'CEO'. Corresponding amendments would then be made to the titles of the next most senior registrars in the court. This change will make position titles more reflective of the responsibilities currently associated with them.

3.2.3 Corporate services

The key effect of the Bill is to merge corporate services across the three courts. The corporate services merger is the source of the projected savings of \$9.4 million over the six financial years to 2020-21, and \$5.4 million annually after that time, to be retained by the courts.

It is therefore essential that corporate services can be effectively managed to achieve these savings. Responsibility for corporate services, and certain responsibilities in relation to the administrative entity, will

be held by the CEO of the Federal Court. The Government recently announced the reappointment of Mr Warwick Soden OAM to the role for another five year term.

The Federal Court CEO will be required to consult the CEOs of the Family Court and the Federal Circuit Court and the heads of jurisdiction in relation to corporate services, which will ensure their delivery is tailored to the needs of the courts.

The Bill sets out what is within corporate services and these items are excluded from the administrative affairs of the courts. It defines corporate services to include:

- communications
- finance
- human resources
- information technology
- library services (which are already shared by the courts)
- procurement and contract management, including security contracts
- property
- risk oversight and management, and
- statistics.

Descriptions of matters coming within each corporate service listed above are included in the explanatory memorandum. For instance, finance includes asset management, finance systems administration, accounts payable and receivable, credit card processing, financial controls, travel management, tax management, balance sheet management, internal and external budgeting and finance governance.

The list is based on advice from Ernst & Young, which provided modelling for the merger of these services, and consultation with the courts. Following consultation with the courts it was agreed that marshals, sheriffs and media officers would remain within the administrative affairs of the courts, rather than corporate services.

The Bill provides for the Attorney-General to determine other matters within the scope of corporate services by legislative instrument. This would provide flexibility for additional matters to be delivered as shared corporate services in the future.

3.2.4 Administrative affairs of the courts

The Bill ensures that the independence of the judiciary continues to be protected, with heads of jurisdiction retaining responsibility for the management of the administrative affairs of their respective courts. Each court will have its own CEO and its own defined budget allocation.

At present, heads of jurisdiction are responsible for managing the administrative affairs of their courts and are assisted with this management by a CEO. Heads of jurisdiction have powers to enter into contracts and acquire and dispose of personal property. The CEO is also the accountable authority for the purposes of the finance law and holds responsibilities for the financial management of the administrative entity.

The Bill largely preserves this arrangement, with two key differences:

- ‘Administrative affairs’ is defined to exclude corporate services, which will be shared across the three courts and managed by the Federal Court CEO. This will appropriately correlate the responsibility of heads of jurisdiction to remaining administrative matters that relate to the business of their particular courts. Carving out this responsibility will ensure that a single person, the Federal Court CEO, has ultimate responsibility for the management of the courts’ corporate services and for the delivery of the significant projected efficiencies.
- As there will be a separate CEO for each of the three courts, only one CEO (the Federal Court CEO) will be the accountable authority for the purposes of the finance law. The CEOs for the other two courts will be delegated powers that will support their functions of assisting heads of jurisdiction with the management of administrative affairs.

The Federal Court CEO will be required to make delegations to the other CEOs in order for him or her to fulfil the obligation under section 15 of the finance law to govern the administrative entity in a way that achieves its purposes, which will include each CEO’s assistance of their head of jurisdiction with the management of the administrative affairs of the court (section 18ZB of the Federal Court Act). The Bill also includes a number of provisions that will limit the persons to whom the Federal Court CEO can delegate functions that relate to the administrative affairs of the Family Court and Federal Circuit Court.

Although the courts will be within a single administrative entity, the Bill will provide clarity and control for each court in relation to its budget allocation. Each court will have its own budget outcome statement, as will the courts’ corporate services. Appropriation acts will set an allocation for each outcome within the entity. The Bill contains provisions that will prevent the Federal Court CEO from spending funds on outcomes to which they are not assigned (section 18ZD of the Federal Court Act) and from imposing an expenditure obligation on the courts when exercising corporate services powers and functions (subsection 18Z(5) of the Federal Court Act), without the consent of the relevant head of jurisdiction or the Attorney-General. These provisions were inserted following consultation with heads of jurisdiction and will provide the courts certainty in relation to their budgets.

3.3 National Native Title Tribunal

The Bill aims to have minimal impact on existing arrangements concerning the National Native Title Tribunal, which is currently within the Federal Court administrative entity. The Bill makes minor amendments to the *Native Title Act 1993* to reflect the updated title of the CEO and Principal Registrar of the Federal Court, who is responsible for assisting the Tribunal President with the management of the administrative affairs of the Tribunal, and centralises some provisions within the Federal Court Act. The Tribunal will retain its current arrangements in relation to administrative affairs and its separate statutory identity.

3.4 Transitional provisions

Schedule 6 of the Bill includes a number of transitional provisions, including to preserve the continuity of the appointment of the Federal Court Registrar as the Federal Court CEO and of other court employees and consultants. It also preserves the Federal Court administrative entity as the administrative entity for the purposes of the finance law and the statutory agency for the purposes of the Public Service Act. In addition, it contains provisions to preserve the courts’ existing enterprise agreements until a new agreement comes into operation for the single administrative entity.

4. Consultation

The Bill and overall design of the reforms have been developed at all stages in both formal and informal consultation with the heads of jurisdiction and senior officers of the Federal Court, Family Court and Federal Circuit Court, including the CEOs. This has included seeking high level views from the courts early in the process on governance options and inviting comments on drafting instructions and an exposure draft, together with consultation on provisions in subsequent drafts. The National Native Title Tribunal President was also provided an opportunity to comment on exposure draft provisions that affect the Tribunal.

The Attorney-General has consulted directly with the heads of jurisdiction of the three courts on a range of matters including in relation to governance arrangements and protection of each court's budget.

To facilitate the development and implementation of the merger, the Attorney-General's Department also established an organisational structure comprising a Court Reform Steering Committee, Project Management Working Group and implementation working groups, as detailed below.

The courts have also been closely consulted in relation to the work undertaken by Ernst & Young to cost the central savings for corporate services and to provide advice to Government on the division of the courts' appropriation within the single administrative entity.

5. Implementation work

The Attorney-General's Department established a Court Reform Steering Committee in January 2015 with responsibility for overall decision making for the development and implementation of the amalgamation. The Steering Committee is made up of senior representatives from the affected courts, including the CEOs, the Attorney-General's Department, the Department of Finance, and the Department of the Prime Minister and Cabinet. The Steering Committee meets regularly and has responsibility for overall decision making for the development and implementation of the project. There were nine Steering Committee meetings held in 2015. Specific functions of the Steering Committee include:

- providing a unified direction and effective decision-making for project development and implementation
- providing resources and authorising spending necessary for successful completion of the project
- ensuring effective communication amongst affected courts and with external stakeholders, and
- delegating effectively to implementation working groups and the project management team within the Attorney-General's Department.

The Steering Committee oversees a dedicated Project Management Working Group comprising representatives from the Attorney-General's Department and the three courts. This group is headed by an independent project director employed by the Federal Court. It oversees and supports the overall progress of four subsidiary implementation working groups in key areas (finance, human resources, information technology and property).

The implementation working groups consist of representatives from the affected courts and the Attorney-General's Department and have responsibility for detailed design and implementation of specific key areas of the project. The working groups held their first meetings in August 2015 and meet monthly. They report to the Steering Committee on implementation planning, progress and risks as they arise.

The Attorney-General's Department provides secretariat support for all three organisational tiers.

Through the above forums a number of products have been prepared and are in place to ensure the successful implementation of the merger from 1 July 2016. This includes:

- project management tools such as a risk and issues register, communication strategy, resource and budget plan
- future state design principles, and
- implementation plans for each key area containing critical actions required for commencement on 1 July 2016 and beyond.

The Project Management Working Group is also responsible for developing a memorandum of understanding to underpin key elements of the merger.

Passage of the Bill early in the 2016 Autumn sitting is essential to provide legislative certainty for the merger and to allow sufficient time to settle implementation arrangements ahead of 1 July 2016. Such certainty is particularly imperative for implementation actions requiring significant investment prior to 1 July 2016, with provision for implementation costs provided for in the 2015-16 Budget.

6. Conclusion

Merging the courts' corporate services functions will create efficiencies that will allow more of their finite budgets to be spent on frontline services to the Australian community. This is essential given the significant budgetary pressures and ongoing deficits faced by the Family Court and Federal Circuit Court.

The projected savings of \$9.4 million over the six financial years to 2020-21 and \$5.4 million annually after this time, as well as the scope for further efficiencies and greater organisational agility, will provide an important contribution toward maintaining the financial sustainability of the courts into the future and to averting cuts to services.

The Bill also carefully safeguards the independence of the courts, which is a foundation stone of our system of government. It ensures heads of jurisdiction will continue to be responsible for the management of administrative matters pertaining to their own court, and that each court will have its own CEO and its own budget allocation.

The Federal Court CEO's ultimate responsibility for corporate services will ensure he or she has sufficient powers to deliver the projected efficiencies. The requirement to consult with the other CEOs and the heads of jurisdiction will ensure the delivery of these services is responsive to the needs of the courts.

The Attorney-General's Department would be happy to provide further information to the Committee if required. Contact details are provided in the covering email.