

**Submission of the Family Court of Australia to the Senate Standing Committee on  
Legal and Constitutional Affairs Legislation in relation to the Courts Administration  
Legislation (Amendment) Bill 2015 (Cth)**

1. This submission is made on behalf of the Family Court of Australia and I make it in my capacity as Chief Executive Officer of that Court.
2. Inevitably, reference to office holders will involve those presently holding positions. However it is not intended that any criticisms of the provisions of the Bill are personal to those presently holding their offices. The Chief Justice of the Family Court is acutely aware that she must retire in 2017 and anxious to leave in place a reasonably workable legislative arrangement for her successor. My own tenure will not continue beyond June 2016 at the latest and I share the concern of the Chief Justice.
3. Many aspects of the Bill have been the subject of discussion and consultation between me and officers of the Attorney General's Department and between the Chief Justice and the Attorney General. Some of the major concerns of the Court have been addressed there is only one matter on which I wish to make a submission to the Committee. This concerns Part IIB – Corporate Services and Other Matters.

**Background**

4. The Chief Executive Officer (who is defined as being the Chief Executive Officer of the Federal Court of Australia from time to time) has the function of providing corporate services for the Federal Court of Australia (“the Federal Court”), the Family Court of Australia (“the Family Court”) and the Federal Circuit Court of Australia (“the Federal Circuit Court”) [18Z(1)].
5. It is important to differentiate in the Bill, two discrete functions of the Chief Executive Officer. First, the Chief Executive Officer has a particular role and powers in relation to Part IIB – Corporate services and other matters. In his second and separate role he is Chief Executive Officer of the listed entity known as the Federal Court of Australia, and the accountable authority for the listed entity for the appropriation for all three federal courts, the Federal Court, the Family Court and the Federal Circuit Court [18ZB] under the *Public Governance, Performance and Accountability Act 2013* (Cth) (“the PGPA Act”) . In addition, as the Chief Executive Officer of the listed entity, he is the statutory agency for the purposes of the *Public Service Act 1999* (Cth) and thus the employer of all staff of all three courts [18ZE].
6. The Bill deals with both aspects of the Chief Executive Officer's role but this submission deals only with the Chief Executive Officer's role in relation to corporate services, not in relation to the proposed sections 18ZB and 18ZE of the Bill.
7. In the case of corporate services, the Chief Executive Officer has the power to do everything necessary to provide corporate services in that office holder's own right. Section 4 of the Bill defines Chief Executive Officer to mean “the Chief Executive Officer and Principal Registrar of the Court”, the Court being the Federal Court of Australia. Hence, the Chief Executive Officer of the Federal Court of Australia is the person entirely responsible for corporate services. In that capacity, the Chief

Executive Officer is not answerable to any head of jurisdiction, including the Federal Court.

8. Section 18A(1)(a) of the Bill provides that the administrative affairs of the Court, that is the Federal Court, do not include corporate services. Section 18A(1)(b) indicates what matters come within corporate services and they are as follows:
  - a) communications;
  - b) finance;
  - c) human resources;
  - d) information technology;
  - e) libraries;
  - f) procurement and contract management;
  - g) property;
  - h) risk oversight and management;
  - i) statistics;
  - j) any other matter prescribed by a determination under subsection (5)
9. All of these features are important to the Family Court, some more than others, and have a capacity to bear on the operations of the Court in relation to its services to the public. Communications, libraries, procurement and contract management, property, statistics and information technology all have a direct relationship to operations of the Court. However, by far the most important of those is information technology.
10. This encompasses all of the hardware and software which the Family Court (and the Federal Circuit Court) use to conduct the operations of the Court. It includes the Court's case management system (Casetrack) and the Commonwealth Law Courts Portal, which is an e-filing and information facility vital to the operation of the Court and to the litigants. The Portal includes listings of when cases are to be heard and when steps are to be taken, recording of time spent in Court, recording of applications and affidavits that have been filed. Casetrack also provides the data which forms the basis for statistical analysis of all the filings and the kind of matters being dealt with, including whether they are parenting or property proceedings and whether family violence allegations form part of applications. The latter is particularly important because much research is done around family violence and its prevalence in matters filed.
11. It is thus very important that the Court has some control over its information technology system and as I propose to indicate, the Bill does not provide for such control to occur.
12. The Chief Executive Officer has the power to do all things necessary or convenient for the purpose of providing corporate services [18Z(2)].
13. There are no constraints on the exercise of that power, other than to consult with the heads of jurisdiction of the three courts and the Chief Executive Officers of the Family Court and the Federal Circuit Court [18Z(3)]. However, a failure to consult does not affect the validity of a decision [18Z(4)]. The only constraint on the exercise of power is that a decision which has the effect of imposing an expenditure obligation on any of the Courts in relation to the administrative affairs of the Court cannot be made unless there is both [18Z(5)(d)]:

- a) Consultation with the Chief Justice or the Chief Judge by the Chief Executive Officer; and
- b) The consent of the Chief Justice or the Chief Judge.

If consent is not given, then the Attorney General must consent to the decision after consultation with the Chief Justice or the Chief Judge [18Z(e)].

14. There is otherwise no constraint on decision making, nor any criteria for how decisions are to be made. Nor is there any provision for governance arrangements between the heads of jurisdiction, the Chief Executive Officers of the Family Court and the Federal Circuit Court and the Chief Executive Officer as to how a particular policy may be conceived, proposed and implemented. No board-like structure, where the relevant heads of jurisdiction can discuss policy or other matters which might affect the exercise of the Chief Executive Officer's powers, is provided for in the Bill.
15. In essence then, subject only to the inability to take decisions which affect the administrative affairs of the Courts, the Chief Executive Officer can make whatever decisions he or she wishes, without the need to advise about what policy is being followed, why a decision is being made, or indeed to provide any transparency about decision making whatsoever.
16. The lack of requirement for any transparency in decision making becomes starker when regard is had to the potential conflict of interest that arises when giving a Chief Executive Officer of one court unconstrained power to make decisions that affect all three courts. With the greatest of respect, it is an unusual form of corporate management to have the Chief Executive Officer of one Court responsible for corporate services of two other courts, with no accountability, requirement for transparency, nor an overseeing body, to set policy.
17. As indicated, there are no provisions in this legislation as to how that might be achieved. The PGPA Act provides in Division 2, Subdivision A general duties of accountable authorities. In particular, s 15(1) requires the accountable authority of a Commonwealth entity to govern the entity in a way that:
  - a) promotes the proper use and management of public resources for which the authority is responsible; and
  - b) promotes the achievement of the purposes of the entity; and
  - c) promotes the financial sustainability of the entity.
18. Section 15(2) of that Act provides that:

In making decisions for the purposes of subsection (1), the accountable authority must take into account the effect of those decisions on public resources generally.
19. Section 17 requires the accountable authority to encourage officials of the entity to cooperate with others to achieve common objectives, where practicable.
20. Section 18 provides that when imposing requirements on others in relation to the use or management of public resources for which the accountable authority is responsible, the accountable authority must take into account:
  - a) the risks associated with that use or management; and
  - b) the effects of imposing those requirements.

21. The problem is that these are broad generalisations and while they impose obligations, they give no assistance as to, for example in s 15(1)(b), how a decision is to be made as to what promotes the achievements of the purposes of the entity and, in s 15(1)(c), what promotes the financial sustainability of the entity. Whilst there are overarching general obligations in the PGPA Act, they are not supported by any specific provisions in this Bill which would give any assistance as to how those general obligations are to be met.
22. Whilst I accept that there are ongoing negotiations about what should be included in MOUs between the Chief Executive officer and the courts, there is no compulsion to agree to proposals.
23. What is lacking, I submit is:
  - a) Provision for policies to be set taking account of the needs of all three courts or, put in terms of the PGPA Act, “promotes the achievement of the purposes of the entity”.
  - b) Provision for transparency in relation to decision making, such as publication of :
    - i. What decision has been reached; and
    - ii. On what basis it has been reached; and
    - iii. How that decision is to be communicated.
  - c) If the general obligations under the PGPA Act are not met, how is the Chief Executive Officer to be held accountable?
  - d) In the event that heads of jurisdiction, other than the Federal Court, or indeed all heads of jurisdiction, are dissatisfied with the performance of the Chief Executive Officer as being responsible for corporate affairs, what provision is there for any recourse to remove and/or replace the Chief Executive Officer?

## **Solutions**

24. Although many of the aspects of corporate services do relate to the operations of the Courts, information technology is the most important. I fully accept the policy decision taken by the government to merge corporate services and do not wish to advocate for unduly complex arrangements. If it is the view that it would be unduly restrictive to impose constraints on all aspects of corporate services, as a compromise position I am prepared to propose that the arrangements around the exercise of power by the Chief Executive Officer be confined to information technology.
25. I suggest that the Bill could be improved in relation to the powers of the Chief Executive Officer in relation to corporate services by inclusion of the following:
  1. Two of the three heads of jurisdiction must agree on any decisions that will affect the operating processes of the Courts.
  2. Any decision affecting the operating processes of the Courts or relating to expenditure over \$ 500,000 must be communicated to the heads of jurisdiction in writing with reasons for the decision reached.
  3. Decisions made that do not comply with points 1 and 2 above are voidable.

4. At least once per annum the heads of jurisdiction of the Federal Court, the Family Court and the Federal Circuit Court are to meet with the Chief Executive Officer and the Chief Executive Officers of their respective Courts to set policy for the coming 12 months for implementation by the Chief executive Officer, with the Chief Executive Officer being responsible for providing heads of jurisdiction with a proposal for operations during the next 12 months at least 14 days prior to the meeting.
5. Any dispute between the heads of jurisdiction about policy which cannot be resolved between them is to be resolved by the Attorney General in consultation with three heads of jurisdiction.