FAMILY COURT OF AUSTRALIA

CHAMBERS OF THE HONOURABLE DIANA BRYANT AO
CHIEF JUSTICE

Commonwealth Law Courts
305 William Street
Melbourne VIC 3000
Mail: GPO Box 9991
Melbourne VIC 3001

Telephone: (03) 8600 4355
Facsimile: (03) 8600 4350
email: chief.justice.chambers@familycourt.gov.au

3 March 2015

Ms Sophie Dunstone
Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dunstone

INQUIRY INTO THE TRIBUNALS AMALGAMATION BILL 2014 (CTH)

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's ("the Committee") Inquiry into the Tribunals Amalgamation Bill 2014 (Cth) ("the Bill"). I make this submission in my role as Chief Justice of the Family Court of Australia, in consultation with the Hon. Justice Steven Strickland, a senior Family Court judge with responsibility for law reform related issues. I wish to emphasise that the views contained herein are my own and may not necessarily reflect the views of all of the other members of the Court.

I first wish to thank the Committee for providing me with an extension of time in which to make my submission. As my Senior Legal Research Adviser explained, despite there being ongoing dialogue between the Principal Registrar of the Family Court and the Attorney-General's Department about the Bill, and particularly its effect on the Family Court's appellate jurisdiction under the *Child Support (Registration and Collection) Act 1988* (Cth) ("the Registration and Collection Act"), I only became aware that the Bill had been referred to the Committee on 27 February 2015. Submissions had closed by that time and I am grateful to the Committee for its indulgence.

I now turn to the substance of the Bill. Subsequent to its introduction in the Senate on 3 December 2014, and after such time as I was able to review the Bill, the Principal Registrar informed the Attorney-General's Department that she had consulted with me and Justice Strickland and raised our concerns about the effect of the Bill. Those concerns include that

the Bill appears to remove the Family Court's existing jurisdiction to hear appeals from the Federal Circuit Court following judicial review of decisions made under the Registration and Collection Act by the Social Security Appeals Tribunal ("SSAT"). The Bill also appears to transfer jurisdiction to hear and determine referrals on a question of law from the Family Court to the Federal Court.

I do appreciate that these measures flow from the amalgamation of the SSAT into the Administrative Appeals Tribunal ("AAT"). However, when jurisdiction is removed from one Court, normally it would be the subject of consultation and discussion, if for no other purpose than to ensure that whatever the policy behind the change is, it is communicated and all its potential ramifications are considered. None of that consultation occurred and the somewhat circuitous way in which the removal of jurisdiction occurs (which is set out below) alone warrants the consideration of your Committee. I would suggest to confirm what the policy behind the change is, whether the ramifications of this part of the Bill have been considered and are necessary, and finally to ensure that the legislation has no unintended consequences.

One example that is concerning is the lack of appropriate saving and transitional provisions to preserve appeals that have been heard but not determined, and which are pending, in the event that the Bill is passed without amendment. This may suggest, as I mention below, that it is not understood what effect the Bill will have on the existing jurisdiction of the Family Court.

It may assist the Committee if I explain what I discern to be the route by which the Bill removes the Family Court's current jurisdiction to entertain appeals from decisions of the Federal Circuit Court following judicial review of a decision of the SSAT.

Currently, subsection 107A(1) of the Registration and Collection Act states:

> An appeal lies, with the leave of the Family Court, to the Family Court from:
>
> (a) A decree of the Federal Circuit Court of Australia exercising original jurisdiction **under this Act**; or
> (b) A decree or decision of a Judge of the Federal Circuit Court of Australia exercising original jurisdiction **under this Act** rejecting an application that he or she disqualify himself or herself from further hearing a matter.
>
> ....
>
> (emphasis added)

Section 10(2) of the *Federal Circuit Court of Australia Act 1999* (Cth) provides that the original jurisdiction of the Federal Circuit Court of Australia includes any jurisdiction vested in it to hear and determine appeals from decisions of persons, authorities or tribunals other than courts. That currently includes decisions of the SSAT but would include decisions of the amalgamated AAT.

Section 107A vests appellate jurisdiction in the Family Court from decisions of the Federal Circuit Court exercising jurisdiction "under this Act", the relevant Act being the Registration and Collection Act. Although the Bill does not seek to directly amend section 107A of the Registration and Collection Act, the proposed excision of Division 3 of Part VIII from the

Registration and Collection Act, in combination with the amendments to Part IVA of the *Administrative Appeals Tribunal Act 1975* (Cth) ("the AAT Act") to give jurisdiction to the Federal Circuit Court to hear and determine appeals from decisions of the amalgamated AAT, would mean that the jurisdiction being exercised by the Federal Circuit Court is not jurisdiction under the Registration and Collection Act. It is, instead, jurisdiction under the AAT Act. Therefore, section 107A of the Registration and Collection Act would no longer apply.

Paragraph 24(1)(d) of the *Federal Court Act 1976* (Cth) ("the Federal Court Act") states that the Federal Court has jurisdiction to hear and determine appeals from judgments of the Federal Circuit Court exercising original jurisdiction under a law of the Commonwealth other than:

(i) the Family Law Act 1975; or

(ii) the Child Support (Assessment) Act 1989; or

(iii) the Child Support (Registration and Collection) Act 1988; or

(iv) regulations under an Act referred to in subparagraph (i), (ii) or (iii);

...

As currently drafted therefore, section 24 of the Federal Court Act does not permit the Federal Court to hear appeals from the Federal Circuit Court when it is exercising jurisdiction under the Registration and Collection Act. However, consequent upon the proposed repeal of Division 3 of Part VIII of the Registration and Collection Act and the commencement of the amendments to Part IVA of the AAT Act, the Federal Circuit Court, in hearing appeals from a "child support first review", would not be exercising jurisdiction under the Registration and Collection Act. Thus, section 24 of the Federal Court Act would apply and appeals from decisions of the Federal Circuit Court in a "child support first review" would be heard by the Federal Court rather than the Family Court.

An important aspect of the work of the Appeal Division of the Family Court is to entertain appeals from decisions of the Federal Circuit Court following a review of the Child Support Registrar's decision by the SSAT. In appeals from decisions made by the SSAT upon review of a decision made pursuant to section 89 of the Registration and Collection Act, the usual path has been to appeal to the Federal Circuit Court on a question of law pursuant to section 110B, and then an appeal to the Full Court of the Family Court pursuant to section 107A.

The Full Court of the Family Court has developed particular expertise in these complex, technical and challenging matters, as evidenced by decisions such as *CSR & Farley* [2011] FamCAFC 207, *CSR & Ahern* [2014] FamCAFC 105, *CSR & Crabbe* [2014] FamCAFC 10, and *Burns & Grint* [2014] FamCAFC 48.

The Full Court has already identified an anomalous situation whereby percentage of care decisions made under the Family Assistance Administration Act, which apply for child support purposes, are subject to a two-stage review process. As the second review body is the AAT, following review by the SSAT, an appeal from the AAT's decision lies with the Federal Court (see for example *P v Child Support Registrar* [2014] FCAFC 98). The

proposed amendments to the Registration and Collection Act, whereby Division 3 of Part VIII of the Registration and Collection Act is repealed and appeals are governed by Part IVA of the AAT Act, will significantly complicate matters further. I am concerned that the result will be greater fragmentation in the child support appellate jurisdiction, and a squandering of the considerable expertise already developed in the Appeal Division of the Family Court in hearing and determining appeals from the SSAT/Federal Circuit Court.

Similar concerns arise with respect to referrals on a question of law.

Currently, referrals are governed by Subdivision C of Division 3 of Part VIII of the Registration and Collection Act. Subsection 110H(1) provides that the SSAT may refer a question of law arising in a review by the SSAT under Part VIIA to a court having jurisdiction under this Act for decision. A referral of a question of law can be made by the SSAT on its own initiative, or at the request of a party. Item 66 of Schedule 4 of the Bill, which repeals Division 3 of Part VIII, would have the effect of repealing Subdivision C. As discussed above, Part IVA of the AAT Act would then become operative. Section 45 of the AAT Act concerns references of questions of law to the Federal Court. Section 45 effectively provides that the AAT may refer a question of law arising in a proceeding before it to the Federal Court, either on its own motion or at the request of a party. Subsection 45(2) currently states that questions of law are to be heard by the Federal Court constituted as a Full Court. Item 130 of Schedule 1 of the Bill repeals the current section 45 and substitutes a new section. The effect of the amended section 45 will be to enable questions of law to be heard by the Federal Court sitting as a single judge or, if after consultation with the President of the amalgamated AAT the Chief Justice decides that it would be appropriate to do so, by a Full Court.

Given the Family Court's expertise in child support matters, particularly at appellate level, in my view there is no logical basis upon which to remove the ability of questions of law arising in amalgamated AAT child support proceedings to be referred to the Family Court.

As I am sure the Committee is aware, the Explanatory Memorandum accompanying the Bill is silent on the issue of its effect on the Family Court's appellate jurisdiction. It is quite possible that the full implications of the proposed repeal of Part 3 of Division VIII of the Registration and Collection Act may not have been apparent to the Attorney-General's Department. However, whether deliberate or inadvertent, I urge the Committee to recommend that the Bill be amended to preserve the Family Court's jurisdiction to hear appeals from the Federal Circuit Court following an appeal from a "child support first review". I also urge the Committee to recommend that the Family Court retain its existing jurisdiction to hear and determine referrals on a question of law.

In my view, these amendments are straightforward and could be made relatively simply.

The issue of saving and transitional provisions falls away if the Committee is minded to adopt my recommended course of action. In the event however that the Committee decides otherwise, or that the parliament elects to pass the Bill unamended, an urgent issue arises in regard to saving and transitional provisions.

I observe that there is nothing in Schedule 9 of the Tribunals Bill, which concerns saving and transitional provisions, that is directed towards the preservation of appeals to the Full Court of the Family Court under the Registration and Collection Act. These comprise appeals that have been lodged and are pending before the Full Court and appeals that have been heard by the Full Court of the Family Court but not determined (ie. where judgment is reserved). It is of critical importance that the saving and transitional provisions make appropriate allowance for appeals that have yet to be finalised. Although such appeals are not numerous, parties who have committed to the time and expense of either initiating or responding to an appeal (which includes the Commonwealth) should not be placed in a position of uncertainty as a result of structural reform of the Commonwealth tribunals system.

I would be happy to elaborate upon the issues raised in this submission if it would be of assistance to the Committee. Should the Committee require clarification or further information, please contact my Senior Legal Research Adviser

Yours sincerely

Diana Bryant AO
Chief Justice