

# CHAPTER 2

## ATTORNEY-GENERAL'S PORTFOLIO

2.1 This chapter summarises some of the matters raised during the committee's consideration of the budget estimates for the Attorney-General's Portfolio for the 2012-13 financial year.

### **Family Court of Australia and Federal Magistrates Court of Australia**

2.2 The committee questioned officers on the processes leading to the discovery and correction of the proclamation error concerning legislation which transferred jurisdiction for de facto property and maintenance matters from the states and territories (except Western Australia) to the Commonwealth.

2.3 De facto property and maintenance matters were transferred to the Commonwealth following the passage of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*. Due to a departmental oversight, a proclamation was not made at the time to set a date from which the Family Court of Australia can exercise the de facto property jurisdiction, resulting in uncertainty around the status of certain family law court orders. The *Family Law Amendment (Validation of Certain Orders and Other Measures) Act 2012* received Royal Assent on 10 April 2012 and retrospectively validates affected orders.<sup>1</sup>

2.4 The committee sought details on the timeline of events which led to the discovery of the error and invited officers from the Attorney-General's Department to assist in providing a response. It was explained that the matter was first identified by the department in the first week of December, following a due diligence exercise. This exercise was undertaken after the notification of a similar issue concerning some appeals from Family Law Magistrates in Western Australia affecting orders made by the federal family courts between 1 July 2006 and 20 October 2011, as a result of the *Jurisdiction of Courts (Family Law) Act 2006*.<sup>2</sup> The Secretary of the department, Mr Roger Wilkins AO, explained to the committee:

**Mr Wilkins:** It is a very unusual type of provision. You would not necessarily expect to find it in an act of parliament, actually. It is a provision that says the functions of the court are those which are prescribed, essentially—which is something that we no longer do and no longer have. So, yes, there should be due diligence, and there is due diligence—and that does occur in the department. I am satisfied that, in 99.9 per cent of cases there is not a problem; this one was a slip-up.

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1 Attorney-General's Department, *Status of various family court orders*, <http://www.ag.gov.au/Families/Currentissuesinthefamilylawsystem/Pages/Status-of-various-family-court-orders.aspx> (accessed 12 June 2012).

2 *Committee Hansard*, 23 May 2012, p. 38.

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**Senator BRANDIS:** So the officer responsible simply through oversight, omitted to have the matter placed on the Executive Council agenda back in 2009 and that oversight was never noticed until the first week of December last year?

**Mr Wilkins:** It was not about the commencement of the provision—that was not the problem. The problem was that there needed to be an extra bit conferring jurisdiction formally on the court, and there is a provision in the legislation prescribing that—which, as I say, is unusual and which recent legislation, as you know, which has come before the House has actually altered to get rid of, on the advice of parliamentary counsel that we should not have that in the legislation.<sup>3</sup>

2.5 The committee was advised that the Chief Justice of the Family Court was notified about the issue by the department on 22 December 2011. The evidence indicated that the Attorney-General was notified of the issue on 9 January 2012; however, the Minister undertook on notice to confirm that date.<sup>4</sup>

2.6 In reply to a question about the number of affected orders, officers of the Family Court indicated that it would be a 'significant number' and undertook to provide details to the committee on notice.

### ***Budget***

2.7 The committee heard that the Federal Magistrates Court (FMC) has run a deficit for the last five years. To turn around this budgetary shortfall, the FMC expected to take steps that may result in the reduction of services and staff numbers. Mr Richard Foster PSM, Acting Chief Executive Officer of the FMC, indicated that the provision of some regional services would also be reviewed.<sup>5</sup> He conceded that inevitably there would be some reduction in court services and potential for greater delays in the system.<sup>6</sup>

2.8 Mr Foster further advised that the number of filings within the FMC has increased steadily in recent years and resourcing levels have not been adequate to cover services:

**Mr R Foster:** The Chief Justice has authorised me to say, as she was the Chief Federal Magistrate when the court was established, that quite frankly the court was never resourced properly from day one. It was her view that there was to be a review of the court's resourcing four or five years after the court commenced, and that has never occurred. So the Federal Magistrates Court has had to live on the goodwill and cooperation of the Family Court

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3 *Committee Hansard*, 23 May 2012, p. 39.

4 *Committee Hansard*, 23 May 2012, p. 41.

5 *Committee Hansard*, 23 May 2012, pp 45-46.

6 *Committee Hansard*, 23 May 2012, pp 45-46.

of Australia and to a lesser extent the Federal Court of Australia, and it has grown to such an extent that there has never been sufficient funding to cover the court. That is consequently why we are running at such significant deficits.

**Senator BRANDIS:** And since 2008 until April of this year—for four years, effectively—under the shadow of uncertainty as to its very future?

**Mr R Foster:** Yes, that is right.

**Senator BRANDIS:** You have told me in previous estimates that at the time that had a terrible effect on the morale of the federal magistrates.

**Mr R Foster:** That is unquestionable.<sup>7</sup>

2.9 Like the FMC, the Family Court is exempt from the additional efficiency dividend; however, the committee sought the agency's response to the impact of the existing 1.5 per cent dividend which applies for the 2011-12 and 2012-13 financial years. Mr Foster, as Chief Executive Officer of the Family Court, outlined a number of areas which are being considered to meet the efficiency dividend and to bring the budget back into surplus. He advised that there will be a reduction in travel, use of consultants, supply costs and a reduction in leased premises in rural and regional areas. He also indicated that there will be a significant reduction in staff.<sup>8</sup>

## Federal Court of Australia

2.10 The committee questioned officers about the budget measure which involves the transfer of the National Native Title Tribunal functions of native title claims mediations to the Federal Court, with the aim of increasing efficiencies within the tribunal. The Chief Executive Officer/Registrar, Mr Warwick Soden, clarified the current arrangements following the 2009 amendments to the *Native Title Act 1993*, which removed the requirement for all matters to be referred from the Federal Court to the tribunal for mediation:

...since that time, as a result of those amendments, there has been a much greater clarity of the responsibility of all of the proceedings. In essence, it shifted from the tribunal to the Federal Court, keeping in mind they were always proceedings in the court. There has been an increase in the case management and related mediation activity and probably ILUA [Indigenous land use agreements] oversight activity by the court in relation to matters that had previously been the responsibility of the tribunal. In one sense...there is a transfer of mediation and related ILUA responsibility from the tribunal to the court, but I would like to make that qualification that it is not happening in an environment where the court has not been involved increasingly in the last couple of years.<sup>9</sup>

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7 *Committee Hansard*, 23 May 2012, p. 47.

8 *Committee Hansard*, 23 May 2012, p. 62.

9 *Committee Hansard*, 23 May 2012, p. 52.

2.11 In response to concerns that this budget measure would result in the removal of mediation of native title disputes from a specialist tribunal to a court with limited specialist experience in the development of Indigenous land use agreements, Mr Soden advised:

...there is a great depth of experience in the Federal Court amongst those judges who have taken a special interest and become, I believe, highly specialised in the native title jurisdiction. And it does not only go to issues concerning the trial; those judges manage the cases from beginning to end and those cases were commenced before the tribunal undertook mediation or work concerning ILUAs associated with a consent determination. So the judges managing those cases had to understand and be on top of what was happening with the case. In that sense, I think they all would have a very deep understanding of the relationship between the case and the ILUA and the issues involved. It was the judges in more recent times with the ability to take control to a greater extent, after the 2009 amendments, that have been able to focus upon the issues in an active case management sense, including, most probably, issues relating to what might need to be done in the ILUA environment, which has led, I believe, to that great acceleration in the consent determinations, which...often involve an ILUA.<sup>10</sup>

...

I cannot speak for policy matters, but I can certainly make a comment from my perspective on what has happened in recent times...I think that a decade or so ago there was a clear policy view that the mediation should be separate from the court and undertaken in an environment that was outside of the court. However, I believe in the last decade there has been a shift in a phenomenon that I would describe as being the realisation that a very effective mediation can take place under the auspices of a judge managing the case, where the judge manages the case and makes orders in relation to the kind of mediation, the timeframe for things to be done and the issues that might be dealt with in the mediation.<sup>11</sup>

2.12 Mr Wilkins added:

...I think this is a move in the right direction as a matter of public policy. Forget about the efficiency aspects of this—which are not unimportant in terms of public policy—if you want a system that actually delivers, as you say, in a more timely and proficient way, consent determinations underpinned by ILUAs, I think this is the right way to go...[S]ome of those functions from the Native Title Tribunal are not just going to disappear; they will be incorporated into the native title functions in relation to ILUA negotiations not related to native title claims mediation. The arbitral functions regarding future acts will stay; they will come across and remain badged under this concept of a National Native Title Tribunal.<sup>12</sup>

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10 *Committee Hansard*, 23 May 2012, p. 55.

11 *Committee Hansard*, 23 May 2012, p. 66.

12 *Committee Hansard*, 23 May 2012, p. 55.

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## National Native Title Tribunal

2.13 The committee pursued this line of questioning during examination of the National Native Title Tribunal. The Registrar, Ms Stephanie Fryer-Smith, described the mediation role as a core function of the tribunal to which it has 'devoted considerable care and time and resources to developing...a multidisciplinary approach'.<sup>13</sup> Ms Fryer-Smith elaborated on the difference in the mediation model of the two bodies:

Obviously my observation of the Federal Court's mediation practice is very much an external one. It is well known that the court has its own priority list of matters—that is, native title cases which are seen as being well within a point of being determined—and the tribunal has quite a number of those matters currently in mediation with it. Many of the cases on the priority list are, I understand, mediated by a deputy district-registrar. Sometimes I understand the court uses external consultants. The court also engages in case management of cases in a way that would certainly not be the same as the tribunal's.

[T]he tribunal has adopted a multi-disciplinary approach to dealing with native title mediations. We have a number of Indigenous employees who are involved in the mediation process. There is a high degree of awareness of the complexity of native title claims and proceedings. There are often very many parties. Their interests and priorities are not necessarily aligned. Over the years we think that the practice we have developed is one that is well suited to determining native title proceedings in a way in which typically there will be Indigenous land use agreements forming part of a packaged settlement of a particular determination. So, in a sense, all the parties' interests can be satisfied in the one outcome. So, it would appear that they are different styles.<sup>14</sup>

2.14 Of interest to the committee was the amount of consultation and the tribunal's position on this budget measure. Ms Fryer-Smith advised that the tribunal was informed of the proposed changes on 27 March 2012 and subsequently had a series of meetings with the department. Mr Fryer-Smith also confirmed that the tribunal had participated in the Skehill review from August until December 2011.<sup>15</sup>

## Office of the Australian Information Commissioner

2.15 This is the second occasion that the Office of the Australian Information Commissioner has appeared before the committee for examination of estimates since that office's transfer from the Prime Minister and Cabinet Portfolio on 19 October 2011.

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13 *Committee Hansard*, 23 May 2012, p. 72.

14 *Committee Hansard*, 23 May 2012, p. 74.

15 *Committee Hansard*, 23 May 2012, p. 73.

2.16 One area of interest to the committee was the implementation of a disclosure log under section 11C of the reformed *Freedom of Information Act 1982* which requires an agency to publish online the details of information that has been released under the Act (subject to exemptions for some personal and business privacy reasons).<sup>16</sup>

2.17 The committee examined a range of other topics with the office, including the power to investigate systemic problems relating to FOI processing within agencies; monitoring of compliance of the Information Publication Scheme; and the *Review of charges under the Freedom of Information Act 1982*, in particular, the recommendation that an agency or minister would have the discretion to refuse to process an FOI request for personal or non-personal information that it estimates to take more than 40 hours.

### **Australian Customs and Border Protection Service**

2.18 Committee members spent considerable time questioning officials from Customs about the impact of budget cuts and additional efficiency dividend on operations in a range of areas within the agency. For example, details were sought on the impact of the budget cut of \$7.2 million from civil maritime surveillance and response, the reduction of \$10.4 million for passenger facilitation and the redirection of capital works totalling \$19.5 million over the forward estimates to other border protection initiatives.

2.19 While still in the process of finalising budgeting decisions, the Chief Executive Officer of Customs, Mr Michael Carmody, assured the committee that the areas of the passenger clearance, border security, air and waterfront control, people smuggling, vessel clearance and offshore maritime response would not be subject to any staffing reductions as a result of the additional efficiency dividend. The agency would also be looking at achieving efficiencies in supplier expenses, including licensing arrangements and legal expenses.<sup>17</sup>

### **Australian Federal Police (AFP)**

2.20 The committee pursued detailed questioning on the AFP's budgetary position and the impact of cuts. It heard that the AFP's operating appropriation is reduced by \$67 million for the next financial year, which includes \$24.54 million as a result of the additional efficiency dividend. The committee was advised that the resulting impact in terms of staffing numbers was expected to be a net reduction in staff of 10 across the organisation.<sup>18</sup> Mr Andrew Wood, Chief Operating Officer, elaborated on the issue of the efficiency dividend:

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16 *Committee Hansard*, 23 May 2012, p. 77.

17 *Committee Hansard*, 24 May 2012, pp 7-8.

18 *Committee Hansard*, 24 May 2012, pp 48-49.

...as an executive team we then take the available resources and look at the priorities of the organisation for the coming financial year. We look at where within the organisation we can pursue efficiencies, reduce duplication, ensure that we are leveraging as best we can off whole-of-government initiatives around ICT purchasing and those sorts of things, so as to minimise the effect on ASL numbers.

So, whilst the PBS does reflect that those resourcing changes—if there is no intervention from the executive of the organisation—would result in a reduction of 10. That is not necessarily the trajectory we intend following once we have an opportunity to look at the budget in the light of our priorities in 1213 and assign it accordingly. So each estimates we tend to, in response to questions, give you an update on just what our staffing numbers are. That will give you a true indication, as estimates processes progress through the year, of the actual staffing levels we are achieving—and then comparing those to the performance of the organisation.<sup>19</sup>

2.21 The AFP was also questioned on a range of issues, including the National Open Source Intelligence Centre (NOSIC) contract, complaints about AFP personnel overseas, the AFP's role in training Indonesian security forces, AFP involvement in the interception of an illegal entry vessel off Cocos (Keeling) Islands, recent seizures of illicit drugs, the closure of the Robina facility, and the new forensics facility announced in the 2012-13 budget.

### **Attorney-General's Department**

2.22 The department updated the committee on its response to the increased efficiency dividend, particularly in terms of staff reductions. The committee heard that a business planning process has begun which will determine the workforce structure, and officers reported that almost half of the additional efficiency dividend will be achieved by reductions in supplier expenditure and the remainder in staff reductions (through natural attrition, discontinuance of non-ongoing contracts and voluntary redundancies). The department reported finding savings through reductions in supplier expenses, use of consultants, travel expenses, printing and publication costs, and legal expenses.<sup>20</sup>

2.23 The committee also questioned officers about the 2012-13 budget expense measure which will defer payments from the Confiscated Assets Account made under section 298 of the *Proceeds of Crime Act 2002*. Budget paper No. 2 indicates that this measure will achieve savings of \$13.5 million in 2012-13 and \$58.3 million over the forward estimates, and will be redirected to support other government priorities.<sup>21</sup> Concerns were raised about the impact of this measure on the programs of expenditure

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19 *Committee Hansard*, 24 May 2012, p. 49.

20 *Committee Hansard*, 23 May 2012, p. 83.

21 *Budget measures: Budget paper no. 2 2012-13*, pp 83-84.

under the Act relating to crime prevention activities which are managed by the department.

2.24 It was explained to the committee that the amounts identified are actually a quarantine of the funds, and that they will remain in the account and become available in later years. Mr Iain Anderson advised that a number of programs will continue to run over the coming years:

There are currently over 200 community based projects funded through the proceeds of crime account that will be running for a period of approximately 18 months to two years, I believe. The government has recently committed to projects that involve funding for women's refuges, for example, to assist them to incorporate new security measures. There is a suite of projects which involve police citizens youth clubs and youth diversionary projects. The terms of an agreement are being negotiated with Neighbourhood Watch for a three-year package of funding for them. So there will still continue to be a considerable body of projects over the next few years.<sup>22</sup>

2.25 Given the department's advice that the funds concerned are quarantined, the committee queried the statement in Budget Paper No. 2 in relation to this measure which indicates that savings will be redirected to support other government priorities:

**Senator WRIGHT:**...Can you provide details about what those priorities and programs will be, or is that at odds with what you are saying, which is that it will actually be remaining quarantined in the fund?

**Mr Wilkins:** There are no identifiable hypothecated things that we can point to, if that is what you are after.

**Senator WRIGHT:** If that was what was stated to be the objective of having that amount as a saving, it is a bit dissonant with what I am hearing now, which is that in fact it is to sit there and be quarantined and not directed to priorities.

**Mr Wilkins:** No, it has the effect of coming off the bottom line of the budget. In accounting terms, it is a saving.

**Senator WRIGHT:** Yes, I understand that. So essentially that might be the priority that was being referred to.

**Mr Wilkins:** You may like to think of it this way: it frees up the capacity to use funds out of the consolidated fund. It offsets, if you like, it going to the bottom line of the budget. So, indirectly, it does allow the government to spend or redirect that funding, if you like, but it is done through the artifice of holding this money and not expending it.<sup>23</sup>

2.26 Other areas of interest to the committee during examination of the department included: progress in the consolidation review of anti-discrimination legislation; the

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22 *Committee Hansard*, 24 May 2012, p. 106.

23 *Committee Hansard*, 24 May 2012, p. 107.



Review of the National Partnership Agreement on Legal Assistance Services and Legal Aid; court fee increases; meetings with the Indonesian government in relation to the release of Indonesian minors held in Australian prisons; the intercountry adoption program between Australia and Ethiopia and termination of a contract with the Tesfa/Abdi Waq orphanage; Australian contract law reform; a federal charter of victims' rights; the United States-Australia Joint Statement on Countering Transnational Crime, Terrorism and Violent Extremism; the updated alert location system; the DisasterWatch phone app; and the Crisis Coordination Centre.

**Senator Trish Crossin**  
**Chair**



