

Introduction to the *Family Law Act* Book 2013

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Introduction

The most sweeping change to the legislation in this book since the publication of the last edition was the renaming of the Federal Magistrates Court of Australia as the Federal Circuit Court of Australia. This received widespread publicity. Less publicised was the insertion of two further Parts into the *Family Law Act 1975* ("the Act"). There are now 28 Parts to the Act. The original version of the Act passed by Federal Parliament in 1975, had only 12 Parts. The new Pts XI and XIB cover suppression and non-publication orders, and vexatious proceedings.

Federal Circuit Court of Australia

The Federal Circuit Court of Australia commenced to operate on 12 April 2013. On that day, the former Federal Magistrates of the Federal Magistrates Court of Australia became Judges of the Federal Circuit Court of Australia. The *Federal Magistrates Court Rules 2001* were renamed as the *Federal Circuit Court Rules 2001*. As a result of these changes numerous consequential but minor amendments were required to the legislation in this book.

Suppression and non-publication orders

The *Access to Justice (Federal Jurisdiction) Amendment Act 2012* ("the 2012 Amendment Act") introduced a scheme for all four Federal Courts including the Family Court and the Federal Circuit Court, for the exercise of those Courts' powers to make:

- Suppression orders - which prohibit or restrict the disclosure of information, by publication or otherwise in proceedings; and
- Non-publication orders - which prohibit or restrict the publication of information in proceedings.

According to the Explanatory Memorandum to the 2012 Amendment Act, the aim is to ensure that suppression and non-publication orders are only made where necessary on specific grounds, taking into account the public interest in open justice, and in terms that clearly define their scope and timing.

The *Family Law Act* has a new Pt XIA which deals with suppression orders and non-publication orders. Prior to the 2012 Amendments, the Family Court already had power to

make such orders under s 34 of the Act and under that Court's implied powers. Section 34 provided that the "Court has power...to make orders of such kinds...as the Court considers appropriate". Section 121(1) is still in the Act. This section restricts the publication or dissemination to the public or to a sector of the public by any means, of any account of any proceedings or part of any proceedings under the Act, that identifies a party to the proceedings or person who is related to or associated with a party to the proceedings or a witness to the proceedings. The exceptions are set out in s 121(9).

Under s 102PB of the 2012 Amendment Act, s 34 of the Act (and the similarly worded s 15 of the *Federal Circuit Court of Australia Act*) can no longer be used to prohibit or restrict the publication or other disclosure of information in connection with proceedings.

The new Pt XIA and s 121 are intended to operate in parallel. The interaction of s 121 and Pt XIA was explained in the Explanatory Memorandum:

Hence, a party or witness to proceedings under the Family Law Act 1975 could apply for an order prohibiting the publication of information that would otherwise be publishable because it fell within one of the exceptions in s 121(9). In other words, an order under Pt XIA could, in a particular case, extend the prohibitions on publishing identifying information set out in s 121.

Additionally, under the provisions of Pt XIA, a suppression or non-publication order could also cover other kinds of information not relating to the identity of a party or witness to proceedings. This is because s 102PF sets out additional grounds for making suppression or non-publication orders, such as when the order is necessary to prevent prejudice to national security

It will be possible, therefore, for a court to make an order prohibiting the publication of certain information under Pt XIA, even though the publication of that information is not an offence under s 121.

Section 121 will continue to apply to create an offence for the publication of identifying information that is not subject to one of the exceptions in s 121(9) of the Family Law Act 1975. Since orders will only be made under Part XIA that will further prohibit publication (not relax the requirements under s 121), these provisions can operate together without being inconsistent. As such, these provisions are intended to operate side-by-side and not interfere with each other.

A non-publication order means:

an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information)(s 102P).

A "party to proceedings" is widely defined and includes "any person named in evidence given in proceedings" (s102P). "Publish" is defined in s 102P to mean:

disseminate or provide access to the public or a section of the public by any means, including by:

- (a) *publication in a book, newspaper or magazine or other written publication; or*
- (b) *broadcast by radio or television; or*
- (c) *public exhibition; or*
- (d) *broadcast or publication by means of the internet.*

A suppression order is defined in s 102P as "an order that prohibits or restricts the disclosure of information (by publication or otherwise)."

In deciding whether to make a suppression order or a non-publication order, the Court "must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice." (s 102 PD).

By making a suppression order or a non-publication order, a court may, under s 102PE(1), prohibit or restrict the disclosure of:

- (a) *information tending to reveal the identity of or otherwise concerning any party to or witness in the proceedings or any person who is related to or otherwise associated with any party to or witness in the proceedings; or*
- (b) *information that relates to the proceedings and is:*
 - (i) *information obtained by the process of discovery; or*
 - (ii) *information produced under a subpoena; or*
 - (iii) *information lodged with or filed in the court.*

The Family Court is also empowered by s 102PE(2) to make such orders as it considers appropriate to give effect to an order under s 102PE(1). According to the Explanatory Memorandum, this gives courts the clear power to make a "take down" order. A "take down" order directs a publisher to remove certain information the subject of the suppression or non-publication order. It could, for example, be directed to website publishers or individuals who had posted content on the internet.

The grounds for making a suppression or non-publication order are one or more of the matters set out in s 102PF:

- (a) *the order is necessary to prevent prejudice to the proper administration of justice;*
- (b) *the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;*
- (c) *the order is necessary to protect the safety of any person;*
- (d) *the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency).*

Section 102PK(1) imposes a penalty for an offence of imprisonment for 12 months, 60 penalty units or both. A person who breaches a non-publication or suppression order can either be punished for committing an offence under s 102PK(1) or for contempt of court, but not for both. Pt XIII A does not apply to a contravention of an order under s 102PE. Pt XIII A

is a separate regime for failing to comply with orders made under the Act (other than those involving children).

Vexatious Proceedings

The 2012 Amendment Act introduced a new framework for the four Federal Courts when dealing with "vexatious proceedings" brought by persons who have frequently instituted or conducted vexatious proceedings in Australian Courts and tribunals, or who are acting in concert with others who have done so. The intention is to harmonise laws across Australia and to discourage forum shopping. Western Australia, Queensland, the Northern Territory and New South Wales have enacted similar legislation. The 2010 Amendment Act means that the legislative authority to support the exercise of the power of courts to deal with vexatious litigants is clearer and more comprehensive.

A new Pt XIB was inserted into the Act. The definition of vexatious proceedings includes:

- (a) proceedings that are an abuse of the process of a court or tribunal; and*
- (b) proceedings instituted in a court or tribunal to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and*
- (c) proceedings instituted or pursued in a court or tribunal without reasonable ground; and*
- (d) proceedings conducted in a court or tribunal in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose (s 102Q).*

The threshold which needs to be met before an order can be made is set out in s 102QB(1).

The court must be satisfied that:

- (a) a person has frequently instituted or conducted vexatious proceedings in Australian courts or tribunals; or*
- (b) a person, acting in concert with another person who is subject to a vexatious proceedings order or who is covered by paragraph (a), has instituted or conducted vexatious proceedings in an Australian court or tribunal.*

The types of orders which can be made are set out in s 102QB(2).

- (a) an order staying or dismissing all or part of any proceedings in the court already instituted by the person;*
- (b) an order prohibiting the person from instituting proceedings, or proceedings of a particular type, under this Act in a court having jurisdiction under this Act;*
- (c) any other order the court considers appropriate in relation to the person.*

An applicant subject to a vexatious proceedings order seeking leave to institute proceedings, must file an affidavit, as required by s 102QE(3), which:

- (a) lists all the occasions on which the applicant has applied for leave under this section; and*
- (b) lists all other proceedings the applicant has instituted in any Australian court or tribunal, including proceedings instituted before the commencement of this section; and*

(c) discloses all relevant facts about the application, whether supporting or adverse to the application, that are known to the applicant.

Section 118 was repealed and a new s 118 excludes the parts which are dealt with in Pt XIB. The new s 118 simply provides:

"The court may, at any stage of proceedings under this Act, if it is satisfied that the proceedings are frivolous or vexatious:

(a) dismiss the proceedings; and

(b) make such order as to costs as the court considers just."

Therefore, the making of an order that a litigant is vexatious, is dealt with entirely under the new Pt XIB.

Transfer of proceedings from courts of summary jurisdiction

The \$5 million monetary limit on family law magistrates in the Magistrates Court of Western Australia has been removed. Like judges of the Federal Circuit Court whose monetary limit was removed on 1 July 2006, they can hear cases of unlimited financial value.

Minor changes were made regarding the transfer of cases from courts of summary jurisdiction.

Amendments to Federal Circuit Court Rules

A new costs schedule applied from 12 April 2013.

A new schedule 3 to the *Federal Circuit Court Rules* includes one extra rule from the *Family Law Rules* which applies to the Federal Circuit Court by virtue of r 1.05 of the *Family Circuit Court Rules*. This is r 6.15 of the *Family Law Rules* which deals with the progress of a property case or an application for the enforcement of a financial application after the death of a party.

Amendments to Family Law Rules

A new costs schedule was introduced and applied from 1 January 2013. A new Pt 22.10 has been inserted which applies to costs orders in appeals.

New rules apply as a result of the insertion of Pts XIA and XIB into the Act. Rule 11.04(1) provides:

If the court is satisfied that a party has frequently started a case or appeal that is frivolous, vexatious or an abuse of process, it may:

(a) dismiss the party's application; and

(b) order that the party may not, without the court's permission, file or continue an application.

An order under r 11.04(1) can be made of the court's own motion or on the application of a party, the Registry Manager of the Family Court of Australia or the Executive Officer of the Family Court of Western Australia. (r 11.04(2)). The applicant must have had a "reasonable opportunity to be heard" (r 11.04(3)).

The matters to be covered in an affidavit under r 5.19(e) in support of an application to suppress a judgment have been expanded to include evidence relating to one or more of the grounds in s 102PF(1) of the Act on which the application is made.

Conclusion

The past year has not been as difficult as previous years for legal practitioners practising in family law to keep up with legislative changes. Although the name change to the Federal Circuit Court of Australia means that there have been many minor changes, the operation of the legislation is not substantially affected.

The insertion of new Pts XIA and XIB into the Act are important. Although these issues do not arise every day legal practitioners need to know that they are there.