

OVERVIEW OF CHANGES IN THE LAW

# Introduction to Family Law Act 2017

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## *Introduction*

Foreshadowed major legislative changes to financial agreements and other aspects of the *Family Law Act 1975* did not eventuate in the past 12 months, but the changes to that Act and the *Family Law Rules 2004* were sufficient to mean that there have been many changes to this Book. The most significant amendments relate to the Rules regarding subpoenas in the Family Court and the section of the Act which deal with the structure and administration of the Family Court.

## **Administration of the Court**

The *Courts Administration Legislation Amendment Act 2016* designated the Federal Court of Australia (including the National Native Title Tribunal), the Family Court of Australia and the Federal Circuit Court of Australia as a single administrative entity under the *Public Governance, Performance and Accountability Act 2013* and a single statutory agency under the *Public Service Act 1999*.

In summary, this Act:

- established shared corporate services functions for the 3 courts;
- maintained the responsibility of the heads of jurisdictions in relation to the business and administrative affairs of their respective courts;
- provided for a Chief Executive Officer (CEO) for each head of jurisdiction to assist with the management of administrative affairs;
- provided that the CEOs also hold the position of Principal Registrar;
- provided for the Federal Court CEO to have responsibility for managing the shared corporate services, with the requirement for consultation;
- provided that the Federal Court CEO is the accountable authority for the administrative entity and the agency head for the statutory agency.

Most changes took effect from 1 July 2016 but giving the CEO the position of Principal Registrar will commence on 1 July 2018.

The Explanatory Memorandum to the bill states that the measure "formed part of the package of reforms aimed at streamlining and improving the financial sustainability of the Federal Courts". The objective was to "generate efficiencies through the establishment of shared corporate services functions for the courts to reduce unnecessary duplication". The administrative burden on each court was reduced by consolidating finance, human resources, information technology, property and operations arrangements. The Act was not intended to "affect the substantive rights of court users". Each head of jurisdiction maintains responsibility in relation to the business of the courts and managing the administrative affairs of their respective courts, with administrative affairs defined to exclude corporate services.

The corporate services of the Family Court and the Federal Circuit Court which were merged for 1 July 2016 are defined in s 38A(1B) *Family Law Act* and s 89(1)(2A) *Federal Circuit Court of Australia Act 1999* as

- (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).

Consequential amendments were also made to the Family Law Rules as the Chief Executive Officer now combines the former positions of the Chief Executive Officer and the Principal Registrar of the Family Court.

The CEO of the Family Court, in his submission to the Senate Standing Committee & Legal Constitutional Affairs, expressed concerns about:

- the loss of control by the Court over its information technology system including the Court's case management system (Casetrack) and the Commonwealth Law Courts Portal (Comcourts);

- the lack of constraints on the exercise of the power by the CEO, with only a requirement to “consult” with the heads of jurisdiction;
- the absence of criteria for how decisions are to be made;
- the lack of provision for any governance and accountability arrangements between the heads of jurisdiction such as a board-like structure;
- the potential conflict of interest which may arise when the CEO of one Court can make decisions that affect the 3 courts.

The CEO of the Family Court recommended to the Committee that to address these concerns the following changes be made:

1. Two of the three heads of jurisdiction must agree on any decisions that will affect the operating processes of the Courts.
2. Any decisions 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 decisions 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.

The Law Council of Australia, in its submission, was primarily concerned with the impact on the Federal Circuit Court, but also with the resourcing of both the Family Court and the Federal Circuit Court. It welcomed the bill, but communicated concerns about the capacity of the Federal Circuit Court to fulfil its role as an intermediate federal court, delays in the Family Court, and the lack of judicial resources in both Courts. The Law Council expressed a need for increased funding and the appointment of additional judges in each of the Federal Circuit Court’s jurisdictions in a timely manner. The Federal Circuit Court’s significant workload, increasing

under its expanding general jurisdiction, has made this requirement a critical one, according to the Council.

The concerns and recommendations of the CEO of the Family Court and the Law Council of Australia have largely not been addressed.

### **Service of subpoenas**

Amendments to the Family Law Rules have been made which follow on from the 2015 amendments in the *Family Law Amendments (Arbitration & Other Measures) Rules 2015*. The 2015 amendments introduced a process for the administrative release of documents produced pursuant to Subpoenas to Produce Documents issued in the Family Court.

The process is streamlined by providing that the manner of service of subpoenas for production can be by ordinary service rather than by hand. This distinction means that personal delivery to the named person is no longer required. Also, the amendments expressly allow for an alternative method of service of subpoenas for production to be agreed upon between the issuing party, each other party and each interested person. In practice, even before the amendments, the issuing party and the person being served sometimes agreed on a manner of service being different to that provided for in the Rules. The new rule, perhaps, makes the process of varying the method of service unnecessarily complex as the issuing party must now obtain the consent of each other party as well as the named person being served. The costs saved in using an alternative method of service agreed upon by the named person might be outweighed by the communications necessary to obtain consent from each other party.

The requirement to file an Affidavit of Service before filing a Notice of Request to Inspect in relation to subpoenas to produce documents has been removed. Complying with the Rules regarding service is, however, still necessary. In practice, compliance is now confirmed by the solicitor indicating this on the Notice of Request to Inspect.

### **Trial Management Hearing**

The term "first day of trial" has been replaced by "trial management hearing". This makes it easier to explain the court processes to clients. The process itself has not changed, but the trial management hearing is more clearly identified as a separate date with a different purpose than the trial itself.

The purpose of the trial management hearing is set out in r 6.08(1) of the Family Law Rules as:

- “(a) for the presiding Judge, with the assistance of the parties and their legal representatives, to discuss and identify the orders sought and issues in dispute

between the parties arising from the applications before the court; and

- (b) in the ordinary course, to hear and determine any interlocutory issues or interim applications that are outstanding on the date of the trial management hearing, or to make appropriate arrangements for the determination of those applications; and
- (c) in a parenting case - to receive evidence, including from the family consultant in the case; and
- (d) in a financial case - to consider the balance sheet; and
- (e) to consider and determine a plan for the trial."

If evidence is taken at the trial management hearing, the Judge who presided at the trial management hearing must also preside at the trial.

### ***Insolvency Law Reform Act amendments***

The *Insolvency Law Reform Act 2016* commenced operation in two stages: the first stage on 1 March 2017 and the second stage on 1 September 2017. The first stage of the reforms was concerned primarily with the registration and discipline of insolvency practitioners. The second stage relates to insolvency administration processes.

As a result of these reforms, there have been changes to the *Family Law Rules* to update references to provisions of the *Bankruptcy Act* which have been repealed or replaced.

In addition, the Family Court has harmonised its Rules relating to bankruptcy cases with those of the Federal Court and the Federal Circuit Court.

The amendments also provide for transitional provisions for matters commenced before the *Insolvency Law Reform Act* commenced.

### ***Trans-Tasman Proceedings***

The general delegation of powers to deputy registrars by reference to powers under Chapter 26A of the Rules in relation to subpoenas in Trans-Tasman proceedings has been removed. Instead, the particular powers delegated to deputy registrars are specified. The purpose of this amendment was to align the approach in the *Family Law Rules* with the approach of the *Federal Circuit Court Rules 2011*.

## **Costs**

The scale of costs was increased by 1.7% from 1 January 2017. Costs for family law proceedings in the Federal Circuit Court of Australia have also increased and apply to work done or services performed after 3 August 2017.

## **Prima facie evidence**

Many Commonwealth Acts have been amended to substitute the phrase "prima facie evidence" for "evidence" where a certificate can be produced to facilitate the proof of a matter. This change was made to s 56(3) *Family Law Act*, which relates to divorce orders. Under this section, if a divorce order has taken effect any person is entitled, on application to the Registry Manager of the court in which the divorce order was made, to receive a certificate signed by the Registrar of that court that the divorce order has taken effect.

As a consequence of the amendment, the certificate under s 56(2) is, in all courts (whether exercising federal jurisdiction or not) and for all purposes, prima facie evidence of the matter specified in the certificate. Prior to the amendment, the certificate was simply "evidence" of the matter specified in the certificate.

## **Future Reforms**

The major changes to rectify the difficulties with the current provisions in the Family Law Act dealing with financial agreements appear to have been deferred by the Federal Government. The Bill currently before Parliament which deals with family law issues, does not include major changes regarding financial agreements. The Civil Law and Justice Legislation Amendments Bill 2017 does, however, contain significant and numerous reforms including:

1. Establishing the Family Court as a Court of law and equity;
2. Amendments to s 44 of the Act in relation to leave to initiate property and maintenance proceedings out of time;
3. The ability of parties to disclose that an offer can be made, without disclosing the terms of the offer;
4. New offences relating to international child abduction;
5. Clarifying the roles of family counsellors and family consultants;
6. Re-numbering Part VIII B, which is the Part dealing with superannuation.

**Conclusion**

Many of the amendments to the contents of this Book relate to the administration of the Family Law Courts. The impact of these changes is difficult to predict and it will probably take some time for the manner in which lawyers and clients deal with the Family Law Courts to be affected.

More immediate in their impact on day-to-day practice have been the changes to the *Family Law Rules* with respect to subpoenas and the increase in the Scale of Costs.

A bill which includes extensive changes to the Act is likely to be passed by Federal Parliament later this year. Presumably, this will result in comprehensive consequential amendments to the Rules of both Family Law Courts.