

OVERVIEW OF CHANGES IN THE LAW

**The Family Court: Restructure,
Destruction or Fade Away?**

JACKY CAMPBELL, NOVEMBER 2018

*"Don't it always seem to go
That you don't know what you've got till it's gone
They paved paradise
And put up a parking lot"*

"Big Yellow Taxi" by Joni Mitchell

The Family Court of Australia (FCofA) was established in 1976 as a best practice model offering in-house alternative dispute resolution such as mediation and counselling (now described as "primary dispute resolution") and court-based dispute resolution.

Internationally, the FCofA has been envied by lawyers and judges in other jurisdictions, the model copied, and its jurisprudence referred to in judgments. The ideal of a specialised "one-stop shop" for separating parties and their children when the FCofA commenced was in line with a worldwide movement (which is still ongoing) to establish specialised family law courts which focus on helping people to resolve their disputes.

The FCofA was established as a superior court in line with the jurisdiction exercised by the Supreme Courts of the States and Territories which dealt with the *Matrimonial Causes Act 1959* and which it was replacing for this area of the law. The Federal Circuit Court of Australia (FCC), initially named the Federal Magistrates Court of Australia, was established in 1999. It deals with family law matters as well as other federal law matters, such as migration and bankruptcy. It is an inferior court and was set up to deal with matters which are less complex than the matters dealt with by the FCofA and the Federal Court, and to do this with simpler procedures than the superior courts.

The prospect of the FCofA disappearing as part of the Federal Government's restructure of the family law courts has caused consternation and concern. What will it mean for parties in the family law system, lawyers and the courts?

The Attorney-General Christian Porter introduced the relevant Bills for the restructure into Parliament on 23 August 2018, and his original proposal was that the restructure or merger of the Family Court with the Federal Circuit Court occur from 1 January 2019. After demands for greater consultation were made by Parliament, lawyers, judges and the community, this timeframe is unlikely to be met. The closing date for submissions to the Senate Legal and Constitutional Affairs Committee was 23 November 2018.

Note: The views and opinions expressed in this article are those of the author. This article was first published on 7 November 2018, updated on 16 November 2018 and on 27 November 2018..

Summary of the changes in the FCFC Bills

The main changes are:

1. The administrative "restructure" of the 2 courts. It will have one point of entry rather than being a true merged court. The new court will be known as the Federal Circuit Court and Family Court of Australia ("FCFC") with the existing FCofA to be known as the FCFC (Division 1) and the existing FCC to be known as the FCFC (Division 2). The Family Court of Western Australia will remain separate and is largely unaffected by the FCFC Bills except for the hearing of appeals. The position in Western Australia is not discussed in this article.
2. The substantial abolition of the Appeals Division of the FCofA with family law appeals to be heard by a new Family Law Division of the Federal Court.
3. Although not strictly part of the formal legislative reform, the Attorney-General has indicated that no further judicial appointments will be made to the FCFC (Division 1) and all future judicial appointments will be to the FCFC (Division 2). This will lead to the eventual abolition of the FCofA - the only specialist superior court in Australia dealing with FLA disputes. Funding cut-backs have already reduced the number of judges in the FCofA. This Government policy is assisted by the restructure and will accelerate the FCofA's demise. There will be increased uncertainty about where certain applications should be filed, and a likely increase in the number of matters transferred between courts at a time when one of the Federal Government's stated objectives is to reduce them. The Family Court of Western Australia will still operate in Western Australia and under the *Family Court Act 1997* (WA). It has both a superior division and an inferior division.
4. The de-specialisation of judges exercising family law jurisdiction, at a time when community expectations are that there be increased specialisation of professions, will continue. The proposals of the Australian Law Reform Commission in its Discussion Paper "Review of the Family Law System" released in October 2018 are contrary to de-specialisation.

Background to the controversy about the FCFC Bills

There is broad agreement within the community and the legal profession that a restructure of the family law courts was inevitable. Establishing the FCC as a separate court to the FCofA (as the Federal Magistrates Court in 1999), rather than a separate division of the FCofA, was criticised at the time, and the criticism has continued - including in the reports referenced by the Attorney-General and available on his website:

www.ag.gov.au/LegalSystem/Courts/Pages/Structural-reform-of-the-federal-courts.aspx.

It is not easy to work out what all the proposed changes are and what impact they will have on parties. The difficulties in working out what else is proposed by the two Bills - the *Federal Circuit Court and Family Court of Australia Bill 2018* ("FCFC Bill 1") and the *Federal Circuit Court and Family Court of Australia (Consequential Amendments & Transitional Provisions) Bill 2018* ("FCFC Bill 2") arise from:

1. The length of the Bills, which total over 570 pages.
2. The replication of large parts of the existing *Federal Circuit of Australia Act 1999* and the *Family Law Act 1975* ("FLA") in the two Bills so that it is a time-consuming task to discern which provisions are new. In his State of the Nation Address to the 18th National Family Law Conference on 3 October 2018, the Attorney-General, Christian Porter, said:

"Indicative of the essentially uncomplicated nature of the structural reform is the fact that the primary Reform Bill has only 20 new provisions and 18 substantially changed provisions to the current legislative situation which exists with the two courts."

Unfortunately, the provisions referred to by the Attorney-General are not easily identifiable, which has hampered the community (including the legal community) in providing a response.

3. Incredibly, the FCFC Bill 2 amends over 140 Acts and over 25 Regulations and Rules, reflecting the degree to which family law matters involve other areas of law.
4. Criticisms or perceived criticisms of the FCofA by the Federal Government, including the Attorney-General (whose role is traditionally to defend the judiciary) such as:
 - Promoting the FCC as better and more efficient than the Family Court; and
 - Justifying the hearing of appeals by the Federal Court rather than the Full Court of the Family Court on the basis that Federal Court judges are "Australia's most skilled judges" ("Court backlog blamed on slow results", *The Australian*, 3 August 2018).
5. The FCFC Bills and the Federal Government have not addressed whether there are stresses on judges arising from the type of the work they do and their workload. There have been instances of FCC judges taking sick leave as a result of stress. These issues are not well publicised, although 2 recent suicides of Victorian Magistrates which have been blamed on the heavy workloads, isolation and stress of the magistrates of the Magistrates' Court of Victoria have given more public attention to the issues ("What you don't understand about our job: judges, magistrates speak out", *The Age*, 3 August 2018). Some of the attacks on judges have been very personal, identifying and targeting judges without looking at the reasons (such as reduced funding) and possible solutions ("Judges leave families hanging without rulings

delayed more than a year", *The Australian*, 14 November 2018). In other workplaces, these leaks to the media might be described as bullying and a risk to occupational health and safety. This does not mean that under-performing judges should not be performance-managed. They should be, if appropriate, but it should be recognised that they are covered by the same employment laws as other employees.

There has been considerable media coverage of the views of judges, the Chief Judge of the FCC (who is also the Deputy Chief Justice of the FCofA and will be the Chief of both courts from 10 December 2018), the Attorney-General, legal professional bodies and others. There have been numerous articles - particularly in the *Australian Financial Review* and *The Australian* - attacking and defending each of the three courts involved in the restructure. One of the most recent was a two-page spread in the *Australian Financial Review* on 26 October 2018, in which current and former Federal Court judges were criticised for their delays in writing judgments. There was even a league table for each Federal Court judge, listing the average number of days they took to write a judgment, the average words per day and the average paragraphs per day.

Chief Justice Allsop of the Federal Court of Australia issued a statement on 29 October 2018 defending his judges and objecting to the approach taken by the journalist, who he said had not included the context of the statistics which had been provided, which meant that "the result is both misleading and unfair". The journalist also failed to take into account all of the work of the Federal Court and the judges, and that "productivity" cannot be "compiled from a narrow and less than accurate date set" capturing only one aspect of the work done. He said that the compilation of the list appeared to be "calculated simply to embarrass individual judges". The Chief Justice of the FCofA and the Chief Judge of the FCC have been noticeably silent and not replied to the attacks on their judges by the Attorney-General and the media.

The FCofA, the FCC and the Federal Court are being pitted against each other and forced to defend their efficiency, complexity of their work, skill and expertise, in a manner which is inconsistent with the tradition of a judiciary independent of government, and is unhealthy and unhelpful to their future co-operation, whether the restructure goes ahead or not.

The reason given by the Federal Government to justify the restructure is increased efficiencies, with the implication of reducing costs. There is, however, no recent independent report examining the options for restructure and making a recommendation for this particular restructure based on evidence and submissions from stakeholders, including the community. The community as a whole has a far greater stake in the operation of the family law courts than any other courts in Australia, as ordinary people are more likely to come into contact with them during their lifetimes. In the absence of an independent frame of reference or background document detailing and explaining the changes to justify its restructure proposal, the Federal Government relies on a PwC report it commissioned

entitled *Review of the efficiency of the operation of the federal courts* ("PwC report"). The PwC report can be downloaded from the Attorney-General's website above.

The PwC report estimates that after the restructure an extra 8,305 matters could be resolved by the FCC and the FCofA each year (p.8), including an extra 3,410 matters just by having a "single court entity" with one point of entry (p.8 and 81). How this will occur is not fully explained.

The recommendations in the PwC report are based on a key assumption, that "in practice, both the courts hear matters of similar complexity" (p.3).

This key assumption has been disputed by current and former judges of the FCofA. Former Family Court judge Peter Rose AM QC, who served on the bench for 13 years, said the plan was "simplistic" and the figures being cited are "a classic example" of the saying popularised by Mark Twain: "There are three kinds of lies: lies, damn lies, and statistics" ("*What the Family Court Shake-up Really Means for Families*", *Sydney Morning Herald*, 18 August 2018).

Contrary to the PwC report, the annual reports of the FCofA and the FCC also refer to differences in complexity between the courts (Family Court of Australia Annual Report 2017/2018 p.10; Federal Circuit Court of Australia Annual Report 2017/2018 p.20). In the Senate Estimates hearing on 23 October 2018, Mr Soden (who is the Chief Executive and Principal Registrar of the FCofA) confirmed this when he said:

"My expectation would be, and I think the Judges of the Family Court would correctly assert that the cases that they dealt with are in the **more complex** category. So I think, in other words, I think it's fair to say that the Family Court and the Federal Circuit Court deal with complex cases, but the Family Court deals with **very complex cases**."

Other criticisms of the assumptions, statistics and conclusions of the PwC report have been made by current and former judges of the FCofA, the Family Law Section of the Law Council of Australia, the Law Council of Australia, the NSW Bar Association and individual family lawyers. Some of the areas of concern about the PwC report are noted later in this article.

When the PwC report was prepared, the FCofA and the FCC were under considerable stress and were often unable to hear cases in a timely fashion. This remains the position. Whilst the number of judges appointed to the FCC has increased in recent years (but still not enough to cope with the workload), the number of FCofA judges has reduced. It is difficult to find actual numbers, but it is the writer's estimate that the number of judges in the FCofA has fallen between 5 and 7 in the past decade Australia-wide, (and this is far more likely to be an under-estimate than an over-estimate). In Melbourne, the effect of this has been that there is no longer a regular Duty Judge List, causing delays in the hearing of interim and urgent matters and the necessity for triaging them by registrars. Interestingly, the PwC report favours the FCC model of listing all matters in the first instance before a judge for case management, but the FCofA does not have the present judicial

capacity to do that, and the analysis by PwC leading to that recommendation is thin (PwC report, p.62, 84, 100, 104).

The Attorney-General, Christian Porter, in his 2018 State of the Nation address warned family lawyers:

"If you fail to engage in the process of reform and fix the system, if Parliament misses the opportunity and if we as lawyers and practitioners and members of the Australian legal community, miss this opportunity then it will necessarily be the case that the Australian people will make demands for even greater and more radical proposals and change."

Precisely what the Attorney-General meant by this threat of consequences if family lawyers opposed his reform proposals is unclear, but there is widespread concern amongst family lawyers that his proposals will not "fix the system", in accordance with his stated objective. In circumstances where the Attorney-General has said that the structural change in the FCFC Bills "is less radical than other alternatives because it does not abolish any existing Court", but at the same time uses the structural reforms to support his policy of appointing fewer judges to the Family Court so that court will cease to exist, it is difficult to envisage any reform which could be more radical.

The Attorney-General, after praising the single court structure of the Family Court of Western Australia, quoted Justice Thackray (the Chief Judge of that court and until recently the Head of the Appeals Division of the Full Court of the Family Court until he was controversially removed), who recently said about the proposed restructure that:

"We should be wary of law reform driven by statistics produced by firms of accountants in the guise of measuring or quantifying the productivity of the courts."

The Attorney-General commented about Justice Thackray's views:

"So elegantly written is this sentence I had to read it three times to work out if it was criticising me or the PwC Report I commissioned.

In the end it seems to be dismissive of both.

Guise is an interesting choice of words because it means that Reports like the three I have recently released for the Senate Committee process are commissioned for a purported purpose (in this case measuring or quantifying productivity) but that stated reason conceals some true reason for commissioning these reports.

I can say when I commission such reports I do so because they can deconstruct known problems and tell us more about those problems to inform the development of better solutions for Australians."

Disputes about the assumptions on which the FCFC Bills rely, the purpose of the PwC report and the objectives of the reforms are likely to continue. The Federal Government assesses the courts, as it does other federal departments and agencies, in an annual report prepared by the

Productivity Commission, which uses different criteria than are used in the PwC report, which used the same "metrics" to measure the efficiency of the 2 courts (PwC report, p.58).

In their annual reports, the FCC and the FCofA do not use the statistics relied on in the PwC report as the sole measure of their success. For example, both courts assess themselves against the International Framework for Court Excellence, which looks at a broader range of indicators: equality (before the law), fairness, impartiality, independence of decision-making, competence, transparency, accessibility, timeliness and certainty. These matters are not considered in the PwC reports. Even if the PwC report is correct in its assumptions and recommendations to increase the efficiency of the family law courts, is the Federal Government in basing its restructure on that report, proposing the best system for parties?

The PwC report only looked at restructuring the FCofA and the family law operations of the FCC, and ignored the non-family law operations of the FCC. Ideally, any inquiry should look at all aspects of the operations of the FCC, which would necessitate how that work relates to the Federal Court's operations.

Why are the FCFC Bills so controversial?

The FCFC Bills are controversial for reasons which include:

The former Attorney-General George Brandis commissioned "the first comprehensive review of the FLA since its commencement in 1976" by the Australian Law Reform Commission ("ALRC") in September 2017 ("Terms of Reference"). The ALRC released an Issues Paper in March 2018 and a Discussion Paper, "Review of the Family Law System", in October 2018. The Final Report is due to be delivered by 31 March 2019. To many stakeholders it seems logical to await the Final Report and consider its recommendations before undertaking major structural reform of the family law courts, and although the current Attorney-General appears resigned to a later start date for the restructure than 1 January 2019, he is still keen for the Bills to be passed late in 2018 or early in 2019, before the ALRC's final report is released.

The ALRC's Discussion Paper is over 350 pages, asks 33 questions and makes 124 proposals for changes to the family law system. Although the Terms of Reference did not specifically include the structure of the family law courts - astonishingly for a "comprehensive review", particularly when a restructure is perhaps universally acknowledged as inevitable - there is a catch-all Term of Reference of "any other matters related to these Terms of Reference". There is no express mention of the structure of the family law courts which has been long recognised as problematic, along with other important matters such as child support, matters of State and Territory responsibility, and the child protection system. The ALRC recognised that it was appropriate to consider these issues, saying in its Issues Paper:

"However, as these issues are so closely related to and frequently interact with the family law system, concerns about the intersections and cooperation between these systems are matters that the ALRC will consider in the course of this Inquiry." (Australian Law Reform Commission, "Review of the Family Law System Issues Paper", para 5)

The ALRC in its Discussion Paper did not consider or make express proposals about the proposed court restructure at all. Disappointingly, the ALRC may have missed an opportunity which may not arise again for many years, to undertake a comprehensive review of the whole family law system. The ALRC should be asked to remedy this deficiency (including its failure to address child support), and be given extra time to consult on these issues before releasing its final report.

Many of the proposals in the ALRC's Discussion Paper relate to family violence - in fact 34 of the ALRC's 124 proposals refer to family violence - which is given little, if any, attention by PwC.

1. The Federal Government's position is that the "restructure" of the two courts will "increase efficiencies, reduce delays, and lead to better outcomes in the family law jurisdiction" (FCFC Bill 2 Ex Memo para 52). Many family lawyers and judges do not accept that these ends can be achieved without additional funding being given to the family law courts, which is not part of the Federal Government's proposals. The PwC report goes so far as to acknowledge the risk that additional resources might be required to "enhance" existing registrar and case management judge resources (p 86).
2. Increasing efficiencies may not lead to a better court system producing better outcomes. There is not a direct cause and effect relationship between efficiencies and better outcomes. The family law courts are not producing widgets: they don't produce a product which can be measured solely with outputs of final judgments, which is the primary measure used by the PwC report. The family law courts deal with real people including the lives of parents and their children. The family law courts make interim and final decisions about whether and how often parents see their children and children see the parents, what the financial position will be of families after separation which impacts on such matters as whether they can buy or retain a home and how comfortable their retirements will be, and the safety of parents and children who have been or are exposed to family violence and abuse. In their annual reports the FCC and the FCofA assess themselves against the criteria of the International Framework for Court Excellence, rather than only against efficiency statistics.
3. One way it is said that efficiencies will be achieved is by most family law appeals being heard by Federal Court judges, with a default bench of a single judge, rather than three judges. The Full Court of the FCofA is abolished and replaced with a Family Law Division of the Federal

Court (FCFC Bill 2, s 24B). It is unclear whether the desired efficiencies will be achieved and whether there will be unanticipated effects.

4. The debate about the proposed restructure on the hearing of appeals involves:
 - 4.1. The Federal Government asserts that appeals to single judges in the new Family Law Division of the Federal Court from the FCFC (Division 2) rather than the usual family law appeal bench of 3 judges will "free up considerable judicial resources to help reduce delays in family law appeal matters" (FCFC Bill 1, Ex Memo para 61). The three-member bench in the Full Court of the FCofA for appeals from the FCofA is set by the FLA (s 94). Appeals from the FCC or a Family Law Magistrate of the Family Court of Western Australia are also required by the FLA to be heard by the Full Court "unless the Chief Justice considers that it is appropriate for the jurisdiction of the FCofA in relation to the appeal to be exercised by a single judge" (s 94AAA(3)).
 - 4.2. The Federal Government says that Federal Court appeals, unlike FLA appeals, are usually heard by single judges. This is overly simplistic (see s 20(2) *Federal Court of Australia Act 1976*). In addition, the legislative presumption in relation to appeals from the FCC is the reverse of the legislative presumption which applies to appeals under the FLA. Appeals from judges of the FCC or courts of summary jurisdiction are usually heard by a single judge unless a Federal Court judge considers it appropriate for an appeal to be heard by a Full Court (s 25(1AA) *Federal Court Act 1976*).
 - 4.3. If the Federal Government wants family law appeals to be dealt with by single judges either consistently, or more frequently, it could amend s 94 FLA without such radical change as abolishing the FCofA and the Full Court of the FCofA, although there would be consequences of this change which are discussed below.
 - 4.4. Appeals from the FCC to the Federal Court are primarily migration appeals. In 2017/2018, 80% of the Federal Court's appellate workload - both the Full Court and single judges - was migration (Federal Court of Australia Annual Report 2017-2018). Arguably these types of appeals are simpler than most family law appeals, usually involve only one party and a Government Department, one piece of legislation and there is little room for discretion.
 - 4.5. A 3-member bench provides the opportunity for parties to hear divergent views, but also to hear 3 judges agree that the trial judge exercised the discretion appropriately in their particular case. A single judge hearing an appeal from a single judge is rare in the common law world, including Australia, New Zealand, the United States and Canada. Usually, appeals are heard by 3 or 5 judges so if the decision of the single

judge is over-turned, it so because more than a single judge disagrees with the original decision of a single judge. This helps to create certainty and the binding nature of precedent on which our legal system is built. There is a risk that single judge appeals may lead to more High Court appeals due to the discretionary nature of the family law jurisdiction.

- 4.6. Under the restructure, family law appeals will generally be heard by judges in the Federal Court who may not have family law expertise, and are even less likely to have the family violence expertise recommended by the ALRC in its recently released Discussion Paper (Proposal 10-8). The Federal Government has not produced evidence that having judges without skills and experience in family law hear family law appeals is a more efficient use of judicial resources than the current system. Chief Justice Pascoe of the FCofA emphasised the importance of family law expertise in the hearing of appeals (State of the Nation Address to the National Family Law Conference, 3 October 2018).
- 4.7. The Federal Government is relying on the judges of the Full Court of the Family Court to become trial judges of the FCofA, to give greater capacity for the FCFC (Division 1) to hear cases faster without appointing more judges to that Division (FCFC Bill 1, Ex Memo para 60). Since the FCFC Bills were proposed many of these judges have either retired or announced their intention to retire, so there will be very few extra trial judges in the FCFC (Division 1) to hear extra cases. The Federal Government has announced that it will not appoint any more judges to the new FCFC (Division 1) ("The Bitter Struggle to reform the Family Court", *Australian Financial Review*, 17 August 2018), although the Attorney-General has suggested he may review that decision. The current intention of the Federal Government is that the FCofA, which will be the new FCFC (Division 1), will disappear and eventually be abolished.
- 4.8. The cost of operating the new Family Law Division of the Federal Court of Australia, to hear family law appeals, has not been factored in by PwC.
- 4.9. Eradicating the travel costs of the Full Court of the FCofA is said to be cost-saving, although the PwC report says it is only a modest percentage of the cost of the Full Court of the FCofA (5%). The PwC report compares the travel costs of the Full Court of the FCofA with the travel costs of FCC judges, but does not state that most travel of the former is interstate and of the latter is within a state. The PwC report has not taken into account that there may be travel costs for Federal Court judges hearing appeals after the restructure.

5. It is unclear whether all constitutional and jurisdictional difficulties associated with the restructure have been adequately addressed. They are referred to later in this article. A true unified court was a key recommendation of the Semple Report ("Future Governance Options for Future Federal Family Law Courts in Australia - Striking the Right Balance", Des Semple, 2008 and discussed later in this article), which included proposals as to how the constitutional difficulties could be overcome. Despite the widespread use of the term "merger" in the media, to overcome the constitutional difficulties the FCFC will be established as "two courts, brought together in practice under a single, overarching, unified administrative structure" (FCFC Bill 1, Ex Memo para 57). The restructure is described as:

"It in no way would constitute either court absorbing the other, or either court being disbanded." (FCFC Bill 1, Ex Memo para 57)

The FCFC will therefore be an administrative rather than a unified judicial court, with a single point of entry. The difference in costs of the two approaches and why there cannot be a true unified family law court as proposed in the Semple Report is not fully explained, except that the FCC is considered by PwC to be more efficient than the FCofA and the FCofA will be abolished anyway.

6. A common set of Rules for the FCFC (Division 1 and Division 2) will be imposed by the Chief Justice of the FCFC (s 56 FCFC Bill 1 in relation to Division 1) rather than the current system of approval by a majority of judges (s 123 FLA and s 81 *Federal Circuit Court Act 1999*). The system of a majority of judges is also used, for example, by the Federal Court (*Federal Court Act (Cth) 1970*, s 59(1)) and the Supreme Court of Victoria (*Supreme Court Act (Vic) 1980*, s 26). The Rules of the Supreme Court of New South Wales are set by a Rules Committee which includes 2 practising members of the legal profession - a solicitor and a barrister - as well as some of the judges of that court (*Supreme Court Act (NSW) 1970*, s 123). A majority of judges allows for there being differences of opinion between the States and Territories, as the litigation cultures are different and some practices which may be necessary or appropriate in one State are not suited to others. More importantly, it allows for the expertise and experience of trial judges and appeal judges to feed into the development of the Rules. The proposed Chief Justice of the FCFC had limited experience in family law before his appointment and has less than 12 months' experience as a judge in either court, and that experience is primarily (or solely) as a judge hearing a few appeals. The current system seems to be more practical than the proposed new system, which may not ensure that the new Rules are workable and have the buy-in of the judges. There is no evidence that switching to an autocratic process for rule-making will be more effective, rather than the current democratic process. Rather, given the fact that a democratic process is widespread and of longstanding, it is fair to assume that taking away the contribution to decision-making

from judges in this area will be as poorly-received as taking away democratic processes in other organisations or the community generally. Combined with reduced financial resourcing, pressure to work harder and the looming death of the FCofA, this may further negatively impact on morale and hamper buy-in to further change.

7. The PwC report concluded that harmonisation of the Rules of the FCofA and the FCC will give greater certainty in family law matters, make transfers between courts more efficient and avoid inconsistent outcomes (p. 59), but it did not give examples of how the discrepancies cause these results, or otherwise explain how these results will occur. No account was taken of the fact that the FCofA's Rules, such as for disclosure, are designed for more complex matters, and how a single set of Rules could apply across both Divisions of the FCFC was not explained. There was no comparison of the differences in the Rules of the 2 courts. Of course, the PwC report did not accept that the FCofA's work was more complex than that of the FCC.
8. A common scale of costs for both divisions does not take into account the greater complexity of the work usually heard by the FCofA or that the FCC's party-party scale of costs is very low compared to the FCofA's party-party scale of costs, as the FCC scale is based on the assumption that the types of matters dealt with by the FCC are less complex than the types of matters dealt with by the FCofA. The PwC report also assumes that parties pay party-party costs to their lawyers (p 4, 65, 75-77), rather than pay solicitor-client costs. The absurdity of this assumption is illustrated by the allocation of only four letters of 200 words each to the sample FCofA property matter file costing. Presumably, these are short letters about procedural matters and not letters of advice, letters relating to interim disputes, letters seeking compliance with orders and the Rules, and offers of settlement. If the approach taken is that lawyers cannot charge for these latter types of letters, the letters may not be written at all and more cases are likely to proceed to trial. They are not built into the FCC party-party costs scale either, and lawyers who charge on that scale may not put the extra effort in to ensure that parties are properly advised and that all reasonable attempts are made to settle interim and final disputes, rather than have recourse to the courts.
9. There is no legislative requirement for specialisation of judges in the FCC or appeal judges of the Federal Court. The FLA provides that a person shall not be appointed as a judge of the FCofA unless "by reason of training, experience and personality, the person is a suitable person to deal with matters of family law" (s 22(2)(b)). This is reproduced in s 11(2)(b) of the FCFC Bill 1 for the FCFC (Division 1). The ALRC Discussion Paper proposed that this requirement be expanded (not repealed) to include as part of the criteria for appointment as a judge to hear family law matters that they have "knowledge, experience and aptitude in relation to family violence" (para 10.4). Judges of the FCC are not currently required to have family law expertise, although according to the FCC's website approximately 90% of its

workload is family law. The FCFC Bills do not propose that this change for the FCFC (Division 2), nor that the Family Law Division of the Federal Court have the FCofA requirement or the ALRC recommendation. Instead, for the FCFC (Division 2), judges must have "appropriate knowledge, skills and experience to deal with matters that may come before" that court (FCFC Bill 1, s 79(2)(b)). Given that the FCFC (Division 2) will presumably continue to have 90% of its workload in family law, similar specialist family law (and family violence) expertise should be expressly required. It is impossible to determine from Austlii what proportion of FLA appeals are from FCC judges without family law experience as the appeal judgments often do not report the names of the trial judges. This statistic, if available, is one way of verifying the views of many family lawyers that parties are disadvantaged by appearing before some of the FCC judges who do not have an interest in family law and lack knowledge and experience of the area.

10. Legal practitioners may be ordered to bear costs personally if they fail to comply with the duty to facilitate the just resolution of disputes, according to law and as quickly, inexpensively and efficiently as possible (s 49(1), (2), (5) and (6) FCFC Bill 1). The PwC report recommends that judges have greater ability to make personal costs orders against lawyers (p.61). PwC says this "will see improved practices from practitioners" as this is "likely to drive compliance with orders and desired behavioural practices" (p.61). At the risk of the writer being accused of self-interest, there are several problems with this proposed change:
 - 10.1. Whilst the existing FCC and FCofA have this power (e.g. r 19.10 *Family Law Rules 2004*), the codification of the power in a jurisdiction where parties are often highly emotional and may act irrationally, refuse to comply with orders and not follow advice, leaves legal practitioners open to defending applications for costs orders to be made against them personally in circumstances where such orders may not be justified.
 - 10.2. There does not appear to have been consideration as to how legal practitioners can defend themselves against a proposed costs order. Their client is unlikely to waive legal professional privilege to enable the legal practitioner to explain that the conduct which was of concern was that of the client not the legal practitioner. It is difficult to see how a greater number of costs orders can be made against legal practitioners, without there being a failure to allow natural justice and due process.
 - 10.3. If faced with the possibility of a personal costs order, legal practitioners may stop acting for parties at an earlier stage than otherwise, potentially resulting in more parties being unrepresented. Legal practitioners will also be more reluctant to take on matters shortly prior to a hearing when an unrepresented party may decide they need representation, leaving the court to more frequently deal with unrepresented parties than it already does. Increasing the numbers of unrepresented parties may impact on

the ability of parties to obtain fair outcomes and be a further burden on the family law courts, by reducing the likelihood of settlement and increasing the length of trials, although there is very little research on this area

- 10.4. There is an underlying assumption that lawyers, not parties, are at fault for non-compliance and there is no discussion in the PwC report that a more effective option might be for costs orders which are rarely made against parties in family law matters for non-compliance with the Rules and court orders, to be more frequently made.
- 10.5. There are already processes and standards to ensure "desired behavioural practices" by legal practitioners, such as the duty of legal practitioners as officers of the court, the ethical rules set by State and Territory Governments and Law Societies including the *Legal Profession Uniform Law (NSW)* (see particularly s 295-298. This has also been adopted in Victoria. The other States and Territories have similar legislation but have not adopted the Uniform Law), and the disciplinary bodies of the States and Territories which can rule on allegations of unsatisfactory professional conduct and professional misconduct. There is no evidence of a gap to be filled in this area.
11. Setting up stand-alone courts exercising family law jurisdiction is more common and a worldwide trend, rather than the position proposed by the Federal Government to collapse a specialist family court into a generalist court. The proposed FCFC is not a specialist family court, and this is emphasised by the words "Federal Circuit Court" preceding "Family Court" and that it retains the general law jurisdiction of the FCC. Presumably, the court is named in this way, with the superior court named last, as the words "and Family Court" will drop off once the FCFC (Division 1) no longer exists. Overseas jurisdictions which have their family courts as a division of a generalist court usually state clearly that they are family courts or combined family and juvenile courts. For example, the Family Court of New Zealand is a division of the District Court, and the Hong Kong Family Court is also a division of the District Court. Other jurisdictions have true specialist family courts, such as the Family Courts of the Philippines and the Thailand Juvenile and Family Courts. The United States does not have a federal family law system, but several states such as New York, Tennessee, Virginia and Hawaii have separate family courts or specialist courts which are divisions of generalist courts. Singapore established its Family Justice Courts in 1994 and used the FCofA (with advice and assistance from that court) as its model.
12. England has a Family Court and a Family Division of the High Court, and like Australia which has a Protocol, there are guidelines as to which matters are heard by each court. As the High Court of England is a superior court, it hears matters which require the exercise of inherent jurisdiction, special medical procedures and Hague child abduction matters. Also like Australia,

some cases in England are transferred from the Family Court to the High Court and back so they acquire the jurisdiction of the superior court.

13. The loss of a specialist superior court hearing family law appeals combined with an appeal court being a single judge rather than a 3-judge bench, may mean that it will take longer for the law to settle after significant legislative changes. Full Court judgments carry more weight than those of single judges, and allow for a diversity of views. This was important after, for example, the introduction of the child support system in 1988-1989, the 2006 parenting reforms and the delivery of High Court judgments in cases such as *Mallet v Mallet* (1984) FLC 91-507; [1984] HCA 21, *MRR v GR* (2010) FLC 93-424; [2010] HCA 4 and *Stanford v Stanford* (2012) FLC 93-518; [2012] HCA 52. The change may mean greater uncertainty about the law, more litigation and more appeals. Decisions of inferior courts like the FCC, whilst published on www.austlii.edu.au, are not usually picked up by the legal publishers.
14. The ideal of a "one-stop shop" for family law disputes has been dissipating for many years, but the proposed restructure takes this a step further by giving FLA jurisdiction to another court, the Federal Court and dispersing the jurisdiction even more widely. The original mediation, counselling and family report writing services of the FCofA have been largely out-sourced, and family law disputes are determined by both the FCofA and the FCC. Child support jurisdiction is currently exercised by DHS-Child Support, the AAT, the FCofA and the FCC and, in certain circumstances after the restructure, certain appeals will also be heard by the Federal Court. In addition, parties deal with family violence orders in the State and Territory Courts and, if the *Family Law Amendment (Parenting Management Hearings) Bill 2017* currently before Federal Parliament is passed, there will be another tribunal or court - a "Parenting Management Panel". Potentially, families may need to decide which of six or seven different decision-making bodies is most appropriate for each part of their case - hardly a "one-stop shop".
15. The introduction of an overarching purpose is not controversial of itself. This generally mirrors s 37M of the *Federal Court of Australia Act 1976*. Overarching purposes have also been introduced for State courts, so the family law courts, although addressing some aspects of an overarching purpose in their Rules, are behind in this regard (see "The Duty Owed to Court: The Overarching Purpose of the Dispute Resolution in Australia", Marilyn Warren AO, Bar Association of Queensland Annual Conference, Gold Coast 6 March 2011, Revised paper; "Civil Procedure Bench Book"). In Victoria it is contained in s 7 *Court Procedure Act 2010* which, applies to the Magistrates' Court, County Court and Supreme Court. Section 48(1) FCFC Bill 1 provides:
 - "The overarching purpose of the Family Law Practice and Procedure provisions is to facilitate the joint resolution of disputes -
 - (a) according to law; and
 - (b) as quickly, inexpensively and efficiently as possible."

Parties are required to act consistently with the overarching purpose (s 49(1)) and legal practitioners must assist parties to comply with the duty (FCFC Bill 1, s 49(2)(b)).

The only concern arises because the Federal Government proposes that the Bills be passed before the ALRC delivers its Final Report. In its Discussion Paper, the ALRC proposes that parties be required to lodge a genuine steps statement at the time of filing an application for property and financial orders (ALRC Proposal 5-4). It is unclear how this will fit with the overarching purpose.

16. Transfers between FCFC Division 1 and FCFC Division 2 will not be effective unless approved by the Chief Justice or Chief Judge of the Division to which the proceeding is being transferred (FCFC Bill 1, s 34(4) and 117(4)). This means that if approval is not given, cases could be delayed and perhaps even stuck between the 2 Divisions.

What did the PwC report get wrong?

The PwC report was prepared for the Attorney-General's Department. Its Executive Summary states:

"The Review's terms of reference required consideration of the differences in case allocation, case management rules and approaches, and Court Rules between the courts and how increased standardisation of the courts' operations could result in time and cost efficiencies.

The efficiency opportunities, summarised on the following page, have been assessed by PwC through a high-level consideration of the following criteria. It is important to note that the potential efficiency gains are not intended as potential cost savings, but instead potential productivity gains for the courts to provide additional court capacity - i.e. implementing the opportunities could result in the 'freeing up' of court capacity to finalise more matters per annum."

The Review took six weeks and resulted in a glossy document of over 100 pages interrupted by large and frequent redactions. There was limited consultation with stakeholders. PwC said that it concentrated the focus of the Review on "the Rules of the courts, case management rules and approaches, case allocation between and within the courts, and overarching process inefficiencies" (p.14).

PwC admitted that certain aspects were outside of its scope, including:

- reconsideration of the family law system as a whole;
- judicial use and/or effectiveness of specialist services such as family consultants and other forms of alternative dispute resolution ("ADR");
- judicial treatment of urgent/serious cases (e.g. Magellan cases);
- future funding needs or expenditure allocation of the courts (p.14).

Arguably, those omissions are significant, particularly when the Attorney-General is using the PwC report to justify structural change which includes the abolition of a specialist court, the FCofA. PwC admits that a limitation of its report was that opportunities for time and efficiency costs have only been identified through:

- " • engagement with senior family law court stakeholders;
 - desktop assessment of court data to establish where variations exist within the family law system.

Given time constraints of this Review, not all possible opportunities have been explored, nor have the potential implications of each opportunity been fully assessed. Furthermore, detailed solutions have not been developed." (p.14)

PwC consulted with heads of jurisdiction, but not judges, and did not consult with family lawyers and legal bodies such as the Family Law Section of the Law Council of Australia and the Law Societies and Bar Associations of the States and Territories (PwC report, p.14).

The Federal Government's arguments for the proposed structural reform rely almost solely upon the PwC report. However, large chunks of the PwC report are redacted (including two of eight opportunities identified for further consideration (p 59-60), parts of caseload (p 47), differences in judicial practice (p 48) and the Executive Summary (p 5). Why the Federal Government considered that redaction was necessary is not clear, but it does arouse suspicion that those parts weren't favourable to the FCFC Bills, the abolition of the FCofA or both.

The unredacted parts of the PwC report have many examples of erroneous assumptions and conclusions including

1. That the indicators used to assess efficiency and compare the courts don't take into account all the work of each court and the different types of work that they do. For example:
 - 1.1. A comparison of the complexity of the cases dealt with by the FCC and the FCofA was found to be difficult, or even impossible, but PwC still concluded that the variation in productivity of the courts could not be explained by a different level of complexity (p. 3, 47);
 - 1.2. Applications for Consent Orders are excluded from the measure of matters finalised by the FCofA, but the Registrars who normally deal with these applications are fully included in the costs of the FCofA finalising other matters (p. 24, 28). Similarly, divorces are excluded from the FCC statistics, but its registrars are included in the costs. There is no attempt by PwC to compare the time taken to deal with each type of excluded matter of each court;

- 1.3. It is unclear as to whether matters finalised by consent are included in the FCofA statistics, for proceedings commenced other than by way of Applications for Consent Orders. They appear to be included in the FCC figures but may not be in those of the FCofA (p 28). It is simply not easy to discern how they have been dealt with;
- 1.4. Although finding that trials are approximately half as long in the FCC than in the FCofA, no consideration is given as to the reasons for this including the comparative complexity of the cases, what proportion of cases filed proceeded to judgment, the processes used by each court to resolve cases prior to trial, and how effective these processes are;
- 1.5. Assessing efficiency on the basis of numbers of matters finalised by a contested hearing is not consistent with the philosophy of the FLA, the FCC and the FCofA and with community expectations that parties should be encouraged to resolve their matters by consent, rather than through a final contested hearing. The courts themselves do not use this as the sole measure of success (or efficiency), and refer to measures set by the International Framework for Court Excellence;
- 1.6. The operating costs per finalisation of contested matters was assessed at one-third of the cost in the FCC compared to the FCofA (p 41), but this figure is simplistic as it does not take into account such factors as complexity, consent orders and whether FCC judges are currently underpaid for the work that they do;
- 1.7. In the FCofA, "parties do not come before a Judge until trial, and trial judges have not had a role in pre-trial activities" (p.5). This obvious error is confirmed by the diagram of the process in each court (p.17), which omits interim hearings in the FCofA as if they do not occur, but refers to them in the FCC process;
- 1.8. The recommended case management process, with a time to trial of 6 to 7 months from filing (p 62), is not suited to the many matters in both courts which need urgent interim orders, involve third parties, necessitate significant disclosure or require valuations of businesses, psychiatric assessments or family reports. Delays in litigation are not only caused by the lack of judicial availability, but also the nature of the cases. There is an assumption by PwC that most cases can speed along the same simplified case management pathway;
- 1.9. There is an assumption that the FCC's case management system of having a first return date before a judge is a significant driver of a higher percentage of cases settling prior to trial (p.5, 7 and 87). There is no evidence for this link;

- 1.10. The FCofA has a lower percentage of *ex tempore* judgments than the FCC (3% compared to 11% of total judgments, p.6, and 15% compared to 60% of trial judgments, p.9) and therefore parties generally wait longer for FCofA judgments, but there is no analysis as to whether this relates to the greater complexity of cases or the length of trials, or both or neither. It appears that the courts do not have the statistics to work out the former, but Austlii could have been used to determine the latter. It is assumed that the Family Court could increase the ratio of *ex tempore* judgments and thus hear more matters (p.8 and 48). The variation in percentage of *ex tempore* judgments between the two courts is assumed to be because of a "variation in the practice/process between the courts" (p.31). Whilst arguably this may account for some of the difference, no consideration is given to the fact that trials are longer and cases generally more complex in the FCofA;
- 1.11. The delay in delivery of written judgments is greater in the FCofA than the FCC because of the higher proportion of reserved judgments (p.5, 6, 8, 35, 48, 88). Increased efficiencies are said to arise by fewer judgments being reserved because the judges will spend less time out-of-court writing them. Unfortunately, the PwC report provides no comparison of reserved judgment rates and delivery rates in other courts and whether the FCofA is out of step with other superior courts. Long delays in delivery of judgments is obviously unacceptable as it prolongs uncertainty for parties and their children. Each of the FCofA and the FCC had approximately 30% of reserved judgments outstanding for more than 6 months (p.88). There is no analysis of the reasons for this, but it is proposed that more judgments be delivered *ex tempore*, without considering the reasons for the delay in the delivery of judgments, whether more *ex tempore* judgments are practicable and whether this will have an unanticipated and costly outcome of appeal rates increasing.
2. The necessity for, and impact of, interim applications is ignored. Applications for interim orders are the second largest category of filing in both courts (p.28). It is unclear how this number is calculated and whether it is only based on the numbers of Applications in a Case which are filed, but in any event, these applications are ignored as a measure of workload and assessment of efficiency. Final orders being used as the "key driver of family law caseload because they require determination and therefore require significant court time" (p.28) ignores the impact of interim hearings. Interim hearings are also ignored in the calculation of sitting days as it is assumed that FCofA judges "only hear trials as all pre-trial matters are managed by registrars and others" so FCC judges complete more tasks (p.48). Whilst accepting that an initial interim order can be "a legitimate intervention" until ADR has occurred, the need for multiple interim orders is not seen as valid, but only "indicates a lack of resolution by parties pending finalisation" (p.30). This ignores the complexity of many of

the cases dealt with by both courts, but particularly the FCofA. A comparison of the length of time taken to determine an interim matter in either court is not made.

3. As the PwC report assumed that the complexity of cases in each court was the same, it ignored a number of notable complex matters which have clogged up the FCofA and been heard over many months or even years – for example, *Jess & Jess and Others* and *Strahan & Strahan* both have multiple judgments.
4. A transfer between courts is said to result "in a 'restart' to litigants, who must begin again in the court to which they've been transferred" (p.37). In 2016/2017 almost 1,200 families had their disputes transferred between the FCofA and the FCC, and then had to restart their proceedings using the procedures of the alternate court (FCFC Bills, Fact Sheet 2). In practice (despite PwC's assumption) cases do not have to restart in the sense of filing fresh forms and going through processes such as a conciliation conference, which have already been undertaken.
5. The transfer statistics between the courts do not take into account the reasons for the transfer, which include:
 - 5.1. Matters may become more complex as they proceed and thereby necessitate a transfer from the FCC to the FCofA. A single point of entry will not overcome the problem that the complexity of cases can change over time. This may arise from the intervention of third parties, the development or exacerbation of drug or alcohol use, family violence, sexual abuse allegations, deterioration in mental health and mental health episodes, bankruptcy, transactions to try to defeat orders, the discovery of assets which had not previously been disclosed, etc. The statistic used by PwC that transfers from the FCC to the FCofA occur, on average, after 11.1 months, is consistent with matters becoming more complex as they proceed and FCC judges realising that they do not have the capacity to handle the expected lengthy trials in their lists. Interestingly, given the Federal Government's intention to make no further judicial appointments to the FCofA, there were 100 more matters transferred to the FCofA from the FCC in 2016-2017 than the other way around (p. 37);
 - 5.2. Matters can become simpler as they proceed. For example, a case might start off in the FCofA with an application under the Hague Convention on the Civil Aspects of International Child Abduction, but if the parenting issues resolve, the property aspects might be relatively straightforward and more suited to the FCC;
 - 5.3. The writer is aware that some parties take advantage of the simpler and cheaper method of filing proceedings in the FCofA (no affidavit is required), and the benefits of

a Case Assessment Conference where the case receives the focussed attention of a registrar rather than a first listing in the busy duty list of a FCC judge. Parties hope that their cases might resolve at a Conciliation Conference or shortly thereafter, thus saving them the expense of affidavits. If the cases do not resolve by that stage, they may be transferred to the FCC if the case is not complex enough for it to stay in the FCofA. The statistic used by PwC that the average delay before a matter is transferred from the FCofA to the FCC of 4.6 months is consistent with the timeline of transfers often occurring after a Conciliation Conference;

- 5.4. Some cases are transferred from the FCC to the FCofA and back to the FCC for the sole purpose of picking up the jurisdiction of the FCofA. The picking up of *Corporations Act 2001* jurisdiction, for example, as a reason for this double-bounce transfer was documented in such cases as *Talbot & Talbot* [2014] FamCA 128 and *Beadline & Goodridge and Ors* [2018] FamCA 737.
6. The number of cases in the FCofA which are unallocated to a trial judge is not a true measure of the backlog (p 39) or the impact on parties. It is not a helpful statistic, as cases allocated to a trial judge in the FCofA for setting a trial date, usually result in a trial within about three months, whereas the FCC usually allocates matters to a trial date on the first date the matter is listed before the court, but the trial date may be up to two years away. The PwC report refers to anecdotal evidence that FCC judges are "incentivised" by the backlog of cases assigned to them to clear cases as soon as possible: in other words to encourage them to work harder (p. 48). Whether or not the workload of the FCC judges is reasonable or it is fair on the FCC judges to increase their stress in this way is not discussed. Mr Moses, President of the NSW Bar, quoted later in this article believes their current workload is unreasonable.
7. The growth in the number of family law matters dealt with by the FCC and the reduction in the number dealt with by the FCofA was considered by PwC to be relevant, but there is no analysis of whether that is the cause or effect of a continued decline in the number of judicial appointments to the FCofA, and delays in the replacement of retiring judges. The reduction in the number of judges in the FCofA in the past few years is not mentioned.
8. The increased backlog of both courts was noted (p 29, 38-39) but the possibility that this could be related to an increased complexity of matters and the needs of parties in both courts, or insufficient numbers of judges was not considered. The anecdotal views of many family lawyers is that the complexity of their work has increased as the cases with more straightforward issues and more co-operative parties are largely settled by the parties themselves using dispute resolution methods outside the court system, often with the assistance and encouragement of legal practitioners. This appears to be the experience of

the courts as well, but there is no discussion or analysis by PwC of the possibility that the complexity of cases has increased.

Chief Justice Pascoe said that he has seen a rise in violence, substance abuse and mental health issues during his time as a judge of both courts. He said:

"Over the years I have been a judge, I have seen a very significant rise in violence and family dysfunction. If this is the experience of the courts, then I am sure it is also the experience of the profession. The number of self-represented litigants has grown sharply, as has the presence of mental illness and substance addiction. All of these factors put children at risk.

It is a sad fact that the spectre of violence and harm is present in courts every day and adds a high level of stress to the work of the judges, who must be commended for their efforts to protect those who are vulnerable. We have seen some awful cases since I have been a judge: cases such that of Darcey Freeman, and the recent Edwards' murders. These are matters that haunt us all and lurk in the shadows as we face new cases with allegations of violence and wonder which seemingly commonplace case may suddenly take a horrific turn." (State of the Nation Address, National Family Law Conference, 3 October 2018)

The Australian Institute of Family Studies found in its research (the findings were summarised in "Separated parents and the family law system: What does the evidence say?" by Rae Kaspiw, 3 August 2016) that families who use the family law system are "troubled":

"They are much more likely to have a history of family violence, concerns for their own or their children's safety as a result of ongoing contact with the other parent, mental ill health, substance abuse, gambling, problematic social media or pornography use ... of parents who use the family law courts, 85% report emotional abuse and 54% report physical violence."

9. A quick look at the FLA gives an indication of how much more complex the legislation has become and it is a reasonable assumption that this complexity has been reflected in the workload of both the FCC and the FCofA giving rise to a need for greater resourcing, not reduced resourcing as proposed by the Federal Government. Significant changes to the FLA since 2000 include the introduction of financial agreements, superannuation splitting, the shared parenting reforms, bankruptcy jurisdiction, de facto property jurisdiction, the family violence reforms and jurisdiction over third parties. Since January 2001, there have been over 60 Acts which amended the FLA.
10. For every appeal which is heard by a single judge instead of a Full Court, capacity is said to be created to hear two additional single judge appeals or two additional first instance family law matters. This assumption is incorrect as a trial usually takes much longer than an appeal and Full Court judges often co-write or share the work associated with writing judgments if they agree. Even if they don't agree, one judge may write the first judgment and include the factual matters and uncontested findings, whilst the judges who disagree partially or fully with

the first judgment can refer to the first judgment and explain their disagreement without writing such a lengthy judgment.

11. Under-listing is assumed to be an under-utilisation of resources, as if a matter settles there is no opportunity to deal with other cases (p. 84). This fails to take account:
 - 11.1. There is no evidence in the PwC report as to how often this occurs;
 - 11.2. Both the FCofA and the FCC commonly over-list. This is reasonable for the reasons given in the PwC report. However, it can result in a waste of legal costs for the parties. An increase in over listing will increase the likelihood of parties attending court with their lawyers, being adjourned, and incurring wasted costs.
 - 11.3. It seems unlikely that if a case settles that judges simply go home or otherwise take the rest of the day off. It is more likely that they will write judgments, read a court file for the next day and do other paperwork.

The Chair of the Family Law Section, Wendy Kayler-Thomson, commented on the PwC report in her State of the Nation speech given at the National Family Law Conference on 3 October 2018 (and reported in the *Australian Family Lawyer* Volume 27/2):

"Even if the raw data is correct, it is the interpretation of that data that is fundamentally flawed. Today is not a day for statistics, but most of us are incredulous at the claim that the Federal Circuit Court can take on the more complex work of the Family Court and dispose of those cases more quickly or efficiently. The suggestion that the Federal Circuit Court can take on more work without any more resources being allocated to it for judges, family report writers, registrars and other court staff is astounding."

The NSW Bar Association proposed a different model, based on the recommendations of the Semple Report. This was a report commissioned by a previous Attorney-General and delivered in August 2008, entitled "Future Governance Options for Future Federal Family Law Courts in Australia - Striking the Right Balance". It can be downloaded from the Attorney-General's website above. The NSW Bar Association's President, Arthur Moses SC, said that "a justice system is not to be judged on spreadsheets" and that instead "it is to be judged on the quality of justice delivered to people at the most vulnerable time in their lives". He referred to the "crushing workload" of FCC judges, with each judge having approximately 500 matters in their case list. He expressed concern about the collapse into the FCC of the most complex FCofA matters ("What the Family Court Shakeup Really Means for Families", Sydney Morning Herald, 18 August 2018).

What did the earlier reports say?

There have been 2 other recent reports by accountants on the family law courts: "Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the

Federal Circuit Court of Australia" by KPMG in 2014 and "High Level Financial Analysis of Court Reform Limitations" by Ernst & Young in 2015. The Attorney-General has put them on the attorney-General Department's website. The PwC report also relies on data from the Productivity Commission's Annual Report on Government Services. The latest report was progressively released in January/February 2018.

The Productivity Commission assesses all Australian courts under the broad objective of performance. "Performance" consists of 3 factors: equity, effectiveness and efficiency. "Effectiveness" is where quality and court file integrity are considered. It is not just how many widgets the courts create, but the quality and integrity of the widgets. The Federal Government only asked PwC to look at efficiency, not equity and effectiveness (PwC report, p 12).

The Productivity Commission relies on the national benchmarks for "backlog", which is a measure of a court's active pending caseload and a factor in determining efficiency. These benchmarks are set by the Federal Government and they are different for the FCC and the FCofA:

1. For the FCC (and other inferior courts) the national benchmark is:
 - no more than 10 per cent of lodgements pending completion are to be more than 6 months old
 - no lodgements pending completion are to be more than 12 months old.
2. For the FCofA (and all other Superior Courts and the District/County Courts) the national benchmark is:
 - no more than 10 per cent of lodgements pending completion are to be more than 12 months old
 - no lodgements pending completion are to be more than 24 months old.

The PwC report did not refer to these different benchmarks, but assessed both courts against the same criteria and compared the courts with each other on the basis of the "key assumption" that both courts did work of the same complexity. It used the same "metrics" for both courts (PwC report, p 58).

The KPMG report includes many tables of data for the 2016-2017 financial year and earlier years. These tables have extensive notes of explanation and provisos which were not referred to in the PwC report, including:

- Some work is done by the FCofA and Federal Court for "free" for the FCC;
- The FCofA and the FCC have combined accounts because the back office functions have already been amalgamated. Estimates are therefore given as to the division of expenses;

- In relation to the court backlog statistics, the Productivity Commission noted that court backlog and timeliness of case processing can be affected by a number of factors:
 - Changes in lodgement and finalisation numbers;
 - Different case flow management practices across court levels and across jurisdictions;
 - A single case may involve several related applications or issues that require judgments and decision by the court;
 - Matters which may be adjourned at the instigation of, and by the consent of, the parties which are outside the control of the court;
 - The court may employ case management or other dispute resolution processes (for example, mediation) as alternatives to formal adjudication (p 17 of Table 7A.18).

There are assumptions and findings in the KPMG report which are inconsistent with those in the PwC report. For example, the KPMG report states:

1. The FCC diverts lower-level matters from the FCofA and the Federal Court, leaving those courts to receive the more complex matters (KPMG p 18). This is contrary to the key assumption by PwC that the FCofA and the FCC do cases of the same complexity.
2. Increasing case complexity is most clearly apparent in the family law jurisdiction and relates to both "the complicated nature of the legal issues to be determined", particularly in the superior court (i.e. the FCofA), as well as "the increasingly complex profile of clients" (KPMG p 25) (e.g. family violence and unrepresented clients). Increasing case complexity was not discussed in the PwC report.
3. The numbers of litigants who are unrepresented in one or more stages of a legal dispute are increasing and the requirement to provide support and guidance to them whilst avoiding a perception of bias leads to delays (KPMG p 30).
4. Between 2009 and 2013, there was a 20% reduction in the number of "less complex" trials which are determined in 5 days or more, but a significant increase in the number of "more complex" trials, with a 263% increase in the number of trials determined in 15 days or more and a 217% increase in the number of trials determined in 20 days or more (KPMG p 34).
5. The savings achieved to date were considered to be encouraging but their overarching impact was limited by the fact that the larger savings measures - particularly implementation of the single administration arrangements between the two courts - had principally been returned to Consolidated Revenue. Not replacing judicial officers has not meant extra funding to the FCofA for other services, such as registrars. Only the 'smaller' savings measures had been reinvested by the courts. This limited the overarching impact of savings and efficiency measures on the courts' financial position (KPMG p 73).

6. It appeared unlikely on available information that additional savings measures and efficiency initiatives (beyond those already implemented) were feasible without negative impacts on service delivery (KPMG p 73).

The Ernst & Young report was produced to provide a high level financial analysis of savings and implementation costs associated with 4 federal court reform areas proposed by the Attorney-General's Department. A significant part of the report was devoted to the amalgamation of court back office functions, which has now been implemented (and as the KPMG report acknowledges, the savings were not passed on as funds to the courts, but as savings for Government). The scope of the potential changes to the jurisdiction of the FCofA was not sufficiently defined to allow for any cost analysis to be done (Ernst & Young p 4).

Are there any jurisdictional issues with the proposed restructure?

The Semple Report dealt with (although it did not directly address) the constitutional issues associated with the court restructure it recommended. Although there were some discussions during the preparation of that report as to the possibility of a single Federal Court incorporating the Federal Court, the FCofA and the then Federal Magistrates Court, this was outside the terms of reference and was not considered in the Report (p.51).

The Federal Government has not disclosed what, if any, constitutional and jurisdictional difficulties there are with the currently proposed restructure. There appear to be some potential problems:

1. The FCofA cannot be easily abolished until all of its current judges retire, and its youngest judge does not turn 70 until 2039 ("The Bitter Struggle to reform the Family Court", *Australian Financial Review*, 17 August 2018). There are constitutional reasons preventing the Federal Government from cancelling the commissions of judges. This means that the FCofA will have prolonged death throes and it could even be resuscitated by a different government. The uncertainty over the future of the FCofA is not beneficial to parties as it creates uncertainty for parties and its judges, affects morale and provides a justification for the Federal Government to continue cuts to resourcing.
2. The FCFC (Division 1) retains its status as a superior court, but the FCFC (Division 2) will not be one (s 9 and 10 FCFC Bill 1). Once the FCofA no longer exists, there will not be a superior court of record exercising FLA jurisdiction. Being a superior court gives the FCofA certain inherent procedural powers to, for example, regulate its own proceedings and make anti-suit injunctions. Whilst inferior courts such as the FCC are usually given these powers by statute or regulation, it is difficult to find any comparison as to whether these powers are the same as those of superior courts.

3. Judges of superior courts have absolute immunity from suit even if they exceed their jurisdiction, and decisions made in excess of jurisdiction are, at worst, voidable, and are valid unless and until they are set aside (*Cameron v Cole* (1944) 68 CLR 571, 590; *DMW v CGW* (1982) FLC 91-274). An inferior court's decision which exceeds jurisdiction is a nullity without being set aside. A superior court can therefore more readily and confidently deal with more complex cases where the jurisdictional and constitutional limits may be tested, as they were when the third party jurisdiction under Pt VIII A FLA commenced. The advantages of the FCofA being a superior court and the disadvantages that the now FCC being an inferior court have arisen, not just in relation to individual cases but in relation to a substantial group of cases where particular jurisdiction was exercised. One occasion was after the commencement of the FLA jurisdiction with respect to the alteration of property interests of de facto partners (see "De facto relationships - welcome to the twilight zone", Jacky Campbell, CCH, 22 February 2012). A similar issue arose earlier when the cross-vesting law given to the federal courts was found to be unconstitutional, although at that time there was no inferior court exercising federal jurisdiction so the repercussions were not as great (*Re Wakim; Ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511; *Residual Assco Group Limited v Spalvins* [2000] HCA 33; (2000) 202 CLR 629). The Federal Government has not provided any detailed analysis of the potential impact of the loss of a superior court of record exercising FLA jurisdiction.
4. The FCofA has an excellent international reputation and its jurisprudence is recognised by courts in England, Canada, the United States and elsewhere. The FCofA, being a superior court in the Australian court hierarchy, is important in the development of precedent in Australia. If there are very few FCofA judges or the FCofA itself no longer exists, the only trial judgments will be those of the FCFC (Division 2). These judgments are inferior to those of the Supreme Courts of the States and Territories, and in the absence of FCofA judgments, the FCFC (Division 2) will arguably be bound by the decisions of the Supreme Court of the State or Territory in which the family law case is being heard. As family law cases often involve other areas of law, this could lead to greater diversity and inconsistency of decisions than is presently the case.
5. One of the possibly unforeseen consequences of the proposed restructure is likely to be the inability to register Australian FLA orders in some overseas jurisdictions (e.g. Singapore) which require that the orders be of a superior court. In practice this means, for example, that if the FCC makes an order, it needs to be registered in the FCofA before it will be recognised and registered by the Family Justice Court of Singapore. A recent example where an overseas court was asked whether it was preferable for the order of the Australian court to be of a superior court to minimise the risk of the orders being unenforceable or appealable in the overseas court was *Biondi & Koen* [2018] FamCA 746. Although it made no difference in

that case, the fact that the question was asked shows that the family law courts are aware of the potential issue. Changes to treaties and the legislation of overseas countries will be required in some instances, to ensure that the FLA orders of an inferior court (the FCFC (Division 2)) are recognised. In Australia, the *Foreign Judgments Act 1991* (Cth) and the *Foreign Judgments Regulations 1992* (Cth) (which do not cover "matrimonial causes" but may cover "de facto financial causes") demonstrate that in Australia, overseas judgments of superior courts (and limited inferior courts) are most commonly recognised by Australian courts and vice versa. The purpose of the *Foreign Judgments Act* is to give mutual substantive reciprocating recognition for the enforcement of money judgments between overseas superior courts and Australian superior courts (s 5(4) and clauses 10-12 of the Explanatory Memorandum). It is unclear whether the Federal Government has considered the impact on parties who need their FLA orders recognised overseas, and has a plan as to what needs to be done so that these parties are not disadvantaged.

6. The FCFC (Division 2) is given some new jurisdiction (s 100, FCFC Bill 1 – the original version of this article incorrectly referred to 2 other sections of the Bill), but some jurisdiction is particular to the FCofA or can only be exercised by a superior court. Further legislative change is required to give the FCFC (Division 2) effectively all the powers of the existing FCofA, which may not in all cases be possible. It is curious that these gaps were not addressed in the Bills. It is also interesting to consider the position in England which has a superior court and inferior court exercising family law jurisdiction and a division of work discussed earlier in this article, similar to Australia. Why is there this division? Is there a benefit or advantage in the superior courts exercising this jurisdiction? There may be a narrowing of the types of disputes which can be dealt with by the FCFC, as the FCFC (Division 1) shrinks as is proposed. The problematic jurisdiction includes:
 - 6.1. Possibly, the *parens patriae* jurisdiction, including special medical procedures. Both the FCC and the FCofA have welfare jurisdiction under s 67ZC FLA, but the extent to which this is broadened or assisted for the FCofA by the inherent jurisdiction of a superior court is unclear. Special medical procedures are currently dealt with by the FCofA, not the FCC, so the FCC's powers have not been tested. The powers of the FCofA have been tested – e.g. the inability of the welfare power to bind third parties was decided by the High Court in *Minister for Immigration and Indigenous Affairs v B* (2004) CLR 365; (2004) FLC 93-174.
 - 6.2. Jurisdiction under the *Corporations Act 2001*. The FCFC Bill 2 amends that Act to substitute the FCFC (Division 1) for the FCofA, but does not give the existing Corporations Act jurisdiction exercised by the FCofA to the FCFC (Division 2).

7. There are other areas in which the FCofA has built up significant expertise over a number of decades, such as complex jurisdictional issues, international relocations and Hague child abduction proceedings. It will take some time for the FCFC (Division 2) and the Family Law Division of the Federal Court to acquire similar experience and expertise. A judge of the FCofA has long been Australia's nominated member of the International Hague Network of judges. The specialist family law judges nominated to the network have, as one of their functions, to assist in judicial communications between countries with respect to the various Hague Conventions dealing with family law. In common law countries it is usual for superior courts to handle Hague child abduction matters. There is no specific requirement under that Convention, but it is a reflection of the serious nature of these matters, and the complexity of inter-jurisdictional issues. Examples are England, Canada and the federal courts of the United States (the courts of the individual states also handle Hague matters and many, if not all, use their superior courts, e.g. New York, California). It is possible that overseas courts will see the transfer of Hague matters to an inferior court without experience in dealing with them as a negative step by Australia in how it treats Hague matters.

Chief Justice Pascoe recognised the importance of a superior court exercising *Family Law Act* jurisdiction:

"There is a clear need for a superior court in family law to deal with matters such as complicated financial cases that involve complex trust and corporate structures; allegations of extreme child abuse; international cases that involve conflicts of laws; adoption and abduction; and those that are on the cutting edge of developments in technology, medicine and psychology. These require the attention and precedent-setting decisions of a superior court." (State of the Nation Address, National Family Law Conference, 3 October 2018)

Can the Federal Government make the FCFC (Division 2) into a superior court?

In theory, any issues about the FCofA being a superior court could be overcome by the Federal Government legislating to make the FCFC (Division 2) a superior court. Some superior courts are inherently superior, such as the State and Territory Supreme Courts. Others, like the FCofA and the Federal Court are superior by statute.

The Federal Government is, though, unlikely to want to make the FCFC (Division 2) into a superior court as this will undoubtedly create pressure from the judges of that court to increase salaries and change their pension arrangements, which are much less than those of superior courts.

Conclusion

The Federal Government plans to continue to reduce funding to the Family Court and not replace judges, many of whom are retiring shortly. The concerns expressed in the PwC report and by the Attorney-General about the numbers of matters transferred between courts are not likely to be

addressed by the restructure proposals if combined with a reduction, rather than an increase in the number of Family Court judges. The number of matters transferred to the FCC from the Family Court is likely to increase, as the Family Court will be increasingly unable to deal with its traditional work. By pushing more cases to the FCC, particularly more complex matters and lengthier trials, FCC judges will be under even more pressure, unless the Federal Government greatly increases the numbers of judges and registrars in the FCC.

The PwC report was prepared in haste - in only 6 weeks. It is a glossy "overview" which does not annex the tables of data and demonstrate the level of analysis of data of the Productivity Commission, KPMG and Ernst & Young reports. Although the Attorney-General has placed the KPMG and Ernst & Young reports on the Attorney-General Department's website, there is no evidence that PwC referred to them. In fact, the many contradictions between the PwC report and the other reports suggest to the contrary. The PwC report states that it relied on the Productivity Commission data, although it makes adjustments to the data based on assumptions not borne out by that report or the other reports. It is difficult to deny the necessity for some reform to the structure of the family law courts, but it is a missed opportunity for the Federal Government to try to push through structural reform without relying on actual data and without looking at the possible consequences of the particular structural reform it is proposing. The problem of two courts exercising FLA jurisdiction occurred for political reasons. It is now seen as a mistake. It will also be a mistake to try to fix the problem without proper research and consideration of the options. The PwC report itself said that it had not explored all possible opportunities, assessed all potential implications of each opportunity and recommended that further testing and design was required (PwC report, p.7).

Many of the assumptions in the PwC report are incorrect. The absence of a recent investigation or review of options, or even a proposal to implement the recommendations of the decade-old Semple Report which involved consultation with stakeholders, mean that the proposed restructure and the abolition of the FCofA are being considered in a vacuum without any genuine assessment of the advantages and disadvantages for parties. Ordinary people, already affected by the cuts to resourcing of the FCofA in particular, will be further detrimentally affected by "efficiencies" which are implemented ostensibly for their benefit. Any serious restructure or reform of the family law courts should be based on research and evidence that it will produce better outcomes for parties, not simply designed as a way to save money.

The underlying implication of the FCFC Bills, the PwC report and the Attorney-General's comments is that FCofA judges are lazy and need to work harder. There is no evidence of this. Putting extra pressures on the judges of both courts who work in a difficult and complex area of the law with people who have complex problems and are at a low-point of their lives is unreasonable and unfair without proper, or indeed any, evidence that they are not working hard. Judges don't

need to create more widgets: the community expects their judges to ensure that the process is fair and produces the best outcomes for parties and their children.

Australians will notice that Australia no longer has a specialist family court. In the short term to medium term, they may have to go to Queensland to find the last remaining FCofA judge to determine a particular matter which requires FCofA expertise or superior court jurisdiction. The FCFC (Division 2) will probably have more difficulty accommodating the larger and more complex cases which the FCofA currently deals with. The expertise of the FCofA in dealing with Hague Child Abduction and medical treatment cases will be lost and take time to re-build. Parties with foreign elements to their cases may have fewer options for the enforcement of orders in an increasingly mobile world. The loss of the respect currently given by overseas courts to judgments of the FCofA will not be easily given to an inferior court.

Without proper thought and checking of the possible repercussions from the loss of a superior specialist court exercising FLA jurisdiction, the true costs and consequences of the court restructure may not be known until the FCofA is barely operational or no longer exists.