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The autonomous model – not all beer and skittles

Background

The Family Court of Australia has been a self-administered, autonomous Court since 1990.

When the Family Court was first established in 1976, it operated under the 'executive model', whereupon the Court was administered by officials of the Commonwealth Attorney-General's Department. The same model also applied to the Federal Court of Australia.

Under this model, which operates in most Australian States and Territories, the Principal Registrar of the Court was responsible to the Secretary of the Attorney-General's Department and to the Chief Justice. The Principal Registrar was effectively the Chief Administrative Officer of staff located in twenty registries across Australia, with budgeting, financial management, courts policy and other management functions being carried out by the Attorney-General's Department.

In 1988, Sir Anthony Mason, the then Chief Justice of Australia, delivered a speech in which his Honour noted that the High Court was the only Court which enjoyed statutory autonomy from the Executive. Sir Anthony Mason, in speaking about the "executive intrusion into the judicial sphere", emphasised the need to ensure that the administration of justice is insulated from interference by the Executive.[1]

[1] Sir Anthony Mason, 'The Courts and their Relationship with Government', Address to the Bicentennial Australian Legal Convention, Canberra, 29 August 1988.

It is unclear as to the extent to which Sir Anthony's speech influenced the decision to devolve administrative responsibility from the Attorney-General's Department to the Court itself (and also to the Federal Court and the Administrative Appeals Tribunal).

In 1989, the Government introduced the *Courts & Tribunals Administration Act 1989* (Cth), which commenced on 1 January 1990. According to the Second Reading Speech, the effect of the Act was to:

> *…transfer from the Attorney-General's Department to the courts and the Tribunal responsibility for the supervision of their own financial management and practices and for the courts and the Tribunal to take control over the management of their other administrative affairs. Self management will mean that the courts…will be free to make their own decisions in human and financial resource management. This will maximise the flexibility of the courts and the Tribunal to cope with changing pressures and priorities throughout the year.*[2]

Thus, the Family Court of Australia has a statutory guarantee of administrative authority, although this is tempered by the reality of its financial dependency upon the Executive and Parliament.

Sallman and Church maintain the changes vest far greater administrative autonomy in the courts and a much higher level of accountability for the conduct of court business. The changes were also consistent with the government philosophy of placing the bulk of authority and accountability for the conduct of public organisations in the one set of hands.[3]

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[2] The Hon. Lionel Bowen, Attorney-General, *Parliamentary Debates*, House of Representatives, 1 November 1989, p. 2269.

[3] Peter Sallman and Thomas Church, *Governing Australia's Courts*, Australian Institute of Judicial Studies, Melbourne, 1991, p. 42.

In anticipation of the Family Court becoming administratively independent of the Attorney-General's Department, the former Chief Justice and the then Attorney-General agreed that there should be a comprehensive review of the operations of the Court to enable arrangements to be made for its future needs. A Working Party and Steering Committee were established to carry out and supervise the review.

The Working Party, Chaired by recently retired Judge and Judge Administrator, the Hon. Neil Buckley, released a 500 page report in September 1990 containing a raft of recommendations. Much of this report serves as the basis for the Court's operations in the current climate. However, the establishment of the Federal Magistrates Court; the creation of a shared registry environment between the two Courts; an increased focus on improving the alignment between judicial administration and national registry administration; and changes to the legislative and policy environment in which the Family Court operates has necessitated further judicial, workforce and resource planning, which is likely to have a significant effect on the Family Court's operation in the future. This is a theme to which I will return.

2. Features of the autonomous model as it applies in the Family Court of Australia

Under the autonomous model that applies to the Family Court, the Chief Justice has ultimate responsibility for the judicial and administrative arms of the Court. The Chief Justice has responsibility under section 38A of the *Family Law Act 1975* (Cth) for managing the administrative affairs of the Court. For that purpose, the Chief Justice has the power to do all things that are necessary or convenient to be done, including entering into contracts and disposing of personal property.

The Family Court receives a single line budget that the Chief Justice can spend with full discretion, or at least could until the advent of the Federal Magistrates Court.

In managing the administrative affairs of the Court, the Chief Justice is assisted by a Chief Executive Officer ('CEO'), a statutory office created under section 38B of the Family Law Act. The CEO is appointed by the Governor-General on the nomination of the Chief Justice and is empowered to do all things necessary or convenient for the purpose of assisting the Chief Justice.[4] In particular, the CEO may act on behalf of the Chief Justice in relation to the administrative affairs of the Court.[5] The CEO is appointed for a period not longer than five years, but may be reappointed.[6] Officers of the Court, as defined in section 38N, are appointed by the CEO.

In the *Report of the Working Party on the Review of the Family Court*, the relationship between the Chief Justice and the CEO is described as "analogous to that between a Minister of State and a Secretary of a Department…the Chief Justice determines high level matters of policy for the Court with the advice of the Chief Executive Officer and the Judge Administrators.[7] The Chief Executive Officer is responsible for implementing high level policy and for determining other policy."[8]

The CEO is assisted by staff from the Court's National Support Office (including the Principal Registrar, the Executive Director of Client Services, the Director of Child Dispute Resolution Services, the Executive Director, Corporate Services

[4] *Family Law Act 1975* (Cth), s. 38D(1).
[5] *Family Law Act 1975* (Cth), s. 38D(2).
[6] *Family Law Act 1975* (Cth), s. 38F.
[7] It should be noted that the retirement of Buckley J on 25 August 2006 means that no Judge currently holds a commission as a Judge Administrator under the Family Law Act. The functions of Judge Administrators are now carried out by the Deputy Chief Justice and Regional Coordinating Judges.
[8] Family Court of Australia, *Report of the Working Party on the Review of the Family Court*, September 1990, p. 93.

and the Registry Managers) in providing governance, accountability and corporate support functions the Court.

The model under which the Family Court operates differs from that in the High Court with respect to the vesting of administrative authority in the Chief Justice, rather than in the court collectively. However, the Chief Justice is assisted in her responsibility for the orderly and expeditious discharge of the business of the Court by the Deputy Chief Justice and by Regional Coordinating Judges, who have coordinating responsibilities in geographic regions.[9] In meeting her obligation to discharge the business of the Court, section 21B(1) of the Family Law Act makes specific provision for the Chief Justice to undertake "such consultation with the Judges as is appropriate and practicable".

The Deputy Chief Justice and the Regional Coordinating Judges, together with the Judge with responsibility for the Appeal Division, the Judge who acts as Chairperson of the Court's Rules Committee, other Judges as appointed by the Chief Justice, the Chief Executive Officer and the Principal Registrar, meet on a quarterly basis as the Chief Justice's Policy Advisory Committee. The function of this body is to provide the Chief Justice will advice on court administration and policy.

There are two Judges' meeting held each year to enable the consultation envisaged by section 21B(1) to take place. In addition, the Chief Justice convenes a monthly teleconference of Judges. The Chief Justice makes regular visits to the Court's registries around Australia and holds frequent informal discussions with the Judges of the Court.

What the Court does effectively is operate on a collegiate model although the ultimate responsibility rests with the Chief Justice.

[9] The office of Deputy Chief Justice is created by section 21B(2) of the *Family Law Act 1975* (Cth).

As Baar has written:

> *[s]ome courts may be too large to allow a whole range of administrative decisions to be debated in town meeting fashion by the full membership, but the use of a committee system (perhaps a smaller executive committee of the court as a whole, but particularly a set of specialised committees reflecting the assignments and interests of the judges who are members) can facilitate useful and effective administration*.[10]

The Family Court does this through the Policy Advisory Committee acting as an executive committee, supported by other committees, both standing and ad hoc.

Thus it can be seen that by permitting the Court to be autonomous in financial and human management there is a large measure of independence from the Executive. Projects and staff can be prioritised as needs require. It should be noted though, that a one line budget can lead to indifference by Government towards supplementing it.

And the effect is that identified by Justice Sackville: that since the appropriation of funds for the operation of self-governing courts is largely determined in practice by the Executive, a risk is created that judicial self-governance will carry the appearance of independence from the Executive without the substance.[11]

3. Relationship between the Family Court, the Federal Court and the Federal Magistrates Court

The Federal Magistrates Court ('FMC') was established in 2000 (as the then Federal Magistrates Service). Like the Family Court and the Federal Court, it operates under the 'autonomous' model. The FMC effectively exercises

[10] Carl Baar, as cited in Justice Beaumont, 'The Self Administering Court: From Principles to Pragmatism, (1999) 9 JAA 61, p. 68.
[11] Justice Sackville, 'Courts in Transition: An Australian View' [2003] NZLR 185, p. 195.

concurrent jurisdiction with the Family Court, save for some matters (such as Hague Convention cases, nullity, adoption, special medical procedures and Magellan cases) which are heard exclusively in the Family Court. By arrangement between the two Courts, certain matters are heard in the FMC, such as divorce applications.

When writing in 1991, Sallman and Church commented that the Federal Courts were not tied together in terms of geography, jurisdiction, culture or general administration, and thus may not need the coordination (nor receive the benefits) which accompany unified, system-wide policy making and administration.[12] With the advent of the Federal Magistrates Court, which also exercises an extensive general federal jurisdiction, this is clearly no longer the case.

The FMC has its own operational budget but the family law registry component is funded from the Family Court budget. When the FMC was established in 2000, there was a capacity for it to enter into agreements with the Family Court and the Federal Court to provide "support services." These services include registry services, information technology systems and support, security services, the provision of family reports and use of counsellors and registrars in case management.

The Family Court currently provides these resources to the FMC either free of charge (to a value currently estimated at $15.15 million) or as further shared services (to a value currently estimated at $15.16 million) to an total estimated value of $30 million. In 2005-06, the value of resources provided to the FMC by the Family Court equated to 26% of the Family Court's total appropriations (net of judicial costs).

The thinking at the time was that, within a couple of years, the FMC would know what range of services it required, those services could be costed and ultimately

[12] Sallman and Church, op cit, p. 71.

the cost of those services would be deducted from the Family Court's appropriation and provided to the FMC. It was thought that it was likely that the Family Court and the FMC would enter into a payer/provider relationship but there was some discussion about the FMC being free to acquire some services elsewhere. This did not happen at that time for a number of reasons but will partially occur within the current financial year.

Subject to Government agreement, the Family Court is advancing the transfer of resources provided free of charge to the FMC and the property costs of chambers, courtrooms and associated waiting areas that are used solely by the FMC to that Court under a purchaser/provider arrangement, with accountability and control of these resources more appropriately residing with the FMC.

In 2004, in response to stated government policy, both Courts embarked on a combined registry initiative to reduce confusion for clients negotiating the family law courts and to minimise duplication of administrative work to support the operations of the Family Court and the FMC.

This appears to have had its genesis in the Australian National Audit Office report of 2003-04, where it was recommended that, in order to improve the quality of service offered to clients, the Family Court and the FMC should actively seek to identify and better understand the needs of their various client groups and implement a range of measures to address those needs.[13]

Sixteens separate projects have been developed as part of the combined registry initiative, including:

- improving the Family Law Courts telephone system by creating a free call 1300 number and a Family Law Courts Telephone Enquiry Centre;
- creating a new Family Law Registry intranet and internet;

[13] Australian National Audit Office, *Client Service in the Family Court of Australia and the Federal Magistrates Court*, Report No.46, 2003-04, Recommendation 1.

- developing a range of shared family law publications;
- improving the 'Casetrack' system to enable clients to use a single file number when interacting with the courts and to enable users from the Family Court and FMC to work with a single file view;
- integrating the Family Court and FMC hard copy files into one Family Law Registry file cover; and
- developing a single form for initiating proceedings in both the Family Court and FMC.

The combined registry is managed by the Family Law Courts Board, which comprises the Chief Justice, the Chief Federal Magistrate and the CEOs of both Courts.

Although the Government has not made an explicit statement about its vision for the Family Court and the FMC, there has been a discernible trend towards replacing retiring Family Court Judges with Federal Magistrates. In the 2005-06 financial year, the number of Family Court Judges decreased from 44 to 41, with a consequent increase in the number of Federal Magistrates appointed.

When a Judge is replaced by a Federal Magistrate, the Family Court has an obligation to transfer funds, which places operating pressures on the Family Court's budget. In 2006-07, the amount to be transferred per Judge is $568,000. Since 2000, the Family Court has transferred $24.8 million in appropriations to the FMC, comprising funding for five retired Judges who were replaced by Federal Magistrates and funding for 18 SES Band 2 Registrars.

The Combined Registry Project has been characterised by a high level of cooperation and good will at a strategic and operational level. Increasingly however, as the FMC grows and the Family Court decreases, greater pressure is placed on the single family law budget arising from both increased and different

case management requirements. Thus, there is competition for resources between the two Courts.[14]

As a result of resource pressures placed on the Family Court, the Family Court and FMC are considering an approach to the Department of Finance and Administration to undertake a resources review, with a view to securing additional funding.

4. Financial resourcing: independence versus accountability

It has been said that the judiciary has no influence over sword or purse, nor direction of the strength or the wealth of society. In this way, it has been argued, the judiciary remains very much at the mercy of the other two arms of government. The reliance of the courts on Parliament and the Executive for their funding has been identified as a threat to judicial independence.[15] Dependence on the Executive and Parliament for appropriations remains a feature of the 'autonomous' model of Court governance.[16]

Necessarily, the Family Court must be accountable to the Executive and Parliament for the monies appropriated to it. Under the Family Law Act, the Chief Justice is required to prepare and give to the Attorney-General a report on the administrative affairs of the Court as soon as practicable after 30 June in each year. The report must include financial statements as required by section 49 of the *Financial Management and Accountability Act 1997* and an audit report on those statements. The Chief Executive Officer may be required to give evidence to the Senate's Finance and Public Administration Committee as part of the estimates hearing process when the annual appropriation to the Court by Parliament is under consideration.

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[14] See discussion of cooperative initiatives between the Family Court, the Federal Court and the Federal Magistrates Court at note 1 at the conclusion of this paper.
[15] John Alford, Royston Gustavson and Philip Williams, *The Governance of Australia's Courts: a Managerial Perspective*, Australian Institute of Judicial Administration, Melbourne, 2004, p. 41.
[16] See discussion of the Family Court's Departmental appropriations at note 2 at the conclusion of this paper.

Although the budgeting model enables the Court to allocate resources as it sees fit, and therefore would appear to vest financial autonomy in the Court, there remain some significant practical constraints. One example is the application of the efficiency dividend, which constitutes an automatic return to the budget of what is seen as a reasonable share of the continuing improvement in efficiency which all agencies (including courts) are expected to achieve.[17]

5. Assessment of the Family Court model

Sallman and Church, in their 1991 work *Governing Australia's Courts*, identify both positive and negative consequences of adopting a system similar to that which operates in the Family Court, whereby administrative authority is statutorily vested in the Chief Justice rather than collectively in the Judges of the Court. Identified advantages include the lack of ambiguity in the allocation of managerial authority and accountability, the ability to respond swiftly and consistently when problems arise and the avoidance of difficulties traditionally associated with 'governing by committee'.[18]

Whilst recognising that the size and geographic spread of the Family Court is such that it occupies a relatively unusual position, Sallman and Church also identify three concerns. These are:

- that the placement of management responsibility on the shoulders of a chief judicial officer could retard the development of administrative involvement and competence by other judges;
- that no 'safety valve' exists where administrative authority is vested in one Judge, who may not be an effective administrator and who largely cannot be removed; and

[17] See discussion of the application of the efficiency dividend to the Family Court of Australia at note 3 at the conclusion of this paper.
[18] Sallman and Church, op cit, p. 68.

- Judges (who are strong individualists and have constitutionally guaranteed independence) cannot be expected to work effectively in the same administrative context as bureaucrats working in a hierarchically organised bureaucracy.

These concerns have not manifested themselves in the Family Court since it moved to a self-governing model. In practice, the Court has functioned in a consultative, cooperative and diffuse manner. The Court's sophisticated system of committees (both standing and ad hoc) and the allocation of regional responsibilities to designated Judges have contributed to the ongoing development of policy development and administrative skills within the Judiciary. In addition, the Family Court has developed strong links with the Federal Court and the Federal Magistrates Court in identifying and responding to mutual issues of concern, as well as progressing discrete initiatives such as the combined registry service.

This collaborative model of intra-courts and inter-courts administration in the Commonwealth has reduced the likelihood that two Chief Justices and the Chief Federal Magistrate will become administratively isolated and removed from governing in the best interests of the courts as a whole.

6. Conclusion

The autonomous model is clearly to be preferred, but has considerable limitations when one court's appropriation has to be shared with another court. The Executive has tended to interpret inevitable tensions about how resources should be shared and requests for further funding as evidence of unwillingness to cooperate. In response, the Attorney is seeking information about other forms of court administration. It would be unfortunate in my view to follow that path when what is required is a careful assessment of the needs of all the federal courts and an acceptance that their needs will differ. Certainly the courts will have to

compromise on occasions but they are best placed to make those decisions and they should also be free to seek and receive further funding where it is warranted. Abrogation of the right to make decisions about processes and priorities for three independent courts would be to interfere with their independence by fiscal constraints.

NOTES

1. Cooperative initiatives between the Family Court, the Federal Court and the Federal Magistrates Court

The Chief Justices of the Family and Federal Courts and the Chief Federal Magistrate are in regular contact, both personally and by telephone, and have worked cooperatively on issues such as implementing the Accommodation Principles developed by the Commonwealth Courts Forum to make additional accommodation available to newly appointed Federal Magistrates and the design and construction of new Commonwealth Courts buildings (such as that in Adelaide).

The Family Court has been the leader in developing the vision for a Commonwealth Courts Portal, a project which is the first of its kind in the world. The portal will allow practitioners, through a single sign on, to lodge, view and undertake actions on their files in all three Commonwealth Courts. The Federal Court and the Federal Magistrates Court have given their support to the project. Further, the Family Court continues to support the development of enhanced functionality in the Casetrack system to assist the Federal Court in the achievement its eCourt services vision.

With the advent of the Commonwealth Courts Portal and the Combined Family Law Registry, the Family Court has recognised an opportunity to improve services to Federal Court clients by enabling them to file general federal law applications in locations where there is no Federal Court presence. Initially, filings will be accepted in the Dandenong, Newcastle, Parramatta and Townsville registries as a 'letter box drop' with a view to expanding this service to filing on Casetrack at any Family Court Registry, subject to a favourable evaluation.

The CEOs of the Family Court, the Federal Court and the FMC and recently agreed to hold regular meetings on a monthly basis, which augments informal meetings and discussions which currently take place.

2. The Family Court of Australia's Departmental appropriations

The Family Court was allocated Departmental appropriations of $129.369 million in the 2006-07 budget. Taking into account other revenues and liabilities assumed for related entities, total Departmental funding for 2005-06 was approximately $141.5 million. Total expenditure for 2005-06 was 142.8 million, of which 54% was comprised of fixed costs (Judges and employees).

3. The application of the efficiency dividend to the Family Court of Australia

The efficiency dividend was introduced in 1987-1988. It reduces the funds available to agencies for their overall departmental type outputs. Its aims are to i) provide managers with a clear financial incentive to continually seek new or more efficient means of carrying out ongoing government business; ii) allow Government to redirect a portion of efficiency gains to higher priority activities; and iii) clearly demonstrate Public Service efficiencies resulting from improvements in management and administrative practices and return these gains to the Budget.

The operation of the efficiency dividend remains Government policy and since 1994-95 has applied at the rate of 1.00% per annum, until it was recently increased to 1.25% per annum in the 2005-06 Budget process. The efficiency dividend rate is to be reviewed in the 2008-09 Budget process. Thus, the efficiency dividend is 1.25% per annum for 2005-06, 2006-07 and 2007-08 and 1.00% per annum thereafter. However the actual impact is cumulative in nature as applied by the Department of Finance so in reality the efficiency dividend will effectively increase to 1.5% in 2006/07 and then 1.75% in 2007/08. The impact of the 0.25% increase in each of 2005-06 thru 2007-08 on the Court is an extra $282k approximately per year ($844k over the 3 years).

The main issue for the Family Court with respect to the efficiency dividend is that because the Court has such a high percentage of fixed costs (ie 54% in Judicial expenditure) the impact of the efficiency dividend falls disproportionately onto the remaining balance of 46%. In reality therefore, the efficiency dividend translates into a 2% or 2.5% impost on Client Services and the National Support Office (CEO, IT & Corporate)).

In addition, the efficiency dividend is applied to Judicial salaries despite repeated attempts by the Court to have Judicial salaries exempted. The efficiency dividend also applies to New Policy Proposals.