

# The Federal Magistrates Court: A successful experiment

By Arthur Moses \*

## Introduction

The (Federal Magistrate Court) deals with shorter and simpler matters in federal jurisdictions, and, in the short time since it was created, it has become even more apparent that since it was created, it has become even more apparent that there is a great deal of work suitable for its attention. The court now receives 40 per cent of all family law work, and most bankruptcy cases. It now deals with migration cases. The court has recently been invested with copyright jurisdiction.

I expect that, in time, it will become one of Australia's largest courts.<sup>1</sup>

The Federal Magistrates Court was established by the *Federal Magistrates Act 1999* (Cth) and commenced operation on 23 December 1999. The first sittings took place over five years ago, on 3 July 2000 in Adelaide, Brisbane, Canberra, Melbourne, Newcastle, Parramatta, and Townsville.

The objective of the court has been 'to provide the Australian community with a simple and accessible forum for the resolution of less complex disputes' within its jurisdiction.<sup>2</sup> The creation of the court was not without controversy. In 1999, the Law Council of Australia strongly opposed the Federal Government's plan to establish a Federal Magistrates Court. At this time, a number of concerns about the operation of a Federal Magistrates Court were raised. For instance, it was said that the funding earmarked for the establishment of the Federal Magistrates Court could be better spent on more judicial resources within the current court structures. It was also asserted that the establishment of the Federal Magistrates Court may result in court procedures which did not adequately protect the fundamental principles of our legal system. (Australian Lawyer, October 1999).

This brief paper demonstrates the ways in which the court has achieved that objective. The Federal Magistrates Court is well on the way to realising Chief Justice Gleeson's prediction in 2001 that 'within the next 20 years, it will become one of the largest courts in Australia'.<sup>3</sup>

## The constitutional basis of the Federal Magistrates Court

The Federal Magistrates Court is a Chapter III court, and consequently the types of questions that have historically been raised about the status and independence of state magistrates do not arise.<sup>4</sup> As a Chapter III court it must be, and be seen to be, independent and impartial.<sup>5</sup> The rule of law depends on it.<sup>6</sup> Federal magistrates are justices of the court.

## The jurisdiction of the Federal Magistrates Court

Jurisdiction is conferred on the court pursuant to the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth). It presently has jurisdiction:<sup>7</sup>

- To determine civil claims under Divisions 1 and 1A of Part V of the *Trade Practices Act 1974* (Cth), to a limit of \$200,000<sup>8</sup>;
- Concurrently with the Federal Court in bankruptcy matters, with the exception of jury trials under s30(3) of the *Bankruptcy Act 1966* (Cth)<sup>9</sup>;
- Concurrently with the Federal Court to enforce decisions of the privacy commissioner pursuant to s55A of the *Privacy Act 1988* (Cth);
- To determine complaints terminated by the president of the Human Rights and Equal Opportunity Commission, under ss46PE and 46PH of the *Human Rights and Equal Opportunity Commission Act 1986*<sup>10</sup> (Cth);
- To provide relief in relation to complaints under the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth),<sup>11</sup> *Disability Discrimination Act 1992* (Cth) and the *Human Rights and Equal Opportunity Commission Act 1986*<sup>12</sup> (Cth);
- Under the *Administrative Decisions (Judicial Review) Act 1977*, except for matters arising under the following Acts, or Regulations made under these Acts – the *Australian Citizenship Act 1948* (Cth), the *Immigration (Guardianship of Children) Act 1946* or the *Migration Act 1958* (Cth);
- To determine appeals from the Administrative Appeals Tribunal that have been transferred to the court by order of the Federal Court (subject to certain restrictions arising under s44A of the *Administrative Appeals Tribunal Act 1975*) (Cth);
- In respect of matters arising under Part VIII of the *Migration Act 1958* (Cth) (including increased jurisdiction to accept matters by way of remitter from the High Court)<sup>13</sup>;
- In property proceedings pursuant to s39(1A) of the *Family Law Act 1975* (Cth) if the total value of the property exceeds \$700,000 and the parties do not consent to the court proceeding<sup>14</sup>;
- In children's matters the court has the same jurisdiction as the Family Court, by virtue of s69H(4) of the *Family Court Act 1975* (Cth);
- Concurrently with the *Family Court under the Child Support (Assessment) Act 1989* (Cth) and *Child Support (Registration and Collection) Act 1988* (Cth);
- In copyright cases pursuant to ss131D, 135ARA, 195AZC(5) and 248MA of the *Copyright Act 1968* (Cth)<sup>15</sup>.

The court also has associated and accrued jurisdiction<sup>16</sup> like the Federal Court.<sup>17</sup>

The Howard Government's 'WorkChoices' proposal has also foreshadowed the addition of a significant industrial jurisdiction to the court.

## Practice and procedure in the Federal Magistrates Court

The Federal Magistrates Court can use a variety of dispute resolution mechanisms, including mediation (conducted by registrars, or private persons at the election of the parties). The court has self-consciously acknowledged the influence of the

Australian Law Reform Commission's report on *Managing Justice*,<sup>18</sup> and the conclusion of numerous government inquiries<sup>19</sup> that access to justice has required improvements.

To that end, the Federal Magistrates Rules, which took effect on 30 July 2001,<sup>20</sup> provide for two basic forms, 'Applications' and 'Responses', which can incorporate cross-claims, and are filed with an affidavit.<sup>21</sup> Substantial compliance with the forms is sufficient.<sup>22</sup> If the Federal Magistrates Rules are regarded to be insufficient or inappropriate, the Family Law Rules and Federal Court Rules as appropriate can be applied.

The court has adopted flexible procedures to accommodate litigants and practitioners including decreased emphasis on discovery and interrogatories (leave is required) and the use of an individual docket system (except in bankruptcy matters).<sup>23</sup> The docket system enables judges of the federal magistracy to limit the range of issues that can be traversed in hearings and the number of occasions when the parties and their representative have to come to court.<sup>24</sup>

As the court was created relatively recently, it has been able to maximise the use of technology to enhance litigant and practitioner amenity, including the use of audio links for mentions and directions hearings and urgent applications, and video links for other hearings.

The court also quickly developed a circuit arrangement to accommodate litigants and practitioners in Coffs Harbour, Dubbo, Lismore, Wollongong, Bendigo, Shepparton, Geelong, Morwell, Warrnambool, Devonport, Hobart, Cairns, Rockhampton, Bundaberg, Mackay, Berri, Port Lincoln, Whyalla, Alice Springs, Toowoomba, Maroochydore, South Port, Ballarat, Castlemaine, Dandenong, Hamilton, Traralgon and Perth.<sup>25</sup>

#### Workload of the Federal Magistrates Court

The court has a significant workload in family law (particularly Form 3F and Form 49 applications), bankruptcy and migration matters. As at 30 June 2002, the court heard:

- 65 per cent of all divorces;
- 28 per cent of all ancillary family law applications;
- 84 per cent of bankruptcy matters;
- 90 per cent of unlawful discrimination matters;
- 65 per cent of all migration applications; and
- an increasing proportion of the Federal Court's workloads in the other areas listed above.<sup>26</sup>

More recent statistics also show a steady rise in the court's workload in family law and bankruptcy matters from 03/04 to 04/05, with a slight drop off in migration matters.

**TABLE A**  
Number of federal magistrates by registry, as at September 2005

Adelaide	2
Brisbane	4
Canberra	2
Dandenong	0
Darwin	1
Hob/Launceston	1
Melbourne	8
Newcastle	2
Parramatta	3
Sydney	12
Townsville	1
<b>Total</b>	<b>36</b>



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**TABLE B**  
Number of family law applications filed by registry, 2003-2004

	Divorce	Divorce granted	Child support	Final orders	Interim orders	Total
Adelaide	3981	3649	133	641	718	9122
Brisbane	10255	9216	90	2008	1466	23035
Canberra	1638	1557	35	568	581	4379
Dandenong	3291	2988	51	1065	1038	8433
Darwin	434	407	33	318	322	1514
Hob/Launceston	1415	611	22	285	267	2600
Melbourne	8702	8061	148	2349	2508	21768
Newcastle	2926	2966	27	829	899	7647
Parramatta	5365	4427	118	1384	1248	12542
Sydney	7264	6769	0	45	336	14414
Townsville	2108	1408	23	373	305	4217
<b>Total</b>	<b>4739</b>	<b>42059</b>	<b>680</b>	<b>9865</b>	<b>9688</b>	<b>109671</b>

**TABLE B**  
Number of family law applications filed by registry, 2004-2005

	Divorce	Divorce granted	Child support	Final orders	Interim orders	Total
Adelaide	4064	3915	104	1020	1097	10200
Brisbane	10139	9976	32	2559	1853	24559
Canberra	1651	1619	2	623	620	4515
Dandenong	3591	3460	07	1160	1133	9351
Darwin	488	497	20	279	306	1590
Hob/Launceston	1392	1372	12	318	260	3354
Melbourne	9357	9071	41	2589	2599	23657
Newcastle	2895	2825	10	953	965	7648
Parramatta	5438	5363	66	1290	1337	13494
Sydney	7400	6978	4	73	338	14793
Townsville	2160	2008	22	516	403	5109
<b>Total</b>	<b>48575</b>	<b>47084</b>	<b>320</b>	<b>11380</b>	<b>10911</b>	<b>118270</b>

**TABLE C**

Number of general federal law applications filed by registry, 2003-2004

	Admin law	Bankruptcy	Consumer protection	Copyright	Human rights	Migration	Total
Adelaide	0	255	1	1	15	14	286
Brisbane	12	624	5	2	6	4	653
Canberra	3	32	3	0	2	3	43
Darwin	1	8	0	0	1	1	11
Hob/Launceston	1	57	0	0	1	2	61
Melbourne	17	979	60	7	19	613	1695
Perth	2	163	9	0	6	8	188
Sydney	14	1262	14	8	48	2386	3732
<b>Total</b>	<b>50</b>	<b>338</b>	<b>92</b>	<b>18</b>	<b>98</b>	<b>303</b>	

**TABLE C**

Number of general federal law applications filed by registry, 2004-2005

	Admin law	Bankruptcy	Consumer protection	Copyright	Human rights	Migration	Total
Adelaide	0	258	1	1	12	16	288
Brisbane	16	729	5	0	12	32	794
Canberra	4	27	4	0	5	12	48
Darwin	0	11	0	1	2	1	15
Hob/Launceston	3	79	0	0	1	4	87
Melbourne	6	1118	46	12	15	427	1624
Perth	2	214	11	2	3	7	239
Sydney	3	1427	15	12	41	1946	3444
<b>Total</b>	<b>34</b>	<b>386</b>	<b>82</b>	<b>28</b>	<b>91</b>	<b>244</b>	

Chief Federal Magistrate Pascoe told *Bar News*, he has been impressed that federal magistrates are able to deliver a great number of decisions expeditiously, despite a very heavy caseload. This has contributed significantly to the success of the court.

Chief Magistrate Pascoe also said a specialist panel system had been established in order to ensure that federal magistrates had appropriate knowledge and experience in specific areas of general federal law. The panel system would resemble that of the Federal Court of Australia.

### Appeals

The full court of the Federal Court of Australia has jurisdiction to hear and determine an appeal from a judgment of the Federal Magistrates Court. However, s25 (1A) of the *Federal Court of Australia Act 1976* (Cth) provides:

The appellate jurisdiction of the court in relation to an appeal from a judgment of the Federal Magistrates Court is to be exercised by a full court unless the chief justice considers that it is appropriate for the appellate jurisdiction of the court in relation to the appeal to be exercised by a single judge.

The discretion of the chief justice to allocate an appeal from a federal magistrate to a single judge of the Federal Court rather than the full court of the Federal Court is unfettered and not subject to review. The parties do not have the right to be heard as to whether an appeal will be heard by a single judge or the full court of the Federal Court. However, parties may be required to make submissions at a directions hearing on whether an appeal from a federal magistrate is suitable for hearing by a single judge.

The jurisdiction exercised by a single judge of the Federal Court in relation to an appeal from a federal magistrate, is the appellate jurisdiction of the full court of the Federal Court. Accordingly, any appeal from the judgment of the judge is to the High Court of Australia and not to the full court of the Federal Court: see sections 24 (IAAA) and 33 (2) of the *Federal Court of Australia Act*.

The nature of appeals from the Federal Magistrates Court to the Federal Court was discussed by Justice Kenny in *Farrington v Deputy Commissioner of Taxation* in terms worth setting out at length:<sup>27</sup>

... it may be helpful to describe the nature of an appeal to this court from a judgment of the Federal Magistrates Court. The jurisdiction of this court to hear and determine an appeal from a judgment of the Federal Magistrates Court is conferred by s24(1)(d) of the *Federal Court of Australia Act 1976* (Cth) ('Federal Court of Australia Act'). Pursuant to s25(1A) of the *Federal Court of Australia Act*, the chief justice directed in this case that the matter be heard and determined by a single judge.

4 An appeal from a judgment of the Federal Magistrates Court is not an appeal by way of a hearing de novo, nor is it an appeal in the strict sense: cf *Low v Commonwealth of Australia* [2001] FCA 702, per Marshall J at [3]. Such an appeal is conducted as a re-hearing. On an appeal by way of re-hearing, the powers of an appellate court are exercisable only if the appellant can demonstrate that, having regard to the evidence before the appellate court, the judgment under appeal is a consequence of some legal, factual, or discretionary error: see *Allesch v Maunz* (2000) 173 ALR 648, at 653-4 per Gaudron, McHugh, Gummow and Hayne JJ; *Minister for Immigration and Multicultural and Indigenous Affairs v Jia* (2001) 178 ALR 421, at 439 per Gleeson CJ and Gummow J; and *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 174 ALR 585, at 590 per Gleeson CJ, Gaudron and Hayne JJ.

5 On an appeal to this court from the Federal Magistrates Court, this court may receive evidence that was not adduced below. It may also draw inferences of fact from the evidence that was received below: see *Federal Court of Australia Act*, s27. The nature of the discretion under s93A(2) of the *Family Court Act 1975* (Cth) 'to receive further evidence upon questions of fact' (which resembles the discretion under s27 of the *Federal Court of Australia Act*) was considered in *CDJ v VAJ* (1998) 197 CLR 172 ('CDJ v VAJ'). McHugh, Gummow and Callinan JJ, at 203-4, said:

The failure to have adduced the evidence before the primary judge will be a variable factor, the weight of which will depend upon all the other factors pertinent to the case. Where the evidence has been deliberately withheld, the failure to call it will ordinarily weigh heavily in the exercise of the discretion. In other cases, the failure to call the evidence even if it could have been discovered by the exercise of reasonable diligence may be of little significance. No invariable rule concerning the failure to call the evidence can or should be laid down in view of the wide discretion conferred on the court by the section.

See also Gaudron J, at 185-8, and Kirby J, at 233-6."

The appellate jurisdiction was also extensively and comprehensively analysed by Justice Branson in a recent part of the *Australian Bar Review*.<sup>28</sup>

### Conclusions

The Federal Magistrates Court has accepted and managed many new challenges in its brief history.

It cannot be doubted that the former chief federal magistrate, Diana Bryant QC (now chief justice of the Family Court of Australia) and the current chief federal magistrate, John Pascoe AO, have managed the resources provided to the court in an effective manner which has delivered one of the most efficient jurisdictions in Australia.



There are still a significant number of self-represented litigants in proceedings in the court, particularly in family law proceedings, where one or both parties are not represented in some two-thirds of all cases. However, despite such challenges, the Federal Magistrates Court has assumed the lion's share of responsibility in three significant, high-volume jurisdictions: family law, bankruptcy and migration matters. It has increased its workload at a remarkable pace and has managed to ensure that the vast majority of its cases are resolved within six months. Importantly, independent analyses including interviews with practitioners have indicated a high degree of support for the Federal Magistrates Court.<sup>29</sup>

\* The writer wishes to acknowledge the co-operation of John Mathieson (the Chief Executive Officer of the FMCA) and Geoff Whelan (the Policy Manager of the FMCA) in providing statistical information sought for this article.

<sup>1</sup> Gleeson, the Hon AM, 'The state of the judiciary' (Paper presented to the 13th Commonwealth Law Conference, Melbourne, 17 April 2003).

<sup>2</sup> Williams, D., 'Federal Magistrates Service', (2000) 11(1) *Public Law Review* 3-6.

<sup>3</sup> Gleeson, the Hon A M, 'A changing judiciary' (Paper presented at the Judicial Conference of Australia, Uluru, 7 April 2001) 1, 1.

<sup>4</sup> See for example *Macrae v Attorney-General (NSW)* [1987] 9 NSWLR 268 at 278, contrast Golder, H., *High and Responsible Office: A History of the NSW Magistracy*, Sydney University Press, 1991.

<sup>5</sup> *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146 at 163-164; *Universal Declaration of Human Rights*, Art 10; *International Covenant on Civil and Political Rights*, Article 14(1); *Beijing Statement of Principles of the Independence of the Judiciary*, Art 4; see also Briese, C., 'judge or Magistrate' (1988) 7 *Commonwealth Judicial Journal* 19, 21.

<sup>6</sup> See DeBelle, The Hon Bruce, 'Judicial independence and the rule of law' (2001) 75 *Australian Law Journal* 556, 558-561; Nicholson, the Hon R.D., 'Judicial independence and accountability: Can they co-exist?' (1993) 67 *Australian Law Journal* 404, 407; Keyzer, P., 'Judicial independence in the Northern Territory: Are undisclosed remuneration arrangements repugnant to Chapter III of the Constitution?' (2004) 32 *University of Western Australia Law Review* 33.

<sup>7</sup> This list was substantially compiled by McInnis, M., in 'The Federal Magistrates Court Practice and Procedure', a paper presented to a meeting of Perth practitioners held on 20 November 2001 at the Commonwealth Law Courts, Perth, pp.3-7.

<sup>8</sup> *Trade Practices Act 1974* (Cth), s86AA. For a critical analysis see Zumbo, F., 'The Federal Magistrates Court and the Trade Practices Act: current and possible future directions', (2003) 11(1) *Trade Practices Law Journal* 46-50.

<sup>9</sup> For a useful analysis of the recent amendments to bankruptcy affecting family law practice see Hartnett, N., 'The Bankruptcy Act 1966 and family law', a paper delivered to the Victorian Bar Compulsory Continuing Legal Education Program.

<sup>10</sup> See further McInnis, 'Human rights and the Federal Magistrates Court of Australia', paper delivered to the 13th Triennial Conference of the Commonwealth Magistrates and Judges Association, Lake Malawi, Malawi, 24-29 August 2003.

<sup>11</sup> *Gardner v National Netball League Pty Ltd* (2001) FMCA 50.

<sup>12</sup> See further Raphael, K., 'Review of discrimination matters in the Federal Magistrates Court', 2003 *Administrative Law Forum*, a paper which provides a helpful summary of a number of cases in these areas, including reflections on particular decisions regarding the award of damages and costs in these jurisdictions.

<sup>13</sup> For further details see Fraser, R., 'Developments in administrative law', (2005) No 45 *AIAL Forum* 1-19, 1-2.

<sup>14</sup> See further 'When to transfer proceedings from the Family Court to the Federal Magistrates Service', (2001) 15(4) *Australian Family Lawyer* 23-25.

<sup>15</sup> Analysed by Esser, K., 'The copyright jurisdiction of the Federal Magistrates Court', (2004) No 57 *Intellectual Property Forum* 46-48.

<sup>16</sup> Pursuant to s18 of the Federal Magistrates Act.

<sup>17</sup> As to which see s32 of the Federal Court of Australia Act, considered in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457.

<sup>18</sup> Report No 89.

<sup>19</sup> 'Access to justice' has been the specific focus of numerous federal inquiries including: Senate Legal and Constitutional Affairs Committee, *Inquiry into Legal Aid and Access to Justice*, 2004; *Report of the National Pro Bono Task Force and Recommended Action Plan*, 2001; Commonwealth Attorney-General's Department, *Legal Assistance Needs Project*, Rush Social Research Agency and John Walker Consulting Services, Commonwealth Attorney-General's Department, Barton ACT, 1999; Australian Law Reform Commission, *Beyond the Door-keeper: Standing to Sue for Public Remedies*, Report No 78, Canberra: AGPS, 1996 (hence ALRC 78); Australian Law Reform Commission, *Who Can Sue?: A Review of the Law of Standing*, Canberra: AGPS, 1995; Australian Law Reform Commission, *Who Should Pay?: A Review of the Litigation Costs Rules*, Report 67, Canberra: AGPS, 1995; Commonwealth Attorney-General's Department, Access to Justice Advisory Committee, *Access to Justice: An Action Plan*, AGPS: Canberra, 1994; Administrative Review Council Report to the Attorney-General, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act* Report No. 32 (Canberra: AGPS, 1989); Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27, Canberra: AGPS, 1985; Australian Law Reform Commission, Discussion Paper No. 4, *Access to the Court - Standing: Public Interest Suits* (1977); *Legal Needs of the Poor Inquiry*, 1975, Cass, M. and Sackville, R., AGPS, Canberra, 1975.

<sup>20</sup> Statutory Rules 2001, No 195.

<sup>21</sup> Rules 28.01 to 28.04, and 4.05.

<sup>22</sup> See ie. Rule 2.04.

<sup>23</sup> McInnis, M., 'The Federal Magistrates Court practice and procedure', a paper presented to a meeting of Perth practitioners held on 20 November 2001 at the Commonwealth Law Courts, Perth, p.1.

<sup>24</sup> Draft submission of the Federal Magistrates Service to the review of the court's operation to 30 June 2002, p.14.

<sup>25</sup> *Ibid.* For further information on their operations in Perth see 'The Federal Magistrates Court in WA', (2003) No 30(2) *Brief* 12-14.

<sup>26</sup> *Ibid.*, p.52.

<sup>27</sup> [2002] FCA 1013 at [3]-[4] (13 August 2002).

<sup>28</sup> Branson, the Hon C., 'Appeals in the Federal Court of Australia', (2005) 26 *Australian Bar Review* 242, 245-246

<sup>29</sup> Cooper, D., 'When Rolls Royce and Holden collide: An analysis of the operation of the Federal Magistrates Service in Queensland in the family law area', (2003) 3(2) *Queensland University of Technology Law and Justice Journal*, at n 154 and accompanying text.