Attorney-General’s Department

Review of the performance and funding of the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia

5 March 2014
Disclaimer

Inherent Limitations

This report has been prepared as outlined in the Review Scope Section. The services provided in connection with this engagement comprise an advisory engagement which is not subject to Australian Auditing Standards or Australian Standards on Review or Assurance Engagements, and consequently no opinions or conclusions intended to convey assurance have been expressed.

No warranty of completeness, accuracy or reliability is given in relation to the statements and representations made by, and the information and documentation provided by the Attorney-General’s Department personnel and stakeholders consulted as part of the process.

KPMG have indicated within this report the sources of the information provided. We have not sought to independently verify those sources unless otherwise noted within the report.

KPMG is under no obligation in any circumstance to update this report, in either oral or written form, for events occurring after the report has been issued in final form.

The findings in this report have been formed on the above basis.

Third Party Reliance

This report is solely for the purpose set out in the Scope Section and for the Attorney-General’s Department’s information, and is not to be used for any other purpose or distributed to any other party without KPMG’s prior written consent.

This report has been prepared at the request of the Attorney-General’s Department in accordance with the terms of KPMG’s contract dated 8 January 2014. Other than our responsibility to the Attorney-General’s Department neither KPMG nor any member or employee of KPMG undertakes responsibility arising in any way from reliance placed by a third party on this report. Any reliance placed is that party’s sole responsibility.
# Document review and approval

## Revision history

<table>
<thead>
<tr>
<th>Version</th>
<th>Author</th>
<th>Date</th>
<th>Revision</th>
</tr>
</thead>
<tbody>
<tr>
<td>WD</td>
<td>KPMG</td>
<td>14/02/14</td>
<td></td>
</tr>
<tr>
<td>1.0</td>
<td>KPMG</td>
<td>25/02/14</td>
<td></td>
</tr>
<tr>
<td>FINAL</td>
<td>KPMG</td>
<td>05/03/14</td>
<td></td>
</tr>
</tbody>
</table>

## This document has been reviewed by

<table>
<thead>
<tr>
<th>Version</th>
<th>Reviewer</th>
<th>Date reviewed</th>
</tr>
</thead>
<tbody>
<tr>
<td>WD</td>
<td>AGD</td>
<td>17/02/14</td>
</tr>
<tr>
<td>1.0</td>
<td>AGD, FCA, FCoA, FCC, PM&amp;C, DoF</td>
<td>28/02/14</td>
</tr>
</tbody>
</table>

## This document has been approved by

<table>
<thead>
<tr>
<th>Subject matter experts</th>
<th>Signature</th>
<th>Date reviewed</th>
</tr>
</thead>
</table>

© 2014 KPMG, an Australian partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity. All rights reserved. The KPMG name, logo and “cutting through complexity” are registered trademarks or trademarks of KPMG International Cooperative (“KPMG International”). Liability limited by a scheme approved under Professional Standards Legislation.
Contents

Disclaimer i

Document review and approval ii

Executive summary v

This review v

Historic and projected workload and demands vii

The Courts’ financial position vii

Steps taken to address the Courts’ financial challenges viii

Discussion of opportunities ix

Summary of key findings x

Summary of recommendations xiii

1 Introduction 1

1.1 Review scope 1

1.2 Review Approach 2

1.3 Context/government policies 3

1.4 Review limitations 4

2 Courts overview 5

2.1 Administration of justice in Australia 5

2.2 The Australian federal court system 7

2.3 Broader impacts of the courts on economic and social environment 19

2.4 Issues affecting court operations 24

3 Performance of the federal court system 40

3.1 Introduction 40

3.2 Demand management 40

3.3 Anticipated workloads and levels of service delivery 54

3.4 Current financial position and forward projections 56

3.5 Steps taken to operate within current and future appropriations and deliver integrated, effective and efficient services 65

4 Future budgetary needs 75
## 5 Discussion of opportunities

5.1 Assessment criteria 82

5.2 Opportunities for reform 83

### Appendices

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Review Terms of Reference</td>
<td>129</td>
</tr>
<tr>
<td>B</td>
<td>Stakeholder consultation and documentation summary</td>
<td>131</td>
</tr>
<tr>
<td>C</td>
<td>Courts Operational Overview</td>
<td>139</td>
</tr>
<tr>
<td>D</td>
<td>Federal Court of Australia – Detailed Analysis of Current Situation</td>
<td>152</td>
</tr>
<tr>
<td></td>
<td>Operational overview</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Staffing profile</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Workload and demand</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Performance analysis</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Financial analysis</td>
<td></td>
</tr>
<tr>
<td>E</td>
<td>Family Court of Australia – Detailed Analysis of Current Situation</td>
<td>209</td>
</tr>
<tr>
<td></td>
<td>Operational overview</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Staffing profile</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Workload and demand</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Performance analysis</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Financial analysis</td>
<td></td>
</tr>
<tr>
<td>F</td>
<td>Federal Circuit Court of Australia – Detailed Analysis of Current Situation</td>
<td>245</td>
</tr>
<tr>
<td></td>
<td>Operational overview</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Staffing profile</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Workload and demand</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Performance analysis</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Financial analysis</td>
<td></td>
</tr>
<tr>
<td>G</td>
<td>Financial Projections</td>
<td>286</td>
</tr>
</tbody>
</table>
Executive summary

The Federal Court of Australia (FCA), the Family Court of Australia (FCoA) and the Federal Circuit Court of Australia (FCC) (collectively, ‘the Courts’) play a critical role in the national administration of justice for Australia’s states and territories. The role of the Courts is more than that of a neutral arbiter – the federal legal system helps frame the relationship between state and society, reflecting an accepted set of social, political and economic norms. As the principal forum upholding the role of law, the Courts play an integral role in a modern democratic society that gives people and organisations confidence that society’s rules (laws) will be respected and upheld, thus underpinning economic and social cooperation.

In light of this, timely, equitable and efficient access to justice is of fundamental importance. To this end, the Courts’ financial and operational performance is a key contributor to enabling (and perpetuating) a justice system which facilitates maintenance of the rule of law and:

- enables people to effectively and fairly resolve their disputes and enforce their legal rights;
- facilitates judicial decisions which uphold and shape economic and social relationships between people, organisations and government, enabling disputes to be resolved efficiently and improving certainty and reducing the risks and costs involved in transactions; and
- enables the lawful, peaceful and fair resolution of disputes.

This review

The Attorney-General’s Department (the Department) engaged KPMG to undertake a review of the performance and funding of the Courts to support future strategic decision-making. This review process has been informed by Terms of Reference (available in Appendix A) developed by the Department, the Attorney-General and the Heads of Jurisdiction of each of the Courts, and further builds on previous work which considered:

- the appropriateness, effectiveness, efficiency, integration, performance and strategic policy alignment of the Courts in the 2012 Strategic Review of Small and Medium Agencies in the Attorney-General’s Portfolio (the Skehill Review); and
- governance options to achieve a more integrated family law system, including structures and management processes necessary to improve the efficiency, effectiveness and integration of service delivery across the family law jurisdiction in the 2009 Future governance options for federal family law courts in Australia (the Semple Review).

A key theme emerging from the Skehill and Semple Reviews, and this review, has been the financial difficulties exhibited by the Courts, particularly the FCoA and FCC. Financial projections indicate that:

- the FCA will achieve a surplus in 2013-14 ($0.2 million), however will be in deficit from 2014-15 ($2.4 million) through to 2017-18 ($9.5 million); and
• the FCoA and FCC will break even in 2013-14, however will be in deficit from 2014-15 ($7.4 million) through to 2017-18 ($16.2 million).\(^1\)

Supplementation funding first provided in 2012-13 ($6.5 million for 2012-13, $10.4 million for 2013-14 and approximately $8.6 million per annum across the remainder of the forward estimates) offset the Courts’ projected deficits, however has not addressed entrenched structural funding issues.

In acknowledging the broader operating environment of the Courts, particularly their impact on economic and social cohesion and their constrained fiscal environment, the following assumptions underpin this review:

• It is desirable to maintain, and further develop, a strong federal legal system and its supporting structures.

• The division of jurisdiction of the federal courts vis-à-vis State and Territory courts, as outlined in the Constitution, is out of scope for review and/or comment.

• The Courts are not exempt from accountability and transparency in the expenditure of public money.

• Accessible justice is a fundamental aspect of an effective legal system, and efforts to promote a legal system which is accessible, appropriate, equitable, efficient and effective for litigants, practitioners and the legal system are of paramount concern and must be carefully balanced.

• Any proposed changes or measures in the report are to be made within the limits of existing government policy.

• It is desirable for matters to be heard and determined in the lowest appropriate jurisdiction.

• The current federal legal system is complex and a product of history and evolution, making it difficult to deconstruct and ‘start afresh’.

• Consideration of the long-term sustainability of the Courts involves two aspects:
  - how efficiently the Courts can work within existing appropriations; and
  - what level of resourcing the Courts need in the future in order to deliver required service levels, taking into account factors such as the impost of the Efficiency Dividend, allowance for increasing costs (via a Wage Cost Index [WCI] which is currently projecting lower growth than the general Consumer Price Index [CPI]) and projected demand.

• There will be efficiency opportunities that cannot be realised because of existing legislative and policy positions.

\(^1\) Note that the Family Court of Australia and the Federal Circuit Court of Australia are considered collectively due to their operation as a single agency for the purposes of the Financial Management and Administration Act 1994 (Cth), an arrangement which was formalised on 1 July 2013.
• Judicial appointments, remuneration decisions and tenure are determined by Government and independent bodies and are not in control of the courts.

• There is a need to have a transparent method of monitoring and reporting of courts’ performance, including for monitoring of judicial workload.

Historic and projected workload and demands

The Courts have indicated that their financial situation presents risks to their ongoing ability to service future workload levels and maintain adequate levels of service delivery to the Australian community. However, historical analysis of court workloads – measured through filing numbers – indicates that while the FCA has seen a sharp increase in the number of applications for determination between 2008-09 and 2012-13 (approximately six per cent per annum), the FCoA and FCC have recorded a more steady filing rate. Divorce Order applications comprise a significant component of the FCoA/FCC’s workload, and are largely administrative in nature. There may be scope to consider opportunities enabling an external agency to oversee the administrative processes associated with Divorce Order applications to relieve the Courts’ workload, whilst ensuring that the final granting of such applications (which is likely to constitute the exercise of judicial power) continues to be undertaken by the Courts.

Further considerations of case complexity may contribute to an increase in workload, however there is no agreed definition or measure of ‘case complexity’ across the Courts and the impact of particular factors which drive case complexity (such as self-represented litigants, class actions and family violence concerns) and their impact(s) on timeliness and court resources.

The Courts have resource planning models which assist in providing resource estimates for elements such as registry services. However, determination of resourcing required to accommodate workload projections for the Courts is difficult as there is no linkage between workload projections (based on case volumes) and financial projections. As such, there is an expectation that the Courts are required to accommodate increased workload and/or demand within their existing appropriations.

The Courts’ financial position

Collectively, the Courts are forecasting an overall deficit (excluding depreciation) of $73.5 million between 2014-15 and 2017-18. The Courts’ current funding model is considered to be financially unsustainable due to the relatively high proportion of non-discretionary expenditure and reliance in appropriation revenue. This has driven a disconnect between expenses incurred and resourcing provided to cover them.

The current financial difficulties the Courts are experiencing are the result of a number complex and interrelated factors, including (but not limited to):

• the application of the Efficiency Dividend to judicial salaries;

• the loss of rent supplementation from July 2012;

• an apparent shortfall in the level of funding for the FCC since inception;

• the general increase in the rate of the Efficiency Dividend applied to the Courts; and
• an inability to sustain the level of efficiency-related initiatives undertaken over the past years.

The most significant of these factors is the application of the Efficiency Dividend to Court appropriations. The high proportion of non-discretionary costs has meant that, over the long-term, the Efficiency Dividend has had a disproportionately large impact on the Courts’ discretionary spending, and a general increase in the rate of the Efficiency Dividend has further exacerbated this. While supplementation funding provided in 2012-13 and 2013-14 has enabled the Courts to return to a breakeven position, it has not been programmed to grow indefinitely and as such does not offer a long term solution. Unless additional funding is made available, the Courts will need to significantly cut their current service levels in the future, which may manifest through, for example, delays in finalisations, closure of smaller registries, cuts in staffing numbers and/or reduction in the use of circuits.

Steps taken to address the Courts’ financial challenges

In response to their challenging financial position, the Courts have made progress towards implementing a range of efficiency-related initiatives to operate within existing appropriations. These initiatives include:

• reducing judicial support officers and general staff in the FCoA;
• travel restrictions; and
• utilising Whole-of-Government panel arrangement for specific services (e.g. interpreters).

These initiatives have delivered cost savings which have been reinvested, although the value of these cost savings is modest and has been insufficient to offset the Courts’ projected deficits.

Larger-scale initiatives, including incorporation of the National Native Title Tribunal (NNTT) into the FCA from 1 July 2012 (savings of $19 million over four years), and not replacing FCA, FCoA and FCC judicial officers from 2009-10 and 2010-11 (savings of $38 million over four years from the relevant implementation date) has delivered larger cost savings, however these savings will be used as Portfolio Offsets and therefore have no impact on the Courts’ projected deficits. Similarly, merging administration functions of the FCoA and FCC generated net savings of approximately $7.8 million over four years, however $6.3 million was to be returned to Consolidated Revenue, with the remaining $1.5 million reinvested in the Courts.

All else equal, the Courts’ costs are rising markedly faster than the appropriation which has been provided to them. Going forward, as the proportion of each Court’s cost base considered to be discretionary is relatively small, there is little scope for the Courts to make future savings without significant (negative) impacts on service delivery levels. This is due to the fact that given constant (or increasing) demand, once efficiencies have been realised, further cuts will need to be applied directly to service levels or lead to ongoing deficits.
Discussion of opportunities

Although the Courts have implemented a range of efficiency measures to date, there is scope for additional initiatives to be considered to drive further cost savings and/or increase productivity. A summary of key opportunities is provided in Table 5-1.

Table 5-1: Key cost saving and efficiency opportunities

<table>
<thead>
<tr>
<th>Category</th>
<th>Opportunities</th>
</tr>
</thead>
</table>
| Structural change             | • Improving integration between the Courts, specifically in the delivery of shared services  
                                 | • Considering broader structural changes to the federal court structure, including the appropriate allocation of corporate services and support staff |
| Sustainable funding model     | • Payment of judicial salaries via a Special Appropriation                   |
|                               | • Retaining either all or part of court fees generated to offset operating costs |
|                               | • Expanding user pays arrangements and cost recovery practices               |
| Property and assets           | • Maximising occupation and utilisation of the CLCs                         |
| Implementation of a redefined operating model | • Enhanced use of technology to drive further efficiency and integration  
                                 | • Streamlined judicial support and resourcing models                        |
|                               | • Expanding use of Registrars in appropriate matters                        |
|                               | • Identifying and implementing a consistent, appropriate and cost-effective Case Management approach across the Courts |

Assessment of each of these opportunities, however must be considered in light of broader social and economic role the Courts play in the administration of justice. The feasibility of each option is a necessarily difficult consideration, with each option involving compromises in broader areas such as efficiency and cost effectiveness, against equitable access to justice, independence of the judiciary and the need for a quality, effective legal system. As such, there is no ‘single solution’ to address the complex environment the Courts are operating in – but rather a nuanced, objective discussion which recognises the need to balance competing interests which necessarily arise in the effective, efficient and equitable administration of justice.

Figure 1 provides a snapshot of the challenge facing the Courts in eliminating their projected deficits across the forward estimates – implementing a range of the more material opportunities identified in this review will not be able to completely ‘close the gap’.
Summary of key findings

Courts overview
1. There are a number of pressures impacting on the Courts’ operating environment which are outside their control, including increasing case complexity and rising judicial remuneration costs. These have consequential impacts on court activity and workload, as well as financial drivers, and are an important part of the contextual backdrop for this review.

2. The current federal court structure with high levels of concurrent jurisdiction and the existence of two superior courts is anomalous, and the result of history and evolution. The current structure does not adequately incentivise the hearing of matters in the lowest appropriate jurisdiction.

Performance of the federal court system

Demand management
3. The allocation of court staff is geographically-based, and does not necessarily correlate with levels of demand.

Anticipated workloads and levels of service delivery
4. The FCA has seen a growth (average of six per cent per annum) in applications for determination over the four-year review period, while the FCoA and FCC have recorded a more steady filing rate, with pockets of increased applications for particular causes of action. Family Law filings across both the FCoA and FCC to 31 December 2014 reflect a marked increase from the same timeframe in 2012-13, driven by Consent Order applications.

5. There is no agreed model to determine workload projections for each of the Courts, which makes analysis of future demand challenging. In any event, there is no clear linkage between case volume estimates and financial forward projections. As such, it appears that there is an expectation that the...
Courts will work harder/find productivity improvements and/or increase delays to both manage existing, and accommodate future increases in, workload.

**Current financial position and forward projections**

6 Relief in the form of supplementation was provided to the Courts in 2012-13 ($6.5 million) and 2013-14 ($10.4 million), designed to cover anticipated deficits in those years. Based on our analysis, the programmed supplementation will not be sufficient given existing service delivery models from 2014-15 onwards.

7 Based on current forecasts, the Courts are expecting to recognise large – and growing (off a small base) – deficits across the forward estimates period. These deficits are forecast to commence in 2014-15 ($9.9 million), and will grow to $25.7 million in 2017-18, resulting in a total cumulative deficit of $74.8 million across the forward estimate period. The FCoA and FCC account for 66 per cent of the total projected deficit over the forward estimates.

8 The proportion of each Court’s cost base considered to be discretionary is relatively small – there is relatively little scope for the Courts to make future savings without significant (negative) impacts on the current service delivery model.

**Application of the Efficiency Dividend**

9 In 2012-13, judicial salaries accounted for 22 per cent of the Courts’ expenditure (being judicial salaries) was (regarded as non-discretionary as the Courts have no power over the appointment or remuneration of judicial officers). Application of the Efficiency Dividend to the Courts is difficult, particularly in light of constitutional requirements relating to judicial remuneration and tenure.

**Property management**

10 Existing capital allocations are insufficient to maintain the CLC fitout over their 15 year lifecycle. Preliminary estimates indicate a funding ‘gap’ of between $9.8 and $16.3 million per annum.

11 The Courts have been granted a ‘grace period’ from the whole-of-government property savings measure associated with the Government Property Data Collection (PRODAC) occupational density target until July 2017. Based on current occupational densities, the Courts are currently well outside these targets, and it has been estimated that the various users of the CLCs will be hit by a $2.7 million reduction in appropriation in 2017-18.

**Steps taken to operate within current and future appropriations and deliver integrated, effective and efficient services**

12 The Courts have, to date, implemented a range of measures to operate within existing appropriations. These include a reduction in judicial support officers, consolidation of library services, travel restrictions, and utilising Whole-of-Government panel arrangements for specific services (e.g. interpreters). While these savings are recurrent and have been reinvested by the Courts, they are modest, and insufficient to offset the Courts’ projected deficits.

13 Merging administration functions of the FCoA and FCC has generated net savings of approximately $7.8 million over four years, although $6.3 million was returned to Consolidated Revenue and therefore could not be used to offset the Courts’ projected deficit.

14 A number of larger-value savings have been implemented, including

- incorporation of the NNTT into the FCA (estimated to deliver savings of $19 million over four years); and
- not replacing FCA, FCoA and FCC judicial officers in 2009-10 and 2011 (estimated to deliver savings of $24.9 million in respect of FCoA and FCC judicial officers between 2009-10 and 2013-14).

These savings have been used as Portfolio Offsets which means they have no impact on the Courts’ projected deficits, nor do they offset the impacts of the Efficiency Dividend.
Future budgetary needs

15 The current funding model for the Courts is not sustainable. The question of sustainability cannot simply be addressed through the injection of additional funds or one-off cuts, rather it requires more fundamental amendments to the model.

16 To achieve the current budget across the forward estimates for all three Courts would require significant cuts to service and staffing levels. Such cuts to administrative services are unlikely to form a sustainable basis or driver for long-term efficiencies.

Discussion of opportunities

Structural change

17 The Government’s policy to establish the FCC independent of the FCoA can be implemented via a number of options. There is an opportunity to implement financial and administrative independence whilst still benefiting from integrated governance and shared service arrangements. The proposed change to the administration of the Victorian court system is an example of this.

Sustainable funding model

18 Exempting judicial salaries from the Efficiency Dividend will improve the Courts’ bottom line by $13.7 million over the forward estimates.

19 A number of state jurisdictions (such as Victoria and Western Australia) allow courts to ‘retain’ either all or part of court fees generated to offset their operating costs.

20 The FCA has developed a model whereby parties bear the cost of engaging professionals to support the court process, such as transcript, interpreters and the use of expert witnesses. The FCoA and FCC’s cost recovery practices are not as extensive, particularly given Family Law litigants are more likely to demonstrate a higher degree of vulnerability and/or disadvantage, and such cost recovery activities may exacerbate these concerns.

Property and assets

21 Indicatively, the effect of transferring responsibility for the Commonwealth Law Courts to a single entity will improve the Courts’ bottom line by $4.9 million over the forward estimates.

22 The CLCs are generously designed and appointed, although there is limited scope to improve their functionality due to independence and security requirements. Notwithstanding this, there are opportunities to consolidate back office (corporate) functions to maximise utilisation and occupancy of both the CLCs and other leased buildings.

Implementation of a redefined operating model

23 There is scope to make savings through changes to the Courts existing operating models.

Enhanced use of technology

24 Enhanced use of technology is considered a critical driver of further efficiency and integration within and across the federal court system.

Judicial support and resourcing models

25 A review of judicial support in the FCoA resulted in reductions in the level of judicial support provided to FCoA first instance judges. Streamlining judicial support for all Courts in accordance with the level provided to FCoA first instance judges would realise savings so long as corresponding improvements in productivity could be found.

Case Management and use of Registrars

26 Appropriate delegation of powers to Registrars can facilitate the timely and efficient resolution of procedural matters and less complex disputes, however the diversion of judicial activity to other resources would necessitate the appointment of additional Registrars to accommodate this increase in workload, which means that such a measure would not realise short-term cost savings. Over the longer-term, savings could be realised as some retiring judicial officers may not require replacement.

27 Case Management practices differ between the FCA and FCC (which employ a judge-led Case Management approach) and the FCC (which employs a case management approach).
Management model), and the FCoA (which delegates a number of procedural activities and facilitation of Conciliation Conferences to Registrars). While Case Management is a matter for the Courts, there is scope to draw on the findings of current research projects to identify a consistent, appropriate and cost-effective approach to Case Management across the federal court system.

Provision of information to court users

28 Continued and enhanced provision of clear and accessible information to court users through court websites, the National Enquiry Centre and registry staff will support parties’ decision-making in relation to progression of matters through the court system, and may lead to decreased use of court and judicial resources over time if a ‘self service’ approach is facilitated for clients, and earlier decisions around case progression are reached. At present there are three major websites used by the family courts to provide information to users in addition to the Commonwealth Courts Portal (CCP). This should be streamlined with the main conduit being the CCP.

Summary of recommendations

Performance of the federal court system

1. That the Courts adopt a consistent approach to measuring and reporting on Court performance and judicial workload.

Future budgetary needs

2. That consideration be given to the introduction of a regular (i.e. once every three years) mechanism by which the workload of each Court is reviewed and, if appropriate, base funding is adjusted accordingly. This process should include the development and utilisation of operational performance improvements to better structure, evidence and support any future financial proposal to Central Agencies for revised funding needs.

3. That the Government consider providing additional supplementation to the Courts ($4.5 million for the FCoA and FCC and $0.5 million for FCA) in 2014-15 to enable them to maintain service levels in the short-term until a more permanent funding mechanism is agreed.

Discussion of opportunities

Structural change

4. Government should seek to achieve the most effective means of independence for the FCC through careful analysis of the associated costs, benefits and timeliness.

Sustainable funding model

5. That the Government consider funding judicial salaries for the FCA, FCoA and FCC through Special Appropriations, or otherwise exempting judicial salaries from the application of the Efficiency Dividend.

6. That the Government consider providing the Courts with an additional stream of revenue, including the possibility of allowing the FCA, FCoA and FCC to retain a proportion of Court Fees generated.

7. That the FCoA and FCC identify further opportunities for user pays arrangements for court-related activities (for example some high-end Family Law property matters may have the potential to be subject to user pays arrangements), accompanied by appropriate safeguards for vulnerable litigants.

Property and assets

8. That a single entity be assigned responsibility and appropriation for the operation, management and maintenance of the Commonwealth Law Courts.

9. That additional capital funding be provided in order to cover the ongoing maintenance and replacement of fitout in the Commonwealth Law Courts. The quantum of the capital funding should be determined based on an external valuation.
10. That a strategic plan for the long-term utilisation of the Commonwealth Law Courts and other space leased by the Courts be developed. Where relevant, consideration should be given to the possibility of relocation for instances in which existing capacity is not considered to be sufficient to satisfy the demands of the respective Courts.

Implementation of a redefined operating model

Enhanced use of technology

11. Consideration should be given for opportunities to:
   - facilitate the use of the Electronic Court File more broadly (i.e. in relation to Family Law matters) as a means of transitioning to a paperless court by enabling the electronic lodgement of documents, correspondence and remote viewing of documents on the court file;
   - increase the use of video link/telelink as a means of reducing FCC circuit expenses (recognising the associated access to justice challenges); and
   - examine reducing (or removing) certain FCC circuit locations where limited demand is apparent and replacing physical court appearances in regional and rural locations with technological solutions.

12. Appropriate technological solutions exist to support all Courts to:
   - flexibly allocate workflow around registry locations, to make best use of existing resources in the short term; and
   - examine the feasibility of closing low-volume registries and facilitate servicing of these registry functions from another location, in order to generate savings.

Judicial support and resourcing models

13. Judicial support arrangements should be examined to promote a cost effective and consistent approach across the federal courts, in order to drive the most efficient use of resources across the courts’ operations.

Case Management and use of Registrars

14. The Courts should draw on the findings of the Australian Centre for Justice Innovation’s Timeliness Project to identify a consistent, appropriate and cost-effective approach to Case Management across the federal court system, particularly given the dual jurisdictions considered by the FCC. Greater transparency and clarification of the role of Registrars would be beneficial. A single case management system should also be encouraged.

Alternative dispute resolution

15. Further opportunities for the flexible use of alternative dispute resolution for Family Law matters including property, and where appropriate general federal law matters, should be explored to support efficient court operations and improved outcomes for litigants. Better linkages to other family law services (e.g. Kiosk initiatives) should be formalised.

Family Reports

16. That the FCoA and FCC undertake an exercise to determine the cost effectiveness of the preparation of Family Reports by Family Consultants in comparison to Regulation 7 providers, in order to ascertain the preferred model for ensuring high quality, efficient reporting in support of improved case outcomes.

 Provision of information to court users

17. Across all Courts, consideration should be given to:
   - enhancing information provided on court websites to promote a ‘self service’ approach from court users; and
   - removing any legislative or practical impediment to registry staff providing greater levels of information and guidance to court users to enhance first point resolution of concerns and
contribute to efficient court operations.

Other changes to the operational model

18. Consideration should be given to further changes to the Courts’ operating model to drive efficiency and enhanced use of judicial resources, including areas such as:

- processes for commencing and hearing appeals; and
- initiatives to streamline the preparation of judgments.

Procedural/legislative change

19. That the Government and Courts consider the merits of the legislative and procedural changes identified throughout this review as a means of improving the efficiency of court processes and outcomes for parties.
1 Introduction

The Federal Court of Australia (FCA), the Family Court of Australia (FCoA) and the Federal Circuit Court (FCC) (collectively; ‘Courts’) have a critical role to play in the national administration of justice for Australia’s states and territories. This review examines the performance and funding of these Courts at a time when demand pressures on court services continue to grow and government is facing an increasingly constrained fiscal environment.

In 2012, the Skehill Review applied expenditure review principles of appropriateness, effectiveness, efficiency, integration, performance assessment and strategic policy alignment to small and medium term agencies in the Attorney-General’s Portfolio. A number of opportunities to optimise the efficiency and effectiveness of the Courts’ administration were identified. The Skehill Review recommended that a more detailed examination and analysis of the Courts’ financial position be undertaken, to determine whether they are financially viable to operate at acceptable service levels within their current and forward estimates appropriations and at current and anticipated activity levels.

The purpose of this review is to provide an independent report to the Government on the performance of the Courts, including each Court’s current and projected financial position, workload, levels of service delivery and steps taken to avoid future operating losses. This review contains analysis on the future budgetary needs of the Courts and advises on options to strengthen the funding model in place for sustainable and efficient court resourcing.

1.1 Review scope

The scope for this review was to review the performance and funding of the Courts, to support future strategic decision-making.

The review has operated under an agreed terms of reference, set out in full at Appendix A. The review’s scope was focused on three key areas:

- Financial analysis
  - high level financial baseline of current operations, including analysis and documentation of historic, current and projected revenues and costs bases;
  - analysis of drivers of financial performance, future cost demand pressures and funding constraints, plus key discretionary expense categories and operating costs

- Operational analysis
  - documentation of key elements of the current courts operating model from a structure, people, process and systems perspective;
  - consideration of past and expected future performance, based on input from stakeholders and data review;
  - analysis of selected interstate comparators
• Identification of potential areas for improvement guided initially by the opportunities identified in the Skehill Review and stakeholder consultations, complemented by findings from comparator analysis and KPMG experience and insight.

This review commenced on 8 January 2014 and was undertaken within seven-week period under considerable time pressure. All stakeholders made every effort to ensure they provided effective input to the review within the time period.

1.2 Review Approach

This review was conducted according to the methodology outlined in Table 1-1.

Table 1-1: Review approach

<table>
<thead>
<tr>
<th>Stage</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project initiation and planning</td>
<td>KPMG developed a detailed project plan, which confirmed the objectives and scope of the project, and the deliverables and timeframes. The plan identified relevant stakeholders for consultation as well as an agreed consultation approach.</td>
</tr>
<tr>
<td>Data collection and analysis</td>
<td>Relevant data from the Attorney-General’s Department (the Department), the FCA, the FCoA and the FCC was collected and analysed. Using this data, KPMG conducted current state diagnostic activities as well as baselining the current financial performance of the courts with a view to meeting the requirements of the Terms of Reference. KPMG analysed the external budget position of the Courts, revised assumptions and identified and analysed the fiscal pressures for the forward estimates period in order to identify potential opportunities and inform recommendations for future consideration. KPMG developed a financial model to analyse the future budgetary requirements and operating scenarios and undertook a high level assessment of opportunities for consideration in phase 3.</td>
</tr>
<tr>
<td>Stakeholder consultation</td>
<td>KPMG consulted stakeholders including Departmental executives, Central Agencies Courts, Court users and experts and peak bodies. This included:</td>
</tr>
<tr>
<td></td>
<td>• Attorney-General</td>
</tr>
<tr>
<td></td>
<td>• Attorney-General’s Department</td>
</tr>
<tr>
<td></td>
<td>• Federal Court of Australia</td>
</tr>
<tr>
<td></td>
<td>• Family Law Council</td>
</tr>
<tr>
<td></td>
<td>• National Legal Aid</td>
</tr>
<tr>
<td></td>
<td>• National Association of Community Legal Centres</td>
</tr>
<tr>
<td></td>
<td>• Australian Bar Association</td>
</tr>
<tr>
<td></td>
<td>• Federal Circuit Court of Australia</td>
</tr>
<tr>
<td></td>
<td>Full details of the stakeholders consulted, questions used to guide consultations and a summary of consultation findings are provided in Appendix B.</td>
</tr>
<tr>
<td>Comparative analysis</td>
<td>KPMG undertook comparative analysis of selected state and international jurisdictions with a view to identifying and comparing opportunities for improvement/better practice.</td>
</tr>
<tr>
<td>Opportunity testing and planning</td>
<td>The initial list of opportunities were tested by considering cost drivers, service deliver and historical performance in order to determine root causes and appropriate solutions and associated risks. KPMG completed tested the proposed reform actions with key stakeholders.</td>
</tr>
</tbody>
</table>


1.3 Context/government policies

A number of important policy drivers have informed this context for this review including the following Government policy positions:

- that the FCC will be established on an independent financial and administrative basis from the FCoA; and

- the need to provide the Australian community with dedicated local registry services in all States and Territories in order to provide equitable access to federal judicial administration.\(^2\)

In addition to these broader contextual and policy considerations, it is important to note that the following assumptions underpin this review:

- It is desirable to maintain, and further develop, a strong federal legal system and its supporting structures.

- The division of jurisdiction of the federal courts vis-à-vis State and Territory courts, as outlined in the Constitution, is out of scope for review and/or comment.

- The Courts are not exempt from accountability and transparency in the expenditure of public money.

- Accessible justice is a fundamental aspect of an effective legal system, and efforts to promote a legal system which is accessible, appropriate, equitable, efficient and effective for litigants, practitioners and the legal system are of paramount concern and must be carefully balanced.

- Any proposed changes or measures in the report are to be made within the limits of existing government policy.

- It is desirable for matters to be heard and determined in the lowest appropriate jurisdiction.

- The current federal legal system is complex and a product of history and evolution, making it difficult to deconstruct and ‘start afresh’.

\(^2\) Refer section 34 of Federal Court of Australia Act 1976 which provides that at least one Registry shall be established in each State, in the Australian Capital Territory and in the Northern Territory and that the Registrar must ensure that at least one Registry in each State is staffed appropriately to discharge the functions of a District Registry, with the staff to include a District Registrar in that State.
• Consideration of the long-term sustainability of the Courts involves two aspects:
  - how efficiently the Courts can work within existing appropriations; and
  - what level of resourcing the Courts need in the future in order to deliver required
    service levels, taking into account factors such as the impost of the Efficiency Dividend,
    allowance for increasing costs (via a Wage Cost Index [WCI] which is currently
    projecting lower growth than the general Consumer Price Index [CPI] and projected
    demand.

• There will be efficiency opportunities that cannot be realised because of existing legislative
  and policy positions.

• Judicial appointments, remuneration decisions and tenure are determined by government
  and independent bodies and are not in control of the courts.

• There is a need to have a transparent method of monitoring and reporting of courts’
  performance, including for monitoring of judicial workload.

1.4 Review limitations

In considering this review, the following limitations are noted:

• Review timeframe. The review was completed within an extremely tight timeframe. Analysis
  undertaken and stakeholders consulted were limited by availability and the review
  timeframe.

• Qualitative and quantitative data. The findings in this review are based on a six-week
  qualitative and qualitative study. The reported performance results also draw on the
  perception of those interviewed for the review and documentation reviewed.

• Data sources. The sources of the information provided are indicated throughout this report. KPMG
  has not sought to independently verify those sources unless otherwise noted within
  the report.

• Financial data. The financial analysis, and therefore an assessment of the financial
  sustainability of the Courts, relies on the base information provided by the Courts.
2 Courts overview

This chapter provides a broad overview of the jurisprudential underpinnings of the FCA, FCoA and FCC and associated operating environment. The Courts operate in a unique environment within a Constitutional framework and accordingly, it is critical to understand the foundations and evolution of the third arm of Government in reviewing the federal court system. This chapter summarises the:

- foundations for the administration of justice, including the role of the courts and the Separation of Powers and Rule of Law doctrines;
- evolution and role of the Courts, including key objectives, jurisdiction and recent developments; and
- Courts’ operating context – including recent review findings, fiscal challenges and emerging demands.

A detailed discussion of the operating environment of each Court is available in Appendices D through to F.

2.1 Administration of justice in Australia

Often referred to as the cornerstone of democracy, the doctrines of the Rule of Law and the Separation of Powers are fundamental tenets of the Australian Constitution as they underpin most Westminster systems of government. Operating collectively, these doctrines are key attributes of modern judicial administration – promoting equity, consistency and transparency in the making, enforcement and interpretation of the law.

Building on Montesquieu’s theories of government and seminal work De L’Espirit des Loix (The Spirit of the Laws), the Separation of Powers doctrine creates three arms of government: the legislature, executive and judiciary. This tripartite approach to the creation, enforcement and interpretation of laws facilitates the balance of power in government, preventing tyranny and arbitrary rule, and preserving individual liberties. As observed by Montesquieu:

*When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty...again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.*

---

The Australian Constitution creates a separation of powers by establishing the Federal Parliament, Executive and Judicature as distinct institutions, vested with separate powers in ss 1, 61 and 71.

Of equal importance, the Rule of Law ensures that all persons are equally subject to the laws enacted by the legislature. The Rule of Law is frequently considered to incorporate two components, as articulated by A V Dicey in the late 19th Century:

1. **Supremacy of law**: the Rule of Law specifies the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, excluding the existence of arbitrariness – creating a situation where persons may only be punished for a breach of law and no other act.

2. **Equality before the law**: the Rule of Law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs the citizens or from the jurisdiction of the ordinary tribunals. 4

In Australia, the supremacy of the Rule of Law is reflected in clause 5 of the preamble to the Constitution (Commonwealth of Australia Constitution Act (Imp) 1900) which states:

>This Act, and all laws made by parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every state and every part of the Commonwealth.

In Australia, whilst the structure of the legislature, executive and judiciary reflects the Separation of Powers doctrine, there is some degree of overlap in the personnel of the legislature and executive. Indeed, the Constitution s 64 requires Ministers to be Members of either the Senate or the House of Representatives within three months of their appointment, while some delegation of law-making power to the Executive is permitted. 5 However, the need to strictly preserve the independence of the judiciary from the executive and legislative arms of government has been affirmed by the High Court of Australia (HCA) on several occasions, which has confirmed that:

- judicial power can only be vested in s 71 courts (i.e. the HCA, federal courts and state courts), and no other body may be vested with judicial power; 6 and
- non-judicial power cannot be vested in s 71 courts. 7

As upheld by the Privy Council in the Boilermaker’s Case:

>In a federal system the absolute independence of the judiciary is the bulwark of the Constitution against encroachment whether by the legislature or by the

---

4 See, for example, Gleeson CJ, ‘Courts and the Rule of Law’ (Speech delivered at the Rule of Law Series, Melbourne 7 November 2001).
5 General Contracting Co Pty Ltd & Meakes v Dingan (1931) 46 CLR 73.
6 New South Wales v Commonwealth (1919) 20 CLR 54.
7 R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254.
executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.8

While there is some debate regarding the erosion of the Boilermaker’s principle in Australia, the judiciary continues to enjoy a strong degree of independence from the Legislative and Executive arms of government.

2.2 The Australian federal court system

Australia’s court hierarchy

The Australian court hierarchy operates in both state/territory and federal jurisdictions and:

- reflects the complexity (or seriousness) of matters being heard; and
- enables superior courts to operate as courts of judicial review or appeal.

Both state/territory and federal jurisdictions have their own hierarchies, although there is some sharing and crossover between these jurisdictions, particularly between Supreme Courts in the states/territories, the FCA and the FCoA.

An overview of the Australian court hierarchy is provided in Figure 2.

---

8 Attorney-General (Commonwealth) v The Queen [1957] AC 288.
Conversely, in New South Wales, all magistrates are coroners and have jurisdiction to conduct an inquest via the coronal jurisdiction of the Local Court of New South Wales.

It is important to note that within certain court levels, a number of specialist jurisdiction courts (such as Indigenous courts, drug courts, etc.) aim to improve the responsiveness of courts to the special needs of particular service users – particularly in state/territory jurisdictions. In addition, tribunals can also improve responsiveness and assist in alleviating the workload of courts – such as the Migration Review Tribunal and the Administrative Appeals Tribunal in the federal law system.

The rationale of the court hierarchy is to enable matters to be heard in the most appropriate forum (having regard to the relative complexity or seriousness of the matter), whilst ensuring that avenues of judicial review or appeal remain in respect of decisions made in lower courts. In
considering the federal law system, this is designed to give effect to the structure outlined in Figure 3.

Figure 3: Australian federal court hierarchy


Notwithstanding this hierarchy, it is important to acknowledge that the FCC enjoys concurrent jurisdiction in relation to General Federal Law matters with the FCA, and Family Law matters with the FCoA. Examples of this concurrent jurisdiction include:

- **Family Law:** Applications concerning spousal and de facto maintenance, property disputes, parenting orders and enforcement of orders made by either the FCC or the FCoA; and
• **General Federal Law:** Matters in areas such as administrative law, bankruptcy, human rights, consumer patterns, privacy, migration, copyright, industrial and admiralty law.\(^9\)

The history, jurisdiction and purpose of the FCA, FCoA and FCC (being the Courts subject to this review) are discussed in further detail below.

**Federal Court of Australia**

**Overview**

Established under the *Federal Court of Australia Act 1976* (Cth), FCA is a superior court of record and a court of law and equity with a strong national presence, sitting in all Australian capital cities and elsewhere on certain occasions. The objectives of the FCA are to:

• decide disputes according to law – as quickly, inexpensively and efficiently as possible and, in so doing, to interpret the statutory law and develop the general law of the Commonwealth, so as to fulfil the role of a court exercising the judicial power of the Commonwealth under the Constitution

• provide an effective registry service for the community, and

• manage the resources allotted by parliament efficiently.\(^10\)

**History**

In the 75 years following federation, the Parliament largely left the exercise of federal jurisdiction to State and Territory courts, with the HCA exercising jurisdiction either exclusively or concurrently with State and Territory courts in a broad range of federal matters. Although establishment of the Federal Court of Bankruptcy in 1930, and the Australian Industrial Court in 1956, enabled exercise of certain federal jurisdiction, the geographical reach of these courts was limited, resulting in a situation where the Parliament ‘made regrettably liberal use of the High Court as a court of original jurisdiction’ until the 1970s.\(^11\)

Recognising the heavy caseload in the HCA’s original jurisdiction, many Australian lawyers began to advocate for establishment of a superior federal court in the 1960s. Advocates argued that establishment of such a court would promote uniformity in the application and interpretation of federal laws, and lift the burden from State and Territory courts exercising federal jurisdiction.\(^12\) While perspectives regarding the jurisdiction of the proposed court differed, and various Parliamentary Bills were defeated in 1967, 1973 and 1974, the eventual *Federal Court of Australia Act 1976* (Cth) created the FCA as a court of limited original and limited appellate jurisdiction.


\(^12\) The Hon Justice Susan Kenny, ‘The evolving jurisdiction of the Federal Court of Australia – administering justice in a federal system’ (Speech delivered at the Seminar on the Jurisdiction of the Federal Courts, National Judicial Institute, Ottawa, 28 October 2011).
appellate jurisdiction. This limited jurisdiction was reflective of the then-Government’s concerns that a general federal court may diminish the status of State and Territory Courts exercising federal jurisdiction, and that ‘only where there are special policy or perhaps historical reasons for doing so should original federal jurisdiction be vested in a federal court’. As such, the original jurisdiction of the FCA was largely limited to industrial matters, bankruptcy, judicial review of administrative decisions and trade practices, although its appellate jurisdiction extended to taxation and certain intellectual property appeals.

**Jurisdiction**

As legislative reforms progressed throughout the 1970s, the FCA’s jurisdiction expanded. Introduction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) enabled the FCA to enhance its status in exercising jurisdiction relating to general administrative law matters, while the introduction of the *Trade Practices Act 1974* (Cth) prohibiting misleading or deceptive conduct by corporations meant that the FCA played an increasing role in mainstream Australian commercial litigation. Legislative changes in the 1980s and 1990s expanded the FCA’s jurisdiction, making it a court of general federal civil law, and in 1983 in particular, the FCA was given jurisdiction with respect to any matter in which a writ of mandamus or prohibition or an injunction were sought against an officer of the Commonwealth. Further reforms introduced under the *Law and Justice Legislation Amendment Act 1997* (Cth) resulted in the FCA acquiring original jurisdiction in respect of any matter in which the Commonwealth sought an injunction or a declaration, arising under the *Constitution* or involving its interpretation, or arising under any laws made by the Parliament, other than a criminal matter. The Explanatory Memorandum to this Bill acknowledged that ‘the jurisdiction gives the Federal Court a greater role in administration of federal laws, by ensuring that the court is able to deal with all matters that are of an essentially federal nature’, making the FCA a court of general federal jurisdiction in civil matters.

While the decision of the HCA in *Re Wakim; Ex parte McNally* ceased part of the cross-vesting jurisdiction scheme, today, the jurisdiction of the FCA is broad and varied, and includes matters such as taxation, human rights, federal administrative law, admiralty, trade practices,

---

13 Refer to the *Federal Court of Australia Act 1976* (Cth) s 19, which original described the original jurisdiction of the FCA as being ‘such original jurisdiction as is vested in it by laws made by the Parliament, being jurisdiction in respect of matters arising under laws made by the Parliament’.


18 See *Judiciary Act 1903* (Cth) s 39B(1). Note that this reflected the terms of the constitutional provision conferring the same jurisdiction on the HCA with respect to the same matters: see *Australian Constitution* s 75(v).


21 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.
native title, intellectual property, industrial relations, corporations and bankruptcy. The FCA’s original jurisdiction is conferred by over 150 statutes of Parliament, and the Court also maintains appellate jurisdiction in matters on appeal from single judges of the Court, from the FCC (in non-family law matters) and Supreme Courts of the States and Territories. In addition, in 2009, the FCA was given jurisdiction in relation to indictable offences for serious cartel conduct. In addition to this jurisdiction, the FCA provides operational support for the Australian Competition Tribunal, Copyright Tribunal, Defence Force Discipline Appeal Tribunal, and in 2012, assumed responsibility for administering the National Native Title Tribunal.

Contemporary operations

The growth of the FCA since its establishment (both in terms of judicial appointments and jurisdiction) is reflective of the increasing prominence and stature of the Court – both nationally and internationally. As noted by Black CJ, ‘as a superior court of record and a penultimate court of appeal in the Australian federal hierarchy, it is unsurprising that the jurisprudence of the FCA is regularly cited by superior courts outside Australia’. The FCA maintains a strong national presence – sitting in all capital cities (and some regional areas, as required), and supports a range of international judicial development programs incorporating collaboration between senior courts across the world (particularly in the Asia-Pacific region), design and provision of technical assistance, capacity building and institutional strengthening projects. It is regarded as an innovative court, pursuing procedural and technological reforms including implementation of the Individual Docket system, development of specialist panels of judges, judicial self-administration and increased use of videoconferencing facilities – and as noted by Black CJ, ‘in light of (the FCA’s) expanding jurisdiction and the increasing complexity of the world in which it exercises its constitutional functions as a Chapter III court, the Federal Court needs to maintain the ideal of its founders that it be a court of excellence, but also the ideal of innovation’.

23 Federal Court of Australia, ‘Courts & Tribunals Administered by the Federal Court’, available at [http://www.fedcourt.gov.au/about/courts-and-tribunals](http://www.fedcourt.gov.au/about/courts-and-tribunals), accessed 5 February 2014. Note that the jurisdiction of the Industrial Relations Court of Australia (IRCA) was transferred to other courts (mainly the FCA) on 25 May 1997; the IRCA continues to exist at law until the last of its judges resigns or retires from office.
Family Court of Australia

Overview

The Family Law Act 1975 (Cth) established the FCoA under Chapter III of the Constitution Ch III. The FCoA is a superior court of record designed to resolve the most complex legal family disputes and commenced operations on 5 January 1976.

The goal of the FCoA is to ‘deliver excellence in service for children, families and parties through effective judicial and non-judicial process and high-quality judgments, while respecting the needs of separating parties’. To this end, the purpose of the FCoA is to:

- determine cases with the most complex law, facts and parties;
- cover specialised areas in family law; and
- provide national coverage as the appellate court in family law matters.

History

Establishment of the FCoA in 1975 represented a significant shift in the paradigm in which family law matters are resolved. In developing a specialised family court, the Australian Government recognised the distinctive nature of family law matters – which, in other common law countries generally comprise part of the broader District Court workload with more difficult first instance work being undertaken by superior courts.28

The Australian approach – with a specialist superior family law court – has meant that the FCoA ‘is held in high regard by the senior courts of England and Wales, as well as in the wider international community’.29 It is also reflective of recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs (the Committee) on the proposed Family Law Bill 1974 (Cth) for ‘a new start in matrimonial law and administration’ which would facilitate a degree of specialisation and professional support (which was not previously available) to enhance the exercise of judicial power in family law.30 To this end, the Committee recommended the FCoA be comprised of two divisions, being:

- a first tier division, with judges having equivalent status to superior (Federal) Court and State Supreme Court judges; and
- a second tier, with judges having equivalent status to District Court judges.

As it transpired, the FCoA was not established as a Court comprising two separate divisions, but rather the Family Law Act 1975 (Cth) facilitated the appointment of Senior Judges (in addition to the Chief Justice) who assumed a dual role function within the ‘appellate division’.

28 The Hon Chief Justice Diana Bryant, ‘Walruses and the Changing Shape of Family Law in Australia’ (Speech delivered at unknown location, 7 November 2008).
29 The Hon Chief Justice Diana Bryant, ‘Walruses and the Changing Shape of Family Law in Australia’ (Speech delivered at unknown location, 7 November 2008).
30 As quoted in The Hon Chief Justice Diana Bryant, ‘Walruses and the Changing Shape of Family Law in Australia’ (Speech delivered at unknown location, 7 November 2008).
Later amendments to the *Family Law Act 1975* (Cth) facilitated the establishment of a separate Appeal Division comprising the Chief Justice, Deputy Chief Justice and up to nine other judges.

The original vision of the FCoA was to create a court more attuned to the needs of family members, and one characterised by less formality and more privacy than is usual in the court system. 31 Key aspects of this included the appointment of judges who were particularly qualified to handle family law matters, the provision of counselling and conciliation services, and an emphasis on litigation as a step of last resort. 32 However, over time, there has been a gradual shift towards formality and transparency in the *Family Law Act 1975* (Cth). Such transition has been prompted by:

- concerns of violence directed at the FCoA and its judges (including the murders of one judge and the wife of another);
- an increasing realisation that small courtrooms and waiting rooms were conducive to tension and violence; and
- complaints that the FCoA was immune to external scrutiny because its proceedings were closed to the public. 33

As such, the formality associated with court proceedings has gradually returned to the FCoA – with the initial prohibition on robing removed in 1988, and the facilitation of open court proceedings since 1983. 34 And, while the welfare of children has always been central to the *Family Law Act 1975* (Cth), the practices and procedures of the FCoA have continually evolved. Most notably, the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) demonstrated a significant change in the legal and philosophical paradigm to parenting orders, through:

- **Shared parental responsibility:** A greater emphasis on shared parental responsibility and the need for both parents to be involved in their children’s lives following separation. This is reflective of a growing body of social sciences and child development literature which seeks emphasise the importance of the child’s (best) interests and the need for child-focused interventions. 35

- **Identification of risk and abuse factors:** An increased understanding of the longer-term impacts of child abuse, family violence, mental health and substance abuse concerns, and the need for a robust risk identification and assessment process in respect of these matters.

---

• **Establishment of Family Relationship Centres**: The 2006 reforms highlighted the need for less adversarial court processes and opportunities for families to manage relationship difficulties outside the courtroom environment where appropriate, particularly through the use of counselling and mediation services at Family Relationship Centres.\(^{36}\)

While the legislated, core services of the FCoA remain akin (albeit expanded) to those envisaged in 1975, the processes surrounding delivery of these core services are more complex. The intersection between the family law system with the broader social services system is increasingly acknowledged – and progress has been made to facilitate improved integration between community-based organisations, Child Protection Services, post-separation cooperative parenting programs and the family law system. This progress recognises the fact that:

• clients accessing the family law system may often receive services from other organisations, and there is a need to minimise duplication whilst facilitating holistic service planning and provision; and

• although judicial intervention is often required to address family law disputes, the issues affecting some families are broader than those that can be addressed via the legal system – frequently requiring support from community organisations, medical practitioners and other specialists.

Such broader scale reforms recognise that while the family law and social services systems are discrete, many clients require support and assistance from both systems – and in order to facilitate holistic, integrated service delivery options, linkages and communication between both systems is necessary.

**Jurisdiction**

In addition to these broader ‘system wide’ or ‘structural’ reforms, over time (and particularly, following establishment of the FCC), the work of the FCoA has evolved, enabling the FCoA to become a smaller, more specialised court that generally deals with appeals and the most complex range of family law cases.\(^{37}\) Such cases include:

• **parenting cases** that involve, for example, a child welfare agency and/or allegations of sexual abuse of serious physical abuse of a child (Magellan cases), family violence and/or mental health issues with other complexities, multiple parties, complex cases where orders sought would have the effect of preventing a parent from communicating with or spending time with a child, multiple expert witnesses, complex questions of law and/or special jurisdictional issues, international child abduction under the Hague Convention, special medical procedures and/or international relocation; and

• **financial cases** that involve multiple parties, valuation of complex interests in trust or corporate structures (including minority interests), multiple expert witnesses, complex

---


questions of law and/or jurisdictional issues (including accrued jurisdiction) or complex issues concerning superannuation (such as complex valuations of defined benefit superannuation schemes).  

In addition to this role as a specialist court, the jurisdiction of the FCoA has expanded in recent years. Most notably, passage of the Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth) brought financial disputes arising out of the breakdown of de facto relationships under the Family Law Act 1975 (Cth).  

As a consequence of this legislation, de facto couples now have access to courts exercising federal family law jurisdiction in property and maintenance matters. This has effectively transferred responsibility for these matters from state and territory jurisdictions to the FCoA (and FCC in respect of its concurrent jurisdiction).

Federal Circuit Court of Australia

Overview

The FCC was established under the Federal Circuit Court of Australia Act 1999 (Cth) as an independent federal court under Chapter III of the Australian Constitution. The FCC is a federal court of record and a court of law and equity with the following objectives:

• to provide a simple and more accessible alternative to litigation in the FCoA and the FCC; and
• to relieve the workload of the superior federal courts.  

History

Increasing demands for the FCoA and FCA, particularly in respect of family law matters arising in the FCoA throughout the 1980s and 1990s led to discussions regarding establishment of a lower-level federal court, termed the Federal Magistrates Court (FMC) or the Federal Magistrates Service. During this time, discussions focused on the need to make justice more accessible and less costly for family law litigants, and to reduce the delays experienced by practitioners and litigants.

While a range of reform models and options were explored, the development of a federal magistracy to undertake less complex civil and family law matters was given in-principle approval designed to deliver the following benefits:

• reduced costs for litigants, particularly through a fixed costs regime;
• reduced waiting times/delays;
• improved access to justice for smaller businesses (who are not as well resourced) and those in regional areas; and

---

39 Note that Western Australia did not confer de facto relationship matters to the Commonwealth.
41 See Department of Parliamentary Services (Cth), Bills Digest, No 59 of 1999-2000, 9 September 1999.
• simpler, more streamlined procedures leading to greater efficiencies.\textsuperscript{42}

The FMC was established by the \textit{Federal Magistrates Act 1999} (Cth) and commenced operations on 20 June 2000.\textsuperscript{43} Designed to operate informally, use streamlined procedures and encourage the use of alternative dispute resolution mechanisms, the FMC marked a change in direction in federal justice administration in Australia. Previously, a lower-level federal court did not exist, so a considerable amount of federal law work had been undertaken in state and territory courts of summary jurisdiction under the provisions of the \textit{Judiciary Act 1903} (Cth). As noted by Gleeson CJ, in referring to the newly-created FMC,:\textsuperscript{44}

\begin{quote}
The Service 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 there is a great deal of work suitable for its attention...I expect that, in time, it will become one of Australia's largest courts.\textsuperscript{44}
\end{quote}

Key features distinguishing the FMC from superior courts relate to its ability to provide simpler and more accessible litigation alternatives. In practice, these features have been reflected in:

• legislative provisions which enable the FCC to operate as informally as possible in the exercise of judicial power;

• the application of streamlined procedures and processes, along with judge-led Case Management with a high level of judicial involvement from the filing of an application;

• use of a range of dispute resolution processes to resolve matters without judicial decisions; and

• regular circuits to regional and rural locations which enable persons living outside major capital cities easier access to the federal court system.\textsuperscript{45}

\textbf{Jurisdiction}

Since its establishment, there has been marked growth in the range and volume of matters heard by the FCC. Its jurisdiction is broad, and includes matters relating to family law and child support, administrative law, admiralty law, bankruptcy, copyright, human rights, industrial law, migration, privacy and trade practices. These jurisdictions operate concurrently with the FCoA and the FCA.

\textsuperscript{42} Department of Parliamentary Services (Cth), \textit{Bills Digest}, No 59 of 1999-2000, 9 September 1999. 
\textsuperscript{43} On 12 April 2013, as a result of its increased jurisdiction, and role as an intermediate court servicing regional centres as well as capital cities, the FMC was renamed the Federal Circuit Court of Australia and its judicial officers received the title ‘Judge’ instead of ‘Federal Magistrate’. This change is further discussed under the heading ‘Contemporary operations’ below. 
\textsuperscript{44} Gleeson CJ, ‘The State of the Judicature’ (Speech delivered at the 13\textsuperscript{th} Commonwealth Law Conference, Melbourne 17 April 2003). 
\textsuperscript{45} Federal Circuit Court of Australia, \textit{Annual Report 2012-13} (Commonwealth of Australia 2013) 2, 22.
The number of acts conferring jurisdiction on the FCC has increased significantly since its establishment – from 16 acts in 1999 to over 70 by 2013. An overview of this increase in jurisdiction, contracted against the number of judicial appointments, is provided in Table 2-1.

Table 2-1: Number of acts conferring jurisdiction on the Federal Circuit Court of Australia (as at 25 September 2012) and number of Federal Circuit Court of Australia/ Federal Magistrates’ Court Magistrates/Judges

<table>
<thead>
<tr>
<th>Year</th>
<th>Existing Acts</th>
<th>New Acts</th>
<th>Total Acts</th>
<th>Number of Magistrates/Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>16</td>
<td>2</td>
<td>18</td>
<td>16</td>
</tr>
<tr>
<td>2001</td>
<td>18</td>
<td>2</td>
<td>20</td>
<td>16</td>
</tr>
<tr>
<td>2002</td>
<td>20</td>
<td>1</td>
<td>21</td>
<td>19</td>
</tr>
<tr>
<td>2003</td>
<td>21</td>
<td>3</td>
<td>24</td>
<td>19</td>
</tr>
<tr>
<td>2004</td>
<td>24</td>
<td>0</td>
<td>24</td>
<td>23</td>
</tr>
<tr>
<td>2005</td>
<td>24</td>
<td>7</td>
<td>31</td>
<td>31</td>
</tr>
<tr>
<td>2006</td>
<td>31</td>
<td>3</td>
<td>34</td>
<td>35</td>
</tr>
<tr>
<td>2007</td>
<td>34</td>
<td>3</td>
<td>37</td>
<td>49</td>
</tr>
<tr>
<td>2008</td>
<td>37</td>
<td>1</td>
<td>38</td>
<td>53</td>
</tr>
<tr>
<td>2009</td>
<td>38</td>
<td>6</td>
<td>44</td>
<td>61</td>
</tr>
<tr>
<td>2010</td>
<td>44</td>
<td>6</td>
<td>50</td>
<td>61</td>
</tr>
<tr>
<td>2011</td>
<td>50</td>
<td>4</td>
<td>54</td>
<td>62</td>
</tr>
<tr>
<td>2012</td>
<td>54</td>
<td>14</td>
<td>68</td>
<td>63</td>
</tr>
<tr>
<td>2013</td>
<td>68</td>
<td>4</td>
<td>72</td>
<td>64</td>
</tr>
<tr>
<td>2014</td>
<td>72</td>
<td>4</td>
<td>76</td>
<td>65</td>
</tr>
</tbody>
</table>

Source: E-mail from Federal Circuit Court of Australia to KPMG, 21 January 2014 (FCC Jurisdiction Acts attachment); E-mail from Federal Circuit Court of Australia to KPMG, 22 January 2014 (Case Management and Trends Presentation); E-mail from Attorney-General’s Department (Access to Justice Division) to KPMG, 17 February 2014. Note that the number of Magistrates/Judges is as at 30 June in each respective year; numbers of acts conferring jurisdiction on the FCC for 2014 are yet to be finalised.

There has been a 375 per cent increase in the number of Acts conferring jurisdiction on the FCC, but only a 300 per cent increase in the number of magistrates/judges. This is potentially (though not conclusively) an indicator that going forward, the FCC will require additional judicial resourcing to adequately manage the increase in its jurisdiction.

Today, the majority of the FCC’s caseload focuses on family law matters, which accounted for 93 per cent of total FCC filings in 2012-13.46 It is noteworthy that of the total number of family law applications made in 2012-13 to the FCC and FCoA, 87 per cent of these were dealt with by the FCC.47

Contemporary operations

Today, it is broadly recognised that the FCC is diverting lower-level matters from the FCoA and the FCA, leaving these courts to receive the more complex matters. In 2012-13, 87 per cent of family law matters were filed in the FCC, and 96 per cent of both migration and bankruptcy

---

applications. In an address to the 2012 Federal Magistrates Plenary, the then Attorney-General noted that the then-FMC was doing “the heavy lifting...to keep the federal judicial system functioning”. 48

In exercising its functions, the FCC employs a judge-led case management model. Immediately upon filing, all matters are allocated directly to an individual judge who will see the matter through to finalisation. This case management model is premised on the FCC’s ‘experience that by playing matters under the oversight of the ultimate decision-maker, it can dispose of a very high volume of work in an efficient and timely manner’. 49 On 12 April 2013, as a result of its increased jurisdiction, and role as an intermediate court servicing regional centres as well as capital cities, the FMC was renamed the FCC and its judicial officers received the title ‘Judge’ instead of ‘Federal Magistrate’. 50 Accompanying this change was a pay increase for the newly-termed judges, with the Remuneration Tribunal conferring an 8.20 per cent pay increase in recognition of the increased jurisdiction and complexity of cases in the FCC. 51 Notwithstanding this salary increase, it is noted that FCC judges do not enjoy the same pension benefits as the FCA and FCoA counterparts. In particular, FCC judges are not entitled to the Judges’ Pensions Scheme (governed by the Judges’ Pensions Act 1968 (Cth)) enjoyed by FCA and FCoA judges (and their spouses, following a judge’s death), but instead receive a superannuation component as part of their salary; this superannuation component is funded via the FCC’s appropriation. 52

2.3 Broader impacts of the courts on economic and social environment

Notwithstanding the above, it is pertinent to note that the federal legal system does not operate in isolation or a solely legal paradigm, but rather is intrinsically linked to broader economic and social relationships between people, organisations and governments. The role (both practical, and symbolic) of the Courts is therefore more than that of a neutral arbiter – but rather is a forum which frames the relationship between state and society, reflecting an accepted set of social, political and economic norms. 53 As the principal forum upholding the rule of law, the court system plays an integral role in a modern democratic society that gives people and organisations confidence that society’s roles (laws) will be respected and upheld, thus underpinning economic and social cooperation. 54

In considering the above, it becomes increasingly apparent that an effective legal system is a contributor to economic growth and prosperity, as well as facilitating (or improving) equality

48 The Hon Nicola Roxon MP, ‘Speech to the Federal Magistrates Plenary’ (Media Release, 26 April 2012).
51 Remuneration Tribunal, Judicial Remuneration – Salaries Payable to the Chief Judge and Judges of the Federal Circuit Court (Statement), 20 May 2013.
between citizens. Given this, the relationship between the federal legal system, rule of law, access to justice and economic development warrants further (brief) analysis.

**Access to justice**

As recognised by the Productivity Commission, access to justice is an essential element of the rule of law and supports a well-functioning, modern democratic society.\(^55\) Justice institutions, including (but not limited to) the federal courts, enable people to protect their rights against infringement by government or other people or bodies in society, and permit parties to bring actions against government to ensure it remain accountable for the exercise of executive power.\(^56\) Continuing checks and balances on the exercise of power are integral to maintenance of the rule of law – and as such, the ability to access legal institutions which facilitate this review process is inextricably linked to an orderly state-society relationship.

While it is broadly acknowledged that access to justice can only ever mean, in the broadest sense, *relatively equitable access to*, and *treatment by*, legal processes, access to justice remains a fundamental tenet of ensuring equality before the law and protection of vulnerable and/or disadvantaged communities.\(^57\) To this end, however, improved access to justice is not solely for the benefit of disadvantaged communities, but leads to broader, community-wide improvements, including:

- the ability for individuals to effectively and fairly resolve their disputes and enforce their legal rights;
- the facilitation of judicial decisions which uphold and shape the economic and social relationships between people, organisations and government, creating valuable precedents which enable other disputes to be resolved more efficiently, improving certainty and reducing the risks and costs involved in transactions;
- the establishment (and use) of mechanisms to resolve disputes lawfully, peacefully and fairly; and
- protection of disadvantaged communities by enabling people to protect their rights against infringement, including by government.\(^58\)

Despite these benefits, it remains a reality that the costs of accessing civil justice can be high – both in terms of financial and other intangible costs. These costs (both real and perceived) inhibit, or at the very least, can prevent, equal access to the legal system. In particular:

- financial costs can arise indirectly from the time and effort expended on resolving a dispute, and more directly from the cost of legal services such as advice, representation, disbursements and court fees;

---


• legal disputes can be complex and take some time to resolve, although unnecessary delays can also be cause by the conduct of the other disputant or system inefficiencies;

• complexities of the law, jurisdictional responsibilities, court practices and procedures – or more simply ‘the process of navigating the legal system’ – can be daunting for the unfamiliar, overtly complicated and result in a lack of understanding and ability to access legal information and assistance; and

• persons in rural and remote areas are often limited in their ability to engage in the legal process – including seeking of legal advice and appearance in court – as the costs of travelling for services are too high.59

These costs of accessing civil justice can dissuade parties from pursuing legal remedies – or, in the first instance, accessing services which may facilitate early dispute resolution. Disputants may forego resolution of their dispute or accept a lesser settlement than they may otherwise be entitled to, thus meaning that their ability to access a justice system to arrive at a fair and equitable outcome is limited.60 Such situations are problematic in the broader context of a society which seeks to uphold the rule of law and promote equality in appearance before, and access to, the legal system.61

These considerations are of particular concern in certain groups which demonstrate increased (and unmet) demand for legal services when contrasted against the broader community. As noted by the Productivity Commission, certain Australians experience particular challenges in accessing justice as a result of their socioeconomic circumstances, language, cultural background, mental and physical wellbeing, or poor literacy and education – with some groups experiencing multiple barriers.62 These issues are further exacerbated when it is noted that some members of these groups are more likely to experience legal problems and/or have more complex needs spanning criminal and civil issues.63 As noted by the Law and Justice Foundation:

In Australia as a whole, people with a disability had significantly higher prevalence of legal problems overall...Indigenous people, the unemployed, single parents, people living in disadvantaged housing and people whose main income was government payments also had significantly higher prevalence according to several measures.64

The difficulties these groups experience in accessing legal remedies is of particular concern to these individuals (as their legal rights may not be recognised or exercised), and is also an indicator of perpetuating disadvantage. However, at a broader level, such difficulties have

64 C Coumarelos et. al., Legal Australia-Wide Survey: Legal Need in Australia (Law and Justice Foundation of NSW 2012) 1.
negative implications for the equitable administration of justice – and community perceptions of the accessibility, usability and effectiveness of the legal system for those it is, at its core, designed to protect. Given that the rule of law plays an important role in defining identity and enabling equitable access to economic and social opportunities, and is a means of developing and enforcing social norms, there remains a need to facilitate equitable access to the legal institutions which maintain and uphold it.

Such access and equity challenges are difficult to address, particularly at a time when financial pressures (discussed further below) may necessitate reductions in existing service delivery levels in order to facilitate ongoing financial sustainability. These competing pressures are not easily resolved, and require detailed consideration of options available to reduce expenditure and their likely impact on litigants, the Courts and the administration of justice.

**Impact of the federal legal system on economic prosperity**

Just as access to justice is a key contributor to maintenance of the rule of law, recognition and enforcement of the rule of law is a key means of reducing corruption, protecting and enforcing legal rights, facilitating due process, good governance and ensuring government is both accountable for, and transparent in, execution of its responsibilities and interactions with people and organisations.65 Given this, it is unsurprising that there is a strong correlation between the rule of law and economic prosperity, as recognised by the World Economic Forum which notes that:

> Governance structures – including an independent judiciary, a strong rule of law, and a highly accountable public sector – ensure a level playing field, enhancing business confidence and thus reinforcing competitiveness.66

In 2012-13, Australia ranked 23 out of 148 countries for the strength of its institutions in the World Economic Forum’s *Global Competitiveness Index* – this ranking reflects the nation’s strengths in creating a ‘sound and fair institutional environment … (which) influences investment decisions, the organisation of production and plays a key role in the ways in which societies distribute the benefits and bear the costs of development strategies and policies’.67 In acknowledging these strengths it is equally important to recall that the inverse relationship also holds true – with the United Nations Development Programme noting the correlation between a weak rule of law and poor socio-economic performance, and further indicating that an effective rule of law is a key facet of economic development, including the protection of individual property rights, guarantee of fair, credible and predictable contract enforcement,

---

labour regulation and facilitation of market creation and access (including for the poor and marginalised).  

In recognising the relationship between an effective legal system and economic growth, it is noted that the FCA, FCoA and FCC collectively contribute to the achievement of broader Government objectives relating to the efficient use of public funds, expediency, certainty and transparency in business transactions, and appropriate enforcement of administrative and judicial decisions. The present Government’s recognition of Australia as being ‘open for business’ and as having an ‘economic future…based on policy principles that allow business to have a fair chance to go for growth’ necessitates a legal system which: 

- is equitable, accessible and efficient for litigants; and
- provides timely resolution of issues, facilitating certainty in business operations and investment decisions.

As recognised by the Australian Law Reform Commission, an effective, well-functioning federal legal system is inextricably related to inbound foreign investment decisions and opportunities for economic growth. Further, The Productivity Commission notes that effective access to justice may also confer a comparative advantage in attracting investment, and in settling trade disputes. As such, the fundamental importance of a strong federal legal system necessitates ongoing innovation, development and investment, to ensure the rule of law is upheld, and a legal framework conducive to economic growth and prosperity is effected.

The importance of a well functioning justice system for economic growth has also been highlighted by the European Commission, as outlined in the case study below.

**Case study: European judicial systems and economic growth**

A 2013 European Commission report analysed comparative information across 27 member states to highlight the criteria and indicators most relevant for improving the business environment and economic growth.

The report found that the efficiency of the justice system, measured by two critical indicators ‘Disposition Time’ and the ‘Clearance Rate’ was clearly linked with the economy and in particular with the most widely used economic indicator, the Gross Domestic Product growth rate.

In terms of potential levers for improving these two indicators, the report suggested that courts

---

69 The Hon Joe Hockey MP, *‘Australia: Open for Business’* (Speech delivered at the American Australian Association, New York, 16 October 2013).
71 Professor David Weisbrot, *‘Reform of the civil justice system and economic growth: Australian experience’* (Speech delivered at the Fundacion ICO Conference, Madrid, 19 October 2000).
of general jurisdiction should:

- reduce caseloads by removing certain types of cases from court dockets;
- consider the use of time standards;
- consider procedural simplification;
- implement specialised courts;
- use technology such as case tracking and management systems, noting that the index of
  systems for registering and managing cases was found to have an impact on the Clearance
  Rate, and similarly, the system for monitoring court activities appeared to be linked to
  Disposition Time. It was noted that such technology benefits only arise if the systems are
  properly implemented and adopted.

In relation to financial resources, the report’s authors noted that there was no clear-cut result
when crossing budget indicators with efficiency indicators, ‘it may mean that there is no need
to modify the amount of budget, but instead to change its distribution and to concentrate
financial resources on items benefiting the efficiency of the system’.

The same broad conclusion was reached for human resources, and the number of judges, the
level in itself not being relevant. The geographical distribution of resources was not found to
play a role in the determination of efficiency indicators.

It should be noted that these comparisons are of member states with varying historical,
geographical, economic and judicial situations. The report also noted that for a few countries,
data on disposition time and clearance rates was not available.

### 2.4 Issues affecting court operations

In acknowledging the unique role of the federal court system (and legal system more broadly)
in maintaining the rule of law, facilitating access to justice and enabling economic growth, it is
recognised that the FCA, FCoA and FCC operate in a broader (constrained) fiscal environment
which necessarily impacts on timely, efficient, equitable access to justice and facilitation of
judicial decision-making. Equally, reported increases in case complexity and changes to the
client profile mean that the courts are operating in a new landscape which presents challenges
to the timely, equitable and efficient administration of justice.

These concerns have not gone unnoticed; the ongoing financial viability of the Courts has been
raised as a concern amongst the judiciary, policymakers and Members of Parliament for some
time. Indeed, the 2008 *Future Governance Options for Federal Family Law Courts in Australia:
Striking the Right Balance* review (the Semple Review), in considering the FCoA and then-FMC
noted that ‘the combined future levels of expenditure will, under current arrangements of the
Family Court and FMC, significantly exceed their annual allocations and are unsustainable for
future years’. More recently, the 2012 Strategic Review of Small and Medium Agencies in the Attorney-General’s Portfolio (the Skehill Review) noted that:

- collectively, the Courts projected total annual deficits of $19.5 million in 2014-15;
- the FCoA had exhausted its remaining cash reserves, and the FMC (as it then was) expected to be in the same position by 2011-12; and
- the FCA noted that its uncommitted reserves were expected to cover projected deficits 2014-15 but no further.

While the Skehill Review was unable to conclude as to whether the Courts were financially viable to operate at acceptable service levels within the current and forward estimates periods at that time, it noted that ‘the data does indicate that the financial position of those Courts warrants further close attention’.

In light of these considerations, this section provides a high-level overview of the key issues affecting court operations and long-term sustainability, including:

- increases in case complexity;
- judicial remuneration increases and application of the Efficiency Dividend to judicial salaries; and
- the level of concurrent jurisdiction between the FCA and FCC, and FCoA and FCC.

**Increases in case complexity**

Increasing case complexity has consistently been highlighted by the courts, judiciary and court users as a growing challenge facing all three courts, most clearly apparent in the Family Law jurisdiction. This reported increase in complexity relates to both the complicated nature of the legal issues to be determined, particularly in the superior courts, as well as the increasingly complex profile of clients appearing before the Court.

The nature of the matters appearing before each court suggests an increase in overarching case complexity, which inevitably impacts on the ability of the Courts to service current workload levels. Although there is no agreed measure of ‘case complexity’, indicators include (but are not limited to):

- in the family law arena, the incidence of Notices of Abuse or Risk of Family Violence filed (particularly those which are included on the Magellan List);
- changes in court user profiles, specifically increases in the prevalence of self-represented litigants and class actions; and

• trial lengths.

In addition, stakeholder feedback highlighted increasing complexity in the legal issues to be addressed in General Federal Law matters, as advances in technology and development drive increased complexity in legal challenges between businesses (for example, with respect to Intellectual Property litigation), while anecdotally, the families being supported through the Family Law system present with increasingly challenging considerations, including mental health, drug and alcohol and family violence issues.

**Notices of Abuse or Risk of Family Violence**

In applying for Parenting Orders under the *Family Law Act 1975* (Cth) Part VII, a party may file a Notice of Abuse or Risk of Family Violence in instances where there has been (or is a risk of) abuse of a child or family violence. Under the *Family Law Act 1975* (Cth) s 60K, the Court must consider and take action on Notices of Risk or Abuse of Family Violence within seven days, and dealt with within 28 days of filing.

Over time, there has been an increase in the total number of applications lodged which incorporate a notice of Child Abuse or Risk of Family Violence in the FCoA and FCC – rising from 1,462 in 2009-10 to 4,607 in 2012-13 – a 215 per cent increase over three years. Further, in 2012-13, 14.4 per cent of Final Order cases in the FCoA included a Notice of Child Abuse or Risk of Family Violence filed. An overview of recent lodgement trends is available in Figure 4.

---

76 E-mail from Family Court of Australia and Federal Circuit Court of Australia to KPMG, 22 January 2014 (Family Violence Lodgement Trend). Note that a change in the definition family violence definitions and rules was introduced on 1 July 2012 and is likely to be a contributing factor to this significant growth.

A significant driver of this growth (particularly between 2011-12 and 2012-13) is the change in definition of ‘family violence’ introduced on 1 July 2012. The Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth) introduced a broader definition of ‘family violence’ and ‘abuse’ to reflect a contemporary understanding of what family violence and abuse is, namely:

- ‘family violence’ is behaviour which coerces, controls or causes fear in a family member;\(^{78}\)
- ‘abuse’ includes assault, sexual activity involving a child, psychological harm (including through family violence) and serious neglect.\(^{79}\)

In broadening these definitions, the scope of behaviours which may constitute ‘family violence’ or ‘abuse’ has extended, and therefore the incidence in which Notices of Child Abuse or Risk of Family Violence may be filed has necessarily expanded. Given the tight deadlines associated with such applications, and the need to proactively manage cases in which such a notice has been filed, this reform has inevitably impacted on the Courts’ workload.

**Magellan cases**

However, while the number of Notices of Abuse or Family Violence filed is increasing, the matters at the most serious end of the spectrum – Magellan cases – appear to be decreasing.

Source: E-mail from Family Court of Australia and Federal Circuit Court of Australia to KPMG, 22 January 2014 (Family Violence Lodgement Trend).

---

\(^{78}\) Family Law Act 1975 (Cth) s 4AB.

\(^{79}\) Family Law Act 1975 (Cth) s 4(1).
sexual or physical abuse of children in post-separation parenting matters.80 Following a successful pilot, the Magellan program was rolled out across all family law registries by 2003,81 and it now relies on such cases being managed by a small team consisting of a judge, a registrar and a family consultant which seeks to work on each case for start to finish, with the aim of the completion within six months from the case being listed.82 A key feature of the program is strong interagency coordination, particularly with state and territory child protection agencies to ensure that problems are dealt with efficiently and that high-quality information is shared. In addition, an independent children’s lawyer is appointed in every Magellan case, for which legal aid is uncapped.83 Despite the wider definition of family violence introduced in 2012, the FCoA’s approach which requires each matter which may constitute a Magellan case to be assessed for eligibility/suitability under the Magellan program, means that there is no automatic correlation between the broader definition of family violence and a higher number of Magellan cases. The number of Magellan cases is illustrated in Figure 5.

---

81 Daryl Higgins, Cooperation and Coordination: An evaluation of the Family Court of Australia’s Magellan case-management model (Family Court of Australia and Australian Institute of Family Studies 2007) 14.
83 Family Court of Australia, Annual Report 2012-13 (Commonwealth of Australia 2013) 58.
As illustrated in Figure 5, there has been a general decline in the number of Magellan cases over the 2008-09 to 2012-13 period. No definitive explanation regarding the circumstances contributing to this decline has been provided, although it is noted that Child Protection has been an area of significant focus in several states and territories over recent years. It may be the case that children’s needs are being identified and addressed at an earlier point in time through the Child Protection Service, which may reduce the number of Magellan cases in the FCoA.

The decline in Magellan cases is not suggestive of the fact that the Courts (specifically the FCoA) are experiencing a decline in overarching case complexity – indeed, as discussed earlier, the number of Notices of Abuse or Family Violence is increasing – however, it does recognise that case complexity is a long-standing consideration of the Courts. In an environment of already-scarce court resources, case complexity, particularly if increasing, is a key consideration impacting on the Courts’ ability to adequately service the needs of litigants at current (or improved) service levels.

It is further noted that the current study on complexity being undertaken within the FCoA (based on a review of a sample of Family Reports prepared by the Court’s Family Consultants) may provide further evidence of the trend towards increased complexity of the client cohort.

It can also be seen that community expectations around the approach to be taken by courts in determining legal issues can also be a driver of complexity. For example, it has been suggested that changes to the definition of family violence has led to a more risk averse approach to management of these cases, with impacts for complexity of processes related to a matter, as well as the timely throughput of these matters through the court system. Stakeholders suggested that in parallel with State and Territory legal systems, better practice standards and processes have demanded additional steps be taken to ensure the appropriate consideration of
these matters, in line with changing community expectations and attitudes. This is said to reflect a broader shift in the management of complex and sometimes intractable matters beyond the court system, across policing, other justice and child protection agencies.

Changes in court user profiles

The changing profile of court users – and the supports and services they require, specifically in matters where there are self-represented litigants or class actions – necessarily impacts on purported increases in case complexity. Such factors do not inherently make the ‘case’ presented more complex, but rather the additional supports, infrastructure and services required to accommodate the needs of these court users can result in lengthier court appearances and trials in order to facilitate equitable access to justice.

Self-represented litigants

A number of stakeholders reflected on the perceived increase in self-represented litigants appearing before the courts across all jurisdictions. Self-represented litigants, being those persons party to a dispute without legal representation at either one or more stages of a legal proceeding, has become an increasing issue over recent years, particularly in relation to family law matters. The requirement for the court to provide support and guidance for these parties through the litigation process leads to delays in the hearing of matters, as well as the potential for perceptions of bias on the part of the court, where an unrepresented party is considered to be receiving favourable treatment through the course of a hearing.

Actual numbers of self-represented litigants are difficult to quantify as the status of a litigant’s legal representation may change during their case. However, data from the FCoA suggests that since 2010-11 the incidence of self-represented litigants is slowly increasing, and in 2012-13 almost one-third of finalised cases had both parties with no legal representation, or only one party with legal representation, as illustrated in Figure 6.

The FCC has also experienced an increase in the proportion of self-represented litigants. Most notably, the proportion of self-represented litigants at Final Application defended hearings almost doubled between 2011-12 and 2012-13 – increasing from six per cent to 12 per cent, as illustrated in Figure 7.

As noted by the FCoA, self-represented litigants ‘add a layer of complexity because they need more assistance to navigate the court system and require additional help and guidance to abide...
by the Family Law Rules and procedures’. In particular, they present challenges to the role of the judge and other court officers in the legal process – as they are required to spend more time explaining legal processes and requirements to litigants to ensure they are appropriately informed of their rights and obligations and afforded access to both due process and justice. This extends hearing and trial lengths, and moves away from the independent, neutral arbiter role a judge is traditionally required to fill, to one which is tending towards support (perhaps advocacy) for the unrepresented party.

It is also noted that the circumstances surrounding why a litigant is self-represented are complex. Whilst reductions in Legal Aid funding (particularly in Victoria) are a contributing factor, not all litigants are self-represented because they cannot afford legal representation and do not qualify for Legal Aid assistance. Stakeholders consulted noted that some (and in their opinion, a growing number of) self-represented litigants did not qualify for Legal Aid assistance, however did not have sufficient funds for private legal representation. Further, research undertaken by Dewar et. al., noted that although most litigants were self-represented as they could not afford legal representation, some chose not to use a lawyer because they felt they did not need, or did not want, one. While empirical research on this point is limited, in referring to those self-represented litigants who did not need (or want) a lawyer, suggestions have been made that such litigants may be vexatious, bringing unmeritorious cases or seeking to further harass their former partner through protracted (and repeat) court proceedings. While there is a need to facilitate access to justice, this must be considered in light of the consumption of excessive court resources and potential abuse of process.

Class actions

Similar to self-represented litigants in family law matters, the growth of class actions in the FCA presents an additional driver of demand for Court services. Class actions, by which a representative applicant commences proceedings for the benefit of a defined group of persons (as opposed to pursuing claims on an individual basis) have been available in the FCA since 4 March 1992. As noted by law firms, class actions are now ‘an established part of the litigation landscape’, and ‘in recent years, Australia has become the most likely jurisdiction outside of the United States in which a corporation will face significant class action litigation’. Recent developments in the Australian legal landscape have driven sustained, long-term growth in class actions, including:

- the acceptance of third-party litigation funding;

---

85 Family Court of Australia, Annual Report 2012-13 (Commonwealth of Australia 2013) 55.
88 John Dewar et. al., Litigants in Person in the Family Court of Australia, Research Report No. 20, Family Court of Australia, 2000.
91 Allens Linklaters, Class Actions in Australia (Allens Linklaters 2013) 1.
• the introduction of, and amendment to, court procedures, rules and regimes directed at facilitating the bringing of class actions;
• a growing focus on corporate governance and the role of private litigation in enforcement and deterrence; and
• changes to work practices in traditional plaintiff law firms – moving from a focus on personal injury law to class actions as significant business opportunities – and further leveraging of these business opportunities by firms other than those traditionally focused on plaintiff causes of action.92

While recent empirical data relating to the prevalence of class actions is limited, research undertaken by Morabito et. al. in 2009 noted that the number of class actions being commenced in the three year period following the 2006 HCA ruling confirming the validity of third-party litigation funding tripled (when compared to the number of actions commenced in the three years prior).93 This finding, coupled with an increasingly favourable legal environment for the commencement of class actions, suggests that, contrary to purported ‘perfect storm’ conditions for class actions, there will be a steady growth in the number of class actions commenced in the future.94 Such growth in class actions – however steady – will inevitably result in increased demand for the FCA’s services, acknowledging the complex, lengthy nature of such matters.

**Length of trials**

Increasingly complex cases require a high level of judicial case management and time in both hearing the matter and writing potentially lengthy judgments with a multitude of complex issues of fact or law. As such, an increased trial length can be considered an indicator of increasing case complexity.

Not all Courts report on the length of trials, but instead report on specific Key Performance Indicators (KPIs) relating to the age of matters (i.e. less than six months, 6-12 months, over 12 months, etc.). However, in its most recent annual report, the FCA provided an overview of trial lengths between 2009 and 2013, as illustrated in Figure 8.

---

92 Allens Linklaters, *Class Actions in Australia* (Allens Linklaters 2013) 3.
Figure 8 indicates that the FCA is experiencing an increase in case complexity, as demonstrated through increased trial lengths. In particular, between 2009 and 2013:

- there has been a 20 per cent reduction in the number of ‘less complex’ trials which are determined in five days or more; while in parallel

- there has been a significant increase in the number of ‘more complex’ trials, with a 263 per cent increase in the number of trials determined in 15 days or more, and a 217 per cent increase in the number of trials determined in 20 days or more (noting the small base figure).

In summary, case complexity may contribute to an increase in workload, particularly in matters where there are family violence concerns, self-represented litigants, or in class actions, however given there is limited data on such matters, and their impact on timeliness and court resources, this limits an accurate understanding of their impact on current workload and development of a fulsome analysis of projected workload(s).

**Judicial remuneration**

In Australia, whilst various rules and customs contribute to the protection of judicial independence, few are more pronounced than remuneration protection and security of tenure. In particular, the Constitution's 72 provides that the Justices of the HCA and other courts created by Parliament:

- are to be appointed by the Governor-General in Council;\(^{95}\)

---

\(^{95}\) Constitution s 72(i).
can only be removed by the Governor-General on an address from both the House of Representatives and the Senate on the ground of proved misbehaviour or incapacity; 96

- are to receive remuneration as fixed by the Parliament, but this must not be diminished during their tenure. 97

- In addition to this, once appointed, judicial officers hold office until the age of 70 or until they retire. 98 As such, judicial salary costs are of a long-term nature, and, given that the Courts have no discretion to appoint or not appoint judicial officers, and no capacity to adjust the number of judicial officers once appointed, the Courts have no scope to reduce this expense. Indeed, the Remuneration Tribunal is responsible for setting judicial salaries, and their increases – which vary from 2.40 to 9.20 per cent, as illustrated in Table 2-2.

96 Constitution s 72(ii).
97 Constitution s 72(iii).
98 Constitution s 72.
## Table 2-2: Remuneration Tribunal salary determinations (1999-2000 to 2013-14)

<table>
<thead>
<tr>
<th>Year</th>
<th>Det. No.</th>
<th>High Court of Australia</th>
<th>Federal Court of Australia</th>
<th>Family Court of Australia</th>
<th>% inc on prior</th>
<th>Federal Circuit Court of Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Chief Justice</td>
<td>Other Judges</td>
<td>Chief Justice</td>
<td>Other Judges</td>
<td>Chief Justice</td>
</tr>
<tr>
<td>99-00</td>
<td>1999/13-17</td>
<td>$264,600</td>
<td>$240,100</td>
<td>$224,000</td>
<td>$203,500</td>
<td>$224,000</td>
</tr>
<tr>
<td>00-01</td>
<td>2000/13</td>
<td>$276,800</td>
<td>$251,200</td>
<td>$234,400</td>
<td>$212,900</td>
<td>$234,400</td>
</tr>
<tr>
<td>01-02</td>
<td>2001/23</td>
<td>$287,900</td>
<td>$261,300</td>
<td>$243,800</td>
<td>$221,500</td>
<td>$243,800</td>
</tr>
<tr>
<td>02-03</td>
<td>2002/21</td>
<td>$308,100</td>
<td>$279,600</td>
<td>$260,900</td>
<td>$237,100</td>
<td>$260,900</td>
</tr>
<tr>
<td>03-04</td>
<td>2003/12</td>
<td>$336,450</td>
<td>$305,330</td>
<td>$284,910</td>
<td>$258,920</td>
<td>$284,910</td>
</tr>
<tr>
<td>04-05</td>
<td>2004/14</td>
<td>$336,450</td>
<td>$305,330</td>
<td>$284,910</td>
<td>$258,920</td>
<td>$284,910</td>
</tr>
<tr>
<td></td>
<td>2004/17</td>
<td>$367,060</td>
<td>$333,100</td>
<td>$310,830</td>
<td>$282,470</td>
<td>$310,830</td>
</tr>
<tr>
<td></td>
<td>2004/23</td>
<td>$367,060</td>
<td>$333,100</td>
<td>$310,830</td>
<td>$282,470</td>
<td>$310,830</td>
</tr>
<tr>
<td>05-06</td>
<td>2005/11</td>
<td>$382,110</td>
<td>$346,760</td>
<td>$323,580</td>
<td>$294,060</td>
<td>$323,580</td>
</tr>
<tr>
<td>06-07</td>
<td>2006/10</td>
<td>$398,930</td>
<td>$362,020</td>
<td>$337,820</td>
<td>$307,000</td>
<td>$337,820</td>
</tr>
<tr>
<td>07-08</td>
<td>2007/11</td>
<td>$415,690</td>
<td>$377,230</td>
<td>$352,010</td>
<td>$319,900</td>
<td>$352,010</td>
</tr>
<tr>
<td>08-09</td>
<td>2008/09</td>
<td>$433,570</td>
<td>$393,460</td>
<td>$367,150</td>
<td>$333,660</td>
<td>$367,150</td>
</tr>
<tr>
<td>09-10</td>
<td>2009/07</td>
<td>$433,570</td>
<td>$393,460</td>
<td>$367,150</td>
<td>$333,660</td>
<td>$367,150</td>
</tr>
<tr>
<td></td>
<td>2009/17</td>
<td>$446,580</td>
<td>$405,270</td>
<td>$378,170</td>
<td>$343,670</td>
<td>$378,170</td>
</tr>
</tbody>
</table>

© 2014 KPMG, an Australian partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity. All rights reserved. The KPMG name, logo and “cutting through complexity” are registered trademarks or trademarks of KPMG International Cooperative (“KPMG International”). Liability limited by a scheme approved under Professional Standards Legislation.
<table>
<thead>
<tr>
<th>Year</th>
<th>Det. No.</th>
<th>High Court of Australia</th>
<th>Federal Court of Australia</th>
<th>Family Court of Australia</th>
<th>% inc on prior</th>
<th>Federal Circuit Court of Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Chief Justice</td>
<td>Other Judges</td>
<td>Chief Justice</td>
<td>Other Judges</td>
<td>Chief Justice</td>
</tr>
<tr>
<td>10-11</td>
<td>2010/03</td>
<td>$460,080</td>
<td>$417,530</td>
<td>$389,610</td>
<td>$354,070</td>
<td>$389,610</td>
</tr>
<tr>
<td></td>
<td>2010/12</td>
<td>$478,950</td>
<td>$434,650</td>
<td>$405,590</td>
<td>$368,590</td>
<td>$405,590</td>
</tr>
<tr>
<td></td>
<td>2010/19</td>
<td>$486,140</td>
<td>$441,170</td>
<td>$411,680</td>
<td>$374,120</td>
<td>$411,680</td>
</tr>
<tr>
<td>11-12</td>
<td>2011/05</td>
<td>$493,440</td>
<td>$447,790</td>
<td>$417,680</td>
<td>$379,640</td>
<td>$417,680</td>
</tr>
<tr>
<td></td>
<td>2011/10</td>
<td>$508,250</td>
<td>$461,230</td>
<td>$430,400</td>
<td>$391,140</td>
<td>$430,400</td>
</tr>
<tr>
<td>12-13</td>
<td>2012/09</td>
<td>$523,500</td>
<td>$475,070</td>
<td>$443,320</td>
<td>$402,880</td>
<td>$443,320</td>
</tr>
<tr>
<td></td>
<td>2013/06</td>
<td>$523,500</td>
<td>$475,070</td>
<td>$443,320</td>
<td>$402,880</td>
<td>$443,320</td>
</tr>
</tbody>
</table>

Source: E-mail from Federal Circuit Court of Australia to KPMG, 21 January 2014 (Remuneration Tribunal Determinations and Pay Increases); Remuneration Tribunal, Determination 2012/12 (Australian Government 2012); Remuneration Tribunal, Determination 2012/09 (Australian Government 2012); Remuneration Tribunal, Determination 2011/05 (Australian Government 2011); Remuneration Tribunal, Determination 2010/19 (Australian Government 2010); Remuneration Tribunal, Determination 2010/12 (Australian Government 2010); Remuneration Tribunal, Determination 2009/17 (Australian Government 2009); Remuneration Tribunal, Determination 2009/07 (Australian Government 2009); Remuneration Tribunal, Determination 2008/09 (Australian Government 2008); Remuneration Tribunal, Determination 2007/11 (Australian Government 2007); Remuneration Tribunal, Determination 2006/10 (Australian Government 2006); Remuneration Tribunal, Determination 2005/11 (Australian Government 2005); Remuneration Tribunal, Determination 2004/17 (Australian Government 2004); Remuneration Tribunal, Determination 2004/14 (Australian Government 2004). Note that Remuneration Tribunal determinations prior to 2004 are not publicly available on the Remuneration Tribunal website.
The impact of this expense on the Courts’ budget position is magnified by the operation of the Efficiency Dividend, a Government measure requiring agencies to find and return savings to the budget which is applied broadly to general appropriation across the Commonwealth. The application of the Efficiency Dividend to Court budgets is somewhat problematic, as:

- the Courts have no capacity to yield savings from judicial salaries, which are non-discretionary expense and cannot be reduced; and
- while not inconsistent with s 72(iii) of the Constitution, application of the Efficiency Dividend does sit uncomfortably with the principle that a judicial officer’s salary should not be diminished. This has been recognised by the HCA, which facilitates payment of judicial salaries from a Special Appropriation (which is not subject to the Efficiency Dividend),99 whilst judicial salaries for FCA, FCoA and FCC judges are paid from the Departmental Appropriations for each Court, leading to the application of the Efficiency Dividend to these salaries.100

Over the long term, the impact of the Efficiency Dividend has meant that the FCA, FCoA and, to a lesser degree (given its relative infancy), the FCC, have been required to seek efficiencies in other areas of discretionary expenditure. This has meant that, over time, the Efficiency Dividend has had a disproportionately large impact on these areas of discretionary expenditure – meaning that greater savings and efficiencies in these areas of discretionary expenditure have had to be realised than may otherwise be the case, resulting in longer-term budget pressures on the Courts.

Key Finding 1

There are a number of pressures impacting on the Courts’ operating environment which are outside their control, including increasing case complexity and rising judicial remuneration costs. These have consequential impacts on court activity and workload, as well as financial drivers, and are an important part of the contextual backdrop for this review.

Levels of concurrent jurisdiction

The level of concurrent jurisdiction across the three Courts is considerably higher than that seen in other jurisdictions (particularly between Superior and Country/District/Magistrates courts in the States and Territories). This is due to a number of factors, including:

- gradual evolution and expansion in jurisdiction of the FCC;
- difficulties associated in adequately identifying features contributing to case ‘complexity’, which would enable more complex cases to be heard in the FCA and FCoA, and less complex cases in the FCC;

---

• a lack of similar ‘distinguishing’ features seen in other jurisdictions which would ordinarily result in clear(er) delineation of jurisdictional requirements, such as indictable/summary offences and sentence length(s) in State and Territory criminal jurisdictions; and

• limited clarity (and application) of guidance material relating to the most appropriate jurisdiction in which to file matters. A key example of this is the Protocol for the division of work between the Family Court of Australia and the Federal Circuit Court, which specifies that if a matter proceeds to a final hearing which is likely to take in excess of four days of hearing time, it is to be filed in the FCoA. Consultations with court users and family law stakeholders have indicated that over time, adherence to this guideline has eroded, and lengthy family law hearings are now frequent in the FCC.

It is noted that the concurrent jurisdiction of the superior courts and FCC is mirrored in the Courts’ registry structure, with registry support provided by each superior court to the FCC, depending on the jurisdiction of matters.

The incidence of transfers between the FCC and FCA/FCoA is an indicator of the level of concurrent jurisdiction between the Courts. Drawing on Family Law performance reporting in the FCoA and FCC for 2012-13, it would appear the majority of Family Law Final Order transfers involve Final Order applications being filed in the FCC and transferred to the FCoA (443 applications were transferred away from the FCoA to the FCC in 2012-13, while 671 were transferred to the FCoA over this time period). As such:

• a relatively high number of Final Order applications are transferred from the FCoA to the FCC (16 per cent of the total number of Final Order applications filed in the FCoA); however

• a relatively low number of Final Order applications are transferred from the FCC to the FCoA (four per cent of the total number of Final Order applications filed in the FCC). 102

This suggests that existing arrangements are conducive to matter being transferred to the lowest appropriate jurisdiction. However, it is difficult to reconcile with the fact that there are two superior courts – the FCA and the FCoA – which, to a significant degree, share jurisdiction with the lower-level (intermediate) court, the FCC. Such a structure does not incentivise the hearing of matters in the lowest appropriate jurisdiction.

Key Finding 2

The current federal court structure with high levels of concurrent jurisdiction and the existence of two superior courts is anomalous, and the result of history and evolution. The current structure does not adequately incentivise the hearing of matters in the lowest appropriate jurisdiction.

101 Family Court of Australia, Summary of Final Orders Applications in the Federal Circuit Court 2012-13 (Family Court of Australia 2013); Family Court of Australia, Summary of Final Orders Applications in the Family Court of Australia 2012-13 (Family Court of Australia 2013).

102 Family Court of Australia, Summary of Final Orders Applications in the Federal Circuit Court 2012-13 (Family Court of Australia 2013); Family Court of Australia, Summary of Final Orders Applications in the Family Court of Australia 2012-13 (Family Court of Australia 2013).
3 Performance of the federal court system

3.1 Introduction

In examining the performance of the federal court system, it is important to measure and analyse both operational and financial considerations. In this way, a holistic exploration of the performance of the courts is facilitated, leading to a more robust assessment of the degree to which the courts have met their service delivery and budgetary objectives.

In any analysis of performance, it is essential to recognise that some elements which go to the calculation of performance will necessarily be beyond the Courts’ control. Courts are required to afford justice to the Australian community in an impartial and accessible manner, and accordingly, in some respects have limited control over demand for their services.

A number of factors combine to increase demand within the court system, not only with respect to rising application numbers, but also the complexity, and identity, of those matters and individuals coming before the court. Added to that increasing areas of jurisdiction as a result of changing government policy and legislation, which influences the breadth of matters before the courts, along with the changing community expectations around how these matters will be dealt with, and it becomes clear the challenge for courts in adequately servicing demand within existing operational and financial constraints is multi-faceted and complex task.

3.2 Demand management

The profile of matters heard across the federal court system has changed over time, across multiple indicators including case profile, volume and timeliness measures. Performance monitoring is also an essential element of promoting effective court operations and judicial performance.

Caseload profile

General Federal Law and Family Law matters are filed and determined around Australia, with the FCA and FCoA providing registry support to the FCC with respect to applications for each jurisdiction. Figure and Figure 10 provide an overview of the resourcing allocated to General Federal Law and Family Law activities in registry locations across Australia, as well as an overview of the overall filings by location in 2012-13.
Figure 9: Registry locations for General Federal Law matters

Sources: Federal Circuit Court of Australia, Annual Report 2012-13 (Commonwealth of Australia 2013), Applications and FTE: E-mails Director, Court Services, Strategy and Policy, Family Court & Federal Circuit Court 22 and 23 January 2014, Applications and FTE: E-mails from Deputy Registrar, Principal Registry, Federal Court of Australia, 17 January 2014, E-mail from Executive Director, Corporate Services, Federal Court of Australia, 21 January 2014 and KPMG analysis.

Note: Chief Justice and Judges have not been included in FTE or ASL count; the FCC undertakes circuits to a number of rural/regional locations in Australia in respect of General Federal Law matters.

Staff have been grouped against the following key functions:

- **District Registry**: comprising the registry locations in each State and Territory.
- **Principal Registry**: comprising the executive area (CEO and support), International Programs Unit, and Corporate Services (Finance, IT, HR, Property/Contracts).
• **Principal Registry National**: including the chambers of the Chief Justice, staff involved in organising Full Court hearings, and the Native Title Unit (as distinct from the Native Title Tribunal).

• **NNTT**: comprising staff associated with the National Native Title Tribunal.

The majority of the Principal Registry staff are located in Sydney, with District Registry staff located around Australia, in higher concentration in the high-volume registries.

*Figure 10: Registry and circuit locations for Family Law matters*

Sources: Family Court of Australia Annual Report 2012-13 (Commonwealth of Australia 2013) Court list, Table 2.3; Applications and FTE: E-mails Director, Court Services, Strategy and Policy, Family Court & Federal Circuit Court 22 and 23 January 2014, and KPMG analysis. Note that ASL data is not available for smaller Family Law registry locations (e.g. Wollongong, Albury).

Staff servicing the Family Law jurisdiction have been grouped against the following key functions:

• **Registry**: comprising Principal Registrar, Senior Registrar, Registrars, judicial support, senior registrar support, client services, Director Child Dispute Services, Family consultants and indigenous liaison officers.
• **Corporate Services**: comprising administration, Executive Director Corporate, ICTS, CS and Support, and statistics.

• **Executive**: comprising Chief Justice Support, Chief Judge support, CEO and CEO support.

The bulk of the Corporate Services and Executive staff are located in Canberra as part of the National Support Office, while registry support is allocated to registry locations around Australia.

Table 3-1 and Table 3-2 provide an overview of the number of General Federal Law and Family Law applications filed in each registry location in 2012-13. These filing volumes are contrasted against registry staff allocation in each location.

### Table 3-1: General Federal Law filings and Registry staff allocation 2012-13

<table>
<thead>
<tr>
<th>Location</th>
<th>No. District Registry staff (ASL + FTE) (2012-13)</th>
<th>No. General Federal Law Applications (2012-13)</th>
<th>No. Filings per Registry Staff Member</th>
<th>Variance from Nationwide Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Perth</td>
<td>28.00</td>
<td>803</td>
<td>28.68</td>
<td>-28%</td>
</tr>
<tr>
<td>Darwin</td>
<td>4.04</td>
<td>44</td>
<td>10.89</td>
<td>-72%</td>
</tr>
<tr>
<td>Cairns</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Brisbane</td>
<td>35.00</td>
<td>1,954</td>
<td>55.83</td>
<td>41%</td>
</tr>
<tr>
<td>Sydney</td>
<td>97.08</td>
<td>5,738</td>
<td>59.11</td>
<td>49%</td>
</tr>
<tr>
<td>Canberra</td>
<td>4.00</td>
<td>199</td>
<td>49.75</td>
<td>26%</td>
</tr>
<tr>
<td>Melbourne</td>
<td>61.03</td>
<td>3,176</td>
<td>52.04</td>
<td>31%</td>
</tr>
<tr>
<td>Hobart</td>
<td>4.00</td>
<td>103</td>
<td>25.75</td>
<td>-35%</td>
</tr>
<tr>
<td>Adelaide</td>
<td>22.16</td>
<td>768</td>
<td>34.66</td>
<td>-12%</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>39.59</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Sources: Federal Circuit Court of Australia, *Annual Report 2012-13* (Commonwealth of Australia 2013), E-mails from Director, Court Services, Strategy and Policy, Family Court & Federal Circuit Court to KPMG (Applications and FTE), 22 and 23 January 2014, E-mails from Deputy Registrar, Principal Registry, Federal Court of Australia to KPMG, 17 January 2014, E-mail from Executive Director, Corporate Services, Federal Court of Australia to KPMG, 21 January 2014 and KPMG analysis. Note that the number of District Registry staff are provided in FTE + ASL.

### Table 3-2: Family Law filings and Registry staff allocation 2012-13

<table>
<thead>
<tr>
<th>Location</th>
<th>No. Registry staff (ASL)</th>
<th>No. Family Law Applications (2012-13)</th>
<th>No. Filings per Registry Staff Member</th>
<th>Variance from Nationwide Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>Darwin</td>
<td>5.92</td>
<td>1,111</td>
<td>187.67</td>
<td>-10%</td>
</tr>
<tr>
<td>Townsville</td>
<td>20.40</td>
<td>3,780</td>
<td>185.29</td>
<td>-12%</td>
</tr>
<tr>
<td>Brisbane</td>
<td>93.49</td>
<td>21,982</td>
<td>235.13</td>
<td>12%</td>
</tr>
<tr>
<td>Newcastle</td>
<td>28.84</td>
<td>5,813</td>
<td>201.56</td>
<td>-4%</td>
</tr>
<tr>
<td>Location</td>
<td>No. Registry staff (ASL)</td>
<td>No. Family Law Applications (2012-13)</td>
<td>No. Filings per Registry Staff Member</td>
<td>Variance from Nationwide Average</td>
</tr>
<tr>
<td>----------</td>
<td>--------------------------</td>
<td>--------------------------------------</td>
<td>-------------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>Sydney</td>
<td>99.98</td>
<td>14,805</td>
<td>148.08</td>
<td>-29%</td>
</tr>
<tr>
<td>Parramatta</td>
<td>47.65</td>
<td>10,014</td>
<td>210.16</td>
<td>0%</td>
</tr>
<tr>
<td>Canberra</td>
<td>16.63</td>
<td>3,400</td>
<td>204.45</td>
<td>-2%</td>
</tr>
<tr>
<td>Melbourne</td>
<td>112.26</td>
<td>21,137</td>
<td>188.29</td>
<td>-10%</td>
</tr>
<tr>
<td>Dandenong</td>
<td>16.51</td>
<td>6,322</td>
<td>382.92</td>
<td>83%</td>
</tr>
<tr>
<td>Hobart</td>
<td>18.51</td>
<td>2,975</td>
<td>160.72</td>
<td>-23%</td>
</tr>
<tr>
<td>Adelaide</td>
<td>45.42</td>
<td>9,149</td>
<td>201.43</td>
<td>-4%</td>
</tr>
<tr>
<td><strong>Average</strong></td>
<td><strong>209.61</strong></td>
<td><strong>-</strong></td>
<td><strong>-</strong></td>
<td><strong>-</strong></td>
</tr>
</tbody>
</table>

Sources: Family Court of Australia Annual Report 2012-13 (Commonwealth of Australia 2013) Table 2.3 ; E-mails from Director, Court Services, Strategy and Policy, Family Court & Federal Circuit Court to KPMG (Applications and FTE), 22 and 23 January 2014; KPMG analysis. Note that Registry staff are referred to in ASL numbers.

Analysis of the number of General Federal Law and Family Law filing volumes in each location against the number of registry staff suggests that there is limited correlation between filing volumes and staff allocation. For example:

- On average, in 2012-13 there were 39.6 General Federal Law applications filed per registry staff member nationwide. However, the Sydney and Melbourne registries experienced significantly higher filing volumes per registry staff member (59.1 and 52.0 respectively), while Hobart and Darwin experienced considerably lower volumes (25.8 and 10.9 respectively).

- On average, in 2012-13 there were 209.6 Family Law applications filed per registry staff member nationwide. However, demand was significantly greater in Dandenong, where 382.9 Family Law applications were filed per registry staff member (83 per cent higher than the nationwide average), but lower in Sydney (148.0 Family Law filings per registry staff member, 29 per cent lower than the nationwide average).

Is acknowledged that filing volumes are one of several indicators of demand, and that there are varying levels of complexity and effort required depending on the nature of the application filed. In addition, additional factors such as the presence of external service providers are likely to impact upon registry workloads. Nevertheless, the above analysis suggests that existing registry staff allocations do not appear to demonstrate a direct or consistent relationship to current registry workloads.

**Key Finding 3**

The allocation of court staff is geographically-based, and does not necessarily correlate with levels of demand.

All three courts have seen growth in the breadth of matters they are required to determine, largely driven by changing government policy direction and expanded/associated legislation. In
just over a decade, we have seen a rise in the number of statutes conferring jurisdiction on the FCC, from 16 acts in 1999 to over 70 by 2013. Areas which are experiencing the greatest proportionate growth in this jurisdiction – for example, Migration and Fair Work matters – can each be seen to be newly vested areas of jurisdiction for the federal courts, commencing in 2005 and 2010 respectively. In Family Law matters, the conferral of powers with respect to de facto property disputes for the FCoA in 2009 are an example of increasing jurisdiction of the federal court system to support the resolution of financial disputes following relationship breakdown. While in some cases, the conferral of increased jurisdiction has been accompanied by increases in judicial resources (for example with respect to migration matters), it would appear in many cases the changes have either been incremental and accordingly unfunded, or may have been un-resourced from the beginning.

Volume

Another consideration when assessing the courts’ ability to meet demand is the changing nature of filing patterns across both courts and areas of law.

Family Law jurisdiction

Over the 2009-10 to 2012-13 review period, applications filed in the FCoA and within the FCC’s Family Law jurisdiction can be seen to be relatively consistent, with deeper analysis required to isolate material areas of growth for the purposes of this analysis. Figure 11 provides an overview of the number of applications filed in the FCoA since 2009-10.
Figure 11: Number of applications to the Family Court of Australia by cause of action

Source: E-mail from Director, Court Services, Strategy and Policy, Family Court & Federal Circuit Court 23 January 2014.

In the FCoA, for example, Consent Order applications represent both the highest volume cause of action within the court (11,377 applications of a total of 17,913 applications overall in 2012-13), as well as the cause of action experiencing consistent growth over the review period (an average of six per cent growth per annum over the review period).

Under legislation, Consent Order applications are filed in the FCoA. In practice these applications, which seek to formalise arrangements for either division of property or custody of children between consenting partners, are finalised in Chambers by a Registrar. As a high volume, transactional matter, these applications represent the largest increase in FCoA filings between 2009-10 and 2012-13, rising six per cent from 10,705 to 11,377 matters. Based on filings for the first six months of the 2013-14 financial year, the FCoA estimates this will rise sharply to 13,762 matters over the year. No conclusive view as to what is driving the increase in these applications has been provided, although stakeholder feedback suggested that the provision of Binding Financial Agreements under the Family Law Act 1975 (Cth) s 87 following legislative amendments in 2000 may be a contributing factor. At this stage, it is unclear whether the increase observed to date will lead to a sustained increase in these types of matters, or whether this represents a ‘spike’ in 2013-14. In any event, this type of application continues to represent the largest percentage of the FCoA’s filing load (65 per cent growth per annum over the review period), and without legislative change, is likely to comprise the largest portion of the FCoA’s workload (albeit of a transactional nature) into the future.

Given the high volume, transactional nature of these matters, there is scope for these to be filed and managed via an electronic lodgement service. Although these are of a non-dispute (i.e. consenting) nature, there is limited scope for them to be dealt with outside the family law system due to restrictions placed on the exercise of judicial power, which can be made only by
a Chapter III Court. ¹⁰³ Notwithstanding this, administrative processes relating to Divorce Order applications are lengthy and constitute a considerable amount of the FCC and FCoA’s workload. There may be opportunities for an external agency to undertake these administrative processes to relieve this aspect of the Courts’ workload, whilst ensuring that the granting of Divorce Orders continues to be undertaken by a Chapter III Court.¹⁰⁴

In addition, filings in the year to date indicate a sharp increase in the number of applications to December 2013, in comparison to the same period last financial year. Without adjusting for seasonality in application filings, this number is projected to rise to 13,762 for 2013-14, a 21 per cent increase on the previous year. Should this continue, Consent applications would constitute the largest change in applications within the FCoA over the forward estimates, accounting for the majority of proposed growth in this area.

Similarly, the FCC has seen overall growth in the number of Interim / Procedural Order and Final Order applications before the Court over the last four years, as illustrated in Table 3-3.

Table 3-3: Summary of top three causes of action in Family Law by volume of applications received

<table>
<thead>
<tr>
<th>Family Law cause of action</th>
<th>2009-10</th>
<th>2010-11</th>
<th>2011-12</th>
<th>2012-13</th>
<th>Change since 1 July 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce</td>
<td>47,178</td>
<td>44,972</td>
<td>46,027</td>
<td>43,285</td>
<td>(8%)</td>
</tr>
<tr>
<td>Interim/ Procedural Orders</td>
<td>18,496</td>
<td>19,639</td>
<td>20,333</td>
<td>20,235</td>
<td>9%</td>
</tr>
<tr>
<td>Final Orders</td>
<td>16,894</td>
<td>17,595</td>
<td>17,449</td>
<td>17,371</td>
<td>3%</td>
</tr>
<tr>
<td>Sub-total</td>
<td>82,568</td>
<td>82,206</td>
<td>83,809</td>
<td>80,891</td>
<td></td>
</tr>
</tbody>
</table>

% of total applications jurisdiction: 90% 91% 91% 90%

Source: E-mail from Deputy Registrar, Principal Registry, Federal Court of Australia, 17 January 2014, E-mail from Director, Court Services, Strategy and Policy, Family Court & Federal Circuit Court 23 January 2014 and KPMG analysis.

Interim Order applications have risen from 18,496 applications in 2009-10 to 20,235 applications in 2012-13, an increase of nine per cent, while Final Order applications have risen from 16,894 to 17,371, or three per cent (with even higher filings in the years between) over the same time period.

Stakeholders have described increasing numbers of interlocutory events within individual matters, which is easiest to track in relation to family law matters. Over time, the rate of increase in filings for Interlocutory Orders has been most visible in the FCC, with the rate of these applications increasing by nine per cent from 2009-10 to 2012-13 (rising from 18,496 to 20,235 applications), while over the same timeframe, applications for Final Orders have only increased by three per cent. This indicates applications for interim orders are increasing at a faster rate than those for Final Orders. No definitive explanation has been provided for this increase, although family law stakeholders noted that increasing length and complexity of matters may contribute to increased instances of interlocutory events, and the longer it takes

for a matter to reach a final hearing, the more likely there will be increased interlocutory events - particularly in cases where facts or circumstances change with time.

In addition, this family law performance reporting in the FCoA and FCC provides an indication of the ratio of interim to final orders in each court, with an average of 1.2 in both courts, above the target range of 0.9-1.15. Interestingly, this ratio differs broadly between registry location. For the FCC, it is the high volume registries which appear to have the greatest ratio of interlocutory to final orders, with Melbourne, Brisbane and Sydney registries recording a 1.2 ratio of these matters (Adelaide is the highest at 1.3). For the FCoA registries with material filing numbers, the differences are more striking, with the Sydney registry recording a ratio outside the range at 1.5 (based on 649 Final Orders filed), while Adelaide has a ratio of 2.7 (based on 63 applications for final orders filed).

While it is noted that increases in applications for specific causes of action does not necessarily mean an increased client or caseload for the court, as multiple applications may be filed concurrently with respect to a single matter, it nevertheless provides an indication of the increasing number of applications required to be determined by the FCC, as well as providing evidence for stakeholders' views that interim applications are adding to the overall time taken to determine matters within this jurisdiction. Consistent with the FCoA's reporting, the FCC has also experienced a sharp increase in filings for Family Law matters over the last six months.

**General Federal Law jurisdiction**

In terms of overall filings, it is the FCA which has seen the greatest level of increased activity over the review period. The number of matters requiring determination has risen markedly over the last four years, albeit from a smaller underlying base, with the number of applications increasing from 3,646 in 2009-10 to 5,803 in 2012-13, an overall 59 per cent rise over this time period, as illustrated in Figure 12.
As illustrated in Table 3-4, the key driver of this overall increase is the rise in filings for Corporations Law matters. Corporations Law filings represent not only the greatest number of total applications (3,849 applications in 2012-13), but also continually strong increases in overall filings, with a 134 per cent increase over the last four years. Other emerging areas of pressure are the Migration and Fair Work jurisdictions, where applications have risen 165 per cent and 73 per cent respectively since 2009-10.

The rising demand in this area work is also reflected in the FCC filing statistics. While Bankruptcy matters represent the largest (although declining over time) area of filings for the FCC in this jurisdiction, that court has seen a 139 per cent increase in Fair Work applications (314 applications in 2009-10 to 752 applications in 2012-13) and 125 per cent increase in Migration applications (880 applications in 2009-10 to 1,982 applications in 2012-13) over the review period.
While demand for the FCC’s General Federal Law jurisdiction has increased slightly over time, this has been offset with a corresponding decrease in Family Law applications, leading to an overall steady filing rate of the period of analysis.

Key Finding 4
The FCA has seen a growth (average of six per cent per annum) in applications for determination over the four-year review period, while the FCoA and FCC have recorded a more steady filing rate, with pockets of increased applications for particular causes of action. Family Law filings across both the FCoA and FCC to 31 December 2014 reflect a marked increase from the same timeframe in 2012-13, driven by Consent Order applications.

Timeliness
The Courts’ ability to effectively deal with the caseload before them can most easily be represented in the annual clearance rate, which measures the number of finalisations in relation to the overall number of filings within a specified time period. That is, it can form a measure of a court’s ability to deal with its overall caseload, and the extent to which it is reducing or increasing its case backlog.

Of the three courts, the FCA has seen the greatest challenges in maintaining an even clearance rate (that is 100 per cent, which indicates it is finalising as many matters as are filed within a certain timeframe). Since 2009-10, the FCA has seen a varying clearance rate, ranging from a low of 93 per cent in 2010-11 (driven mainly by a low clearance rate for its highest volume cause of action – Corporations Law matters at an 89 per cent clearance rate), to a high of 109 per cent the following year, where a sharp positive increase in clearance of Corporations Law matters again appears to have influenced the FCA’s overall clearance performance (133 per cent clearance rate for Corporations Law matters, with 3,284 applications and 3,710 finalisations in that financial year). In 2012-13, the court’s clearance rate returned to below 100 per cent, with a 95 per cent clearance rate experienced over this time period. This would appear to suggest that the FCA is unable to keep up with the increasing applications being filed within the court over the last financial year.

Clearance rates across Family Law matters in both the FCoA and FCC have generally indicated these courts are managing to keep pace with year on year demand, with the FCoA’s clearance
rate ranging between 99 per cent and 104 per cent over the review period (101 per cent overall average), while the Family Law jurisdiction of the FCC has fluctuated between a low of 96 per cent and 101 per cent over the same timeframe (also a 101 per cent overall average).

It can be seen that the sheer volume of Family Law matters determined by the FCC can lead to some clouding of the underlying clearance rate for specific causes of action across the FCC. Given Family Law applications consistently comprise over 92 per cent of the FCC’s workload, it is possible for overall clearance rates to mask challenges associated with finalising matters within the court’s General Federal Law jurisdiction. For this smaller number of matters, the clearance rate dropped to 92 per cent in 2012-13, possibly an indication of the challenges of managing an increasing caseload in this area. In addition, over the four year review period, clearance rates for General Federal Law matters have only reached 100 per cent once, remaining steady at 97 per cent in the other years. The key driver for the last financial year’s drop in performance (based on this metric) appears to be the challenge of maintaining the pace of Migration application determinations. After Bankruptcy matters, these applications now represent the greatest volume cause of action, with 1,982 applications in 2012-13, but only 1,393 finalisations over this timeframe (70 per cent clearance rate). Accordingly, this suggests this jurisdiction is an area of increasing pressure for the FCC’s overall performance.

The FCoA and FCC also track timeliness through reporting on the median time taken for a matter to reach a trial (FCoA) or first hearing (FCC). The FCoA has a target range of 10-12 months, while the FCC’s target range is 6-9 months. The average time to trial in the FCoA is above the target range at 11.5 months. In some of the higher volume registries such as Sydney and Melbourne in 2012-13, the median time to trial was lower or around than the average, at 10.9 and 11.6 months respectively. However Brisbane, the other very high volume registry, reported a median time to trial of 15 months, well outside the target range. This suggests there is a clear difference in timeliness of trial commencement between registry locations.

For the FCC, the median time to reach a trial (FCoA) or to the first hearing is well outside the target range of 6-9 months across almost all locations except Melbourne. The average median time to first hearing across all registries is 10.8 months, with Sydney and Brisbane significantly higher than this, at 15 and 13.6 months respectively. This appears to suggest that where a matter is progressing to a defended hearing or trial, timelines are much longer than the desired target range across most areas of the FCC, and particularly for some of the high volume registries. Rising case complexity may play a factor in increasing the time taken to reach trial. It is also acknowledged that as a matter extends, so too does the opportunity for additional interlocutory activity, given parties’ circumstances change and may require reflecting through interim orders or other administrative activities.

Finally, the Courts use ‘time to finalisation’ as a Key Performance Indicator (KPI) which measures the time taken to finalise a target number of cases within the year. The FCA, FCoA and FCC report this KPI slightly differently according to:

- timeframe (also referred to as timespan) from filing to disposition; and

---

105 Family Court of Australia, Summary of Final Orders Applications in the Federal Circuit Court 2012-13 (Family Court of Australia 2013); Family Court of Australia, Summary of Final Orders Applications in the Family Court of Australia 2012-13 (Family Court of Australia 2013).
• the percentage of cases completed within a specific timeframe (e.g. six months).

These measures are arguably indicative of the differing types and complexity of the matters being heard by each of the Courts, indicating the more complex matters are being heard by the superior courts. For example, the FCA reports against a KPI of 85 per cent of cases completed within 18 months of commencement, while the FCoA and the FCC report against KPIs of 75 per cent of cases finalised within 12 months, and 90 per cent of cases completed within six months respectively.

Of the three courts, the FCC did not meet its KPI of 90 per cent of cases completed within six months in 2012-13, recording 83 percent of all applications (Family Law and General Federal Law) being completed within six months. When the timeframe was extended to 12 months, the FCC achieved 94 per cent of cases finalised in 12 months. The FCA and FCoA report meeting their KPIs in this area, with the FCA completing 92 per cent of cases within 18 months (against the target of 85 per cent), and the FCoA reporting 92 per cent of applications finalised within 12 months (against the target of 75 per cent).

Comparisons with interstate jurisdictions can be challenging, given the varying nature of data collection and reporting. The 2014 Report on Government Services includes limited information on court timeliness. Backlog across all civil matters is recorded where the pending caseload is over 12 and 24 months. The federal courts perform in the mid-range of these backlog indicators (recording 38.1 per cent of cases pending for greater than 12 months, and 23.1 per cent of cases pending for greater than 24 months). The challenge in analysing this data relates to different approaches across jurisdictions, so in this instance, the FCoA and FCC do not deem a matter as finalised even where there has been no court event for at least 12 months. This means some matters may be impacted by proceedings in other courts, for example, and although currently inactive would be included in the reported data. The need for more lengthy and intensive case management for a higher proportion of complex Family Law disputes in the FCoA is also acknowledged as potentially influencing this result.

Court performance monitoring and judicial accountability

Performance monitoring is an essential element of facilitating strong court and judicial accountability, and the Courts have adopted a range of measures to support this activity in recent years. This is an important step in promoting strong courts administration and judicial accountability. It can be seen, however, that the approaches taken across the Courts have been developed in relative isolation, and consistent measures are not recorded and reported across the three jurisdictions.

In relation to court performance, the FCoA and FCC have developed a formal one page document to monitor performance metrics of Family Law final order applications across the Courts. This includes analysis on finalisations, clearance rates, transfer times and pending matters. This information is captured by registry location, and facilitates a high level understanding of how the courts are performing relative to a target range, and where areas of pressure are emerging. As illustrated in Figure 13, a ‘traffic light’ colour coding supports easy

---

understanding of performance against targets, and given the time period over which this data has been captured (copies of performance summaries from 2010-11 to 2012-13 were provided in the course of the review process), emerging and persistent trends can be identified and monitored, in order to facilitate remedial action where necessary.

Figure 13: One page performance monitoring tool for Family Court of Australia and the Federal Circuit Court of Australia

Source: Attorney-General’s Department, January 2014.

In the past, the notion of judicial independence may have raised a tension with respect to performance monitoring. In the modern world, however, it is accepted good practice that assessing performance for the purposes of monitoring and improvement are an important aspect of any high performing organisation. With respect to judicial accountability, the FCA has developed a sophisticated monitoring tool to assess individual judges’ performance. It is understood that individual judges are able to see their own performance metrics, as well as a coded (that is, anonymous) copy of all other judges’ performance results. An extract of this report is provided in Figure 14.

Figure 14: Federal Court of Australia sample workload report

Source: Federal Court of Australia, Sample Court Workload Report (Federal Court of Australia 2014).

Through this analysis, it is possible to identify the number of substantive cases allocated to an individual judge, how many they have finalised, and other accountability metrics such as clearance rates, the median time of cases in their docket, and those cases which are over 18 months old, thus facilitating a fair indication of judicial workload. The preparation of judgements is also monitored, including how many interim and final judgments were delivered, the average page length, and where judgments took over 90 days to complete. In this way, a realistic assessment of a judge’s performance is enabled, given a full suite of performance metrics is able to be considered. For example, the assessment would highlight where a judicial officer...
was determining only a small number of matters in a given year, which could explain a perception of low numbers of finalisations and judgement delivery.

At present, the tools that allow the Heads of Jurisdiction to monitor and report on Court performance and discuss judicial accountability are not consistent. This inhibits the ability of the Heads of Jurisdiction to conduct a comparative analysis across each of the Courts and provide a reliable benchmark on which to assess Court performance.

In addition, it has been noted that there is limited information available to assess case complexity across the respective Courts. As part of reporting on court performance, there is scope to identify a consistent approach across the Courts for adopting and recording measures of case complexity – for example, the number of self-represented litigants appearing before the Courts. Challenges in capturing data of this nature across a matter’s lifecycle would need to be discussed between the Courts as it is recognised that in this example, litigants may be variously represented and not represented at different points in time, and an appropriate measure would need to be agreed. Capturing data of this nature would support a broader assessment of court performance by providing further context on changing case and court user profiles which are likely to drive performance outcomes.

**Recommendation 1**

That the Courts adopt a consistent approach to measuring and reporting on Court performance and judicial workload.

### 3.3 Anticipated workloads and levels of service delivery

It has been challenging to find an accurate and accepted measure of projected workload across the courts over the forward estimates. While limited analysis can occur using historic trends in application numbers, it is difficult to estimate future levels of service delivery given the heavy influence of currently unknown quantities, such as government policy and human behaviour. The courts have resource planning models which assist in providing resource estimates (for example, registry services, Registrars and Family Consultants in the FCoA and FCC). These resource planning models are based on a range of assumptions including forecast levels of filings and activity based timings. However, determination of resourcing required to accommodate workload projections for the Courts is difficult as there is no linkage between workload projections (based on case volumes) and financial projections.

This poses challenges in making a robust argument around future funding needs on the basis of future workload or projected demand. It also means that the Courts are being required or expected to work harder or find productivity improvements to meet increased application rates, or operate with increased delays where this is not possible. This report includes a limited assessment of courts’ future workload, based on initial linear projections developed by as part of the review process, based on average annual growth over a four-year period, supplemented by the Courts’ individual assessment of likely future growth, based on past filing trends, year to date filings for the current financial year, as well as the courts’ professional opinion based on known or anticipated government policy change and other drivers beyond the Courts’ control.
Court-developed projections relating to anticipated workloads are premised on historic filing trends, broken down by matter type. These projections highlight the types of matters which have experienced the most significant level of growth over the past four years as the drivers of future growth. A brief overview of anticipated workloads for each court is provided below.

**Federal Court of Australia**

The FCA projects a 108 per cent increase in the total number of filings between 2013 (5,803 filings) and 2018 (12,059 filings). This projection is based on growth in Corporations Law matters, which comprise the most significant component of the FCA’s workload. If Corporations Law filings continue to grow at the rate seen between 2010-11 and 2012-13 (approximately 18 per cent per annum), it is expected that there will be 8,805 Corporations Law filings in 2018, which will comprise 73 per cent of total filings in the FCA.

There is some doubt, however, about whether Corporations Law applications will continue to rise at the projected rate, given recent changes to court fees in this area. The FCA advises that a major driver of Corporations Law work comes from winding up applications lodged by the Australian Taxation Office (ATO). The ATO has indicated that the most recent fee increases make lodging matters in the FCA comparatively more expensive than, for example, lodging matters with the Supreme Court of NSW, which has concurrent jurisdiction in relation to these matters. Should the approach taken by the ATO with respect to lodging winding up applications change as a result of fee pressure, this would have a marked impact on FCA filing projections in this area.

Accordingly, the FCA also provided projections if changes in lodgement practices for these high volume matters took place, and relevant applications in the Sydney and Melbourne registries were redirected to the NSW and Victorian Supreme Courts in favour of State-based determination. This highlights the impact of policy changes on the filing workload of the courts. In particular:

- if no Corporations Law matters are filed in the Melbourne or Sydney registries from 2014 onwards, it is projected that there will be a total of 3,001 Corporations Law filings nationwide in 2018; however
- if Corporations Law matters continue to be filed in the Melbourne and Sydney registries, it is projected that there will be a total of 8,805 Corporations Law matters filed nationwide in 2018 – a difference of approximately 5,000 filings.

**Family Court of Australia**

The FCoA indicated there was potential for the volume of applications to the FCoA to steady over the forward projections. However based upon the anticipated filings for 2013-14 total fillings are anticipated to reach 23,445 in 2017-18, a projected increase of 31 per cent from 2012-13. The increase in FCoA filings is largely driven by an increase in Consent Order applications, which are expected to rise to 17,692 in 2017-18, where they will represented 75 per cent of the total anticipated FCoA applications.
Federal Circuit Court of Australia

Filing projections provided by the FCC indicate that there may be a significant increase in 2013-14. This projection is based on a comparison of year to date filings in the FCC in the 2012-13 and 2013-14 financial years.

The use of this estimate to establish projections leads to a generally higher number of filings in the FCC across most areas of law. If current year to date trends continue, 96,200 FCC filings are anticipated in 2013-14, which is a significant increase on the actual number of filings in 2012-13 (89,557). From the limited assessment of projections, it is unclear if the most recent increase in filings represents:

- a longer-term (increase) in the number of applications filed in the FCC;
- current environmental influences; or
- a one-off ‘spike’ in applications.

The current increase in filings appears across several matter types, and as such it is not easily possible to isolate the increase to one particular cause of action.

Under this model, all courts are anticipating significantly increased caseloads over the forward estimates. It has been acknowledged that this exercise does not form a robust measure of future service delivery demand, and accordingly, it is not considered possible to rely on these projections as a comprehensive basis for understanding future demand. Nevertheless, in the absence of a more accurate model of future workload, this exercise is at least instructive in highlighting areas of increasing pressure across particular jurisdictions (for example, the FCC), as well as specific case types that, based on recent trends, appear likely to significantly influence the mix of cases across the courts over the forward estimates.

Key Finding 5

There is no agreed model to determine workload projections for each of the Courts, which makes analysis of future demand challenging. In any event, there is no clear linkage between case volume estimates and financial forward projections. As such, it appears that there is an expectation that the Courts will work harder/find productivity improvements and/or increase delays to both manage existing, and accommodate future increases in, workload.

3.4 Current financial position and forward projections

This section is intended to provide a high-level overview of the historically observed and projected financial performance of the Courts. A more detailed financial snapshot for each Court is available in Appendix D, E and F if required.

As can be seen from Table 3-5, the FCA, FCoA, FCC and NNTT recorded an aggregate operating deficit (excluding the effects of depreciation) of $17.83 million over the past three completed financial years.

Table 3-5: Surplus / (Deficit) Excluding Depreciation – 2010-11 to 2012-13
The three Courts all recorded deficit positions in 2010-11 and 2011-12, driven by a range of factors including the change in the Commonwealth bond rate (and its implications for leave liability), an increase in property-related costs for the Commonwealth Law Court buildings and a $5.1 million write down recognised by the FCA in 2010-11. During the 2012-13 PAES process, the Courts received additional funding intended to offset forecast losses for 2012-13 ($1.2 million for FCA, $4.0 million for FCoA and $1.3 million for FCC) and 2013-14, which has been primarily responsible for the return to surplus. Whilst the supplementation was designed to offset losses through to 2013-14, it has not been programmed to grow indefinitely (indeed it falls by $1.9 million in 2014-15) and as such is not considered to be (nor was it ever intended as) a permanent solution to the funding issues.

The additional funding was linked to the recent initiative to increase the amount of revenue collected through court fees (for 2012-13 an additional $14.2 million was raised). This process was designed to pass on a greater share of the Courts’ operating costs to users who have the capacity to help pay for them. The court fees collected are required to be returned directly to consolidated revenue and as such do not factor directly into the calculation of the operating result for the respective entities, although clearly they have an impact at the portfolio and whole-of-government levels.

In contrast to the trends outlined above, the internally projected position of the Courts is looking decidedly less favourable across the forward estimates (Table 3-6 provides a ‘bottom line’ summary from the financial projections included at Appendix G). Whilst the expectation is that they will come in on, or slightly ahead of, the ‘official’ budget in the current financial year, significant losses (relative to the size of the available funding) are anticipated from 2014-15 onwards. These forecast losses are not consistent with the published position in the Commonwealth budget which indicates a neutral (once depreciation is excluded) for the period under review. The anticipated drivers of this deterioration are discussed in the following section.
It is important to note that as opposed to the audited ‘realised’ figures discussed earlier in this analysis, there is a degree of inherent uncertainty surrounding projections as to future performance. The figures in question are dependent upon a range of factors such as demand levels, legislative settings, cost growth rates and the economic parameters applied in determining the appropriation level. The assumptions for the projections outlined above are spelled out in detail in Appendix D, E and F. Should one, or a combination, of these assumptions not hold the realised position is likely to differ from the predictions in Table 3-6.

Given the timeframe available for this review, the internal costing models from the Courts and associated assumptions were used as the basis of the quoted projections. A small number of changes were made to the projected position based on feedback received during the review consultation process. Any such changes have been discussed and explained to Court representatives. For the purposes of projection, the FCoA and FCC positions have been consolidated, consistent with the current external reporting structure and internal modelling framework.

### Key Finding 6
Relief in the form of supplementation was provided to the Courts in 2012-13 ($6.5 million) and 2013-14 ($10.4 million), designed to cover anticipated deficits in those years. Based on our analysis, the programmed supplementation will not be sufficient given existing service delivery models from 2014-15 onwards.

### Key Finding 7
Based on current forecasts, the Courts are expecting to recognise large – and growing (off a small base) – deficits across the forward estimates period. These deficits are forecast to commence in 2014-15 ($9.9 million), and will grow to $25.7 million in 2017-18, resulting in a total cumulative deficit of $74.8 million across the forward estimate period. The FCoA and FCC account for 66 per cent of the total projected deficit over the forward estimates.

### What has led to the projected deficits?
Previous reviews, along with stakeholder consultation undertaken for this report have identified a range of factors which have contributed to the forecast deficit, most notably:
- the application of the Efficiency Dividend to judicial salaries;

Table 3-6 Projected Surplus / (Deficit) Excluding Depreciation – 2013-14 to 2017-18

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$’000s</td>
<td>$’000s</td>
<td>$’000s</td>
<td>$’000s</td>
<td>$’000s</td>
<td>$’000s</td>
</tr>
<tr>
<td>Federal Court of</td>
<td>207</td>
<td>(2,413)</td>
<td>(5,146)</td>
<td>(7,979)</td>
<td>(9,515)</td>
<td>(24,847)</td>
</tr>
<tr>
<td>Australia</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Family Court of</td>
<td>0</td>
<td>(7,470)</td>
<td>(10,913)</td>
<td>(15,294)</td>
<td>(16,229)</td>
<td>(49,906)</td>
</tr>
<tr>
<td>Australia and FCC</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>207</td>
<td>(9,883)</td>
<td>(16,059)</td>
<td>(23,273)</td>
<td>(25,744)</td>
<td>(74,753)</td>
</tr>
</tbody>
</table>
• the loss of rent supplementation from July 2012;
• an apparent shortfall in the level of funding for the FCC since inception;
• the general increase in the rate of the Efficiency Dividend applied to the Courts; and
• an inability to sustain the level of efficiency-related initiatives undertaken over the past years.

Each of these factors will be discussed in detail in the following sections, however, in general terms the ongoing effect of the efficiency dividend has been a steady reduction in the pool of ‘discretionary expenditure’, making it increasingly difficult to find efficiencies which will not significantly impact on service levels.

Additionally, users should note that the underlying issues have been ‘masked’ to an extent over the 2012-13 and 2013-14 financial years due to the additional injection of funding, but appear to have been in play since the time of the Semple Review in 2008.

Key Finding 8

The proportion of each Court’s cost base considered to be discretionary is relatively small – there is relatively little scope for the Courts to make future savings without significant (negative) impacts on the current service delivery model.

Application of the Efficiency Dividend

Since 1987, the Government has employed the Efficiency Dividend as a means of requiring agencies to find and return savings to the budget. It is applied broadly to general appropriation across the Commonwealth – as at December 2012 only three agencies had full exemptions with a further six partially exempt.107

Whilst a uniform rate is applied to all entities, it has been argued in a number of recent reviews and reports that the Efficiency Dividend has a disproportionate impact on the Courts due to their reliance on appropriation,108 and the significant proportion of fixed elements in their cost base.109

Under this line of logic, the annual ‘hit’ on the Court’s discretionary expenditure is greater than that which is required of other entities as the required savings are calculated based on the total appropriation (including funding for fixed costs) whilst they may only be applied to expenditure categories over which the courts have control.

As can be seen in Figure 15, all three Courts have a significant proportion of their overall cost base which is considered to be less than ‘discretionary’ in nature. This is driven by a number of factors such as legislation (such as that which governs judicial appointments and the

108 JCPAA, Report 413: The efficiency dividend and small agencies: size does matter, xvii
109 Stephen Skehill, Strategic Review of Small and Medium Agencies in the Attorney-General’s Portfolio, January 2012, 56-57
requirement to maintain registries in each state capital), Government policy (in order to provide access to justice for those in regional and remote areas, travel expenses will be necessarily incurred by judges in the course of circuiting) and – at least in the short to medium term – a lack of feasible alternatives (there is no readily available alternative to the CLCs).

Figure 15: Proportion of non-discretionary, semi-discretionary, discretionary and balance-sheet related expenditure of total expenditure 2012-13

In such discussion, judicial salaries provide the key category of non-discretionary cost as the Courts have no power to appoint or remove Judges (which is a function of the Government) or their rates of pay (which is a function of the Remuneration Tribunal). This represents a significant proportion of each Court’s Departmental appropriation (33.62 per cent for FCA, 23.55 per cent for FCoA and 45.49 per cent for FCC in 2012-13, as illustrated in Table 3-7). The proportionate share of judicial salaries has also increased over time, suggesting an increasing impact on the ‘effective Efficiency Dividend’.

Table 3-7: Judicial Salaries as a proportion of general appropriations and total expenditure – 2010-11 – 2012-13

<table>
<thead>
<tr>
<th>Judicial salaries</th>
<th>2010-11</th>
<th>2011-12</th>
<th>2012-13</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial salaries as % of appropriation</td>
<td>31.04%</td>
<td>34.98%</td>
<td>33.62%</td>
</tr>
<tr>
<td>Judicial salaries as % of total expenses</td>
<td>23.85%</td>
<td>26.11%</td>
<td>23.86%</td>
</tr>
<tr>
<td>Federal Circuit Court of Australia</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial salaries as % of appropriation</td>
<td>99.51%</td>
<td>44.70%</td>
<td>45.49%</td>
</tr>
<tr>
<td>Judicial salaries as % of total expenses</td>
<td>22.86%</td>
<td>22.95%</td>
<td>24.34%</td>
</tr>
<tr>
<td>Family Court of Australia</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial salaries as % of appropriation</td>
<td>14.27%</td>
<td>18.98%</td>
<td>23.55%</td>
</tr>
<tr>
<td>Judicial salaries as % of total expenses</td>
<td>12.56%</td>
<td>15.92%</td>
<td>17.48%</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial salaries as % of appropriation</td>
<td>24.44%</td>
<td>29.34%</td>
<td>32.43%</td>
</tr>
<tr>
<td>Judicial salaries as % of total expenses</td>
<td>18.64%</td>
<td>21.18%</td>
<td>21.73%</td>
</tr>
</tbody>
</table>
In reviewing the above, users should note that in 2010-11, a significant proportion of the FCC’s operating budget was appropriated through the FCoA (i.e. recognised as appropriation revenue by FCoA and transferred ‘free of charge’ to the FCC). From 2011-12 onwards, a greater proportion of the FCC’s funding came through direct appropriation ($53.4 million as opposed to the $22.1 million recognised in 2010-11), which explains both the fall in percentage terms (from 99.51 per cent to 44.70 per cent) for FCC and corresponding increase for the FCoA (from 14.27 per cent to 18.98 per cent). As one would expect, when using the broader ‘base’ of total expenses the proportions are less volatile across the review period.

It is noted that for the HCA, judicial salaries are paid through a Special Appropriation and hence are not subject to the Efficiency Dividend. In 2012, the Skehill Review recommended consideration be given to funding the other federal courts through a similar mechanism, although this recommendation has not been adopted to date.

Were the decision made not to subject judicial salaries to the Efficiency Dividend, this would have a cumulative effect on the bottom line of the courts of approximately $1.33 million per annum at the current judicial and resourcing level. As one would expect, this figure may be split between the FCA and FCoA and FCC on (approximately) a 40:60 basis, proportional to the projected level of judicial expense for the respective Courts. This projection relies on a number of key assumptions holding, including the ongoing application of the 2.25 per cent Efficiency Dividend rate, judicial numbers remaining relatively constant and no ‘shocks’ in terms of the Remuneration Tribunal determinations. It should be clearly noted that such a scenario would involve a diversion of funds that would otherwise have been returned to Consolidated Revenue.

**Key Finding 9**

In 2012-13, judicial salaries accounted for 22 per cent of the Courts’ expenditure (regarded as non-discretionary as the Courts have no power over the appointment or remuneration of judicial officers). Application of the Efficiency Dividend to the Courts is difficult, particularly in light of constitutional requirements relating to judicial remuneration and tenure.

**Property management**

By nature of their operations, the respective courts need to occupy a geographically diverse set of properties. Most prominent amongst these are the Commonwealth Law Court (CLC) Buildings which occupy prime CBD real estate in the state capitals, although the Courts – most notably the FCoA and FCC – have also entered into commercial leases to provide the requisite footprint in regional centres. An overview of the Courts’ current property arrangements is provided in Table 3-8.

---

110 Ibid, 64
There is an argument that the very nature of the CLC buildings, with their grand appointments and seemingly generous allocation of space has fostered a perception among external stakeholders (for example, some government departments and court users) that the federal courts are a well resourced group. This may have led to a view being widely held that the courts have scope to absorb some level of funding pressure, which based on our earlier analysis, does not appear to be the case currently.

The Department of Finance (DoF) serves as the landlord for the majority of the CLCs, with the key exception of Sydney (the Queen’s Square building) which is owned jointly by the NSW and Commonwealth Governments.

From a budgetary perspective, a number of property-related challenges have been observed in recent years or are expected to manifest across the forward estimate period. These include:

### Responsibility for the fitout of the Commonwealth Law Court buildings

Rough estimates from the DoF’s Property and Construction Division indicate that the cost of replacement of fitout in the non-office areas across the 8 Commonwealth owned CLCs (in areas managed by DoF) is somewhere between $147 million and $245 million. In applying a useful life of 15 years, this implies that between $9.8 and $16.3 million in capital expenditure will be required annually for replacement. As far as it can be determined, neither the Courts, nor DoF, nor the Department have been provided with the capital budget for such expenditure. This has effectively left a funding ‘black hole’ which will become increasingly problematic until addressed, as a greater backlog of work will require funding.

---

Table 3-8: Location of Property currently occupied by at least one of the Courts

<table>
<thead>
<tr>
<th>Property type</th>
<th>Locations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth Law Court buildings</td>
<td>• Adelaide</td>
</tr>
<tr>
<td></td>
<td>• Melbourne</td>
</tr>
<tr>
<td></td>
<td>• Brisbane</td>
</tr>
<tr>
<td></td>
<td>• Parramatta</td>
</tr>
<tr>
<td></td>
<td>• Canberra</td>
</tr>
<tr>
<td></td>
<td>• Perth</td>
</tr>
<tr>
<td></td>
<td>• Hobart</td>
</tr>
<tr>
<td></td>
<td>• Sydney (97-99 Goulburn Street, Sydney)</td>
</tr>
<tr>
<td>Other leases</td>
<td>• Albury</td>
</tr>
<tr>
<td></td>
<td>• Launceston</td>
</tr>
<tr>
<td></td>
<td>• Alice Springs</td>
</tr>
<tr>
<td></td>
<td>• Lismore</td>
</tr>
<tr>
<td></td>
<td>• Cairns</td>
</tr>
<tr>
<td></td>
<td>• Newcastle</td>
</tr>
<tr>
<td></td>
<td>• Coffs Harbour</td>
</tr>
<tr>
<td></td>
<td>• Rockhampton</td>
</tr>
<tr>
<td></td>
<td>• Dandenong</td>
</tr>
<tr>
<td></td>
<td>• Sydney (88 Goulburn Street, Sydney)</td>
</tr>
<tr>
<td></td>
<td>• Darwin (State Square, Darwin)</td>
</tr>
<tr>
<td></td>
<td>• Sydney (Queen’s Square, Sydney)</td>
</tr>
<tr>
<td></td>
<td>• Darwin (Mitchell Street, Darwin)</td>
</tr>
<tr>
<td></td>
<td>• Townsville</td>
</tr>
<tr>
<td></td>
<td>• Dubbo</td>
</tr>
<tr>
<td></td>
<td>• Wollongong</td>
</tr>
</tbody>
</table>
Key Finding 10
Existing capital allocations are insufficient to maintain the CLC fitout over their 15-year lifecycle. Preliminary estimates indicate a funding ‘gap’ of between $9.8 and $16.3 million per annum.

The loss of supplementation associated with the costs of leasing the various Commonwealth Law Court buildings

Prior to July 2012, the Courts received supplementation for instances in which rate of rent increases for the CLCs exceeded the general WCI budgetary adjustment (i.e. the allowance for escalation in costs). As part of a broader package of changes from that date (to be discussed in more detail below), a decision was made to end the supplementation (collectively worth $15.8 million to the various users of the CLCs at the time), such that any increases in rent in excess of WCI need to be met by the Courts. It is noted that the currently proposed escalation clauses for the leases are significantly higher than the WCI parameters applied across the forward estimates, indicating that this will result in an additional drain on the Court’s discretionary expenditure pool.

The revised ‘Special Purpose Property’ funding model

In July 2012, a revised model for funding the CLCs was introduced, under which the DoF assumed direct responsibility property-related expenses associated with for the proportion of each CLC which met the definition of ‘Special Purpose Property’. This included the various courtrooms, mediation rooms, Judge’s chambers and libraries and represents 74.6 – 92.1 per cent of the floor space111 of the various buildings. An equivalent proportion of each Court’s appropriation was transferred to Finance to compensate.

The Australian Government Property Data Collection guidelines

Under the Property Framework, the Courts (as with other Federal entities) are required to reduce their footprint to 14m2 of usable office space per occupied work point (as per the Australian Government Property Data Collection [PRODAC] guidelines). At present, all CLC properties are significantly outside this target density level. The Courts are the only

111 Footprint provided by the Attorney-General’s Department on 21 January 2014
Commonwealth entities to have been provided with a temporary 'period of grace' from the whole-of-government property savings measure associated with the occupational density target, initiated in the 2010-11 Budget. The period of grace was granted until July 2017, at which time the SPP model was to be fully implemented and the property savings harvested. Work has begun to reduce the occupational density (for example by converting registry space to mediation rooms in Brisbane and looking to convert ‘usable office space’ to a jury courtroom in Perth) but it is not certain that such work will be sufficient or that the DoF would be prepared to allow the Courts to ‘relinquish’ pockets of usable space in the various building unless a suitable alternative tenant can be found. We note also the challenges associated with a ‘moving target’ for space due to changing staffing numbers over time.

Irrespective of the above, unless a further compromise can be negotiated with DoF or changes to the current CLC model are applied, the PRODAC changes are expected to result in a reduction in the Court’s appropriation of approximately $2.7 million per annum from 2017-18.

**Key Finding 11**
The Courts have been granted a ‘grace period’ from the whole-of-government property savings measure associated with the PRODAC occupational density target until July 2017. Based on current occupational densities, the Courts are currently well outside these targets, and it has been estimated that the various users of the CLCs will be hit by a $2.7 million reduction in appropriation in 2017-18.

### Funding arrangements for the Federal Circuit Court

In the course of our consultation process, a number of stakeholders have expressed the opinion that the FCC, and its previous incarnation (the FMC) were never adequately funded, and has effectively been subsidised by the FCoA in recent years. Due to the absence of documentation surrounding the funding arrangements for the FMC when it was established, this review has been unable to form an opinion as to the original funding levels.

### The pace of change

Over the past five years, the Courts have been actively attempting to identify and implement measures to operate within their available appropriation. This has included the commissioning of a number of reviews (most notably the Attorney-General’s Department’s Skehill and Semple reviews) to identify options to deal with projected deficits. A significant number of the recommendations from the reviews and health checks have already been implemented – these are discussed in greater detail at section 3.5 below.

The current challenge now lies in that the pool of potential ‘efficiencies’ has already been tapped and that it does not appear possible to continue to produce them at the same pace across the forward estimates period without a significant restructure or decline in service levels.
3.5 Steps taken to operate within current and future appropriations and deliver integrated, effective and efficient services

In response to the financial challenges experienced by the Courts, a range of productivity, efficiency and savings measures have been implemented to address (and reduce the impact of) projected financial deficits. Given the more precarious financial position of the FCoA and FCC, many of these savings initiatives have been realised in these Courts, however, as time passes, savings measures have also impacted on the FCA.

The realisation of these savings measures has been challenging for the Courts. In the paper *Budget Challenges 2013-14 and Beyond*, the FCoA and FCC noted that:

> The overriding principle the courts are applying when considering reductions in service delivery, including staffing, is to minimise the harm to families. Such a reduced service means disputes (which frequently include allegations about violence and abuse) may become protracted and entrenched. The risk of harm to children may be exacerbated by continuing unsuitable parenting arrangements. Equally, unresolved financial and property disputes do not allow parties to make decisions about the future and any assets may be eroded by legal costs.112

Identification and implementation of budget measures inevitably requires consideration of the benefits and costs of adequate access to justice, a fair and equitable legal system and the ability of courts to service demand levels in a timely and efficient manner. Such issues are difficult to resolve, meaning that compromises between service delivery and savings measures need to be made.

Given the challenges, the Courts have made progress towards achieving budget savings whilst minimising impacts on service delivery. An overview of measures implemented in the FCoA and FCC and where quantified, the savings they provide, is outlined in Table 3-9.

<table>
<thead>
<tr>
<th>Savings strategy</th>
<th>Estimated saving ($ million)</th>
<th>Year</th>
<th>Period</th>
<th>Returned to Consolidated Revenue/Reinvested</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulation 7 Family Reports</td>
<td>0.3</td>
<td>2012-13</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Reduced staff</td>
<td>1.4</td>
<td>2012-13</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Sessional employees</td>
<td>0.2</td>
<td>2012-13</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Travel</td>
<td>0.4</td>
<td>2012-13</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Consultants</td>
<td>0.1</td>
<td>2012-13</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
</tbody>
</table>

### Savings strategy

<table>
<thead>
<tr>
<th>Savings strategy</th>
<th>Estimated saving ($ million)</th>
<th>Year</th>
<th>Period</th>
<th>Returned to Consolidated Revenue/Reinvested</th>
</tr>
</thead>
<tbody>
<tr>
<td>Audio portal licences</td>
<td>0.1</td>
<td>2011-12</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Telephony</td>
<td>0.1</td>
<td>2011-12</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Property operating (including guarding)</td>
<td>0.3</td>
<td>2011-12</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Webmaster</td>
<td>0.1</td>
<td>2011-12</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Energy costs review</td>
<td>0.1</td>
<td>2011-12</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Suppliers</td>
<td>0.1</td>
<td>2011-12</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Archiving</td>
<td>0.1</td>
<td>2011-12</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Judicial support review</td>
<td>0.3</td>
<td>2010-11</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Child Dispute Services review</td>
<td>0.6</td>
<td>2010-11</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Interpreter services</td>
<td>0.4</td>
<td>2010-11</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Guarding services</td>
<td>0.1</td>
<td>2010-11</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Transcription services</td>
<td>0.3</td>
<td>2010-11</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Reduction in travel</td>
<td>0.2</td>
<td>2010-11</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Reduction in general administration</td>
<td>0.2</td>
<td>2010-11</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
<tr>
<td>Not replacing judicial officers</td>
<td>14.4</td>
<td>2010-11</td>
<td>Over 4 years</td>
<td>Used as Portfolio offsets</td>
</tr>
<tr>
<td>Not replacing judicial officers</td>
<td>10.5</td>
<td>2009-10</td>
<td>Over 4 years</td>
<td>Used as Portfolio offsets</td>
</tr>
<tr>
<td>Single administration</td>
<td>7.8</td>
<td>2008-09</td>
<td>Over 4 years</td>
<td>6.3 returned to Consolidated Revenue 1.5 reinvested</td>
</tr>
<tr>
<td>Back office review</td>
<td>0.4</td>
<td>2007-08</td>
<td>Recurrent</td>
<td>Reinvested</td>
</tr>
</tbody>
</table>

Source: Family Court of Australia and Federal Circuit Court of Australia, *Budget challenges 2013-14 and beyond* (Family Court of Australia and Federal Circuit Court of Australia 2013) 36-7; E-mail from Attorney-General’s Department (Access to Justice Division) to KPMG, 18 February 2014.

In addition to these initiatives, the FCA undertook a range of targeted savings initiatives over the 2008-09 to 2010-11 period, achieving savings of approximately $4 million.¹¹³ These initiatives were the result of a number of operational reviews, including the:

- Major Registries Review;
- Small Registries Review;

---

• Library Collections Review;
• Human Resources Branch Review;
• eServices Business Unit Review; and
• Library and Information Services Staffing Structure Review.  

The following provides a more discussion of key savings measures implemented.

**Working together more closely as part of recommendations in the Skehill Review**

The Skehill Review identified a range of opportunities to improve working relationships and create efficiencies within, and between, the Courts. The opportunities canvassed that have been implemented (at least to some degree) include:

• merging administration functions of the FCoA and FCC; and
• incorporation of the NNTT into the FCA.

Each opportunity is considered in turn.

**Merging administration functions of the Family Court of Australia and the Federal Circuit Court of Australia**

In 2009, the FCoA and FCC amalgamated administration activities (including corporate functions), eliminating duplication of functions such as human resources, payroll, property services and finance systems. This single administration arrangement was formalised in March 2013, when the *Courts and Tribunals Legislation Amendment (Administration) Act 2012 (Cth)* received Royal Assent. Under this formalised arrangement (effective 1 July 2013), there is a single agency known as the Family Court and Federal Circuit Court for the purposes of the *Financial Management and Accountability Act 1997 (Cth)* and a single CEO for both the FCoA and the FCC.  

This single administration arrangement has removed duplication of administration activities (including audited financial statements, production of Annual Reports, Budget and Additional Estimates, compliance costs, etc.), generating net savings of approximately $7.8 million over four years. Notwithstanding this significant saving, it is important to note that $6.3 million of that saving was returned to Consolidated Revenue (with the remaining amount reinvested to fund a shortfall in Family Report funding).  

Full implementation of the Skehill Review recommendation, being merging of FCA, FCoA and FCC administration functions, has not been realised at this time.

---

Incorporation of the National Native Title Tribunal into the Federal Court of Australia

From 1 July 2012, the FCA assumed responsibility for administering the NNTT. Under this arrangement:

- the NNTT’s corporate services functions (human resources, finance, property management and information technology) and certain corporate and operational staff members were transferred to the FCA;
- the appropriation of the NNTT, its staff and some of its administrative functions were transferred to the FCA; and
- the NNTT is no longer a statutory agency for the purposes of either the Financial Management and Accountability Act 1997 (Cth) or the Public Service Act 1999 (Cth).\(^\text{117}\)

Notwithstanding this, the NNTT continues to operate as an independent statutory authority undertaking native title statutory functions, and a Memorandum of Understanding between the FCA and NNTT preserves the operational independence of the NNTT. This institutional reform is expected to enable the FCA and NNTT to operate more efficiently and effectively in the future, and is estimated to deliver savings of $19 million over four years, which will be used as Portfolio Offsets.\(^\text{118}\)

Progressing e-Services reforms

While the FCA, FCoA and FCC use a common case management system, Casetrack, and share in the development of the Commonwealth Courts Portal (CCP), it is noted that:

- the FCoA and FCA provide all IT services to the FCC;
- the FCoA provides helpdesk support for Casetrack and the CCP to the Family Court of Western Australia (NB Casetrack support only in the case of the latter); and
- the FCA and FCoA have separate IT networks and infrastructures.\(^\text{119}\)

The Heads of Jurisdiction Consultative Committee undertook a review of the information technology infrastructure and case management systems in operation across the FCA, FCoA and FCC to identify opportunities for efficiencies. This review process ultimately found that, efficiency opportunities existed, major changes were cost prohibitive.\(^\text{120}\)

Notwithstanding this, some improvements in usability of the Casetrack system are underway, as prior to December 2013 General Federal Law Casetrack for the FCA and FCC was located on hardware owned and supported by the FCoA under a shared services arrangement. Under this arrangement, the user interface for staff in the FCC looked and behaved in an identical way.

\(^\text{118}\) E-mail from Attorney-General’s Department (Access to Justice Division) to KPMG, 17 February 2014.
\(^\text{119}\) Family Court of Australia and Federal Circuit Court of Australia, Budget challenges in 2013-14 and beyond (Family Court of Australia and Federal Circuit Court of Australia 2013) 41.
\(^\text{120}\) Family Court of Australia and Federal Circuit Court of Australia, Budget challenges in 2013-14 and beyond (Family Court of Australia and Federal Circuit Court of Australia 2013) 32.
regardless of whether they were using Casetrack for General Federal Law or Family Law purposes. In December 2013 the FCA relocated the General Federal Law Casetrack to hardware owned and supported by the FCA. At present, the two systems look identical, but from 24 March 2014 the FCoA will introduce the first module of the new Casetrack rebuild which will provide the foundation for the move to an Electronic Court File. At that point, the existing systems will diverge.\(^1\)

It is understood that the FCA was invited to join in a further shared services approach to redevelop the General Federal Law Casetrack system in a similar way to that for Family Law between the FCoA and FCC, but has elected to pursue a separate option. This is due to business reasons associated with the FCA’s development and implementation of the Electronic Court File system, the projected savings of which have already been factored into the budget profile.\(^2\)

Relocating the General Federal Law aspects on the Casetrack system will facilitate two separate case management systems, and two separate courts managing their case management systems. The changes have no impact on the CCP which will continue to operate as a full shared services for the FCA, FCoA, FCC and Family Court of Western Australia.\(^3\)

In addition to these eServices reforms, the FCA re-allocated a number of functions in smaller registries to locations where staff are more able to be utilised to fulfil specific functions. Further, video conferencing administration has been relocated from Sydney to Canberra, while accounting for the Court’s International Program is now undertaken by the Hobart registry, with the Darwin registry also seeking additional national functions.\(^4\)

Sharing/sub-leasing buildings

The Skehill Review made a range of recommendations outlining opportunities to improve management and sharing of buildings, specifically the Commonwealth Law Courts (CLCs).

In late 2012 the Heads of Jurisdiction agreed to transfer the FCoA and FCC library services into the FCA library. This produced a financial saving to the Courts of approximately $0.286 million in 2013-14 and generated greater economies of scale.\(^5\)

In addition to this reform, progress has been made towards sharing of buildings with State and Territory jurisdictions. The Sydney Law Court buildings is jointly owned by the New South Wales and Commonwealth Governments. Under this arrangement all costs associated with this lease (rent and building operating costs) are met by the Department on behalf of the Commonwealth. Similar to the special purpose property arrangements, this is recognised as a

---

\(^1\) Letter from Richard Foster (Family Court of Australia and Federal Circuit Court of Australia) to Attorney-General’s Department, 28 February 2014.

\(^2\) Letter from Heads of Jurisdiction Consultative Committee to the Attorney-General, 26 March 2013, 4; Letter from Richard Foster (Family Court of Australia and Federal Circuit Court of Australia) to Attorney-General’s Department, 28 February 2014.

\(^3\) Letter from Richard Foster (Family Court of Australia and Federal Circuit Court of Australia) to Attorney-General’s Department, 28 February 2014.

\(^4\) O’Connor Marsden, Federal Court of Australia: Organisational Health Check Review (O’Connor Marsden 2011) 16.

\(^5\) Family Court of Australia and Federal Circuit Court of Australia, *Budget challenges in 2013-14 and beyond* (Family Court of Australia and Federal Circuit Court of Australia 2013) 32.
resource received free of charge (income) and operating lease (expense) in the FCA’s financial statements.

**Other steps taken to avoid future operating losses**

The FCoA and FCC have implemented a range of measures to deliver savings, although the cumulative impact of these is not necessarily sufficient to compensate for projected deficits. These measures include:

- changes to judicial support models in the FCoA;
- savings in administration and other expenses, including travel, interpreters and transcription;
- limits on staffing appointments.

Each measure is discussed in turn.

**Changes to judicial support models in the Family Court of Australia**

A review was undertaken assessing the different models of judicial support for FCoA judges. This review resulted in changes to the level of court support provided, whereby the previous arrangement of each judge having a dedicated court officer as part of their support was changed to enable in-court support staff to perform other registry tasks when not required in court. An overview of the current judicial support staff allocations across each Court is provided in Table 3-10.

<table>
<thead>
<tr>
<th>Court</th>
<th>Chambers staff allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td>1 FTE APS5</td>
</tr>
<tr>
<td></td>
<td>1 FTE APS6</td>
</tr>
<tr>
<td>Family Court of Australia</td>
<td>First instance judges</td>
</tr>
<tr>
<td></td>
<td>0.5 FTE APS4</td>
</tr>
<tr>
<td></td>
<td>1 FTE APS5</td>
</tr>
<tr>
<td>Appellate judges</td>
<td>1 FTE APS4</td>
</tr>
<tr>
<td></td>
<td>1 FTE APS5</td>
</tr>
<tr>
<td>Federal Circuit Court of Australia</td>
<td>1 FTE APS4</td>
</tr>
<tr>
<td></td>
<td>1 FTE APS5</td>
</tr>
</tbody>
</table>

Source: Advice from the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia to KPMG, 31 January 2014. Note that FCoA judges at first instance receive in-court support from appropriately trained staff from the client service teams. These staff are not dedicated chambers staff and perform other registry functions when not in court.

As illustrated in Table 3-10, first instance judges in the FCoA have considerably less judicial support than both appellate judges, and judges in the FCA and FCC, while the level of support provided to appellate judges is equivalent to that seen in the FCC. Although there is no
consensus as to the desirable level of judicial support, it is noted that this measure has generated $345,000 per annum in recurrent savings to the Courts.126

Savings in administration and other expenses, including travel, interpreters and transcription

The FCoA and FCC have undertaken reviews of administrative spending. In particular:

- **Travel expenses:** The 2008 *National Support Office Health Check* identified $1.5 million per annum in FCoA air travel expenses. Effective 1 July 2008, restrictions were implemented requiring a 20 per cent reduction of the National Support Office travel budget, mandated economy travel between Canberra and Sydney, and the use of flexible airfare rates only in relation to return flights (note that outbound flights must be booked at the lowest possible rate, being a non-flexible fare).

- **Whole-of-Government contracting arrangements:** The FCoA and FCC have leveraged whole-of-government interpreter panels, resulting in savings in interpreter costs.127 In addition, the FCA, FCoA and FCC consolidated a number of contracts both within the three courts, and utilised whole-of-Government contracts in relation to fleet management, electricity, cleaning and telecommunications.

- **Audio portal and transcription services:** Changes have been made to the way in which judicial officers access recordings in the preparation of judgments, leading to savings in the use of audio portal and transcription services.128

Collectively, these initiatives have resulted in recurrent savings to the courts of $1.87 million per annum.129

Staffing appointments

The 2008 *National Support Office Health Check* identified a number of opportunities to reduce staffing positions, including:

- Reduction of three FTE Executive Assistant Positions performing administrative tasks for FCoA Senior Executives to two FTE. In practice, one role was reduced to a part-time position, resulting in 1.5 FTE Executive Positions, rather than three FTE.

- Relocation of the FCoA Deputy Marshall position from Adelaide to Canberra, resulting in a reduction in air travel and the level of staff required for the position. This recommendation was implemented.

---

• Reduction of payroll resourcing in the FCoA from four FTEs to two FTEs. In practice, the FCoA assumed responsibility for the FCC payroll functions following the merging of administration functions without an increase in FTE.

• Reduction of FCoA recruitment resourcing (three FTEs) through greater use of templates, forms and process instructions. In practice, the FCoA assumed responsibility for FCC recruitment functions following the merging of administration functions without an increase in FTE.

• Reduction in the three FCoA property staff and three contract staff supervised by an EL2 manager through splitting the Property and Contracts Team, thereby removing the need for the EL2 Manager position. This recommendation was implemented.

• Reducing the FCoA Risk Management Team by one FTE; a recommendation which was implemented.

In addition to these staff reductions, it is noted that whilst the FCoA and FCC have not implemented a formal recruitment ‘freeze’, ‘robust decisions’ have been made in relation to deciding whether recruitment activity ought to be pursued. Further, a number of staff, including the CEO, have assumed responsibility for the administrative support functions of the FCC while maintaining their duties within the FCoA – therefore effectively performing more than one role.130

Between 2008-09 and 2010-11, the FCA made a series of staff reductions. In particular, the Research Directorate was disbanded and efforts were made to reduce the Courts’ administrative costs.131 These staffing reductions are outlined in Table 3-11.

<table>
<thead>
<tr>
<th></th>
<th>2007-08</th>
<th>2010-11</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal/National</td>
<td>90</td>
<td>65</td>
</tr>
<tr>
<td>New South Wales/Australian Capital Territory</td>
<td>121</td>
<td>113</td>
</tr>
<tr>
<td>Victoria/Tasmania</td>
<td>91</td>
<td>76</td>
</tr>
<tr>
<td>South Australia/Northern Territory</td>
<td>34</td>
<td>32</td>
</tr>
<tr>
<td>Queensland</td>
<td>42</td>
<td>37</td>
</tr>
<tr>
<td>Western Australia</td>
<td>34</td>
<td>35</td>
</tr>
</tbody>
</table>

Source: O’Connor Marsden, Federal Court of Australia: Organisational Health Check Review (O’Connor Marsden 2011) 17.

Finally, while the Courts have no control over judicial appointments, it is noted that electing not to replace FCoA and FCC judicial officers in 2010-11 generated $10.5 million in savings over four years, and $14.4 million in savings over four years in 2010-11.132 These savings have been

---

130 Family Court of Australia and Federal Circuit Court of Australia, Budget challenges in 2013-14 and beyond (Family Court of Australia and Federal Circuit Court of Australia 2013) 33.
131 O’Connor Marsden, Federal Court of Australia: Organisational Health Check Review (O’Connor Marsden 2011) 17.
132 Letter from Attorney-General’s Department to KPMG, 28 February 2014.
used as Portfolio Offsets. In addition to this, the FCA did not replace five judicial officers over the same period, generating savings in the vicinity of $12.05 million over four years.

The 2008 National Health Check identified recurrent savings to the Courts in the vicinity of $400,000 per annum through the staff reductions outlined above. In addition to these savings, the performance of ‘dual roles’ by some FCoA staff in respect of FCC-related work activity are expected to drive further efficiency savings, although these are unquantified.

Other legislative and practical initiatives

The range of other legislative and practical initiatives undertaken is potentially broad, and therefore it is possible that some activities (particularly smaller-scale ones) may not have been identified as potential efficiency gains or savings. Notwithstanding this, the development of an agreed allocation of Family Consultants from in-house resources between the FCoA and FCC has enabled:

- the FCoA and FCC to facilitate alignment of its resources to ensure both courts benefit equitably from Family Consultant services; and
- the optimal use of in-house resources, therefore reducing the need to engage Regulation 7 Consultants as frequently, generating recurrent savings to the Courts of approximately $600,000.

Conclusion

The measures implemented to date are reflective of the Courts’ recognition of the difficult financial position in face of challenges relating to ongoing (and persistent) workload demands and the need to facilitate timely, appropriate and equitable access to justice. Whilst the savings achieved to date are encouraging, their overarching impact has been limited by the fact that the larger savings measures – particularly implementation of the single administration arrangements between the FCoA and FCC – have principally been returned to Consolidated Revenue, while not replacing judicial officers has been used as Portfolio Offsets. As such, only the ‘smaller’ savings measures have been reinvested by the Courts. This has limited the overarching impact of savings and efficiency measures implemented to date on the Courts’ financial position. On the basis of information available, it appears unlikely that additional savings measures and efficiency initiatives (beyond those already implemented) are feasible without negative impacts on service delivery.

---

133 Family Court of Australia and Federal Circuit Court of Australia, *Budget challenges in 2013-14 and beyond* (Family Court of Australia and Federal Circuit Court of Australia 2013) 36.

134 E-mail from Federal Court of Australia to Attorney-General’s Department, 27 February 2014; Letter from Attorney-General’s Department to KPMG, 28 February 2014.

135 Family Court of Australia and Federal Circuit Court of Australia, *Budget challenges in 2013-14 and beyond* (Family Court of Australia and Federal Circuit Court of Australia 2013) 34.

Key Finding 12
The Courts have, to date, implemented a range of measures to operate within existing appropriations. These include a reduction in judicial support officers, consolidation of library services, travel restrictions, and utilising Whole-of-Government panel arrangements for specific services (e.g. interpreters). While these savings are recurrent and have been reinvested by the Courts, they are modest, and insufficient to offset the Courts’ projected deficits.

Key Finding 13
Merging administration functions of the FCoA and FCC has generated net savings of approximately $7.8 million over four years, although $6.3 million was returned to Consolidated Revenue and therefore could not be used to offset the Courts’ projected deficit.

Key Finding 14
A number of larger-value savings have been implemented, including

- incorporation of the NNTT into the FCA (estimated to deliver savings of $19 million over four years); and
- not replacing FCA, FCoA and FCC judicial officers in 2009-10 and 2011 (estimated to deliver savings of $24.9 million in respect of FCoA and FCC judicial officers between 2009-10 and 2013-14).

These savings have been used as Portfolio Offsets which means they have no impact on the Courts’ projected deficits, nor do they offset the impacts of the Efficiency Dividend.
4 Future budgetary needs

As has been outlined earlier in this report, the Courts face significant financial challenges with projected costs rising faster than the appropriation provided to cover them. The proportion of non-discretionary expenditure currently funded by general appropriation (and hence subject to the efficiency dividend) is a significant contributing factor to these challenges. It is not possible for the current funding model to be sustainable given constant (or increasing) demand. Once efficiencies have been realised further cuts will need to be applied directly to service levels. Whilst the injection of additional funds may provide temporary relief (as has been applied in previous years), such a fix will not be capable of addressing the general misalignment between growth in costs and revenues. Table 4-1 provides a high level snapshot of the projected deficits for the respective Courts (the complete projections and underlying assumptions have been included at Appendix G).

<table>
<thead>
<tr>
<th></th>
<th>2013-14 $'000s</th>
<th>2014-15 $'000s</th>
<th>2015-16 $'000s</th>
<th>2016-17 $'000s</th>
<th>2017-18 $'000s</th>
<th>Total $'000s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td>207</td>
<td>(2,413)</td>
<td>(5,146)</td>
<td>(7,979)</td>
<td>(9,515)</td>
<td>(24,847)</td>
</tr>
<tr>
<td>Family Court of Australia and Federal Circuit Court of Australia</td>
<td>0</td>
<td>(7,470)</td>
<td>(10,913)</td>
<td>(15,294)</td>
<td>(16,299)</td>
<td>(49,906)</td>
</tr>
<tr>
<td>Total</td>
<td>207</td>
<td>(9,883)</td>
<td>(16,059)</td>
<td>(23,273)</td>
<td>(25,744)</td>
<td>(74,753)</td>
</tr>
</tbody>
</table>

Judicial salaries and the CLC leases represent the most significant categories of non-discretionary expenditure for the courts at present, and hence, by extension, key factors to be addressed in order to make the model more sustainable over time. One possible course of action to address this would be to exempt judicial remuneration from the application of the Efficiency Dividend and to deem the entirety of the CLC portfolio as Special Purpose Property (SPP) and provide all related expenditure to the Courts on a free-of-charge basis. The projected impact of such changes on the courts bottom line are outlined in Table 4-2 and Table 4-4 and discussed in greater detail in Chapter 5. Importantly, it should be noted that such whilst such actions would improve the sustainability (and projected financial position) for the Courts they would need to be funded from elsewhere in the budget.

<table>
<thead>
<tr>
<th></th>
<th>2014-15 $'000s</th>
<th>2015-16 $'000s</th>
<th>2016-17 $'000s</th>
<th>2017-18 $'000s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td>520</td>
<td>1,056</td>
<td>1,607</td>
<td>2,175</td>
</tr>
<tr>
<td>Family Court of Australia and Federal Circuit Court of Australia</td>
<td>810</td>
<td>1,644</td>
<td>2,504</td>
<td>3,389</td>
</tr>
<tr>
<td>Total</td>
<td>1,330</td>
<td>2,700</td>
<td>4,111</td>
<td>5,564</td>
</tr>
</tbody>
</table>

Funding judicial salaries via a Special Appropriation (as was recommended in the Skehill review and is currently the case for the HCA) provides a mechanism for such an exemption in that it
can be clearly linked to an existing precedent and would be somewhat easier to administer than a ‘pure’ exemption. Whilst in the long run such an approach is expected to have a beneficial impact on the Court’s bottom line (at the expense of the budget), it must be acknowledged that such benefit would be offset in part by the loss of projected savings associated with delays in appointing judicial officers upon retirement and long leave. The Courts have provided quantification as to the scale those projected savings (as outlined in Table 4-3 below).

Table 4-3: Projected savings associated with delays in Judicial Appointments and Long Leave

<table>
<thead>
<tr>
<th></th>
<th>2014-15 $’000s</th>
<th>2015-16 $’000s</th>
<th>2016-17 $’000s</th>
<th>2017-18 $’000s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td>756</td>
<td>756</td>
<td>756</td>
<td>756</td>
</tr>
<tr>
<td>Family Court of Australia and Federal Circuit Court of Australia</td>
<td>971</td>
<td>1,588</td>
<td>1,074</td>
<td>458</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,727</strong></td>
<td><strong>2,344</strong></td>
<td><strong>1,830</strong></td>
<td><strong>1,214</strong></td>
</tr>
</tbody>
</table>

Table 4-4: The impact on the court’s bottom line of providing CLC related property and lease services on a free-of-charge basis

<table>
<thead>
<tr>
<th></th>
<th>2014-15 $’000s</th>
<th>2015-16 $’000s</th>
<th>2016-17 $’000s</th>
<th>2017-18 $’000s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td>255</td>
<td>518</td>
<td>790</td>
<td>1,069</td>
</tr>
<tr>
<td>Family Court of Australia and Federal Circuit Court of Australia</td>
<td>269</td>
<td>546</td>
<td>831</td>
<td>1,125</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>524</strong></td>
<td><strong>1,064</strong></td>
<td><strong>1,621</strong></td>
<td><strong>2,194</strong></td>
</tr>
</tbody>
</table>

Depending on the level of efficiencies it is assumed the courts can sustainably find and apply annually (as discussed later in this chapter), it is anticipated that ‘dealing’ with the impact of the efficiency dividend on judicial salaries and the CLCs will resolve between 30 per cent and 45 per cent of the structural ‘funding gap’ (that is to say the degree at which costs are growing faster than revenues). In other words, they would be able to help to reduce the degree of unsustainability associated with the current model but not completely nullify it.

Based on the current policy settings, it appears unlikely that significant reductions to service levels or a general exemption from the efficiency dividend are on the table, significantly reducing options to deal with the structural gap from the ‘expense side’, which has driven focus on income. One option here would be to convert all – or a part – of Court Fees from Administered to Departmental (under the general principles of cost recovery). This would be offset by a commensurate reduction in the General appropriation currently available to the Courts.

Assuming that the Fees grew in line with the WCI adjustments, this would have the dual benefits of reducing reliance on appropriations and providing the Courts with a degree of ‘automatic cover’ for growth in demand. Such an arrangement would not be without precedent in Australia – both the Western Australian and Victorian models already allow the retention of such fees.

In this space, the key challenges would come in terms of:
• determining the basis on which fees may be retained (possibilities include, but are not limited to a proportion of all fees generated, specific fee types or all fees revenue in excess of an agreed threshold); and

• dealing with scenarios in which the realised fee levels were significantly higher or lower than budgetary forecasts (i.e. does all revenue over a given cap need to be returned to Consolidated Revenue or will the court receive additional appropriation if anticipated revenue does not eventuate).

For the purposes of this analysis, if it was assumed that both the FCA and combined FCoA and FCC were allowed to retain $10 million worth of fees annually (with this figure growing in line with the budgetary WCI rates), the incremental improvement in the bottom line for each Court would be as outlined in Table 4-5. This would ‘close’ another seven per cent to twelve per cent of the funding gap, bringing the collective ‘impact’ of the three changes outlined to between 37 and 57 per cent. In 2012-13, slightly under $60 million was collected by the Courts as Administered revenue – were all of this retained the impact would be roughly triple the figures outlined below.

Table 4-5: The impact on the court’s bottom line of allowing $10m of fees to be retained as Departmental annually

<table>
<thead>
<tr>
<th></th>
<th>2014-15 $'000s</th>
<th>2015-16 $'000s</th>
<th>2016-17 $'000s</th>
<th>2017-18 $'000s</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td>229</td>
<td>459</td>
<td>692</td>
<td>927</td>
</tr>
<tr>
<td>Family Court of Australia and Federal Circuit Court of Australia</td>
<td>229</td>
<td>459</td>
<td>692</td>
<td>927</td>
</tr>
<tr>
<td>Total</td>
<td>458</td>
<td>918</td>
<td>1,384</td>
<td>1,854</td>
</tr>
</tbody>
</table>

Revised projections for the Courts with the quantified changes as discussed above have been included at Table 4-6 and Table 4-7.
Table 4-6: Revised projection – Federal Court of Australia including strategies to make model more sustainable

<table>
<thead>
<tr>
<th>Federal Court of Australia</th>
<th>2012-13 ($'000)</th>
<th>2013-14 ($'000)</th>
<th>2014-15 ($'000)</th>
<th>2015-16 ($'000)</th>
<th>2016-17 ($'000)</th>
<th>2017-18 ($'000)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sale of G&amp;S</td>
<td>3,341</td>
<td>3,341</td>
<td>13,501</td>
<td>13,664</td>
<td>13,829</td>
<td>13,997</td>
</tr>
<tr>
<td>Other Revenue</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other Gains</td>
<td>30,901</td>
<td>32,060</td>
<td>39,233</td>
<td>40,704</td>
<td>42,230</td>
<td>43,814</td>
</tr>
<tr>
<td>Revenue from Government</td>
<td>89,020</td>
<td>93,213</td>
<td>77,872</td>
<td>78,298</td>
<td>78,952</td>
<td>80,983</td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td>123,262</td>
<td>128,614</td>
<td>130,606</td>
<td>132,666</td>
<td>135,011</td>
<td>138,794</td>
</tr>
<tr>
<td><strong>Expenses</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judges</td>
<td>29,926</td>
<td>33,447</td>
<td>34,450</td>
<td>35,484</td>
<td>36,548</td>
<td>37,645</td>
</tr>
<tr>
<td>Other Employees</td>
<td>43,194</td>
<td>45,633</td>
<td>46,774</td>
<td>47,943</td>
<td>49,142</td>
<td>50,371</td>
</tr>
<tr>
<td>Separation and Redundancy</td>
<td>678</td>
<td>300</td>
<td>300</td>
<td>350</td>
<td>650</td>
<td>950</td>
</tr>
<tr>
<td><strong>Total employee expense</strong></td>
<td>73,798</td>
<td>79,380</td>
<td>81,524</td>
<td>83,777</td>
<td>86,340</td>
<td>88,966</td>
</tr>
<tr>
<td>IT &amp; Comms</td>
<td>3,980</td>
<td>4,548</td>
<td>4,637</td>
<td>4,730</td>
<td>4,824</td>
<td>4,921</td>
</tr>
<tr>
<td>Consultants &amp; Contractors</td>
<td>2,655</td>
<td>3,022</td>
<td>3,082</td>
<td>3,144</td>
<td>3,207</td>
<td>3,271</td>
</tr>
<tr>
<td>Property</td>
<td>2,480</td>
<td>2,526</td>
<td>2,577</td>
<td>2,628</td>
<td>2,681</td>
<td>2,734</td>
</tr>
<tr>
<td>Travel</td>
<td>3,402</td>
<td>3,497</td>
<td>3,567</td>
<td>3,638</td>
<td>3,711</td>
<td>3,786</td>
</tr>
<tr>
<td>Operating Lease</td>
<td>27,195</td>
<td>27,679</td>
<td>28,717</td>
<td>29,798</td>
<td>30,911</td>
<td>32,070</td>
</tr>
<tr>
<td>Workers Comp</td>
<td>381</td>
<td>474</td>
<td>483</td>
<td>493</td>
<td>503</td>
<td>513</td>
</tr>
<tr>
<td><strong>Total suppliers expense</strong></td>
<td>46,714</td>
<td>48,955</td>
<td>50,418</td>
<td>51,929</td>
<td>53,489</td>
<td>55,100</td>
</tr>
<tr>
<td>Finance Costs</td>
<td>72</td>
<td>72</td>
<td>72</td>
<td>72</td>
<td>72</td>
<td>72</td>
</tr>
<tr>
<td>Write Down / Impairment</td>
<td>560</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Losses From Asset Sales</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Other Expenses</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td>125,409</td>
<td>132,686</td>
<td>136,609</td>
<td>139,914</td>
<td>144,037</td>
<td>148,273</td>
</tr>
<tr>
<td>Surplus/Deficit</td>
<td>(2,147)</td>
<td>(4,072)</td>
<td>(5,803)</td>
<td>(7,249)</td>
<td>(9,026)</td>
<td>(9,479)</td>
</tr>
<tr>
<td>Surplus/Deficit excl. Deprecation</td>
<td>2,118</td>
<td>207</td>
<td>(1,409)</td>
<td>(3,113)</td>
<td>(4,890)</td>
<td>(5,344)</td>
</tr>
</tbody>
</table>

Assumptions for the projected performance outlined above are consistent for those included at Appendix G but for the funding of judicial remuneration through a Special Appropriation, deeming the entire CLC portfolio as SPP and allowing $10 million in court fees to be retained as Departmental Revenue.
Assumptions for the projected performance outlined above are consistent for those included at Appendix G but for the funding of judicial remuneration through a Special Appropriation, deeming the entire CLC portfolio as SPP and allowing $10 million in court fees to be retained as Departmental Revenue.

Clearly, in the revised projections for both reporting entities deficits are still expected, however, the rate that they are growing is noticeably slower than that which is evident in Table 4-1. This enables us to consider the remaining deficits as two separate elements – an initial base and subsequent increments. The former can simply be addressed via either a recurrent injection of funds or cuts to resourcing, whereas the case is not so simple for the latter. Per the earlier discussion, in order for the model to be truly sustainable the incremental impact would need to be nil after the effects of savings and efficiency measures have been applied. This would require the Courts to find between $1 million and $3 million each annually on top of existing savings measures already programmed in. Such savings could only be achieved if accompanied by a significant investment (in an area such as IT) and could not be sustained in the medium term due to the limited ‘discretionary’ cost base as discussed previously.
Key Finding 15

The current funding model for the Courts is not sustainable. The question of sustainability cannot simply be addressed through the injection of additional funds or one-off cuts, rather it requires more fundamental amendments to the model.

Recommendation 2

That consideration be given to the introduction of a regular (i.e. once every three years) mechanism by which the workload of each Court is reviewed and, if appropriate, base funding is adjusted accordingly. This process should include the development and utilisation of operational performance improvements to better structure, evidence and support any future financial proposal to Central Agencies for revised funding needs.

In terms of future budgetary needs, the key questions come down to the level of service expected to be provided by the respective Courts and structure under which such services will be delivered. It is noted that these decisions (with associated financial consequences) are a matter for Government, and will require a balancing of factors such as quality, timeliness and access to justice with the bottom line implications on the budget.

Due to the inability of the courts to quantify the linkages between resourcing and output (and assertions that internal budgets are prepared without reference to projected workload) there is no clear evidence to support a case for additional judicial (or other non-financial) resources given projected workloads.

That said, it is apparent that the Courts are facing a challenging budget in 2014-15 which will require them to make significant cuts to resourcing levels. Given the quantum of these cuts ($7.1 million for the FCoA and FCC alone) it is expected that they will require significant reductions to staffing levels which will have a clear impact on service levels. In the medium- to long-term, sustained cuts to administrative services may well be counterproductive and will be unable to drive long-term efficiencies.

Key Finding 16

To achieve the current budget across the forward estimates for all three Courts would require significant cuts to service and staffing levels. Such cuts to administrative services are unlikely to form a sustainable basis or driver for long-term efficiencies.

Recommendation 3

That the Government consider providing additional supplementation to the Courts ($4.5 million for the FCoA and FCC and $0.5 million for FCA) in 2014-15 to enable them to maintain service levels in the short-term until a more permanent funding mechanism is agreed.
As can be seen from Figure 16, should all of the initiatives discussed in this chapter be implemented they will not be sufficient to overcome the projected deficits. Other options available to help close the remaining ‘gap’ include additional supplementation, cuts to acceptable service levels (such as registry closures), increasing the amount of court fees able to be retained as departmental revenue, increasing the degree of integration between the courts or a range of other opportunities as outlined in Chapter 5 of this report.

Figure 16: Comparison of the combined impact of proposed measures to the initially projected deficit
5 Discussion of opportunities

The review has examined the performance of the federal court system in the context of a constrained budget environment, changing demand profile, and increased complexity. The Terms of Reference for this engagement highlighted a range of focus areas within which to examine the sustainability of the courts’ current funding model and their ability to operate within existing appropriations.

The interrelated financial, economic and social operating environment means that there is no single solution to support the courts in their efforts to operate within their existing budget allocation. It is clear, however, that opportunities do exist to build on the efficiencies already realised by the courts through recent savings initiatives, ranging from major structural change to more localised productivity drivers.

5.1 Assessment criteria

A broad range of opportunities have been identified for initial consideration as a means to achieve greater efficiencies or increase productivity across the federal courts, in order to position the courts on a more sustainable basis. Given the highly variable nature of these opportunities, it is helpful to develop a framework for assessing the relative value of the opportunities identified, across a range of financial and non-financial indicators.

The fundamental importance of the justice system to Australia’s societal fabric means there are a number of overarching considerations in the assessment of opportunities to achieve increased court performance and effectiveness.

Work undertaken by the European Commission has examined opportunities to increase judicial efficiencies in light of the recent global financial crisis and corresponding austerity measures, and identified elements to underpin the functioning of national judicial systems. This includes the following high level themes:

- **economic facilitation:** business-friendliness of land and property registration, company registration, insolvency proceedings and obtaining licences, with the European Commission emphasising that efficient judicial institutions can in turn contribute to economic growth and development;\(^{137}\)

- **resourcing of justice:** resources of justice, including budget, human resources, workload and ICT; and

- **access to justice:** use and accessibility of justice, including length and cost of procedures, use of simplified and ADR procedures.

Drawing on these considerations, a series of criteria were developed to support the identification and quantification of opportunities to improve the integration, effectiveness and efficiency of the federal courts. These criteria are outlined in Table 5-1 and are considered essential to provide a framework for the assessment of opportunities, in line with overarching objective of identifying a sustainable and efficient funding model to underpin court operations.

Table 5-1: Criteria to support the assessment of opportunities

<table>
<thead>
<tr>
<th>Assessment criteria</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Materiality</td>
<td>The size or scale of the opportunity in financial terms, to identify the opportunities which have the greatest impact on the courts’ ability to operate within existing appropriations</td>
</tr>
<tr>
<td>Effectiveness</td>
<td>The capacity of the reform to achieve better outcomes for the courts, practitioners, litigants and government, including desirability of placing the right type of activity at the ‘right’ level of the court system and hierarchy, based on matter type, complexity etc</td>
</tr>
<tr>
<td>Efficiency</td>
<td>Whether the opportunity will achieve more with existing resources (or with less potentially)</td>
</tr>
<tr>
<td>Integration</td>
<td>The extent to which the reform supports integration across the court system, both from a governance and court user perspective</td>
</tr>
<tr>
<td>Sustainability</td>
<td>The ability of the reform to recalibrate existing arrangements on a sustainable basis over the medium to long term</td>
</tr>
</tbody>
</table>

The analysis indicates that opportunities for reform fall into two distinct categories. On one hand, there are opportunities to fundamentally reset the existing funding model for court operations, in order to address what could be considered an ongoing structural deficit in the way courts are funded to deliver justice services. Opportunities in this area go to the sustainability driver in the Terms of Reference, and are characterised by the materiality of their impact.

In addition, there are a range of opportunities which can be explored to assist the courts to streamline their performance and operations, in order to drive efficiencies within a constrained funding environment. All areas of government are required to find ways to do more with less, and it is important for courts to continue to drive performance improvement and process efficiency across all areas of court operations.

5.2 Opportunities for reform

Initial analysis has identified a range of opportunities intended to support the federal courts to achieve greater efficiencies or increase productivity across the system, in an effort to operate within existing appropriations in the first instance, or achieve a more sustainable funding reforms over the medium to long term. Opportunities have been identified across a range of areas, including:

- structural change;
- the development of a sustainable funding model;
property and assets;
the courts’ operating model;
case management and judicial activity; and
procedural and legislative change.

These opportunities are explored in further details in the analysis below.

**Structural change**

As has been noted earlier in this report, the Courts have been able to realise ongoing efficiencies as a result of two structural changes over the review period – the strengthening of linkages between the FCoA and FCC ($7.8 million over four years) and bringing the NNTT into the FCA ($19 million over four years). In each instance, this allowed for savings through generation of economies of scale and removal of duplication in ‘shared services’. Notwithstanding this, the current funding arrangements of the FCA, FCoA and FCC are complex, as outlined in Figure 17.
Figure 17 highlights the complexity of the existing federal court structure, whereby:

- an integrated entity provides registry, family law support and corporate services for the FCoA and FCC (it understood that approximately 92 corporate services staff are based in Canberra and provide this service nationally), however the FCA maintains a separate corporate services division;

- the FCA provides General Federal Law registry services for the FCC (which in 2012-13 comprised eight per cent of total filings in the FCC), while the FCoA provides Family Law...
registry services for the FCC (which in 2012-13 comprised 92 per cent of total filings in the FCC);
- the FCA now provides library services for the FCoA and FCC, an initiative of the Heads of Jurisdiction Committee following the Skehill Review; and
- there are two superior courts (the FCA and the FCoA), although, as discussed in Chapter 2, there are high levels of concurrent jurisdiction between the FCA and FCC in respect of General Federal Law Matters and the FCoA and FCC in respect of Family Law matters, meaning that the current structure may not incentivise the hearing of matters in the lowest appropriate jurisdiction.

This section will explore opportunities to enable the early progression and implementation of the Government’s policy to establish the FCC on a financial and administrative basis independent of the FCoA as well as the possibility of generation of further economies of scale associated with greater integration of the three courts. It is recognised that structural change can represent a significant impost on organisations however the best results are usually realised with full implementation of a desired model rather than by adopting a piecemeal approach to change.

### Separation of the FCC from FCoA

There are a number of scenarios under which the FCC could achieve independence from the FCoA, ranging from a complete separation to more moderate governance-driven options. The preferred option (and associated cost) will depend on the Government’s view as to the acceptable level of independence.

The separation of the FCC from FCoA on a financial and administrative basis forms part of the Government’s policy. This chapter is intended to explore the manner in which this policy may be effected.

There are a number of relevant considerations in determining how the FCC can obtain independence, most notably:
- whether it is appropriate to share resources for ‘support’ services such as IT and HR;
- whether any ‘shared services’ should be provided through a dedicated agency;
- whether the registry function should be shared or split by Court;
- which entities will receive appropriations;
- how will the FCC’s General Federal Law function be funded; and
- how much it will cost.

Such choices give rise to a significant number of permutations for models for independence. These range from a relatively minor amendment to the existing structure to the complete separation of the FCC from the FCoA. This chapter will discuss five possible models identified in the course of stakeholder consultation.
We note that this is by no means an exhaustive list of possibilities, but does provide users with a spectrum of possibilities and associated pros and cons associated with the uses of the identified variables. The following diagram provides an overview of possible models considered in this section.

A broad overview of the spectrum of options considered is provided in Figure 18.

Figure 18: Spectrum of structural change options

Scenario One: Discrete judicial functions and CEO for each Court but otherwise continue to share administration, services and appropriation in line with current arrangements

The first scenario, illustrated in Figure 19, involves positioning the respective Courts as independent judicial bodies within a broader Courts entity. Under this model, each Court would be responsible – and funded (via an agreed share of the overall appropriation) – for their judicial and executive functions whilst the broader Courts entity would handle the remaining shared and support services. This model can be broadly paralleled to the existing structure of the FCoA and FCC with two key points of difference – the establishment of a CEO for the FCC and strengthening the governance and funding arrangements. Of the five options considered for separation, this represents the least ‘extreme’ change.
Due to the significant similarities to the ‘current state’ as outlined above, relatively little change would be required to provide independence in this instance. Key amongst these would be the establishment of the additional CEO (or equivalent) position which would require amendment to the FCC’s enabling legislation and provision of appropriate support personnel. We have provisionally estimated that this option would come at an incremental cost less than $1 million a year, as outlined in Table 5-2.
Table 5-2: Estimate of incremental costs associated with Scenario 1

<table>
<thead>
<tr>
<th>Family Court of Australia &amp; Federal Circuit Court</th>
<th>2014-15 ($'000)</th>
<th>2015-16 ($'000)</th>
<th>2016-17 ($'000)</th>
<th>2017-18 ($'000)</th>
<th>Ref</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sale of G&amp;S</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Revenue</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Gains</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Revenue from Government</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Expenses</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees expense</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judges</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Employees</td>
<td>662</td>
<td>682</td>
<td>702</td>
<td>723</td>
<td>(1)</td>
</tr>
<tr>
<td>Separation and Redundancy</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total employee expense</strong></td>
<td>662</td>
<td>682</td>
<td>702</td>
<td>723</td>
<td></td>
</tr>
<tr>
<td>Suppliers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IT &amp; Comms</td>
<td>69</td>
<td>19</td>
<td>19</td>
<td>18</td>
<td>(2)</td>
</tr>
<tr>
<td>Consultants &amp; Contractors</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Property</td>
<td>44</td>
<td>44</td>
<td>43</td>
<td>43</td>
<td>(3)</td>
</tr>
<tr>
<td>Travel</td>
<td>117</td>
<td>117</td>
<td>118</td>
<td>119</td>
<td>(4)</td>
</tr>
<tr>
<td>Other Suppliers</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Operating Lease</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Workers Comp</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>(5)</td>
</tr>
<tr>
<td><strong>Total suppliers expense</strong></td>
<td>232</td>
<td>181</td>
<td>182</td>
<td>183</td>
<td></td>
</tr>
<tr>
<td>Depreciation / Amortisation</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Finance Costs</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Write Down / Impairment</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Losses From Asset Sales</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Expenses</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td>894</td>
<td>863</td>
<td>884</td>
<td>906</td>
<td></td>
</tr>
<tr>
<td>Surplus/Deficit</td>
<td>(894)</td>
<td>(863)</td>
<td>(884)</td>
<td>(906)</td>
<td></td>
</tr>
<tr>
<td>Surplus/Deficit excl. Depreciation</td>
<td>(894)</td>
<td>(863)</td>
<td>(884)</td>
<td>(906)</td>
<td></td>
</tr>
</tbody>
</table>

(1) 1 additional SES Band 2 Officer and 3 administrative personnel
(2) $50,000 expense to modify existing tools and systems in 2014-15 and allowance for on costs
(3) General allowance for on costs (standard per head rate)
(4) 3% increase in projected travel linked to increased governance and administration
(5) Calculated on a flat per head rate

Additionally, it should be noted that such a structure would allow for the addition of other small and medium entities from within the portfolio over time in an attempt to drive greater efficiencies associated with economies of scale and move towards a ‘smaller’ public service.
Scenario Two: Discrete judicial and registry functions and CEO for each Court but otherwise continue to share administration, services and appropriation in line with current arrangements

The second scenario is illustrated in Figure 20 and differs from the first in one area only – it considers the registry function to be part of the respective Courts rather than a shared service for both. In a sense, this becomes a hybrid of the first and last scenarios, trading off cost and timeliness of implementation for a greater degree of ‘formal’ separation between the Courts. Clearly, this is only one such example of a hybrid solution – other shared services (i.e. Family Consultants) could be reclassified as court functions depending on the relative appetite for separation, cost and timeliness.

Figure 20: Illustration of proposed structure under Scenario 2

Based on our analysis of the Court’s costing for Scenario 5 (as discussed below), it appears that the cost of separating and subsequently duplicating parts of the registry function will cost approximately $7.4 million a year to implement with potentially another $1 million to $2 million required for up front fit out expenditure, as outlined in Table 5-3. It seems reasonable to assume that the associated cost will increase were additional shared services to be allocated to the individual Courts.
Table 5-3: Estimate of incremental costs associated with Scenario 2

<table>
<thead>
<tr>
<th>Family Court of Australia &amp; Federal Circuit Court</th>
<th>2014-15 (’$000)</th>
<th>2015-16 (’$000)</th>
<th>2016-17 (’$000)</th>
<th>2017-18 (’$000)</th>
<th>Ref</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Forward estimates</strong></td>
<td>Impact</td>
<td>Impact</td>
<td>Impact</td>
<td>Impact</td>
<td></td>
</tr>
<tr>
<td>Income</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sale of G&amp;S</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Revenue</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Gains</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Revenue from Government</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Expenses</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees expense</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judges</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Employees</td>
<td>5,862</td>
<td>6,038</td>
<td>6,219</td>
<td>6,406</td>
<td>(1)</td>
</tr>
<tr>
<td>Separation and Redundancy</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total employee expense</strong></td>
<td>5,862</td>
<td>6,038</td>
<td>6,219</td>
<td>6,406</td>
<td></td>
</tr>
<tr>
<td>Suppliers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IT &amp; Comms</td>
<td>404</td>
<td>252</td>
<td>250</td>
<td>249</td>
<td>(2)</td>
</tr>
<tr>
<td>Consultants &amp; Contractors</td>
<td>250</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>(3)</td>
</tr>
<tr>
<td>Property</td>
<td>594</td>
<td>590</td>
<td>586</td>
<td>582</td>
<td>(4)</td>
</tr>
<tr>
<td>Travel</td>
<td>195</td>
<td>194</td>
<td>196</td>
<td>198</td>
<td>(5)</td>
</tr>
<tr>
<td>Other Suppliers</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Operating Lease</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Workers Comp</td>
<td>32</td>
<td>32</td>
<td>32</td>
<td>32</td>
<td>(6)</td>
</tr>
<tr>
<td><strong>Total suppliers expense</strong></td>
<td>1,475</td>
<td>1,069</td>
<td>1,065</td>
<td>1,061</td>
<td></td>
</tr>
<tr>
<td>Depreciation / Amortisation</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Finance Costs</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Write Down / Impairment</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Losses From Asset Sales</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Expenses</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td>7,337</td>
<td>7,107</td>
<td>7,284</td>
<td>7,467</td>
<td></td>
</tr>
<tr>
<td>Surplus/Deficit</td>
<td>(7,337)</td>
<td>(7,107)</td>
<td>(7,284)</td>
<td>(7,467)</td>
<td></td>
</tr>
<tr>
<td>Surplus/Deficit excl. Depreciation</td>
<td>(7,337)</td>
<td>(7,107)</td>
<td>(7,284)</td>
<td>(7,467)</td>
<td></td>
</tr>
</tbody>
</table>

(1) Incremental staffing per scenario 1 + 50 additional personnel for roles in the registries and administration

(2) $150,000 expense to modify existing tools and systems in 2014-15 and allowance for on costs

(3) Up front expenditure to help with the separation of the registry function

(4) General allowance for on costs (standard per head rate) with a $50,000 increase reflecting loss of economies of scale

(5) 5% increase in projected travel linked to increased governance and administration

(6) Calculated on a flat per head rate
Recent Victorian reforms in court administration provide an interesting comparator example for consideration. Court Services Victoria illustrates a changed approach to the delivery of court support services in Victoria, relying on a governance model led by Heads of Jurisdiction to ensure the independent support of judicial activity across multiple courts and tribunals.

**Case study: Victoria**

The Victorian Government is currently implementing an independent statutory agency, Court Services Victoria (CSV) – to provide administrative services and facilities for Victoria’s Courts and the Victorian Civil and Administrative Tribunal (VCAT) which are currently delivered by the Victorian Department of Justice.

As noted in the Explanatory Memorandum to the Court Services Victoria Bill 2013:

> Whilst the courts themselves will remain as separate and distinct entities and their governing councils, internal arrangements and rule-making responsibilities will remain unchanged, their executives will come together with the Chief Executive Officer to manage Court Services Victoria as a whole.  

The governing body of CSV will be the Courts Council which will be chaired by the Chief Justice and will comprise the heads of each jurisdiction and up to two appointed non-judicial members with expertise in the areas of finance, administration or management. The Courts Council will direct the strategy and governance of CSV.

The CSV Chief Executive Officer (CEO) will be responsible for managing CSV’s day-to-day operations and staffing, with powers, functions and obligations similar to those of chief executive officers in other independent statutory bodies.

Each jurisdiction will continue to have a CEO for that jurisdiction. They will be appointed by the Courts Council on the nomination of the head of that jurisdiction but will have dual responsibilities and accountabilities. This means the Court CEOs are responsible to, and must comply with the directions of the head of jurisdiction in relation to the operation of that jurisdiction and the CSV CEO in relation to all other matters.

The allocation of public resources to each court will continue to be determined through usual budgetary processes accountable to the Parliament and CSV will provide administrative staff and facilities to each court in accordance with that court’s budget. It is understood that CSV will be considered a public body and department for the purposes of the *Financial Management Act 1994* (Vic), and will receive appropriations for division to the various court entities.

---

138 Court Services Victoria Bill 2013, Amended Print, Explanatory Memorandum, Legislative Assembly 13 December 2013
139 Court Services Victoria Bill 2013, Amended Print, Explanatory Memorandum, Legislative Assembly 13 December 2013
140 Court Services Victoria Bill 2013, Second reading speech, 12 December 2013, Legislative Council.
The reforms have been welcomed by Chief Justice Marilyn Warren:

“For many years the judiciary has sought to achieve administrative arrangements which reflect and support the independence of the courts as a third arm of government. The new structure will enhance the capacity of the courts and VCAT to innovate and respond to emerging issues based on first-hand knowledge of the court system. This structure will enable the courts and VCAT to better serve the Victorian community, with the assurance that they do so independently of government.”

Ms McLeod SC, Chair, Victorian Bar agreed with the Chief Justice:

“One of the benefits of Court Services Victoria will be the opportunity for sharing back-office technology, staff, systems and processes which will in turn improve efficiency and respond more directly to access to justice issues.”

The Court Services Victoria Bill has been passed in both houses of the Victorian Parliament and is awaiting royal assent with CSV expected to fully operational from 1 July 2014.

---

Scenario Three: Discrete judicial functions, appropriations and CEO for each Court with shared services purchased from a shared services entity or FCA as deemed appropriate

The third scenario is illustrated in Figure 21 and envisages three separate entities – the Courts and a Shared Services Agency. In this instance, appropriations are applied directly to the courts which then have the power (or obligation) to ‘purchase’ non-core functions and support from the Shared Services Agency or other entities (such as the FCA) as needed. Due to the lack of a direct appropriation for the Shared Services Agency, its staff would need to notionally be employed by one, or a combination of the courts, leading to significant implementation issues and overheads. Consideration would also need to be given for the potential for sub-optimal outcomes as a result of competition between the Courts or need to ‘lock in’ demand over the medium to long term to provide funding certainty for the Shared Services Agency.

Figure 21: Illustration of proposed structure under Scenario 3

As an indicative estimate, independence under this scenario would cost an additional $3 million annually – predominantly driven by the need for additional executive and corporate support staff. Implementation costs of up to $1 million are also expected to be required, as outlined in Table 5-4. As with the previous options, this would require amendment to the FCC’s enabling legislation to establish a separate CEO.
Table 5-4: Estimate of incremental costs associated with Scenario 3

<table>
<thead>
<tr>
<th>Family Court of Australia &amp; Federal Circuit Court</th>
<th>2014-15 ($'000)</th>
<th>2015-16 ($'000)</th>
<th>2016-17 ($'000)</th>
<th>2017-18 ($'000)</th>
<th>Ref</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sale of G&amp;S</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Revenue</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Gains</td>
<td>50</td>
<td>51</td>
<td>51</td>
<td>52</td>
<td>(1)</td>
</tr>
<tr>
<td>Revenue from Government</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td>50</td>
<td>51</td>
<td>51</td>
<td>52</td>
<td></td>
</tr>
<tr>
<td><strong>Expenses</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Employees expense</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judges</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Employees</td>
<td>2,052</td>
<td>2,114</td>
<td>2,177</td>
<td>2,242</td>
<td>(2)</td>
</tr>
<tr>
<td>Separation and Redundancy</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total employee expense</strong></td>
<td>2,052</td>
<td>2,114</td>
<td>2,177</td>
<td>2,242</td>
<td>(2)</td>
</tr>
<tr>
<td><strong>Suppliers</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IT &amp; Comms</td>
<td>124</td>
<td>124</td>
<td>124</td>
<td>124</td>
<td>(3)</td>
</tr>
<tr>
<td>Consultants &amp; Contractors</td>
<td>78</td>
<td>77</td>
<td>78</td>
<td>79</td>
<td>(4)</td>
</tr>
<tr>
<td>Property</td>
<td>165</td>
<td>164</td>
<td>163</td>
<td>162</td>
<td>(5)</td>
</tr>
<tr>
<td>Travel</td>
<td>195</td>
<td>194</td>
<td>196</td>
<td>198</td>
<td>(6)</td>
</tr>
<tr>
<td>Other Suppliers</td>
<td>50</td>
<td>51</td>
<td>51</td>
<td>52</td>
<td>(1)</td>
</tr>
<tr>
<td>Operating Lease</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Workers Comp</td>
<td>9</td>
<td>9</td>
<td>9</td>
<td>9</td>
<td>(7)</td>
</tr>
<tr>
<td><strong>Total suppliers expense</strong></td>
<td>621</td>
<td>619</td>
<td>621</td>
<td>623</td>
<td></td>
</tr>
<tr>
<td><strong>Depreciation / Amortisation</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Finance Costs</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Write Down / Impairment</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Losses From Asset Sales</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Other Expenses</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td>2,673</td>
<td>2,732</td>
<td>2,798</td>
<td>2,866</td>
<td></td>
</tr>
<tr>
<td><strong>Surplus/Deficit</strong></td>
<td>(2,623)</td>
<td>(2,682)</td>
<td>(2,747)</td>
<td>(2,814)</td>
<td></td>
</tr>
<tr>
<td><strong>Surplus/Deficit excl. Depreciation</strong></td>
<td>(2,623)</td>
<td>(2,682)</td>
<td>(2,747)</td>
<td>(2,814)</td>
<td></td>
</tr>
</tbody>
</table>

(1) Audit fees (and associated resources free of charge from the ANAO) linked to preparation of a second set of financial statements
(2) Incremental staffing per scenario 1 + an additional SES officer and 10 administrative resources
(3) General allowance for on costs and 1% increase in projection for additional reporting functionality
(4) 5% increase to help satisfy additional administrative responsibilities
(5) General allowance for on costs
(6) 5% increase in projected travel linked to increased governance and administration
(7) Calculated on a flat per head rate
Scenario Four: Discrete judicial functions, appropriations and CEO for each Court with shared services provided by a shared services entity (or FCA) with separate appropriation

In the same vein as Scenario three, another alternative illustrated in Figure 22 considers three separate entities, distinguished in this by the Shared Services agency receiving a separate appropriation. Such a scenario is broadly consistent with the new model being adopted in Victoria. Generally speaking, the pros and cons of Scenarios three and four are broadly similar, with additional certainty for the shared services agency in this instance offset by the need to triplicate external reporting functions. If this model was adopted, one of the key challenges would come in establishing the governance process by which the shared services agency was managed and decisions impacting on the allocation of services to each court were made. In the Victorian model, such governance has been achieved through the introduction of a ‘governing council’ (comprising the Heads of Jurisdiction and independent members) with responsibility for appointment of the CEO and setting of strategic direction.

Figure 22: Illustration of proposed structure under Scenario 4

In considering Scenario 4, it if further noted that the Western Australian model for Family Law combines State and Commonwealth responsibilities, and is an example of where an integrated registry function has been successfully adopted.

*Note that library services are provided by the FCA*
Case study: Western Australia

The federal Family Law Act 1975 allows federal family law jurisdiction to be vested in State family courts by agreement and Western Australia did this by creating the Western Australian Family Court (WAFC) in 1976. This court is established under the Family Court Act 1997 (WA) which repealed the Family Court Act 1975 (WA).

The WAFC is vested with State and Federal jurisdiction in matters of family law and it deals with divorce, property of a marriage or defacto relationship, matters relating to children, maintenance, adoptions and surrogacy.

Western Australia’s Department of the Attorney General provides administrative and logistical support for the operation of this court.

The court registry approach adopted by the WAFC is to use one process for filing which requires only a single application to be made by the parties. The Principal Registrar makes the decision when in doubt about whether a matter should be listed for determination by a Registrar, Magistrate or Judge. The decision on where an application is listed is based on complexity and type of matters and children’s matters are prioritised.

In relative terms, and as outlined in Table 5-5, this is anticipated to be marginally more expensive than the third scenario both in terms of the ongoing operating increment $4 million and initial investment (approximately $1 million) owing primarily to the general expenses associated with the operation of three separate reporting entities. This option would also require a greater degree of legislative change than the previous scenarios due to the need to establish the Shared Services Agency under the FMA Act and transfer the relevant personnel to it from the Courts.

---

143 Family Court of Western Australia Annual Reviews 2012/13 and 2011/12
Table 5-5: Estimate of incremental costs associated with Scenario 4

<table>
<thead>
<tr>
<th>Family Court of Australia &amp; Federal Circuit Court</th>
<th>2014-15 ($'000)</th>
<th>2015-16 ($'000)</th>
<th>2016-17 ($'000)</th>
<th>2017-18 ($'000)</th>
<th>Ref</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Forward estimates</strong></td>
<td>Impact</td>
<td>Impact</td>
<td>Impact</td>
<td>Impact</td>
<td></td>
</tr>
<tr>
<td><strong>Income</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sale of G&amp;S</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Revenue</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Gains</td>
<td>100</td>
<td>101</td>
<td>102</td>
<td>103</td>
<td>(1)</td>
</tr>
<tr>
<td>Revenue from Government</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td>100</td>
<td>101</td>
<td>102</td>
<td>103</td>
<td></td>
</tr>
<tr>
<td><strong>Expenses</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Employees expense</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judges</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Employees</td>
<td>3,092</td>
<td>3,185</td>
<td>3,280</td>
<td>3,379</td>
<td>(2)</td>
</tr>
<tr>
<td>Separation and Redundancy</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total employee expense</strong></td>
<td>3,092</td>
<td>3,185</td>
<td>3,280</td>
<td>3,379</td>
<td></td>
</tr>
<tr>
<td><strong>Suppliers</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IT &amp; Comms</td>
<td>171</td>
<td>171</td>
<td>170</td>
<td>170</td>
<td>(3)</td>
</tr>
<tr>
<td>Consultants &amp; Contractors</td>
<td>109</td>
<td>110</td>
<td>111</td>
<td>112</td>
<td>(4)</td>
</tr>
<tr>
<td>Property</td>
<td>275</td>
<td>273</td>
<td>271</td>
<td>269</td>
<td>(5)</td>
</tr>
<tr>
<td>Travel</td>
<td>195</td>
<td>194</td>
<td>196</td>
<td>198</td>
<td>(6)</td>
</tr>
<tr>
<td>Other Suppliers</td>
<td>100</td>
<td>101</td>
<td>102</td>
<td>103</td>
<td>(1)</td>
</tr>
<tr>
<td>Operating Lease</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Workers Comp</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>15</td>
<td>(7)</td>
</tr>
<tr>
<td><strong>Total suppliers expense</strong></td>
<td>865</td>
<td>864</td>
<td>866</td>
<td>868</td>
<td></td>
</tr>
<tr>
<td><strong>Depreciation / Amortisation</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Finance Costs</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Write Down / Impairment</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Losses From Asset Sales</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Other Expenses</strong></td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td>3,957</td>
<td>4,049</td>
<td>4,146</td>
<td>4,247</td>
<td></td>
</tr>
<tr>
<td><strong>Surplus/Deficit</strong></td>
<td>(3,857)</td>
<td>(3,948)</td>
<td>(4,044)</td>
<td>(4,144)</td>
<td></td>
</tr>
<tr>
<td><strong>Surplus/Deficit excl. Depreciation</strong></td>
<td>(3,857)</td>
<td>(3,948)</td>
<td>(4,044)</td>
<td>(4,144)</td>
<td></td>
</tr>
</tbody>
</table>

(1) Audit fees (and associated resources free of charge from the ANAO) linked to preparation of three sets of financial statements
(2) Incremental staffing per scenario 3 + an additional 8 administrative resources (including FCC regional support)
(3) General allowance for on costs and 1% increase in projection for additional reporting functionality
(4) 7% increase to help satisfy additional administrative responsibilities
(5) General allowance for on costs
(6) 5% increase in projected travel linked to increased governance and administration
(7) Calculated on a flat per head rate
Scenario Five: Complete Separation

Under this scenario, the FCC would achieve complete separation from the FCoA, with no sharing of any resources, as illustrated in Figure 23. Of all the scenarios discussed, this model provides the greatest degree of financial and operational independence, granting autonomy to each court.

Relative to the other choices, this option would be the most expensive due to a combination of a reduction in economies of scale, the need to duplicate a significant proportion of the current management/support structure and the large upfront investment required to implement the change (fitout, signage, IT etc). Preliminary costings for this process (provided by the Courts) have indicated potential initial investment of up to $17.5 million would be required (highly conditional on the eventual cost associated with separation of Casetrack) whilst we have estimated an ongoing expense increment of $15 million to $16 million, as outlined in Table 5-6.
Table 5-6: Estimate of incremental costs associated with Scenario 5

<table>
<thead>
<tr>
<th></th>
<th>2014-15 ($'000)</th>
<th>2015-16 ($'000)</th>
<th>2016-17 ($'000)</th>
<th>2017-18 ($'000)</th>
<th>Ref</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Income</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sale of G&amp;S</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Revenue</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Gains</td>
<td>50</td>
<td>51</td>
<td>51</td>
<td>52 (1)</td>
<td></td>
</tr>
<tr>
<td>Revenue from Government</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total income</strong></td>
<td>50</td>
<td>51</td>
<td>51</td>
<td>52</td>
<td></td>
</tr>
<tr>
<td><strong>Expenses</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judges</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Employees</td>
<td>10,080</td>
<td>10,382</td>
<td>10,694</td>
<td>11,015 (2)</td>
<td></td>
</tr>
<tr>
<td>Separation and Redundancy</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total employee expense</strong></td>
<td>10,080</td>
<td>10,382</td>
<td>10,694</td>
<td>11,015</td>
<td>(2)</td>
</tr>
<tr>
<td>IT &amp; Comms</td>
<td>901</td>
<td>906</td>
<td>909</td>
<td>912 (3)</td>
<td></td>
</tr>
<tr>
<td>Consultants &amp; Contractors</td>
<td>156</td>
<td>154</td>
<td>156</td>
<td>157 (3)</td>
<td></td>
</tr>
<tr>
<td>Property</td>
<td>2,296</td>
<td>2,429</td>
<td>2,473</td>
<td>2,482 (3)</td>
<td></td>
</tr>
<tr>
<td>Travel</td>
<td>390</td>
<td>369</td>
<td>392</td>
<td>396 (3)</td>
<td></td>
</tr>
<tr>
<td>Other Suppliers</td>
<td>1,320</td>
<td>1,274</td>
<td>1,286</td>
<td>1,294 (4)</td>
<td></td>
</tr>
<tr>
<td>Operating Lease</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Workers Comp</td>
<td>47</td>
<td>47</td>
<td>47</td>
<td>47 (5)</td>
<td></td>
</tr>
<tr>
<td><strong>Total suppliers expense</strong></td>
<td>5,111</td>
<td>5,199</td>
<td>5,264</td>
<td>5,289 (5)</td>
<td></td>
</tr>
<tr>
<td>Depreciation / Amortisation</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Finance Costs</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Write Down / Impairment</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Losses From Asset Sales</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other Expenses</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td><strong>Total expenses</strong></td>
<td>15,191</td>
<td>15,582</td>
<td>15,957</td>
<td>16,303</td>
<td></td>
</tr>
<tr>
<td>Surplus/Deficit</td>
<td>(15,141)</td>
<td>(15,531)</td>
<td>(15,906)</td>
<td>(16,252)</td>
<td></td>
</tr>
<tr>
<td>Surplus/Deficit excl. Depreciation</td>
<td>(15,141)</td>
<td>(15,531)</td>
<td>(15,906)</td>
<td>(16,252)</td>
<td></td>
</tr>
</tbody>
</table>

(1) Audit fees (and associated resources free of charge from the ANAO) linked to preparation of two sets of financial statements
(2) Duplication of the SES structure (8 extra SES) plus 70 roles in the registries and administration
(3) 10% increase in general suppliers expenses due to loss of economies of scale and additional administration
(4) 5% increase in other suppliers expenses due to loss of economies of scale and additional administration
(5) Calculated on a flat per head rate

It is noted that of the five scenarios outlined above, the model for independence preferred by the Heads of Jurisdiction would be the quickest to implement and result in the lowest level of incremental cost to the budget. Provided that the Government was satisfied that such arrangements provide sufficient independence to achieve policy objectives this appears to be the most logical avenue to pursue.

Even if not completely satisfied, we note that such arrangements could be implemented on a trial basis for between one and three years to better assess its ability to provide independence for the FCC’s operations. It would require minimal investment and has the potential to avoid the need for more extensive and expensive changes if successful. We note also that the changes...
required would also be a necessary precursor to three of the four other scenarios outlined above and as such would not be ‘wasted’ unless the complete separation option was later pursued.

Ultimately, the choice of mechanism by which independence is to be pursued is a matter for Government, based on their policy and funding priorities. Despite the above discussion, it is possible that complete separation is the only option which would provide the necessary level of independence, in which case scenario five provides the only viable choice.

**Opportunities to strengthen integration between the courts**

Any analysis as to strengthening integration between the courts must be considered in light of the Government’s policy on independence as discussed above. Should ‘complete separation’ of the courts be determined as the only model consistent with Government policy, there would be very little scope for structural change to drive additional efficiencies through integration. If, on the other hand, governance-based independence was considered appropriate, there are a range of models under which all, or part, of the respective court’s functions may be integrated.

In following the discussion outlined above, a number of the proposed ‘separation’ scenarios could readily be expanded to include the FCA, as illustrated in Figure 24 and Figure 25. In the longer term (in taking a very conservative stance) we have projected that such scenarios should result in ongoing savings of at least ten per cent of the combined administrative and support function costs for the courts (that is to say we expect savings of at least $11 million per annum), although realistically it would not be out of the question to achieve savings in the order of 20 per cent ($22 million) to 25 per cent ($27.5 million). In order to achieve these savings, a considerable investment would be required to standardise systems, establish new governance structures and redeploy or retrench staff. It may also take a number of years to fully realise the benefits of such changes due to existing contractual arrangements for the provision of services such as property leases and information technology.
Figure 24: Modification of Scenario 1 to include Federal Court of Australia

Figure 25: Modification of Scenario 4 to include Federal Court of Australia
Another possible alternative for integration would be the establishment of a single superior court with separate divisions for general and family law, as illustrated in Figure 26. In practical terms, the projected savings associated with economies of scale would be similar to the scenarios outlined above, however, the investment required to realise them is expected to be higher due to added legislative and practical complexities associated with the ‘single court’ model.

Figure 26: Revised structure with a single superior court with multiple divisions

---

© 2014 KPMG, an Australian partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative (“KPMG International”), a Swiss entity. All rights reserved. The KPMG name, logo and “cutting through complexity” are registered trademarks or trademarks of KPMG International Cooperative (“KPMG International”). Liability limited by a scheme approved under Professional Standards Legislation.
Key Finding 17
The Government’s policy to establish the FCC independent of the FCoA can be implemented via a number of options. There is an opportunity to implement financial and administrative independence whilst still benefitting from integrated governance and shared service arrangement. The proposed change to the administration of the Victorian court system is an example of this.

Recommendation 4
Government should seek to achieve the most effective means of independence for the FCC through careful analysis of the associated costs, benefits and timeliness.

Sustainable funding model
The concept of the sustainability of the courts’ funding model was outlined in chapter four of this report. In order to truly be sustainable, the available resourcing for each Court must be able to keep up with the cost of resourcing for the specified level of service. At present, this is clearly not the case. This is a structural issue which cannot be addressed simply through injections of cash or one off cuts of staff or other resourcing.

Accordingly, a series of reforms designed to recalibrate existing arrangements in order to achieve sustainability for court funding over the medium to long term have been considered. These are identified in the following assessment matrix, and described in further detail below.

Funding of judicial salaries
The possibility and implications of exempting judicial salaries from the application of the efficiency dividend have already been discussed in some detail in Section 3.4 of this report. Based on our analysis, we consider the combination of the Efficiency Dividend, reliance on General Appropriations as a source of funding and relatively high proportion of non-discretionary expenditure (such as judicial salaries) to be one of the key impediments to achieving sustainability for the Courts. Removing the impact of the efficiency dividend on judicial salaries would help reduce the unsustainable ‘squeeze’ on discretionary expenditure (based on current projections and assumptions something in the order of $1.3 million per annum). We note that this treatment would not be without precedent – the HCA, Department of the Senate and Department of the House of Representatives all employ such a mechanism under similar circumstances and constraints. From the Whole-of-Government perspective, this would require offsetting savings to be found.

Key Finding 18
Exempting judicial salaries from the Efficiency Dividend will improve the Courts’ bottom line by $13.7 million over the forward estimates.
Recommendation 5

That the Government consider funding judicial salaries for the FCA, FCoA and FCC through Special Appropriations, or otherwise exempting judicial salaries from the application of the Efficiency Dividend.

Funding for other non-discretionary expenditure

In theory, a similar line of logic to that which was employed for the funding of judicial salaries could be extended to the other significant categories of non-discretionary expenditure for the Courts. This includes items such as CLC-related property and lease costs (at least in the short term), circuit-related travel and parts of the legal library subscriptions. Their existence essentially means the efficiency dividend needs to be concentrated more strongly on other ‘discretionary’ items. The mere existence of ‘non-discretionary’ expenditure is not – and should not be – sufficient grounds to employ a funding mechanism such as a Special Appropriation. Doing so would set a clear precedent for other agencies and may ultimately impair the effectiveness of the efficiency dividend as a tool to control expenditure and as such would need to be carefully considered by the Government before implementation.

Providing the Courts with an additional source of Departmental revenue

In a number of state jurisdictions (such as Victoria and Western Australia), the courts have been allowed to ‘retain’ either all or a part of the court fees generated to offset their operating costs. If applied in the federal context, such a model would help to reduce the Courts’ reliance on Appropriations for their funding and, by extension, the base to which the Efficiency Dividend needed to be applied. Conceptually, this could be rationalised as a form of cost recovery.

Key Finding 19

A number of state jurisdictions (such as Victoria and Western Australia) allow courts to ‘retain’ either all or part of court fees generated to offset their operating costs.

Recommendation 6

That the Government consider providing the Courts with an additional stream of revenue, including the possibility of allowing the FCA, FCoA and FCC to retain a proportion of Court Fees generated.

Making greater use of user pays arrangements

The provision of justice is expensive and we support the proposition that users of the Courts who have the capacity to contribute towards the costs of the service they are receiving should do so. In relation to activities to support litigants as part of the court process, the FCA has developed a model whereby parties bear the cost of engaging professionals to support the court process (such as transcript, interpreters and use of expert witnesses).
To date, the FCoA and FCC’s cost recovery practices are not as extensive, although this has been driven in part by the differing nature of their users – particularly the fact that litigants accessing the Family Law system (in either the FCoA or FCC) may demonstrate a greater degree of vulnerability than those accessing the General Federal Law system. As an illustrative example, the Family Law Council notes that persons from culturally and linguistically diverse backgrounds face particular challenges in accessing the family law system – including language barriers, racism, a Western legal framework which does not recognise all elements of cultural diversity (including religious divorce laws and faith-based practices), and a fear of authorities. As such, the introduction of user pays arrangements, particularly for interpreters, may further disadvantage this particular group of court users. As such, any consideration of cost recovery arrangements must be carefully balanced against access to justice requirements.

It should be noted that in recent years the FCA, FCoA and FCC have been investigating options to increase the extent of cost recovery activities. Similar to the discussion above, increasing cost recovery will help reduce the reliance on appropriation, leading to a more sustainable funding model overall.

### Key Finding 20

The FCA has developed a model whereby parties bear the cost of engaging professionals to support the court process, such as transcript, interpreters and the use of expert witnesses. The FCoA and FCC’s cost recovery practices are not as extensive, particularly given Family Law litigants are more likely to demonstrate a higher degree of vulnerability and/or disadvantage, and such cost recovery activities may exacerbate these concerns.

### Recommendation 7

That the FCoA and FCC identify further opportunities for user pays arrangements for court-related activities (for example some high-end Family Law property matters may have the potential to be subject to user pays arrangements), accompanied by appropriate safeguards for vulnerable litigants.

### Development of a robust forward projections model

The Courts do not currently have a model which can forecast demand for services, taking into account indicators such as the caseload profile, volume of matters, complexity and timeliness, plus societal factors that can impact demand such as population growth. This situation inhibits the Courts’ ability to anticipate future workload and therefore develop forward projections which outline the full funding requirements for judicial and administrative resources to

---


accommodate required service delivery levels. As such, the current funding model is isolated from workload and activity projections.

Opportunities exist to develop a model which incorporates considerations such as future caseload profile, volume of matters, complexity and timeliness to enable more accurate identification of the resourcing profile required to adequately service projected (future) demand levels.

**Property and assets**

After employee expenses, leases and property represent the most significant category of expenditure for the FCA, FCoA and FCC. We have dedicated a section to it as part of this analysis due to its significance to the bottom line and degree of uncertainty surrounding the projections as to these costs across the forward estimate period.

**Revision/Replacement of the funding model for the CLC buildings**

The current challenges associated with the funding model for the CLC buildings were outlined in Section 3.4 of this report.

Under the current model, DoF has assumed financial responsibility for the proportion of each building considered to be ‘Special Purpose Property’ (such as courtrooms, libraries and judges’ chambers) and also acts as the landlord for the ‘usable office space’ in the buildings. This space has been subject to an independent market valuation, resulting in a significant charge to the Courts given they are located in prime real estate in the various capital CBDs.

It is arguable that such valuation overstates the ‘true’ value of such space for so long as the buildings continue to function as CLCs due to the limited pool of entities regarded as acceptable to operate in the same building as the courts. In illustrating, the Courts do not consider it appropriate for barristers to have chambers in the Law Courts or for commercial entities which may need to appear before the courts at some point in the future – the suitable pool of candidates essentially comes down to courts, tribunals and similar public entities. Such arguments have merit, and in the long run it may well be a more efficient use of Commonwealth resources to deem the entire building to be ‘Special Purpose’ and manage it centrally rather than continue on with the current situation in which nine separate entities receive appropriation for their ‘share’ of the buildings. This would also avoid the challenges associated with operating a small proportion of each building as commercial office space.

Should the Government elect to pursue this model, the two clear choices to manage the CLCs would be DoF (given the benefits associated with the specialist skill sets within their Property branch) and the Attorney-General’s Department (which has portfolio responsibility for the various courts and tribunals which currently occupy the buildings). In either instance, it would be prudent to transfer appropriation from the respective courts and tribunals and provide the use of the building to them as a resource free of charge from that point forward. As part of this centralisation, efficiencies could also be achieved through provision of building or portfolio wide contracting for services such as cleaning and document destruction.
Key Finding 21

Indicatively, the effect of transferring responsibility for the Commonwealth Law Courts to a single entity will improve the Courts’ bottom line by $4.9 million over the forward estimates.

Recommendation 8

That a single entity be assigned responsibility and appropriation for the operation, management and maintenance of the Commonwealth Law Courts.

As previously discussed, there appears to be a significant capital ‘funding gap’ with respect to the fitout. Indicative estimates from DoF indicate that across the CLCs, the fitout is worth somewhere between $147 million and $245 million. As far as we can tell, neither the Attorney-General’s Department, nor DoF, nor the Courts have been allocated capital funding to cover the ongoing maintenance and replacement of these assets. This effectively represents a $10 million to $16 million ‘gap’ annually as the current infrastructure deteriorates.

Recommendation 9

That additional capital funding be provided in order to cover the ongoing maintenance and replacement of fitout in the Commonwealth Law Courts. The quantum of the capital funding should be determined based on an external valuation.

Optimising the use of the available space

Discussions with stakeholders have suggested that some of the CLCs have a significant amount of underutilised space at present whilst others are operating at absolute capacity. In a number of the capital cities, the Courts have also entered into commercial leases due to the insufficiency of space in the CLCs.

Additionally, we note that the recent PRODAC survey indicates that the court’s registry functions significantly exceed the ‘target’ space utilisation levels in a number of locations. All said, this combination of factors suggests there is scope to make more effective and efficient use of the space in question.

In the short term it is acknowledged that the situation is relatively ‘fixed’, however, in the longer term, the option exists to transfer ‘corporate’ resources to locations with greater capacity, reconfigure space (i.e. converting office space to courtrooms) or potentially even relocate or redevelop such that sufficient space became available to satisfy the demands of the respective courts.

From the Commonwealth’s perspective, there has been a significant investment and ongoing cost associated with the accommodation for the Courts. In order to make effective and efficient use of such resources going forward, it seems prudent to strengthen planning and governance processes so as to make best use of the available space. Whilst potentially unpopular, this should take into consideration the possibility of relocating the CLCs to sites which are able to offer either a more appropriate capacity (enabling all Courts to operate in the
one building and preventing costs associated with unwanted space) and/or comparative cost advantages). To the extent possible, such planning should incorporate the input of central agencies and other potential users of the buildings (such as the other Commonwealth Courts and Tribunals and the relevant State Governments).

Key Finding 22

The CLCs are generously designed and appointed, although there is limited scope to improve their functionality due to independence and security requirements. Notwithstanding this, there are opportunities to consolidate back office (corporate) functions to maximise utilisation and occupancy of both the CLCs and other leased buildings.

Recommendation 10

That a strategic plan for the long-term utilisation of the Commonwealth Law Courts and other space leased by the Courts be developed. Where relevant, consideration should be given to the possibility of relocation for instances in which existing capacity is not considered to be sufficient to satisfy the demands of the respective Courts.

Implementation of a redefined operating model

While some of the opportunities described seek to place the Courts on a more sustainable financial footing over the longer term, it is recognised scope exists to examine in parallel aspects of the Courts’ operating model/s in order to identify opportunities for increased efficiency and use of scarce resources. These include the examination of technological enablers, consolidation of, or greater flexibility in the delivery of, some key court functions.

The experience of other jurisdictions can be insightful in assessing the benefits that changes to courts’ operating models can realise. While acknowledging the differences between Australia and Singapore, the USA and New Zealand they are three such jurisdictions, with recent reforms generating benefits for overall court administration and performance outcomes.

Singapore

Throughout the 1990s, Singapore implemented a significant judicial reform agenda tackling case management and delay, focused on three key performance indicators:

- clearance rates, including monitoring by individual categories of cases;
- disposal; and
- trial date availability.

The measures adopted by Singapore to make civil claims more efficient and affordable covered:

- diversionary measures such as alternative dispute resolution and mediation;
- facilitative measures such as the number of judges, court processes and technology;
monitoring and control: through active and aggressive case management; and

dispositive measures: such as auto-discontinuance.

Singapore’s judicial reforms dramatically improved the efficiency and effectiveness of court operations. As the World Bank has noted, “[b]usiness leaders indicate that companies that consider investing in Singapore base their decisions partly on the quality of the legal framework and the integrity and commercial mindedness of judges”. 146

As a result of the success of these reforms, an International Framework for Court Excellence has been developed by the Singaporean judiciary in collaboration with international partners in Australia, the USA and elsewhere.147 The resulting Framework, which the FCA, FCC and the FCoA are implementing, incorporates a self-assessment questionnaire, which allows a court to undertake its own assessment of its performance measured against the Seven Areas for Court Excellence. The Framework is meant to aid courts in finding the appropriate means for meeting its goals. Several of the Seven Areas for Court Excellence relate to promoting greater efficiency and effectiveness as well as improving the quality of judicial services, for example:

- Court Planning and Policies, examining:
  - promotion of monitoring of court
  - performance (incl. court dashboards)
  - application of strategic and operational court planning policies

- Court Resources (Human, Material and Financial), examining:
  - HR policies for judges and court staff (incl. judicial performance evaluation)
  - application of workload models
  - management of material resources policies (incl. e-justice policies)
  - management of financial resources by a planning and control approach (incl. cost per case approach)
  - education/training systems, requirements and policies

- Court Proceedings and Processes, examining:
  - application of time management standards
  - use of backlog reduction and prevention programs
  - promoting active role of the judge
  - stimulation of mediation policies

- use of different court tracks (fast track, regular track and mixed track)

The Framework emphasises the need to take a holistic approach to court performance, rather than presenting a limited range of performance measures, directed to limited aspects of court activity. It is designed to apply to all courts and to be equally effective for sophisticated large urban courts, smaller rural or remote courts and tribunals.

United States of America

The National Centre for State Courts, in conjunction with the Department of Justice developed a High Performance Court Framework, with six key elements for producing high quality administration of justice:

• administrative principles: defining high performance indicating the type of administrative processes considered to be important;

• managerial culture: the way judges and managers believe work is completed;

• perspectives of a high performing court: a) customer, b) internal operating, c) innovation; and d) social value;

• performance measurement: assesses the customer and internal operating perspectives;

• performance management: uses performance results to refine court practices using evidence-based innovation and publishes job performance to the public and policy makers to fulfil the social value perspective; and

• quality cycle: a dynamic iterative process to link the preceding concepts into a chain of action to support ever-improving performance.

The National Center for State Courts has completed empirical workload assessment studies in nearly 30 states across the USA, providing advice on managing the distribution of resources across various case types and functions.

The Center offers expertise and assistance to states across the USA to support court re-engineering processes, based on a set of principles of judicial administration, covering case administration, governance or funding principles.

New Zealand

In 2011, the New Zealand Ministry of Justice carried out a broad review of the New Zealand Family Court to ensure that it is sustainable, efficient, cost effective and responsive to children and vulnerable adults needing access to its services. The review found that Family Court processes were complex, uncertain, and too slow. It noted that the cost to the taxpayer of running the Family Court had grown 70 per cent in the six years to 2012, from $84 million to

---

$142 million per year, despite the overall number of applications to the court remaining relatively steady.149

The resulting reforms, passed by the New Zealand Parliament in September 2013 and due to come into effect in March 2014, were designed to respond to concerns that the Family Court:

- is not able to focus enough on the most serious cases;
- does not have clear processes, so it is difficult to understand and navigate; and
- has seen its costs increase greatly in recent years.150

The reforms were designed to refocus the role of the Family Court and ensure a modern, accessible family justice system that is efficient and effective, significantly by avoiding court proceedings wherever possible.

The changes primarily relate to Care of Children Act matters, which account for about 40 per cent of applications to the Family Court with three new ‘tracks’ through the court created for such applications: ‘without notice’, ‘simple’ and ‘standard’.151 The Family Court’s response to domestic violence is also improved through a new Family Dispute Resolution service. New powers were established for the judiciary, to deal with abuses of its processes.152

In relation to the Australian federal court system, the following discussion has been divided into two categories:

- opportunities which may attract some form of financial saving, even if modest; and
- opportunities which are not subject to savings considerations, however are likely to improve the efficiency of court operations.

Key Finding 23
There is scope to make savings through changes to the Courts’ existing operating models.

---

Opportunities for possible savings

Enhanced use of technology

A critical driver of further efficiently and integration within and across courts will be the innovative use of technology, to streamline service delivery, promote timely access to justice, and reduce the effort associated with a physical, paper-based administrative process.

Over recent years, the Courts have made progress in implementing e-Services and technology reforms to improve access and usability of the court system. Key examples include:

- the establishment of the Commonwealth Courts Portal;
- implementation of eFiling to varying degrees across the Courts, including the FCA’s preparation for the Electronic Court File;
- the increased use of video and teleconferencing technology (for example, the FCC holding of some procedural and urgent hearings by video link and telelink in between circuit visits).

Key Finding 24

Enhanced use of technology is considered a critical driver of further efficiency and integration within and across the federal court system.

Not only does use of technology allow the courts to address urgent matters in a timely fashion, if property organised and appropriately funded, it provides an opportunity to reconsider some of the approaches currently employed in determining matters. For example, reliable and cost effective technological solutions could provide an opportunity to address the number of expenses associated with the circuit function of the FCC. Notwithstanding this, any proposal to limit (or reduce) circuits must be considered in light of the specific areas/regions in which circuits are facilitated, with stakeholders noting that these are often areas of with high levels of dysfunction and/or financial distress, which makes both access to, and use of, technological solutions difficult for some litigants. The Review noted that the FCC considers all possible avenues are being explored.

Circuits are generally a week in duration, and are coordinated out of the closest registry (for example, the Broken Hill circuit is coordinated out of Adelaide). In 2014, the FCC plans to circuit to 28 regional and rural locations, and based on the current schedule, will spend over 730 days on circuit. Table 5-7 provides a breakdown of this activity.

Table 5-7: 2014 Federal Circuit Court of Australia circuit activity

<table>
<thead>
<tr>
<th>State / Territory</th>
<th>Circuit locations (number)</th>
<th>Total days on circuit</th>
</tr>
</thead>
<tbody>
<tr>
<td>Queensland</td>
<td>Bundaberg, Hervey Bay, Ipswich, Lismore, Maroochydore, Southport, Rockhampton, Toowoomba, Mackay (9)</td>
<td>175</td>
</tr>
<tr>
<td>South Australia</td>
<td>Broken Hill, Mount Gambier (2)</td>
<td>50</td>
</tr>
<tr>
<td>Victoria</td>
<td>Mildura, Morwell, Shepparton/Cobram, Ballarat, Geelong, Bendigo/Castlemaine, Warnambool (7)</td>
<td>276</td>
</tr>
</tbody>
</table>
When on circuit, FCC judges are accompanied by Chambers staff (Associate and Deputy), together with a variable amount of Registrar and Family Consultant resources. In Victoria, separate Judge and Registrar circuits are scheduled on separate weeks for each location, which would appear to streamline the types of matters heard during that week.

Opportunities exist to either reduce circuit activity based on workload at particular locations, or consider the effectiveness of limiting a circuit to Judicial or Registrar resources only for specific weeks, as occurs in Victoria. Physical attendance by court officers at regional and rural locations would be replaced with video link or telelink hearings, conducted from the coordinating registry location. This would provide savings in terms of travel costs, and may result in very modest coordination savings.

There may also be scope to consider removing some circuit locations all together, based on an analysis of case volume and the number of appropriate circuit locations in that State or Territory. For example, it is considered there would be greater scope to reduce circuit locations in a smaller State, where travel distances for clients and practitioners would be least impacted by the closure of a local circuit activity.

Considerations around access to justice should be carefully weighed when considering changes to circuit activity, however there is scope and precedent to suggest technological approaches constitute an effective approach to dispensing justice. Possible downstream impacts should be explored and taken into account in any consideration of a reduction in circuits.

**Recommendation 11**

Consideration should be given for opportunities to:

- facilitate the use of the Electronic Court File more broadly (i.e. in relation to Family Law matters) as a means of transitioning to a paperless court by enabling the electronic lodgement of documents, correspondence and remote viewing of documents on the court file;

- increase the use of video link/telelink as a means of reducing FCC circuit expenses (recognising the associated access to justice challenges); and

- examine reducing (or removing) certain FCC circuit locations where limited demand is apparent and replacing physical court appearances in regional and rural locations with technological solutions.
Consolidation of registry functions and activity

At present, the provision of registry services is geographically-based. The extent to which there is sharing of work across registry locations is unclear. The principle for division of work should be that if some registries experiencing higher workload volumes are at capacity, there is scope to work flexibly to utilise registries in locations experiencing smaller workloads which may have considerable free capacity or operate in a different time zone, in order to facilitate the efficient distribution of activity across sites. Taking this discussion further, there is potentially also scope to shift discrete, non-location specific activity to areas with excess capacity, which may in fact reduce the requirement for some staff in other locations.

Technological advances have the capacity to change the way high volume, transactional matters are dealt with in a highly efficient manner. For example, we understand there is a move towards accepting electronic Divorce applications. It is considered another high volume cause of action – Consent applications – could also be determined in this manner. This approach would allow the flexible and speedy disposal of these types of matters, as activity could be shared by registries around the country, and the need for individuals to present at registry locations would decrease.

The effective use of technology is a key enabler of a cross-country approach to flexible work allocation, either within or outside the court system. In addition to sharing activity between physical locations, increased technological capability may also be considered a precursor to a discussion around the viability of certain registry locations. Elements such as the level of workflow, number of staff and ability to ensure a sufficient level of service through technological means would be key considerations around decisions to close existing registry sites, and consolidate the physical activity to an appropriate ‘hub’ registry. It is common for service delivery agencies across portfolio areas to service smaller sites from a central hub, and this principle would be applied in cases of registry closure. Legislative barriers would need to be considered in such an exercise – for example, the section 34 of Federal Court of Australia Act 1976 provides that at least one Registry shall be established in each State, in the Australian Capital Territory and in the Northern Territory and that the Registrar must ensure that at least one Registry in each State is staffed appropriately to discharge the functions of a District Registry, with the staff to include a District Registrar in that State.

The development of a national, electronic (i.e. remote access) approach to parties’ lodgement of applications and the provision of registry services would enhance flexibility in service delivery, and ensure physical registry services are placed in areas of highest activity and demand (noting the challenges for flexibility where workload fluctuates year on year). It is considered legitimate concerns around accessibility for parties and practitioners would be best addressed through a technological solution, which provides equality of access to all court users.

As a first step, the flexible sharing of work between registries is not anticipated to generate specific savings – rather, it will initially serve as a workload equaliser, taking pressure away from the busiest registries through flexible use of existing resources. Over time, however, it is anticipated this approach could realise FTE savings, as the work allocation becomes more sophisticated, reducing the overall staffing requirement for a court.

A more extreme possibility involves the closing or downgrading smaller registries. Such an initiative would increase the overarching efficiency of the Courts through concentration of work
in major centres. Under this model, costs associated with the need to maintain a full time presence in specific locations (such as staff, operating leases and suppliers) could be reduced, offset in part by increased circuiting and IT expenditure. From a purely financial perspective, it is expected that this would result in long term savings once initial separation and relocation costs, primarily driven by staffing considerations, had been covered. The Courts have indicated that depending on the number of registries closed or downgraded, up to $6.4 million per annum could be saved ($0.6 million for FCA and $5.8 million for FCoA and FCC).

Such savings would come at a cost, however, in terms of reduced service levels to those in rural and regional areas and a perception of reduced access to justice for those who lived outside the state capitals. A previous attempt to downgrade the FCA registry in Hobart was opposed in the Senate on such grounds and as such it is considered likely that any further attempts to reduce services to rural and regional areas will also be met with opposition in Parliament.

**Recommendation 12**

Appropriate technological solutions exist to support all Courts to:

- flexibly allocate workflow around registry locations, to make best use of existing resources in the short term; and
- examine the feasibility of closing low-volume registries and facilitate servicing of these registry functions from another location, in order to generate savings.

**Judicial support and resourcing models**

It is recognised that judicial support staff perform an important role as part of the Courts’ current operating model. Activities performed by associates include provision of legal research assistance and administrative support to the judge, management of the documentation and administration related to a judge’s docket, attendance to the judge during court sittings, and assistance with the effective functioning of the judge’s chambers.

Under existing arrangements, each judicial officer is provided a support staff allocation, which varies between the three Courts. Table 5-8 summarises the current judicial support staff allocations across each Court.

<table>
<thead>
<tr>
<th>Court</th>
<th>Chambers staff allocation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td>1 FTE APS5</td>
</tr>
<tr>
<td></td>
<td>1 FTE APS6</td>
</tr>
<tr>
<td>Family Court of Australia</td>
<td>First instance judges</td>
</tr>
<tr>
<td></td>
<td>0.5 FTE APS4</td>
</tr>
<tr>
<td></td>
<td>1 FTE APS5</td>
</tr>
<tr>
<td>Appellate judges</td>
<td>1 FTE APS4</td>
</tr>
<tr>
<td></td>
<td>1 FTE APS5</td>
</tr>
<tr>
<td>Federal Circuit Court of Australia</td>
<td>1 FTE APS4</td>
</tr>
<tr>
<td></td>
<td>1 FTE APS5</td>
</tr>
</tbody>
</table>
Source: Advice from the Federal Court of Australia, Family Court of Australia and Federal Circuit Court of Australia to KPMG, 31 January 2014. Note that FCoA judges at first instance receive in-court support from appropriately trained staff from the client service teams. These staff are not dedicated chambers staff and perform other registry functions when not in court.

It is noted that the allocation of judicial support for judicial officers across the three Courts is not consistent. A first instance FCoA judge is allocated 0.5 FTE APS4 and one FTE APS5 whereas other judicial officers are allocated two FTE with varying classification levels.

Drawing on models in other State jurisdictions, there could be opportunities to consider changing the allocation of support staff to judicial officers to streamline resourcing in this area. For example, the South Australian Supreme Court has a model of sharing one associate between two judges, while the Victorian County Court has moved towards a pooling arrangement, where groups of associates and legal researchers are used flexibly between judges.

If streamlining judicial support were considered appropriate, even simply applying a consistent approach to resourcing support for federal judges across the FCA, FCoA and FCC could generate some savings. This might involve streamlining arrangements either in terms of the number of FTE allocated to a judge (reducing to 1.5 FTE in line with the FCoA first instance judges) or in relation to the classification of future appointments (at the APS 4 and APS 5 level in line with existing FCoA and FCC arrangements.

The combined effect of changing classification levels and reducing FTE allocations on judicial support expenditure would be approximately $4 million per annum, however in order to realise this level of savings, corresponding productivity or process improvements would be required. This may include difficult decisions about which activities were no longer a priority to be undertaken by the Courts.

Accordingly, it is recognised the level of savings associated with such a move is likely to be considerably lower as some elements of the judicial support roles would need to be absorbed elsewhere within the court system.

A higher level of change – for example, in relation to sharing or pooling associates between judicial officers in line with some State jurisdictions – would constitute an even higher order transformation, and the ability to extract productivity improvements to support the realisation of all savings would need to be carefully considered.

Any approach that involved changes to existing allocations of judicial support would need to be undertaken in close consultation with Heads of Jurisdiction and the judiciary. As part of developing this report the Courts have advised of the challenges associated with changing allocations of judicial support and that this would need to be examined in the border context of court activities.

**Key Finding 25**

A review of judicial support in the FCoA resulted in reductions in the level of judicial support provided to FCoA first instance judges. Streamlining judicial support for all Courts in accordance with the level provided to FCoA first instance judges would realise savings so long as corresponding improvements in productivity could be found.
Recommendation 13
Judicial support arrangements should be examined to promote a cost effective and consistent approach across the federal courts, in order to drive the most efficient use of resources across the Courts’ operations.

Opportunities for improved efficiency or savings over the longer term

Case Management and use of Registrars

At present, the FCA, FCoA and FCC make use of Registrars in deciding certain matters (for example, Consent Orders, Divorce, Bankruptcy, procedural matters, etc.). This arrangement enables judges to focus on more complex matters of law and/or fact. Unlike some State jurisdictions, there are no Judicial Registrars used in the federal court system. Appropriate delegation of powers to Registrars can facilitate the timely and efficient resolution of procedural matters and less complex disputes.

In a cost constrained environment, the increased use of Registrars in this manner recognises judges’ time and effort is best directed towards the most challenging and complex matters. It is acknowledged, however, the diversion of judicial activity to other resources would necessitate the appointment of additional Registrars to accommodate this increase in workload, which means that such a measure would not realise short-term cost savings.

The FCA and FCC adopt a judge-led Case Management model, which emphasises the use of judges (rather than Registrars) as a means of enabling early identification of issues and potential earlier settlement of matters. In some cases, a docket judge sitting in general federal law will refer matter to a registrar for a first court date (for example in the migration jurisdiction). In Victoria, the FCC has established Registrar-only circuits, where they will undertake certain specified delegated responsibilities. It is noted that judicial time is comparatively expensive, and, in relation to less complex matters, it may be more time and cost effective for such matters to be handled by a Registrar (under appropriate delegation), rather than a judge.

In contrast to the FCA and FCC judge-led Case Management model, a first court event in the FCoA is heard by a Registrar, and Registrars will also lead a number of procedural activities, including conducting Conciliation Conferences. This enables the identification of key issues in dispute and support parties to find appropriate solutions before reaching trial. It is interesting to note that the FCC has adopted the judge-led Case Management approach of the FCA, notwithstanding the fact that the vast majority of filings in the FCC relate to Family Law matters.

The Australian Centre for Justice Innovation (a joint initiative between the Australasian Institute for Judicial Administration and the Faculty of Law at Monash University) is currently undertaking The Timeliness Project which, among other things, is examining whether some Case Management approaches are better than others from a timeliness perspective. The project’s Discussion Paper, released in October 2013, highlights the significant variation in case
management approaches for courts and tribunals across Australia, indicating that this variation is often dictated by the availability of court resources.\textsuperscript{153}

There would be value in the courts drawing upon the outcomes of this project to:

- form a view as to the most efficient Case Management model, in order to promote a consistent, efficient approach to case management across the court system, particularly given the FCC is required to determine matters across both federal jurisdictions;

- identify opportunities to further use Registrars in appropriate matters (particularly in relation to procedural matters and/or initial Case Management activity), acknowledging that the delegating such power to Registrars may enable such matters to be dealt with more efficiently – thus delivering on a key access to justice principle which enables disputes to be disposed of at the earliest point in time and with limited costs(s) to the Government and litigants.\textsuperscript{154}

Submissions should be made so that this study accounts for the financial considerations and the impact on outcomes (i.e. differences in judge-led Case Management vis-à-vis greater use of Registrars) for parties. It is noted that in considering shifting judicial effort to other resources, the appointment of additional Registrars would be required, and that short-term savings are unlikely given that judges enjoy security of tenure regardless of workload fluctuation.

\textbf{Key Finding 26}

Appropriate delegation of powers to Registrars can facilitate the timely and efficient resolution of procedural matters and less complex disputes, however the diversion of judicial activity to other resources would necessitate the appointment of additional Registrars to accommodate this increase in workload, which means that such a measure would not realise short-term cost savings. Over the longer-term, savings could be realised as some retiring judicial officers may not require replacement.

\textbf{Key Finding 27}

Case Management practices differ between the FCA and FCC (which employ a judge-led Case Management model), and the FCoA (which delegates a number of procedural activities and facilitation of Conciliation Conferences to Registrars). While Case Management is a matter for the Courts, there is scope to draw on the findings of current research projects to identify a consistent, appropriate and cost-effective approach to Case Management across the federal court system.

\textbf{Recommendation 14}

The Courts should draw on the findings of the Australian Centre for Justice Innovation’s Timeliness Project to identify a consistent, appropriate and cost-effective approach to Case

\textsuperscript{153} Australian Centre for Justice Innovation, \textit{The Timeliness Project: Discussion Paper} (2013) 64

\textsuperscript{154} Attorney-General’s Department, \textit{A Strategic Framework for Access to Justice in the Federal Civil Justice System} (Commonwealth of Australia 2009) 63.
Management across the federal court system, particularly given the dual jurisdictions considered by the FCC. Greater transparency and clarification of the role of Registrars would be beneficial. A single case management system should also be encouraged.

Alternative dispute resolution

In addition, the Timeliness Project is examining the use of alternative dispute resolution, recognising this plays an “important role in achieving timeliness in the resolution of disputes across the civil justice sector partly because it may support earlier dispute resolution”. It is also considered the use of alternative dispute resolution is a less costly alternative to litigation.

The family law system has made effective use of alternative dispute resolution, and the identification of opportunities to encourage matters to be settled ahead of lengthy trial events, or to encourage contestability of service provision with more activities being undertaken by the private or community sectors. The establishment of Family Relationship Centres, the use of professional Family Consultants, and requirements to participate in mediation processes (subject to particular exceptions such as family violence) prior to seeking a court order have all been positive developments which support the efficient disposal of matters, with the aim to deliver better outcomes for clients.

Stakeholders identified opportunities to adopt a more flexible approach to alternative dispute resolution activities across the federal court system. These included:

- offering dispute resolution throughout the course of a matter (in cases where restrictions currently apply) in an effort to reduce the number of matters which proceed to trial; and
- identifying opportunities for referrals to court-directed activity outside the court system (e.g. services performed by community service providers) to improve outcomes for litigants.

It is considered there would be benefits for litigants and the Courts in exploring further opportunities for the flexible use of alternative dispute resolution for family law, and where appropriate general federal law matters, in order to promote more efficient use of court resources and improve case outcomes.

**Recommendation 15**

Further opportunities for the flexible use of alternative dispute resolution for Family Law matters including property, and where appropriate general federal law matters, should be explored to support efficient court operations and improved outcomes for litigants. Better linkages to other family law services (e.g. kiosk initiatives) should be formalised.

Family Reports

A large proportion of Family Reports across the FCoA and FCC are prepared by external Regulation 7 providers, who are appointed under regulation to serve as part of a broad pool of professionals identified as having the necessary skills and experience to undertake this

---

function. Alongside this capacity, FCoA/FCC Family Consultants prepare around 2-3 Family Reports per month, alongside their other planned activities.

It is important to acknowledge that Family Consultants undertake a range of professional activities to support the court in identifying underlying issues impacting families before the Court. Table 5-9 provides an overview of the range of activities performed by these professionals, including an estimate of the time allocated to undertake each task.

Table 5-9: Family Consultant activities and time allocations

<table>
<thead>
<tr>
<th>Activity</th>
<th>Time allocation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Section 11F interventions – Federal Circuit Court</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Child Dispute Conference</td>
<td>2 hours</td>
<td>• Read file</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Interview parents separately, undertake risk assessment (e.g. mental health, drug/alcohol)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Assess parents’ capacity to parent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Write 2-page memo</td>
</tr>
<tr>
<td>Child Inclusive Conference</td>
<td>6 hours</td>
<td>• Read file</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Interview parents and undertake similar risk assessment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Meet with children as a group, then individually</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• May observe child in the company of each parent</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Get parents to re-focus on the needs of the child</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Write template memo (longer than above)</td>
</tr>
<tr>
<td><strong>Section 11F interventions – Family Court (Child Responsive Program)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intake and assessment meeting</td>
<td>3 hours</td>
<td>• Parents-only meetings</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Undertake risk assessment</td>
</tr>
<tr>
<td>Child and family meeting</td>
<td>6 hours</td>
<td>• Follow up with child and family meetings</td>
</tr>
<tr>
<td>Children and Parents Issues Assessment</td>
<td>3 hours</td>
<td>• Write Children and Parents Issues Assessment</td>
</tr>
<tr>
<td><strong>Family Reports (all courts)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Family Report</td>
<td>21 hours</td>
<td>• Read file (could be multiple boxes – all subpoena documents from police, child protection, mental health service providers etc)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Interview parents separately, undertake risk assessment (may bring in new partners, grandparents etc)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Meet children separately</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Observe each child separately with each parent / new partner [this activity usually takes place over 1-1.5 days, try not to</td>
</tr>
</tbody>
</table>
## Activity | Time allocation | Description
--- | --- | ---
| bring children back to court twice | | • Obtain collateral information – e.g. ring schools, counsellors, psychologists  
• Write comprehensive report based on template. Expected to evaluate, provide clinical assessment, make recommendations on future care.  
• Family Report can be used as a settlement tool. If matter doesn’t settle on the basis of this, Family Report can be used in trial. Family Consultant can be called to give evidence.

### Other reports

#### Magellan List Reports
- 24 hours
- • Sexual, physical abuse of a child  
• Policy to do these reports internally. Prioritised.

#### Hague Convention Reports
- 21 hours
- • Where a child is kept in Australia and not returned  
• Note the report is based upon a different framework – not about the ‘best interests of the child’

#### FCC Duty Days

#### Child Dispute Conference
- 3 hours
- • Undertake Child Dispute Conferences on the spot  
• May give oral evidence to court on the day

Source: Interview with Principal, Child Dispute Services, FCoA, 24 January 214

It is understood that to date, no formal examination of the costs associated with the different approaches to Family Report preparation has been undertaken. There would be value in identifying the true cost of an in-house Family Report, in order to ascertain the most cost effective approach to their commissioning, while also considering non-financial considerations such as the quality of reports prepared by the two groups of professionals. There could be an argument that those full time FCoA/FCC professionals who are exposed to the Family Law court setting more regularly are better placed to prepare high quality reports on a regular basis.

**Recommendation 16**

That the FCoA and FCC undertake an exercise to determine the cost effectiveness of the preparation of Family Reports by Family Consultants in comparison to Regulation 7 providers, in order to ascertain the preferred model for ensuring high quality, efficient reporting in support of improved case outcomes.

**Provision of information to court users**

At present, registry staff are limited in terms of the information they can provide to court users. As an administrative function, registry staff have avoided providing information that could be interpreted as legal advice. The National Enquiry Centre provides some guidance for court users in respect of family law matters and the FCoA and FCC have recently released a YouTube video to help navigate divorce procedures, however court users consider the current arrangements...
rely heavily on the use of judicial officers or registrars to provide information (specifically of a legal nature) to parties as part of the case management process. This results in a significant impost on senior officers’ time, which is inherently more expensive than that of registry staff.

Consideration could be given to enhancing the range of information registry staff are able to provide to court users that may influence parties’ decisions to progress matters through the court system, and accordingly, may impact the time and use of judicial resources over the longer term.

It is considered enhancing online website information accessible to court users may also assist to minimise the volume of enquiries fielded by registry staff and the National Enquiry Centre in the longer term.

Key Finding 28

Continued and enhanced provision of clear and accessible information to court users through court websites, the National Enquiry Centre and registry staff will support parties’ decision-making in relation to progression of matters through the court system, and may lead to decreased use of court and judicial resources over time if a ‘self service’ approach is facilitated for clients, and earlier decisions around case progression are reached. At present there are three major websites used by the family courts to provide information to users in addition to the CCP. This should be streamlined with the main conduit being the CCP.

Recommendation 17

Across all Courts, consideration should be given to:

- enhancing information provided on court websites to promote a ‘self service’ approach from court users; and
- removing any legislative or practical impediment to registry staff providing greater levels of information and guidance to court users to enhance first point resolution of concerns and contribute to efficient court operations.

Other changes to operational model

Appeal processes

Opportunities exist for the superior courts to further consider approaches which may reduce the movement of judges across Australia to undertake judicial activities. For example, in order to avoid the perception of conflict, KPMG understands FCA appeals are heard by judges from outside the relevant State or Territory registry, in order to provide confidence to parties that an objective assessment is undertaken. In the FCoA Appeal Division, a policy existed whereby appeal division judges and general division judges who sat on appeals with them, would preferably not sit in their home location. As a result of the need for fiscal restraint this policy has been suspended; however, the FCA argues that it remains preferable to avoid the perception of conflict, judges should not sit on appeals in their home location. To this end, the FCA has noted that the use of interstate judges is a necessary component contributing to the
creation of a national court, and prevents the Court fragmenting into regional districts. The FCA has further indicated that a degree of interstate judge participation is also critical to the ability of the Court to organise highly skilled and specialist benches for resolution of specialist appeals, which contributes to the Court’s reputation. Notwithstanding this, it is not clear that appellate judges are appointed to registry locations based on the likely volume of appeals at that location.

There is scope to revisit the approach to undertaking appeal work and the registry location of appellate judges, in order to ensure the most efficient use of scarce resources, while at the same time balancing the need to provide confidence in the appellate process for litigants and the community. While this may be more challenging in smaller registry locations with only a small number of judicial officers, it is considered there are clear precedents for independent, impartial appellate processes at the State and Territory level which necessarily involve local judicial officers undertaking this important aspect of the superior courts’ activities.

The appellate process can also benefit from procedural change to promote efficient disposition of appeals and maximise the effective use of judicial resources. Reforms relating to the appeals process in the Supreme Court of Victoria (Court of Appeal) are showing promising results in this area in relation to criminal appeals, and are being considered in relation to civil appeals. Established on 28 February 2011, the new regime specifies that all applications for leave to appeal (whether convictions, sentence or both) are to be considered by a judge, unless a judge or the Registrar directs otherwise. The applicant seeking leave to appeal may elect to have the application determined on the papers, without an oral hearing. Preliminary results indicate that the reforms are assisting to reduce the number of pending appeals. In particular:

- there was an increase in the intensity of listing of appeals and finalisations (in 2011, 669 appeals were finalised compared to 475 in 2010; and
- there was a reduction in the initiation rate of applications (in 2011, 315 appeals were initiated compared to 477 in 2010).

Given the positive impact of these reforms, the Supreme Court of Victoria has resolved to apply a similar management regime to civil appeals. The proposed regime is designed to build on the front-end management of civil appeals and applications introduced by the Court of Appeal in 2006 through having head application and appeal assessed by Registry staff, including Registry lawyers, assigned to the task of managing appeals/applications so that appeals and applications will be dispatched as efficiently and expeditiously as possible. At the time of writing, the Supreme Court of Victoria noted that implementation of these reforms in relation to civil appeals was reliant on government funding, and therefore was unable to provide an expected implementation date.

---

156 Supreme Court of Victoria, Court of Appeal Criminal Reforms Newsletter – No. 1 (February 2012) (Victorian Government 2012) 1.
157 Supreme Court of Victoria, Court of Appeal Criminal Reforms Newsletter – No. 1 (February 2012) (Victorian Government 2012) 1.
158 Supreme Court of Victoria, Court of Appeal Newsletter – No. 5 (March 2013) (Victorian Government 2013) 2.
159 Supreme Court of Victoria, Court of Appeal Newsletter – No. 5 (March 2013) (Victorian Government 2013) 2.
Judgments

As courts of record, judicial officers in the FCA, FCoA and FCC are required to prepare a written judgment at the conclusion of legal proceedings. According to the FCA’s judicial performance reporting, the median page length of judgments is 18.7 pages. It is unclear whether the FCoA and FCC keep similar measures. There may be scope to consider approaches to streamline the preparation of judgments, in order to make best use of judicial effort, and promote clarity of understanding for litigants. For example, thresholds of which cases require a written judgment could be considered, or a template could be developed by the courts to support only the minimum amount of information necessary being included as part of a judgment. These considerations would be underpinned by a desire to speed up the judgment process, potentially reduce the number of longer-form judgments prepared by judicial officers, and provide an opportunity for increased judicial focus on other matters.

Recommendation 18

Consideration should be given to further changes to the Courts’ operating model to drive efficiency and enhanced use of judicial resources, including areas such as:

- processes for commencing and hearing appeals; and
- initiatives to streamline the preparation of judgments.

Procedural / legislative change

Alongside opportunities for a fundamental re-examination of the courts’ funding model, and initiatives to promote increased efficiency and productivity across the courts’ operations, it is also possible to consider challenges or inefficiencies which appear to arise from legislative or other procedural requirements.

Stakeholders interviewed as part of this review highlighted a number of areas where they perceived opportunities existed to either reduce unnecessary or burdensome procedural activity, or update legislative requirements to provide greater opportunity for matters to be resolved in an efficient and effective manner in order to reduce court time and effort, and achieve better outcomes for parties.

Table 5-10 summarises a number of legislative or procedural options identified throughout the review which could be considered as measures to streamline court processes, support earlier resolution of matters and improve case outcomes.
### Table 5-10: Legislative and procedural options

<table>
<thead>
<tr>
<th>Opportunity</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Making of parenting orders under the Family Law Act 1975 (Cth) Part VII</strong></td>
<td>Legislative changes arising from the Family Law Act (Shared Parental Responsibility Amendment) 2006 (Cth) have introduced an extensive decision-making process for the making of parenting orders under the Part VII of the Family Law Act 1975 (Cth). Stakeholder feedback indicates the revised decision-making process under Part VII increased complexity for practitioners, clients and the judiciary. In their view, the outcome of earlier legislation and the 2006 amendments is the same – a decision which is in the child’s best interests, and therefore the increased complexity associated with the 2006 reforms has no demonstrable impact on the final outcome. Opportunities exist to consider whether reform of Part VII is required to reduce complexity in current processes and legislative requirements.</td>
</tr>
<tr>
<td><strong>Requirement to show ‘best endeavours’ to resolve financial disputes</strong></td>
<td>Stakeholders highlighted the opportunity to streamline court processes through the removal of the administrative processes associated with the requirement to show ‘best endeavours’ to resolve financial disputes through reversal of changes introduced by the Civil Dispute Resolution Act 2011 (Cth). Stakeholder considered existing administrative where parties are required to demonstrate ‘genuine steps’ to resolve disputes (evidenced by a Genuine Steps Statement) to be time consuming and have no impact on outcome(s). This is not to be confused with relaxation or removal of mandatory mediation requirements altogether.</td>
</tr>
<tr>
<td><strong>Introduction of mandatory mediation for property matters</strong></td>
<td>At present, the Family Law Act 1975 (Cth) requires parties with a parenting dispute to participate in mediation, usually through a Family Relationship Centre, before seeking a court-based parenting order. No similar mandatory mediation requirement is provided in respect of property matters. Some stakeholders argued this limits the number of property matters which may be settled using alternative dispute resolution, which generally provides a more cost- and time-effective mechanism for dispute resolution than the FCoA or FCC. Opportunities exist to consider the introduction of a mandatory mediation requirement in respect of property disputes, subject to appropriate exclusion criteria (for example, in instances where there is a power imbalance between the parties).</td>
</tr>
<tr>
<td><strong>Increases to financial jurisdiction of the FCC in respect of General Law Matters</strong></td>
<td>In order to promote the efficient determination of matters in the most appropriate forum, there is scope to consider amendments to courts’ jurisdictional limits to promote the resolution of matters at the lowest appropriate level. For example, increasing existing monetary limits in the FCC’s General Federal Law jurisdiction is likely to drive additional matters to the lowest appropriate jurisdiction.</td>
</tr>
<tr>
<td><strong>Conferral of Corporations Law jurisdiction on the FCC</strong></td>
<td>At present, Corporations Law matters can only be heard in the FCA and State and Territory Supreme Courts. In 2012-13, Corporations Law matters comprised a significant component of the FCA’s workload, being some 66 per cent of applications filed. Corporations Law filings in the FCA have increased by 134 per cent between 2009-10 and 2012-13. Given the FCC’s jurisdiction in relation to specific bankruptcy, trade marks and...</td>
</tr>
</tbody>
</table>
Opportunity | Description
--- | ---
 | consumer law matters, some stakeholders considered it incongruous for the FCC not to have jurisdiction in respect of Corporations Law matters. Opportunities exist to consider whether certain matters arising under the *Corporations Act 2001* (Cth) may be heard in the FCC in order to reduce demands on the FCA’s workload. Reference Group feedback indicated this approach could raise challenges given Corporations Law is a cooperative scheme, with considerations for State and Territory governments in relation to this approach. Any challenges of this nature should be clearly articulated and considered when deciding upon future action in this area.

**Self represented litigants**

In order to address the growing impact of self represented litigants on the justice system, there may be scope for the introduction of provisions which require self-represented litigants in the FCA to seek leave to proceed when filing an application. This may serve to reduce the frequency of unrepresented parties appearing before the court, although must be considered in light of access to justice principles which seek to provide a legal system which is accessible and not dependent on the capacity to afford private legal representation.

**Evidence Act considerations**

Reference Group feedback indicated the *Evidence Act 1995* (Cth) could provide challenges with respect to swearing witnesses remotely, and warrants further consideration to improve court efficiency.

Sources: KPMG analysis; stakeholder feedback.

**Recommendation 19**

That the Government and Courts consider the merits of the legislative and procedural changes identified throughout this review as a means of improving the efficiency of court processes and outcomes for parties.