

THE COURT SYSTEM AND DISPUTE RESOLUTION

THE FAMILY COURTS AND OTHER COURTS WITH JURISDICTION IN FAMILY LAW

- Defined as *a process (other than the judicial process) in which parties to a dispute present arguments and evidence to an arbitrator, who makes a determination to resolve the dispute*
- Two types: **Facilitative** (designed to assist people find their own solutions) v **determinative** (imposing outcomes) i.e. judicial determination or arbitration
- Courts resolve disputes by judicial process. However, courts are not a means of dispute resolution.
- s60I requirement that parties must, prior to filing proceedings in the court, provide a certificate evidencing dispute resolution – only for those with children. Arbitrators have centralised and standardised accreditation.
- Includes: neutral third party evaluation where an expert provides their view of what they think will happen which is often uncommon in family law, lawyer assisted negotiation in which solutions are found by precedence, family dispute resolution and mediation (s 10F), family counselling (s 10B) and arbitration (s 10L)
- Traditionally the elements of ADR is that they are voluntary, private, confidential, neutral, timely and impartial.
- ADR is not compulsory (unless under s60I) and ADR is generally considered as voluntary. It can only occur with the consent of all parties. Arbitration is available in financial proceedings under the FLA. It can also occur prior to or without proceedings being commenced.
- Arbitration became a viable option with amended Family Law Rules in 2016 (rules are made by the majority of judges)

S69ZN Principles:

Principle 1: The court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings.

Principle 2: The court is to actively direct, control and manage the conduct of the proceedings.

Principle 3: The proceedings are to be conducted in a way that will safeguard the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and the parties to the proceedings against family violence.

Principle 4: The proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

Principle 5: The proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible.

ALRC review of the FLA

Recommendation 21 The Family Law Act 1975 (Cth) should be amended to: require that parties take genuine steps to attempt to resolve their property and financial matters prior to filing an application for court orders; and specify that a court must not hear an application unless the parties have lodged a genuine steps statement.

Recommendation 26: The Family Law Act 1975 (Cth) and the Child Support (Assessment) Act 1989 (Cth) should be amended to increase the scope of matters which may be arbitrated.

Recommendation 30: The Family Law Act 1975 (Cth) should include an overarching purpose of family law practice and procedure to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and their families.

Recommendation 31: The Family Law Act 1975 (Cth) should impose a statutory duty on parties, their lawyers, and third-parties to cooperate amongst themselves, and with the courts, to assist in achieving the overarching purpose. Breach of the duty will have costs consequences for the person who fails to act in accordance with the overarching purpose.

Australian Family Law in Context Ch 7, 'Courts in Family Law' and Ch 8, 'Dispute Resolution in Family Law'

- In the year 2000, the Federal Magistrates Court was established. This later became known as the Federal Circuit Court. It came to hear most trials in family law matters. It also has jurisdiction in many federal matters. From January 2019 the two courts dealing with family law matters were amalgamated to create the Federal Circuit and Family Court of Australia (FCFCA).
- It was envisaged that the Federal Magistrates Court would “ease the workload of the Family and Federal Courts and will provide an alternative for families that will be quicker and cheaper than current court processes
- The Federal Circuit Court was established as a separate federal court of record and a court of law and equity, with such original jurisdiction as is vested in it by Commonwealth legislation – most of the court’s work has been family law although it has jurisdiction to deal with other matters such as migration and bankruptcy
- Because of constitutional limitations on substantive law existing at the time when the Family Court of Australia was being established, the states were encouraged to set up their own Family Courts, to be funded by the Commonwealth. Only Western Australia established such a court and there is no realistic prospect of any other state establishing one. There is thus not the same problem in the rest of Australia that the family law jurisdiction is divided between two courts with almost the same jurisdiction but different rules and procedures.

Family Consultants:

- Family consultants play an important role in the family court system, conducting family dispute resolution conferences. Following changes to the FLA in 2006, the work of family consultants with families is not protected by confidentiality, as the same family consultant may well go on to prepare a report for the Court.

11A Functions of family consultants

The functions of family consultants are to provide services in relation to proceedings under this Act, including:

- (a) assisting and advising people involved in the proceedings; and
- (b) assisting and advising courts, and giving evidence, in relation to the proceedings; and
- (c) helping people involved in the proceedings to resolve disputes that are the subject of the proceedings; and
- (d) reporting to the court under sections 55A and 62G; and
- (e) advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings. ...

11C Admissibility of communications with family consultants and referrals from family consultants

- (1) Evidence of anything said, or any admission made, by or in the company of:
 - (a) a family consultant performing the functions of a family consultant; or
 - (b) a person (the professional) to whom a family consultant refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;is admissible in proceedings under this Act.

...

Associated and Accrued Jurisdiction

- The Federal Circuit Court and Family Court both have **associated** jurisdiction – meaning jurisdiction that can be inferred from other Commonwealth legislation. This jurisdiction must always be exercised in relation to some express jurisdiction which is conferred upon the Court either by the FLA or some other Act; it cannot be relied on as a source of jurisdiction in itself.
- **Accrued** jurisdiction has also emerged – deriving from s 76(ii) of the Constitution, Parliament may make laws conferring original jurisdiction on the High Court “in any matter...arising under any laws made by the Parliament”. It is now established “beyond doubt” by High Court decisions *Fencott v Muller*, *Stack v Coast Securities (No 9) Pty Ltd* and *Re Wakim*, that the Constitution grants Parliament the power “to give authority to federal courts to decide the whole of a single justiciable controversy of which a federal issue forms an integral part”.

Warby v Warby [2001] FamCA 1469

- NICHOLSON CJ, FINN and STRICKLAND JJ: We have formed the view that as a matter of law, the Family Court of Australia is not restricted to the determination of a family law claim or proceeding; it may exercise accrued jurisdiction to determine the non- Federal aspects of a justiciable controversy of which the family law claim or

cause of action forms a part

- The matters appropriate to be taken into account in determining whether the Family Court of Australia will exercise its accrued jurisdiction are as follows:
 1. what the parties have done;
 2. the relationships between or among them;
 3. the laws which attach rights or liabilities to their conduct and relationships;
 4. whether the claims are part of a single justiciable controversy and in determining that question whether the claims are “attached” and not “severable” or “disparate”;
 5. whether the claims are non-severable from a matrimonial cause and arise out of a common substratum of facts;
 6. whether the Court has the power to grant appropriate remedies in respect of the “attached” claims.
- In the present case there is a single property that is central to the parties’ controversy. The Family Court cannot determine and settle the property of the parties without determining the relative beneficial interests of the parties to the marriage and the wife’s father in the property. It is not to the point that a State court could make orders as to the dispute between the parties to the marriage and the wife’s father, and that the Family Court of Australia could then determine the family law dispute between the parties to the marriage.

Restriction on Publication

- When the Family Law Act was first introduced it contained a blanket ban on reporting anything in relation to proceedings in the Family Court. By virtue of s 97 all proceedings were to be held in closed courtrooms and under s 121 it was an offence to publish any statement or report proceedings that had been instituted or any account of evidence in proceedings.
- In 1983 the Act was amended to permit proceedings to be held in open court, with the restrictions on identification of parties remaining. The amendment was in response to the earlier Joint Select Committee’s report, which recommended that proceedings take place in open court.

SECT 121 Restriction on publication of court proceedings

- (1) A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:
 - (a) a party to the proceedings;
 - (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
 - (c) a witness in the proceedings;commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.
- (2) A person who, except as permitted by the applicable Rules of Court, publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means (otherwise than by the display of a notice in the premises of the court), a list of proceedings under this Act, identified by reference to the names of the parties to the proceedings, that are to be dealt with by a court commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.
- (3) Without limiting the generality of subsection (1), an account of proceedings, or of any part of proceedings, referred to in that subsection shall be taken to identify a person if:
 - (a) it contains any particulars of:
 - (i) the name, title, pseudonym or alias of the person;
 - (ii) the address of any premises at which the person resides or works, or the locality in which any such premises are situated;
 - (iii) the physical description or the style of dress of the person;
 - (iv) any employment or occupation engaged in, profession practised or calling pursued, by the person or any official or honorary position held by the person;
 - (v) the relationship of the person to identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;
 - (vi) the recreational interests, or the political, philosophical or religious beliefs or interests, of the person; or
 - (vii) any real or personal property in which the person has an interest or with which the person is otherwise associated;