

Copyright Society

Copyright in the Federal Magistrates Court and the Copyright Tribunal

Federal Magistrate Rolf Driver

Introduction to the Court

- The **Federal Magistrates Court (FMC)** is an independent Court established on 3 July 2000 pursuant to Chapter III of the Australian Constitution by the *Federal Magistrates Act 1999*.
- The Court's initial jurisdiction is found in the *Federal Magistrates (Consequential Amendments) Act 1999*.

Introduction to the Court

- The FMC has been established to deal with a range of less complex federal disputes currently heard in the Federal Court or the Family Court of Australia.
- It is intended to provide a quicker, more affordable option for litigants and to ease the workload of the other federal courts. Emphasis is placed on alternate dispute resolution processes.

Introduction to the Court

- The FMC aims to finalise cases within six months and to deliver reserved judgments within six weeks.
- This objective has proved a challenge, particularly in the migration jurisdiction in Sydney but is now being achieved in 55% of cases nationally and 61% of copyright cases.

Jurisdiction

- The general federal law jurisdiction conferred on the FMC is concurrent with that of the Federal Court – the only exception is the migration jurisdiction under the *Migration Litigation Reform Act 2005*, which gives the FMC concurrent jurisdiction with the High Court.

Jurisdiction (continued)

- The FMC has jurisdiction conferred upon it in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Court is invoked. (FM Act s.18). The associated and accrued jurisdiction is available to both Applicants and Respondents.

Jurisdiction (continued)

- The Federal Court and the Family Court can transfer to the FMC any matter within their jurisdiction even if the matter could not be commenced in the FMC.
- The FMC has all of the powers of a modern Court of Equity.

Copyright

- The Federal Magistrates Court has jurisdiction to hear and determine civil copyright matters under the *Copyright Act 1968*, as amended by the *Copyright Amendment (Parallel Importation) Act 2003*.

Copyright (continued)

- The Court can deal with matters arising under Parts V (remedies and defences), VAA (broadcast decoding devices), IX (moral rights) and part XIA (performance protection) of the *Copyright Act*.

Copyright (continued)

- The Court generally follows the practice and procedure of the Federal Court in relation to interlocutory and ex parte applications, such as applications for interlocutory injunctions and Anton Pillar orders.

Copyright (continued)

- The Court dealt with principles in relation to interlocutory injunctions in *Paramount Design Group Pty Ltd v Awaba Group Pty Ltd* [2003] FMCA 336.

Trade Practices

- Applications under Part IVA, IVB, V and VA of the *Trade Practices Act 1974*. This includes consumer protection provisions dealing with unfair practices such as:-
 - Misleading or deceptive conduct
 - Bait advertising
 - Referral selling
 - Pyramid selling
 - Product safety; and
 - Product information.

Trade Practices (continued)

- The FMC has power to award damages up to a maximum of \$750,000.
- The opportunity exists to combine trade practices proceedings with proceedings under the general law (eg for breach of contract) or with proceedings in another area of the Court's jurisdiction.

Bankruptcy

- The FMC has concurrent jurisdiction with the Federal Court under the *Bankruptcy Act*. The only exception is the capacity to undertake trials with a jury pursuant to section 30(3) of the *Bankruptcy Act*, which is limited to the Federal Court.

Admiralty

- Admiralty law jurisdiction was also conferred on the Court by the *Jurisdiction of the Federal Magistrates Court Legislation Amendment Act 2006*.
- The amendment confers jurisdiction on the Court in *in personam* actions.
- Jurisdiction in respect of limitation proceedings defined in section 3, remains confined to the superior courts.
- However, the Federal Court can transfer to the Federal Magistrates Court – in addition to State and Territory courts – proceedings commenced as actions *in rem*.

ADJR and Privacy

- The FMC has jurisdiction to hear applications under the *Administrative Decisions (Judicial Review) Act 1977*.
- The FMC has the same jurisdiction as the Federal Court in matters arising under the *Privacy Act 1988*.

AAT

- Appeals from Decisions of the Administrative Appeals Tribunal must be commenced in the Federal Court of Australia and then transferred by order of the Federal Court to the FMC.

Human Rights

- The FMC has jurisdiction in relation to complaints terminated by the President of the Human Rights and Equal Opportunity Commission under section 46PE or 46PH of the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act).

Human Rights (continued)

- There are no monetary jurisdictional limits upon the FMC in proceedings under the *HREOC Act*.
- The jurisdiction covers complaints under the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004* and the *HREOC Act*.

Migration

- The FMC has concurrent jurisdiction with the High Court under the *Migration Act 1958*.
- The Court exercises the same powers as the High Court under s.75(v) of the Constitution.
- The Federal Court generally only deals with appeals.

Workplace Relations

- Employment law jurisdiction is conferred on the Court by the *Workplace Relations Amendment (Work Choices) Act 2005*.
- The Act confers jurisdiction on the Federal Magistrates Court to hear unlawful termination claims and jurisdiction on the Federal Magistrates Court in relation to a wide range of enforcement powers by way of civil penalties and injunctive relief, unfair contracts and breaches of agreements.

National Security

- National security jurisdiction is conferred on the Court by the *Anti-Terrorism Act (No 2) 2005*.
- This Act is part of an anti-terrorism legislative package.
- The legislation includes jurisdiction for the provision of control orders to be granted by the Court to limit a person's movement, association or activities if the Court decides the restraint will substantially assist in preventing a terror attack.
- The Federal Magistrates Court is an *issuing court* for the purpose of the control order regime.

Commencing an application

- The FMC uses the registries of the Federal Court for accepting and processing applications and other documents, file control and client services.
- The Registrars of the Federal Court perform similar functions in the FMC to those they carry out in the Federal Court, such as taxation of costs, mediation and conciliation, the settling of Appeal Book indexes and the exercise of delegated judicial functions.

Procedure

- In most cases the FMC endeavours to allocate a first hearing date within 4 weeks of the date of filing.
- At the First Court Date it is expected that parties will be able to advise the Court about the issues, the expected duration of the hearing and be prepared for the matter to be referred for PDR.

Procedure (continued)

- PDR in general federal law proceedings is dealt with in Part 27 of the *Federal Magistrates Court Rules*.
- Either mediation or arbitration is possible.
- Registrars of the Court conduct mediations.
- Anyone could conduct an arbitration on terms agreed by the parties.

Procedure (continued)

- Normally a hearing date will be fixed and the matter proceed on that fixed date in the event that PDR has not been successful.
- Discovery and interrogatories will be considered by the Court only upon application.

Fees

- It should be noted there are **no daily hearing fees in the FMC**. Fees on transfer of files to another Court are in accordance with respective fee regulations of the receiving Court from the date of the transfer.
- Generally, fees in the FMC are about half those in the Federal Court.

Rules of Court

- The Rules of Court came into operation on 30 July 2001.
- The rules deal comprehensively with the practice and procedure of the Court in almost all of the areas of jurisdiction.
- In bankruptcy proceedings the FMC and the Federal Court apply harmonised rules which are almost identical.

Forms

- There are two basic forms for the FMC. These are the Application and the Response. Most proceedings in the FMC will be commenced by an application.
- Some jurisdictions (eg bankruptcy, migration and human rights) have special forms.
- Normally an affidavit is required with the application but applicants have the option of filing a statement of claim or points of claim instead.
- Applications are issued in registries of the FMC that are co-located with registries of the Federal Court of Australia.

Costs

- FMC Rules provide an events based costs regime.
- Costs may be referred for taxation on the Federal Court scale but unless a 20% increase is achieved the party seeking taxation must pay for it.
- Federal Court Rules concerning bankruptcy costs generally apply.

Costs (continued)

- A Federal Magistrate may fix the amount of costs and disbursements payable.
- Costs may be fixed in a specific amount where the application of the Court scale of costs would produce an inappropriate result and where the delay and expense associated with a taxation of costs is not justified.

Subpoenas

- Up to five subpoenas can be issued without leave.
- Generally seven days notice for attendance or production must be given.

Appeals

- Appeals are possible as of right from final decisions of Federal Magistrates, to the Full Court of the Federal Court.
- As with the decision of Judges, leave is required to appeal from interlocutory decisions.
- An appeal is not by way of a hearing *de novo*.
- Appeals are heard by a single judge unless the judge considers that it is appropriate for the Court to be constituted by a Full Court.

Access

- The FMC uses video or audio conferencing to ensure that parties have opportunities in remote localities to participate without necessarily travelling long distances to Court.
- The Court has established circuits to rural areas to provide greater access to the Court system.
- Generally, the Court strives to adopt more streamlined, less formal procedure.

Workload

- The FMC currently does about 95 per cent of bankruptcy work, about 70 per cent of human rights work, virtually all first instance migration work and more than 50 per cent of family law and child support work.
- This year the Court has established itself as the busiest federal court.

Workload (continued)

In the 11 months to 31 May 2007:

- 41 intellectual property applications were filed in the Court;
- 36 were finalised; and
- 27 were pending.

54% of copyright workload was in Sydney.

Electronic Court

- The FMC Rules establish procedures for the electronic filing of documents.
- Videolink and audiolink facilities are available.
- In time, the Court will consider the use of new technologies to facilitate the complete conduct of proceedings electronically.

Summary Disposal

- Section 17A of the *Federal Magistrates Act 1999* (Cth) gives the Court the power to give summary judgment or to summarily dismiss an application.
- Rules 13.07 and 13.10 of the Court rules deal with summary judgment and summary dismissal.

Summary Disposal (continued)

- In *Vivid Entertainment LLC v Digital Sinema Australia Pty Ltd & Ors* [2007] FMCA 157, I dealt with summary judgment in copyright proceedings and adopted the following principles:
 - In assessing whether there are reasonable prospects of success on an application or a response, the Court must be cautious not to do an injustice by summary judgment or summary dismissal.
 - There will be reasonable prospects of success if there is evidence which may be reasonably believed so as to enable the party against whom summary judgment or summary dismissal is sought to succeed at the final hearing.
 - Evidence of an ambivalent character will usually be sufficient to amount to reasonable prospects.
 - Unless only one conclusion can be said to be reasonable, the discretion under s.17A cannot be enlivened.
 - The Court should have regard to the possibility of amendment and additional evidence in considering whether only one conclusion can be said to be reasonable. In that consideration, the conduct of the parties and the other circumstances of the case may be relevant.

Withdrawing a case

- An applicant can discontinue a case at any time if no final hearing date has been fixed.
- If a final hearing date has been fixed, a notice of discontinuance can be filed not less than 14 days before the final hearing without leave of the Court.
- To withdraw a case, a notice of discontinuance must be filed at the court registry and served on the other parties.

Copyright Tribunal of Australia

- The Tribunal, unlike the FMC, has a long history.
- The Tribunal was established on 1 May 1969 on the commencement of the *Copyright Act 1968*.
- Also unlike the FMC, the Tribunal had no work for its first ten years.

Copyright Tribunal of Australia (continued)

- Statutory provisions dealing with the jurisdiction of the Tribunal are complex but the jurisdiction can be summarised as:
 - hearing and determining applications for the granting of licenses under licensing schemes;
 - arbitration of disputes in relation to the terms of existing and proposed licensing schemes;
 - fixing amounts of royalties or equitable remuneration under compulsory licenses; and
 - making ancillary orders with respect to the operation of compulsory licensing schemes.

Copyright Tribunal of Australia (continued)

- The Tribunal is constituted by:
 - a judicial president (Lindgren J);
 - two judicial deputy presidents (Emmett J and myself);
 - three non judicial members (Professor Dennis Pearce, Ms Rhonda Smith and Mr Hugh Sibly).

Copyright Tribunal of Australia (continued)

- Although the Tribunal is an administrative body exercising arbitral powers, its practice and procedure has been established by its judicial members, who have previously all been Federal Court judges.

Copyright Tribunal of Australia (continued)

- The Tribunal can refer questions of law to the Federal Court for determination.
- Decisions of the Tribunal are administrative and can be reviewed under the ADJR Act.

Copyright Tribunal of Australia (continued)

- Justice Lindgren delivered a paper to the Copyright Society on 24 May 2007 on the changes to the jurisdiction of the Tribunal enacted by the *Copyright (Amendment) Act 2006*.