



FAMILY COURT OF AUSTRALIA

FEDERAL MAGISTRATES SERVICE:
IMPLICATIONS FOR THE FAMILY COURT

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1.0 Background

1.1 The Federal Magistrates Act 1999 (FMA) and the Federal Magistrates (Consequential Amendments) Act 1999 (FMCA) were both assented to on 23 December 1999. The FMA establishes the Federal Magistrates Court which obtains its jurisdiction from various acts of the Commonwealth Parliament including Child Support (Assessment) Act 1989, Child Support (Registration and Collection) Act 1988 and Family Law Act 1975. The FMCA amends the Commonwealth legislation to provide the jurisdiction for the new court and to make other consequential amendments. The Federal Magistrates Court will exercise jurisdiction in respect to matters currently within the jurisdiction of the Family Court and the Federal Court. This paper only examines that jurisdiction which is relevant to the Family Court (FCA) and the ramifications for the Court in determining matters.

2.0 Jurisdiction of the Federal Magistrates Court

2.1 Overview of relevant provisions

2.1.1 Section 10 of FMA provides that the Federal Magistrates Court has such **original jurisdiction** as is conferred in it by laws made by the Parliament. One has to therefore look to the various pieces of legislation to determine the full extent of the jurisdiction.

2.1.2 Section 19(1) of FMA provides that **proceedings must not be instituted** in the Federal Magistrates Court in respect of a particular matter if proceedings in respect of an associated matter are pending in the Family Court. It should be noted that the registration of state or overseas orders under Part VII Division 13A (should this Division become law as part of Family Law Amendment Bill 1999) and proceedings under Part XIII A (Sanctions for failure to comply with orders and contempt of Court) of FLA are exceptions (Section 19(2) of FMA).

2.1.3 **“Proceeding”** is defined in section 5 of FMA and means "a proceeding in court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal".

2.1.4 An **“associated matter”** is not defined in FMA at the present time (it is also not defined in FLA).¹

¹ New Subsection 19(2)

(2) Subsection (1) does not apply to:

- (a) proceedings for a decree of dissolution of marriage; or
- (b) proceedings instituted in Federal Magistrates Court under:
 - (i) Division 13A of Part VII of the Family Law Act 1975; or
 - (ii) Part XIII or X111A of that Act.



2.1.5 Sections 39 and 40 of FMA provide the FMS **discretion to transfer** matters within its jurisdiction to the Family Court. Section 41 of FMA provides for the mandatory transfer of proceedings to the Family Court of proceedings of the kind to be specified in regulations made for the purpose.²

2.2 FMS Jurisdiction

2.2.1 The Family Law Act was amended by the FMCA. The relevant amendments provide jurisdiction to the Federal Magistrates Court as follows:

- i. Section 39(1A) matrimonial causes other than proceedings for a decree of nullity of marriage and proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise. This includes limited jurisdiction in property matters (property having total gross value not exceeding \$300,000.00).
- ii. Subsection 39(5A) matters arising under FLA in respect of which proceedings are instituted under:
 - regulations made for the purposes of section 109, 110, 111, 111A, or 111B or
 - regulations made for the purposes of paragraph 125(1)(f) or (g) or
 - Section 117A.
- iii. Section 45A with the consent of the parties property proceedings in relation to property of a total gross value exceeding \$300,000.00.
- iv. Subsection 69H(4) matters arising under Part VII (Children) (other than proceedings for leave under section 60G).
- v. Section 69MA with the consent of the parties in contested proceedings for a residence order or an order under Part VII discharging, varying, suspending or reviving a residence order, or a part of a residence order.

2.2.2 There is at present no jurisdiction to make interim or final residence orders without consent. However if a residence matter is to be transferred to the Family Court before transferring the proceedings the FMS may make such orders it considers necessary pending the disposal of the matter by the Family Court. It should be noted that there is currently a Bill which extends FMS jurisdiction to include interim and final residence jurisdiction³. It is not expected that those amendments will be debated before August.

2.2.3 Court is defined in section 4(1) of FLA as “*court*, in relation to any proceedings, means the court exercising jurisdiction in those proceedings by virtue of this Act”. In addition to the specific jurisdiction outlined in the previous paragraph the Federal Magistrates Service will exercise other jurisdiction under the Family Law Act eg. Powers under Part XIII A (sanctions) and Part XIV (injunctions) by virtue of it exercising jurisdiction under the Act.

² See attachment Table of Comparative Provisions

³ Family Law Amendment Bill 1999



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- 2.2.4 The Child Support (Assessment) Act was amended by the FMCA. The amendments provide jurisdiction in relation to matters arising under the Act (S. 99(1)).
- 2.2.5 The Child Support (Registration and collection) Act was amended by the FMCA. The amendments provide jurisdiction in relation to matters arising under the Act (S. 104(1)).
- 2.2.6 In brief, the FMS has jurisdiction to make final orders in child contact proceedings, property proceedings within its value limits, child residence proceedings with consent, and property proceedings in excess of the value limit with consent, orders in respect of Child Support, Enforcement of orders and Hague Convention applications.

2.3 Appeals from FMS

- 2.3.1 Section 94AAA of FLA provides for appeals from the Federal Magistrates Court exercising original jurisdiction under FLA to the Full Court of the Family Court.
- 2.3.2 Appeals from the FMS exercising original jurisdiction under the Registration and Collection Act lie with the leave of the Family Court to the Full Court (section 107A).
- 2.3.3 Appeals from the FMS exercising original jurisdiction under the Assessment Act lie with the leave of the Family Court to the Full Court (section 102A).
- 2.3.4 The jurisdiction in relation to an appeal is to be exercised by a Full Court unless the Chief Judge considers it appropriate for the jurisdiction to be exercised by a single Judge (subsection 94AAA(3) of FLA, subsection 102A(2) of Assessment Act and subsection 107A(2) of Registration and Collection Act).

2.4 Exclusive Jurisdiction of Family Court

- 2.4.1 The Family Court will retain exclusive jurisdiction in respect of:
- proceedings for a decree of nullity of marriage
 - proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise
 - appeals from courts of summary jurisdiction
 - appeals from Federal Magistrate Court
 - property proceedings where the total value of the property exceeds \$300,000.00⁴ unless both parties consent to the FMS hearing the proceedings⁵

⁴ In determining value, mortgage, lien etc are to be disregarded S45A(5)

⁵ If parties consent a party is not entitled subsequently to object to jurisdiction S45A(3)

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- proceedings for a residence order (subject to proposed legislative amendment) or an order discharging, varying, suspending or reviving a residence order or part of a residence order when the respondent seeks an order different from that sought in the application unless both parties consent to the FMS hearing and determining the proceedings and the legislation has been amended accordingly.
 - transfers from courts of summary jurisdiction (state courts)
 - leave to grant adoption proceedings S60G FLA.

3.0 Implications for the Family Court

3.1 Filing

- 3.1.1 The FMS propose to have an omnibus form commencing proceedings. The FMC Rules and forms are not available and during the interim, FMS propose to rely on FCA Rules⁶. FMS propose that parties use an FCA form and to write “FMS” on it to indicate their intention to file with FMS.
- 3.1.2 FMA Regulations providing for fees have issued and while fees are in some cases lower in FMS than FCA (particularly in respect to divorce applications), a number of FMS applications attract fees that would not otherwise apply in FCA. It should be noted that this issue is being addressed by FMS and that it is expected that the regulations will be amended to address this anomaly. Waiver of fee provisions set out in FMA regulations are similar to those of FCA.
- 3.1.3 It will be some time before FMS has in place Forms, Rules and Regulations however under the FLR there are a number of forms for specific applications that are within the jurisdiction of FMS which can be readily identified by counter staff on filing. For example:
 - Forms 4 Application for Divorce
 - Form 12 Application for Maintenance
 - Form 45 Notice requiring financial information
 - Form 45A Notice requiring financial information-child support
 - Form 45B Enforcement summons-child support
 - Form 46 Enforcement summons
 - Form 47 Application - contempt
 - Form 48 Application - Contravention of order
 - Form 49 Application - Contravention of child order
 - Form 63 Child Support (Assessment) Act - Child Support (Registration and Collection) Act-application/appeal
 - Form 64 Child Support (Assessment) Act - Child Support (Registration and Collection) Act - appeal from decision of Child Support Registrar
 - Hague Convention

3.2 Transfers

- 3.2.1 Section 33A(1) of FLA provides that proceedings must not be instituted in the FCA in respect of a matter if the FMS has jurisdiction and proceedings in an

⁶ Section 43(2)(a) FMA



associated matter are pending in the FMS. Exceptions in respect of proceedings instituted under Part VII Division 13A and Part XIII A of FLA apply (subsection 33A(2)).

- 3.2.2 Section 33B of FLA provides the Family Court with discretion to transfer matters to the FMS. The standard Rules of Court may set out factors that are to be taken into account in deciding whether to transfer (subsection 33B(4)). Subsection 33B(5) provides for consultation between the courts before the rules are made. In transferring such applications, the FCA is required to take into consideration the resources of the FMS⁷.
- 3.2.3 Section 33B(6) of FLA set out those matters that the FCA must have regard to in transferring matters to FMS including:
- Rules of Court made for the purposes of this section,
 - Whether there are proceedings for an associated matter pending in FMC
 - Whether the resources of FMC are sufficient to hear and determine the proceedings; and
 - The interest of the administration of justice.
- 3.2.4 FMS are in the process of drafting rules in respect of transfers from FMS to FCA. Section 40(5) FMA provides that some of the matters to be considered in making the Rules are whether the matters are more appropriately dealt with in FCA, resources of FMC, administration of justice. Factors such as case duration and child abuse are included in the FMS draft. There is no appeal in respect of a transfer.⁸
- 3.2.5 It should be noted that section 33C of FLA provides for the mandatory transfer of proceedings to the FMS of proceedings of the kind to be specified in regulations made for the purpose however no such regulations have been made as yet.
- 3.2.6 Proceedings is defined in section 4(1) of FLA to mean "a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connection with a proceeding". Proceeding is defined in the Oxford Companion to Law as "a term sometimes used as including, or meaning an action or prosecution, and sometimes meaning a step in an action."⁹
- 3.2.7 It is submitted that if the term "proceedings" is given a wide interpretation, FCA could transfer to FMS interim applications without the prerequisite requirement of transferring the substantive application.

3.3 Associated Matters

- 3.3.1 Section 33 FLA provides that "To the extent that the constitution permits, jurisdiction is conferred on the Court in respect of matters not otherwise within the jurisdiction expressed by this Act or any law to be conferred on the Court that are associated with matters (including matters before the Court on appeal) in which the jurisdiction of the Court is invoked or that arise in proceedings (including proceedings on appeal) before the Court." This provision gives the

⁷ See section 33B(6) FLA, section 33B(8) FLA

⁸ See section 39(6) FMA

⁹ Also see discussion in CCH commentary at p 40104



Court (Family Court or FMS) jurisdiction in associated matters arising under other federal law¹⁰.

- 3.3.2 Section 18 of FMA provides "To the extent that the Constitution permits, jurisdiction is conferred on the Federal Magistrates Court in respect of matters not otherwise within its jurisdiction that are associated with matters in which the jurisdiction of the Federal Magistrates Court is invoked."
- 3.3.3 Should the reference to "associated matter" in section 33A of FLA and section 19 of FMA be given the same wide interpretation as has been given to the interpretation in section 33 FLA, then the prohibition imposed by those sections is quite extensive. Associated matter could encompass any application involving the same parties, or where there is a nexus between the issues requiring determination.
- 3.3.4 The context in which the term "associated matter" is used in section 19 FMA and section 33A FLA however suggests that it has no connection with the associated jurisdiction under section 18 FMA and section 33 FLA. The prohibition in section 19 FMA and section 33A FLA would then be quite narrow and could be limited to matters involving common parties which usually should be heard together eg. concurrent property and parenting matters.¹¹

4.0 Appeals from FMS

4.1 Relevant Provisions

- 4.1.1 Section 20(1) of the FMA provides that an appeal must not be brought directly to the High Court from a judgment of the FMS.
- 4.1.2 Section 94AAA(3) provides for the Full Court of FCA to determine an appeal from FMS unless the Chief Judge considers that it is appropriate for the jurisdiction of the Family Court in relation to the appeal to be exercised by a single judge¹². The single judge need not be a member of the Appeal Division¹³.
- 4.1.3 An appeal does not lie to a Full Court from a single judge exercising appellate jurisdiction (section 94AAA(12) of FLA, section 102A(11) of Assessment Act and section 107A(11) of Registration and Collection Act).

5.0 Delegation of Powers to Registrars of Federal Magistrates Court

5.1 Background Provisions

¹⁰ Gibbs C.J., Wilson and Dawson JJ in *Smith v Smith* (No. 3)(1986) FLC 91-732 at 75,333

¹¹ see also discussion in CCH Federal Magistrates Court Practice commentary at P.40,451

¹² see also section 102A(2) of the Child Support (Assessment) Act and section 107A(2) of the Child Support (Registration and Collection) Act)

¹³ Section 94AAA(13) of FLA and also section 102A(12) of the Assessment Act and section 107A(12) of the registration and collection Act).

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- 5.1.1 The Chief Executive Officer of the Federal Magistrates Court has powers in respect of officers of the Federal Magistrates Court as if he were Secretary of a Department of the Australian Public Service (section 97(1) FMA). Under section 97(2) however this does not apply to Federal Magistrates Court officers who are also officers or members of staff of the FCA.
- 5.1.2 Registrar is defined in section 5 of FMA to mean “a Registrar of the Federal Magistrates Court”. Section 99(1)(a) of FMA provides that such Registrars as are necessary are to be officers of the Federal Magistrates Court. The Registrars of the Federal Magistrates Court are to be persons appointed or employed under the Public Service Act 1922 (section 101).
- 5.1.3 Section 99(4) of FMA provides that “a person may be an officer of both the Federal Magistrates Court and the Family Court”. The officers of the Federal Magistrates Court include the Chief Executive Officer, Registrars, Sheriff and Deputy Sheriff and Marshal and Deputy Marshal (subsection 99(1)). Unlike the provisions of section 38N(1) of FLA (which describes court counsellors as officers of the Family Court) a counsellor is not an officer of the Federal Magistrates Court. It should be noted that although registrars, the Marshal and Deputy Marshal may hold dual appointments, they remain officers of FCA and are employed by FCA.
- 5.1.4 A Registrar of the Federal Magistrates Court must take an oath or affirmation before discharging his/her duties (section 105).

5.2 Delegations

- 5.2.1 The FMA seems to draw a distinction between powers to be exercised by Registrars (section 102) and powers delegated to Registrars (section 103). Indeed one could query whether the purported exercise of powers by a Registrar pursuant to a direction of a Federal Magistrate in accordance with section 102 is ultra vires without the appropriate delegation of that power by Rules of Court.
- 5.2.2 Section 102(1) of FMA allows certain powers of the Federal Magistrates Court to be exercised by a Registrar. The Court or a Magistrate may direct that a Registrar exercise certain prescribed powers (section 102(2)). The powers are confined to those set out in the subsection and are similar but not the same as set out in section 37A of FLA. They can be equated to the powers exercised by Family Court Registrars prior to the grant of the extended delegations in 1999.
- 5.2.3 The limitation on the exercise of powers by a Registrar is contained in subsection (3), (4) and (5). Subsection 102(3) limits the Registrars power in relation to costs orders to matters heard by the Registrar. Subsections 102(4) and (5) impose the limitations applied by FLA section 37A(2) and (5).
- 5.2.4 Section 103(1) of FMA provides that the Rules of court may delegate to the Registrars any of the powers of the Federal Magistrates Court, including (but not limited to) all of the powers mentioned in section 102(2). Limitations similar to those applying to the exercise of powers apply to delegated powers and are contained in subsections 103(4), (5) and (6).

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- 5.2.5 Section 104(1) of FMA provides for the independence of Registrars. A Registrar is not subject to the direction or control of any person or body in the way in which he or she exercises powers under subsection 102(2) or a delegation under subsection 103(1).
- 5.2.6 Provision for review of the exercise of powers contained in section 102(2) or delegated powers under section 103(1) are set out in subsections 104(2) and (3). The review is by the Federal Magistrates Court.
- 5.3 The FMC is proposing to delegate functions to FCA registrars and at present discussions are focused on the delegations of the divorce powers. The conduct of divorces by FCA registrars is under discussion and will be incorporated in the MOU between FLA and FMS.

6.0 Section 90 FMA Arrangements

- 6.1 Section 90 of FMA provides that the Chief Federal Magistrate may on behalf of the FMC arrange for an officer or officers of another Australian Court to perform non-judicial functions of the court. Such functions include:
- Receipt of documents to be lodged or filed in FMC
 - Signing and issuing of writs, commissions and process for the purposes of any proceedings in the FMC
 - Authentication of orders of the FMC
 - Administration of oaths etc
 - Other non-judicial functions.
- 6.2 It should be noted that for the purposes of this section, a member of staff of an Australian court is taken to be an officer of that court¹⁴ and therefore, in respect of FCA, “officer” is not confined to the meaning in S38N. A Section 90 arrangement has been entered into.

7.0 Arbitration, Conciliation Counselling and Mediation

- 7.1 Part 4 of FMA deals with Primary Dispute Resolution which include:
- Counselling
 - Mediation
 - Arbitration
 - Neutral evaluation
 - Case appraisal
 - Conciliation

Section 26 of FMA provides for the Federal Magistrates Court to order conciliation with or without consent and for conciliation to be in accordance with the Rules of Court. The term conciliator is used in the section and is not defined in the Act. The Rules of Court are not yet notified so as to aid understanding of the procedure for conciliation in the Federal Magistrates Court.

- 7.2 Sections 28, 29 and 30 of FMA provide for Rules of Court, regulations in respect of PDR processes and costs. Rules have yet to be promulgated however

¹⁴ Section 90(5) FMA



if the relevant Section 90 arrangements are in place FCA counsellors may discharge some of the obligations that the FMA places on the officers of that court. Reference is made to a “designated officer”. The following are examples of the obligations imposed on this officer.

- 7.3 For the purposes of sections 15A and 62CA “*designated officer*” of the Federal Magistrates Court is an officer of the court specified in writing by the CEO for the purposes of the subsection (subsections 15A(4) and 62CA(4)).
- 7.4 Parts III and VII of FLA has been amended by FMCA. Section 15A of FLA provides for a person who is a party to a marriage or to proceedings under the Act in the Federal Magistrates Court may ask for the assistance of a family and child counsellor. The section then goes on to place an obligation on a “designated officer” of the Federal Magistrates Court to arrange an interview by a Family and child counsellor for any of the purposes set out in subsection 15A(2).
- 7.5 Section 62CA has also been inserted and provides that a person who is a party to proceedings under Part VII in the Federal Magistrates Court or a child representative under section 68L or a parent of a child or a child may ask for the assistance of a family and child counsellor. An obligation is placed on a designated officer of the FMC to arrange an interview with a family and child counsellor or welfare officer (subsection 62CA(2)).
- 7.6 The provisions of sections 62F and 62G apply to the FMC.
- 7.7 Section 19AAA of FLA provides for a person who is the parent or adoptive parent of a child or a child or a party to a marriage or a party to proceedings in the Federal Magistrates Court may ask for the help of a Family and child mediator. The designated officer is to arrange for a family and child mediator to mediate (subsection 19AAA(2)). Section 19A provides for the filing of a notice and for the matter to be dealt with in accordance with the standard rules of court. In this regard Order 25A contains the standard rules of court.
- 7.8 Section 19BAA of FLA provides that with the consent of the parties the FMC may make an order referring the dispute for mediation by a family and child mediator. The Family Court may do likewise pursuant to section 19B.
- 7.9 It should be noted that Section 91 of FMA provides for government and non-government organisations to be arranged to perform non-judicial functions of the Federal Magistrates Court.

8.0 Conclusion

Until the Federal Magistrates Rules are notified, and FMS provide clear guidelines as to its processes it will be difficult to assess the FCA workload. The Attorney General in his second reading speech addresses some of the objectives that the FMS is to achieve including the handling of less complex matters to so that the FCA can focus on more complex matters appropriate to a superior court of record.

TABLE OF COMPARITIVE PROVISIONS

	FCA	FMS
Jurisdiction	FLA s.33 s.39(1) s.69H(1)	FMA s.10 S18 FLA s.39(1A) s.39(5A) s.45A s.69H(4) s.69MA
Appeals	FLA s.94 (Assessment) Act ss.101, 102 (Collection) Act ss.106, 107	FMA s.20(1) FLA s.94AAA (Assessment) Act s.102A (Collection) Act s.107A
Transfers	FLA s.33A(1) s.33B(1) s.33B(2) s.33B(3) s.33B(4) s.33B(5) s.33B(6) s.33B(7) s.33B(8) s.33B(9) s.33B(10) s.33C(1) s.33C(2) s.33C(3) s.33C(4) s.33C(5) s33C(6) s33C(7) s33C(8)	FMA s.19(1) s.39(1) s.39(2) s.40(3) s.40(4) s.40(7) s.39(4) s.39(5) s.39(6) s.39(7) s.39(8) s.41(2) s.41(4) s.41(5) s.41(6) s.41(7) s.41(8) s.41(9) s.41(10) s.40(5)
Child Support	(Assessment) Act s.99(1) (Collection) Act s.104(1)	(Assessment) Act s.99(1) (Collection) Act s.104(1)

