

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE
INQUIRY INTO THE IMPACT OF FEDERAL COURT FEE INCREASES SINCE 2010 ON
ACCESS TO JUSTICE IN AUSTRALIA

PUBLIC HEARING 17 MAY 2013

COMMONWEALTH ATTORNEY-GENERAL'S DEPARTMENT

Senator Wright asked the following question at the hearing on 17 May 2013:

I am going to ask you some questions on notice because we are going to need to finish in a minute. One of them is for some updated figures on court usage since the department's 2011 review.

1. What feedback has the department received about the operation of increased fees since it undertook the review in 2011?
2. Are there any discernible trends in filing patterns in the Federal Court since 2010? You have given some evidence about that, but if you could give us some figures that would be useful.
3. Is there any data available about whether the introduction of staged hearing fees in 2010 has had an impact on the duration of complex cases before the courts?
4. What ongoing work is the department doing to monitor and evaluate the impact of the 2013 round of fee increases, and can we get some idea from you as to when we might be able to get some meaningful information about that, given that it is still only relatively recently that they were introduced?

The other thing I would like to ask you on notice is in relation to submissions that have raised the likelihood, or the possibility, of forum shopping; that is, litigants choosing to no longer use federal courts but to use state jurisdictions where they are available. Submitters have raised concerns that higher fees for federal courts could lead to litigants filing proceedings in state jurisdictions instead.

5. The Australian Tax Office has advised the committee that it is considering shifting its casework to state courts in order to take advantage of lower fees in those jurisdictions. Is this an acceptable outcome?
6. Should litigants shift proceedings away from the federal courts where possible in response to increased fees? It is particularly interesting to think about litigants who are also funded by the federal government
7. Could the Federal Court lose fee revenue as a result of litigants shifting cases to state jurisdictions?

The answers to the honourable senator's questions are as follows:

1. Feedback received by the Department about court fees since the 2011 Review has generally focussed on specific fees, rather than the general level of fees. Comments have predominantly been about the reduced fee introduced in 2010 in lieu of fee exemptions, particularly from the Department of Immigration and Citizenship and the courts in relation to applicants in migration

proceedings, and from community legal centres in respect of processing that fee. Recent correspondence about the 2013 fee changes has mainly been from legal aid commissions and community legal centres about the fees payable by Independent Children's Lawyers and the level of the divorce fee.

2. Statistical information about filings is kept by the federal courts and is included in Annual Reports.

The Federal Court has advised that it is not possible to do comprehensive trend analysis of that data in the time available. However from data compiled regularly for the Court's management purposes it is possible to make a number of observations about filings. Filings nationally in the Federal Court have remained reasonably steady (albeit with fluctuations from month to month consistent with long term seasonal variations) since the most recent changes to fees was introduced on 1 January 2013. If a full-year projection is made from year-to-date filings in the current financial year and compared against each of the two previous years, filings over these three years have increased gradually from year to year. That gradual rate of increase has however plateaued this calendar year (i.e. since 1 January 2013).

The Federal Circuit Court has advised that since 1 January 2013 there has been a decline in the bankruptcy filings which may impact on the overall general federal law filings. However there has been a trend upwards in respect of migration filings. On current filings it can be expected that filings will be slightly down on last year overall.

The Family Court has advised that it is unable to provide any comprehensive data in the limited time available. However, based on family law filings (final orders) provided in the annual reports for the past two financial years and year-to-date filing figures for this financial year (as at the end of April 2013) it appears there will be a small downward trend in the Federal Circuit Court (ca. 1% decrease), whereas the numbers in the Family Court are consistent with previous years. As at the end of April 2013 the filing figures in the Federal Circuit Court are at the same level as 2011-12. However, while the Family Court for the same period is showing a slight reduction of 15%, a seasonal adjustment usually occurs in the last quarter. This is based on estimates only.

3. The Federal Court has advised that data is not compiled for management purposes about staged hearing fees. Anecdotally, there appears to be an increase in the number of very complex and lengthy trials in the Federal Court. Matters in this category that are currently in trial or have recently concluded include the Storm Financial litigation, Apple Inc v Samsung Electronics, the Centro Properties litigation and the GPT property trust litigation. Generally these matters are very well funded and involve very significant commercial stakes. The amount paid in hearing fees (and court fees generally) is both a very insignificant part of the overall cost of the litigation and what is at risk in it.

The Family Court has advised that it is unaware of any data that is currently available that would indicate that the introduction of staged hearing fees in 2010 has had an impact on the duration of complex cases before the courts.

4. The Department will continue to monitor and respond to enquiries about the operation of court fee regulations in the federal courts. The Government has already responded to stakeholder concerns about payment of fees by Independent Children's Lawyers by providing an exemption from subpoena and interim application fees as part of the 2013-14 Budget. Any formal process for evaluation or review of the impact of the 2013 court fee increases is a matter for Government.

5. The Department responded to this question at the hearing.
6. There are a number of factors that influence the forum in which to commence proceedings, with court fees only being one factor. Other costs contribute to the cost of litigation, including travel costs for practitioners where the matter is located in a number of different geographic locations.

The Federal Court is a single national court governed by one set of rules about practice and procedure, has exclusive jurisdiction in a number of cases including judicial review, a unique docket system where each judge manages the cases in their own docket and electronic case management facilities.

In 2011-12 the Federal Court cleared almost 10% more matters than the number of matters being filed, even where filings for corporations matters has doubled since 2007-08. The Court has a benchmark of clearing 85% of matters in less than 18 months, and on average has been finalising over 90% of matters (excluding native title). The announced appointment of three additional judges to the Federal Court in the Sydney, Melbourne and Brisbane registries will further expedite cases.

The Commonwealth continues to explore with the States and Territories a consistent approach to the setting of court fees.

The Department will continue discussions with other government agencies about the impact of court fee increases on decisions about choice of forum.

7. If applicants filed in a State Court rather than the Federal Court then the Commonwealth (not the Federal Court) would not receive the fee revenue from these matters. The reasons an applicant chooses to file in one jurisdiction rather than another are manifold and have been referred to in the Department's evidence at the Committee hearing and above. Court fees will be a consideration among many and are a small component of total litigation/legal costs.

Additional written questions from Senator Wright:

Increased filing fee for family law matters involving children and property

In relation to the introduction of a higher filing fee of \$500 for family law applications that involve both children's and property matters, the Law Council contended that 'it is unclear how charging a higher fee for matters involving children could be in any way justified by justice policy considerations' (Submission 26, p. 14).

8. What is the policy rationale for introducing a higher filing fee for matters involving children and property?
9. Is this increased fee consistent with the principle articulated in the Strategic Framework for Access to Justice (AGD 2009, p. 48) that cost recovery may be inappropriate in matters involving children?

Removal of refunds for first day hearing fees when hearing does not proceed

The 2013 fee increases included removing the option for a refund of setting down fees for the first day of hearing in a matter, where that hearing does not proceed. The Law Council argued: Removal of refunds for the first day set down for hearing operates as a clear disincentive to clients who might weigh the costs and benefits of settling a matter before hearing. This is contrary to commonly understood justice policy aimed at encouraging parties to settle prior to hearing. (Submission 26, p. 15)

10. What is the policy rationale for this change?
11. Will it discourage litigants from settling matters prior to a hearing?

New fees for applications for urgent injunctions

The Law Council argued that the new fees for urgent injunctions impose an unacceptable burden for applications that are time-critical and may be the only mechanism available for applicants seeking to preserve their rights (Submission 26, p. 15).

12. What is the policy rationale for the introduction of this new fee?
13. How was the level of this new fee determined? Will the high cost (\$5,500 for corporations and \$2,000 for other litigants) lead to litigants being unable to afford urgent applications which are necessary to enforce their legal rights?
14. The Law Council also argued that this fee will: undermine the preservation of the rule of law, by limiting access to a function that can only be provided by the court; and undermine the administration of justice, by providing a disincentive to apply to the court to prevent actions which may lead to the destruction of property or evidence. What is your response to these concerns?

Fees for human rights matters in the Federal Court

Under the 2013 changes, a low filing fee of \$55 is maintained for applications under the Australian Human Rights Commission Act 1986 where a complaint has been made to the Australian Human

Rights Commission. After this point, however, litigants will have to pay full fees to continue a matter (for example, a \$2,155 fee for setting down a hearing). A representative from Hunter Community Legal Centre argued that these later costs are disproportionate to the initial filing fee, and prohibitive for low or middle-income earners (Proof Hansard, 17 May 2013, p. 21).

15. Why do the reduced fees for human rights matters only apply to the filing stage of proceedings?
16. Does the failure to provide reduced fees at all stages of the court process for these matters inhibit applicants' ability to access a final resolution from the courts in matters relating to discrimination law?

Corporations fees

In his submission, Associate Professor Michael Legg questioned whether higher fees for corporations are a positive development, given the need for competitiveness on the world stage and the need for certainty in commerce (Submission 9, p.4)

17. Is the corporate position in the current debate underestimated or overlooked?
18. What are the arguments for, and against, making a distinction between small and large corporations, as there is for individuals and corporations?

Divorce application fees

Submitters have complained that the increased filing fees for divorce applications have prevented individuals from obtaining divorces, even in cases of domestic violence or other extreme circumstances.

19. Are you aware of the anecdotal evidence presented by legal assistance providers that increased divorce fees have prevented some of their clients from obtaining a divorce? If so, what is your response?
20. Given the relatively low administrative burden of hearing divorce matters, which are usually speedy and uncontested, what is the rationale for increased fees?
21. What is the rationale for having no exemption from divorce application fees available for parties on extremely low incomes?

Application of revenue from increased court fee revenue

Although one of the rationales advanced for the increase in court fees is that of "cost recovery", of the revenue raised from the increased fees introduced in 2013, \$64 million has been directed to consolidated government revenue. Some submitters have argued that this amounts to 'effectively taxing federal court and tribunal users to fund other essential government services' (e.g. Law Council, Submission 26, p.22).

22. How does the retention of revenue from increased fees in consolidated revenue square with the notion of "cost recovery" for the courts?

23. As a matter of principal, should court fee revenue be used to fund initiatives in the legal system? What rationale is there for using court fee revenue for matters outside these areas?

Access to justice for low income Australians

Some submitters have argued that the increased filing fees have put access to the courts out of reach for low income Australians who do not qualify for a fee exemption.

24. Is there a case for increasing the threshold for "financial hardship" exemptions to increase the access to the courts for low income earners?

The answers to the honourable senator's written questions are as follows:

Increased filing fee for family law matters involving children and property

8. This fee relates to a resource intensive process as matters involving both children's and property issues are often complex, and require separate consideration by the court. They are therefore likely to require more court processes to adjudicate. Such a fee is also appropriate to encourage litigants to consider whether they need adjudication on both causes of action. Fee exemptions for disadvantaged litigants are available to ensure equitable access to the system.
9. The Access to Justice Taskforce Report indicates that there are a number of factors relevant to cost recovery in the civil justice system. One of those factors is the type of dispute. There may be a public interest in the resolution of matters (such as those involving children) and that consideration should be given to whether cost recovery is appropriate (p.48). The Report does not suggest that all children's matters be precluded from cost recovery. The Report goes on to say that other factors should further nuance cost recovery policy decisions, including encouraging desirable behaviour: *'In family law disputes involving children, a mediated outcome is preferable to a more acrimonious litigated outcome'* (p.51). In accordance with this policy rationale, it is appropriate to send a price signal about seeking court determination of matters involving children. There are no court fees for conciliation conferences in parenting proceedings.

Removal of refunds for first day hearing fees when hearing does not proceed

10. Processing refunds is an administratively resource intensive process for the court and abolishing the refund would alleviate resources used in processing refunds. Such a fee reflects the resources expended by the courts in listing and preparing for the hearing. For court litigants who pay a setting down fee, even where a hearing does not proceed, parties benefit from pre-hearing processes and are effectively able to 'reserve' a hearing date. If a matter does not proceed, the courts would have expended resources in listing and preparing the matter for the first day of hearing. This is similar to where barristers charge a briefing fee where a fixed hearing is vacated to reflect the costs of the barrister preparing for the hearing. Refunds are still available for second and subsequent hearing days.
11. In developing the fee measures and in consultation with the courts, it was determined that a non-refundable first day hearing fee would not substantially change litigant behaviour. In particular, other costs such as legal costs and factors such as legal advice about the merits of a party's case are likely to be determinative for a litigant in deciding on whether to proceed with a hearing or to settle.

New fees for applications for urgent injunctions

12. The higher fee is limited to urgent injunctions relating to property matters, especially Mareva orders (orders to freeze funds) and Anton Piller orders (orders to search/inspect property). Mareva and Anton Piller orders are usually only sought in high value commercial matters. This fee applies only in the Federal Court and predominantly in applications for urgent orders where no substantive application to commence proceedings has been filed.
13. The level of the fee is a combination of the general filing fee and the hearing fee. It reflects the service by the court in attending to the matter urgently, processing the application and for hearing the matter. In providing such a service, the Court foregoes priorities in hearing other matters to attend to the urgent order.
14. This fee appropriately reflects the capacity to pay by litigants who are usually involved in such proceedings. Fee exemptions for disadvantaged litigants will be available to ensure equitable access to the system and the lower fee for small businesses means these litigants will be able to ensure they can protect their business interests.

Fees for human rights matters in the Federal Court

15. No other fees, except for the filing fee of \$55, are payable for proceedings under section 46PO or 46PP of the *Australian Human Rights Commission Act 1986* – see s 2.10(1) of the *Federal Court and Federal Circuit Court Regulation 2012*). Additionally, no fees are payable for an appeal in the Federal Court from a judgment in relation to an application under section 46PO or 46PP of the *Australian Human Rights Commission Act 1986* – see s 2.08(2)(a) of the *Federal Court and Federal Circuit Court Regulation 2012*. This includes exemption from payment of the filing fee for the appeal.
16. The fees do not give rise to this concern.

Corporations fees

17. Associate Professor Legg's submission indicates that there are a number of other factors beyond court fees that influence corporate decision making on dispute resolution, including substantive and procedural law, court expertise and legal costs. As previously mentioned in the response to Q.11, the Department considers that a decision to commence litigation is highly unlikely to be based solely on the level of court fees and is likely to reflect a more broadly based commercial decision on the part of a corporation.
18. The policy rationale which underlies the decision to apply different fees to small and large corporations is based on capacity to pay and to some extent the complexity and resource intensive nature of proceedings that these different categories of corporations are likely to be involved in. The alternative of a flat fee for all corporations would create a barrier to access to justice for smaller corporations that do not have the same capacity to pay as large and publicly listed corporations. The empirical evidence for creating categories of corporations which fall within the definition of 'small business' as distinct from larger corporations which for example, fall within the definition of 'publicly listed companies' is outlined in the following paragraphs.

Small business

Incorporated small businesses can be differentiated from large corporations because they are more comparable to individuals than other corporate litigants in terms of their resourcing and capacity to litigate. This is consistent with other government policies which differentiate small businesses from other corporations, for example the Australian Taxation Office provides a range of tax concessions for small businesses.

Legal professional associations have previously raised concerns about the impact of higher corporations fees on small business as part of fee changes in 2010. This measure responds to those concerns.

Publicly listed companies

Publicly listed companies are likely to have the capacity to engage in resource intensive litigation. According to the Australian Securities Exchange (ASX) Listing Rules, for admission to the ASX, the company must have, amongst other things, a profit of \$1 million over the last 3 years and net profit of \$400,000 during the 12 months before applying for admission to the ASX (Rule 1.2); or \$3 million net tangible assets (Rule 1.3.1); or \$10 million market capitalisation (Rule 1.3.1).

Fees related to the ASX are also high. For example, the initial admission fee to the ASX is \$25,000 for a company with assets up to \$3 million and the minimum on-going annual fee is \$9,990. Fees increase depending on the value of the company.

The ASX Listing Rules also require the company to have had the same main business over the last 3 years (Rule 1.2.2) in order to be listed. This means only established corporations are listed and therefore any fee charged on publicly listed companies will not be a disincentive for new businesses.

Divorce application fees

19. The Department is aware of anecdotal evidence presented by legal assistance providers that increased divorce fees have prevented some of their clients from obtaining a divorce. Divorce applications are rarely urgent as they have specific longer term timelines under the legislation. Under the *Family Law Act 1975*, the only ground for divorce is that the marriage has broken down irretrievably. A couple must have been separated for at least 12 months and one day in order to satisfy the Court that the marriage has broken down irretrievably. If there are children under 18, a court can only grant a divorce if it is satisfied that proper arrangements have been made for them. This may involve parenting proceedings in the courts. Obtaining a divorce is not a necessary pre-condition to obtaining any other orders under the Family Law Act. In the circumstances, the fees for divorce can be planned for, including for individuals who are eligible for the reduced rate of \$265.
20. The increase to divorce fees only represents an increase of approximately 7.6% over the consumer price index (CPI) since 2000.
 - Prior to 2000, the Family Court handled all divorce matters. On 1 July 2000 the divorce fee was \$526.

- The divorce fee was reduced to \$250 on establishment of the Federal Magistrates Court.
- The Federal Circuit Court (as renamed) is now the main court dealing with divorce – there were 46,031 filings in 2011-12. The fee was increased to \$800 in 2013.
- With CPI increases only, the 2000 fee would have been \$743.46 in 2013. Now that the Federal Circuit Court is well established as the main court dealing with divorce, an incentive to file in the Federal Circuit Court is no longer required.

21. While recognising that divorce will be a significant event in a person's life, fees are charged for a number of services which are also significant life events, such as marriage and probate. Fees for these services are not subject to any exemption for people on very low incomes. The rationale for imposing a reduced fee for divorce for low income earners is that divorce is not a necessary pre-condition to obtaining any other orders under the Family Law Act and therefore is a matter of personal choice for which there is time to plan and save for. Fee deferral is available at the discretion of the Registrar where filing an application for a divorce order is urgent or where financial circumstances would make payment of the fee at the time of filing oppressive or unreasonable.

Application of revenue from increased court fee revenue

22. In 2011-12, the Australian Government spent \$274 million on the federal court system. The courts are not run on a cost recovery basis where fee revenue raised is directly returned to the courts; rather they are funded through the Budget. It is convenient, however, to consider this in terms of notional cost recovery levels, or the proportion that court users pay in fees as a percentage of the cost of the courts. The increased revenue from the new court fees will increase the cost recovery levels of the federal courts to a level consistent with State and Territory levels of cost recovery (excluding probate). Revenue generated under the old fees was approximately 15% of the cost of running the courts. The new fees will recover 25-30% of the costs of running the courts. As the courts are funded through the Budget, it is appropriate that all court fee revenue return to consolidated revenue.
23. The federal courts are funded out of the Budget not through court fees. Court fee revenue is returned to consolidated revenue. It costs far more to run the federal courts than is raised through court fees. The primary consideration for the 2013 court fee increases was to increase cost recovery levels of running the courts. Out of this increased fee revenue from the 2012-13 Budget, the Government decided to allocate additional Budget funding to the courts at a level that it considered an appropriate amount to put the courts on a firmer financial footing. The remainder of the fee revenue is appropriately available to fund other Budget priorities.

Access to justice for low income Australians

24. The 'financial hardship' exemption is a flexible exemption which allows the court to consider the person's individual circumstances. The fees regulations do not prescribe how the test is to be implemented.

However, the Family Court and Federal Circuit Court have published '*Guidelines for exemption of court fees*' which sets out guidelines for the financial hardship exemption (available on the family law courts website). The guideline indicates that the maximum allowable fortnightly income

available for the financial hardship exemption is \$1207.50 (before tax) for a person with no dependents. The maximum allowable income rate increases with dependents, and there is also an allowance for liquid assets. Although legal aid commissions assess financial circumstances differently, this maximum threshold for a fee exemption is higher than the maximum income test applied by Legal Aid NSW of \$636 net fortnightly for a person with no dependents. It is also higher than the Newstart allowance of \$497 fortnightly for a person with no dependents.

It should be noted that these are only guidelines. Court fee exemptions and legal aid may still be available even if a person earns more than these thresholds.

For persons who are not eligible for fee exemptions, fee deferral may be an option. Fee deferral is available in a number of circumstances, including where it would be oppressive or otherwise unreasonable to require payment having regard to the financial circumstances of the person. The current formulation of the fee deferral provision was introduced in the *Federal Court of Australia Regulations 2004*. The Explanatory Statement to that regulation explains that, '*this regulation gives the Court greater flexibility to administer the payment of fees by having the capacity to tailor, where appropriate, the time of payment of fees required by the Regulations to the particular circumstances of certain litigants.*'

Court fees are also broadly structured to account for capacity to pay fees – general fees for individuals have increased by 15% (20% in family law but the real dollar increases are much lower than in general federal law), allowing small businesses to pay the non-corporate fees rate, and higher fee increases for corporations and publicly listed companies.

Court fees are not the most significant issue for those who do not meet the current 'financial hardship' threshold. They would unlikely be able to access legal assistance programs. Leaving aside the possibility of pro bono legal assistance, the cost of legal representation would far exceed court fees.