Submission to Senate Legal and Constitutional Affairs Committee: Impact of federal court fee increases since 2010 on access to justice in Australia

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Court Fees and Access to Justice

Access to justice has been expressed as a human right, with justice being equated with 'a fair and public hearing by a competent, independent and impartial tribunal established by law'.[1] An important challenge is ensuring that access to justice is a reality and not just an aspiration. The main obstacle to access to justice in 2013 is cost.

The costs associated with seeking to have a matter resolved by a Court are:

- Court fees to commence proceedings and then for certain steps in the litigation such as filing a notice of motion, mediation by a court officer, setting down for hearing and daily hearing fees.
- Lawyer's fees
- Disbursements which includes such matters as expert's fees and photocopying
- Adverse costs orders in the event that a party is unsuccessful and has to pay (usually a proportion) their opponent's costs
- Lost time and resources in dealing with a dispute such as dealing with lawyers, attending court or a mediation.

Court fees are one of a number of costs that act as a barrier to access to the justice system. As this inquiry is addressing federal court fees, this submission will be limited to that issue. However, the Federal Parliament should give further consideration, perhaps through a reference to the Australian Law Reform Commission, as to how the cost of access to justice may be further addressed.

Reasonableness of Court Fee Increases

The *Federal Court and Federal Magistrates Court Regulation 2012* and *Family Law (Fees) Regulation 2012* significantly increased court fees in federal jurisdictions: the Federal Court, the Family Court and the Federal Magistrates Court (now Federal Circuit Court of Australia). This means the vast range of matters these courts deal with – from divorce,

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1 See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) art 14. See also *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810 at 71 (1948) art 8.

family law and child support to bankruptcy, administrative law, human rights, privacy, consumer matters and copyright – become more expensive for those Australians who need to use the federal courts every year.

To illustrate the change in fees since 2010 the *Federal Court of Australia Regulations 2004* (Cth) has been examined. The 2004 regulations were amended on a number of occasions until it was repealed by the *Federal Court and Federal Magistrates Court Regulation 2012*. However, the fees for the Federal Court appear to have been set or changed expressly by the regulations only once since 2010. This was on 1 July 2010. The fees had previously been expressly set by regulation in 2006. However, this does not mean that the fees were static during those periods. Schedule 2 to the regulations contains a formula for biennial increases based on the Consumer Price Index (CPI). For example, the Federal Court filing fee (see table 1) was set at $894 from 1 July 2010 but was increased to $938 on 1 July 2012 due to CPI increases.[2] Nonetheless a focus on the amounts specified by the regulations illustrates the way in which court fees have increased due to the express determination by government. Three examples are provided:

Table 1 - Federal Court filing fee to commence proceedings

Time Period	Corporation	Individual/Other
1/10/2006 - 30/6/2010	$1762 + CPI increases	$735 + CPI increases
1/7/2010 – 01/01/2013	$2142 + CPI increases	$894 + CPI increases
1/01/2013 -	$3145	$1080
	$4720 (publicly listed)	

Table 2 - Federal Court filing fee for notice of motion/interlocutory application

Time Period	Corporation	Individual/Other
1/10/2006 - 30/6/2010	$540 + CPI increases	$270 + CPI increases
1/7/2010 – 01/01/2013	$657 + CPI increases	$328 + CPI increases
1/01/2013 -	$965	$395
	$1450 (publicly listed)	

[2] Each court may have the fees that applied for specific time periods. However, the courts only have the current fees available on their websites.

Table 3 - Federal Court fee for setting down for hearing a proceeding

Time Period	Corporation	Individual/Other
1/10/2006 - 30/6/2010	$2936 + CPI increases	$1469 + CPI increases
1/7/2010 – 01/01/2013	$3569 + CPI increases	$1786 + CPI increases
1/01/2013 -	$5245	$2155
	$7870 (publicly listed)	

The January 2013 fee increases were a 15% increase on prevailing fees for individuals, a 40% increase on prevailing fees for corporations and established a new category of fees for listed corporations that was 150% of the fee for a corporation.[3]

The reasonableness of the court fee increases may be criticised on the basis that while fees may need to be charged to cover or contribute to the costs of the court system, the January 2013 court fee increases apparently occurred:

- to allow the Federal Government to raise $76.9 million in new revenue over the next four years, rather than to provide court services or otherwise assist in providing access to justice; and
- to encourage court users to utilise alternative dispute resolution processes so as to create less 'demand' for courts which may then lead to an ability to further cut funding to the court system.

Consequently, it is not just that the fee increases appear excessive because they raise the threshold for accessing courts in aid of revenue raising, but the philosophy behind the changes to the fees suggests a lack of understanding as to the important role that the court system plays.

Individual disputants will weigh the need for litigation with other concerns such as its expense. This may mean that an individual who otherwise needs access to the court system but cannot afford it has no choice but to turn away. Substantive rights that cannot be enforced are worthless. The decision of the individual may also have more far-reaching social ramifications - "[b]asic civil liberties have been won and secured by people who sometimes stand up for their rights and assert them".[4] The respect for the rule of law, protection of rights and promulgation of precedents will all be harmed if the courts cannot be meaningfully accessed. Government must be conscious of this connection between the decision of the individual disputant and the larger public policy concerns.

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3 *Explanatory Statement Select Legislative Instrument 2012 No 280* p2. The percentage increases caanot be applied to the amounts in tables 1 to 3 as those amounts do not include any increases for CPI that may have applied.

4 The Hon Michael Kirby, 'Mediation: Current Controversies and Future Directions' (August 1992) Australian Dispute Resolution Journal 139, 146.

There must also be a question as to whether the fee increases will actually achieve the goals identified above as disputants may choose, where possible, to have their dispute commenced in another jurisdiction, such as the State courts, or in the case of international litigation, in another country. For example a corporation can commence proceedings in the Supreme Court of New South Wales for $2737[5] compared to the Federal Court where the filing fee is $3145 or if the company is listed, $4720.

Capacity of Different Types of Litigants to Pay

Individuals

Litigation is not something that individuals lightly enter into because of the associated costs. It must be kept in mind that an individual does not just pay a single fee they pay a number of them depending on the steps in the particular dispute. In addition to the examples included in tables 1 to 3 the daily fee for the hearing of an application for an individual from 1 January 2013 is:

Table 4 - Federal Court fee for hearing an application payable by an individual

Days	Fee per day
2-4	$860
5-9	$1430
10-14	$2875
15 and subsequent days	$4315

If the fees in tables 1 to 4, individually and cumulatively, are compared with the full-time adult average weekly total earnings in Australia of about $1500,[6] it is clear that court fees would be a substantial expenditure for the average Australian. When combined with the other costs associated with litigation it is difficult to disagree with former Chief Justice Doyle of the Supreme Court of South Australia who has observed that 'the average person can't afford to get involved in substantial civil litigation, even a fairly well-off person'.[7] Court fees are not the only cost in seeking access to justice, but the higher they are the greater the burden imposed on individuals.

Corporations

The examples in tables 1 to 3 demonstrate that corporations, and in particular corporations listed on a stock exchange or financial market (in any country), face significant increases in fees if they wish to access the Federal court. A further example of the increases is the daily fee for hearing an application from 1 January 2013:

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5 See Supreme Court of New South Wales Fees from 1 January 2013: http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m6700011711802/filing%20fees%20(from%201.1.13).pdf

6 Australian Bureau of Statistics, 6302.0 - Average Weekly Earnings, Australia, Nov 2012.

7 Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 434.

Table 5 - Federal Court fee for hearing an application payable by a corporation

Days	Fee per day for corporation	Fee per day for listed corporation
2-4	$2100	$3150
5-9	$3775	$5665
10-14	$7450	$11,175
15 and subsequent days	$11,175	$16,765

The ability of corporations to pay the fees is hard to comment on as corporations come in many different sizes. However, the issue with corporations is much larger than ability to pay.

While corporations may at first blush seem unlikely to gain much sympathy in relation to their use of tax-payer funded courts, especially considering examples such as the C7 litigation in the Federal court (120 hearing days) and the Bell litigation in Western Australia (404 hearing days),[8] it needs to be borne in mind that corporations contribute to gross domestic product, jobs and general economic prosperity. Disputes and their resolution are part of doing business.

However, there are two related reasons for giving serious consideration to whether higher fees for corporations are a positive development: first the legal system is a competitive factor in a globalised world, and second certainty in commerce is desirable in terms of efficiency.[9]

Retired Justice Neville Owen, who presided over the Bell litigation in the Supreme Court of Western Australia and headed the HIH Royal Commission, has opined that courts have an obligation to hear large complex commercial disputes despite their burden on the court system to make sure that the market system and economy operates properly.[10]

Repeat players in the global market place will wish to structure their legal relationships so that disputes are referred to the Courts where they can expect the best outcome. This requires consideration of both substantive and procedural law which will influence the choices made in contracts as to governing law and the Courts to which disputes are to be referred and the content of dispute resolution clauses. Careful consideration will

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8 See Michael Legg, *Case Management and Complex Civil Litigation* (Federation Press, 2011) p 263 comparing a number of complex cases through a number of indicia.

9 Australian Law Reform Commission, *Managing Justice – A Review of the Federal Civil Justice System, Report No. 89* (2000) at [1.105]-[1.107] and former Attorney-General, The Hon Robert McClelland, *Speech to Australian Financial Review Legal Conference 2008*, Melbourne, 17 June 2008 at [59] ("Affordable justice can contribute to our courts ability to be a centre of excellence for commercial litigation in our region. From that base we can support the growing productivity and competitiveness of our economy.").

10 Marsha Jacobs, 'Courts need to hear big business cases', *The Australian Financial Review*, 4 June 2010 p 6.

be given to which forum has the legal system with the expertise and procedure to efficiently resolve the dispute.

The impact of substantially higher court fees can hinder Australia's attraction as a place to do business if corporations determine that Australian justice is too expensive. While many of the fee increases such as those in tables 1 to 3 appear to have no purpose other than raising revenue or deterring use of the courts, the use of increased fees for each day of a hearing may be a way in which to address the excesses of large scale litigation. Litigants are encouraged to use the court's time efficiently so as to minimise cost. However, it can also be argued that litigants will incur legal costs for each of those days that act as an incentive for efficiency anyway. Indeed the daily legal costs for a corporation involved in large scale litigation would dwarf even the largest hearing fees. The use of fees as a case management tool requires further consideration.

Court Fees and Alternative Dispute Resolution

The focus on ADR, especially by government which has responsibility for funding the courts and providing legal aid, has enlivened a continuing debate about how justice is defined and whether government's embrace of ADR has more to do with self-imposed fiscal constraints than improving access to justice. The previous Attorney-General for Australia has stated:[11]

> Access to justice extends beyond the courts. It incorporates everything we do to try to resolve the disputes we encounter — from the little things, such as using information found on the internet, calling a helpline or asking for help from a friend or family member, through to the big things, like filing an application in a court ...
>
> Court fees have the capacity to send pricing signals to people that the courts should not be the first port of call for resolving disputes and to encourage them to use ADR processes where appropriate.

The above comments would appear to be aimed at allowing government to define access to justice as including a host of activities other than the provision of publicly funded courts and that court fees may be legitimately raised to deter citizens from using the courts.

Encouraging resilience, self-reliance, and educating people about how to resolve disputes amongst themselves or with the help of a third party are worthy goals. Broadening the range of dispute resolution options and encouraging their use may allow for compromises that better satisfy all disputants' interests compared to going to court. Relationships may be preserved and creative solutions adopted. Disputants and lawyers

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11 Former Attorney-General for Australia, The Hon Nicola Roxon MP, *Launch of Your Guide to Dispute Resolution*, Canberra, 23 July 2012. See also Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p 3–4.

should be thinking hard about what dispute resolution method promises to best achieve their aims. But ADR, let alone phone calls and internet searches, cannot be equated with access to justice. With ADR, unlike a court, the dispute is not necessarily decided according to law. It may be, but that is not known because ADR is usually conducted in secret. Other interested parties, including the media, are not able to be present. The procedural protections mandated by and for courts do not necessarily apply.

The concern is that this redefinition of access to justice is 'about neither more access nor more justice [but rather] about diversion of disputants away from the courts'.[12] This runs the risk of creating a bifurcated system of justice with the 'haves' (mainly corporations and government) being able to afford litigation if they cannot achieve a desired outcome through ADR, and the 'have nots' who need to accept whatever is offered through ADR because they cannot afford litigation. Promoting and encouraging the use of ADR can be beneficial but if litigation is the last option, it must be a real option.

For the fundamental right of access to justice to be upheld disputants should be able to make a genuine choice about whether ADR or the courts better meet their needs.

Enabling disputing parties to make that choice means ensuring they are aware of the relative advantages and disadvantages of various forms of ADR as well as litigation. Educating citizens and training lawyers about the various methods available for resolving disputes is the way in which ADR and the courts can be used most effectively. However, the laudable goal of promoting ADR cannot be a substitute for an accessible court system.

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12 Dame Hazel Genn, *Judging Civil Justice – The Hamlyn Lectures 2008* (Cambridge University Press, 2010) p 69.