



18 April 2013

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Ms Julie Dennett
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
PO Box 6100
CANBERRA ACT 2600

and via email: legcon.sen@aph.gov.au

Dear Ms Dennett

Senate inquiry into the impact of Federal Court fee increases on access to justice

1. I refer to your email of 5 March 2013 inviting the Society to consider the Senate inquiry into the impact of Federal Court fee increases on access to justice and thank you for inviting the Society's comments in relation to the inquiry.
2. The matter was referred to the Society's Justice Access Committee and Civil Litigation Committee. This submission incorporates comments from the Justice Access Committee.
3. The Society shares the concerns of the Law Council regarding fee increases, in particular the significant and detrimental impact on access to justice for low-income earners and ordinary Australians.¹
4. The reintroduction of the waiver and exemption model provides some benefits for those who can at least afford to access the courts (eg medium to large businesses), however, the overall increases to fees has created additional financial barriers to accessing the courts especially for ordinary South Australians and operators of small businesses.²

¹ Law Council of Australia, 'New federal court fee structure limits access to justice' (Media Release, 13 September 2012) <<http://www.lawcouncil.asn.au/media/news-article.cfm?article=BCBBFBEB-1999-B243-6E6A-1F91B2C9EE3F>>

² Ibid

5. The terms of reference for the inquiry include whether fee increases are reasonable, based on evidence and consistent with other justice policy matters. The Terms thus invite comment both in principle and as a matter of practice.
6. As a matter of principle, citizens are entitled to have their disputes justly determined according to law by an impartial and independent judicial system. Obstacles to such determinations, such as court fees, act to deprive citizens of that right.
7. It ought to go without saying, but it does perhaps need to be said, that the right is a fundamental pillar of our political and social structure, and it should not be undermined by other arms of government which seek to encroach on the justice system.
8. Increased fees necessarily act as an obstacle to access to justice. They are therefore wrong in principle.
9. However, in practice there are limits on the resources available to the justice system, and it is well-established that some threshold fees attach to access to justice. Plainly, those fees must not be permitted to exclude deserving litigants from access. It follows that the fees must be confined to the minimum necessary to filter out vexatious litigants, and that any fees should be invested directly in the justice system.
10. The increased Federal Court fees fail these tests. They are arbitrary. They are patently an obstacle to access to the Courts.³ They are also explicitly a tax on litigants for the benefit of general revenue.⁴ They are therefore not merely unreasonable. They undermine the rationale of the justice system.
11. It has been said that the extra funds would mean the Federal Court can maintain the level of service they are providing at present.⁵ That cannot be maintained, given the surplus to be paid to general revenue.
12. The Society strongly opposes increases to court fees in circumstances where most of the proceeds of the fees will not be provided towards the improvement of administration of justice and will instead be directed towards general revenue.

³ The Federal Court Annual Report 2012 shows an overall trend of increased filings between 2007/8 and 2011/12. The figures are not broken down by Registry. Anecdotally, it is the South Australian experience that the increased cost of litigation in the Federal Court has led to reluctance to use it.

⁴ The Society understands that the Government plans to spend \$38 million of the fee income on the courts over the next four years while returning over \$60 million to consolidated revenue. Chris Merritt, 'Hike in court fees 'puts access at risk', *The Australian*, 14 September 2012

⁵ *Ibid*

13. At a practical level, the Society submits that the fee increases are not reasonable. We suggest examples below that aim to highlight the unreasonableness of these fees.

- a. In the Supreme Court of South Australia, the trial fee for a person in the civil jurisdiction is \$2,196 per day.⁶ In contrast, the trial fee in the Federal Court can be up to \$4,315 per day.⁷ Both fees are excessive, but there is no justification for the difference.
- b. A comparison of the fees highlights further examples of the differences between jurisdictions. Filing a notice of appeal in the Federal Court could cost up to \$3,630 but in the Supreme Court of South Australia the maximum fee for an individual is \$2,196. Filing a bill of costs in the Supreme Court of South Australia costs \$66, however in the Federal Court you can expect to pay \$350.

The examples could be multiplied. The fees imposed are arbitrarily high. They are a tax on exercise of the right to judicial determination.

14. The terms of reference for the inquiry also ask how increases in court fees can act as a barrier to accessing justice. The short answer is that the higher the fees, the less likely that ordinary people and businesses can afford to access the Federal Court. The fees promote a two-tiered justice system where only the rich and large businesses can afford to 'have their day in court'.

15. It is no answer to this problem to suggest that other forms of dispute resolution are available. These are welcome alternatives to judicial determination, but they are not a basis to exclude access to that determination. Apart from the issue of principle, there are areas of law in the federal jurisdiction that is not suitable for alternative dispute resolution. In particular, migration matters are not areas where a person can readily negotiate an alternative outcome, unlike say commercial litigation. In a migration matter, a person is either granted a visa or they are not. There are few opportunities to find an alternative 'middle ground' resolution to problems of this nature.

16. The issue necessarily rests on first principles:

- a. Access to judicial determination is a right;
- b. Financial impositions are effectively a discouragement and a barrier to that access;

⁶ Supreme Court Fees, *Civil Fees as at 1 July 2012* <<http://www.courts.sa.gov.au/ForLawyers/Pages/Supreme-Court-Fees.aspx>>

⁷ Federal Court and Federal Magistrates Court Regulation 2012, Schedule Item No. 121 (as at 1 January 2013) <<http://www.fedcourt.gov.au/news-and-events/11-december-2012/Fees-2013.doc>>

- c. Taxing litigation is an intrusion of the Executive into the Judicial arms of government, and a fundamental breach of separation of powers;
- d. The increased Federal Court fees are an obstacle to access to justice.

Thank you for the opportunity to consider this matter.

Yours sincerely

John White
PRESIDENT