Law Council
OF AUSTRALIA

Inquiry into the impact of filing fee increases since 2010 on access to justice

Senate Legal and Constitutional Affairs References Committee

15 April 2013

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

Introduction

1. The Law Council of Australia welcomes the opportunity to make a submission to this important inquiry into the impact of recent changes to filing fees in the federal courts on access to justice.

2. As outlined in **Attachment A**, the Law Council of Australia represents the 16 Australian state and territory law societies and bar associations and the Large Law Firm Group (collectively referred to as the "constituent bodies" of the Law Council). In this way, the Law Council effectively acts on behalf of some 60,000 lawyers across Australia.

3. This inquiry follows enormous increases in filing fees in the federal courts, and the introduction of substantial new fees in July 2010 and January 2013. The Law Council is on the record as strongly opposing the fee changes and the Law Council's constituent bodies are also unanimously opposed to the changes in fees. The Law Council is concerned about both the size of the fee increases and the justification given by the government in each instance for doing so.

4. The Law Council accepts that filing fees and other expenses associated with using the federal courts should be regularly reviewed and adjusted in accordance with movements in inflation and additional costs experienced by the courts themselves. However, federal courts are not agencies of government. The High Court, Federal Court, Federal Circuit Court and Family Court are established under Chapter III of the Constitution and form one of the three branches of government, alongside the Parliament and Executive. Chapter III of the Constitution grants original jurisdiction to the High Court to hear challenges to the lawfulness of government decisions. The Law Council therefore submits that it is fundamental to the functioning of a free and democratic society, subject to reasonable strictures to preserve the institution of the courts and the administration of justice, that people have a right to access the courts in order to have their disputes heard and determined in accordance with the law.

5. It flows from this that access to the courts should never be contingent upon the capacity of individual litigants to pay. It has been long accepted that the courts are not a "user-pays" system and that fees, where they are imposed, serve the function of covering reasonable administrative costs associated with handling court documents and processes; and deterring frivolous, vexatious or unnecessary litigation.

6. The Law Council submits that recent increases in federal court filing fees:

    (a) impact significantly on low-to-middle income Australians and small-to-medium sized businesses, that do not qualify for legal aid or any fee exemption or waiver;

    (b) are unreasonably large and not justified by any rational policy objective, or supported by evidence that changes to fees will advance the government's putative policy objectives;

    (c) impose an unreasonable barrier to accessing justice, by making access to the federal courts contingent upon the capacity of litigants of various means to meet the substantial additional cost of litigating;

    (d) impact upon litigants inequitably and establish a regime which disproportionately impacts on those of more limited financial means,

notwithstanding the apparent attempt by the government to establish a larger burden for publicly listed companies;

(e) are being used to generate revenue for the federal government by way of an effective tax on court users; and

(f) are unfortunately justified on the basis that funds raised are being used to fund essential government services, including legal assistance services and the federal courts, following years of chronic underfunding.

7. The Law Council is also concerned about the manner in which the recent changes to filing fees have been introduced, with very limited or no consultation, with little or no warning and, in relation to the 2013 fee changes, in disregard of undertakings given to the Law Council about the manner in which future changes would be introduced.

8. The Law Council considers that recent changes to federal court filing fees have had a profound impact on access to justice, the understanding of which is likely to grow as experience of the most recent changes is realised. The Law Council submits that:

(a) recent changes to filing fees should be wound back;

(b) a clear policy with respect to future changes to federal court filing fees should be developed by the Attorney-General's Department in consultation with the courts, the legal profession and other stakeholders; and

(c) the Senate Committee should consider presenting for adoption by the Senate a clear statement on the importance of keeping federal court filing fees at a reasonable level, to ensure all Australians have reasonable and equitable access to the federal courts.

9. The Law Council would like to thank a number of its constituent bodies and other important stakeholders who have provided assistance in the preparation of this submission, including the Law Institute of Victoria, Law Society of NSW, Law Society of South Australia, Law Society of Western Australia, Queensland Law Society, ACT Law Society, the Family Law Section, Federal Litigation Section and Federation of Community Legal Centres.

Background

10. The Law Council has been centrally involved in responding to the federal court filing fee changes in July 2010 and January 2013, and considers it important that the Senate Legal and Constitutional Affairs References Committee be informed of background against which this submission is made.

Introduction of the July 2010 filing fee changes and the injection of funding for legal assistance services

11. In June 2010, the Federal Government introduced a new Regulation which:

    (a) on 1 July 2010, substantially increased filing fees in the High Court, Federal Court, Family Court, Federal Magistrates Court and Administrative Appeals Tribunal. In some cases, the fee increases almost doubled the pre-1 July 2010 fee; and

    (b) on 1 November 2011, replaced fee-waivers and exemptions (where a litigant applied to the court under hardship provisions) with new flat fees of $100 and $60.

12. The 2010 filing fee changes were announced without any prior consultation of which the Law Council is aware. However, the fee changes were apparently linked to the Federal Government's announcement in May 2010 that it would provide additional funding of $154 million over four years towards the legal assistance sector. The increased fees were expected to raise $66 million in revenue over the forward estimates and account for 43% of the additional funding for legal assistance services.

13. The funding injection for legal assistance services announced in May 2010 came at a critical juncture for legal aid and other legal assistance service providers. Since 1996, real funding for legal assistance services has steadily declined, largely due to the abrogation of Commonwealth funding responsibility. Since 1996, the Commonwealth's share of funding for legal aid has fallen from roughly 55% of overall funding, to around 32% at current levels. The effect of this fall in funding for legal assistance services has been severe. By way of example, at current funding levels legal aid commissions have been forced to restrict eligibility for legal aid to such an extent that many people living beneath the Henderson Poverty Line are ineligible for legal aid.

14. Over the course of 2009-10, the Law Council campaigned heavily for a substantial injection of funding into the legal assistance sector. Accordingly, the Law Council welcomed the additional funding announcement by the then Attorney-General in May 2010. However, there was no warning or advice that 43% of this funding would be raised through additional fees paid by users of the federal courts.

15. In response to the announcement of a substantial increase in federal court filing fees in June 2010, the Law Council immediately announced its strong opposition.

16. The Law Council engaged in discussions with the then Attorney-General, who advised the Law Council that withdrawal or disallowance of the filing fee increases would jeopardise funding promised to the legal assistance sector. However, due to commitments under the National Partnership Agreement on Legal Assistance Services concerning the direction of funding for Legal Aid Commissions (LACs), this would

impact most severely on community legal centres (CLCs) and Aboriginal and Torres Strait Islander Legal Services (ATSILS).

17. The Attorney-General ultimately gave a commitment to the Law Council in November 2010 to commission a review of the impact of the filing fee changes, to be concluded by the end of June 2011; and that the legal profession, courts and other stakeholders would be consulted closely before any future filing fee increases were introduced.

Review of 2010 filing fee changes and failure to make findings public until after the commencement of the January 2013 fee changes

18. The promised review of the 2010 filing fee changes (the Review) did not in fact commence until June 2011. It was apparently delayed pending the outcome of the appeal in *Rosson v Tesoriero* [2011] FCA 449.[1]

19. The federal courts were invited to make submissions to the Attorney-General's Department (AGD) in relation to the Review, as was the Law Council. However, the AGD also stated that it did not intend to publicly release any report on the outcome of the review. This was surprising to the Law Council and did not accord with the spirit of the commitment given by the then Attorney-General.

20. In 26 September 2011 the Law Council was provided with data and submissions prepared by the federal courts. Those submissions and data revealed, among other things, that the new flat fees, which replaced fee waivers and exemptions, had created a substantial additional administrative burden for the courts and that there had been no perceivable change in the number of the filings in the federal courts as a result of the fee increases.

21. In a submission to the Attorney-General on 11 October 2011, the Law Council expressed its opposition to the federal court filing fees, noting that the filing fee changes had:

    (a) inhibited access to justice, by substantially increasing the cost of accessing federal courts and tribunals;

    (b) placed additional pressure on the legal assistance sector, which may have to bear the new fees on their client's behalf; and

    (c) created an additional administrative burden for the courts, given the need to establish a system to track and chase up fees.

22. In light of these adverse impacts and the absence of any evidence to demonstrate that the fee changes had reduced the number of cases filed in the federal courts, the Law Council recommended that the Government withdraw or reduce the increase in court and tribunal fees, withdraw the flat fee system and revert to the waiver and exemption model.

23. The Law Council also made repeated requests for the findings of the Review to be made public, requests that were repeatedly refused and were inconsistent with the

[1] This was a matter involving an appeal from a decision not to defer fee payment under sub-regulation 14(2), notwithstanding that the applicant was in immigration detention, without any funds to cover his review application

commitment by the former Attorney-General to carry out the Review and provide transparency. In this regard, the Law Council considers the statement by the Department that there was never any commitment given to make the findings of the Review public[2] to be not only incorrect, but also inconsistent with Law Council's clear understanding of the then Attorney General's commitment. It was not until the Attorney-General, the Hon Mark Dreyfus MP, tabled the findings of the Review in the Senate on 26 February 2013, in response to an order of the Senate on 7 February 2013, that the Law Council became aware that there was no report produced by the Department following the Review.

24. According to the response by the Department to the Senate Order of 7 February 2013, some of findings of the Review were as follows:

    (a) There had been no discernible impact on filings as a result of the substantial 2010 increases in filing fees;

    (b) The new flat fees introduced to replace the previous system of fee waivers and exemptions had created a significant administrative cost burden for each of the federal courts and, in many cases, impeded the provision of justice;

    (c) The Department considers the provision of flexible and alternative payment options to be less important following reinstatement of fee waivers and exemptions; and

    (d) A two-third fee for divorce would be implemented due to the lack of urgency of most divorce applications.

Introduction of the January 2013 fee changes and funding to the federal courts

25. In March 2012, the then Attorney-General, the Hon Nicola Roxon MP, foreshadowed her intention to introduce further fee increases in the federal courts. In May 2012, the then Attorney-General announced, as part of the 2012-13 Federal budget that the Commonwealth would be introducing substantial new fees and increases to existing filing fees, in order to provide additional funding to the federal courts.

26. On 4 September 2012 the then Attorney-General wrote to the Law Council President advising of substantial increases in filing fees in the federal courts, as well as several new fees. The Attorney-General stated that the changes to court fees are based upon the following principles:

    (a) a focus on litigants with the capacity to pay, such as large corporations and commercial disputants;

    (b) targeting resource intensive processes and high intensity litigation such as lengthy hearings;

    (c) sending appropriate pricing signals to court users to encourage them to utilise alternative dispute resolution processes where appropriate; and

    (d) ensuring access to justice is maintained.

[2] As stated in the *Results and findings of the Departmental review of the 2010 court fee changes conducted in 2011*, tabled in the Senate on 26 February 2013.

27. The Law Council has appended a table at **Attachment B** which summarises each of the fee changes introduced since July 2010. At no stage was the Law Council consulted in relation to the fee changes, either at the stage of their development or in any meaningful sense prior to their introduction. To be clear, the Law Council does not regard merely announcing the changes without requesting or considering feedback, or without providing the Regulation in draft form for comment in accordance with ordinary legislative standards, to be adequate or meaningful consultation.

Comments on the terms of reference

(a) The impact of federal court fee increases on low-income and ordinary Australians and operators of small businesses

28. The Law Council submits that the impact of these fee increases on low income Australians and operators of small businesses has been significant.

29. The Law Council notes that the former Attorney-General characterised the January 2013 fee changes as "reforms" focused on "litigants with a capacity to pay such as large corporations and resource intensive processes".[3] The former Attorney-General also stated that the principles on which the fee changes were based included "sending appropriate pricing signals to court users to encourage them to utilise alternative dispute resolution (ADR) processes where appropriate" and "ensuring access to justice is maintained".[4]

30. It appears that the key mechanisms adopted by the Government to target litigants with the capacity to pay and highly litigious are:

    (a) a 50% uplift in fees for publicly listed corporations;

    (b) extension of the individual fee to small businesses; and

    (c) reintroduction of fee waivers and exemptions for low income earners.

<u>Fee waivers and exemptions</u>

31. The Law Council welcomes the reintroduction of fee waivers and exemptions, which were replaced by the Government in July 2010 with flat fees. In the Law Council's submission, removal of fee waivers was an ill-conceived decision and probably resulted in a much greater administrative cost burden for the federal courts than any revenue the flat fees might have raised.

32. In evidence presented by the federal courts under the Review of the 2010 fee changes, administering and collecting the $100 and $60 flat fees:

> "… led, without any compensating resources, to a significantly higher workload in registries in processing applications where previously there were none if an exemption or waiver was granted (particularly with hardship reductions where

[3] Letter from The Hon Nicola Roxon MP to the former Law Council President, Catherine Gale, on 4 September 2013.
[4] Ibid.

reductions must now be sought, decided and the reduced fee paid on each occasion a full fee would otherwise be payable)."[5]

33. In most registries, administering the new flat fee system effectively required manual and labour-intensive processes to receive payment, follow-up payment, or initiate recovery action where necessary (or, in most cases, having to write off the expense under the *Financial Management and Accountability Act 1977*); training staff, producing training materials, developing new Casetrack and e-lodgment processes and instructions; and reprogramming technology, revising forms and explaining the new fees to litigants and practitioners.[6]

34. Legal assistance providers also reported significant problems with clients being unable to pay the flat fee and, in some cases, the Law Council understands that the legal assistance providers were paying the fee on behalf of their clients.

35. However, notwithstanding the importance of restoring fee waivers and exemptions, both for impecunious parties and the financial position of the courts, waivers and exemptions do not extend to the vast majority of working families and working poor, who do not qualify for legal aid and yet in many cases have no option other than to approach the courts to resolve their (often complex) legal problems. Very often it will be no fault of the litigant that they are forced to use the court system, and it is inimical to access to justice for major financial barriers to be placed in the way of litigants who have no other course.

36. The burden faced by people who approach the courts is particularly acute for those who recognise that their legal predicament is complex and requires expert legal advice and representation. Such representation almost invariably results in better outcomes for both the client and the courts (as opposed to those who choose to represent themselves), however the cost of retaining competent counsel is a significant financial burden that is only exacerbated by the imposition of substantial court fees.

37. The following case studies are everyday examples of the additional burden imposed by these fee increases on "ordinary Australians".

Case examples in the family law jurisdiction

Divorce proceedings

Mrs R's husband left her for another woman in 2010. She has three children who were then aged 14, 15 and 19, all students. He works in a professional capacity earning about $175,000 a year. For 18 months he paid her generous support, which covered the mortgage and support of the children. He then reduced it by 80%.

He attended Mediation without representation but departed angrily before any significant negotiations could occur. She had no alternative other than to commence proceedings in the Federal Magistrates Court. She was forced in that application to seek urgent interim orders for support because her mortgage was falling into arrears. She had to pay a filing fee in the Federal Magistrates Court of $305 (Initiating Application), plus $105 (Interim Application), because the same document asked for urgent interim financial orders.

[5] Federal Court of Australia, *Submission to Attorney-General's Department on Changes to Court Fees*, 19 September 2011.
[6] Ibid.

Her solicitors had to issue three subpoenas to obtain details of his bank account, because he refused to make disclosure, as many self-represented people do. The filing fee on the subpoenas was $150.

Rather than hear the urgent Application, the Federal Magistrate gave an urgent date for a Conciliation Conference. Because she was the Applicant, Mrs R had to pay a $350 Conference fee before the Conciliation Conference could proceed. Accordingly, Mrs R had paid $910 in court fees up to the Conciliation Conference. During the Conference she was given an estimate of the further costs in the matter, including Court fees. Those costs were:

(a)	Cost of three further subpoenas	$150
(b)	Cost of setting down for trial	$560
(c)	Cost of two day trial	$560
	Total further costs	**$1,270**

Mrs R settled the matter at the Conciliation Conference for a less than satisfactory outcome. One of her considerations was the additional costs associated with proceeding, including the court fees.

Parenting matter

Parenting matter commences in the Family Court with an Application and Interim Application for urgent orders because of allegations of child abuse or some other ground of urgency. The court fees are:

(a)	Filing fee	$305
(b)	Interim Application	$105
(c)	Respondent opposes Application and files a Response	$305
(d)	Respondent's Interim Application	$105
(e)	Setting down fee for hearing paid by Applicant	$765
(f)	Daily hearing fee for, say, a three day trial (first day excluded)	$1,530
Total Court fees paid by both parties		**$3,115**

(b) Whether these fee increases are reasonable, based on evidence and consistent with other justice policy matters

38. The Law Council submits that the July 2010 and January 2013 fee increases are extreme and inconsistent with commonly understood policy with respect to setting of filing fees in the federal courts.

39. The table set out at **Attachment B** provides a detailed summary of the applicable filing fees in the Federal Court, Federal Magistrates Court (now the Federal Circuit Court) and the Family Court pre -1 July 2010, post-1 July 2010 and post -1 January 2013. As

can be observed from the table, the applicable fee for many applications from 1 January 2013 is at least double – and in many cases, *triple* – the fee that applied prior to 1 July 2010.

40. At the outset, it is reasonable to expect the government and the courts to revise fees regularly, to account for movements in inflation and the changing costs of delivering certain services. Changes beyond this should only be made in exceptional circumstances. The Law Council submits that it is not reasonable to tax court users to fund essential services, such as legal aid, the courts or non-justice related initiatives, which has been the case in relation to recent increases in filing fees.

41. The provision of court services is not on a cost-recovery basis. It is a fundamental element of maintenance of the rule of law in a civil society that citizens have fair and reasonable access to dispute resolution mechanisms. Given the courts are a "public good", the state has a responsibility to provide access to these services on the same basis as other essential public infrastructure.

42. A significant caveat is that it is that public goods often carry a private benefit to individual users at a significant public cost. It is therefore reasonable in some cases that access should be subject to a threshold, which deters those who might use the service unnecessarily or without due regard to other alternatives, while not making access to the service dependent on capacity to pay.

43. The AGD's Strategic Framework for Access to Justice in the Federal Civil Justice System reflects this broad principle, in stating that:

> "Courts and tribunals are state sponsored mechanisms for dispute resolution and the enforcement of rights—a fundamental element for the maintenance of the rule of law. These mechanisms also provide significant benefits to the Australian community. However, the specific functions of a court in any particular matter are performed at the request of the parties who have the immediate and almost exclusive interest in the conduct and outcome of the litigation.
>
> "While the existence of courts and other justice services has public benefits that clearly deserve public funding, it remains legitimate to explore the extent to which specific activities in particular matters, which are of more limited interest to the parties, might be appropriate subjects of assessing cost recovery."[7]

44. The *Strategic Framework* elaborates upon this:

> "As a general principle, one of the purposes of cost recovery is to improve the efficiency and inform the market about the true cost of a service so that decisions about consumption and production can be made. **However, this does not apply in a monopoly or where functions cannot be provided by the market. In this context it is clear that only a court can perform judicial functions–to finally declare the state of the law and enforce decisions**. These features of the courts are fundamental to the rule of law and cannot be outsourced, nor granted to the private sector."[8] [Emphasis added]

45. The corollary of this appears to be that dramatically increasing court fees will only have a positive impact, in terms of the government's policy objective of encouraging

[7] Access to Justice Taskforce, *Strategic Framework for Access to Justice in the Federal Civil Justice System,* September 2009, Commonwealth Attorney-General's Department, page 44
[8] Ibid, page 49

parties to engage in ADR or settle their disputes, rather than approach the courts, if the parties:

(a) actually have other reasonable options left to pursue; and

(b) have not exhausted all of those options.

46. The Law Council considers that anyone with competent legal advice would pursue all legal options available to them before approaching the courts. As the government has clearly recognised, formal dispute resolution through the courts is the most expensive and often least desirable option available to anyone with a legal problem. This is not simply a consequence of the expense of funding the courts – the cost of litigation is suffered most acutely by the parties involved, through legal fees, court fees and other professional services retained to gather evidence - but it is also an arduous and time-consuming process, which anyone with competent advice would avoid if other reasonable options were available.

47. While it is very difficult to prove empirically that all parties do exhaust all reasonable options to resolve disputes, it is reasonable to expect that the vast majority do so. The *Civil Dispute Resolution Act 2011* makes it a requirement that all parties certify that they have taken "genuine steps" to resolve their dispute before reaching court. Such a certification could be challenged in each and every instance by an opposing party, or the Court, and there may be consequences that flow from a failure by a legal representative to reasonably claim that their client has been advised of all reasonable options to resolve their dispute.

48. Similarly, in the family law jurisdiction, parties to a parenting dispute must make a genuine effort to resolve the matter by family dispute resolution (except in limited circumstances involving urgency). The Court will not be able to hear an application for a parenting order unless a certificate from an accredited family dispute resolution practitioner is filed with the application. The Family Court requires people intending to apply for financial orders to follow pre-action procedures, including attending dispute resolution, before filing an application (there are some exceptions to these requirements, such as those involving family violence, fraud or urgency). In the Federal Magistrates Court, parties intending to apply for financial orders are encouraged to resolve disputed issues before filing an application. In most cases, parties will be ordered to attend family dispute resolution when an application is filed with the Court.

49. However, there is no evidence available to suggest that increasing court fees has had any impact on the tendency of parties to engage with ADR. The Law Council is only aware of anecdotal reports of instances in which parties have settled for an undesirable outcome to avoid being forced to pay thousands of dollars in court fees, on top of legal fees and other costs, as outlined above.

50. The Law Council submits that a simple examination of the fee changes demonstrates the lack of any relationship between existing justice policy and the fee changes introduced in 2010 and 2013. For example:

(a) Divorce fees, consent orders and family law matters generally:

Fees have been increased substantially in family law matters (for divorce applications the minimum fee is now $265 in "hardship" cases and $800 for other applications; the fee for applications for consent orders has increased

from $0 to $145; and most other applications have increased by between 30 per cent and 200 per cent).

This is contrary to the AGD's own policy guidelines on cost recovery in the federal courts, because the Court has an effective "monopoly" on divorce applications, consent orders and several other processes.[9] There are no market-based alternatives to achieve a divorce or consent orders. Divorce proceedings last, on average, 5-10 minutes and utilise a minimal amount of the Court's time. It is difficult to fathom how $800 could be considered "reasonable" in the circumstances.

In other cases, it appears parties are to be "punished" through substantially increased court fees, simply because they have been unable to achieve agreement or settlement. This may seriously disadvantage one party who has to rely on the reasonableness of the other party to the proceedings. In many cases, children are involved, which clearly invokes another caveat set down by the AGD as favouring the public interest in resolving disputes without exorbitant fees:

> "There may be a greater public interest in the resolution of certain types of disputes (such as matters involving children, native title and human rights matters)."[10]

(b) Introduction of a higher filing fee of $500 for applications which involve both children's and property matters:

It is unclear how charging a higher fee for matters involving children could be in any way justified by justice policy considerations.

(c) New fees for conciliation conferences in family law matters ($350) and substantially increased fees for mediations in the federal courts (50% higher for individual and 75% higher for corporations):

The Law Council is not aware of any attempt by the Department to explain how fees for conciliation conferences can be justified under commonly understood justice policy considerations, which generally refer to the imperative of *encouraging* greater use of ADR, including mediation and conciliation, as a means of heading off litigation.

As noted above, fees for Conciliation Conferences in family law matters disadvantage the applicant, who is often the party seeking to resolve the matter reasonably.

The Law Council is also advised that the large daily fees for mediation are providing a disincentive for parties to engage in the process. Many complex matters cannot be resolved in mediation on a single day and the charging of a fee of for each day of mediation is a disincentive for parties to continue the process. The new fees are $2,460 for a public company, $1,640 for a corporation and $700 in all other cases. The Law Council is advised that it is unclear at this stage whether settlement rates have been impacted and

[9] Ibid, page 48. Where the court has a "monopoly" over the resolution of certain matters and there is no private, market-based alternative, imposition of additional fees is not appropriate.
[10] Ibid, page 48.

whether savings in judicial time through previous efforts to encourage mediation will be maintained.

(d) Removal of refunds for first day hearing fees where the hearing does not proceed:

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.

(e) New fees for applications for an urgent injunction for Mareva or Anton-Piller type orders (for the detention, custody, preservation or inspection of property, to freeze assets, or preserve evidence) before the start of a proceeding, set at $5,500 for corporations and $2,000 for other litigants:

These are applications which, of their very nature, are urgent and may be the only mechanism available to applicants seeking to preserve their rights, prevent another party disposing of evidence, information or assets, or enforcing a judgment of the Court. This is an enormous imposition for what in many cases will be an unavoidable application.

The Law Council submits such fees are contrary to the public interest in preserving the rule of law, by seriously limiting access to a function that can only be provided by the court. Impeding access to this kind of application may also undermine the administration of justice, as it presents a disincentive to apply to the court to prevent actions which may lead to the destruction of property or evidence, for example.

Further, the size of the fee is remarkable – while seriously disadvantaged people may qualify for a waiver or exemption, those seeking to enforce rights over property are unlikely to fall into that category and would be expected to have immediate access to $2,000 in order to enforce their rights, unless the Registrar agrees to deferral of payment. This may be a particularly harsh imposition in many circumstances where a person is simply seeking to prevent unlawful or prejudicial action, or preserve the *status quo* until the matter can be resolved by the court.

(f) New fees for requests to issue subpoenas in the FMC and family law jurisdictions:

Subpoenas are often the only and most efficient means of ensuring appropriate evidence is brought before the courts. In any given proceeding, it may be necessary to issue several subpoenas to ensure the prompt and complete delivery of relevant information. While the cost to the courts of administering subpoenas is relatively low, the fees charged may create a substantial additional financial burden to litigants. Ultimately, the use of subpoenas promotes the administration of justice and the imposition of substantial fees is not supported by justice policy considerations.

By way of example, the Law Council has been advised of an instance where a party had sought leave to issue 37 subpoenas in a substantial matter. However, because the fee for each subpoena was $180, the client incurred a filing fee of $6,600.00. This excluded any conduct money which the subpoenaed party may seek from the issuing party.

Insolvency litigation and the public interest

51. A strong example of matters which are adversely affected by these court fee increases can be found in insolvency litigation.

52. Insolvency proceedings have a public interest aspect and do not constitute ordinary *inter partes* litigation. Applicant creditors in bankruptcy creditor petitions and plaintiffs in winding up proceedings act on behalf of all creditors. In addition, the Court has historically distinguished insolvency proceedings from debt collection proceedings.

53. Often, insolvency proceedings are the only viable legal option available to creditors. Given that insolvency proceedings are commenced with a legal presumption of insolvency,[11] the capacity for these matters to be resolved through alternative dispute resolution may be limited. Indeed, company winding-up proceedings and bankruptcy creditor's petitions were expressly exempted from the genuine steps requirements of the *Civil Dispute Resolution Act 2011* (Cth), presumably for this very reason. As a consequence of the fee increases, the legal options available to creditors who are owed significant debts by insolvent creditors may be further limited.

54. The revised filing fees either eclipse or substantially cover the statutory minimum thresholds for debts the subject of winding up proceedings ($3,145 charged for a winding up application filed by a company versus the $2,000 statutory threshold) and creditor's petitions ($2,915 charged for petition filed by a company versus the $5000 statutory threshold).

55. If creditors become reluctant to commence such proceedings because of perceived disproportionate filing costs, this may, in turn, result in higher incidences of insolvent trading by companies and the continual incurring of debt by insolvent individuals. As a consequence, the long-standing public policy objective of protecting the public from clearly insolvent companies and individuals may be frustrated.

56. In many corporations and bankruptcy cases, trustees, liquidators and other external administrators seek directions in their capacity as officers of the Court and in relation to complex legal problems. Increased Court fees may make insolvency practitioners more reluctant to seek directions from the Court in such matters, leaving creditors with less confidence that appropriate decisions have been made on their behalf.

57. The Law Council has already been advised anecdotally of a number of instances in which creditors of an insolvent company have elected not to pursue debts due to prohibitive court fees. Alternatively, many insolvency practitioners have been advising their clients to file in the state and territory Supreme Courts.

58. The case set out below is typical of insolvency matters affected by these fees.

Insolvency litigation case study

A law practice took action on behalf of a creditor who had obtained judgment in the Victorian Magistrates' Court. They obtained and served bankruptcy notices (the Insolvency and Trustee Service Australia's (ITSA's) fee for issuing a bankruptcy notice is $440). After personally serving the notice and awaiting 21 days, the notice expired

[11] A creditor's petition requires an act of bankruptcy by an individual debtor (often his/her non-compliance with a bankruptcy notice). A winding-up proceeding relies on the non-compliance with a statutory demand by a debtor company. Both acts result in a statutory rebuttable presumption of insolvency.

without the debtor responding. At this point the client's total costs were approximately $1,500 (including the ITSA fee) which is in the normal range.

The client then had two options:

(1) take no further action and write off the debt; or

(2) institute proceedings, take on the risk involved (~$6k) and hope that the debtor had some assets out of which the costs of the process could be repaid.

The firm could not identify sufficient assets to outweigh the substantial cost of the proceedings and hence the client elected not to proceed.

Impact on government regulatory action

59. The Law Council is advised that a number of government agencies have begun to consider whether regulatory functions can be carried out in the federal courts due to the impact of substantially increased filing fees on departmental litigation budgets.

60. The Law Council understands that there has been a significant impact on the Australian Tax Office (which is the largest user of the Federal Court in terms of volume of filings) and its capacity to institute winding-up applications.

61. The Law Council is advised anecdotally that this has also affected other agencies, including the Department of Sustainability, Environment, Water, Population and Communities, the Department of Immigration and Citizenship, the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission.

(c) How increases in court fees, and other reforms to the courts and justice system, can act as a barrier to accessing justice

62. The Law Council submits that excessive financial barriers to the courts impose an unreasonable barrier to accessing justice. Clearly, the intention of the Government in introducing these fee increases was to recover a higher level of costs from users of the federal courts. In the case of recent fee increases, which as demonstrated by the table at **Attachment B,** double or triple the previously applicable fee, there has been a significant shift in the capacity of Australians to access the federal courts on an equal footing.

Enhancing inequity

63. It is noted that the recent substantial increases to court fees and new fees impact unequally on parties, by giving a significantly greater advantage to the party with greater financial resources. Additional fees for publicly listed companies and waivers and exemptions for the severely disadvantaged are reasonable attempts to address this inequity at the margins. However, the substantially increased fees significantly exacerbate the inequity for parties who are not wealthy and have significant other financial responsibilities (including mortgages, legal fees, the expense of running a business, etc), who may face greater pressure to agree to an unfair or undesirable outcome when facing a dispute with a person or entity prepared to “wait out” their opponent, in the knowledge that they will have to concede eventually for financial reasons.

64. This inequity is particularly apparent in the family law sphere, as demonstrated above in the case of divorce proceedings (of which there are many other examples, some of which are outlined below). However, this inequity could easily be expected to emerge in a dispute between a major corporation, such as a bank or mining company, and a small-to-medium sized company with limited financial resources, seeking to enforce a debt. The fee for the bank or mining company might be 50 per cent higher, but their revenue and asset base will be many times larger than an ordinary company of, say, 25-50 employees and an annual turnover of $5 million (which would take it well outside the definition of "small business" under the *Federal Court and Federal Magistrates Court Regulation 2012*.

Unrepresented litigants

65. The Law Council submits that increasing court fees also contributes to the tendency of individuals, who do not qualify for legal aid and are unlikely therefore to qualify for any waiver or exemption of court fees, to represent themselves. This is because many people who are faced with such substantial costs to commence and maintain proceedings, may be more likely to avoid the anticipated cost of legal representation.

66. Unrepresented litigants often present to the court with complex legal problems and very little knowledge or understanding of either formal or informal dispute resolution processes. Unrepresented litigants are therefore less likely to engage positively with ADR and expend considerable court resources (including registry and judicial resources) managing their claim. While this may amount to a cost saving for the litigant, it will invariably lead to an increased drain on the limited resources of the courts and impact adversely on other parties to the litigation.

67. The Family Law Council has suggested some of the reasons people choose to represent themselves:

> "Some choose to do so, and the reasons for doing so may range from distrust of lawyers to a great faith in the merits of their case. Others do so not from choice, but because they do not qualify for legal aid on means or merits grounds, and cannot afford representation."[12]

68. Clearly, the imposition of significant additional expenses is likely to impact on the growing number of unrepresented litigants and thereby increase the cost to the courts of delivering justice.

69. The Law Council is advised by its constituent bodies that there is an emerging practice of some suburban practitioners to provide "satellite advice" to clients whom they encourage to appear unrepresented in litigation in an effort to control costs.

Case examples: the impact of the new two-thirds divorce fee

70. The Law Council has been advised by the Federation of Community Legal Centres that its members have reported that the new fee for divorce applications has already begun to impact on people who feel unable to proceed due to the cost, and has provided the following case studies prepared by one of FCLC's members.

Case study 1: 'Client w' was married in about 2008 and separated from her husband, in about December 2011. A Community Legal Centre (CLC) assisted Client w with a

[12] Family Law Council (2000) Litigants in Person – A Report to the Attorney-General prepared by the Family Law Council, Canberra at page 5.

property settlement and after this was finalized, Client w approached the service for assistance with a divorce. Unfortunately Client w is unable to afford the $265 filing fee at present, and is saving up the money so that she can apply for a divorce in the future. She is hoping to proceed in about August 2013.

Client w is supported solely by a Centrelink disability support pension and until recently, had the care of the husband's 16 year old child. In 2012 she was diagnosed with breast cancer, and has recently had surgery. She is now due to undergo chemotherapy and radiation treatment, and has significant medical expenses to pay as a result of this. Even for a Commonwealth card holder, cancer treatments have significant co-payments. Client w has re-partnered and is seeking to marry her new partner, but she cannot do so until she can obtain a divorce from her husband. Her new partner is also battling cancer and supported by a Centrelink disability pension, so he is unable to assist with paying the filing fee.

It is not an option for client w to ask the husband to pay for the divorce. Although client w received a property settlement from her husband, the settlement involved a superannuation split only, as there were no other assets to divide. Her husband went bankrupt in 2009.

After their separation, client w took out Family Violence Orders against the husband for her protection. The husband was uncooperative in relation to the property settlement, initially avoiding service of those Court proceedings.

Client w was advised to approach services to find out about financial hardship payments that might be available but has not yet been able to find anyone to assist her. It was suggested that she might seek a Centrelink loan. However client w instructs that she has previously taken out a Centrelink loan and is paying it off.

As a result of client w's inability to pay for a divorce, she has to endure an additional burden of an unwanted legal status for another 6 months at an already difficult time in her life and is being prevented from remarrying her new partner.

There are no other options for client w to resolve her legal problem (such as dispute resolution), as Court Orders are the only way to obtain a divorce.

Case Study 2: In December last year client x made contact with a CLC to discuss her options for applying for a divorce. Client x is a pensioner and has limited financial resources. Client x had discussed with her spouse who was willing to pay the $60 filing fee on her behalf, just so he did not have to deal with the paperwork himself. Client x made an appointment in mid-January to get assistance in completing and filing her divorce application. Client x was advised that the filing fee had increased substantially on 1 January, to $265.00. Client x advised she had already received a cheque for $60.00 from her spouse and did not have the courage to call him again to ask for more money. Client x has been unable to make contact with her spouse again and cannot afford the filing fee herself. Client x has cancelled her appointment and will not be filing for divorce now.

Case Study 3: A CLC received a phone call from client y to enquire about filing for divorce. Client y has an Intervention Order in place against him and cannot make contact with his spouse. Client y does not have a copy of the Marriage Certificate and will have to order a new one and pay the small fee. Client y advised that he was able to do this as he was currently working. The service was about to make an appointment for client y, in two weeks time, to allow time for his Marriage Certificate to arrive. Client y was advised of the filing fee of $800, as he did not have a Centrelink Benefit card. When advised of the filing

fee, client y said he was unable to pay that and would not be able to proceed with his application at this stage.

Case Study 4: Client z had made an appointment with a CLC in late 2012 for early in 2013 to receive assistance to file for divorce. Client z has 8 children and lives in a small rural community. Client z made the appointment on a day when she would travel to town for shopping to save costs on fuel. Client z was advised of the fee increase prior to her appointment. Client z was very upset at the increase, said she could not afford $265 and cancelled her appointment.

71. As demonstrated by the case examples, the impact of the increased court fees means that low income Australians either cannot afford the court fees or have a delay in their application to the court. In this case, the unaffordable court fees act as a barrier for many people to access justice and resolve their legal problems.

(d) The extent to which court fee increases may impact on services provided by legal assistance services (i.e. legal aid commissions, Aboriginal and Torres Strait Islander legal services, family violence prevention legal services and community legal services)

72. The Law Council understands that in many cases persons who actually qualify for legal assistance will qualify for an exemption or waiver.

73. However, the Law Council is advised that legal assistance providers are continuing to be affected. For example:

<u>Independent Children's Lawyers (ICLs)</u>

(a) The Law Council is advised that, while litigants represented by a Legal Aid Commission (LAC) (either directly or under a grant of legal aid), by an Aboriginal and Torres Strait Islander Legal Service (ATSILS) or community legal centre (CLC) are usually eligible for an exemption or waiver, ICLs retained by legal assistance providers in family law matters do not qualify. Accordingly, in matters involving children, where all parties might otherwise meet the financial hardship exemption, ICLs remain liable for the full fees for applications and subpoenas. Often the ICL will make an application to the LAC to pay the fee, however the Law Council is advised that in many cases the LACs refuse.

This is problematic, because the role of ICLs is to assist the Court in children's matters. In order to carry out that role, the ICL needs to issue subpoenas to obtain necessary information. The failure to afford an exemption impacts on the availability of information before the court in children's matters, as the filing fee acts as a disincentive for ICLs to make all relevant inquiries – ICLs are not paid to make applications for grants of legal aid or for issuing of subpoenas.

The Law Council is advised that the AGD does not concede that this is an unintended oversight in the design of the waiver and exemption provisions, notwithstanding the clear justice policy imperative of limiting the deleterious impact of these fee changes on matters involving children.

Divorce fees

(b) As noted above, the Law Council is advised that legally assisted clients are choosing not to proceed with divorce applications due to the cost of the filing fee. From 1 January 2013, the minimum fee payable for a divorce application increased from $60 to $265. Previously, exemptions applied for persons in 'hardship' categories, but now they do not.

(e) the degree to which the fee changes reflect the capacity of different types of litigants to pay

74. As noted above, beyond the very blunt instruments of fee waivers and exemptions, the 50 per cent uplift for publicly listed companies and the application of the individual fee for "small businesses" (which really only affect court users at the margins), the fee changes do not reflect the capacity of different types of litigants to pay.

75. As demonstrated by the table at **Attachment B**, filing fees have doubled for most applications and have in many cases tripled, regardless of income or assets. The Court retains discretion to exempt certain parties on the basis of financial hardship, however, this is unlikely to benefit the majority of applicants who are faced with a range of expenses and, as outlined above, are more harshly affected by these fee increases due to their limited financial resources.

Hardship exemptions

76. As noted above, while the reintroduction of waivers and exemptions under the January 2013 fee changes is welcome and will assist some of the most disadvantaged people, the majority of litigants, while not poor, will find these filing fees very difficult to pay.

Publicly listed companies

77. The Law Council notes that the 50 per cent uplift for publicly listed companies fails to take account of the diversity of listed firms.

78. While some national and international companies, such as BHP, Rio Tinto, Woolworths, Coles, etc., have enormous market capitalisation and resources to pour into litigation, many companies listed on the Australian Stock Exchange are relatively small, with low market capitalisation and market share and little capacity to withstand lengthy litigation at a rate of $16,765 per day, plus legal fees and other disbursements, if a complex case is dragged on by an opponent with greater financial resources. Similarly, a relatively small publicly listed company may struggle to meet the cost of an appeal from a decision in the AAT or a judgment of another court ($11,765), notwithstanding that if a party wishes to appeal against a perceived error of judgment by another court they cannot have the decision overturned in any other way.

79. At $2,460 per day, a publicly listed company may also see little value in attending mediation on one or more occasion, particularly in complex disputes, where there is no great likelihood that the parties will resolve all of the issues in one or two sessions.

(f) The application of the revenue that has been raised by federal court fee increases

80. The Law Council considers it is appropriate that revenue derived from court fees be directed toward the courts. However, given court fees recoup only a fraction of the

actual cost of running the courts, the application of revenue derived from court fees should be largely irrelevant.

81. Court fees do not, and should not, exist to raise revenue for the government or to fund essential services. To establish a "user pays" system would put the courts far beyond the financial means of most Australians and seriously impede access to justice. The essential function of court fees is to place a reasonable check on access to a "public good", to ensure prospective litigants consider other options. However, as noted in the *Strategic Framework*:

> "Pricing a service beyond the reach of a disputant provides an inequitable barrier to justice. For a well-functioning justice system, access to the system must not be dependant on capacity to pay."[13]

Responsibility to properly fund legal assistance and the federal courts

82. The Law Council has very serious concerns that the July 2010 and January 2013 fee changes were apparently justified on the failure of successive governments to properly fund the legal assistance sector and the federal courts. For example:

    (a) The July 2010 fee changes were projected to raise $66 million over 4 years, and were earmarked to cover 43 per cent of the $154 million of additional funding allocated to the legal assistance sector under the 2010 federal budget. While the legal assistance funding announcement was welcome, it is in fact only a fraction of what is needed following 17 years of neglect by successive governments. In 1996, the introduction of the Commonwealth-State divide in funding for LACs has seen the Commonwealth's share of LAC funding fall from 55 per cent in 1996 to around 32 per cent today. This has forced LACs to cut eligibility for legal aid to such an extent that many people living beneath the Henderson Poverty Line are ineligible for legal aid. The state of funding for ATSILS and CLCs, which is a Commonwealth Government responsibility, is even more dire.

    (b) The January 2013 fee changes are projected to raise $106 million over 4 years. This actually followed an annual inflationary adjustment to the fees in 2012 and the unprecedented increases of 2010. Of the projected $106 million, $38 million was allocated to the federal courts to address, in part, years of chronic underfunding. For example, last year 41 judges sat in the Federal Court; a reduction from 50 just 7 years ago. Such reduction occurred during a period of budgetary attrition over successive years. Over the same period, the caseload of the Court has increased while registries have had to be cut back. Notwithstanding this, and given the opportunity to direct more resources to the courts, the government has directed the remaining $68 million projected to be raised from the 2013 court fee changes into consolidated revenue.

83. The Law Council strongly opposes the emerging practice of effectively taxing federal court and tribunal users to fund other essential government services. It is important to recognise that the courts are not and should not be treated as government agencies, which are required to continue to serve essential and inalienable functions on ever-shrinking budgets. The federal courts are established under Chapter III of the Constitution and form one of the three branches of the national system of government.

[13] Ibid, *op cit 6*, page 50.

They are an essential check on Executive power and ensure that the rule of law is upheld. In order to ensure the strength of our system of government, the federal courts must be adequately resourced and not be reliant on hand-outs raised by court fees. Nor should the courts be regarded as revenue-raising tools of government, or self-funded entities. To treat the courts in such a fashion would seriously undermine access to justice and, ultimately, the capacity of the courts to uphold the rule of law

84. The modern legal aid system in Australia was founded on a similar premise, of ensuring access to justice for all Australians as an essential aspect of promoting the rule of law. In establishing the Australian Legal Aid Office in 1973, the then Attorney-General, the Hon Senator Lionel Murphy QC, stated:

> "The Government has taken this action because it believes that one of the basic causes of inequality of citizens before the law is the absence of adequate and comprehensive legal aid arrangements throughout Australia. This is a problem that will be within the knowledge of every honourable Senator who will on many occasions have had to inform citizens seeking assistance with their legal problems that there is nothing he can do for them; that they will need to go and see a private solicitor… The ultimate object of the Government is that legal aid be readily and equally available to citizens everywhere in Australia and that aid be extended for advice and assistance of litigation as well as for litigation in all legal categories and in all courts."[14]

85. The progressive reduction in real funding to the legal assistance sector over the last 17 years, notwithstanding growing demand for those services over the same period, has meant that fewer and fewer grants of legal assistance are made each year. This seriously undermines access to justice and increases the number of unrepresented litigants, creating a further drain on the courts.

86. It is worth remarking on the fact that adequately funding legal aid is actually an investment that produces strong returns. A report produced by PricewaterhouseCoopers in 2009 demonstrated that for every dollar invested in legal aid, there are downstream savings for the justice system and broader community of $1.60 - $2.25.[15] Similarly, a report produced for the National association of Community Legal Centres found that investments in community legal services yield savings of 18 times the value of the investment in terms of savings.[16]

87. As stated in the Law Council's submission to the Senate Legal and Constitutional Affairs Committee's *Inquiry into Access to Justice*:

> "An adequately funded legal assistance sector clearly provides a wide range of social justice benefits. On a broad level, the public's view that the legal system is fair and equitable supports the legitimacy of the legal system as a whole. Equality before the law is meaningless if there are barriers that prevent people from

[14] Senator Lionel Murphy QC, Senate Hansard, 13 December 1973.
[15] National Legal Aid (prepared by PricewaterhouseCoopers), Economic value of legal aid: Analysis in relation to Commonwealth funded matters with a focus on family law (2009), p 25, available at: http://www.nla.aust.net.au/res/File/Economic%20Value%20of%20Legal%20Aid%20-%20Final%20report%20-%206%20Nov%202009.pdf
[16] Judith Stubbs & Assoc., June 2012, *Economic Cost-Benefit Analysis of Community Legal Centres,* National Association of Community Legal Centres.

enforcing their rights. The legal assistance sector is therefore critical in maintaining the integrity of the justice system and upholding the rule of law."[17]

88. Accordingly, there are very powerful arguments in favour of adequately funding the legal assistance sector and the federal courts. The Law Council submits that the current funding model for both should be overhauled; and that neither funding model should be linked to revenue raised through imposition of court fees.

(g) Other relevant matters

Forum shopping and impact on State and Territory courts

89. The Law Council is advised that the size of recent increases in filing fees in the federal courts have stunned legal practitioners, clients (including government departments, major, mid-sized and minor corporations and average individual court users), as well as the courts themselves. The Law Council is also advised that court registry staff and judicial officers have been receiving regular complaints from legal practitioners and litigants about the fee increases.

90. Anecdotally, the Law Council understands that the fee increases are such that many litigants are now opting, where possible, to file in State courts. A table illustrating the significant differences in court fees in the federal courts, compared with state and territory courts, is appended to this submission at **Attachment C.** The Federal Court is now far and away the most expensive jurisdiction in the country in which to litigate. The Law Council has not had opportunity to examine overseas jurisdictions, however the Law Council notes that the filing fee in the United States of America Federal Court (in the same trial jurisdiction as the Federal Court of Australia) is US$350 and they do not appear to charge hearing fees.

91. The Law Council is advised forum shopping is particularly prevalent in relation to insolvency and winding-up matters. However, it is not possible for those with matters arising under the exclusive jurisdiction of the federal courts, including family law matters, bankruptcy, etc.

92. Forum shopping is likely to increase until the State and Territory Governments raise their fees to the staggering levels of the federal courts. The Law Council submits this will result in courts right across the country becoming inaccessible to most Australians.

Loss of specialist expertise in the federal courts

93. The Law Council submits that the fee increase may give rise to the perception that the Federal Court and Federal Magistrates Court are prepared to forfeit their concurrent jurisdiction over certain matters to the State courts. It may also create perceptions that the Court has determined that it is more appropriate for the State courts to bear the cost burden of handling such proceedings. Both of these possible perceptions would be highly undesirable.

94. If Federal Court work was ultimately lost to the State courts, there may be a degradation of the Court's commercial expertise and experience, which could in turn undermine the community's confidence in the Court in respect of commercial causes.

[17] Law Council of Australia, submission to the Senate Legal and Constitutional Affairs Committee *Inquiry into Access to Justice*, page 5. Available at: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=7E2D7CEB-1E4F-17FA-D28C-1DAEBEB362B8&siteName=lca

Instead, the focus of the Court's work may be in the areas of migration, employment and industrial matters. This, in turn, could affect the capacity of the Court to attract judicial candidates with strong reputations in the commercial sphere.

95. As noted earlier in this submission, the Law Council is advised that litigants are already opting for the State courts in matters where there is concurrent jurisdiction.

The Court's legislative mandate

96. The Court has a legislative obligation under s37M of the *Federal Court Act 1976* (Cth) to facilitate the just resolution of disputes according to law, as quickly, inexpensively and efficiently as possible, including through:

- the efficient use of the judicial and administrative resources available for the purposes of the Court;
- the efficient disposal of the Court's overall caseload;
- the disposal of all proceedings in a timely manner; and
- the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

97. The imposition of the recent fee increases may potentially compromise the Court's capacity to discharge its legislative mandate by significantly contributing to the expense of litigation in a manner which is disproportionate to the importance and complexity of the matters in dispute between the parties.

Conclusion

98. The Law Council remains greatly concerned by the significant and unjustified fee increases in the federal courts. The Law Council welcomes this Senate inquiry and would be pleased to provide further evidence which may assist to demonstrate the deleterious impact recent court fee changes have had, and will have, on the Australian justice system.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B - Table of 1 July 2010 and 1 January 2013 federal courts fee changes

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
High Court[18]	101	Application for an order to show cause in relation to a writ of certiorari, mandamus, habeas corpus etc.	(a) $2,422 for corporations (b) $1,211 in any other case	(a) $5,148 for corporations (b) $2,078 in any other case	(a) $11,350 for a publically listed company. (b) $7,565 for a corporation (c) $2,505 for an individual/other (d) $835 financial hardship
	105	Application initiating a proceeding	(a) $2,422 for corporations (b) $1,211 in any other case	(a) $5,148 for corporations (b) $2,078 in any other case	(a) $11,350 for a publically listed company. (b) $7,565 for a corporation (c) $2,505 for an individual/other (d) $835 financial hardship
	107	Criminal notice of appeal	$445	$570	(a) $600 for a publically listed company. (b) $600 for a corporation (c) $600 for an individual/other

[18] High Court of Australia (Fees) Regulation 2012 (Cth). Fee increases under regulation commenced January 2013.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
					(d) $200 financial hardship
Federal Court	1 a–d	Filing of a document by which a proceeding in the Court is commenced.	$1,453 for corporation $606 in any other case	$2,142 for a corporation $894 in any other case	$4,720 for a publically listed company. $3,145 for a corporation. $1,080 in any other case.
	5	Filing of an affidavit or other document originating application for leave or special leave to appeal	$966 for a corporation $483 in any other case	2,134 for a corporation 1,203 in any other case	$4,705 for a publically listed company. $3,135 for a corporation. $1,450 in any other case.
	6	Filing notice of appeal from judgment of another court	(a) $2,422 for corporations (b) $1,211 in any other case	(a) $5,334 for corporations (b) $3,007 in any other case	(a) $11,760 for a publically listed company (b) $7,840.00 for a corporation (c) $3,630.00 in any other case
	7	Filing notice of appeal from decision of the AAT	(a) $2,422 for corporations (b) $1,211 in any other case	(a) $5,334 for corporations (b) $3,007 in any other case	(a) $11,760 for a publically listed company (b) $7,840 for a corporation (c) $3,630 in any other case

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
	8	Filing notice of appeal in relation to which a fee has been paid under item 5	(a) $1,456 for corporations (b) $728 in any other case	(a) $3,200 for corporations (b) $1,804 in any other case	(a) $7,060 for a publically listed company (b) $4,705 for a corporation (c) $2,180 in any other case
	9	Filing of application to review decision of registrar	(a) $592 for a corporation (b) $296 in any other case	(a) $873 for a corporation (b) $436 in any other case	(a) $1,920 for a publically listed company (b) $1,280 for a corporation (c) $525 in any other case
	10	Filing of a notice of motion[19] In any other case	$657 for a corporation $223 in any other case	(a) $446 for a corporation $328 in any other case	$1,450 for a publically listed company $965 for a corporation $395 in any other case
	11	Filing of an application for an order for substituted service of a bankruptcy notice	(a) $298 for corporation (b) $149 in any other case	(a) $438 for a corporation (b) $220 in any other case	(a) $970 for a publically listed company (b) $645 for a corporation (c) $265 in any other case

[19] Pursuant to the *Federal Court Rules 2011*, notices of motion have been replaced with interlocutory applications.

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
	12	Filing of a cross claim	$1,453 for corporation $606 in any other case	(a) $2,142 for corporation (b) $894 in any other case	(a) $4,720 for a publically listed company (b) $3,145 for a corporation (c) $1,080 in any other case
	13	Setting down for a hearing	$2,422 for corporation (b) $1,211 in any other case	(a)$3,569 for corporation $1,786 in any other case	$7,870 for a publically listed company $5,245 for a corporation $2,155 in any other case
	14	For the hearing of an application under ss35A (5) of the Act	$484 for corporation (b) $242 in any other case	$713 for corporation $356 in any other case	$1,920 for a publically listed company $1,280 for a corporation $525 in any other case
	15	For the hearing of an application (for each day – or part of a day other than the first hearing day)	$ 969 for a corporation $483 in any other case	$,1428 for a corporation $712 in any other case	$3,150 for a publically listed company $2,100 for a corporation $860 in any other case

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
	18	For the seizure & sale of goods by an officer of the court in the execution of the process of the court	$ 527	$777	$940 for a publically listed company $940 for a corporation $940 in any other case
	19	For issuing a subpoena to produce or give evidence	$49	$73	$270 for a publically listed company $180 for a corporation $90 in any other case
	20	For taxation of a bill of costs in which the amount claimed in the bill is $10,000 or less	$576	$848	$1,025 for a publically listed company $1,025 for a corporation $1,025 in any other case
	21	For taxation of a bill of costs in which the amount claimed in the bill is $10,000 or more	$1.381	$2,036	$3,500 for a publically listed company $3,500 for a corporation $3,500 in any other case
	22	For mediation by a court officer – for the first attendance at the mediation	$606 for a corporation $303 in any other case	$894 for a corporation $446 in any other case	$2,460 for a publically listed company $1,640 for a corporation $700 in any other case

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
	105	Filing of a Bill of Costs	Nil	Nil	$350 (no separate fee for corporation or publically listed companies)
	115	Filing of an urgent application without notice, by a person (the prospective applicant) who intends to commence a proceeding, for any of the following: if the proceeding relates to property — an order: for the detention, custody, preservation or inspection of property; or to authorise a person to enter land, or do an act or thing, to give effect to the order; if the proceeding relates to the right of the prospective	Nil	Nil	(a) 8,250.00 for a publically listed company (b) 5,500.00 for a corporation (C) 2,000.00 in any other case.

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
		applicant to an amount in a fund — an order that the amount in the fund be paid into the Federal Court or otherwise secured			
	115A	Filing of an application, including an interlocutory application, for an order: restraining a person from removing, disposing of, dealing with , or diminishing the value of, assets; or for the purposes of preventing the frustration or inhibition of the Court's process by seeking to meet a danger that a judgment or prospective judgment of the Court will be wholly or partly	Nil	Nil	(a) 8,250.00 for a publically listed company (b) 5,500.00 for a corporation (c) 2,000.00 in any other case.

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
		unsatisfied			
	115B	Filing of an application, including an interlocutory application, for an order for the purpose of securing or preserving evidence and requiring a person to permit other persons to enter premises for the purpose of securing the preservation of evidence that is, or may be, relevant to an issue in a proceeding or anticipated proceeding	Nil	Nil	(a) 8,250.00 for a publically listed company (b) 5,500.00 for a corporation (c) 2,000.00 in any other case.
	121	For the hearing of an application (including a cross-claim) other than: an application mentioned in item 117; or an issue or question	Nil	Nil	(a) 16,765.00 for a publically listed company (b) 11,175.00 for a corporation (C) 4,315.00 in any other case.

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
		in such an application; or an appeal (including a cross-appeal); for the 15th and subsequent days, or part of the 15th and subsequent days			
	122	For the hearing for an examination by a Registrar of the Federal Court under: section 50 or 81 of the *Bankruptcy Act 1966*; or Division 1 of Part 5.9 of the *Corporations Act 2001*; for each day or part of a day	Nil	Nil	(a) 3,150.00 for a publically listed company (b) 2,100 for a corporation (c) 860.00 in any other case.
	126	For issuing a subpoena	Nil	Nil	(a) 270.00 for a publically listed company (b) 180.00 for a corporation

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
					(c) 860.00 in any other case.
	127	For issuing a summons to a person, under section 50 or 81 of the Bankruptcy Act 1966, to attend examination about a debtor's examinable affairs	Nil	Nil	(a) 600.00 for a publically listed company (b) 400.00 for a corporation (C) 200.00 in any other case.
	129	For taxation of a bill of costs in which the amount claimed in the bill is more than $10,000 and no more than $100,000	Nil	Nil	(a) 3,500.00 for a publically listed company (b) 3,500.00 for a corporation (c) 3,500.00 in any other case.
	130	For taxation of a bill of costs in which the amount claimed in the bill is more than $100,000 and no more than $500,000	Nil	Nil	(a) 4,000.00 for a publically listed company (b) 4,000.00 for a corporation (c) 4,000.00 in any other case
	131	For taxation of a bill of costs in which the amount claimed in the bill is more than	Nil	Nil	(a) 4,500.00 for a publically listed company

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
		$500,000			(b) 4,500.00 for a corporation (c) 4,500.00 in any other case
Family Court		Application for consent orders	Nil	$80	$145
		Application for a declaration as to validity	$682	$777	$1135
		Initiating application (Family Law)	$155	$243	$305 (family law) $500 (children & financial orders)
		Response to initiating application	$155	$176	$305
		Hearing fee for each hearing day (defended matters)	$534	$608	$765 (for each hearing day, excluding the first hearing day)
		Notice of appeal under sect. 96 from a decree of a court of summary jurisdiction	$534	$608	$765
		Notice of appeal to the Full Court incl.	$840	$956	$1205

Court	Item	Document or service	Fee before 1 July 2010	Fee from 1 July 2010	Fee from 1 Jan 2013
		Appeal from the Fed. Mags. Court			
Federal Magistrates Court	2A	Application for divorce	$432	$550	$800
		Application for divorce (reduced fee)	Nil	$60 (introduced 1/7/12 with annual inflationary adjustment)	$265
	3	Initiating application (Family Law)	$155	$243	$305 (family law) $500 (children & financial orders)
	7	Response	$155	$176	$305
	5A	Setting down for hearing fee (defended matters)	$390	$444	$560
		Daily hearing fee (for each hearing day excluding the first hearing day)	Nil	$444	$560

Attachment C – comparison of fees across jurisdictions

	NSW Supreme Court	Victorian Supreme Court	Queensland Supreme Court	Federal Court[20]
Originating process	Corporation - $2737 Other - $999	Commercial list - $3,668.80 Other - $938.50	Commercial - $2215 Other - $925	PLC - $4720 Corporation - $3145 Other - $1080
Commence corporations matter (e.g. winding up)	Corporation - $2,737 Other - $999	$938.50	Commercial - $2215 Other - $925	PLC - $4,720 Corporation - $3,145 Other - $1,080
Interlocutory application (corporations matter)	Corporation - $838 Other - $366	$342.10		PLC - $1,450 Corporation - $965 Other - $395
Setting -down Fees (includes 1st day of	Corporation - $4560	$1,108.90	Corporations - $3695.00 (under the *Corporations Act* or *Admiralty Act 1988 (Cth));* $2590 (in any other	PLC - $7870

[20] *Federal Court and Federal Magistrates Court Regulation 2012* (Cth) (from 1 January 2013)

hearing)	Other - $1995		proceedings) Other - $1850.00 (under the *Corporations Act* or *Admiralty Act 1988 (Cth));* $1295 (in any other proceedings	Corporation - $5245 Other - $2155
Hearing Fees (2nd to 4th day)	Corporation - $1824 Other - $795	$576.40	Corporations - $1480 (under the *Corporations Act* or *Admiralty Act 1988 (Cth));* $1035 (in any other proceedings) Other - $735 (under the *Corporations Act* or *Admiralty Act 1988 (Cth));* $520(in any other proceedings)	PLC - $3150 Corporation - $2100 Other - $860
Hearing fee per day (days 5, 6, 7, 8 and 9)	Corporation - $3,168 Other - $1,278	$962.30	Corporations - $2660 (under the *Corporations Act* or *Admiralty Act 1988 (Cth));* $1225 (in any other proceedings) Other - $1865 (under the *Corporations Act* or *Admiralty Act 1988 (Cth));* $930 (in any other proceedings)	PLC - $5,665 Corporation - $3,775 Other - $1,430
Hearing fee per day (days 10 and subsequent)	Corporation - $6,252	$1,607.60	Corporations - $5245 (under the *Corporations Act* or *Admiralty Act 1988 (Cth));* $2465 (in any other	PLC - $11,175

	Other - $2,572		proceedings) Other - $3625 (under the *Corporations Act* or *Admiralty Act 1988 (Cth));* $1810 (in any other proceedings)	Corporation - $7,450 Other - $2,875
Mediation by Court official	Nil or not applicable	$77 per hour (eg: 7 hours = $539)	Nil or not applicable	PLC - $2,460 Corporation - $1,640 Other - $700
Commence appeal (without application for leave)	Corporation - $6,743 Other - $3,325	$3,226.50	Corporation - $2330 Other - $1165	PLC - $11,760 Corporation - $7,840 Other - $3,630