

Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the impact of federal court fee increases since 2010

Australian Government Attorney-General's Department submission

A. INTRODUCTION

1. The Attorney-General's Department welcomes the opportunity to provide this submission to the Senate Standing Committee on Legal and Constitutional Affairs as part of the Committee's inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia.

2. The Department understands that the Committee's inquiry is considering current fees across all the federal courts. There have been two sets of fee changes in the federal courts since 2010 – in July and November 2010, and on 1 January 2013. These changes apply mainly to the civil law jurisdictions of the federal courts.¹

3. The Australian Government has adopted the view that 'access to justice' is a concept broader than the ability of individuals to enforce their legal rights in the courts, and extends to non-court dispute resolution processes and 'everyday justice' in conflict prevention and resolution. The *Strategic Framework for Access to Justice in the Federal Civil Justice System* (the Strategic Framework), adopted by Government in 2009, promotes a holistic view of the federal civil justice system.² This view recognises that access to justice is about ensuring that people are able to resolve their disputes through the least costly, quickest and most appropriate means.

4. Courts are an integral part of the justice system, and play a critical role in deciding the most complex and entrenched disputes and those requiring an adjudicated statement of law.

5. Taking a whole of system perspective, the Department does not consider that federal court fee increases since 2010 impede access to justice in Australia. Courts are not, and should not be, the first port of call for all disputes. Court fees have long been part of the civil justice system in all Australian jurisdictions. Federal court fees serve a number of important roles, including:

- recognising that courts are a limited and expensive public resource by ensuring some

¹ Fee increases in 2013 did not apply to criminal law matters in the High Court of Australia.

² Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) (the Access to Justice Taskforce Report). This report was carried out by the Access to Justice Taskforce within the Attorney-General's Department and publicly released in September 2009.

element of cost recovery

- sending pricing signals to ensure appropriate use of the courts, and
- enabling equitable access to the court system.

6. Additional revenue as a result of court fee changes since 2010 has allowed injection of funds into sectors of the justice system (including legal assistance and the courts) to enhance access to justice. Recognising the variety of users in each federal court, court fees have been structured in an appropriately targeted way to enable equitable access to the justice system. For example, in 2013, changes to court fees reinstated access to justice safeguards for disadvantaged litigants (such as fee exemptions).

7. This submission outlines further the Government's policy on access to justice and the role of the courts and court fees. While not detailing every change to fees since 2010, this submission discusses key changes to the court fees framework in light of access to justice issues.

B. WHAT IS ACCESS TO JUSTICE?

8. The Australian Government has adopted the Strategic Framework to guide future civil justice reforms, which comprises five key principles (accessibility, appropriateness, equity, efficiency and effectiveness) and specific methodologies for achieving these principles in practice. Access to justice is defined broadly to extend beyond access to courts and lawyers, and includes conflict prevention and resolution. The Strategic Framework promotes a more holistic view of the federal civil justice system over the following three tiers:

- everyday justice — avoiding conflict and managing disputes
- informal justice — resolving disputes with the assistance of a third party adviser or facilitator, and
- formal justice — resolving disputes through the courts and tribunals, often with a lawyer.³

9. This broad approach reflects that people currently resolve most disputes without recourse to any formal justice institutions, and often without access to professional assistance.⁴ This approach encourages a whole-of-system approach to justice instead of focusing only on formal institutions, and emphasises the importance of delivering fair outcomes as efficiently as possible, and resolving disputes early and at the most appropriate level.

10. The Strategic Framework has formed the basis of numerous Australian Government access to justice initiatives aimed at reducing barriers and improving accessibility by increasing access to education, information and support services across the federal civil justice system. Many of these initiatives target earlier and more effective dispute resolution

³ Access to Justice Taskforce Report, pages 4-5.

⁴ The Access to Justice Taskforce Report found that most disputes are resolved without recourse to formal legal institutions or dispute resolution mechanisms: Access to Justice Taskforce Report, page 3.

by building the resilience and capability of individuals to resolve their own legal issues without resorting to litigation, including legislation encouraging people to take genuine steps to resolve their disputes outside of courts.

11. The Government is also considering access to justice issues more broadly in its longer term project aimed at building an evidence base for the civil justice system to guide future policy and reform.

C. ACCESS TO JUSTICE THROUGH THE COURTS

Role of the courts in the justice system

12. The courts are a cornerstone of the justice system, reflecting their core role in the maintenance of the rule of law and their status as one of the three constitutional arms of government. The role of the courts in the federal civil justice system is heavily informed by their constitutional role (under Chapter III of the Commonwealth *Constitution*) as the institutions empowered to exercise the judicial power of the Commonwealth. Only courts can declare and enforce, without consent, people's existing rights and liabilities or existing legal status.⁵

13. As the final arbiter in the justice system, the courts properly decide the most complex and entrenched disputes that are not capable of resolution by other means or where the parties need or desire an adjudicated statement of the law. Individual federal courts have the following roles and jurisdiction:

- *High Court of Australia* – the final court of appeal in Australia for civil and criminal matters in all Australian courts, and exercises original jurisdiction in disputes about the meaning of the *Constitution*
- *Federal Court of Australia* – hears federal matters on a range of different subject matter including bankruptcy, corporations, industrial relations, native title, taxation and trade practices laws, and hears appeals from decisions (other than family law decisions) of the Federal Circuit Court of Australia
- *Family Court of Australia* – Australia's specialist court dealing with family disputes, and hears appeals from decisions in family law matters of the Federal Circuit Court of Australia, and
- *Federal Circuit Court of Australia*⁶ – hears family law matters and less complex disputes in federal matters under administrative, bankruptcy, industrial relations, migration and trade practices laws.

14. Despite the small proportion of matters that reach court, the activities of the courts

⁵ *The Queen v Davison* (1954) 90 CLR 353, 368–369; *Re Cram*; *Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 148–9; *Harris v Caladine* (1991) 172 CLR 84, 147; *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547, 15; *Nicholas v The Queen* (1998) 193 CLR 173, 70; *Attorney-General (Cth) v Alinta* (2008) 233 CLR 542, 153.

⁶ The Federal Magistrates Court was renamed as the Federal Circuit Court of Australia under the *Federal Circuit Court of Australia Legislation Amendment Act 2012*, which commenced on 12 April 2013.

affect all dispute resolution by providing a background of norms and procedures against which negotiation and regulation takes place.⁷

Access to the courts

15. An important issue for access to justice is ensuring that disputes are resolved at the earliest opportunity and at a cost proportionate to the issues in dispute.⁸ For disputes requiring resolution by a court, the costs of proceedings to an individual is obviously a significant access to justice issue.

16. The largest costs in litigation are not court fees, but legal fees.⁹ Court and tribunal fees are only a small proportion of the actual costs of using the court or tribunal where legal representation is involved.¹⁰ Legal costs to an individual will vary according to the service used and complexity of issues. However, in an example of a family law financial proceeding in the Federal Circuit Court (see **Attachment A**), a litigant may incur the following costs in the course of proceedings:

- court fees – \$2,130, and
- legal costs – at least \$16,753.

17. Given these proportions, for many people, increases to court fees will not necessarily impede access to justice relative to the total cost of litigation.

Importance of legal assistance

18. Legal assistance is a vital component of the Government's commitment to access to justice, as it helps the most disadvantaged members of the community. Services provide the major safety net for the most disadvantaged Australians with legal problems. The client group consists of vulnerable people with complex legal issues. Typically, clients have clusters of problems and needs that require high levels of case management and intervention.

19. The Australian Government funds four legal assistance programs to provide disadvantaged people with access to a range of legal services including information, community legal education, minor advice and assistance, advocacy, dispute resolution, duty lawyer services and representation. The four legal assistance programs are:

- legal aid
- community legal services
- Aboriginal and Torres Strait Islander Legal Services (ATSILS), and
- Family Violence Prevention Legal Services (FVPLS).

20. Further detail about these programs is **Attachment B**.

⁷ Access to Justice Taskforce Report, page 100.

⁸ Access to Justice Taskforce Report, page 121.

⁹ Access to Justice Taskforce Report, page 121.

¹⁰ Access to Justice Taskforce Report, page 121.

21. Legal assistance funding in Australia is a joint Commonwealth/State responsibility. The Commonwealth's share of funding across all legal assistance programs is approximately 51%. Total funding for legal assistance services over the four years from 2012-13 to 2015-16 will be \$1.354 billion.

22. For the eight legal aid commissions, Commonwealth funding for 2012-13 is \$212.609 million. The Commonwealth almost entirely funds the ATSILS. Funding for ATSILS in 2012-13 is \$68.099 million. Of nearly 200 community legal centres (CLCs) across Australia, the Commonwealth funds 138. Commonwealth funding for 2012-13 for CLCs is \$33.510 million. In 2012-13, the Commonwealth will provide funding of \$19.09 million to 14 FVPLS organisations (in all States and Territories except Tasmania and ACT). On 31 January 2013, the Government announced \$8 million in Australian Government funding to support families experiencing separation. Of this, \$2.56 million was provided to ATSILS and \$1.2 million to CLCs to deliver family law services to Aboriginal and Torres Strait Islander clients.

D. ROLE OF COURT FEES IN THE JUSTICE SYSTEM

23. Court fees are often thought of as simply a cost to individuals seeking resolution of their dispute through the courts. However, court fees play a much more complex role in ensuring that resources across the justice system are appropriately distributed.

Resourcing of the courts

24. The court system is the most significant cost component of the justice system. In 2011-12, the Commonwealth spent \$274 million on the federal courts.¹¹ This funding is used for a range of components which are essential to the operation of courts, including:

- accommodation (court buildings) and furnishings
- running court buildings (utilities)
- salaries and expenses for court staff and the judiciary
- library reference materials
- computer, video conferencing and telephone systems
- new and ongoing maintenance
- stationery, office equipment and resources
- corporate services, such as payroll, human resources and financial services
- travel to conduct circuit courts in rural and regional areas, and
- travel to hear appeals.

25. The cost of the court system is high as governments seek to ensure extensive reach of court services to ensure equitable access to formal justice for all Australians, to the extent

¹¹ See High Court of Australia, *Annual Report 2011-2012* (Commonwealth of Australia 2012) page 51; Federal Court of Australia, *Annual Report 2011-2012* (Commonwealth of Australia 2012) page 73; Family Court of Australia, *Annual Report 2011-2012* (Commonwealth of Australia 2012) page 151; Federal Magistrates Court of Australia, *Annual Report 2011-12* (Commonwealth of Australia 2012) page 115.

possible. However, courts will always be a limited public resource, as they cannot, and should not, deal with every dispute which may arise between people. The proper role of the courts is to solve the most intractable of disputes. Courts should not be the first port of call for all dispute resolution, and limited court resources should be directed mainly to those disputes which require court resolution.

Cost recovery

26. Given that courts are a limited, expensive public resource to operate, it is appropriate for Government to seek recovery from users of some of the costs of their operation. Almost every developed country levies some charge for use of its courts.¹² While there is clear public benefit in courts as state sponsored machinery for dispute resolution and enforcing rights, specific civil litigation functions of a court are performed at the request of parties who have immediate and almost exclusive interest in the conduct and outcome of litigation. This makes it important that court fees strike appropriate balance between access to justice and user pays principles. It is reasonable to require those who use courts regularly for private benefit and have capacity to pay for court services to contribute to the cost of those services.

27. The federal courts do not operate a direct cost recovery model. Court fees are collected by each federal court on behalf of the Commonwealth. The federal courts are funded for their operations through annual appropriations. In the Australian court system, the term ‘cost recovery’ is generally used to describe the level of court fees divided by the level of funding provided to the court.¹³ This enables some comparison to be made of cost recovery levels in other jurisdictions.

Cost recovery levels in the courts

28. In the federal system, the total amount of court fees collected remains significantly less than the cost to Government of providing court services:

- In the 2009-10 financial year, the proportion of court fees to court funding as a total for all Commonwealth Courts was 10%.
- In 2010-11, this proportion increased to 16.5%.
- Even after the 2013 changes, it is estimated for future years that the Government will only recover approximately 30% of the total costs of operating the courts.

29. While approaches to cost recovery vary across jurisdictions, the level of cost recovery in federal courts is comparable to other Australian jurisdictions and New Zealand, and is substantially less than cost recovery levels in the United Kingdom (full cost recovery, at 80% taking into account remissions - the equivalent of fee exemptions). **Attachment C** provides further detail about cost recovery in other jurisdictions.

¹² Christopher Hodges, Stefan Vogenauer and Magdalena Tulibacka, *The Costs and Funding of Litigation: A Comparative Perspective* (Hart Publishing 2010), page 13.

¹³ Steering Committee for the Review of Government Services Provision, *Report on Government Services 2013* (Productivity Commission 2013) page 7.71.

Pricing signals

30. Court fees can act as pricing signals to influence litigant behaviour, and shape the kinds of matters which come before the courts and the resolution of those disputes. Because of the varied roles and jurisdiction of the federal courts, there are a range of court users with differing interests. A tailored approach to court fees structures, as well as fee levels, is necessary to indicate signals about dispute resolution options to different people.

31. Court fee structures should be directed toward sending pricing signals to encourage appropriate use of the courts. This reflects that the courts should not be the first port of call for dispute resolution. Fee arrangements should seek to ensure that meritorious litigants, while making an appropriate contribution, are not unnecessarily deterred from seeking redress through the courts. Court fees can also encourage early resolution of disputes where appropriate (such as providing incentives to settle), assist litigants to focus on resolution throughout the litigation process, prevent proceedings being drawn out by unnecessary arguments, and ensure that disputants are conscious of the cost of the service they receive.

Equitable access to the court system

32. Enabling equitable access to the court system is a key consideration in structuring court fees. Under principles of equity, the justice system should be fair and accessible for all, including those facing financial and other disadvantage. For a well-functioning justice system, access to the system should not be dependent on capacity to pay and vulnerable litigants should not be disadvantaged.

33. Those litigants who use the courts frequently or impose significant burdens on the courts, and have capacity to pay for those services, should make a greater contribution to the cost of those services. In setting court fees, it is appropriate that fee structures target particular issues such as:

- litigants with capacity to pay
- litigation that is wholly or primarily for private benefit, and
- resource intensive processes.

34. A court fees regime should also be able to be administered in as practical and efficient manner as possible, be clear so that litigants understand the fees structure, and reflect the individual role of each federal court within the justice system.

35. These considerations appropriately inform how court fees are set, and should be taken into account in evaluating the impact of court fees on access to justice from a whole of system perspective. Further discussion about how these issues have informed the current court fees structure is below.

E. CHANGES TO COURT FEES SINCE 2010 AND ACCESS TO JUSTICE

Overview of court fee changes since 2010

36. Since 2010 there have been two main reforms to the structure of federal courts fees ('2010 changes' and '2013 changes').

Changes in 2010

37. The 2010 changes involved reforms to federal court and Administrative Appeals Tribunal (AAT) fees as part of a suite of measures forming an access to justice framework in the 2010-11 Budget.

38. On 1 July 2010, the first stage of the 2010 changes implemented a range of increases to existing fees (approximately 8%) in the federal courts and the AAT, and included:

- staged hearing fees in the Federal Court so that higher fees are payable in longer cases
- changes from one-off hearing fees in the Family Court and the Federal Circuit Court to a daily hearing fee structure, and
- a new one-off fee of \$80 for filing a consent order in the Family Court.

39. On 1 November 2010, a flat fee of \$60 in family law matters and \$100 in other matters was introduced for litigants who previously had been eligible for fee exemptions (such as recipients of Centrelink benefits or legal assistance).

40. The revenue from the changes to fees in the courts and the AAT provided injection of funds for legal assistance programs over four years.

Changes in 2013

41. As part of the Government's court reform package, the 2012-13 Budget included increases to federal court fees to ensure there is a greater and more appropriate contribution by court users to the costs of running the courts.

42. The court fees package as part of the 2012-13 Budget was implemented in fee regulations¹⁴ which commenced on 1 January 2013. Information provided and issues raised by stakeholders to the Department as part of the review of the 2010 changes, including data provided by the federal courts, were considered in development of the new court fee framework. Statistical data received from the courts about the 2010 changes showed no clear changes to filing levels coinciding with the fee changes. Overall, the data did not allow any conclusive observations to be made other than there were no significant changes to the numbers of filings in the relevant recording period.¹⁵ The 2013 changes addressed issues beyond those arising from the 2010 changes and incorporated a number of stakeholder

¹⁴ *High Court of Australia (Fees) Regulations 2012, Federal Court and Federal Circuit Court Regulation 2012 and Family Law (Fees) Regulation 2012*

¹⁵ July 2010 to May 2011

suggestions about fees regulations generally. The federal courts were closely consulted in development of the fees package.

43. Key 2013 changes included:

- reinstatement of fee exemptions
- general increases to court fees of 40% for corporations fees; 15% for other fees in general federal law; and 20% for family law fees
- new fees for publicly listed corporations (150% of the corporations rate) and requiring public entities to pay the corporations fee rate
- making incorporated small businesses and unincorporated not-for-profit associations eligible for the fees payable by individuals instead of corporations, and
- introduction of new fees which target resource intensive matters, including fees for examinations in bankruptcy and winding up.

44. The changes also consolidated and harmonised the drafting of the fees regulations, by creating a single fees regulation for the Federal Court and general federal law jurisdiction of the Federal Circuit Court, and a separate fees regulation for family law matters.

45. The 2013 changes will provide additional revenue of \$102.4 million over four years, with accompanying funding of \$38 million over four years reinjected into the courts to maintain delivery of key services, including regional circuit work.

Promoting efficiency and improving administration of court fees

46. In the circumstances of the prevailing tight fiscal environment since 2008, court fees policy has been geared to ensuring our justice system functions as efficiently and effectively as possible, so that courts can provide the best service possible within budgetary constraints faced by all arms of government.

47. Each increase to federal court fees since 2010 has provided an additional injection of funds into the federal justice system which benefit both the court and court users.

48. Court fee changes have focussed on the efficient use of the courts' resources. Some services continue to be highly resource intensive for the courts, and appropriate court fees can better reflect the cost of providing those services for litigants. Changes to court fees aim to assist to reduce the length of matters and make available court resources for other matters. For example, higher fees for longer hearings (as restructured both in 2010 and 2013) are directed to reducing lengthy hearings and allowing other proceedings to be heard.

49. The 2013 fee changes substantially updated the drafting of fees regulations to assist in making them more easily accessible and as simple as possible to administer to ensure greater efficiency. The reintroduction of fee exemptions and rounding fees to the nearest \$5 simplifies cash handling processes for the courts and litigants.

Fees for court users

50. As outlined above, ensuring that court users make an appropriate contribution to the cost of operation of the courts recognises that different categories of court users will have differing interests in litigation, as well as different capacities to pay. This should be taken into account when setting court fees.

51. The below discusses changes to court fees which are specific to categories of court users.

Corporations, publicly listed companies and government agencies

52. Under the 2013 changes, court fees have been structured to better reflect the capacity of different litigants to pay, including through higher fees for publicly listed companies, corporations and Commonwealth agencies. Higher fees for these categories of court users are based on the following considerations:

- Corporations generally have resources to pay court fees and it is appropriate that litigation costs be factored into the cost of doing business.
- Publicly listed companies are highly likely to have the resources to engage in litigation and regularly engage in the most complex, resource intensive litigation.
- Public entities have the capacity to pay court fees, and should use their resources in an effective and economical manner.

53. In targeting these groups, the fee structures encourage ongoing consideration of whether and when litigation is necessary.

54. Through staged hearing fees, the fee reforms target lengthy protracted actions. These actions often involve corporate and commercial entities. New fees in 2013 target proceedings that run 15 days or longer and which represent the most complex and time-consuming of all Federal Court proceedings.

Small business

55. In structuring fees targeting the capacity of litigants to pay fees, the 2013 fee reforms recognised that incorporated small businesses are more akin to individuals in their ability to pay for litigation. Although fees for non-corporations have increased by 15%, incorporated small businesses will generally pay a fee that is lower than the fee they paid under the previous fees structure. For example, prior to 1 January 2013 an incorporated small business would have paid the corporations rate of \$2248 for commencing a proceeding in the Federal Court but under the current fee structure will only pay a fee of \$1080 (for individuals).

Individuals

56. While there is a general need for litigants to contribute to the cost of court services,

the fee structure provides a lower fee for non-corporations which recognises that the capacity of individuals to pay fees is lower than for other categories of court user (such as corporations). While fee increases in 2010 were 8% across most fee categories, fee increases were differentiated in 2013 (generally 15% for individuals compared to 40% for corporations).

57. In recognising individual matters which have a greater public interest element, the fee regime retains lower application fees for human rights matters. The fee regime also clarifies there are lower fees for small claims proceedings in the Federal Circuit Court, in order to reflect that a small claims procedure should incur limited litigation costs.

58. Individuals may access the federal courts across a range of jurisdictions, including family law and bankruptcy. This means that individuals access the courts for different reasons. The 2013 fee changes have particularly targeted matters that are undertaken wholly or primarily for private benefit, instead of those with higher public interest, while seeking to ensure that meritorious litigants are not unnecessarily deterred from seeking redress through the courts. For example, reforms to bankruptcy matters reflect that these proceedings are generally brought for debt recovery. In 2010, fees for bankruptcy applications increased to \$828 for both courts, from \$785 in the Federal Court and from \$374 in the Federal Circuit Court. In 2013, although bankruptcy fees were increased at the same rate as other matters, new fees were introduced for examinations before a registrar under the *Bankruptcy Act 1966*. This aimed to reflect the resource intensive nature of these processes for the court which is comparable to hearings.

59. A whole of system perspective recognises that judicial determination is only one way of resolving a dispute. Alternative dispute resolution processes which may be available, prior to going to court, include negotiation, mediation, and conciliation (in family law). In some cases, parties may be ordered by the court to attend these services. In the case of mediation and conciliation, this can be provided in-house by a court registrar or through a private mediator.

60. Increased fees for mediation in the Federal Court and Federal Circuit Court better reflect the cost of providing the service, which is available privately at a substantially higher cost. The fee amount is \$700 for individuals in the Federal Court and \$410 in the Federal Circuit Court per mediation session. This amount compares favourably with private mediators charging on average \$300 to \$350 per hour, in addition to fees for venue hire and travel costs.¹⁶

Families

61. The court fee framework recognises that the balance between private gain and public benefit in family law matters is different to the balance in general federal law.

62. The increase to family law fees ensure families involved in court processes contribute

¹⁶ Based on rates charged by practitioners who are members of LEADR (Association of Dispute Resolvers).

to the cost of services. However, the court fees framework needs to be tailored because not all family law matters are the same. Different considerations may apply for financial and property matters, compared with parenting proceedings in which the best interests of the child is the paramount consideration.

63. The 2013 changes introduced a fee for conciliation conferences which is payable only in property matters. The fee is designed to encourage parties to seek to settle the matter before a conference is necessary. Where a matter does proceed, the fee aims to encourage litigants to use the conciliation conference in an effective manner to narrow issues.

64. Although parties may feel forced into litigation involving a child due to their own circumstances, it is important to ensure that families are conscious of the cost of the services they are receiving and appropriately engage with those services. It is also desirable to ensure that family law proceedings are not unnecessarily drawn out by parties taking unnecessary steps in litigation, and are resolved as quickly as possible. The 2010 changes introduced daily hearing fees for proceedings that continue for longer than a day where previously there was no daily hearing fee. Imposition of this fee is consistent with the practice in other courts, and ensures parties consider the length of hearings carefully. Similarly, introduction in 2013 of fees for issuing a subpoena encourage parties to carefully consider the evidence required in an individual case.

65. Family law proceedings can be a highly emotional event in a person's life. However, appropriate pricing signals can encourage litigants to consider whether they should engage in litigation, and the approach they take in relation to the conduct of that litigation, while also ensuring that meritorious litigants are not deterred from seeking redress. For example, the 2013 changes increased the fee for an application for leave to appeal to the same rate as that of a fee to file an appeal to discourage applications for leave with no or limited merit. No additional fee is payable for filing the appeal if leave to appeal is granted.

66. In the family law courts, there are a high percentage of litigants which are eligible for fee exemptions and reductions. In the family law jurisdiction of the Federal Circuit Court, it is estimated the percentage of litigants paying full fees as compared to being exempt from fees are as follows:

- applications for final orders – 52%
- applications for divorce – 69%, and
- hearing fees – 44%.¹⁷

Divorce fees

67. In 2013, the fee for divorce in the Federal Circuit Court increased from \$577 to \$800 and the fee for divorce in the Family Court increased from \$816 to \$1135.

¹⁷ These percentages are calculated from full fee filings as compared to filings where the reduced fee was payable in the period 1 July 2011 to 30 April 2012.

68. It should be noted that the increase to divorce fees only represents an increase of approximately 7.6% over the consumer price index (CPI) since 2000. When the then Federal Magistrates Court was introduced, the divorce fee was cut by more than 50% (from \$526 to \$250). The Court is now firmly established as the court to handle divorce matters. It is appropriate to restore divorce fees to their pre-2000 CPI-based levels to continue to send appropriate pricing signals to litigants while reflecting the cost of the service.

69. Increases to divorce fees also reflect that divorce applications are rarely urgent and cannot be commenced until the parties have been separated for 12 months, which provides an opportunity to anticipate the cost of seeking divorce. Delay in obtaining a divorce order does not affect the standing of litigants to apply for final orders in children's or property matters. If a case is particularly urgent, the fee regime retains the ability of a disadvantaged applicant to apply for a deferral of the divorce fee to allow the matter to proceed prior to payment.

Legal assistance

70. It is important that Government funding for legal assistance is used effectively to enhance access to justice.

71. In the 2010-11 Budget, the Australian Government injected an additional \$154 million into legal assistance programs over four years. This amount included \$92.3 million for legal aid, \$34.9 million for Indigenous legal aid and \$26.8 million for community legal services. This was the biggest injection into the legal assistance sector for well over a decade. Approximately half of the increase in funding was supported by fees in federal courts. A key component of the funding was greater emphasis on prevention and early intervention services which empower individuals to resolve their legal problems before they escalate.

72. Submissions to the 2010 fees review noted an administrative burden for legal assistance providers in relation to collecting fees from clients, including disproportionate administrative costs in pursuing several debts of \$100 or less, and assisting with applications for fee reduction or fee deferral where applicable. Consistent with an administratively efficient fee structure, fee exemptions have been reinstated in 2013 to address these concerns. Additionally, the 2013 changes extended availability of fee exemptions to the fee for the filing of consent orders.

Access to justice safeguards

73. As discussed above, court fees should enable equitable access to the court system and not create barriers to justice. Consistent with this principle, the 2013 changes reinstated full fee exemptions for categories of disadvantaged litigants set out in the regulations. These mitigate access to justice concerns against the general increase to fees and reduce the administrative difficulties experienced in paying the reduced fee.

74. The fee structure retains a flexible approach to ensure access to the courts, by:
- providing full fee exemption on the basis of financial hardship. This ensures that fee exemptions are applied on a case by case basis
 - retaining the power of the court to defer payment of fees in cases of urgency or where it is warranted as a result of the person's financial circumstances
 - discretion to file and/or hear a matter where a fee has not been paid (despite the general rule that matters should not be filed or heard if the fee is unpaid), and
 - retaining the courts' powers of apportionment to direct who is liable to pay court fees, including splitting fees between parties.

F. CONCLUSION

75. Federal court fees play an important part in delivering an effective and efficient justice system, by ensuring access to justice as well as the most effective use of limited public resources across the justice system. Changes to court fees since 2010 should be evaluated in light of the effect on the broader justice system.

76. The Department would be pleased to appear at any hearings to assist the Committee in its inquiry. The Department reserves its ability to provide additional information responding to issues raised in other submissions to the Committee where necessary.

ATTACHMENT A

Court fees and legal fees payable in example of Federal Circuit Court matter

The following table illustrate court fees and legal costs likely to be payable in a financial matter in the family law jurisdiction of the Federal Circuit Court. The notes to table provide further explanation about the example.

Table A.1 Federal Circuit Court – Family law financial matter:

Stage in proceeding	Court fee		Legal costs	
Initiating or opposing application up to completion of first court day	Filing an application for final orders in eligible financial or parenting proceedings	\$305	Preparation	\$1,942
			Hearing fee for court attendance	\$264
Interim or summary hearing – as a discrete event	Filing an interim order application	\$105	Preparation	\$1,617
	Issuing subpoenas (a maximum of five subpoenas can be issued without leave)	\$250 (\$50 per subpoena)	Hearing fee for court attendance	\$264
Up to and including conciliation conference	For a conciliation conference in proceedings for an order under Part VIII or VIIIAB of the Family Law Act	\$350	Preparation	\$1,617
Preparation for and attending final hearing (for a two day matter)	Setting down fee	\$560	Preparation	\$5,131
	Second day hearing fee	\$560	Hearing fee for court attendance	\$3,884 (\$1,942 per day)
			Advocacy loading (counsel)	\$1,942 (50% of hearing fee for court attendance)
Final hearing costs for solicitor	Attendance at hearing to take judgment and explain orders	Nil	Preparation	\$264
			Hearing fee for court attendance	\$264
TOTAL		\$2,130		\$16,753

Notes to table A.1

1. The below table is for illustrative purposes only. It should not be interpreted as constituting all the possible stages or work done in relation to a family law financial matter or other matter in the Federal Circuit Court. There may be additional stages in a matter, such as applications for various orders, which would involve both further court fees and legal costs.
2. The legal costs included in the table represent legal fees that can be awarded under the *Federal Magistrates Court Rules 2001* (the Rules).
3. The amounts listed for preparation work do not represent a certain number of hours of preparation work – instead, they represent the lump sum amount of the legal fees that can be awarded pursuant to rule 21.10 and Parts 1 and 2 of Schedule 1 of the Rules.
4. Lawyers representing a party to proceedings are likely to charge higher fees than those costs which can be awarded under the Rules. Lawyers would also generally charge fees for work for which no provision is made in the Rules – for example, the Rules do not provide for travel costs to be paid, whereas a lawyer would generally cost any applicable travel costs

Legal assistance programs funded by the Australian Government

Legal aid commissions are funded by the Commonwealth under the National Partnership Agreement on Legal Assistance Services. Commonwealth legal aid service priorities under the NPA include family law, Commonwealth criminal law and a range of civil law matters including migration, social security, Commonwealth employment cases and consumer law matters. Most of the Commonwealth funding for legal aid commissions goes to family law matters (more than 80%). Commissions provide the full range of services including early intervention and prevention services, family dispute resolution, duty lawyers, minor advice and assistance and representation.

Aboriginal and Torres Strait Islander Legal Services (ATSILS) are funded by the Australian Government to ensure that Indigenous Australians can fully exercise their rights as Australian citizens. This funding recognises the special disadvantage Indigenous Australians face in dealing with the justice system. Indigenous people have disproportionately high levels of complex legal need, including issues with language, cross cultural barriers and social disadvantage. 85% of assistance given by ATSILS is for State criminal law matters and 5% and 10% respectively of their services are directed at family and civil law.

Community legal centres (CLCs) are an important part of the government's commitment to enhancing social inclusion and access to justice. CLCs have a strong history of community centred legal support across Australia over the last 30 years and attract significant volunteer and pro bono support. CLCs provide legal assistance services to disadvantaged members of the community, those with special needs and those whose interests should be protected as a matter of public interest. Most are generalist centres that service specific geographic regions. Others are specialist organisations servicing communities of interest or areas of law; for example, women; youth, disability discrimination matters, welfare rights, consumer credit and immigration. Services include legal information, advice and casework services and community legal education.

The Family Violence Prevention Legal Services (FVPLS) program assists Indigenous adults and children who are survivors of family violence or who are at immediate risk of such violence. FVPLS provide culturally sensitive assistance to Indigenous clients through legal assistance, court support, casework and counselling in regional and remote areas of Australia. The reinstatement of fee exemptions will ensure that the majority of Indigenous victims of family violence assisted through the regional and remote Family Violence Prevention Legal Service Program will be quarantined from the impact of the fee increases as they will satisfy the exemption criteria.

Cost recovery for courts in other jurisdictions

Australia

Levels of cost recovery in the courts vary across Australian jurisdictions. The table below indicates the level of civil court fees as a proportion of court expenditure in States and Territories.

Figure 1: Civil court fees collected as a proportion of civil recurrent expenditure 2011-12 (per cent)¹⁸

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust courts	Total
Supreme (without probate) / Federal ¹⁹	37.6	18.4	35.0	19.4	38.5	10.2	19.8	3.0	10.4	22.3
Supreme (with probate) ²⁰	72.7	32.6	61.4	23.9	80.9	31.9	28.9	9.2	13.7	39.1
District/County	38.0	29.4	59.3	26.8	36.3	..	..	..	..	35.6
Magistrates' (total)	31.8	29.7	23.5	31.7	28.6	28.9	4.8	6.3	..	28.2
<i>Magistrates' (only)</i>	34.9	37.4	29.9	34.4	30.6	37.6	5.2	6.6	..	32.5
<i>Children's</i>	—	..	—	—	0.4	..	..	..	..	—
Family courts	..	..	..	13.7	..	..	..	..	2.3	4.6
Federal Magistrates	..	..	..	..	..	..	..	..	30.2	30.2

¹⁸ Steering Committee for the Review of Government Services Provision, *Report on Government Services 2013* (Productivity Commission 2013) page 7.26.

¹⁹ Represents the Federal Court of Australia.

²⁰ Jaguar Consulting Pty Ltd, *Regulatory Impact Statement: Supreme Court (Fees) Regulations 2012, County Court (Fees) Regulations 2012* (Victorian Department of Justice October 2012) page 31 (Regulatory Impact Statement).

The Victorian Department of Justice has recently indicated an intention to increase recovery levels. A 2012 regulatory impact statement recommended cost recovery levels as follows:

- 40% in the Supreme Court, and
- 50% in the County Courts.

This reflects full cost recovery levels for administrative fees and a target cost recovery level of 40% or 50% for fees where there is work undertaken with a judicial element.²¹

In Western Australia, a policy of partial cost recovery is adopted in the civil jurisdiction. A review of court fees is conducted each year to ensure fees are achieving the appropriate balance between the three criteria of:

- access to justice
- incentives to settle, and
- user pays contributions.

A staged civil fee structure is used, whereby users make contributions towards the cost as they progress through the court system. This encourages parties to settle before taking a matter to the next stage. The pricing structure aims to regulate demand and discourage frivolous use of the civil court system. This is balanced against the need to ensure that access to justice is not compromised by making it prohibitively expensive.²²

New Zealand

The New Zealand Ministry of Justice has outlined proposed fee increases for the first half of 2013 across all courts.

A consultation paper issued by the New Zealand Ministry of Justice proposes a principled, consistent and equitable framework for setting fees. The framework balances the public and private benefits generated by courts and tribunals. It aims for a fair system that ensures people seeking private benefits – such as a financial settlement or review of a decision – contribute to the cost of the service, so that the burden doesn't fall entirely on the taxpayer.²³

The proposed fee systems also ensures courts and tribunals remain accessible to all people regardless of their personal financial circumstances. The New Zealand model provides for concessions and fees waivers, including for legally aided litigants, and the power to waive fees in cases where the applicant would suffer undue financial hardship if required to pay, or where the matter involved a case of genuine public interest and would not otherwise proceed.

²¹ Regulatory Impact Statement, page 3.

²² Department of the Attorney General, *Annual Report 2011-12* (Department of the Attorney General Western Australia September 2012) page 112.

²³ Ministry of Justice, *Civil fees review: A public consultation paper* (New Zealand Ministry of Justice September 2012) page 3 (Civil fees review: A public consultation paper).

The proposed cost recovery levels are as follows.

Figure 2: Proposed cost recovery in New Zealand courts (per cent)²⁴

Jurisdiction	Cost recovery – 2010/11	Proposed cost recovery
District Courts (general jurisdiction)	24	33
High Court (general jurisdiction – both first instance and appeal)	22	37
Court of Appeal (intermediate appellate court)	13	15
Supreme Court (final court of appeal)	0.4	0.5
Employment Court	1.5	4.6
Environment Court	1.9	5.5
Māori Land Court	less than 1	1

The levels of cost recovery also reflect the nature and jurisdiction of each court:²⁵

- The District Court deals with first instance criminal and civil matters.
- The High Court has jurisdiction in both criminal and civil matters and hears matters at first instance or on appeal.
- The Court of Appeal is New Zealand's intermediate appellate court, dealing with appeals from both the High Court and District Court, and
- The Supreme Court is New Zealand's final court of appeal.

²⁴ Civil fees review: A public consultation paper, page 7.

²⁵ Civil fees review: A public consultation paper, page 3.

United Kingdom

The civil and family courts in England and Wales are self-financing and are mostly funded by court fees paid by court users.²⁶ Fees aim to cover the full cost of court proceedings, with lower targets where there is a sound policy justification, such as some fees in family law. The policy of full-cost recovery ensures that as far as possible users pay for the service they receive. Although the term 'full-cost recovery' is often used, government funding still contributes to the cost of running the courts, especially contributing to fee concessions and waivers.²⁷

Costs recovered in the courts of England and Wales in the civil system were as follows

- 80% in 2011-12²⁸
- 80% in 2010-11, and
- 82% in 2009-10²⁹.

In 2010-11, cost recovery levels across different jurisdictions were approximately:

- 50% in family law
- 99% in the higher courts
- 115% in probate matters, and
- 94% in the magistrates court.³⁰

The UK Government has outlined proposals to increase further fees in the family law jurisdiction to full cost recovery by the end of 2014-15.³¹

Fee levels in UK courts have been criticised by the report *Review of Civil Litigation Costs* prepared by Lord Jackson in 2009. The report expressed the view that court fees were too high and that full cost pricing was wrong in principle (although the report considered that reducing the level of fees in the economic climate were not realistic).³²

²⁶ The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Preliminary Report* (May 2009) page 63.

²⁷ Ministry of Justice, *Fees in the High Court and Court of Appeal Civil Division – Consultation Paper CP15/2011* (Ministry of Justice United Kingdom November 2011) page 12.

²⁸ House of Commons Committee of Public Accounts, *Ministry of Justice Financial Management Seventy-fifth Report of Session 2010-12* (The Stationery Office March 2012) page 9.

²⁹ National Audit Office, *Financial Management Report 2011* (The Stationery Office November 2011) page 27 (Financial Management Report 2011).

³⁰ Financial Management Report 2011, page 28. Percentages have been calculated based on figures in the report.

³¹ Financial Management Report 2011, page 27.

³² The Right Honourable Lord Justice Jackson, *Review of Civil Litigation Costs: Final Report* (December 2009) page 49.