



# QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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The Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs:

## **Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia**

### Scope of submission

The QCCL ("the Council") is a voluntary organisation committed to the protection of civil liberties through active community involvement. We do not, however, have means for collating comprehensive quantitative data on changes in court filing as a result of fee increases.

On 13 March 2013, we contacted the Queensland Registry of the Federal Court of Australia via email for the purpose of gathering data on changes in rates and types of filing in the wake of recent filing fee increases. We had hoped this would assist our submission, but not having received a reply from the Registry, our submission is limited to a qualitative response.

Nevertheless, we expect relevant data to accompany the Committee's 6 June report. We understand that the Committee has limited ability to inquire into community legal organisations should they not respond to its invitation, but believe that data from Federal Court Registries and other Commonwealth legal bodies should supplement the Committee's final recommendations.

### The danger of prohibitive costs

As a general principle, the Council believes that justice should not be administered on a user-pays basis and that in many cases, financial means should not dictate whether one can enforce one's legal rights. Accordingly, this submission focuses on fees in the Federal Magistrates Court of Australia and Family Court of Australia, which see a large proportion of the private law matters that course through federal courts.

Even if only the latest fee increases commencing January 1 2013 are examined, exorbitant changes are revealed. For example, an initiating application relating to children or financial orders which previously required no fee, now costs \$500.00.<sup>1</sup> Similarly, an application for divorce, previously costing \$577.00 to file, has increased by \$223.00.<sup>2</sup> In, we would submit, the majority of cases, Corporations are in effect individuals running small businesses. In this regard the Council notes further some fees in the Federal Court which potentially become payable by individuals through their small business or self-managed superannuation funds for example, and considers these similarly excessive. Such fees include \$1,080.00 for filing an originating document, \$3,630.00 for some notices of appeal and \$2,155.00 to set a

<sup>1</sup> *Federal Magistrates Regulations 2000* (Cth) (repealed); *Family Law (Fees) Regulation 2012* (Cth) sch 1 item 10.

<sup>2</sup> *Federal Magistrates Regulations 2000* (Cth) (repealed); *Family Law (Fees) Regulation 2012* (Cth) sch 1 item 2.

*Watching them while they are watching you!*

proceeding down for hearing.<sup>3</sup> Figures 1 and 2 below show that the aforementioned examples are consistent with the general magnitude of increases implemented from January 1:

Figure 1. Family Court of Australia<sup>4</sup>

	Document or service	Fee change
Applications	Application for consent orders	<b>+\$61</b>
	Application for nullity	<b>+\$319</b>
	Application for a direction as to validity	<b>+\$319</b>
	Initiating application (children and financial orders)	<b>+\$500</b>
	Initiating application (family law)	<b>+\$50</b>
	Response to initiating application (family law)	<b>+\$50</b>
	Interim application	<b>+\$105</b>
Hearings	Issue subpoena	<b>+\$50</b>
	Daily hearing fee	<b>+\$127</b>
	Setting down for hearing fee (defended matters)	<b>+\$127</b>
Appeals	Conciliation conference	<b>+\$350</b>
	Notice of appeal for a court of summary jurisdiction	<b>+\$127</b>
	Notice of Appeal to Full Court including appeal from Federal Magistrates Court	<b>+\$201</b>
	Application for leave to appeal	<b>+\$1205</b>

Figure 2. Federal Magistrates Court of Australia<sup>5</sup>

	Document or service	Fee change
Applications	Application for divorce	<b>+\$223</b>
	Application for divorce – reduced fee	<b>+\$265</b>
	Initiating application (children and financial)	<b>+\$500</b>
	Initiating application (family law)	<b>+\$50</b>
	Response	<b>+\$50</b>
	Interim application	<b>+\$105</b>
	Issue subpoena	<b>+\$50</b>
Hearings	Setting down for hearing fee (defended matter)	<b>+\$94</b>

<sup>3</sup> Federal Court and Federal Magistrates Court Regulation 2012 (Cth) sch 1 pt 1.

<sup>4</sup> Family Court of Australia, *Changes to family law fees from 1 January 2013*, Family Court of Australia <<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/new/FCOAFee+restructure+0113>>.

Daily hearing fee (for each hearing day, excluding the first hearing day)	<b>+\$94</b>
Conciliation conference	<b>+\$350</b>

The Council considers fee increases of this magnitude as exorbitant from two perspectives. Firstly, the increases limit the extent to which individuals can enforce their legal rights. For individuals with limited financial means, the increases as have been implemented in recent years have the potential to force a choice between professional legal advice and access to the court and its processes. With the funds an individual will now spend on certain federal court filing, multiple professional attendances could have been paid for. The choice between legal advice and a judicial adjudication may result in a difficult predicament as both may be necessary to resolve a matter.

Further, the exorbitant fee increases limit the extent to which individuals can enforce their legal rights once proceedings have commenced. While a wealth disparity between parties can often be the cause of inequality, the government should not implement policies which only exacerbate this, as these increases do. This sentiment is shared by the President of the Law Council of Australia who noted, 'These fee increases have the potential to create a system only accessible by those with extensive financial resources.'<sup>6</sup> The Council also notes that while the Commonwealth Attorney-General described court fees as a 'very small component' of the cost of litigation,<sup>7</sup> we would argue that the relativity of costs is inconsequential considering that an individual's financial capacity obviously does not grow proportionally with such costs. As keenly stated by UNSW Associate Professor Michael Legg, 'A right that cannot be enforced for lack of funds is no right at all.'<sup>8</sup>

Also on the point of enforcing one's legal rights, the Council questions one of the motives for the increases: in a speech to the NSW Bar Association, former Commonwealth Attorney-General Nicola Roxon stated, 'Court fees, for example, have the capacity to send pricing signals that the courts should not be the first port of call for resolving disputes. But this tool has often been underused, or implemented haphazardly in the face of court costs pressures.'<sup>9</sup> This idea is fundamentally flawed for two reasons. For litigants who can afford to pay the increases, alternative dispute resolution would only be employed should they determine that it will render a more favourable outcome than litigation. For litigants who cannot afford to pay the increases, they will have no choice but to negotiate an out-of-court resolution. As the outcome of ADR is not founded in legal precedent and may involve negotiation between two parties who are unequal financially and in bargaining ability, the prospect of a just outcome seems remote.

Secondly, while the Council notes that the Registrar of the court has discretion to waive fees for financial hardship,<sup>10</sup> we cannot wholeheartedly endorse the Guidelines for Exemption of

<sup>5</sup> Family Court of Australia, *Changes to family law fees from 1 January 2013*, Family Court of Australia <<http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/new/FCOAFee+restructure+0113>>.

<sup>6</sup> Law Council of Australia, 'Law Council welcomes inquiry into federal court filing fees' (Media release, 27 February 2013).

<sup>7</sup> Lee, J, 'Inquiry to look at court fees', *The Age*, (Melbourne), 28 February 2013.

<sup>8</sup> Legg, M, 'Higher court fees erode the right to justice', *Financial Review*, (Melbourne), 8 February 2013.

<sup>9</sup> The Hon. Nicola Roxon MP, 'Speech to NSW Bar Association Alternative Dispute Resolution Workshop', (Speech delivered at NSW Bar Association Alternative Dispute Resolution Workshop, Westin Hotel Sydney, 4 August 2012).


<sup>10</sup> *Family Law (Fees) Regulation 2012* (Cth) s2.05.

Court Fees.<sup>11</sup> In Part 3 of the three-part test, the individual's living expenses and liabilities are assessed to determine whether their fortnightly surplus exceeds a maximum threshold, which changes depending on the category of filing fee being considered by the Registrar. In every category, the maximum threshold is less than half the filing fee. Therefore, an individual whose entire fortnightly surplus is marginally greater than the maximum threshold may be faced with a single expense imposed by the court more than double the amount of that surplus. This scenario is a best-case scenario, where the individual faces no other unexpected expenses, for example.

While the Application for exemption from fees includes a section where an individual who has not met the Guidelines can detail why the fee will otherwise cause financial hardship, there are no publicly available criteria by which to judge these exceptional circumstances. Such a process is uncertain and requires too much unguided discretion. While the Council understands that the federal court system incurs significant and increasing expenses, we do not believe that compounding the individual's burden is a satisfactory response. In the event that the allegation is proven that income from the increases has supplemented the Commonwealth's Consolidated Revenue Fund,<sup>12</sup> the Council's opposition to the increases is significantly more emphatic.

This submission is the work of executive member Will Kuhnemann. We trust it is of assistance to you.

Yours faithfully

  
Michael Cope  
Executive Member  
For and on behalf the  
Queensland Council for Civil Liberties  
16 April 2013

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<sup>11</sup>Family Court of Australia and Federal Magistrates Court of Australia, *Guidelines for exemption of court fees* (at 1 January 2013).

<sup>12</sup>Merritt, C, 'Higher court fees endanger access to justice', *The Australian*, (Sydney), 22 February 2013.