



Inquiry into Federal Court Fee increases since 2010

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006). CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people.

We thank the Senate Legal and Constitutional Committee for the extension of time to make a submission to inquiry. We are grateful for the opportunity to provide comment and would appreciate the opportunity to provide further input as required.

Terms of Reference

The terms of reference of the inquiry are detailed in the table below.

The impact of Federal Court Fee increases since 2010 on access to justice in Australia, with particular reference to:

- (a) the impact of federal court fee increases on low-income and ordinary Australians and operators of small businesses;
- (b) whether these fee increases are reasonable, based on evidence and consistent with other justice policy matters;
- (c) how increases in court fees, and other reform to the courts and justice system, can act as a barrier to accessing justice;
- (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);
- (e) the degree to which the fee changes reflect the capacity of different types of litigants to pay;
- (f) the application of the revenue that has been raised by federal court fee increases; and
- (g) other relevant matters.

The NSW CCL has not received complaints or comments regarding the impact of Federal Court Fees on access to justice. We understand that legal practitioners and their representative bodies may have views on these matters.

General overview

The ability to access the courts is a civil right. It is essential that persons can access the courts to ensure that they are able to exercise their freedoms and liberties and enforce their rights and others' obligations.

Consequently, each person needs be able to access the Federal Court system in order to have the opportunity to enforce their rights and obligations if they judge this is appropriate. This ability to access the courts is a requirement in a society in which the state has the legal monopoly on justice and enforcing legal rights and obligations. This ability to access the courts must not be diluted for reason of financial incapacity.

All persons must, as a matter of their civil rights, have the capacity to access the Federal Court regardless of their financial situation or other means. In addition, the fees associated with accessing the Federal Court must not act as a material detriment to their accessing the court if they judge that doing so is an appropriate course of action.

In addition, a person's use of the Federal Court should not substantially diminish their ability to exercise and enjoy their civil rights and liberties in the future, nor substantially detract from their social and economic experience in the usual course of events. This suggests that Federal Court fees and charges should not ordinarily lead to a person becoming financially destitute nor push them to the edge of financial hardship.

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

From the information in the Appendix to this submission (relating to fees associated with a selection of court systems and jurisdictions) Federal Court fees appear to be high compared to other Commonwealth court systems (apart from the High Court) and New South Wales, Victoria and Queensland.

While it is unclear whether these other schedules of fees are targeted towards the capacity of litigants to pay, the Federal Court fees appear relatively high on the face of it.

The degree to which the fee changes reflect the capacity of different types of litigants to pay

We understand that Federal Court fees have risen substantially since before 1 July 2010. It would be expected, given the size of the increases, that fewer potential litigants would have the capacity to pay the fees since 1 January 2013 relative to those who could pay them before 1 July 2010.

We also note that fixed fee categories will not, by definition, reflect the capacity of different types of litigants to pay. It is likely that some form of fee categorisation would be needed in

the foreseeable future as the administrative costs associated with determining a particular litigant's capacity to pay are likely to be high.

We understand there is a perception among some members of the legal profession that the increase in Federal Court fees has made access to the Courts much more challenging for potential litigants.

The application of the revenue that has been raised by Federal Court fee increases

We have no specific knowledge of the application of the revenue that has been raised by Federal Court fee increases.

In any event, we consider that Federal Court fees should not gouge people, nor should they be used as an alternative revenue collection stream for the Federal Government.

We would consider it unwise for the Commonwealth to adopt a cost-recovery model for accessing the Federal Courts. This is because such a model would be likely to reduce access to the Federal Court. While it is appropriate for the suite of judicial-like resources to be used efficiently, having access to the courts is imperative and must trump economic efficiency (beyond having incentives to avoid misuse of the courts).

Other relevant matters

Exemptions

Persons or bodies are exempt from paying Federal Court fees if they fall into one or more exemption categories. Individuals are also exempt if they would otherwise suffer financial hardship in the view of the Registrar or authorised officer. These exemptions (effectively Community Service Obligations) are described in the table below (substantially copied from the Federal Court website).

Exemption categories

A body or person is exempt generally from paying court fees in a proceeding if:

- the body or person has been granted legal aid for that proceeding;
- the person is the primary holder of a health care card, a pensioner concession card, a Commonwealth seniors health card or any other card certifying entitlement to Commonwealth health concessions;
- the person is serving a sentence of imprisonment or is otherwise detained in a public institution;
- the person is younger than 18;
- the person is receiving youth allowance, Austudy payments or ABSTUDY benefits; or
- the body or person has been granted assistance under Part 11 of the Native Title Act 1993 to bring that proceedings in the Federal Court by a registered body (see section 253 of that Act) or a person or body granted funding for that purpose under section 203FE of that Act.

Once a general exemption is established it continues until the proceeding is finalised, provided that there is no change in circumstances that alters the continued entitlement to that exemption.

Financial hardship

An individual is exempt from paying a court fee which otherwise is payable in a proceeding if, in the opinion of a Registrar or an authorised officer, payment of that fee at that time would cause the person financial hardship. In deciding this, the Registrar or authorised officer is required to consider the individual's income, day-to-day living expenses, liabilities and assets.

We have not received complaints about the operation of the exemption provisions.

We note that the effective operation of the exemption provisions requires that potential exemptees are aware of the provisions and are able to seek an exemption. This may require communication techniques and channels for people with a wide range of sensory, language, literacy, numeracy, mental and physical capabilities. We do not have information about whether these communications are targeted or effective.

At a policy level, the exemption categories appear potentially appropriate as they are likely to allow access to the Federal Courts regardless of a person's financial resources. However, the Inquiry can only determine their practical effectiveness and whether they are correctly targeted by evaluating the operation of the exemption categories and whether a person's preparedness to access the Federal Court has any dependence on their financial resources.

In order for the Committee to understand whether the exemption categories are correctly targeted and effective, we urge the Committee to examine any relevant evaluations of their operation. We urge the Committee to also seek to understand the experiences of people who:

- were deterred from using the Federal Courts due to its fees;
- used the Federal Courts and did not seek a fee exemption;
- used the Federal Courts and unsuccessfully sought a fee exemption; and
- used the Federal Courts and successfully sought a fee exemption.

The financial hardship exemption category should be expanded

From a policy perspective, the financial hardship exemption category should be expanded as the provisions for exemption for financial hardship are unreasonably narrow. It is unreasonable that Federal Court fees could push a person to the edge of financial hardship – which could happen under the current exemptions.

Instead, exemptions should apply if a person's combined savings, disposable income, and other liquid investments would otherwise fall below a level that would provide the person with a buffer from financial hardship. While we do not have a clearly defined view about the appropriate quantum of the level, we suggest that it might be defined with reference to a fixed amount (e.g. \$5,000).

Appropriateness of using price signals to guide behaviour

We are concerned about any use of price signals that detrimentally impacts access to the courts in a material way.

The 2012 Commonwealth budget papers stated:

The Government will reform court fees to better reflect the capacity of different types of litigants to pay, with an overall increase to court fee revenue of \$76.9 million over four years. The reforms will send more appropriate price signals to court users to encourage them to utilise alternative dispute processes where appropriate, and will focus particularly on fees for corporations and resource intensive matters.

Access to the Federal Court is a civic right that must be upheld notwithstanding that there may be an inefficient use of judicial resources. We support people and organisations using whichever judicial-like forum is most appropriate for the matter needing to be addressed. It is unclear whether price signals are an appropriate basis to encourage the use of one particular form of forum over another.

It is also conceptually unclear whether price signals are an appropriate tool to use in an attempt to enhance the efficiency of the use of judicial resources. Using prices in this way may result in people making trade-off decisions between using courts and alternative dispute processes by reference to the relative costs and potential benefits, rather than on the basis of the most appropriate forum in which the matter should be determined.

Dr Sacha Blumen
Co-convenor, Police Powers and Civil Rights Sub-committee

Appendix – Selection of Court fees

Commonwealth courts

	Federal Court of Australia (\$)	Federal Magistrates Court (\$)	High Court of Australia (\$)	Family Court of Australia (\$)
Filing of a doc by which a proceeding in the Court is commenced / Initiating application	- Publicly listed company: 4720 - Corporation: 3145 - Other: 1080	- Publicly listed company: 1870 - Corporation: 1245 - Other: 515	- Publicly listed company: 11350 - Corporation: 7565 - Other: 2505 - Financial hardship: 835	- Children and financial orders: 500 - Family law: 305
For the hearing of an application – for each day or part of a day	- Publicly listed company: 3135 - Corporation: 2090 - Other: 860	- Publicly listed company: 2245 - Corporation: 1495 - Other: 610	Full Court - except 1 st day - Publicly listed company: 5130 - Corporation: 3420 - Other: 1405 - Financial hardship: 465	Excluding the 1 st hearing day - 765
For issuing a subpoena	- Publicly listed company: 270 - Corporation: 180 - Other: 90	- Publicly listed company: 180 - Corporation: 120 - Other: 60		50
Exemption categories		<ul style="list-style-type: none"> *you are receiving legal aid for your proceeding in the High Court of Australia *you are the primary cardholder of a Health Care Card, Pensioner Concession Card, Commonwealth Seniors Health Card or any other card that entitles you to Commonwealth health concessions (this does not extend to a dependant of the primary cardholder) *you are an inmate of a prison or otherwise detained in a public institution *you are younger than 18 *you are receiving youth allowance or Austudy payments or Abstudy benefits, *you have been granted assistance under Part 11 of the Native Title Act 1993 for your proceeding in the High Court of Australia *you act as litigation guardian for any of the above 		

Comparison of Federal Court fees with selection of NSW, Victoria, and Queensland Court fees

	Filing of a doc by which a proceeding in the Court is commenced / Initiating application (\$)	For the hearing of an application – for each day or part of a day (\$)	For issuing a subpoena (\$)
Federal Court of Australia	- Publicly listed company: 4720 - Corporation: 3145 - Other: 1080	- Publicly listed company: 3135 - Corporation: 2090 - Other: 860	- Publicly listed company: 270 - Corporation: 180 - Other: 90
NSW Supreme Court	- Standard: 999 - Corporation: 2737	By one or more judges; 2 nd -4 th day - Standard: 795 - Corporation: 1824	- Standard: 74 - Corporation: 148
NSW Local Court	General division - Standard: 217 - Corporation: 434		- Standard: 74 - Corporation: 148
Supreme Court of Victoria		For appeal, after the 1 st day: 576.40	
County Court Victoria		2 nd to 4 th day 461.10	- Civil: 130.30 - Criminal/Appeal: nil
Supreme Court of Queensland	- Standard: 925 - if at least 1 plaintiff is a corporation: 2215	2 nd -4 th day - Standard: 735 - if at least 1 plaintiff is a corporation: 1480	76