

CHAPTER 1

INTRODUCTION AND BACKGROUND

Referral of the inquiry

1.1 On 27 February 2013, the Senate referred the matter of the impact of federal court fee increases since 2010 on access to justice in Australia to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 6 June 2013, 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.¹

1.2 On 6 June 2013, the committee tabled an interim report for the inquiry, stating that due to the need to thoroughly consider the evidence presented and conclude its deliberations, the committee intended to table its final report by 12 June 2013.² On 12 June 2013, the committee tabled a second interim report, extending the reporting date for the inquiry to 17 June 2013 in order to enable additional time for the committee to finalise its report.³

1 Senate, *Journals of the Senate*, No. 135–27 February 2013, p. 3674.

2 Senate Legal and Constitutional Affairs References Committee, *Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia: Interim Report*, 6 June 2013, p. 2.

3 Senate Legal and Constitutional Affairs References Committee, *Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia: Second Interim Report*, 12 June 2013, p. 2.

Background

1.3 The Commonwealth administers four federal courts: the High Court of Australia (High Court), the Federal Court of Australia (Federal Court), the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia⁴ (Federal Circuit Court).

1.4 Each of these courts charges administrative fees for a variety of different applications made to the court and procedures undertaken by the court. These include, among other things, fees for:

- making an application to commence a proceeding in a court;
- setting down hearing dates for a matter to be heard;
- hearing fees (charged for each day a matter is heard in a court);
- applications to subpoena evidence; and
- applications to restrain property or evidence in relation to a matter.⁵

Access to Justice Taskforce

1.5 In January 2009, the then Attorney-General, the Hon Robert McClelland MP, established an Access to Justice Taskforce to 'undertake a comprehensive examination of the federal civil justice system with a view to developing a more strategic approach to access to justice'.⁶ The final report of the Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Strategic Framework), was released in September 2009, and was adopted by the government to assist in the development of access to justice initiatives and broader civil justice reforms.⁷

1.6 The Strategic Framework recommended in respect of court fees that the Attorney-General 'should initiate a thorough examination by the Standing Committee of Attorneys-General of issues and options for funding aspects of the justice system on a cost recovery basis...to ensure that resourcing of the justice system maximises access to justice'.⁸

4 The Federal Magistrates Court was renamed the Federal Circuit Court of Australia from 12 April 2013, pursuant to the *Federal Circuit Court of Australia Legislation Amendment Act 2012*.

5 See, for example: Federal Court of Australia, 'Fees payable from 1 January 2013', <http://www.fedcourt.gov.au/forms-and-fees/court-fees/fees> (accessed 14 June 2013).

6 Attorney-General's Department (AGD), *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p. ix.

7 Attorney-General's Department, *Submission 10*, p. 2.

8 Recommendations 9.1: Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p. 123.

1.7 The Strategic Framework also recommended that full cost pricing for long court hearings should be introduced:

Given the significant public costs of court hearings, and the opportunities parties have to resolve matters without hearing, or minimise the length of hearings by identifying the real issues in dispute, full cost pricing for long hearings is generally appropriate. The Government should propose a model of full cost pricing for long hearings which would:

- commence after a certain number of hearing days, or adopt a sliding scale, rather than be imposed as an exercise of judicial discretion, and
- be subject to a comprehensive system of exemptions and waivers (excluding, for example, human rights and native title matters) to protect access to justice.⁹

1.8 Following the publication of the Strategic Framework, the Standing Committee of Attorneys-General reported that Ministers had agreed to 'develop a harmonised approach to options for greater cost recovery of justice services, including consideration of cost recovery options for courts and tribunals'.¹⁰

Recent fee increases in the federal courts

1.9 Successive rounds of fee increases have occurred in the federal courts in the last few years, with changes being implemented in July 2010, November 2010 and January 2013.¹¹ A consolidated list of these changes was provided to the committee by the Attorney-General's Department, and is published on the committee's website.¹²

9 Recommendation 9.2: Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p. 123. The Taskforce noted in its Report (p. 45) that the Australian Law Reform Commission had previously recommended in 2000 that the Commonwealth 'consider the introduction of staged fees, where the fees increased along a sliding scale as [the] case progresses to hearing' in order to 'provide an incentive for litigants to settle matters at an earlier stage'.

10 Standing Committee of Attorneys-General, Annual Report 2009-10, p. 3, http://www.sclj.gov.au/sclj/standing_council_publications/standing_committee_annual_reports.html (accessed 27 May 2013).

11 In addition to these increases, fees were also increased from 1 July 2012 to adjust for inflation. The fee regulations provide for biennial changes to court fees to adjust for inflation. See: Consolidated table of federal court fee increases since 2010, provided by the Attorney-General's Department on 7 May 2013, p.1.

12 Additional Information Received, 'Consolidated table of federal court fee increases since 2010, provided by the Attorney-General's Department on 7 May 2013'. See also: Law Council of Australia, *Submission 26*, pp 27-38.

Fee increases in 2010

1.10 Two stages of fee increases were instigated in 2010 as part of a suite of access to justice measures in the 2010-11 Federal Budget.¹³ A range of increases were introduced on 1 July 2010, amounting to an approximately eight per cent increase across the federal courts. This included introducing:

- 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 then Federal Magistrates Court to a daily hearing fee structure; and
- a new one-off fee of \$80 for filing a consent order in the Family Court.¹⁴

1.11 In November 2010, new flat fees were introduced for litigants who previously had been eligible for fee exemptions. These fees were \$60 in family law matters and \$100 in other matters.¹⁵ Prior to November 2010, the categories of individuals automatically granted an exemption were:

- recipients of legal aid under an approved scheme;
- persons holding certain concession cards, including health care and pensioner cards;
- persons who are imprisoned or otherwise detained in a public institution;
- persons under 18 years of age;
- persons receiving youth allowance, Austudy payments or benefits under the ABSTUDY scheme; and
- persons involved in certain Native Title proceedings.¹⁶

1.12 In addition to the automatic fee exemption for certain categories of individuals, the courts could also grant an exemption if paying the fee would cause financial hardship to the individual. The fees regulations provide that in considering whether a fee would cause financial hardship, the court must consider the individual's income, day-to-day living expenses, liabilities and assets.¹⁷

13 AGD, *Submission 10*, p. 8.

14 AGD, *Submission 10*, p. 8.

15 AGD, *Submission 10*, p. 8.

16 See, for example (in relation to the Federal Court and the Federal Circuit Court): section 2.05, Federal Court and Federal Circuit Court Regulation 2012.

17 See, for example (in relation to the Federal Court and Federal Circuit Court): section 2.06, Federal Court and Federal Circuit Court Regulation 2012.

1.13 The 2010 fee increases were designed to raise \$66.2 million in revenue over four years, to be directed toward additional funding for legal assistance services.¹⁸

Review of 2010 increases undertaken by the Attorney-General's Department

1.14 In 2011 the Attorney-General's Department (Department) conducted an internal review of the 2010 fee changes, to ascertain the impact of the changes on court users in the first year of their operation. The current Attorney-General, the Hon Mark Dreyfus QC MP, has stated that few strong conclusions could be drawn as a result of the review:

Data provided by the federal courts and the Administrative Appeals Tribunal showed no clear changes to filing levels coinciding with the fee changes, including no reductions in the filing of consent orders or significant changes to full fee filings for corporations. Overall, the data did not allow any conclusive observations to be made other than that there were no significant changes to numbers of filings in the period July 2010 to May 2011.¹⁹

Fee increases from 1 January 2013

1.15 The government announced further reform to the structure of federal court fees in the 2012-13 budget, which came into effect from 1 January 2013 through new fee regulations.²⁰ In its submission to the committee's current inquiry, the Department explained that the main changes were:

- reinstatement of fee exemptions (in place of the flat fees introduced in 2010);
- general increases to court fees of 40 per cent for corporations fees, 15 per cent for other fees in general federal law matters, and 20 per cent for family law fees;
- new fees for publicly listed corporations (150 per cent 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

18 Australian Government, *Budget Measures: Budget Paper No. 2 2010-11*, 11 May 2010, pp 103-104. The 2010-11 budget measures included providing additional funding for legal assistance services of \$154 million over four years, offset by the increased revenue raised from court fees as well as funding reductions of \$84 million over four years to the Attorney-General's Department and increased efficiencies in the Family Court of Australia, Federal Court of Australia and National Native Title Tribunal.

19 The Hon Mark Dreyfus QC MP, Attorney-General, 'Response to Senate order of 7 February 2013', tabled in the Senate on 26 February 2013, p. 2.

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

- introduction of new fees which target resource intensive matters, including fees for examinations in bankruptcy and winding up.²¹

1.16 The Department noted that the 2013 fee changes are forecast to raise \$102.4 million in revenue over four years, with accompanying funding of \$38 million to be reinjected into the courts 'to maintain delivery of key services, including regional circuit work'.²²

Reinstatement of fee exemptions in place of flat fees introduced in 2010

1.17 The 2013 changes included the reintroduction of the fee exemption categories, in place of the flat fees that had replaced them in November 2010.²³ The Department explained the rationale for this policy reversal:

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.²⁴

Conduct of the inquiry

1.18 The committee advertised its inquiry in *The Australian* on 27 March 2013. The committee also wrote to 153 organisations and individuals, inviting submissions by 12 April 2013. Details of the inquiry were also placed on the committee's website at www.aph.gov.au/senate_legalcon.

1.19 The committee received 32 public submissions, and all public submissions were made available on the committee's website. A list of those submissions is at Appendix 1. The committee held a public hearing for the inquiry in Canberra on 17 May 2013. A list of witnesses who gave evidence at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the committee's website.

Acknowledgement

1.20 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

21 *Submission 10*, p. 9.

22 *Submission 10*, p. 9.

23 Explanatory Statement, Federal Court and Federal Magistrates Court Regulation 2012, pp 6-7.

24 *Submission 10*, p. 13.

Structure of the report

1.21 The report is divided into four chapters:

- Chapter 2 outlines access to justice policy considerations as they relate to the structuring and pricing of federal court fees;
- Chapter 3 discusses the broad impact of federal court fee increases since 2010, as well as the impact on specific court users; and
- Chapter 4 sets out the committee's views and recommendations.

Note on references

1.22 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.