CHAPTER 2

ACCESS TO JUSTICE POLICY CONSIDERATIONS

2.1 Submitters and witnesses to the inquiry discussed several issues regarding access to justice and the development of policy settings for the structure and quantum of federal court fees. These included:

- the overarching concept of the term 'access to justice';
- cost recovery as a principle in operating the federal courts;
- the use of court fees as so-called 'price signals';
- ensuring equitable access to the court system;
- the application of revenue from court fees; and
- concerns relating to how the quantum of court fees is set.

Philosophical approach to 'access to justice'

2.2 The Attorney-General's Department (Department) noted that a broad understanding of the concept of access to justice has informed policy development since the release of the *Strategic Framework for Access to Justice in the Civil Justice System* (Strategic Framework) in 2009:

> 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]…promotes a holistic view of the federal civil justice system. 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.[1]

2.3 Some submitters expressed concern that such an approach to access to justice may be misguided. Associate Professor Michael Legg argued that, while non-court processes can be useful, they 'cannot be equated with access to justice'.[2] Associate Professor Legg noted that only in official court proceedings are matters definitively determined according to law, with mandated procedural protections that are unavailable in other less formal resolution mechanisms.[3]

2.4 The Law Society of South Australia argued that a broader understanding of access to justice could weaken the fundamental rights of citizens:

> As a matter of principle, citizens are entitled to have their disputes justly determined according to law by an impartial and independent judicial

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1 *Submission 10*, p. 1.

2 *Submission 9*, p. 7.

3 *Submission 9*, p. 7.

> system. Obstacles to such determinations, such as court fees, act to deprive citizens of that right…[This] right is a fundamental pillar of our political and social structure, and it should not be undermined by other arms of government which seek to encroach on the justice system.[4]

2.5 The Rule of Law Institute of Australia (Rule of Law Institute) noted that there is a public interest in the courts hearing disputes, beyond the benefit to individual parties:

> A determination by a court may not only provide finality for the parties concerned, it can provide other, broader benefits such as establishing precedents, evidencing open justice and elucidating the law.[5]

Court fees and cost recovery

2.6 Examining the issue of cost recovery in the civil justice system, the Strategic Framework noted that 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…might be appropriate subjects of assessing cost recovery'.[6] The Strategic Framework identified factors that are relevant considerations in determining a government's policy approach toward cost recovery in the courts, including:

- the balance between the public and private benefits accorded by different types of proceedings in the courts;
- recognition that cost recovery may be inappropriate where certain parties are involved (such as matters involving children or human rights matters), or where the courts hold an effective monopoly over the provision of a service;
- fees must still ensure that price is not a barrier to access to the courts; and
- full cost pricing could encourage litigants to pursue less expensive dispute resolution mechanisms.[7]

2.7 The Department has put to the committee that some level of cost recovery is appropriate in the federal courts:

> 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. 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

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4 *Submission 20*, p. 2.

5 *Submission 4*, p. 3.

6 Attorney-General's Department (AGD), *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p. 44.

7 AGD, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p. 48.

> and outcome of litigation. This makes it important that court fees strike [an] 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.[8]

2.8 A representative from the Department confirmed that cost recovery was the primary principle guiding recent court fee changes:

> [I]n relation to the setting of the court fees, the overarching policy intent was to move the courts onto a greater cost recovery basis. Once that decision had been made then it really was about devising a package around that.[9]

2.9 The Department advised that the proportion of court fees to court funding, as a total for all Commonwealth courts, was 10 per cent in 2009-10, increasing to 16.5 per cent in 2010-11 and projected to rise to around 30 per cent as a result of the 2013 fee changes.[10]

Opposition to the principle of cost recovery

2.10 Submitters expressed strong views about what level of cost recovery, if any, is appropriate in the federal civil justice system. The Law Council of Australia (Law Council) argued:

> 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.[11]

2.11 The Rule of Law Institute agreed that high court fees should not be employed as a method of user-pays funding of the court system.[12] The NSW Council for Civil Liberties also considered that adopting a cost recovery model for accessing the federal courts is unwise and will reduce access to the courts.[13]

2.12 Mr John Emmerig from the Law Council remarked that employing a 'user-pays' approach is not consistent with the status of the federal courts as an independent arm of government:

> There seems to be a user-pays philosophy which is not consistent with that status as a branch of government. One can understand that in tight financial times people are looking to save money, and cost-cutting is on everyone's

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8 *Submission 10*, p. 6.

9 Dr Albin Smrdel, AGD, *Committee Hansard*, 17 May 2013, p. 33.

10 *Submission 10*, p. 6.

11 *Submission 26*, p. 12.

12 *Submission 4*, p. 2.

13 *Submission 29*, p. 3.

> agenda, but it seems to me—and I respectfully suggest—that it should be very important to this committee and to parliament generally that great attention is paid in that sort of environment to ensuring that the pressures to cost-cut and recover revenue and so on do not provide or are not used as a vehicle to prevent access to the important instrument of the courts to provide justice to people.[14]

Resource intensive matters

2.13 A principle guiding the development of the 2013 fee changes was that there should be higher fees for resource-intensive events in the courts.[15] In relation to targeting complex or resource intensive matters, the Rule of Law Institute argued that the complexity of litigation alone should not demand higher fees for court users:

> [T]he complexity of the legal issues [should not] be the sole determinant of the costs of accessing the court system. The fact that citizens are subjected to increasingly complex legislation should not mean that the costs of challenging or seeking clarity of that legislation be passed on to them.[16]

'Price signalling'

2.14 In announcing the 2013 fee changes, the 2012-13 Budget papers stated:

> [The new fees will] better reflect the capacity of different types of litigants to pay…The reforms will send more appropriate price signals to court users to encourage them to utilise alternative dispute processes where appropriate.[17]

2.15 The Department advised that appropriately structured court fees can act as pricing signals to influence litigant behaviour and shape how litigation proceeds through the courts. The Department's position is that tailored fee levels should send 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.[18]

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14 *Committee Hansard*, 17 May 2013, pp 13-14.

15 Dr Albin Smrdel, AGD, *Committee Hansard*, 17 May 2013, p. 33.

16 *Submission 4*, p. 2.

17 Australian Government, *Budget Measures: Budget Paper No. 2 2012-13*, 11 May 2012, p. 10.

18 *Submission 10*, p. 7.

2.16 When asked whether there is any evidence to indicate that the courts are, in fact, viewed as the 'first port of call' for dispute resolution, a departmental representative indicated that an increase in court filing levels could be one form of empirical evidence to support such a proposition, but did not indicate that this had occurred.[19]

Encouraging litigants to use alternative dispute resolution (ADR)

2.17 Some submitters and witnesses contested the claim that increasing court fees would encourage many litigants to resolve disputes through ADR mechanisms. For example, the Law Council argued that it is reasonable to expect that the vast majority of parties would exhaust all reasonable options to resolve a dispute before approaching the courts, as litigation is 'the most expensive and often least desirable option available',[20] and in many cases there is a legal requirement to pursue alternative options before commencing litigation.[21] Further:

> [T]here 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.[22]

2.18 Associate Professor Michael Legg contended that a shift in emphasis toward non-court processes and ADR is simply about diverting parties away from the courts, rather than achieving better outcomes:

> This runs the risk of creating a bifurcated system of justice with the 'haves' (mainly corporations and government) being able to afford litigation if they cannot achieve a desired outcome through ADR, and the 'have nots' who need to accept whatever is offered through ADR because they cannot afford litigation. Promoting and encouraging the use of ADR can be beneficial but if litigation is the last option, it must be a real option.
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> For the fundamental right of access to justice to be upheld disputants should be able to make a genuine choice about whether ADR or the courts better meet their needs.[23]

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19 Ms Margaret Meibusch, AGD, *Committee Hansard*, 17 May 2013, p. 38. Filing levels in the federal courts since 2010 are discussed further in Chapter 3.

20 *Submission 26*, p. 13.

21 *Submission 26*, p. 13. The Law Council also noted that, under the *Civil Dispute Resolution Act 2011*, all parties are required to certify that they have taken 'genuine steps' to resolve their dispute before reaching court; and, in family law cases, parties to a parenting dispute must make a genuine effort to resolve the matter by family dispute resolution before court proceedings can commence.

22 *Submission 26*, p. 13.

23 *Submission 9*, p. 7. See also: Kingsford Legal Centre, *Submission 21*, p. 3.

2.19 The Law Society of South Australia highlighted that there are areas of federal law, for example migration matters, that are not suitable for resolution through ADR.[24] Mr Malcolm Stewart from the Rule of Law Institute commented that ADR processes, while important, can be subject to abuse and should not become a substitute for an independently adjudicated outcome.[25]

Deterring unmeritorious litigants

2.20 Several submitters and witnesses contested the argument that court fees acting as 'price signals' can deter unmeritorious litigants from bringing matters before the courts. For example, Associate Professor Legg argued that the Australian legal costs system, where the unsuccessful party pays the other party's costs, already acts as a deterrent:

> [I]t would be a much larger disincentive than anything you are going to do with court fees, because the amount is much greater. In terms of the unmeritorious type of litigation you might have people who…try to judgement-proof themselves: 'I've got no assets; I don't care if I lose.' It is still highly likely that that person could be bankrupt. I do not think that trying to use court fees to dissuade them is really going to work.[26]

2.21 The Rule of Law Institute agreed that unmeritorious litigants would not be deterred by higher fees:

> [T]here are complex factors motivating unmeritorious or vexatious litigants. They may include mental health issues and certain personality traits. These factors are generally unresponsive to 'price signals'. In fact, raising filing fees may add to the sense of grievance felt by such litigants or increase their sense of entitlement (having paid the fees) to access the legal system. More likely, the brunt of dealing with the increased fees is going to be met by administrative staff dealing with applications for reduced fees or fee exemptions.[27]

Deterring meritorious cases

2.22 Australian Lawyers for Human Rights contended that higher court fees will also deter cases with genuine merit from being heard by the courts:

> Increased court fees are a blunt instrument to deter litigation. Such imposts deter cases without merit but they can also deter cases with merit. This is not a preferable approach. The courts have an inherent power to stop proceedings that are frivolous, vexatious, or otherwise an abuse of process. The use of these rules allows the Courts to deter litigation that has no merit,

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24 *Submission 20*, p. 3.

25 *Committee Hansard*, 17 May 2013, p. 7.

26 *Committee Hansard*, 17 May 2013, p. 11.

27 Response to a question on notice provided by the Rule of Law Institute of Australia on 23 May 2013, p. 1.

> in a way that does not operate as a blunt instrument deterring access to justice to other cases.[28]

2.23 Mr David Gaszner from the Law Council agreed:

> [T]he concept of a pricing signal is a sugar-coated way of saying that if you put the financial barrier high enough people will not come to court, and that is justified by the idea that it is preventing unmeritorious cases from being advanced…[T]here are many quite meritorious cases which, when they encounter this barrier, are not brought to court. They are easy to identify but an unmeritorious case is not.[29]

2.24 In response to the suggestion that increased fees might deter meritorious cases, a departmental officer stated:

> In terms of price signals…it is not really just about deterring frivolous or vexatious litigants…[Rather], it is also about noting that courts are expensive public resources and that really it should only be the most difficult cases that get to the courts.[30]

Equitable access to the court system

2.25 The Department has noted that structuring court fees should also be informed by equity considerations:

> 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.[31]

2.26 Several submitters argued that the fee increases since 2010 have breached this fundamental principle of equity in accessing the courts. For example, the Law Council contended that the increased fee regime enhances inequity in the legal system:

> [T]he 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…[T]he 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.[32]

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28 *Submission 8*, p. 2.

29 Mr David Gaszner, Law Council of Australia, *Committee Hansard*, p. 15.

30 Dr Albin Smrdel, AGD, *Committee Hansard*, 17 May 2013, p. 33.

31 *Submission 10*, p. 7.

32 *Submission 26*, p. 17.

2.27 The Law Society of South Australia argued that increased fees obstruct equitable access to justice:

> As a matter of principle, citizens are entitled to have their disputes justly determined according to law by an impartial and independent judicial system…[This] right is a fundamental pillar of our political and social structure, and it should not be undermined by other arms of government which seek to encroach on the justice system. Increased fees necessarily act as an obstacle to access to justice.[33]

2.28 Associate Professor Michael Legg contended that the recent fee increases have made the courts inaccessible in Australia, stating that 'the vast majority of individuals are going to have difficulty accessing the courts'.[34]

Access to fee exemptions

2.29 As described in Chapter 1, the 2013 changes included reintroducing fee exemptions for financially disadvantaged individuals. While submitters were supportive of the decision to reinstate fee exemptions,[35] some questioned whether the exemptions available are sufficient to ensure access to justice. For example, the Law Council argued:

> [N]otwithstanding 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]

Pro bono clients

2.30 The National Pro Bono Resource Centre noted that many law firms provide pro bono services to clients who are unable to pay court filing fees, and argued that automatic fee exemptions should be granted to individuals who are being represented on a pro bono basis:

> This would provide greater efficiency for the court and the applicant in dealing with persons being acted for on a pro bono basis. It would save time in completing and assessing the lengthy applications submitted for fee

33 *Submission 20*, p. 2.

34 *Committee Hansard*, 17 May 2013, p. 9.

35 See, for example: Law Council of Australia, *Submission 26*, p. 9; Law Society of South Australia, *Submission 20*, p. 1; Australian Lawyers for Human Rights, *Submission 8*, p. 2; Women's Legal Service New South Wales, *Submission 12*, p. 1.

36 *Submission 26*, p. 10.

> waiver or deferral and bring pro bono matters into line with the current treatment of those matters where there is a grant of Legal Aid.[37]

2.31 Mr John Corker, Director of the National Pro Bono Resource Centre, informed the committee that only 25 per cent of law firms undertaking pro bono work are willing to meet external disbursement costs, including court fees, for pro bono clients. Further, rigorous processes are undertaken in selecting pro bono clients:

> When matters are taken on pro bono, generally, for litigation, firms and/or pro bono clearing houses make a careful assessment of that matter as to its merits. They form a view that legal assistance will not be available elsewhere and they will also look to the means of the person to afford to pursue litigation before they make that decision…As a matter of fairness, as a matter of principle, these matters should be treated in the court rules in exactly the same way as those under the grant of legal aid or the other exempt categories—but particularly legal aid, because of the similar assessment of that person's capability.[38]

2.32 Mr Corker also noted that most recipients of pro bono assistance qualify for fee exemptions under the financial hardship test.[39]

2.33 On the issue of whether firms might take on pro bono work for reasons other than assisting clients who cannot afford legal representation, Mr Malcolm Stewart from the Rule of Law Institute commented that this would be very rare.[40] Mr Corker stated that some 'public interest' cases may be taken on pro bono on this basis.[41]

2.34 The National Pro Bono Resource Centre explained that pro bono clients' applications for an exemption could be subject to clear certification processes:

> The fact that the lawyer was acting on pro bono basis could be certified by the relevant lawyer or by a pro bono clearing house (to be named by regulation). There are currently ten such schemes in Australia. A definition of 'pro bono legal work' exists in paragraph 2 of Appendix F of the Commonwealth Legal Service Directions 2005 which could be used in this regard.[42]

2.35 Mr John Emmerig from the Law Council expressed support for creating a permanent exemption category for pro bono clients:

> Anything that can simplify that process for the pro bono provider and also for the court would be welcome…[O]ne of the impressive and encouraging things…in legal practice in this country is the increase in attention by the profession to pro bono work. It is a momentum that needs to be supported.

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37 *Submission 31*, p. 3.

38 *Committee Hansard*, 17 May 2013, p. 2.

39 *Committee Hansard*, 17 May 2013, p. 2.

40 *Committee Hansard*, 17 May 2013, p. 3.

41 *Committee Hansard*, 17 May 2013, p. 3.

42 *Submission 31*, p. 6.

> Anything that makes it simpler and more efficient would be very, very welcome.[43]

2.36 A representative from the Department informed the committee that it was government policy for fee exemption requests by pro bono clients to be assessed on a case by case basis:

> The application of pro bono services for a particular litigant does not follow necessarily the same process that you might get, for example, in a grant of legal aid. It is not necessarily the case that a litigant in those circumstances will have no capacity to pay. The government believes it is appropriate that there be an assessment, not simply that because pro bono services have been provided it should be automatic. It may well be, for example, that there is a particularly significant point of law involved that has attracted a private lawyer to act pro bono. That does not necessarily mean that the litigant does not have some ability to pay...[T]he position of the government is that there should be an assessment on a case by case basis.[44]

Clients of Community Legal Centres

2.37 Witnesses at the committee's public hearing raised concerns regarding access to fee exemptions for clients of community legal centres (CLCs). Ms Liz Pinnock from the Hunter Community Legal Centre informed the committee that, while the clear intention of the fee regulations is that clients of prescribed CLCs should be exempt, anomalies in the fee exemption form used in the Federal Court and the Federal Circuit Court mean that there is ambiguity about whether CLC clients are covered under the category of those 'receiving legal aid':

> [I]t would appear from the reading of the regulations, and the reading of the list of approved schemes, that there is an intention that most if not all community legal centre clients should be exempt from the fees—and yet the exemption form itself does not include that as a possibility. Anecdotally, we have been told that many CLC clients have gone to court, applied for an exemption and not received it, when in fact they should have received an exemption.[45]

2.38 In addition, Ms Lucy Larkins from the Federation of Community Legal Centres Victoria raised concerns that not all CLCs that are eligible have been prescribed as approved legal aid schemes under the Legal Aid Schemes and Services Approval 2013. Ms Larkins recommended that this legislative instrument be reviewed to ensure that all eligible CLCs are appropriately recognised.[46]

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43 *Committee Hansard*, 17 May 2013, p. 17. See also: Mr Denis Farrar, Law Council of Australia, *Committee Hansard*, 17 May 2013, p.17; Associate Professor Michael Legg, *Committee Hansard*, 17 May 2013, p. 9.

44 Mr Kym Duggan, AGD, *Committee Hansard*, 17 May 2013, p. 37.

45 *Committee Hansard*, 17 May 2013, p. 21. See also: Hunter Community Legal Centre, *Supplementary Submission 17*, pp 1-4 and 10.

46 *Committee Hansard*, 17 May 2013, p. 26.

2.39 A departmental representative commented that the list of approved providers had been updated prior to the introduction of the current regulations in January 2013, and that further updates are possible:

> The approval was updated at the time the regulations were made, and commenced on 1 January 2013, and, on the basis of knowledge of CLCs that should be on the list at the time, a further process could be undertaken. The sort of thing you might do would be to seek other CLCs who might think they should be on the list. It is not an automatic thing that one would go on the list. They would have to meet certain criteria. But, certainly, if a particular CLC has that sort of interest they can raise it with the department.[47]

Other flexibility measures in relation to court fees

2.40 The Department noted that, in addition to fee exemptions, several other measures give the courts flexibility in dealing with fees. These are:

- 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.[48]

Application of revenue from court fees

2.41 As noted in Chapter 1, the government has made several announcements about the application of revenue from the increased federal court fees since 2010:

- the 2010 fee increases were designed to raise $66.2 million in revenue over four years, which was to be directed toward additional funding for legal assistance services;[49] and
- the 2013 fee changes are forecast to raise $102.4 million in revenue over four years, with additional funding of $38 million to be reinjected into the court system.[50]

2.42 The Department commented in relation to the application of revenue raised from federal court fees:

> The federal courts are funded out of the Budget not through court fees. Court fee revenue is returned to consolidated revenue. It costs far more to

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47 Ms Margaret Meibusch, AGD, *Committee Hansard*, 17 May 2013, p. 36.

48 *Submission 10*, p. 14.

49 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.

50 AGD, *Submission 10*, p. 9.

> run the federal courts than is raised through court fees. The primary consideration for the 2013 court fee increases was to increase cost recovery levels of running the courts. Out of this increased fee revenue from the 2012-13 Budget, the Government decided to allocate additional Budget funding to the courts at a level that it considered an appropriate amount to put the courts on a firmer financial footing. The remainder of the fee revenue is appropriately available to fund other Budget priorities.[51]

2.43 Several submitters and witnesses raised objections to court fee revenue being returned to consolidated government revenue.[52] The Law Council expressed the view that 'court fees do not, and should not, exist to raise revenue for the government or to fund essential services'.[53] Further:

> 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…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.[54]

2.44 The Rule of Law Institute agreed that the lack of funding for the operation of federal courts and legal assistance services should not be made up through increased fees at the risk of compromising access to justice:

> [T]he rise in federal court filing fees has confused two issues: access to justice and budgeting. The rise in fees is not just a financial issue, it is a threat to a fundamental principle of the rule of law. Provision of justice through a functioning, adequately resourced justice system is a core responsibility of government. Budget crises require budgetary responses, not inroads into the rule of law and access to justice.[55]

2.45 The National Pro Bono Resource Centre suggested that, in order to ensure appropriate use of fee revenue, a percentage could be 'tied and directed towards legal assistance funding'.[56] Mr Stewart of the Rule of Law Institute supported the idea of allocating revenue from court fees to legal assistance services.[57]

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51 Response to questions on notice provided by AGD on 24 May 2013, p. 9.

52 See, for example: Law Society of South Australia, *Submission 20*, p. 2; Queensland Council for Civil Liberties, *Submission 25*, p. 4.

53 *Submission 26*, p. 22.

54 *Submission 26*, pp 22-23.

55 *Submission 4*, p. 4. See also: Law Society of South Australia, *Submission 20*, p. 2.

56 *Submission 31*, p. 6.

57 *Committee Hansard*, 17 May 2013, p. 6.

Associate Professor Legg, while supportive, expressed caution that putting fee revenue back into legal assistance schemes would not help the majority of citizens, who will not qualify for legal assistance yet may still struggle to pay higher fees in order to enforce their rights.[58]

Broader context of the overall costs of litigation

2.46 In addition to access to justice considerations specifically relating to court fees, the Department highlighted the fact that court fees are only one component of the overall cost of resolving disputes in the courts:

> The largest costs in litigation are not court fees, but legal fees. Court and tribunal fees are only a small proportion of the actual costs of using the court or tribunal where legal representation is involved. 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…a litigant may incur the following costs in the course of proceedings:
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> • court fees – $2,130, and
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> • legal costs – at least $16,753.
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> Given these proportions, for many people, increases to court fees will not necessarily impede access to justice relative to the total cost of litigation.[59]

2.47 Associate Professor Legg commented that the high cost of legal representation does not justify increasing costs in other areas:

> [J]ust because you have other costs out there it does not make it right for government to…put more of a burden on people and increase the costs even further, just because [fees] are a small part of it. The fact is that all of the costs impede access to justice…[E]veryone should take responsibility for trying to keep the costs down.[60]

Policy development process for setting court fees

2.48 Mr Emmerig from the Law Council argued that there is a lack of logic underpinning the policy settings for federal court fees since 2010:

> There is no real logic that we have been able to discern behind the quantum of the fee increases. It is not linked to CPI or some other ordinary benchmark like that. It puts the federal court fees completely out of alignment with the fees being charged by other courts. It makes the federal court fees the highest in the country and therefore the most difficult for people to access.[61]

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58 *Committee Hansard*, 17 May 2013, p. 10.

59 *Submission 10*, p. 4.

60 *Committee Hansard*, 17 May 2013, p. 9.

61 *Committee Hansard*, 17 May 2013, p. 14.

2.49 Mr Emmerig also expressed the Law Council's view that there has been inadequate consultation undertaken by the government with the legal profession during the development of changes to federal court fees.[62] Other submitters and witnesses agreed that broader consultation is necessary in order to avoid anomalies and unintended consequences in the fee regime.[63]

2.50 Mr Emmerig proposed a broader consultation model to be adopted in developing future changes to court fees:

> It seems to [the Law Council] that it is very important that people who have a relevant perspective to this issue are involved in some form of effective and transparent consultation process when the fees are adjusted. Without wishing to be exhaustive, one could imagine that those people would include: the Law Council, because of the large number of lawyers that are involved in these matters; the Federal Court; associations linked with pro bono work; legal aid; and Family Court specialists who work in that particular discipline. And there may be a need for some other experts who deal with other areas such as immigration, insolvency and so on; maybe they could be caught by other bodies. But…there does need to be a wide pool of people who need to be involved in the process and it has got to be a lot more transparent than it is right now.[64]

2.51 In response to questioning about consultations undertaken in relation to fee changes, a departmental representative told the committee that consultation was undertaken in 2011 during the review of the 2010 fee increases, including with stakeholders such as the Law Council, National Legal Aid and the National Association of Community Legal Centres.[65]

2.52 In relation to the setting of the quantum of court fees, the representative confirmed that this is a confidential budget process of government:

> The court fees process is typically undertaken as part of the budget process, which is confidential to government, so the ability of government to consult is quite significantly constrained during the course of a budget process. We were able to have some discussions with the courts about the design—I am not talking about quantum but at least in terms of the design—of the new court fee measures, and subsequent to the budget process being endorsed we were able to consult quite closely with the courts on the fee regulations.
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> …[I]t is open to stakeholders to engage with the department to discuss appropriate settings for court fees, while recognising that that can only be at the principle level. Furthermore, at the time that the budget processes are

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62 *Committee Hansard*, 17 May 2013, p. 13.

63 See, for example: Federation of Community Legal Centres, *Submission 28*, p. 2; Ms Helen Matthews, Women's Legal Service Victoria, *Committee Hansard*, 17 May 2013, p. 28; Ms Alexandra Kelly, Consumer Credit Legal Centre, *Committee Hansard*, 17 May 2013, p. 28.

64 *Committee Hansard*, 17 May 2013, p. 17.

65 Dr Albin Smrdel, AGD, *Committee Hansard*, 17 May 2013, p. 35.

entered into, when government have a particular idea of the quantum they are looking for, the ability at that stage is constrained but relies on principles that have been established as a result of consultations.[66]

66 Dr Albin Smrdel, AGD, *Committee Hansard*, 17 May 2013, pp 34-35.