

## **CHAPTER 3**

### **IMPACT OF COURT FEE INCREASES SINCE 2010**

3.1 Submitters and witnesses commented on several aspects of the impact of federal court fee increases since 2010. Stakeholders discussed whether increased fees had affected filing levels in the courts since 2010, as well as exploring the impact of fee increases on various groups that access the courts, namely low and medium-income individuals, corporations and government agencies. Concerns were also raised regarding other impacts of fee increases, including the accessibility of ADR mechanisms and the possibility of litigants shifting matters away from the federal courts to avoid higher fees.

#### **Filing levels in the federal courts since 2010**

3.2 The question of whether fee increases have affected filing levels in the courts was discussed at the committee's public hearing. A departmental representative informed the committee that empirical data relating to filing levels in the courts show that the 2010 fee increases did not have a significant impact, and that 'filings still seemed to be pretty much at the same level, if not having gone up' after the changes.<sup>1</sup> On the impact of the more recent 2013 fee increases, the representative stated that it is 'probably still too early to have a definitive view on how it is going'.<sup>2</sup> Despite this, the Department provided some initial observations about filing levels since 1 January 2013.

3.3 The Department informed the committee that filings nationally in the Federal Court have remained reasonably steady since 1 January 2013. Further:

If a full-year projection is made from year-to-date filings in the current financial year and compared against each of the two previous years, filings over these three years have increased gradually from year to year. That gradual rate of increase has however plateaued this calendar year[.]<sup>3</sup>

3.4 In relation to filings in the Federal Circuit Court, the Department stated:

[S]ince 1 January 2013 there has been a decline in the bankruptcy filings which may impact on the overall general federal law filings. However there has been a trend upwards in respect of migration filings. On current filings it can be expected that filings will be slightly down on last year overall.<sup>4</sup>

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1 Dr Albin Smrdel, Attorney-General's Department (AGD), *Committee Hansard*, 17 May 2013, p. 34.

2 Dr Albin Smrdel, AGD, *Committee Hansard*, 17 May 2013, p. 34.

3 Response to questions on notice provided by AGD on 24 May 2013, p. 2.

4 Response to questions on notice provided by AGD on 24 May 2013, p. 2.

3.5 The Department also noted that filing numbers in the Family Court in 2013 are 'consistent with previous years'.<sup>5</sup>

3.6 At the committee's public hearing, a departmental representative emphasised that the Department 'will be monitoring very carefully the impact of these fees and bringing to the attention of government any emerging signals'.<sup>6</sup>

### **Impact of court fee increases on low and medium-income individuals**

3.7 Submitters and witnesses expressed concern that low-income individuals and families may no longer be able to afford to access justice through the courts as a result of fee increases since 2010.<sup>7</sup>

3.8 The Consumer Credit Legal Centre (NSW) argued that low-income individuals will be forced to accept substandard outcomes due to an inability to afford court fees:

[L]ow-income clients are generally reluctant to be involved in proceedings in the first place and rarely have the willingness or the bargaining position where they can insist that the other parties will cover federal court fees as a part of a settlement...The increased federal court fees will force already disadvantaged consumers to resolve their complaints with lenders or retailers on less-favourable terms, if they are able to resolve them at all as legal recourse to the courts no longer becomes a feasible option.<sup>8</sup>

3.9 Submissions from legal assistance service providers raised anecdotal cases of individuals who, while not qualifying for a financial hardship fee exemption, could still not afford to pay increased court fees in order to access justice.<sup>9</sup> Women's Legal Service Victoria noted:

[I]ndividuals on low incomes, who may not necessarily satisfy the test for financial hardship applied by the court, are unfairly disadvantaged by the current structure of fees...[Fees are] prohibitively expensive for a woman on a low income who may not satisfy the financial hardship test because she works and has a small amount of savings in the bank.<sup>10</sup>

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5 Response to questions on notice provided by AGD on 24 May 2013, p. 2.

6 Mr Kym Duggan, AGD, *Committee Hansard*, 17 May 2013, p. 39.

7 See, for example: Ms Liz Pinnock, Hunter Community Legal Centre, *Committee Hansard*, 17 May 2013, p. 21; Kingsford Legal Centre, *Submission 21*, p. 1; Family Law Practitioners Association of Tasmania, *Submission 16*, p. 1.

8 *Submission 18*, p. 2.

9 See, for example: Hunter Community Legal Service, *Submission 17*, pp 2-3; Federation of Community Legal Centres (Victoria), *Submission 28*, pp 1-2.

10 *Submission 22*, p. 3.

3.10 Ms Helen Matthews from Women's Legal Service Victoria suggested that introducing graded filing fees for low to middle-income earners would improve access to justice for this group.<sup>11</sup> The NSW Council for Civil Liberties argued that the financial hardship exemption should be expanded:

[T]he 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.<sup>12</sup>

3.11 Ms Lucy Larkins of the Federation of Community Legal Centres Victoria agreed that the 'bar for financial hardship is set too high', and that the financial hardship test for fee exemptions should be reassessed.<sup>13</sup>

### ***Departmental response***

3.12 In relation to access to justice for low-income individuals, the Department stated that court fees are 'broadly structured to account for capacity to pay fees'.<sup>14</sup> On the level of the financial hardship exemption, the Department commented:

The 'financial hardship' exemption is a flexible exemption which allows the court to consider the person's individual circumstances. The fees regulations do not prescribe how the test is to be implemented.

However, the Family Court and Federal Circuit Court have published...guidelines for the financial hardship exemption...The [guidelines indicate] that the maximum allowable fortnightly income available for the financial hardship exemption is \$1207.50 (before tax) for a person with no dependents. The maximum allowable income rate increases with dependents, and there is also an allowance for liquid assets. Although legal aid commissions assess financial circumstances differently, this maximum threshold for a fee exemption is higher than the maximum income test applied by Legal Aid NSW of \$636 net fortnightly for a person with no dependents. It is also higher than the Newstart allowance of \$497 fortnightly for a person with no dependents.

It should be noted that these are only guidelines. Court fee exemptions and legal aid may still be available even if a person earns more than these thresholds.<sup>15</sup>

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11 *Committee Hansard*, 17 May 2013, p. 23.

12 *Submission 29*, pp 4-5.

13 *Committee Hansard*, 17 May 2013, p. 22.

14 Response to questions on notice provided by AGD on 24 May 2013, p. 10.

15 Response to questions on notice provided by AGD on 24 May 2013, pp 9-10.

3.13 The Department also noted that for individuals who are not eligible for an exemption, fee deferral is available in a number of circumstances, 'including where it would be oppressive or otherwise unreasonable to require payment having regard to the financial circumstances of the person'.<sup>16</sup>

### **Families and family law matters**

3.14 Fees in family law matters have been subject to increases in both the 2010 and 2013 changes. This includes increases to fees for filing matters, divorce applications, consent orders, issuing subpoenas and hearing fees.

3.15 Mr Dennis Farrer from the Law Council argued that increased fees for family law matters would have significant impacts on affected families, including children:

[A]ccess to justice for separating families is essential where other means of resolution have failed. Delayed or obstructed access to the court process generally has detrimental effects for separating families and, in particular, their children. Even where children are not the subject of proceedings, they are often heavily impacted by delay in dispute resolution. For example, future accommodation arrangements for children will be dependent on resolving property matters between their parents.

Many separating families have limited access to liquid funds...[and] rarely do they have significant savings. In those circumstances, if the available cash that they have, which they generally guard carefully, is devoted to trying to resolve the dispute with their ex-partner then, at the end of the day, that is denuding them and their future, because in the family law circumstance it is rare that a loser pays a winner's costs.<sup>17</sup>

3.16 The Law Council also argued that the recently increased fees for some family law matters as a means of increasing cost recovery in the courts system is inappropriate:

This is contrary to the [Department's] own policy guidelines on cost recovery in the federal courts, because the Court has an effective 'monopoly' on divorce applications, consent orders and several other processes. There are no market-based alternatives to achieve a divorce or consent orders.

In other cases, it appears parties are to be 'punished' through substantially increased court fees, simply because they have been unable to achieve agreement or settlement. This may seriously disadvantage one party who has to rely on the reasonableness of the other party to the proceedings. In many cases, children are involved, which clearly invokes another caveat set down by the [Department] as favouring the public interest in resolving disputes without exorbitant fees[.]<sup>18</sup>

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16 Response to questions on notice provided by AGD on 24 May 2013, p. 10.

17 *Committee Hansard*, 17 May 2013, p. 15.

18 *Submission 26*, p. 14.

3.17 In relation to fees for family law matters, the Department commented:

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.<sup>19</sup>

3.18 Mr Farrar disagreed that higher fees would result in quicker resolution to disputes:

Historically...the statistics under the Family Law Act were that approximately 95 per cent of cases did not go to trial. Interestingly the statistics since the family relationship centres were established would indicate that the same number still exists—that is, about five per cent of couples need a court decision, and that has been the situation historically fairly consistently.

That indicates—and it is the experience of family lawyers—that parties who litigate in parenting matters are people who have been unable to resolve their disputes through the processes of ADR and need a court to do so...[I]mposing greater financial impediment upon them in accessing courts is not going to help them resolve the dispute that they have.<sup>20</sup>

3.19 The Family Law Practitioners Association of Tasmania commented that some clients are forced to abandon proceedings due to ongoing fees throughout the court process:

When court fees are not paid[,] the court event to which the fee relates (a conference or a hearing) is likely to be cancelled, leaving the case in limbo. This is an awful consequence for an applicant who, having unsuccessfully sought resolution through mediation and negotiation, has come to the court system for assistance. The cancellation of court events wastes valuable judicial time as well as other court resources such as the time of registrars who conduct conferences.<sup>21</sup>

### ***Divorce applications***

3.20 As part of the 2013 changes, the fee for divorce applications in the Family Court increased from \$816 to \$1135, and the fee in the Federal Circuit Court increased from \$577 to \$800.<sup>22</sup> The 2013 changes also increased the reduced 'hardship' fee for divorce applications in the Federal Circuit Court from \$60 to \$265.<sup>23</sup>

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19 *Submission 10*, p. 12.

20 *Committee Hansard*, 17 May 2013, pp 14-15.

21 *Submission 16*, p. 2.

22 AGD, *Submission 10*, p. 12.

23 *Family Law (Fees) Regulation 2012*, Section 2.06.

3.21 The Department explained these changes as follows:

[T]he increase to divorce fees only represents an increase of approximately 7.6 [per cent] 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 [per cent] (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.<sup>24</sup>

3.22 The Department also noted:

While recognising that divorce will be a significant event in a person's life, fees are charged for a number of services which are also significant life events, such as marriage and probate. Fees for these services are not subject to any exemption for people on very low incomes.<sup>25</sup>

3.23 Other submitters argued that the increases to divorce application fees were unreasonable.<sup>26</sup> Several community legal centres provided anecdotal evidence of low-income individuals who were unable to proceed with a divorce application due to the increased fee.<sup>27</sup>

3.24 Submitters and witnesses noted that access to divorce can be extremely important for individuals, particularly in cases of domestic violence. The Women's Law Centre WA stated:

It is in the interests of the community that all individuals, who would like to, are able to finalise the end of a marriage by being able to file for divorce. Divorce is often a positive step for individuals in rebuilding their lives after marriage. It can be particularly important for women who have experienced family violence as it can bring finality and positively impact on health and emotional well-being. As such, ensuring accessibility for all individuals in our community is extremely important.<sup>28</sup>

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24 *Submission 10*, p. 13.

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

26 See, for example: Australian Lawyers for Human Rights, *Submission 8*, p. 2; Law Council of Australia, *Submission 26*, p.14; Cairns Community Legal Centre, *Submission 3*, p. 2; Top End Women's Legal Service, *Submission 11*, pp 1-2.

27 See, for example: Women's Law Centre WA, *Submission 5*, p. 2; Hunter Community Legal Centre, *Submission 17*, p. 3; Federation of Community Legal Centres (Victoria), *Submission 28*, pp 1-2; Women's Legal Service Victoria, *Submission 22*, p. 2.

28 *Submission 5*, p. 2. See also: Kingsford Legal Centre, *Submission 21*, p. 2.

3.25 Ms Helen Matthews from the Women's Legal Service Victoria noted that accessing divorce can be important for legal reasons, including the impact that divorce has on succession laws for the parties involved and the presumption of parentage.<sup>29</sup> Ms Matthews also noted that the ability to obtain divorce in order to legitimately remarry has particular cultural importance for many communities within Australia.<sup>30</sup>

#### *Urgency of divorce applications*

3.26 The Department pointed out that divorce applications need to be planned in advance, and hence there should be opportunity for applicants to save the necessary funds for the application fee:

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.<sup>31</sup>

3.27 In relation to the mandatory separation period for couples prior to obtaining a divorce, Ms Larkins from the Federation of Community Legal Centres Victoria commented:

The government has justified the lack of a fee waiver for divorce on the basis that the 12-month separation period required will give people the opportunity to save the necessary funds. However, the reality is that the 12-month period of separation is one of the most disruptive periods in a person's life. A mother may have needed to flee her home with her children and live in a women's refuge or she may be in the pressure cooker of being separated under roof with a husband who asserts financial control over her. This period of chaos is not conducive to saving money for a divorce. Therefore, the government's rationalisation for withholding full exemption for fees in cases such as these lacks logic.<sup>32</sup>

#### *Efficiency of divorce proceedings*

3.28 The Rule of Law Institute argued that divorce matters are relatively straightforward and should not be made inaccessible to those on low incomes:

It is antithetical to the principle of access to justice that divorce applications should be made financially inaccessible. Often, divorce is accompanied by

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29 *Committee Hansard*, 17 May 2013, p. 23.

30 *Committee Hansard*, 17 May 2013, p. 27.

31 *Submission 10*, p. 13.

32 *Committee Hansard*, 17 May 2013, pp 21-22.

serious economic consequences for the parties and the filing fee may add to those difficulties by effectively penalising the person who makes the application for divorce. Moreover, if the justification for increases in certain court federal court fees is to reflect the complexity of those matters, then the rise in divorce application fees is unwarranted, as it is one of the simpler matters courts deal with in a generally streamlined process.<sup>33</sup>

3.29 The Law Council agreed that increases in divorce application fees cannot be justified by the cost to the courts of hearing divorce proceedings:

Divorce proceedings last, on average, 5-10 minutes and utilise a minimal amount of the Court's time. It is difficult to fathom how \$800 could be considered 'reasonable' in the circumstances.<sup>34</sup>

### ***Subpoena fees***

3.30 The 2013 changes introduced a \$50 fee for issuing a subpoena for family law matters and matters in the Federal Circuit Court. The Department stated that these subpoena fees will 'encourage parties to carefully consider the evidence required in an individual case' in order to ensure that proceedings are not unnecessarily drawn out.<sup>35</sup>

3.31 The Law Council argued against the introduction of this fee:

Subpoenas are often the only and most efficient means of ensuring appropriate evidence is brought before the courts. In any given proceeding, it may be necessary to issue several subpoenas to ensure the prompt and complete delivery of relevant information. While the cost to the courts of administering subpoenas is relatively low, the fees charged may create a substantial additional financial burden to litigants. Ultimately, the use of subpoenas promotes the administration of justice and the imposition of substantial fees is not supported by justice policy considerations.<sup>36</sup>

3.32 Associate Professor Michael Legg noted that, in the Federal Court, there are already procedures in place to provide oversight for the issuing of subpoenas and ensure that parties do not make subpoena applications unnecessarily.<sup>37</sup>

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33 *Submission 4*, p. 3.

34 *Submission 26*, p. 14.

35 *Submission 10*, p. 12.

36 *Submission 26*, p. 15.

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



## Impact on businesses and corporations

3.33 The 2013 changes included: a general fee increase of 40 per cent for corporations fees; the introduction of new fees for publicly listed corporations (150 per cent of the corporations rate); and making incorporated small businesses eligible for the fees payable by individuals (instead of the higher corporations rates). The Department informed the committee that the higher fees for corporations 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; and
- publicly listed companies are highly likely to have the resources to engage in litigation and regularly engage in the most complex, resource intensive litigation.<sup>38</sup>

3.34 The Department noted that the use of staged hearing fees, introduced in 2010 and expanded in 2013, would target lengthy and protracted proceedings:

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.<sup>39</sup>

3.35 The Law Council argued that the new increased fees for publicly listed companies (150 per cent of the corporations rate) fail 'to take account of the diversity of listed firms'. Specifically:

While some national and international companies...have enormous market capitalisation and resources to pour into litigation, many companies listed on the Australian Stock Exchange are relatively small, with low market capitalisation and market share and little capacity to withstand lengthy litigation at a rate of \$16,765 per day, plus legal fees and other disbursements, if a complex case is dragged on by an opponent with greater financial resources.<sup>40</sup>

3.36 Associate Professor Legg argued that increased corporations fees could impact Australia's competitiveness for international companies:

Repeat players in the global market place will wish to structure their legal relationships so that disputes are referred to the Courts where they can expect the best outcome...Careful consideration will be given to which forum has the legal system with the expertise and procedure to efficiently resolve the dispute.

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38 *Submission 10*, p. 10.

39 *Submission 10*, p. 10.

40 *Submission 26*, p. 21.

The impact of substantially higher court fees can hinder Australia's attraction as a place to do business if corporations determine that Australian justice is too expensive.<sup>41</sup>

3.37 In relation to the ability of publicly listed companies to pay higher fees, the Department stated:

Publicly listed companies are likely to have the capacity to engage in resource intensive litigation. According to the Australian Securities Exchange (ASX) Listing Rules, for admission to the ASX, the company must have, amongst other things, a profit of \$1 million over the last 3 years and net profit of \$400,000 during the 12 months before applying for admission to the ASX (Rule 1.2); or \$3 million net tangible assets (Rule 1.3.1); or \$10 million market capitalisation (Rule 1.3.1).

Fees related to the ASX are also high. For example, the initial admission fee to the ASX is \$25,000 for a company with assets up to \$3 million and the minimum on-going annual fee is \$9,990. Fees increase depending on the value of the company.

The ASX Listing Rules also require the company to have had the same main business over the last 3 years (Rule 1.2.2) in order to be listed. This means only established corporations are listed and therefore any fee charged on publicly listed companies will not be a disincentive for new businesses.<sup>42</sup>

### ***Insolvency proceedings and consumer protection***

3.38 The Law Council argued that increased filing fees may have an impact on insolvency proceedings being brought before the Federal Court:

If creditors become reluctant to commence such proceedings because of perceived disproportionate filing costs, this may, in turn, result in higher incidences of insolvent trading by companies and the continual incurring of debt by insolvent individuals. As a consequence, the long-standing public policy objective of protecting the public from clearly insolvent companies and individuals may be frustrated...The Law Council has already been advised anecdotally of a number of instances in which creditors of an insolvent company have elected not to pursue debts due to prohibitive court fees.<sup>43</sup>

3.39 On a different point, the Consumer Credit Legal Centre argued that increased filing fees will prevent consumers from pursuing credit-related issues in the courts:

Any reduction in access to justice in the courts will inevitably have a negative effect on retail and consumer credit markets as unjust or fraudulent

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41 *Submission 9*, pp 5-6.

42 Response to questions on notice provided by AGD on 24 May 2013, p. 8.

43 *Submission 26*, p. 16.

businesses are allowed to stay in business because consumers cannot afford to take them to court.<sup>44</sup>

### **Impact on government agencies taking regulatory action**

3.40 The 2013 changes included making Commonwealth agencies pay fees at the corporations rate, as explained by the then Attorney-General on 10 September 2012:

Recognising that the Commonwealth is one of the most frequent court users, government agencies will now also pay the corporations rate. [This] will encourage government agencies to actively decide whether court action is necessary, or whether alternative methods are available[.]<sup>45</sup>

3.41 The Law Council asserted in its submission that this may have an impact on agencies' ability to undertake activities:

[A] number of government agencies have begun to consider whether regulatory functions can be carried out in the federal courts due to the impact of substantially increased filing fees on departmental litigation budgets.<sup>46</sup>

3.42 In response to this assertion, several agencies provided the committee information regarding any potential impact of increased fees. The Australian Taxation Office (ATO) advised the committee that increased fees are having a significant effect on its litigation processes:

The ATO has a significant volume of court proceedings each year in both state and federal jurisdictions, including commencing several thousand debt-related actions (wind-ups and creditors petitions) in the Federal Court. As such, the increase in Federal Court fees has had and will continue to have a significant impact on the potential cost of the ATO's litigation activity.<sup>47</sup>

3.43 The ATO confirmed that its filing fees are expected to increase from \$2.88 million in the 2011/12 financial year to \$5.96 million in the 2012/13 financial year.<sup>48</sup>

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44 *Submission 18*, p. 2.

45 The Hon Nicola Roxon MP, Attorney-General, Media Release, 'Federal courts back on firm footing', 10 September 2012, p. 1.

46 *Submission 26*, p. 17.

47 Response from the Australian Taxation Office to comments on page 17 of the Law Council of Australia's submission, 7 May 2013, p. 1.

48 Response from the Australian Taxation Office to comments on page 17 of the Law Council of Australia's submission, 7 May 2013, p. 1. The ATO noted that its total legal expenditure in 2011-12 was \$101.74 million: see p. 2.

3.44 Conversely, other agencies did not expect court fees to have such an impact on their activities. The Australian Securities and Investments Commission commented that it 'does not currently expect increases in federal court fees to affect adversely the performance of its regulatory functions'.<sup>49</sup> The Department of Sustainability, Environment, Water, Population and Communities stated that 'the increase in court fees will not prevent the department from commencing legal action to enforce Commonwealth environmental law'.<sup>50</sup>

### **Other impacts of federal court fee increases**

3.45 Submitters and witnesses also commented on several other impacts, or potential impacts, arising as a result of fee increases since 2010, including: the administrative impact on legal assistance centres; the impact on the ability of disputants to access ADR processes; and the potential for litigants to move some matters away from federal courts in order to avoid higher fees.

#### ***Administrative impact on legal assistance providers***

3.46 The National Family Violence Prevention Legal Services Forum (FVPLS), which provides legal assistance services to Aboriginal and Torres Strait Islander clients, argued that tightened eligibility for legal aid assistance, combined with higher court fees, is having an impact on legal assistance providers:

As eligibility for Legal Aid services has tightened, more FVPLS clients now have to self-fund their legal cases, as they are no longer eligible for Legal Aid...Disbursements such as consent orders (\$145) and subpoenas (\$50) can quickly add up to significant costs for clients. As well as putting pressure on the clients, the National Forum is concerned about the pressure on legal services and lawyers. FVPLS lawyers report a reluctance to impose high filing fee costs on clients they know are ill-equipped to pay.

FVPLSs are finding themselves regularly in the position of having to chase clients for money to cover the costs of filing fees and other disbursements. Not only is this an ineffective use of limited staff resources, it is not encouraging Aboriginal clients to remain engaged with the legal system.<sup>51</sup>

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49 Response from the Australian Securities and Investments Commission to comments on page 17 of the Law Council of Australia's submission, 7 May 2013, p. 1.

50 Response from the Department of Sustainability, Environment, Water, Population and Communities to comments on page 17 of the Law Council of Australia's submission, provided on 9 May 2013, p. 1.

51 *Submission 14*, p. 4.

### ***Impact on access to ADR processes***

3.47 Submitters expressed concern that despite the emphasis on using increased court fees as pricing signals to direct potential litigants towards ADR processes where appropriate, some ADR fees have also been increased in the 2013 changes.<sup>52</sup>

3.48 The Law Council noted that a new fee (of \$350) has been introduced for conciliation conferences in family law matters:

The Law Council is not aware of any attempt by the Department to explain how fees for conciliation conferences can be justified under commonly understood justice policy considerations, which generally refer to the imperative of encouraging greater use of ADR, including mediation and conciliation, as a means of heading off litigation...[F]ees for Conciliation Conferences in family law matters disadvantage the applicant, who is often the party seeking to resolve the matter reasonably.<sup>53</sup>

3.49 Fees for mediation sessions also increased in 2013.<sup>54</sup> The Law Council commented:

[T]he large daily fees for mediation are providing a disincentive for parties to engage in the process. Many complex matters cannot be resolved in mediation on a single day and the charging of a fee...for each day of mediation is a disincentive for parties to continue the process...[I]t is unclear at this stage whether settlement rates have been impacted and whether savings in judicial time through previous efforts to encourage mediation will be maintained.<sup>55</sup>

3.50 The Department explained the reason for the increase in conciliation conference fees as follows:

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.<sup>56</sup>

3.51 In relation to increased mediation fees, the Department stated:

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.

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52 See, for example: Rule of Law Institute of Australia, *Submission 4*, p. 3.

53 *Submission 26*, p. 14.

54 The rates are: \$2,460 per day for a public company, \$1,640 per day for a corporation and \$700 for individuals in the Federal Court; and \$410 for individuals in the Federal Circuit Court. See: Federal Court and Federal Circuit Court Regulation 2012, Schedule 1 (items 132 and 224).

55 *Submission 26*, pp 14-15.

56 *Submission 10*, p. 12.

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.<sup>57</sup>

***Shifting the workload from federal courts onto state and territory courts***

3.52 The Law Council raised concerns that the higher fees payable in federal courts would mean that, where matters could be brought in either federal or state jurisdictions, litigants would choose to instigate proceedings in state and territory courts to take advantage of lower fees. The Law Council argued that this could particularly have an impact in relation to insolvency and winding-up matters.<sup>58</sup>

3.53 The ATO advised the committee that it is considering shifting cases to state courts:

In light of the recent increase in Federal Court filing fees we are considering what options we may have around the number of actions filed and in which courts. Cost of filing was a significant factor in the ATO's decision to shift towards primary use of the Federal Court for our wind-up and creditors petition actions. Due to the cost of filing there is a possibility that the ATO may consider shifting volumes of matters back to the State Courts.<sup>59</sup>

3.54 The Law Council submitted that, if increased 'forum shopping' away from the federal courts continues, specialist expertise in the federal courts may be lost:

[T]he fee increase may give rise to the perception that the Federal Court and Federal Magistrates Court are prepared to forfeit their concurrent jurisdiction over certain matters to the State courts. If Federal Court work was ultimately lost to the State courts, there may be a degradation of the Court's commercial expertise and experience, which could in turn undermine the community's confidence in the Court in respect of commercial causes. Instead, the focus of the Court's work may be in the areas of migration, employment and industrial matters. This, in turn, could affect the capacity of the Court to attract judicial candidates with strong reputations in the commercial sphere.<sup>60</sup>

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57 *Submission 10*, p. 11.

58 *Submission 26*, p. 24.

59 Response from the Australian Taxation Office to comments on page 17 of the Law Council of Australia's submission, 7 May 2013, p. 2.

60 *Submission 26*, pp 24-25.

3.55 The Department commented:

There are a number of factors that influence the forum in which to commence proceedings, with court fees only being one factor. Other costs contribute to the cost of litigation, including travel costs for practitioners where the matter is located in a number of different geographic locations.<sup>61</sup>

3.56 Further, the Department noted that the Commonwealth 'continues to explore with the States and Territories a consistent approach to the setting of court fees'.<sup>62</sup>

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61 Response to questions on notice provided by AGD on 24 May 2013, p. 3.

62 Response to questions on notice provided by AGD on 24 May 2013, p. 3.