



NATIONAL PRO BONO RESOURCE CENTRE

Submission to the Senate Legal and Constitutional Affairs Committee

Impact of federal court fee increases since 2010 on access to justice in Australia

15 April 2013

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About the National Pro Bono Resource Centre ('the Centre')

The Centre is incorporated as a company limited by guarantee and was established at UNSW in 2002 following the recommendation by the National Pro Bono Task Force to the Commonwealth Attorney-General. The Centre exists to support and promote the provision of pro bono services. Its role is to stimulate and encourage the development, expansion and coordination of pro bono services as well as offering practical assistance in this regard.

The Centre is an independent, non-profit organisation that aims to:

- Promote pro bono work throughout the legal profession;
- Undertake research and projects to inform the provision of pro bono legal services;
- Provide practical assistance to pro bono providers (including information and other resources);
- Develop strategies to address legal need; and
- Promote pro bono law to community organisations and the general public.

The Centre receives financial assistance from the Commonwealth and States' and Territories' Attorney-General's Departments, and support from the Faculty of Law at the University of New South Wales.

The Centre has established an Advisory Council and consults widely with the legal profession, Community Legal Centres (**CLCs**), pro bono referral schemes, Legal Aid, Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) and produces resources of immediate benefit to the legal profession and community sector.

1. Summary

Anecdotal evidence from pro bono clearing houses around Australia, and from law firm pro bono programs indicates that most law-income Australians that are acted for on a pro bono basis are either exempt from the payment of fees or manage to have the “financial hardship” discretion of the Court exercised in their favour so that no fees are payable or else are deferred.

However, there is a case for adding a further exempt fee category to the current rules, “those that are being acted for 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 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 (see details below).

2. Terms of Reference

The focus of the current inquiry is:

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

3. Introduction

Pro bono comes from the latin phrase *pro bono publico* which means for the public good. This is work undertaken by the private legal profession mainly for low-income and disadvantaged individuals who generally do not qualify for legal aid and for organisations who work on behalf of low income or disadvantaged members of the community which would otherwise not have access to justice. Some of this work is also done in cases involving matters of significant public interest.

Law firms and barristers usually only agree to take on these matters on a pro bono basis after an investigation has been conducted into the merits of the matter and the means of the person to pay for legal fees. This investigation might be undertaken by the firm, the barrister or by a referring agency, particularly a pro bono clearing house.

Where this work involves lawyers initiating or responding to proceedings in the Federal Courts, the question arises as to the quantum of any filing, hearing, or other court fees and who should pay these fees. The legal work is generally being done without any expectation of professional fees being received by either solicitor or barrister. Some of the larger law firm programs will be willing to pay filing fees on behalf of pro bono clients but fairness would seem to require that parties being acted for pro bono should **not** have to pay such fees (on the same policy basis that those that have been granted Legal Aid for the current proceedings are exempted).

Matters in the Federal Court might typically be first instance matters in Migration cases, appeals from various jurisdictions but particularly under the Migration Act from the Federal Circuit Court, matters under Part IV and Schedule 2 of the Consumer and Competition Act that raise matters in the public interest or matters under the human rights or native title jurisdiction of the court.

4. Comments on (a) the impact of federal court fee increases on low-income and ordinary Australians and the degree to which the fee changes reflect the capacity of different types of litigants to pay;

Anecdotal evidence from pro bono clearing houses around Australia, and from law firm pro bono programs indicates that most law-income Australians that are acted for on a pro bono basis are either exempt from the payment of fees or manage to have the “financial hardship” discretion of the Court exercised in their favour so that no fees are payable or else are deferred.

Exemptions

The current Federal Court Rules provide for exemptions from having to pay filing fees for certain categories of persons. These include:

- (a) Those granted Legal Aid
- (b) Those granted assistance under Part 11 of the Native Title Act by a representative Aboriginal or Torres Strait Islander body.
- (c) Holders of a
 - health care card;
 - a health benefit card
 - a pensioner concession card;
 - a Commonwealth Seniors health card;
 - another card issued by the Department of Family and Community Services (Not Family Court),
 - Centrelink or the Department of Veterans’ Affairs that certifies entitlement to Commonwealth
 - health concessions; or

- (d) an inmate of a prison or a person otherwise lawfully detained in a public institution;
or
- (e) a child under the age of 18 years
- (f) a person in receipt of Youth Allowance, Austudy or ABSTUDY

The Court's discretion to waive payment of the fee

Some of those being acted for pro bono do not fall within the above exempt categories (e.g. asylum seekers) and so have to seek a waiver or deferral of the payment of the fee on the basis that payment of the fee would cause the person to suffer financial hardship having regard to their income, day-to-day living expenses, liabilities and assets. Many asylum seekers were represented pro bono before the court last year and the Centre understands that this was dealt with by granting deferral of the payment of filing fees. These become a debt to the Commonwealth.

The application for waiver or deferral requires completion of a four-page Statement of Financial Position and attesting in an affidavit about the veracity of the information provided. This can be a lengthy process which in the main is successful but not in all cases.

For example recently an asylum seeker in Australia on a temporary visa was advised his application for waiver or deferral was refused on the basis that he had \$4000 in the bank, which he had recently earned working long hours in the kitchens of a bakery. He had no other assets. He could have appealed the matter to the AAT but this is cumbersome. As last advised the law firm involved was considering paying the fee on his behalf.

5. Comments on the application of the revenue that has been raised by federal court fee increases

During 2011–12 eighty-eight per cent of first instance cases commenced in the Court were commercial in nature. The case types included corporations law, intellectual property, competition law, consumer protection, taxation, admiralty, and bankruptcy¹.

The Court applies a number of techniques designed to deliver the just, quick and inexpensive disposition of commercial disputes but some corporations continue to use the courts for delay so as to improve their own competitive position as against competitors or against government. Fees (particularly hearing fees) should be able to be imposed by the court on parties who are using legal proceedings in this way.

As the work of the Federal Court is primarily in commercial in nature and most of these legal actions are between large corporations, they must share their fair share of the burden of providing these forums and generally helping access to justice for others who cannot afford it. Law firms do this through their pro bono programs.

The question for the inquiry is where the balance should lie between Government's responsibility to provide a court that is ensuring that the laws of the Commonwealth are

¹ Federal Court Annual Report 2011-2012, Part 2 accessed at <http://www.fedcourt.gov.au/publications/annual-reports/2011-12/part-2>

applied equally and fairly for the protection and welfare of all our citizens, and the responsibility of corporations to pay for the use of the courts to resolve disputes, to pursue litigation for commercial strategic purposes and, as primary users of the system, to contribute to the cost of access to justice and this includes access by those who cannot otherwise afford access.

Wherever the balance should lie, the issue should be seen against the backdrop of inadequate funding for Community Legal Centres, Legal Aid Commissions, Family Violence Prevention Legal Services and Aboriginal and Torres Strait Islander Legal Services and the significant revenue raised by fees from the Courts. The Centre understands that this revenue is now directed into General Revenue but a percentage could perhaps be tied and directed towards legal assistance funding. The Annual Report of the Court for 2011-2012 shows revenue from filing and hearing fees in 2012 of \$10,446,000 regarded as revenue administered on behalf of Government.

6. Conclusion

Greater pro bono participation should be encouraged and accordingly relevant legislation and court rules should support and encourage Australian legal practitioners to undertake pro bono legal work.

There is a case for adding a further exempt fee category to the current rules, “those that are being acted for 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 applications submitted for fee 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.

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.

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