

CHAPTER 4

COMMITTEE VIEWS AND RECOMMENDATIONS

4.1 This chapter puts forward the views of the majority of the committee, which comprises Government and Coalition senators.

4.2 A wide range of issues were canvassed during this inquiry, in relation to the reasonableness of current federal court fees, the process of setting court fees, and access to justice policy issues. The committee has formed views on the most significant issues raised by submitters and witnesses to this inquiry.

Reasonableness of federal court fee increases since 2010

4.3 The committee heard significant evidence regarding the reasonableness of fee increases in the federal courts since 2010.

4.4 The committee notes that the fee increases introduced in 2013 have been broadly in line with the capacity of different litigants to pay, with percentage increases in the range of 15-20 per cent for individuals and 40 per cent for corporations, as well as new higher fees for publicly listed companies. The fee increases are balanced by several access to justice measures which should ensure equitable access to the court system. These include making small businesses eligible for the lower fees paid by individuals (rather than the corporations rate), and reintroducing fee exemptions and waivers for disadvantaged litigants. The committee considers that these are measures that will assist in reducing the financial burden for small businesses and low-income individuals who need to access the courts.

4.5 The committee also considers that any decrease in the level of federal court fees would have a budgetary impact on government revenue and the federal courts themselves, and could consequently lead to a reduction in court services, particularly in regional areas. As such, the committee considers that reducing the revenue available to the courts from court fee increases is inappropriate at the present time.

Overall costs of litigation

4.6 The Department emphasised that court fees are only a small proportion of the costs of accessing the courts where legal representation is involved, and that fee increases will not necessarily impede access to justice relative to the total cost of litigation. The committee agrees that high legal costs are much more likely to prevent individuals from accessing the courts than filing or other fees associated with bringing litigation before the courts.

Cost recovery

4.7 The Department informed the committee that the government's stated intention in restructuring federal court fees, and in particular in implementing the 2013 changes, has been to increase notional cost recovery in the courts to

around 25-30 per cent of the cost of running the courts. In percentage terms, this is broadly in line with the level of cost recovery in other Australian jurisdictions.¹

4.8 The committee notes that this level of cost recovery is still well short of the level of cost recovery in some comparable overseas jurisdictions, such as the United Kingdom, where cost recovery in the courts has averaged 80 per cent of court running costs for the past several years.²

4.9 Accordingly, the committee considers that it is appropriate for some of the costs of running the courts to be recouped through court fees.

Policy process

4.10 The committee has heard that there are currently no foundational guidelines or evidence base used in determining the appropriate quantum of fees for different matters in the courts. While the Department has articulated some of the main policy principles informing the recent increases in fees, the committee considers that there is a disconnect between these broad principles and any more meaningful rationale for specific fee increases.

4.11 The committee also notes that there is little information available to help inform policy in this area. Departmental representatives indicated that the headline figure of overall court filing levels can provide some evidence of whether or not fees are having an impact on litigants' use of the courts. The utility of even this data, however, is limited. While overall filing figures may provide a broad indication of activity levels in the courts, it is difficult to draw definitive conclusions from this headline figure on the impact of particular policy settings including court fees. That is because the figures do not elucidate the reasons why disputants decide whether or not to bring a matter before the courts. If more appropriate conclusions are to be drawn regarding the impact of court fees on the behaviour of disputants, more comprehensive quantitative and qualitative data is required. The committee considers that this is essential to help inform the development of future policy settings in relation to federal court fees.

4.12 The committee is therefore recommending that evidence-based research be undertaken into how court fees affect court users' behaviour, in order to inform policy development for any future changes in court fee settings. The committee notes that the Department is currently coordinating a long-term working group project in order to develop a framework to guide the collection of consistent data to create an evidence base for the civil justice system in Australia.³ Without wishing to be prescriptive, the committee considers that this working group may be able to provide input into the development of an evidence base for setting federal court fees.

1 *Submission 10*, pp 6 and 18-19.

2 See: AGD, *Submission 10*, p. 21.

3 AGD, 'An evidence base for the civil justice system', <http://www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx> (accessed 24 May 2013).

Consultation with the legal profession

4.13 The committee also notes concerns raised by submitters and witnesses to the inquiry that the most recent fee changes, introduced in January 2013, were largely implemented without taking the views of significant stakeholder into account.

4.14 The committee considers that final decisions regarding the setting of court fees are a matter for the government of the day, as part of the government's budget processes. It is appropriate for the government to make these decisions in this way, and the confidentiality of the budget process must be understood in that context.

4.15 Having said this, the committee agrees that the decision-making process of government would be assisted by stakeholders proactively putting forward their views in relation to federal court fees. Stakeholders from the legal profession should also be encouraged to put forward suggestions on reducing the overall cost to individuals who need to access the courts, including in relation to the issue of legal fees. The committee is therefore recommending that stakeholders be given adequate opportunity to present their views on court fees policy, prior to future changes in federal court fee settings.

Recommendation 1

4.16 The committee recommends that the Australian Government commission or undertake research to develop quantitative data and qualitative evidence on the effect of federal court fee settings on the behaviour of disputants and on broader access to justice issues, in order to better inform policy development in this area.

Recommendation 2

4.17 The committee recommends that, prior to any future changes to federal court fee settings, and keeping in mind that budgetary decisions are ultimately a matter for government, relevant stakeholders from the courts and the legal profession should be given adequate opportunity to present their views on these matters to the Australian Government. These stakeholders should include:

- **the High Court of Australia, the Federal Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Australia;**
- **the Law Council of Australia;**
- **National Legal Aid;**
- **National Association of Community Legal Centres;**
- **representatives from the pro bono legal sector in Australia; and**
- **other relevant legal experts.**

Application of fee revenue

4.18 Some submitters and witnesses criticised the fact that revenue from federal court fees is returned to consolidated government revenue. The committee notes the Department's evidence that while it is convenient to consider court fees in terms of notional cost recovery levels (that is, the proportion that court users pay in fees as a percentage of the cost of the courts), the courts are not run on a direct cost recovery basis where revenue raised is returned directly to the courts.⁴ The federal courts are funded through the federal Budget and, as such, the committee considers that it is appropriate for revenue from federal court fees to be returned to consolidated revenue. On principle, any revenue stream to government from agencies that collect fees should be available to fund wider budget priorities.

4.19 Some submitters and witnesses suggested that court fee revenue should be directly tied to court services or other legal services. These suggestions fail to recognise that revenue from fees would not be sufficient to fund the courts, or the government's other expenditure on legal services. Tying fee revenue entirely to the provision of court services could also risk a reduction in services if fee revenue falls in the future.

4.20 The committee considers that it is appropriate for the government of the day to determine the resourcing necessary for the efficient operation of the federal courts, with regard to the needs of the courts and the overall budgetary position of government. The allocation of \$38 million in additional funding to the federal courts over four years will help maintain the delivery of key services, including the regional circuit work of the courts.

Reinstatement of fee exemptions and waivers

4.21 The committee commends the reintroduction, in January 2013, of a comprehensive regime of fee exemptions and waivers. These exemptions ensure that at least some disadvantaged litigants are not prevented from accessing redress through the courts. Submitters and witnesses universally agreed that this system of exemptions and waivers is preferable to the regime of flat fees which operated between November 2010 and December 2012.

4.22 The committee notes the Department's evidence that, in addition to the fee exemptions regime, federal courts retain flexibility in the way they treat fees, including by:

- 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;
- exercising 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

4 Responses to questions on notice provided by the Attorney-General's Department on 24 May 2013, p. 9.

- retaining the courts' powers of apportionment to direct who is liable to pay court fees, including splitting fees between parties.⁵

4.23 The committee considers that these measures will go some way to improving access to justice for low-income individuals seeking to access the courts.

Threshold for financial hardship exemptions

4.24 The committee heard that a significant proportion of individuals and families will be unable to pay court filing fees, but will not qualify for a financial hardship exemption under the current criteria used by the courts.

4.25 The committee notes that the fee regulations do not specify the threshold for qualifying for a financial hardship exemption, but that the Family Court and the Federal Circuit Court have issued *Guidelines for exemption of court fees* specifying the level at which such exemptions will generally be granted.

4.26 The committee has reached the view that these guidelines may need revising in order to ensure that low to middle-income individuals are not priced out of the court system. The committee considers that it is unreasonable that court fees could push a person 'to the edge of financial hardship'⁶ without an exemption being accessible.

Recommendation 3

4.27 The committee recommends that the qualifying threshold for financial hardship exemptions under the *Guidelines for exemption of court fees* be reviewed. If necessary, the guidelines should be amended in order to ensure that the threshold for financial hardship exemptions does not inhibit the ability of individuals to access redress through the courts.

Access to exemptions for clients of Community Legal Centres

4.28 The committee has heard evidence on several points in relation to fee exemptions for clients of Community Legal Centres (CLCs). The committee has received anecdotal evidence that some clients of CLCs who should be entitled to a fee exemption have found it difficult to access the exemption, because of ambiguity surrounding whether CLC clients are covered under the definition of 'legal aid' on the exemption application form used by the Federal Court and the Federal Circuit Court.⁷ The committee considers that the courts should review these application documents to ensure that CLC clients are not inadvertently excluded from fee exemptions.

5 *Submission 10*, p. 14.

6 NSW Council for Civil Liberties, *Submission 29*, p. 4.

7 Ms Liz Pinnock, Hunter Community Legal Centre, *Committee Hansard*, 17 May 2013, pp 20-21. See also: Hunter Community Legal Centre, *Supplementary Submission 17*, pp 1-4 and 10.

4.29 Secondly, the committee heard that not all CLCs that should be eligible for fee exemptions are prescribed under the relevant legislative instrument, the Legal Aid Schemes and Services Approval 2013.⁸ The committee considers that it would be prudent for the Australian Government to review this instrument to ensure that all eligible legal aid providers are appropriately recognised as such.

Recommendation 4

4.30 The committee recommends that consideration be given to appropriately amending the application form for exemption from paying court fees used in the Federal Court of Australia and the Federal Circuit Court of Australia, to remove any ambiguity concerning the ability of clients of Community Legal Centres prescribed under the Legal Aid Schemes and Services Approval 2013 to access a fee exemption.

Recommendation 5

4.31 The committee recommends that the Australian Government undertake a review of the schemes and services listed in the Legal Aid Schemes and Services Approval 2013, and update the Approval as necessary, to ensure that all eligible legal aid providers are appropriately listed under the Approval.

Other proposed changes to the fee exemption regime

4.32 The committee notes that one proposal suggested by submitters, in relation to exempting Independent Children's Lawyers (ICLs) from court fees incurred in the performance of work on behalf of legal assistance providers, has already been addressed by the government as part of the 2013-14 Budget.⁹ Some submitters and witnesses to the inquiry argued for additional categories of individuals to be added to the fee exemptions regime, however the committee does not consider that there is a clear policy justification for these changes at the present time.

Senator Trish Crossin
Deputy Chair

Senator Gary Humphries

8 Ms Lucy Larkins, Federation of Community Legal Centres Victoria, *Committee Hansard*, 17 May 2013, p. 26. See also: Response to a question on notice provided by the Federation of Community Legal Centres Victoria on 24 May 2013, pp 2-3.

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

Senator Mark Furner

Senator Sue Boyce

Senator Michaelia Cash

Senator Louise Pratt