

CHAIR'S VIEWS AND RECOMMENDATIONS

Introduction

1.1 The Chair of the Legal and Constitutional Affairs References Committee prefers to work collaboratively in order to reach consensus in committee reports, where possible. In this inquiry, the Chair thoroughly examined the evidence presented to the committee, and put forward, for the committee's consideration, a series of views and recommendations that she believes accurately reflect the weight of the evidence received. However, agreement could not be reached with Government and Coalition senators in relation to issues which the Chair has concluded need to be critically addressed by government. For this reason, the views and recommendations of the Chair are presented separately to the report of the committee majority.

1.2 While not necessarily in agreement with the general views and conclusions expressed in the majority report, the Chair considers that Chapters 1-3 of the majority report are a fair and balanced reflection of the evidence presented to the committee by submitters and witnesses during the inquiry. Nevertheless, the Chair cannot agree that the general conclusions drawn by the committee majority in Chapter 4 do justice to the weight of evidence presented to the committee.

1.3 Fees in the federal courts have undergone significant changes since 2010, with unprecedented increases occurring in both 2010 and 2013. Given the significant changes undertaken in this area in recent times, it has been timely for the committee to examine these changes at length and consider whether they are appropriate in the context of access to justice considerations. Through this inquiry, the committee has heard evidence from legal professional peak bodies, academic experts and representatives of legal assistance providers with direct practical experience working in the civil justice system. The overwhelming consensus from these stakeholders is that recent fee increases are largely unreasonable and have inhibited access to justice in Australia.

1.4 Accordingly, the Chair's primary recommendation is that the increases to court fees introduced in January 2013 for individuals should be wound back, leaving fees at pre-2013 levels. This view is informed by a number of policy principles, as well as the evidence presented to the committee concerning the practical impact of court fee increases on individuals and families in Australia. In addition to this primary recommendation, the Chair is critical of the process that led to the introduction of the 2013 round of fee increases, and believes that improvements to this policy development process are necessary in future. There are also several matters in relation to specific fees and fee exemptions that the Chair considers should be addressed immediately.

Reasonableness of court fee increases since 2010

1.5 The committee has received considerable evidence about the reasonableness of federal court fee increases since 2010. In particular, the Chair has concerns about the level of fees now payable by individuals in bringing matters before the courts.

Fees for individuals

1.6 Stakeholder views presented to the inquiry suggest that increased court fees, particularly since the 2013 changes, will make it difficult for the majority of Australians to access redress through the courts.

1.7 The Chair shares the concerns of submitters such as Associate Professor Michael Legg, who argued that the current fee settings run the risk of creating a bifurcated system of justice, with the 'haves' 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 processes because they cannot afford litigation.¹ The Chair views the creation of this level of inequality as an unacceptable outcome.

1.8 The committee has received considerable anecdotal evidence regarding the impact of higher fees on low-income individuals, and the Chair considers that the impact on this group will be particularly acute. Further to this, the Chair believes that under the current fee settings even moderately well-off Australians will find it difficult to pursue a matter through the courts. The Chair concludes that the effect of the increased court fees, particularly since the 2013 changes, represents a barrier to access to the courts, inconsistent with the Australian Government's 2009 Strategic Framework. The effect of this will be to prevent meritorious litigants from having matters resolved by the courts.

1.9 Given the evidence presented to the committee concerning the adverse impacts of the most recent court fee increases on the ability of individual litigants to pay, the Chair believes it is prudent for the 2013 fee increases for individuals (non-corporations) to be wound back, leaving fees at the levels they were prior to 1 January 2013.

1.10 In making this recommendation, the Chair is not stating definitively that she considers that the pre-January 2013 fees achieve the right policy settings for federal court fees. Rather, the Chair has taken the view that fee levels since 1 January 2013 are so high as to create a significant barrier to access to justice for many Australians, and that even if such increases are wound back, more policy development work will be required to determine whether further reductions, or other changes to the way court fees are structured, are necessary.

1 *Submission 9, p. 7.*

Recommendation 1

1.11 The Chair of the committee recommends that the increased court fees for non-corporations introduced on 1 January 2013 in the High Court of Australia, the Federal Court of Australia, the Federal Circuit Court of Australia and the Family Court of Australia be wound back, leaving fees at pre-2013 levels.

Corporations fees

1.12 While the majority of the evidence presented to the committee related to the impact of increased court fees on individuals, several stakeholders also commented on the potential impact of the court fee changes on corporations.

1.13 The 2013 changes included the introduction of a tiered fee structure for corporations, with publicly listed companies paying a higher rate than non-listed companies, and small businesses with under 20 employees paying fees at the lower individuals' rate.

1.14 The Chair considers that the ability of small businesses to pay court fees at the individuals' rate rather than the corporate rate is a welcome measure that will go a long way to ensuring access to justice is not compromised in this area.

1.15 The new fee structure separating publicly listed companies from other corporations is a new development with largely untested results. The Chair considers that such a fee structure may be appropriate, however the operation of this structure should be monitored closely in the coming months, to assess its impact on medium and large corporations. Given that one of the stated goals of introducing higher corporation fees is to deter the increasing practice of 'meta-litigation' in the corporate sphere consuming vast resources in the courts, it is necessary to assess whether this goal is being achieved.

1.16 Further, several stakeholders argued that corporations may now choose to commence proceedings in state and territory jurisdictions in order to avoid paying higher fees in the Federal Court. Filing figures in the courts should be monitored closely to determine if there is any trend in this direction; if such a trend becomes evident, it may be necessary to reduce corporate fee rates in the Federal Court to bring them into line with other Australian jurisdictions in which corporate matters are heard.

1.17 On balance, the Chair has concluded that changes to the new structure for corporate fees are not necessary at this time. The new structure should, however, be monitored and reviewed in any future consideration of changes to federal court fee structures, to ensure that the corporations fee regime is operating effectively.

Recommendation 2

1.18 The Chair of the committee recommends that the two-tiered fee structure for corporations and publicly listed companies introduced in the High Court of Australia, the Federal Court of Australia and the Federal Circuit Court of Australia on 1 January 2013 be maintained at the present time. If court filing levels for these corporations show a decline over the 2013 calendar year, these corporate fee rates should be reduced to bring them into line with other comparable jurisdictions in Australia.

Court fees policy matters

1.19 This inquiry has raised several matters in relation to the underlying policy behind setting federal court fees. These include issues concerning the policy rationale underpinning the recent fee increases, and the process for developing policy settings in this area.

Policy development process

1.20 The committee received concerning evidence in relation to the policy development process underpinning the most recent changes in federal court fees. The committee heard that there is little data available to guide the development of court fees policy settings. The Chair agrees with Recommendation 1 in the committee majority's report, that research work is needed to develop quantitative data and qualitative evidence in relation to the effect of federal court fee settings on the behaviour of disputants and on broader access to justice issues. This work is essential to ensure that future changes in federal court fee settings are necessary and supported by a rigorous evidence base.

1.21 In relation to the adequacy of consultation with relevant stakeholder groups, the committee heard evidence from submitters and witnesses that recent court fee changes, and particularly the 2013 increases, were implemented without any meaningful consultation with the legal profession or other relevant stakeholders. The Chair considers that it is entirely inappropriate for government to introduce significant changes to court fee structures without adequate consultation with key stakeholder groups, particularly when such changes could have a significant impact on access to justice in Australia. It is imperative that any future changes to court fee settings, other than CPI increases, be undertaken only after comprehensive consultation with the courts and relevant stakeholders from the legal profession.

1.22 The Chair does not accept the view of the committee majority that decisions relating to court fees should be made confidentially through the government's budget process. This arrangement completely removes transparency from the process of setting court fees. While the committee majority recommends (Recommendation 2 of the majority report) giving stakeholders an opportunity to comment on court fees policy prior to future changes, the Chair does not believe this will go far enough to ensure that any future changes to federal court fees are reasonable. The Chair is of the view that the courts and relevant stakeholders from the legal profession should play an integral role in helping develop future changes to federal court fee settings.

Recommendation 3

1.23 The Chair of the committee recommends that any future changes to federal court fee settings be developed in close consultation with relevant stakeholders from the courts and the legal profession. 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.**

Cost recovery

1.24 The Department informed the committee that the primary determinant underpinning the 2013 changes was the intention of increasing the level of cost recovery in the federal courts.² As a matter of fundamental principle, the Chair believes that federal courts should not be operated on a cost recovery or 'user-pays' basis. Access to the courts is a fundamental tenet of the rule of law and Australia's democratic society, and should not be determined by an individual's level of wealth.

1.25 As such, the Chair fundamentally rejects the premise that cost recovery should be the primary consideration in setting federal court fees. While the Chair agrees that some fees are necessary in order to recognise the administrative processes undertaken by the courts, the current fee levels have gone well beyond this and have created significant barriers for parties seeking to access justice in Australia. In developing policy for setting court fees, access to justice should not be compromised in the name of 'cost recovery'.

1.26 The Chair acknowledges that court fees are not the sole cost associated with going to court, and that other expenses such as legal fees may represent a greater burden for many litigants. The fact that legal costs are expensive does not, however, justify increasing costs to litigants with respect to court fees. This will simply increase the overall burden on those who find it necessary or appropriate to resolve a dispute through the courts. Instead, the Commonwealth should be doing everything in its power to facilitate equitable access to the courts for all.

2 Response to questions on notice received from the Attorney-General's Department on 24 May 2013, p. 9.

'Price signalling'

1.27 The Chair is concerned at the government's justification of certain fee increases on the grounds that increased fees can send 'price signals' to direct litigants towards alternative dispute resolution (ADR) and deter unmeritorious litigants.

1.28 The Chair believes that fees should not attempt to force disputants into other processes such as ADR. While ADR mechanisms are in many cases a better alternative than resolving disputes through the courts, there are situations in which ADR is not appropriate and will not be effective in achieving suitable outcomes. Additionally, there is no evidence to suggest that litigants view the courts as the 'first port of call' for dispute resolution; on the contrary, submitters and witnesses to the inquiry emphasised that disputants generally do not wish to progress matters to court, and tend to exhaust all available options before resorting to litigation.

1.29 While higher fees will be a barrier to litigants using the courts, irrespective of the merit of their case if they do not have the means to pay, the Chair considers that it is too simplistic to assume that higher fees will necessarily direct litigants towards other forms of dispute resolution. Instead, higher fees may simply add to the economic burden for individuals who are forced to resolve matters through the courts.

1.30 The committee heard extensive evidence to conclude that the fee increases, particularly those since 2013, may deter meritorious litigants from being able to access the courts. The Chair considers that court fees are a blunt instrument with which to try to manage the type and number of cases which come before the courts, and considers that the existing powers of the courts are sufficient to manage and deter litigants who are unmeritorious or vexatious.

Application of fee revenue

1.31 An issue of contention throughout the inquiry has been the application of the revenue generated through the recent increases in federal court fees. The Chair does not believe that it is appropriate for revenue from significantly increased federal court fees to be used to fund other government budget priorities. Higher fees necessarily make it more difficult for litigants to access justice through the courts. As such, any revenue generated from federal court fees should be directed towards the operation of the court system itself, or other measures which help ensure access to justice for all Australians.

1.32 Stakeholders presented a variety of suggestions about the possible uses of court fee revenue, including funding specific initiatives or tying a percentage of fee revenue to measures to improve the operation of the legal system. The Chair considers that the government should adopt a policy approach of using fee revenue to build the general capacity of the Australian civil justice system to provide access to justice for the broadest range of people possible.

Recommendation 4

1.33 The Chair of the committee recommends that the Australian Government adopt a policy of directing fee revenue collected from the federal courts to fund initiatives that enhance the operation of the courts, or otherwise facilitate access to justice for the broadest range of Australians possible.

Fee exemptions

1.34 While the Chair has concluded that some of the 2013 increases to fees should be wound back to pre-2013 levels, the fee exemption categories reintroduced in 2013 should be maintained. The Department and other stakeholders have recognised that this exemption regime is highly preferable to the flat fee regime for disadvantaged litigants that operated between November 2010 and December 2012.

1.35 The inquiry received considerable evidence about possible further reforms to the exemptions regime for the federal courts, and the Chair is convinced that several changes are necessary to ensure the exemptions are appropriately targeted.

Exemptions for divorce application fees

1.36 The inquiry heard evidence from numerous submitters and witnesses that the increased fee level for divorce applications is unreasonable, and that even the 'reduced fee' rate is preventing low-income individuals from accessing a divorce.³ The Chair is concerned about the significant impact this may have, particularly on individuals who have experienced domestic violence or are seeking divorce for particular cultural reasons.

1.37 While it is still possible for the courts to grant a deferral of fees for divorce applications in urgent cases, the Chair is concerned that the current quantum of the fee may lead to individuals choosing not to proceed with an application at all, rather than attempting to rely on a fee deferral from the court. Further, no good rationale was advanced as to why an individual should not be able to access an exemption for a divorce application fee, when exemptions are accessible for all other matters in family and general law.

1.38 The Chair does not accept the Department's argument that the longer lead times in divorce matters mean that individuals will be able to plan ahead and save the necessary money for the divorce application fee. The Chair notes that the current minimum divorce application fee is close to a week's income for a person in receipt of Newstart Allowance and it is generally acknowledged that individuals find it difficult to survive on a low income like that, let alone save. Further, the committee heard that the mandatory 12-month separation period prior to a divorce application can be an exceptionally turbulent time for those involved and that, in many cases, applicants

3 The 'reduced fee' rate for divorce applications is available to individuals who would qualify for an exemption for other fees. This includes legal aid recipients, certain concession card holders and those for whom paying fees would cause financial hardship.

may not have the financial means to support themselves after separation from their spouse.⁴

1.39 The committee has also heard that divorce proceedings are generally not complex, and do not represent a large administrative burden on the courts.

1.40 The Chair is therefore of the view that fee exemptions should be introduced for divorce applications, for individuals who would qualify for a fee exemption in other family law matters. Currently such individuals pay a 'reduced fee' rate for divorce applications under the Family Law (Fees) Regulation 2012. A new exemption for divorce applications would replace this 'reduced fee' category.

Recommendation 5

1.41 The Chair of the committee recommends that:

- **the 'reduced fee' category for individuals filing an application in proceedings for a divorce order in the Family Court of Australia or Federal Circuit Court of Australia, which is available to individuals who would otherwise qualify for a fee exemption, be removed; and**
- **a fee exemption be introduced for any applicants filing an application in proceedings for a divorce order, who would qualify for a fee exemption under section 2.04 or 2.05 of the Family Law (Fees) Regulation 2012.**

Creating an exemption category for pro bono clients

1.42 Several submitters and witnesses argued that a fee exemption category should be created for individuals who are being represented on a pro bono basis. The Chair agrees that this measure is appropriate for several reasons.

1.43 As the majority of pro bono clients already qualify for exemptions on other grounds, creating a clear exemption category would create administrative efficiencies for the courts in processing these claims, and would remove uncertainty for clients who currently have to apply for exemptions or fee deferrals on other grounds. More importantly, a clear exemption would recognise the increasingly important contribution that pro bono assistance providers make to the legal system in Australia, a contribution without which the Commonwealth would be forced to spend significantly more on legal assistance.

1.44 The committee has heard that such an exemption could easily be certified, such that only approved pro bono providers can access the exemption category. This would be a prudent way of administering an exemption category for pro bono clients, and could operate in a similar fashion to the current exemption for legal aid providers, whereby approved providers are prescribed in regulations.

4 See: Ms Lucy Larkins, Federation of Community Legal Centres Victoria, *Committee Hansard*, 17 May 2013, pp 21-22.

1.45 The government's position that pro bono clients should be assessed on a case-by-case basis appears to be founded on the assumption that a significant proportion of pro bono cases are taken on for reasons other than assisting impecunious clients. However, the evidence before the committee was that this is true in only a very small minority of cases, and the Chair considers that the administrative efficiencies offered by a clear exemption category outweigh any concerns about lost fee revenue from this small number of matters. As a further balance, it would be straightforward for the pro bono exemption category to require that the client is being represented pro bono due to their financial circumstance, as certified by the provider of the pro bono services.

Recommendation 6

1.46 The Chair of the committee recommends that a new fee exemption category be introduced in the federal courts, for clients who are being represented on a pro bono basis. This exemption should be limited to certified pro bono assistance schemes, prescribed in regulations, or cases where the pro bono lawyer certifies that they are acting pro bono and their client cannot otherwise afford legal representation.

Review of the financial hardship threshold

1.47 The Chair is concerned at the evidence presented to the committee indicating that a high number of individuals and families will find it impossible to pay court filing fees due to their financial circumstances, yet will still not meet the qualifying threshold required to access a financial hardship exemption. The Chair supports Recommendation 3 in the committee majority's report that this qualifying threshold should be reviewed, in order to ensure that individuals who need to access the courts are not pushed to the edge of financial hardship by doing so.

Exemptions for clients of Community Legal Centres

1.48 The Chair is supportive of Recommendations 4 and 5 in the committee majority's report in relation to the ability of clients of Community Legal Centres to access fee exemptions. The Chair considers that it is imperative that the fee exemption regime operates effectively and in accordance with its underlying policy principles, in appropriately granting exemptions to clients of qualifying CLCs.

Senator Penny Wright
Chair