The Senate

# Legal and Constitutional Affairs References Committee

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

June 2013

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# RECOMMENDATIONS

**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.**

**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.**

**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.**

# CHAPTER 1

# INTRODUCTION AND BACKGROUND

## Referral of the inquiry

1.1 On 27 February 2013, the Senate referred the matter of the impact of federal court fee increases since 2010 on access to justice in Australia to the Legal and Constitutional Affairs References Committee (committee) for inquiry and report by 6 June 2013, 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.[1]

1.2 On 6 June 2013, the committee tabled an interim report for the inquiry, stating that due to the need to thoroughly consider the evidence presented and conclude its deliberations, the committee intended to table its final report by 12 June 2013.[2] On 12 June 2013, the committee tabled a second interim report, extending the reporting date for the inquiry to 17 June 2013 in order to enable additional time for the committee to finalise its report.[3]

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1 Senate, *Journals of the Senate*, No. 135–27 February 2013, p. 3674.

2 Senate Legal and Constitutional Affairs References Committee, *Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia: Interim Report*, 6 June 2013, p. 2.

3 Senate Legal and Constitutional Affairs References Committee, *Inquiry into the impact of federal court fee increases since 2010 on access to justice in Australia: Second Interim Report*, 12 June 2013, p. 2.

## Background

1.3 The Commonwealth administers four federal courts: the High Court of Australia (High Court), the Federal Court of Australia (Federal Court), the Family Court of Australia (Family Court) and the Federal Circuit Court of Australia[4] (Federal Circuit Court).

1.4 Each of these courts charges administrative fees for a variety of different applications made to the court and procedures undertaken by the court. These include, among other things, fees for:

- making an application to commence a proceeding in a court;
- setting down hearing dates for a matter to be heard;
- hearing fees (charged for each day a matter is heard in a court);
- applications to subpoena evidence; and
- applications to restrain property or evidence in relation to a matter.[5]

### *Access to Justice Taskforce*

1.5 In January 2009, the then Attorney-General, the Hon Robert McClelland MP, established an Access to Justice Taskforce to 'undertake a comprehensive examination of the federal civil justice system with a view to developing a more strategic approach to access to justice'.[6] The final report of the Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Strategic Framework), was released in September 2009, and was adopted by the government to assist in the development of access to justice initiatives and broader civil justice reforms.[7]

1.6 The Strategic Framework recommended in respect of court fees that the Attorney-General 'should initiate a thorough examination by the Standing Committee of Attorneys-General of issues and options for funding aspects of the justice system on a cost recovery basis…to ensure that resourcing of the justice system maximises access to justice'.[8]

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4 The Federal Magistrates Court was renamed the Federal Circuit Court of Australia from 12 April 2013, pursuant to the *Federal Circuit Court of Australia Legislation Amendment Act 2012*.

5 See, for example: Federal Court of Australia, 'Fees payable from 1 January 2013', http://www.fedcourt.gov.au/forms-and-fees/court-fees/fees (accessed 14 June 2013).

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

7 Attorney-General's Department, *Submission 10*, p. 2.

8 Recommendations 9.1: Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p. 123.

1.7 The Strategic Framework also recommended that full cost pricing for long court hearings should be introduced:

> Given the significant public costs of court hearings, and the opportunities parties have to resolve matters without hearing, or minimise the length of hearings by identifying the real issues in dispute, full cost pricing for long hearings is generally appropriate. The Government should propose a model of full cost pricing for long hearings which would:
>
> - commence after a certain number of hearing days, or adopt a sliding scale, rather than be imposed as an exercise of judicial discretion, and
> - be subject to a comprehensive system of exemptions and waivers (excluding, for example, human rights and native title matters) to protect access to justice.[9]

1.8 Following the publication of the Strategic Framework, the Standing Committee of Attorneys-General reported that Ministers had agreed to 'develop a harmonised approach to options for greater cost recovery of justice services, including consideration of cost recovery options for courts and tribunals'.[10]

## Recent fee increases in the federal courts

1.9 Successive rounds of fee increases have occurred in the federal courts in the last few years, with changes being implemented in July 2010, November 2010 and January 2013.[11] A consolidated list of these changes was provided to the committee by the Attorney-General's Department, and is published on the committee's website.[12]

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9 Recommendation 9.2: Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p. 123. The Taskforce noted in its Report (p. 45) that the Australian Law Reform Commission had previously recommended in 2000 that the Commonwealth 'consider the introduction of staged fees, where the fees increased along a sliding scale as [the] case progresses to hearing' in order to 'provide an incentive for litigants to settle matters at an earlier stage'.

10 Standing Committee of Attorneys-General, Annual Report 2009-10, p. 3, http://www.sclj.gov.au/sclj/standing_council_publications/standing_committee_annual_reports.html (accessed 27 May 2013).

11 In addition to these increases, fees were also increased from 1 July 2012 to adjust for inflation. The fee regulations provide for biennial changes to court fees to adjust for inflation. See: Consolidated table of federal court fee increases since 2010, provided by the Attorney-General's Department on 7 May 2013, p.1.

12 Additional Information Received, 'Consolidated table of federal court fee increases since 2010, provided by the Attorney-General's Department on 7 May 2013'. See also: Law Council of Australia, *Submission 26*, pp 27-38.

### *Fee increases in 2010*

1.10 Two stages of fee increases were instigated in 2010 as part of a suite of access to justice measures in the 2010-11 Federal Budget.[13] A range of increases were introduced on 1 July 2010, amounting to an approximately eight per cent increase across the federal courts. This included introducing:

- staged hearing fees in the Federal Court so that higher fees are payable in longer cases;
- changes from one-off hearing fees in the Family Court and the then Federal Magistrates Court to a daily hearing fee structure; and
- a new one-off fee of $80 for filing a consent order in the Family Court.[14]

1.11 In November 2010, new flat fees were introduced for litigants who previously had been eligible for fee exemptions. These fees were $60 in family law matters and $100 in other matters.[15] Prior to November 2010, the categories of individuals automatically granted an exemption were:

- recipients of legal aid under an approved scheme;
- persons holding certain concession cards, including health care and pensioner cards;
- persons who are imprisoned or otherwise detained in a public institution;
- persons under 18 years of age;
- persons receiving youth allowance, Austudy payments or benefits under the ABSTUDY scheme; and
- persons involved in certain Native Title proceedings.[16]

1.12 In addition to the automatic fee exemption for certain categories of individuals, the courts could also grant an exemption if paying the fee would cause financial hardship to the individual. The fees regulations provide that in considering whether a fee would cause financial hardship, the court must consider the individual's income, day-to-day living expenses, liabilities and assets.[17]

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13 AGD, *Submission 10*, p. 8.

14 AGD, *Submission 10*, p. 8.

15 AGD, *Submission 10*, p. 8.

16 See, for example (in relation to the Federal Court and the Federal Circuit Court): section 2.05, Federal Court and Federal Circuit Court Regulation 2012.

17 See, for example (in relation to the Federal Court and Federal Circuit Court): section 2.06, Federal Court and Federal Circuit Court Regulation 2012.

1.13 The 2010 fee increases were designed to raise $66.2 million in revenue over four years, to be directed toward additional funding for legal assistance services.[18]

*Review of 2010 increases undertaken by the Attorney-General's Department*

1.14 In 2011 the Attorney-General's Department (Department) conducted an internal review of the 2010 fee changes, to ascertain the impact of the changes on court users in the first year of their operation. The current Attorney-General, the Hon Mark Dreyfus QC MP, has stated that few strong conclusions could be drawn as a result of the review:

> Data provided by the federal courts and the Administrative Appeals Tribunal showed no clear changes to filing levels coinciding with the fee changes, including no reductions in the filing of consent orders or significant changes to full fee filings for corporations. Overall, the data did not allow any conclusive observations to be made other than that there were no significant changes to numbers of filings in the period July 2010 to May 2011.[19]

### *Fee increases from 1 January 2013*

1.15 The government announced further reform to the structure of federal court fees in the 2012-13 budget, which came into effect from 1 January 2013 through new fee regulations.[20] In its submission to the committee's current inquiry, the Department explained that the main changes were:

- reinstatement of fee exemptions (in place of the flat fees introduced in 2010);
- general increases to court fees of 40 per cent for corporations fees, 15 per cent for other fees in general federal law matters, and 20 per cent for family law fees;
- new fees for publicly listed corporations (150 per cent of the corporations rate) and requiring public entities to pay the corporations fee rate;
- making incorporated small businesses and unincorporated not-for-profit associations eligible for the fees payable by individuals instead of corporations; and

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18 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, offset by the increased revenue raised from court fees as well as funding reductions of $84 million over four years to the Attorney-General's Department and increased efficiencies in the Family Court of Australia, Federal Court of Australia and National Native Title Tribunal.

19 The Hon Mark Dreyfus QC MP, Attorney-General, 'Response to Senate order of 7 February 2013', tabled in the Senate on 26 February 2013, p. 2.

20 High Court of Australia (Fees) Regulations 2012, Federal Court and Federal Circuit Court Regulation 2012 and Family Law (Fees) Regulation 2012.

- introduction of new fees which target resource intensive matters, including fees for examinations in bankruptcy and winding up.[21]

1.16 The Department noted that the 2013 fee changes are forecast to raise $102.4 million in revenue over four years, with accompanying funding of $38 million to be reinjected into the courts 'to maintain delivery of key services, including regional circuit work'.[22]

*Reinstatement of fee exemptions in place of flat fees introduced in 2010*

1.17 The 2013 changes included the reintroduction of the fee exemption categories, in place of the flat fees that had replaced them in November 2010.[23] The Department explained the rationale for this policy reversal:

> Submissions to the 2010 fees review noted an administrative burden for legal assistance providers in relation to collecting fees from clients, including disproportionate administrative costs in pursuing several debts of $100 or less, and assisting with applications for fee reduction or fee deferral where applicable. Consistent with an administratively efficient fee structure, fee exemptions have been reinstated in 2013 to address these concerns.[24]

## Conduct of the inquiry

1.18 The committee advertised its inquiry in *The Australian* on 27 March 2013. The committee also wrote to 153 organisations and individuals, inviting submissions by 12 April 2013. Details of the inquiry were also placed on the committee's website at www.aph.gov.au/senate_legalcon.

1.19 The committee received 32 public submissions, and all public submissions were made available on the committee's website. A list of those submissions is at Appendix 1. The committee held a public hearing for the inquiry in Canberra on 17 May 2013. A list of witnesses who gave evidence at the hearing is at Appendix 2, and copies of the *Hansard* transcript are available through the committee's website.

## Acknowledgement

1.20 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearing.

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21 *Submission 10*, p. 9.

22 *Submission 10*, p. 9.

23 Explanatory Statement, Federal Court and Federal Magistrates Court Regulation 2012, pp 6-7.

24 *Submission 10*, p. 13.

## Structure of the report

1.21 The report is divided into four chapters:

- Chapter 2 outlines access to justice policy considerations as they relate to the structuring and pricing of federal court fees;
- Chapter 3 discusses the broad impact of federal court fee increases since 2010, as well as the impact on specific court users; and
- Chapter 4 sets out the committee's views and recommendations.

## Note on references

1.22 References to the committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and the official *Hansard* transcript.

# 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.
>
> 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:
>
> • court fees – $2,130, and
>
> • legal costs – at least $16,753.
>
> 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.
>
> …[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.

# 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.[1] 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'.[2] 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[.][3]

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.[4]

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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'.[5]

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'.[6]

## 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.[7]

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.[8]

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.[9] 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.[10]

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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.[11] 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.[12]

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.[13]

### *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'.[14] 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.[15]

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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'.[16]

## 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.[17]

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[.][18]

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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.[19]

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.[20]

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.[21]

### *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.[22] The 2013 changes also increased the reduced 'hardship' fee for divorce applications in the Federal Circuit Court from $60 to $265.[23]

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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.[24]

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.[25]

3.23 Other submitters argued that the increases to divorce application fees were unreasonable.[26] 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.[27]

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.[28]

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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.[29] Ms Matthews also noted that the ability to obtain divorce in order to legitimately remarry has particular cultural importance for many communities within Australia.[30]

*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.[31]

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.[32]

*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.[33]

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.[34]

### *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.[35]

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.[36]

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.[37]

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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.[38]

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.[39]

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.[40]

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.

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.[41]

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.[42]

### *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.[43]

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.[44]

## 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[.][45]

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.[46]

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.[47]

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.[48]

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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'.[49] 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'.[50]

## 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.[51]

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.[52]

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.[53]

3.49 Fees for mediation sessions also increased in 2013.[54] 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.[55]

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.[56]

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.[57]

### *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.[58]

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.[59]

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.[60]

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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.[61]

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'.[62]

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.

# 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.

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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.

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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** **Senator Gary Humphries**

**Deputy Chair**

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**

# 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.

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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.

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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**

# ADDITIONAL COMMENTS BY COALITION SENATORS

1.1 Coalition senators recognise the importance of regular review and, where necessary, increases of court fees in order to maintain the day to day operation of our justice system.

1.2 Coalition senators heard evidence through submissions and live testimony that raised serious concerns in the case of these most recent fee increases. Three of the primary concerns are summarised as follows.

## Revenue measure

1.3 Coalition senators are concerned that court fee increases since 2010 have been, for the most part, a mechanism primarily instituted to generate revenue and are not commensurate with a workload increase or change in the nature of business of the courts.

1.4 The inquiry heard evidence from John Corker, Director of the National Pro Bono Resource Centre, who stated 'from looking at the annual reports of the courts, that the revenue raised through court fees does go back into general revenue…'[1] i.e., rather than the courts directly.

1.5 Under questioning during the Legal and Constitutional Affairs Legislation Committee's Budget Estimates hearings, Mr Peter Bowen, Chief Finance Officer of the Federal Court of Australia, revealed that only a small proportion of the extra revenue raised by the fee increases actually reaches the courts:

> **Senator BRANDIS:** So basically the government has given you about $1.4 million?
>
> **Mr Soden:** That is correct.
>
> **Mr Bowen:** Yes.
>
> **Senator BRANDIS**: Have you got an actual figure?
>
> **Mr Bowen:** It is $1.466 million.
>
> **Senator BRANDIS**: And the increase in the court fees has generated additional revenue of $9.24 million. So 80 per cent, roughly, has been returned to consolidated revenue and $1.466 million, or about 20 per cent, has been reinvested in the court. Is that right?
>
> **Mr Bowen:** That is correct.[2]

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

2 Mr Peter Bowen, Chief Finance Officer of the Federal Court of Australia, *Estimates Hansard*, 29 May 2013, p. 62.

1.6 This evidence highlights that the Government's primary objective in implementing these fee increases is to attempt to balance its own budget, and not of a means to improving the efficiency or operation of the courts.

## Access to justice

1.7 Coalition senators believe that any increase in court fees must take the Government's Strategic Framework for Access to Justice and the fundamental principles of access to justice into consideration with significant weighting so as not to preclude any person from the right to access the court system.

1.8 This point was a point made by several witnesses, including the Law Council of Australia:

> It flows from this that access to the courts should never be contingent upon the capacity of individual litigants to pay. It has been long accepted that the courts are not a "user-pays" system and that fees, where they are imposed, serve the function of covering reasonable administrative costs associated with handling court documents and processes; and deterring frivolous, vexatious or unnecessary litigation.[3]

1.9 Ill-conceived rises in court fees have a flow on impact that limits justice at many levels of the community. Associate Professor Michael Legg, appearing in a private capacity, noted:

> In terms of the impact on access to justice cost generally is problematic. It does not just impact the poor or the disadvantaged, although it clearly does impact them. It impacts the majority of Australians because accessing the legal system is expensive.[4]

1.10 Coalition senators are concerned that increasing court fees does not necessarily aid in conflict resolution. This point was made by Mr Denis Farrer of the Law Council of Australia, who said:

> There is no research, to my knowledge, that would suggest that charging people more is going to mean that they are going to settle their dispute. The reality is that people, if they reach the breaking point in terms of their finances—if the straw that breaks the camel's back is the filing fee—will be unhappy and disgruntled. If you divert them out of the legal system by making it unaffordable that does not mean that their problem is solved.[5]

1.11 It is reasonable to expect, that by limiting access to justice, litigants that should be afforded the right of access to the court system, will allow the matter to remain unresolved.

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3 Law Council of Australia, *Submission 26*, p. 4.

4 *Committee Hansard*, 17 May 2013, p. 8.

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

## Lack of consultation

1.12 Coalition senators are concerned with the lack of consultation that was undertaken when arriving at the decision to increase court fees by such a substantial amount. As the committee Chair, Senator Wright, correctly pointed out during the hearing:

> …everyone believes there should be court fees and we are not objecting to that. Someone, somewhere has to be responsible for overseeing them. But what I see is that the very basic cornerstone upon which this whole structure is built has not been done in consultation with stakeholders.[6]

1.13 The inquiry heard further criticism of the lack of consultation from Mr John Emmerig of the Law Council of Australia:

> There has been a lack of consultation, which means that for the bodies we represent—and that is all the law societies and the bar associations, and through them essentially 60,000 front-line practicing practitioners—that input has been lost in the process of setting these fees, and I think that is an important problem.[7]

1.14 The Coalition considers the lack of consultation with stakeholders in the legal fraternity to be a gross oversight on the part of the government. These issues highlight the government's mishandling of the recent court fee increases and show them to be driven largely by a desire to raise revenue than to improve access to justice.

**Senator Gary Humphries** **Senator Sue Boyce**

**Senator Michaelia Cash**

6 *Committee Hansard*, 17 May 2013, p. 28.

7 Mr John Emmerig, Law Council of Australia, *Committee Hansard*, 17 May 2013, p. 13.

# APPENDIX 1

## SUBMISSIONS PUBLISHED ON THE COMMITTEE'S WEBSITE

| Submission Number | Submitter |
|---|---|
| 1 | Ms Ann Lightowler |
| 2 | David Burrell and Co |
| 3 | Cairns Community Legal Centre |
| 4 | Rule of Law Institute of Australia |
| 5 | Women's Law Centre of Western Australia |
| 6 | Mr Michael Foster, Murdoch Clarke Barristers and Solicitors |
| 7 | Department of Immigration and Citizenship |
| 8 | Australian Lawyers for Human Rights |
| 9 | Associate Professor Michael Legg |
| 10 | Attorney-General's Department |
| 11 | Top End Women's Legal Service |
| 12 | Women's Legal Services New South Wales |
| 13 | SCALES Community Legal Centre |
| 14 | National Family Violence Prevention Legal Services Forum |
| 15 | Sydney Centre for International Law |
| 16 | Family Law Practitioners Association of Tasmania |

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|---|---|
| 17 | Hunter Community Legal Centre |
| 18 | Consumer Credit Legal Centre (NSW) |
| 19 | Family and Relationship Services Australia |
| 20 | Law Society of South Australia |
| 21 | Kingsford Legal Centre |
| 22 | Women's Legal Service Victoria |
| 23 | Name Withheld |
| 24 | National Legal Aid |
| 25 | Queensland Council for Civil Liberties |
| 26 | Law Council of Australia |
| 27 | Community and Public Sector Union |
| 28 | Federation of Community Legal Centres Victoria |
| 29 | NSW Council for Civil Liberties |
| 30 | Central Coast Community Legal Centre |
| 31 | National Pro Bono Resource Centre |
| 32 | Mr P.D. Burke |

## ADDITIONAL INFORMATION RECEIVED

1 Consolidated table of federal court fee increases since 2010, provided by the Attorney-General's Department on 7 May 2013

2 Response from the Attorney-General's Department to comments in the Law Council of Australia's submission, provided on 7 May 2013

3 Response from the Australian Taxation Office to comments in the Law Council of Australia's submission, provided on 7 May 2013

4 Response from the Australian Securities and Investments Commission to comments in the Law Council of Australia's submission, provided on 7 May 2013

5 Response from the Department of Sustainability, Environment, Water, Population and Communities to comments in the Law Council of Australia's submission, provided on 9 May 2013

6 Response to a question on notice provided by the National Pro Bono Resource Centre on 20 May 2013

7 Response to a question on notice provided by the Rule of Law Institute on 23 May 2013

8 Response to a question on notice provided by the Federation of Community Legal Centres Victoria on 24 May 2013

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

10 Responses to questions on notice provided by the Law Council of Australia on 24 May 2013

# APPENDIX 2

## WITNESSES WHO APPEARED BEFORE THE COMMITTEE

**Canberra, 17 May 2013**

CORKER, Mr John, Director, National Pro Bono Resource Centre

COUSINS, Ms Loren, Senior Legal Officer, Federal Courts Branch, Attorney-General's Department

DUGGAN, Mr Kym, First Assistant Secretary, Social Inclusion Division, Attorney-General's Department

EMMERIG, Mr John, Member, Federal Litigation Section Executive, Law Council of Australia

FARRAR, Mr Denis, Member, Family Law Section Executive, Law Council of Australia

GASZNER, Mr David, Member, Federal Litigation Section Executive, Law Council of Australia

KELLY, Ms Alexandra, Senior Solicitor, Consumer Credit Legal Centre New South Wales

LARKINS, Ms Lucy, Senior Policy Adviser, Federation of Community Legal Centres Victoria

LEGG, Associate Professor Michael, Private capacity

MATTHEWS, Ms Helen, Principal Lawyer, Women's Legal Service Victoria

MEIBUSCH, Ms Margaret, Principal Legal Officer, Federal Courts Branch, Attorney-General's Department

PARMETER, Mr Nicholas, Director, Civil Justice Division, Law Council of Australia

PINNOCK, Ms Elizabeth, Managing Solicitor, Hunter Community Legal Centre

SMRDEL, Dr Albin, Assistant Secretary, Federal Courts Branch, Attorney-General's Department

STEWART, Mr Malcolm, Vice President, Rule of Law Institute of Australia