
Inquiry into the Impact of Filing Fee Increases since 2010 on Access to justice – Response to Question on Notice

Senate Legal and Constitutional Affairs References Committee

24 May 2013

Responses to questions on notice

1. On 17 May 2013, the Law Council appeared at the public hearing into the impact of filing fee increases since 2010 on access to justice (the Inquiry), conducted by the Senate Legal and Constitutional Affairs References Committee.
2. At the hearing, the Law Council agreed to respond to questions from Senator Humphries on notice.
3. The Law Council's responses are outlined below.

Question 1: administrative cost burden for the courts

Senator HUMPHRIES: I have just a couple of questions. You say in paragraph 24 of your submission:

“The new flat fees introduced to replace the previous system of fee waivers and exemptions had created a significant administrative cost burden for each of the federal courts and, in many cases, impeded the provision of justice...”

That arises out of the review of the 2010 filing fee charges that was done by the Attorney-General's Department, I think. Can you just explain what you mean and what the finding of that review was in that respect. How did the introduction of the flat fees cause an increase in the administrative cost burden of the federal courts?

4. In July 2010, the government (among several other significant changes to filing fees in the federal courts and tribunals) introduced \$100 and \$60 flat fees for applications previously eligible for fee waiver or exemption – for example, where the applicant could demonstrate financial hardship.
5. In June 2011, the Attorney-General's Department commenced a review of the 2010 filing fee changes. In August and September 2011, the Attorney-General's Department received submissions and data from each of the federal courts and tribunals concerning the impact of the 2010 filing fee changes. For the information of the Senate Committee, the Law Council has **attached** the submissions of the:
 - (a) High Court of Australia;
 - (b) Federal Court of Australia;
 - (c) Family Court of Australia;
 - (d) Federal Magistrates Court;
 - (e) Administrative Appeals Tribunal.
6. Some key observations of the Federal Court's submission were that:
 - (a) “The fee changes have led, without any compensating resources, to a significantly higher workload for registries in processing applications where previously there were none if an exemption or waiver was granted (particularly with hardship reductions where reductions must now be sought, decided and

the reduced fee paid on each occasion a full fee would otherwise be payable.)”¹

- (b) “Significant resources are utilised in training staff, producing training materials, checklists, tables to assist staff with the new fees, new Casetrack and e-lodgment instructions, getting ‘bugs’ out of the system, revising forms, updating the web-sites, checking and fixing up mistakes and explaining the new fees to litigants and practitioners. The resources involved cannot be underestimated.”²
- (c) “The fee structure in the Federal Court is excessively complex to interpret and administer and it has become more so since the most recent amendments. This results in significant waste of the Court’s resources. It is also wasteful of parties’ resources and adds to the expense of litigation and in some matters can result in delay if incomplete or incorrect information has been provided. It also adds to the anxiety and frustration for those in litigation and adds an unnecessary level of complexity to the litigation process.”³
- (d) “The reduced fee system is an administrative burden to apply **and may be a barrier to justice for the most vulnerable**. These changes have seen a significant increase in persons seeking a deferral of the fees, which increases the administrative burden and creates a situation where it is highly unlikely the amount will ever be recovered. Consideration should be given to its abolition. It would be cost neutral as the cost of pursuing a \$100 is easily outweighed by the administrative cost of the manual processing involved that inevitably results in the amount being written off.”⁴ [emphasis added]

7. The key observations of the Family Court’s submissions were much the same, for example:

- (a) “The new fees and new arrangements presented significant challenges for the court given their complexity and the short timeframe available in which to implement the changes. The courts did not have the infrastructure, systems or client services resources in place to fully support the changes. Those changes also occurred against the backdrop of increased family law filings and declining staff levels in registries.”⁵
- (b) “The complexity and increased volume of administration and transactions generated by the changes mainly from the new reduced fees, fees for consent order applications and daily hearing fees for both courts, have required significant resources to administer.”⁶

8. The submissions of the Federal Court, Family Court and Federal Magistrates Court to the 2011 review of the 2010 filing fee changes contain significant amounts of information and data, which the Law Council believes could assist the Senate Committee.

¹ Federal Court of Australia, Submission to the Attorney-General’s Department’s Review of the 2010 Filing Fee Increases, 19 September 2011, page 3, 5th paragraph.

² Ibid, page 4, 2nd paragraph.

³ Ibid, page 6-7.

⁴ Ibid, page 7, 4th paragraph.

⁵ Family Court of Australia, Submission to the Attorney-General’s Department’s Review of the 2010 Filing Fee Increases, 19 September 2011, page 2, final paragraph.

⁶ Ibid, page 3, 1st paragraph.

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9. The Law Council notes that the supplementary submission of the Attorney-General's Department to the Senate Committee states that:

“Paragraph 24(b): the Department notes that the Government's response to the Senate order did not include an assessment that, in many cases, new flat fees impeded the provision of justice.”⁷

10. The Law Council acknowledges that this is correct. The Attorney-General's Department's response to the Senate order did not refer to this specific impact, notwithstanding the extensive references contained in the submissions of the Federal Court and Family Court on this issue.
11. The Law Council considers the federal courts are in the best position to comment on the full effects of administering changes to the fee structure in the federal courts. However, the capacity or appropriateness of the courts expressing a clear view about these matters may be compromised by the linking of filing fee increases to funding of the federal courts, particularly in view of the difficult financial position of the federal courts after several years of underfunding.

Question 2: concurrent jurisdiction of Federal and State/Territory courts

Senator HUMPHRIES: ...The other point made in the submission concerns forum shopping: people moving out of the federal court to a state court that is cheaper. To what extent is that an issue? There would not be many matters where you would have a mutual jurisdiction between the two levels of courts, would there?

Concurrent jurisdiction in general federal law matters

12. As noted by the Law Council's representative, Mr John Emmerig, in response to this query at the public hearing on 17 May 2013, there are in fact many areas in which Federal and State/Territory courts have concurrent jurisdiction.
13. Since the hearing on 17 May 2013, the Law Council has consulted with the Federal Court, which has confirmed the following areas of concurrent jurisdiction with state/territory superior courts:
- (a) Corporations Law;
 - (b) Admiralty matters;
 - (c) Some civil penalties
 - (d) Many areas of intellectual property
 - (e) Many commercial law areas (including defamation) via accrued or associated jurisdiction.

⁷ Louise Glanville, First Assistant Secretary, Response from the Attorney-General's Department to Comments on page 7-8 of the Law Council of Australia's Submission to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Impact of Filing Fee Increases Since 2010 on Access to Justice*, 7 May 2013, page 2.

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14. The Federal Court's Annual Reports indicate that corporations law, admiralty and intellectual property alone account for around half of the Federal Court's case load⁸, however this could be significantly greater if civil penalties and commercial law matters arising under the Court's accrued jurisdiction are included.
15. It should be understood that, unless there is no federal law element to a dispute whatsoever, there will be concurrent jurisdiction between the federal courts and state/territory courts. For example, many contractual disputes arise under a state or territory law, however many of these may also include an allegation of misleading or deceptive conduct under the *Competition and Consumer Act 2010* (Cth), or may include issues under the *Corporations Act 2001* (Cth), bringing the matter within the jurisdiction of the federal court,
16. There are a number of factors which will affect the decision to file a matter in the Federal Court or the State/Territory superior courts, of which filing fees are one consideration. Others might include the quality of case management processes in particular registries and the relative expertise and experience of certain judicial officers in areas of shared jurisdiction.
17. As stated in the Law Council's primary submission to this inquiry, the Law Council considers the substantial increases in filing fees will lead (and may already be causing) parties to elect to file in State and Territory courts. This is supported by the submissions to this inquiry by the Australian Tax Office (which is the most frequent user of the Federal Court) and the Australian Securities and Investments Commission, both of which exercise important regulatory functions under federal law. There are a number of risks attending with such a shift, including that:
- (a) State and Territory Governments may raise court fees in all jurisdictions, in order to avoid an influx of claims and an associated strain on the capacity of the State and Territory courts to cope with increased demand in areas of concurrent jurisdiction. This raises obvious access to justice concerns.
 - (b) If State and Territory court fees remain at the same or similar levels, this may result in an inappropriate shift in the burden of responsibility for federal law matters from the Federal Government to the States and Territories;
 - (c) There may be a diminution of the relative experience of judicial officers in the federal courts in federal law matters where jurisdiction is shared, as cost implications drive litigants toward State and Territory courts. This raises concerns about the long term impact on the reputation of the federal courts. For example, if corporations law and commercial law matters are moved to the state courts to a significant extent, 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.
 - (d) Any reduction in filings in the federal courts that may result from fee increases in areas of concurrent jurisdiction will impact on the funds the federal courts will raise through the fees. This is perhaps a matter for concern for the government, given cost-recovery is one of the justifications raised by the Attorney-General's Department for the substantial recent fee increases.

⁸ For example, under the Federal Court of Australia, *Annual Report* in 2011-12, 2010-2011 and 2009-10, the total number of cases brought under the Corporations Law, Admiralty and Intellectual Property were 862 of 1875 in 2011-12; 1244 of 2281 in 2010-11; and 1010 of 2034 in 2009-10. (See table 3.1 in each report)

Concurrent jurisdiction of in family law matters

18. The Law Council is advised as follows:

- (a) A matrimonial cause ⁹ may be instituted in a court of summary jurisdiction of a State or Territory (see s 39(2) *Family Law Act 1975*). Anecdotally, the Law Council understands that very few matters are filed in these courts other than in regional centres.
- (b) Proceedings in relation to children must be transferred from a court of summary of jurisdiction to the Family Court or Federal Circuit Court (or Family Court of Western Australia or the Supreme Court of the Northern Territory) unless each of the parties consents to that court hearing and determining the matter (see s69N *Family Law Act 1975*).
- (c) Similarly, proceedings in relation to property proceedings with a total value exceeding the ceiling amount (currently \$20,000 ¹⁰) must be transferred from a court of summary jurisdiction to the Family Court of Australia or Federal Circuit Court of Australia (or the Supreme Court of a State or Territory) unless each of the parties consents to that court hearing and determining the matter (see s46 *Family Law Act 1975*).
- (d) Proceedings for divorce cannot be instituted in a court of summary jurisdiction ¹¹ (see Regulation 10A of the *Family Law Regulations 1984*).
- (e) The fees set out in the *Family Law (Fees) Regulation 2012* apply to all proceedings under the *Family Law Act 1975* whether initiated in the Family Court of Australia, the Federal Circuit Court of Australia or other courts that exercise jurisdiction under the Family Law Act.

19. The Law Council would be pleased to respond to any other queries the Senate Committee may have about evidence presented to this inquiry by the Law Council, or any other party.

⁹ Other than proceedings for a decree of nullity of marriage or for declaration as to the validity of a marriage/divorce/annulment.

¹⁰ Except in Western Australia where, the ceiling amount in the Magistrates Court of Western Australia is set by regulation

¹¹ Other than certain prescribed courts – see Regulation 10A, *Family Law Regulations 1984*

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.



Australian Government
Attorney-General's Department

11/16305-03

31 August 2011

Mr Alexander Ward
President
Law Council of Australia
GPO Box 1989
CANBERRA ACT 2601



Dear Mr Ward

Review of federal court fees arrangements – provision of court information

I refer to my correspondence to you of 25 July 2011 about extending the period for consultation to provide the Law Council with material submitted by the federal courts and tribunals.

I enclose for your consideration, information the Department has received from the courts and tribunals. The Department is still awaiting input from the Federal Court which we intend to forward to you upon receipt.

I note that the Law Council has indicated it will provide a more detailed submission to the review once it has had an opportunity to consider the material provided. I look forward to receiving the Law Council's submission in the near future.

Yours sincerely

Dr Albin Smrdel
Assistant Secretary
Federal Courts Branch

From: Carolyn Rogers
Sent: Monday, 18 July 2011 8:44 pm
To: Smrdel, Albin
Cc: Andrew Phelan
Subject: Review of recent changes to court fees - High Court of Australia data

Dear Albin,

I refer to your letter dated 21 June 2011 addressed to the Chief Executive and Principal Registrar seeking information relevant to the review of recent changes to court and tribunal fees that the Department is presently undertaking. The information relating to High Court matters is provided in the attached document.

In relation to the practical operation of the changes in fee structures introduced last November there are two issues to mention. Firstly, the availability of a partial waiver under Regulation 10 for items 108, 109 and 110 of Part 1, Schedule 1 of the *High Court of Australia (Fees) Regulations*. Our view is that it is unlikely to have been the intention that these three fees, and in particular the reduced fee in item 110, should be amendable to partial waiver under Regulation 10. Secondly, the deferral provision in Regulation 11 is arguably available for the reduced fee (item 110) in circumstances where a time limit for commencing a proceeding is about to expire and the applicant is unable to pay even the reduced fee (for example, where an applicant is in immigration detention and has no source of income). Again, it is our understanding that the intention of the reduced fee was that all applicants are required to pay at least the reduced fee before commencing proceedings in the Court.

I would be happy to discuss these issues further if they fall within the compass of your review.

Kind regards,

Carolyn Rogers
Senior Registrar
High Court of Australia

COURT FEES DATA - HIGH COURT OF AUSTRALIA

1a. The number of initiating and any other applications, disaggregated by type, where possible, for the periods of 1 July 2010 to 31 May 2011 and data from comparative periods for the previous two financial years.

	01/07/08	01/07/09	01/07/10
Category of matters filed	31/05/09	31/05/10	31/05/11
Leave (Civil)	453	460	380
Leave (Criminal)	61	53	78
Appeal (Civil)	46	49	57
Appeal (Criminal)	5	7	14
Writ of Summons	8	6	14
Removal	2	7	5
Cause Removed	0	0	1
Prerogative writ or injunction	34	26	83
Electoral	1	0	5
Application for leave to issue	7	3	10
TOTAL	617	611	647

1b. The number of initiating and any other applications, disaggregated by type, where possible, for the periods of 1 November 2010 to 31 May 2011 and data from comparative periods for the previous two financial years.

	01/11/08	01/11/09	01/11/10
Category of matters filed	31/05/09	31/05/10	31/05/11
Leave (Civil)	253	301	240
Leave (Criminal)	41	24	59
Appeal (Civil)	31	27	36
Appeal (Criminal)	3	2	8
Writ of Summons	5	5	11
Removal	2	5	5
Cause Removed	0	0	0
Prerogative writ or injunction	18	13	71
Electoral	1	0	0
Application for leave to issue	3	3	7
TOTAL	357	380	437

2. The number of fees imposed at the reduced rate (where fee exemptions or waivers previously applied), disaggregated by law type for the period 1 November 2010 to 31 May 2011, and data from comparable periods for the two previous financial years when exemptions and waivers applied.

Category of matter filed with reduced fees excluding Financial Hardship Waivers	01/11/08 31/05/09	01/11/09 31/05/10	01/11/10 31/05/11
Leave (Civil)	37	43	48
Leave (Criminal)	25	13	25
Appeal (Civil)	0	1	2
Appeal (Criminal)	2	1	8
Writ of Summons	0	0	7
Removal	0	3	5
Cause Removed	0	0	0
Prerogative writ or injunction	1	4	16
Electoral	0	0	0
Application for leave to issue	0	0	0
TOTAL	65	65	111

3. The number of fees deferred, disaggregated by law type for the period 1 July 2010 to 31 May 2011 and comparative periods for the previous two financial years.

None.

4. Information about fees that were not paid and debt recovery action taken.

None.

5. Information about the number and profile of litigants who are corporations for the period 1 July 2010 to 31 May 2011 and comparative periods for the previous financial years, including information about the number of deferrals and waivers granted during this period.

Category of All Corp matters filed	01/07/08 31/05/09	01/07/09 31/05/10	01/07/10 31/05/11
Leave (Civil)	80	94	70
Leave (Criminal)	0	0	0
Appeal (Civil)	20	27	22
Appeal (Criminal)	0	0	0
Writ of Summons	4	3	1
Removal	0	0	0
Cause Removed	0	0	0
Prerogative writ or injunction	1	3	4
Electoral	0	0	0
Application for leave to issue	0	0	0
TOTAL	105	127	97

Category of Corp matters filed with waiver	01/07/08 31/05/09	01/07/09 31/05/10	01/07/10 31/05/11
Leave (Civil)	5	8	1
Leave (Criminal)	0	0	0
Appeal (Civil)	1	1	0
Appeal (Criminal)	0	0	0
Writ of Summons	0	0	0
Removal	0	0	0
Cause Removed	0	0	0
Prerogative writ or injunction	0	0	1
Electoral	0	0	0
Application for leave to issue	0	0	0
TOTAL	6	9	2

All corporate matters filed with a waiver were a financial hardship waiver. No deferrals.



FAMILY COURT OF AUSTRALIA

GPO Box 9991
Canberra ACT 2600

15 August 2011

Dr Albin Smrdel
Assistant Secretary Access to Justice Division
Federal Courts Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

Dear Dr Smrdel,

Review of recent changes to court fees

I refer to your letter of the 21st June 2011 regarding the above review.

The Court welcomes the opportunity to provide input to the review and accordingly please find attached the following:

- (1) a submission which outlines some of the practical issues encountered by the court in administering the recent fee changes;
- (2) data in respect to Family Law initiating and other applications, disaggregated by type, as requested; and
- (3) data in respect to the number of Family Law fees imposed at the reduced rate, disaggregated by type, as requested

Please note that data in respect to the number of deferred fees is not presently available however the court is currently examining options to provide this information in the future.

~~Yours sincerely~~

Grahame Harriett
Executive Director Corporate

Submission on the practical operation and impacts arising from the recent changes to court fees

Introduction

This submission outlines the practical operation and impacts arising from the new fees and fee arrangements introduced on 1 July and 1 November 2010 on the Family Court of Australia and Family Law Court Registries for consideration in the Attorney-General's Department's review of court and tribunal fees. The submission also suggests options for a simplified fees regime that would have less impact on the court's limited resources and be less costly to administer.

Background

In addition to the regular biennial fee increases, new fees and arrangements were introduced on 1 July and 1 November for both the Family Court of Australia (FCoA) and the Federal Magistrates Court (FMC). In summary:

- A fee of \$80 was introduced for applications for consent orders (FCoA only);
- A setting down fee, to cover the first day of hearing, became applicable in both the FCoA and FMC;
- A new fee was introduced for each hearing day beyond the first day of hearing, to apply in all eligible defended final order hearings;
- Waivers were replaced with the 'Reduced Fee on the basis of financial hardship';
- Exemptions were replaced with the 'Reduced Fee – General'; and
- The eligibility criteria for both of these fees remained the same, however, a fee of \$60 became payable.

The new fees and new arrangements presented significant challenges for the court given their complexity and the short timeframe available in which to implement the changes. The courts did not have the infrastructure, systems or client service resources in place to fully support the changes. Those changes also occurred against the backdrop of increased family law filings and declining staffing levels in registries.

Issues

1. Registry impacts

The main impacts of the recent changes have been experienced at the registry level. The complexity and increased volume of administration and transactions generated by the changes, mainly from the new reduced fees, fees for consent order applications and daily hearing fees for both courts, have required significant resources to administer. In the large registries, this has impacted on the ability of registries to process applications and related banking transactions in a timely manner. In medium and small registries, the impacts of the fees changes have been less far-reaching.

It is estimated that approximately 21,000 additional fee payments were collected for the 7 months from November 2010 to May 2011 for both courts compared to the same period last year. This equates to an additional 40,000 transactions each year requiring processing in registries. The increased volume of transactions has resulted in significant backlogs of cheques requiring processing and banking being experienced in some large registries which have created compliance risks under the Financial Management and Accountability Act 1997 and Regulations. We are actively addressing this issue.

2. New daily hearing fees

The FCoA and FMC previously had one up front fee for hearings: a hearing fee in the FCoA; and a setting down fee in the FMC. The recent changes introduced a uniform setting down fee and daily hearing fees. In practical terms, the daily hearing fees have generated additional administrative tasks and require increased staff resources and other measures (e.g. Casetrack system upgrades) to administer them.

By way of illustration, when a matter is fixed for hearing, an associate or case coordinator sends the orders to parties with an accompanying letter outlining what fees are payable and when (which is different for each court). Twenty one days before the hearing, client service officers retrieve the files and ascertain if the fees have been paid. If they haven't, a reminder letter is sent. At present, this is a manual function as the court's Casetrack system requires an enhancement to enable it to link fees to an event. Prior to the matter going to chambers for final hearing, client service staff review the file for fees paid and tag files accordingly. The

relevant judicial officer exercises his or her discretion to proceed or not if the fees remain unpaid.

3. Reduced fees

Reduced fees were introduced in place of exemptions and waivers where previously no fee was payable once the exemption or waiver was granted. The introduction of reduced fees has led to a significant increase in the number of transactions and resources being utilised processing these applications. It has also led to greater complexity in Casetrack recordings. The reason for a reduced fee, the start and end dates of the reasons for a reduced fee and if a reduced fee has already been paid must now be recorded in Casetrack which was previously not required. Before the change, users recorded that the current fee was \$0 and a reason for the exemption or waiver.

Reduced fees have also had particular impacts on some legal aid agencies, their clients and the court in terms of the take up of e-filing. As most legal aid clients have ongoing financial pressures, legal aid agencies are understandably reluctant to pay the reduced fee for the application up front and then seek reimbursement by the client later. With paper applications, this means that the completed applications are simply held by the agency until the client is able to afford to pay the fee and this is usually either by cash or cheque. As the portal cannot accept payment for e-filing applications by cash or cheque, many legal aid agencies are not utilising e-filing and the court is unable to optimise the benefits from this important e-initiative.

4. Deferral of fees

A filing fee, setting down fee or hearing fee may be deferred for a period of 30 days, or any other period specified by a Registrar under certain circumstances which are set out in the regulations. Some of these circumstances include the urgency of the application, financial circumstances and for a setting down fee, if the date of the hearing is more than 6 months after the day on which the proceedings are set down for hearing.

At present, manual systems such as spreadsheets are used to identify and track deferred payments as the court does not currently have the systems in place to monitor and report on deferrals in Casetrack or enforce their payment once the matter is finalised. Manual auditing is also currently being undertaken.

5. Refunds

Anecdotal evidence from registries suggests that the introduction of daily hearing fees, has led to an increase in the number of refunds being sought. The refunds process is onerous with staff having to perform a number of checks which involve Casetrack, chambers staff and the court file prior to processing any refund application.

6. Splitting fees

Splitting fees, while previously available in the fees regulations, has become more common in practice since the introduction of the new fees regime and the introduction of the daily hearing fee. In the FCoA, the regulations allow a Judge or Registrar to order "what proportion of the hearing fees may be paid". For example, a four day hearing involving 4 parties may be split into quarters. This may seem simple to accommodate, however, some of the parties may be required to pay in full while others qualify for a reduced fee or no fee depending on when the action was commenced. Staff may be required to go back through a complex file and determine when the action commenced and at what stages parties joined and ultimately who pays what amount. In the FMC, whilst the regulations also allow a Federal Magistrate or Registrar to order that "another party to the proceedings to which the fee applies is liable to pay the fee or part thereof " this practice isn't common.

7. Enforcement

Enforcement systems to administer, recover and report on unpaid or deferred fees have yet to be developed. This requires the development of a Casetrack enhancement (\$50-100,000) and other procedures and systems. Enhancements are also required to enable account based invoicing for legal aid agencies, law firms and other entities which would enhance fees administration and enforcement.

The Court is currently reviewing the priority of the above development work given the court's current financial and resource position.

Comment

The Court would welcome a simplified fees regime that had less impact on the court's limited resources and was less costly to administer. Options for achieving a simplified system from an administrative perspective may include:

- **A shift to slightly higher, up front fees at the commencement of court proceedings rather than reduced fees and fees staggered throughout the process. This recognises the Attorney-General's Department's position that any changes arising from the court fees review would need to be revenue neutral¹. While this may appear at face value to create tension between access to justice principles that cost should not be a barrier to justice² and the desire to lessen regulatory and administrative impacts on the courts, the court considers that this can be adequately addressed through exemptions and waivers and other measures.**
- **Returning to an exemption and waiver regime (no fees) instead of reduced fees to promote access to justice for disadvantaged clients and reduce the administrative and transactional costs in the system in pursuing limited fee revenue. This would also allow the full benefits of e-filing to be realised by making it more attractive to legal aid agencies to use.**
- **If the current structure is retained, simplifying the setting down and daily hearing fees arrangements for both courts to create a first day hearing fee and then a flat fee for hearings that go more than one day. This recognises and retains the full cost recovery and proportionality principles underpinning the introduction of the daily hearing fees³ while also simplifying their administration.**
- **Removing the capacity to defer fees and providing instead discretion to dispense with fees to simplify the system and reduce the costs involved in pursuing small sums (mostly reduced fees).**
- **Further harmonise regulations for fee structures and collection for the FCoA and FMC to simplify fees administration and lessen the resources required to administer the system.**

¹ Letter to Mr Richard Foster, CEO FCoA from Mr Aibin Smedel, Assistant Secretary Federal Courts Branch of the Attorney-General's Department dated 21 June 2011.

² Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) at 61-68.

³ As discussed in Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) at 122-23.

**Numbers and value of Exemptions and Waivers by Fee type for the FCoA
with a transaction date between 01 Nov 2008 and 31 May 2009**

Fee type	Fee type	Fee Type Payable	Exempted from Payment (#)	Legal Aid Exemptions (#)	Payments Waived (#)	Payments (#)	Total Fee Collected (\$)	Total Foregone (\$)**
Collect Hearing Fee Notice	Collect Hearing Fee Notice	Full Fee				233	124,422	
Collect Hearing Fee Notice	Collect Hearing Fee Notice	No Fee	105	93	30			121,752
Response to Final Orders	Response to Final Orders	Full Fee	105	93	30	233	124,422	121,752
Response to Final Orders	Response to Final Orders	No Fee	363	145	9	1,118	173,290	
Application for Final Orders	Application for Final Orders	Full Fee	363	145	9	1,118	173,290	80,135
Application for Final Orders	Application for Final Orders	Full Fee				1,324	205,220	
Application for Final Orders	Application for Final Orders	No Fee	705	107	14			128,030
Application for Final Orders Validity/Nullity	Application for Final Orders Validity/Nullity	Full Fee	705	107	14	1,324	205,220	128,030
Application for Final Orders Validity/Nullity	Application for Final Orders Validity/Nullity	No Fee				8	5,456	
Notice of Appeal	Notice of Appeal	Full Fee						6,820
Notice of Appeal	Notice of Appeal	No Fee	4	4	2	8	5,456	
Application for Divorce	Application for Divorce	Full Fee	7	3	0	4	2,136	5,340
Application for Divorce	Application for Divorce	No Fee	6	0	1	1	682	5,340
Amended Application (Fees Apply)	Amended Application (Fees Apply)	Full Fee						4,774
			1,190	352	56	2,868	511,206	346,851

Report compiled by Rod Diaz, SSU (03)6243846.
 Code: 95-Project/Fee/Fees FTR App
 Source: Casetrack (as of 01 June 2011)
 Report notes:
 * TOTAL FEE COLLECTED field utilises transaction amount for FULL FEE records and FEE records.
 * OUTSTANDING field identified where TRANSACTION PAID flag = 'No'
 ** TOTAL FOREGONE:
 * 'NO FEE' and 'REDUCED FEE \$?' use the whole full fee amount
 * 'REDUCED FEE' is the whole full fee amount minus reduced fee
 * Does not include outstanding transactions

**Numbers and value of Exemptions and Waivers by Fee type for the FMC
with a transaction date between 01 Nov 2008 and 31 May 2009**

Fee type	Fee type	Fee Type Payable	Exempted from Payment (#)	Legal Aid Exemptions (#)	Payments Waived (#)	Payments (#)	Total Fee Collected (\$)	Total Foregone (\$)**
Collect Setting Down Fee Notice	Collect Setting Down Fee Notice	Full Fee				559	218,010	
	Collect Setting Down Fee Notice	No Fee	353	311	45			276,510
Collect Setting Down Fee Notice	Response to Application for Final Orders	Full Fee	353	311	45	559	218,010	276,510
	Response to Application for Final Orders	No Fee				3,116	482,980	
Response to Application for Final Orders	Response to Application for Final Orders	No Fee	1,598	1,143	42			431,365
	Application for Final Orders	Full Fee				3,116	482,980	431,365
Application for Final Orders	Application for Final Orders	Full Fee				4,017	622,635	
	Application for Final Orders	No Fee	3,010	1,557	90			721,835
Application for Final Orders	Application for Divorce	Full Fee	3,010	1,557	90	4,017	622,635	721,835
	Application for Divorce	No Fee				17,488	7,554,816	
Application for Divorce	Application for Divorce	No Fee	7,905	148	400			3,651,696
			7,905	148	400	17,488	7,554,816	3,651,696
			12,866	3,159	577	25,180	8,879,441	5,081,406

Report compiled by Fed Dis. SSU (03/26/2010)
 Code: SUPPLEMENTARY FEE
 Source: Courtbook (as of Feb 01 June 2011)
 Report notes:
 * TOTAL FEE COLLECTED: Paid Utilises
 Transaction amount for FULL FEE records and
 Payment amount for REDUCED
 FEE records
 * OUTSTANDING: field identified where
 TRANSACTION PAID flag = "No"

** TOTAL FOREGONE:
 * NO FEE and REDUCED FEE \$0: use the whole full
 amount
 * REDUCED FEE: is the whole full fee amount minus
 reduced fee
 * Does not include outstanding transactions



Family Court of Western Australia

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Website: www.familycourt.wa.gov.au

Your Ref:
11/15771-04

Our Ref:
David Monaghan

Enquiries:
Principal Registrar

Dr Albin Smrdel
Assistant Secretary
Federal Courts Branch
Attorney-General's Department
3 - 5 National Circuit
BARTON ACT 2600

Dear Dr Smrdel

REVIEW OF RECENT CHANGES TO COURT FEES

I refer to your letter of 21 June 2011 in relation to the above matter, and am pleased to provide this response on behalf of the Family Court of Western Australia.

Attached to this letter are the relevant statistics sought in relation to filing numbers of initiating applications, reduced fees and waivers.

By way of explanation, the Family Court Regulations 1998 (WA), under which fees are prescribed for the filing of applications for non-married parties, were amended to bring them into line with the Family Law Regulations 2004 (Cth) as follows:

1. With effect from 10 November 2010 in relation to increasing the filing and hearing fees, providing for daily hearing fees and providing for a filing fee for consent order applications; and
2. With effect from 14 May 2011 in relation to deferral of fees, reduced fees and otherwise consolidating the appropriate fee amounts.

As deferred and reduced fees for non-married parties were not introduced until 14 May 2011, I have not included those statistics.

The attached statistics show there has been no effect on filings as a result of the changes to court fees.

Courts and Tribunal administration

Since the introduction of the setting down and hearing fees, payable on a per day basis, there has been a significant increase in the number of Applicants seeking that those fees be "split" when orders are being made regarding payment. Generally, judicial officers

are open to making such orders. I am advised by management that "split" orders create significant administrative work when recording them in Casetrack, and when they remain unpaid by either or both parties.

In relation to consent order applications, I can see merit in "splitting" the filing fee. Such applications are, in reality, joint applications. Parties can "manipulate" the "Applicant" to minimize the fee payable, as occurs with joint applications for divorce. The main concern in so doing however would be the increased administrative work to process the "split" fee, particularly in circumstances where one party is eligible for a reduced fee and the other party is not. The person filing the application would be unaware as to the precise amount payable at the time of filing.

The decision in *Rosson v. Tesoriero* has not caused concern for the Registrars of this court. In the course of giving instructions for the amendment of the Family Court Regulations 1998 (to mirror) the Family Law Regulations 1984 in relation to fees, I did however come across some queries as to the drafting of the latter. In particular, it would appear at least arguable that sub-regulation 11(2)(a) means that the Applicant should pay the filing fee for a response. The drafting in the Family Court Regulations 1998 is as follows:

- “(2) The person liable to pay a fee is —
 - (a) if the fee is a filing fee, the person seeking to file the application or response; or
 - (b) if the fee is a setting down or hearing fee, the person who initiated the proceedings or lodged the appeal; or
 - (c) if the court or a registrar so orders —
 - (i) another party to the proceedings or appeal; or
 - (ii) each of 2 or more parties to the proceedings or appeal, including the person initiating the proceedings or lodging the appeal in the proportions ordered.”

It has been necessary for us to re-assign administrative duties in order to make provision for a "fees clerk" in order to monitor compliance with unpaid setting down/hearing fees. Our procedure is to write to defaulting clients (currently on a number of occasions) in relation to default. If it is cost effective, we would anticipate sending the matter to the State Solicitor for enforcement proceedings if necessary. We have not taken that step at the date of this letter.

The support staff of each judicial officer checks compliance with payment of these fees prior to the commencement of hearings. If the fee remains unpaid the clients are telephoned and the non-compliance brought to their attention. In some circumstances the judicial officer will raise the non-compliance in court at the commencement of the hearing.

Should a hearing take longer than estimated, thus requiring payment of a further hearing fee, the judicial officer will usually make the appropriate order during the hearing. This in turn creates an additional workload as the fee event must be processed in Casetrack and the fee received prior to the commencement of that day of the trial or, where payment cannot be made, the file is referred to the registry for recovery action, post trial.

The increase in court fees appears to have created additional workload with the average file requiring a number of recovery interventions to fully collect the appropriate fee.

Impact on legal aid commissions/CLCs/ATSILS

At a recent Reference Group meeting convened by the Chief Judge, Legal Aid (WA), the Aboriginal Legal Service WA and the Women's Law Centre (a CLC) all advised that they were paying the reduced fee for filing in a significant number of cases.

Thank you for the opportunity of providing this response. Should you have any queries or require any further information please do not hesitate to contact me.

Yours faithfully

D MONAGHAN
PRINCIPAL REGISTRAR

18 August 2011

attach

m PACUSTOMER SERVICES\Fees\AGD_Fees review letter.doc

Family Court of Western Australia

	Jul08-May09	Jul09-May10	Jul10-May11	Nov08-May09	Nov09-May10	Nov10-May11
Divorce						
Lodgements	4552	4836	4781	2877	3048	2920
Exemption/Waiver	1053	1202	1062	660	773	650

	Jul08-May09	Jul09-May10	Jul10-May11	Nov08-May09	Nov09-May10	Nov10-May11
Form 1 - Parenting						
Married Lodgements	490	501	506	334	328	339
Married Exemption/Waiver	175	188	170	114	120	101
Not Married	700	717	701	458	458	446
Not Married Exemption/Waiver	320	393	373	211	264	230

	Jul08-May09	Jul09-May10	Jul10-May11	Nov08-May09	Nov09-May10	Nov10-May11
Form 1 - Financial						
Married Lodgements	631	679	683	408	413	429
Married Exemption/Waiver	153	168	181	99	98	104
Not Married Lodgements	233	218	230	129	134	140
Not Married Exemption/Waiver	54	60	60	26	41	36

	Jul08-May09	Jul09-May10	Jul10-May11	Nov08-May09	Nov09-May10	Nov10-May11
Form 1 - Parenting & Financial						
Married Lodgements	142	190	128	104	110	71
Married Exemption/Waiver	153	168	181	27	32	20
Not Married Lodgements	38	38	39	23	25	26
Not Married Exemption/Waiver	54	60	60	5	11	6

	Jul08-May09	Jul09-May10	Jul10-May11	Nov08-May09	Nov09-May10	Nov10-May11
Form 11 Consent						
Lodgements	2025	2238	2101	1265	1396	1300

Form 1 - Parenting & Financial - Deferrals

Lodgements	
Deferrals since paid	15
Deferrals application now dismissed	12
Deferrals outstanding	1
	2

Jul10-May11	
	15
	12
	1
	2

Form 1 - Hearing Fee - Deferrals
Lodgements

Jul10-May11
0

Form 1 - Hearing Fees
Trials Listed
Paid
Exemption/Waiver
Fee outstanding, pending collection

Jul10-May11
308
162
61
85



ADMINISTRATIVE APPEALS TRIBUNAL

ABN 90 680 970 626

PRINCIPAL REGISTRY

20 July 2011

Dr Albin Smrdel
Assistant Secretary
Federal Courts Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Dr Smrdel

Review of recent changes to court and tribunal fees

I refer to your letter dated 21 June 2011.

The following points are provided by way of background.

- Under the *Administrative Appeals Tribunal Regulations 1976* (AAT Regulations), no fees are payable for lodging an application for the review of a prescribed decision, being a decision specified in Schedule 3 to the Regulations. This means no fees are payable in relation to applications for the review of decisions about social security, workers compensation and veterans' entitlements.
- The Tribunal's case management system does not record information about fees. This functionality is being developed but has been delayed, in part, pending the rewrite of the AAT Regulations that is now close to completion. This means it is not possible to provide the disaggregated fees information mentioned in your letter.

Number of initiating and other applications

Table 1 of the Excel document accompanying this letter sets out information about applications lodged between 1 July and 31 May in the last 3 years.

Table 2 sets out information about applications lodged between 1 November and 31 May in the last 3 years.

In addition to the figures disaggregated by jurisdiction, Tables 1 and 2 include an additional table setting out an aggregated figure for all applications in the 'full fee payable' jurisdictions such as tax and immigration/citizenship. A small proportion of the applications in this table may not be subject to fees as a consequence of Schedule 3 to the AAT Regulations. The aggregated figures also exclude applications in the social security, workers compensation and veterans' jurisdictions, for which no fee is generally payable.

It should be noted that variations in the number of applications to the Tribunal varies from year to year due to a wide range of factors (including the number of decisions made by primary decision-makers, changes in legislation or policy and compliance action). It is therefore difficult to draw any conclusions from the data as to the impact of the new fees structure.

Number of fees imposed at reduced rate

The Tribunal is unable to provide this information on a disaggregated basis.

Table 3 sets out information about fee waiver/reduction decisions made between January and June in the last 3 years. As this information is collected on a quarterly basis, the Tribunal is unable to provide it for a May to November period.

Number of fees deferred

The AAT Regulations do not provide for the deferral of fee payments.

Fees not paid and recovery action taken

The need to recover unpaid fees does not arise in the Tribunal. Under section 29A of the *Administrative Appeals Tribunal Act 1975*, an application to the Tribunal is not taken to be made unless the prescribed fee (if any) in respect of the application is paid. Where a fee is requested but not paid, the matter does not proceed and the Tribunal closes the file. Information about 'no fee paid' finalisations for the period November 2010 to May 2011 is set out in table 4. The table does not distinguish between whether the fee required was a standard fee or a reduced fee (this would only apply in 2010-11, as previously reduced fee applications would have been fully exempt).

Number of Tribunal users who are corporations

The Tribunal does not collect information about corporations as the AAT Regulations do not distinguish between corporations and non-corporations. The Tribunal does collect information that distinguishes between individuals and organisations (that is, non-individuals). Information about applications lodged by organisations is set out in table 5.

Other comments

The implementation of the new fees structure involved a significant amount of work in relation to staff training and updating the Tribunal's website, fact sheets, brochures, forms, standard correspondence and orders.

On 16 November 2010 the Tribunal wrote to the Department's Administrative Law Branch in relation to possible issues arising from the introduction of the new filing fee of \$100 that is to accompany applications to the Tribunal for review of decisions made under s 501 of the *Migration Act 1958*. A copy of this letter is enclosed. Subsequent decisions by the Tribunal have not entirely resolved the issues.

Further information

Please contact me if you require any further information.

Yours sincerely

Philip Kellow
Registrar
(sent by email)

Table 1 - Applications Lodged - 1 July to 31 May

	08/09	09/10	10/11	Change 08/09 - 09/10	Change 09/10 - 10/11	% Change 08/09 - 09/10	% Change 09/10 - 10/11
Social Security							
NSW	665	627	513	-38	-114	-5.7%	-18.2%
Vic	499	493	365	-6	-128	-1.2%	-26.0%
Qld	344	343	268	-1	-75	-0.3%	-21.9%
NT	8	2	10	-6	8	-75.0%	400.0%
SA	196	172	135	-24	-37	-12.2%	-21.5%
WA	166	162	106	-4	-56	-2.4%	-34.6%
ACT	56	54	29	-2	-25	-3.6%	-46.3%
Tas	93	66	72	-27	6	-29.0%	9.1%
All Registries	2027	1919	1498	-108	-421	-5.3%	-21.9%
Veterans' Affairs							
NSW	187	163	139	-24	-24	-12.8%	-14.7%
Vic	90	82	101	-8	19	-8.9%	23.2%
Qld	183	132	139	-51	7	-27.9%	5.3%
NT	5	1	1	-4	0	-80.0%	0.0%
SA	32	31	39	-1	8	-3.1%	25.8%
WA	29	16	19	-13	3	-44.8%	18.8%
ACT	12	12	11	0	-1	0.0%	-8.3%
Tas	13	14	8	1	-6	7.7%	-42.9%
All Registries	551	451	457	-100	6	-18.1%	1.3%
Workers' Compensation							
NSW	253	245	276	-8	31	-3.2%	12.7%
Vic	365	324	345	-41	21	-11.2%	6.5%
Qld	147	127	121	-20	-6	-13.6%	-4.7%
NT	8	3	8	-5	5	-62.5%	166.7%
SA	90	86	87	-4	1	-4.4%	1.2%
WA	43	43	50	0	7	0.0%	16.3%
ACT	233	268	160	35	-108	15.0%	-40.3%
Tas	16	18	12	2	-6	12.5%	-33.3%
All Registries	1155	1114	1059	-41	-55	-3.5%	-4.9%
Taxation Appeals Division							
NSW	326	387	480	61	93	18.7%	24.0%
Vic	254	268	192	14	-76	5.5%	-28.4%
Qld	191	122	150	-69	28	-36.1%	23.0%
NT	1	0	0	-1	0	-100.0%	0.0%
SA	40	57	80	17	23	42.5%	40.4%
WA	185	56	111	-129	55	-69.7%	98.2%
ACT	12	15	13	3	-2	25.0%	-13.3%
Tas	10	2	11	-8	9	-80.0%	450.0%
All Registries	1019	907	1037	-112	130	-11.0%	14.3%

Small Taxation Claims Tribunal							
NSW	26	23	33	3	10	-11.5%	43.5%
Vic	17	13	9	4	4	-23.5%	-30.8%
Qld	6	4	8	2	4	-33.3%	100.0%
NT	0	0	0	0	0	0.0%	0.0%
SA	5	2	19	3	17	-60.0%	850.0%
WA	17	6	5	11	1	-64.7%	-16.7%
ACT	14	1	0	13	1	-92.9%	-100.0%
Tas	1	1	0	0	1	0.0%	-100.0%
All Registries	86	50	74	36	24	-41.9%	48.0%

Citizenship & Immigration							
NSW	78	157	137	79	20	101.3%	-12.7%
Vic	57	41	65	16	24	-28.1%	58.5%
Qld	9	21	31	12	10	133.3%	47.6%
NT	0	0	0	0	0	0.0%	0.0%
SA	15	20	14	5	6	33.3%	-30.0%
WA	15	17	36	2	19	13.3%	111.8%
ACT	7	3	6	4	3	-57.1%	100.0%
Tas	1	0	2	1	2	-100.0%	—
All Registries	182	259	291	77	32	42.3%	12.4%

Other							
NSW	191	164	174	27	10	-14.1%	6.1%
Vic	195	144	124	51	20	-26.2%	-13.9%
Qld	85	92	81	7	11	8.2%	-12.0%
NT	3	1	1	2	0	-66.7%	0.0%
SA	37	33	32	4	1	-10.8%	-3.0%
WA	44	38	50	6	12	-13.6%	31.6%
ACT	37	38	25	1	13	2.7%	-34.2%
Tas	10	6	10	4	4	-40.0%	66.7%
All Registries	602	516	497	86	19	-14.3%	-3.7%

Totals							
NSW	1726	1766	1752	40	14	2.3%	-0.8%
Vic	1477	1365	1201	112	164	-7.6%	-12.0%
Qld	965	841	798	124	43	-12.8%	-5.1%
NT	25	7	20	18	13	-72.0%	185.7%
SA	415	401	406	14	5	-3.4%	1.2%
WA	499	338	377	161	39	-32.3%	11.5%
ACT	371	391	244	20	147	5.4%	-37.6%
Tas	144	107	115	37	8	-25.7%	7.5%
GRAND TOTAL	5622	5216	4913	406	303	-7.2%	-5.8%

Full Fee Payable (Taxation Appeals Division, Citizenship, Other)							
NSW	595	708	791	113	83	19.0%	11.7%
Vic	506	453	381	53	72	-10.5%	-15.9%
Qld	285	235	262	50	27	-17.5%	11.5%
NT	4	1	1	3	0	-75.0%	0.0%
SA	92	110	126	18	16	19.6%	14.5%
WA	244	111	197	133	86	-54.5%	77.5%
ACT	56	56	44	0	12	0.0%	-21.4%
Tas	21	8	23	13	15	-61.9%	187.5%
All Registries	1803	1682	1825	121	143	-6.7%	8.5%

Table 2 - Applications Lodged - 1 November to 31 May

	08/09	09/10	10/11	Change 08/09 - 09/10	Change 09/10 - 10/11	% Change 08/09 - 09/10	% Change 09/10 - 10/11
Social Security							
NSW	393	347	307	-46	-40	-11.7%	-11.5%
Vic	331	269	228	-62	-41	-18.7%	-15.2%
Qld	188	207	168	19	-39	10.1%	-18.8%
NT	4	2	8	-2	6	-50.0%	300.0%
SA	132	95	82	-37	-13	-28.0%	-13.7%
WA	101	86	78	-15	-8	-14.9%	-9.3%
ACT	33	26	18	-7	-8	-21.2%	-30.8%
Tas	60	37	46	-23	9	-38.3%	24.3%
All Registries	1242	1069	935	-173	-134	-13.9%	-12.5%
Veterans' Affairs							
NSW	85	98	79	13	-19	15.3%	-19.4%
Vic	49	51	61	2	10	4.1%	19.6%
Qld	97	75	85	-22	10	-22.7%	13.3%
NT	3	0	1	3	1	-100.0%	—
SA	15	14	26	-1	12	-6.7%	85.7%
WA	18	11	13	-7	2	-38.9%	18.2%
ACT	6	5	4	-1	-1	-16.7%	-20.0%
Tas	9	9	6	0	-3	0.0%	-33.3%
All Registries	282	263	275	-19	12	-6.7%	4.6%
Workers' Compensation							
NSW	148	133	162	-15	29	-10.1%	21.8%
Vic	221	226	207	5	-19	2.3%	-8.4%
Qld	91	71	74	-20	3	-22.0%	4.2%
NT	5	1	4	-4	3	-80.0%	300.0%
SA	59	48	57	-11	9	-18.6%	18.8%
WA	34	23	37	-11	14	-32.4%	60.9%
ACT	132	151	103	19	-48	14.4%	-31.8%
Tas	6	14	5	8	-9	133.3%	-64.3%
All Registries	696	667	649	-29	-18	-4.2%	-2.7%
Taxation Appeals Division							
NSW	208	206	267	-2	61	-1.0%	29.6%
Vic	161	151	115	-10	-36	-6.2%	-23.8%
Qld	120	95	100	-25	5	-20.8%	5.3%
NT	0	0	0	0	0	0.0%	0.0%
SA	31	27	43	-4	16	-12.9%	59.3%
WA	123	38	80	-85	42	-69.1%	110.5%
ACT	5	13	4	8	-9	160.0%	-69.2%
Tas	6	1	5	-5	4	-83.3%	400.0%
All Registries	654	531	614	-123	83	-18.8%	15.6%

Small Taxation Claims Tribunal							
NSW	13	14	21	1	7	7.7%	50.0%
Vic	5	7	7	2	0	40.0%	0.0%
Qld	5	3	4	-2	1	-40.0%	33.3%
NT	0	0	0	0	0	0.0%	0.0%
SA	3	2	8	-1	6	-33.3%	300.0%
WA	9	2	3	-7	1	-77.8%	50.0%
ACT	13	0	0	-13	0	-100.0%	0.0%
Tas	0	1	0	1	-1	—	-100.0%
All Registries	48	29	43	-19	14	-39.6%	48.3%

Citizenship & Immigration							
NSW	56	85	86	29	1	51.8%	1.2%
Vic	45	29	37	-16	8	-35.6%	27.6%
Qld	2	18	17	16	-1	800.0%	-5.6%
NT	0	0	0	0	0	0.0%	0.0%
SA	13	15	8	2	-7	15.4%	-46.7%
WA	10	11	17	1	6	10.0%	54.5%
ACT	5	2	3	-3	1	-60.0%	50.0%
Tas	0	0	1	0	1	0.0%	—
All Registries	131	160	169	29	9	22.1%	5.6%

Other							
NSW	107	102	90	-5	-12	-4.7%	-11.8%
Vic	123	91	71	-32	-20	-26.0%	-22.0%
Qld	53	47	40	-6	-7	-11.3%	-14.9%
NT	1	0	0	-1	0	-100.0%	0.0%
SA	23	16	15	-7	-1	-30.4%	-6.3%
WA	32	28	25	-4	-3	-12.5%	-10.7%
ACT	25	24	13	-1	-11	-4.0%	-45.8%
Tas	3	4	4	1	0	33.3%	0.0%
All Registries	367	312	258	-55	-54	-15.0%	-17.3%

Totals							
NSW	1010	985	1012	-25	27	-2.5%	2.7%
Vic	935	824	726	-111	-98	-11.9%	-11.9%
Qld	556	516	488	-40	-28	-7.2%	-5.4%
NT	13	3	13	-10	10	-76.9%	333.3%
SA	276	217	239	-59	22	-21.4%	10.1%
WA	327	199	253	-128	54	-39.1%	27.1%
ACT	219	221	145	2	-76	0.9%	-34.4%
Tas	84	66	67	-18	1	-21.4%	1.5%
GRAND TOTAL	3420	3031	2943	-389	-88	-11.4%	-2.9%

Full Fee Payable (Taxation Appeals Division, Citizenship, Other)							
NSW	371	393	443	22	50	5.9%	12.7%
Vic	329	271	223	-58	-48	-17.6%	-17.7%
Qld	175	160	157	-15	-3	-8.6%	-1.9%
NT	1	0	0	-1	0	-100.0%	0.0%
SA	67	58	66	-9	8	-13.4%	13.8%
WA	165	77	122	-88	45	-53.3%	58.4%
ACT	35	39	20	4	-19	11.4%	-48.7%
Tas	9	5	10	-4	5	-44.4%	100.0%
All Registries	1152	1003	1041	-149	38	-12.9%	3.8%

Table 3 - Fees exempted, waived or reduced

	2008-09	2009-10	2010-11
Total # concession exemption (08-09/09-10) and reduction (10-11) in Jan-Jun:	162	201	82
Total # hardship waiver (08-09/09-10) and reduction (10-11) requests in Jan-Jun:	41	69	43
% of fee waiver (08-09/09-10) and reduction (10-11) requests granted in Jan-Jun:	80.5%	73.9%	83.7%

Fairburn, Katrina

Subject: FW: Review of Court and Tribunal Fees - NNTT Comments

From: Fryer-Smith, Stephanie
Sent: Sunday, 21 August 2011 10:21 am
To: Fairburn, Katrina
Cc: Denley, Kathleen
Subject: Review of Court and Tribunal Fees - NNTT Comments

Hello Katrina

This is further to earlier communications about the above.

On 1 July 2010 the fee for lodging a future act application under the *Native Title Act 1993* (Cth) (NTA) increased from \$682 to \$710 (see ss 75, 76 NTA). The fee exemption provisions under Reg 8 of the *Native Title (Tribunal) Regulations 1993* continued to apply.

In respect of those increases, the Tribunal comments as follows:

- most applications in respect of future act matters are made in Western Australia and Queensland, and the number of those applications is increasing.
- in the reporting year 2010-11, a total of 159 future act determinations applications (FADAs) were lodged, although a significant number were withdrawn or dismissed. Since FADAs are usually lodged by the proposed grantee party it appears that the applicant rarely, if ever, seeks exemption from payment of the application fee.
- In 2010-11, a total of 1,697 applications objecting to inclusion in an expedited procedure (AOEPs) were lodged, although again a significant number were withdrawn or dismissed. In the vast majority of AOEPs (i.e. approximately 96% in WA and 99% in Queensland) a fee waiver was granted, pursuant to Reg 8, usually on production by the applicant of a concession card.

Accordingly, it appears that the increase in fees which commenced on 1 July 2010 has had little if any effect on the rate of future act applications.

The Tribunal makes no comment in respect of the changes to Commonwealth court fees made in July and November 2010.

Please let me know if you require any further information.

Regards

Stephanie Fryer-Smith | REGISTRAR
Principal Registry



Australian Government
Attorney-General's Department

11/16305-03

22 September 2011

Mr Alexander Ward
President
Law Council of Australia
GPO Box 1989
CANBERRA ACT 2601

Dear Mr Ward

Review of federal court fees arrangements – provision of court information

I enclose for your consideration, information the Department has received from the Federal Court and the Federal Magistrates Court.

I note that the Law Council has indicated it will provide a more detailed submission to the review once it has had an opportunity to consider the material provided. I look forward to receiving the Law Council's submission in the near future.

Yours sincerely

Tracy Ballantyne
A/g Assistant Secretary
Federal Courts Branch



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

DX 613 SYDNEY

A.B.N. 49 110 847 399

Your Ref:

Our Ref:

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

19 September 2011

Dr Albin Smrdel
Assistant Secretary
Federal Courts Branch
Access to Justice Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Dr Smrdel

Review of recent changes to court fees

Thank you for the opportunity of contributing to the Department's review of changes to court and tribunal fees that were implemented in July and November 2010. In making these comments the Federal Court of Australia has had the benefit of reading the contributions to the review made by the High Court of Australia, Family Court of Australia and has discussed with the Federal Magistrates Court its proposed contribution.

From recent discussions with you, it is understood that comments for the review are also being obtained from the Law Council of Australia and that it would aid that process if a copy of the Court's contribution to the review could be made available to the Law Council. The Court has discussed in some detail many of the implications of the fee changes referred to below with the Law Council's Federal Court Liaison Committee at its meetings with that Committee and is very happy for a copy of this contribution to be provided to the Law Council.

In response to your letter the following are attached:

- Attachment A -Submissions
- Attachment B -Statistical Data
- Attachment C -Suggested amendments to Federal Court of Australia Regulations 2004 consequential to implementation of Federal Court Rules 2011.

Federal Court fees have always been complicated, but the added intricacies introduced by the fee changes in July and November 2010 have proved excessively complex, administratively cumbersome and may have had an adverse impact on access to justice particularly to the most vulnerable.

Yours sincerely

~~John Mathieson~~
Deputy Registrar

Attachment A

FEDERAL COURT OF AUSTRALIA

SUBMISSIONS ON CHANGES TO COURT FEES

The Federal Court of Australia has had the opportunity of considering the submissions of the High Court of Australia, the Family Court of Australia and discussed with the Federal Magistrates Court of Australia its proposed contribution. The Federal Court endorses the comments made by both the High Court and Family Court, but in particular the submissions of the Family Court regarding the concerns about the complexity and increased cost to administer the new fee regime.

More detailed comments on the implication for the Federal Court, its users and more generally follow.

Administrative Burden

The Federal Court provides registry services for all Federal Court matters and Federal Magistrates Court (general federal law).

The regulations for each Court are not consistent in their terminology, drafting styles nor fee structure, eg there is no fee for photocopying in Federal Magistrate Court matters but a fee applies to matters in the Federal Court. This causes confusion, not only to registry staff but to litigants and practitioners. It adds to the administrative burden of managing two different sets of regulations and results in loss of revenue.

The fee changes have led, without any compensating resources, to a significantly higher workload in registries in processing applications where previously there were none if an exemption or waiver was granted (particularly with hardship reductions where reductions must now be sought, decided and the reduced fee paid on each occasion a full fee would otherwise be payable).

The Family Court addresses the expense it has incurred in modifying Casetrack as a result of the fee changes. These changes have also led to the Federal Court incurring significant expenditure in modifying Casetrack. In addition the Federal Court has needed to also modify its e-lodgment application and incurred further significant expenditure in doing so. Given the complexity of the changes to the fees, and the manner in which the Regulations are drafted, the Federal Court experience is that it is not until the fees are being implemented and questions arise that the full impact of the change in fees and the added cost in changing Casetrack and e-lodgement is realised. This is due in part to the inconsistent way exemption of fees are dealt with in the Federal Court Regulations and the Federal Magistrates Court Regulations. For example, the exemption to pay setting down fees or hearing fees in some Fair Work matters is under the heading in the Federal Court Regulations under Schedule 3 for Exemption of Setting Down Fees and Hearing Fees whereas under the Federal Magistrates Court Regulations the exemption to non-payment is not under the Exemption Headings but

under the regulation "Circumstances in which fee not payable". This inconsistency in drafting is confusing.

Significant resources are utilized in training staff, producing training materials, checklists, tables to assist staff with the new fees, new Casetrack and e-lodgment instructions, getting 'bugs' out of the system, revising forms, updating the web-sites, checking and fixing up mistakes and explaining the new fees to litigants and practitioners. The resources involved cannot be underestimated.

The estimated cost associated with Casetrack and e-lodgment totals \$65,000 with the Casetrack component being about \$14,000 and for e-lodgment \$51,000.

The other feature that is common with the Family Court is the significant increase in the use of deferral of fees in the Federal Court and Federal Magistrates Court (general federal law) particularly in migration applications of offshore entry persons. However, the distinguishing characteristic between the family law and general federal law area since the changes has been the significant increase in requests being received in general federal law for documents to be accepted for filing without payment of a fee (refer to *Rosson v Tesoriero* [2011] FCA 449). Previously the provisions relied upon in that decision were only used in the cases of urgency (for example after hours duty matters or where filed in Court as an urgent duty matter), however, now it is more regularly sought. It is self-evident that these litigants would have been either exempt from fees or had their fees waived previously. These matters pose a significant administrative burden in follow up and if necessary, initiating recovery action and (for many, if not most) having to write them off under the *Financial Management and Accountability Act 1997*. The extra work associated with this cannot be overemphasised.

This has required, as the Family Court has said, the establishment of manual and very labour intensive processes and systems and there will be a significant cost for appropriate support in Casetrack and e-lodgment.

Complexity

Complexity which gives rise to increase administrative burden exists also because fee arrangements are not exclusively contained in the Regulations but are contained in other legislation: eg bankruptcy in the Bankruptcy Regulations, industrial matters in the Fair Work Act which are then mirrored in the Federal Court Regulations.

As mentioned above, fee exemptions regarding setting down and hearing fees for certain Fair Work matters are not dealt with consistently in their drafting. The inconsistency in drafting makes it difficult to follow and apply the Regulations. It gives rise to a greater number of enquiries.

It is difficult to understand the rationality behind some of the fees, eg an appeal from the AAT incurs a significantly higher fee than an appeal from the Superannuation Complaints Tribunal or other Tribunals. All are heard in the Court's original jurisdiction and are by way of a question of law. The procedure in preparing the matter for hearing is the same.

The Court suggests the review reconsider the policy approach to fees. The Court suggests there should be one filing fee for a proceeding in the original jurisdiction of the Court, and one filing fee for a proceeding in the appellate jurisdiction. Fees, where for policy reasons are

viewed to require a discount, eg human rights and some industrial matters, should have the same reduced fee apply together with any other fee exemptions or reductions. Such fees should be uniform.

Inconsistency with State Enforcement

In November 2009, the Standing Committee of Attorney-Generals endorsed an approach for greater harmonisation in the Commonwealth and State and Territory justice systems. This would include court fees.

Enforcement proceedings, for example, in the Supreme Court of New South Wales, do not attract a fee whereas in the Federal Court an interlocutory proceeding does attract a fee. An exemption should apply for enforcement of judgments. The Court understands that a similar submission will also be made by the Federal Magistrates Court and that it will be suggested that for consistency the fee payable for a similar service should both be consistent.

Splitting fees

Fees in the Federal Court are not usually split. However, where it is used, it is particularly difficult. It usually arises in the case of cross-claims or where two matters are heard together. It can become quite difficult where parties in the two matters or where cross-claims arise and the parties are not the same. They are also quite difficult to apply where related matters have been transferred from other courts to be heard with related matters in the Federal Court and the fee structure from the other court is considerably different than the Federal Court. The parties usually try and shift responsibility to the payment of the fees and challenge any invoice that issues. This occurs where the initiating party in one proceeding is not the initiating party in the other proceeding where fees ordinarily arise, in other words, it is in effect the situation of having a cross-claim that has been transferred from another Court.

Given there is little benefit in splitting fees with significant difficulties in its application the Court recommends that fees not be split. Where a case may be made for splitting of fees, exercise of the Court's power by way of a costs order would be a more appropriate method to address this issue.

Impact of Fee changes

It is difficult to assess what effect if any, the fee changes have had. Attachment B1 shows that the number of filings has increased since the introduction of the new fees. However, other factors also come into play and it is not possible to identify what impact the fees have had. During the period covered by the attachment there have been a number of other significant changes to other legislation that may have affected the number of proceedings being commenced. These include the amendments to the Bankruptcy Act 1966 increasing the amount to issue a Bankruptcy Notice and for Creditor's Petition from \$2000 to \$5000 and the amendments to the Australian Consumer and Competition Act.

Fee Differentiation – Corporation and Other

The fees payable for corporations give rise to a number of anomalies due largely to the expansive definition of corporations.

The Court agrees with, what is understood, the Federal Magistrates Court will be proposing, that if the current approach is retained particular difficulties with trade unions, unincorporated associations, as well as local councils, aboriginal land councils or other indigenous corporate bodies, office holders, agencies by way of example.

To deal with the issue about the wide definition of corporation in the current regulations, the Attorney-General's Department has suggested possibly adopting the Western Australia model of an alternate differential approach. This involves reduced fees for individuals, small business (less than 20 full-time employees) and non-profit organisations. An alternative model which could be considered is that operating in New South Wales. The New South Wales model involves having the corporation fee reduced, if the corporation can produce evidence satisfactory to a registrar of the Court, that the corporation had a turnover of less than \$200,000.

Both models appear to provide a fairer outcome than the current Commonwealth approach but adoption of either approach would require administrative manageability. This would require identifiable criteria and the means of satisfaction and proof would need to be clear. The ability to claim a further fee reduction or waiver due to financial hardship would still need to be available to a company in appropriate circumstances.

The Regulations could also be amended to make it clear that where any party either an applicant or respondent is liable for a fee, and there is a mixture of a corporate body or individual, the corporation amount is properly due and any reduction be considered based on the corporate status. The Queensland Supreme Court's fee structure has such a provision.

New Federal Court Rules

Federal Court Rules 2011 commenced on 1 August 2011. The Rules have an impact on the Federal Court Regulations 2004 but the Regulations could not be changed within the time frame available before the introduction of the Rules. The Attorney-General's Department suggested that any proposals for amendment to the Regulations consequential of the new Rules be included with the Fees review. The proposed changes are shown in Attachment C.

Impact of access to justice

As you would know, many litigants in general law matters (such as offshore entry persons) are the most vulnerable in the community. Importantly, the impact of the fee increases, and fee reduction arrangement most impacts adversely affects on such people who seek access to justice.

Conclusion

The Federal Court agrees other options proposed by the Family Court should be considered. The Family Court proposes a higher upfront fee. While this might enjoy simplicity it does not assist access to justice principles.

The fee structure in the Federal Court is currently excessively complex to interpret and administer and it has become more so since the most recent amendments. This results in significant waste of the Court's resources. It is also wasteful of parties' resources and adds to the expense of the litigation and in some matters can result in delay if incomplete or incorrect

information has been provided. It also adds to the anxiety and frustration for those in litigation and adds an unnecessary level of complexity to the litigation process.

The Regulations should be rewritten to clearly state when fees are payable, when fees are not payable, when fees are reduced (if applicable) and when they may be deferred.

There should be one fee for the commencement of any action in the original jurisdiction, and another for the appellate jurisdiction, the reduced fees for human rights and Fair Work matters should be consistent, and any exemptions should be set out in a Schedule so they are easy to understand.

The reduced fee system is an administrative burden to apply and may be a barrier to justice for the most vulnerable. These changes have seen a significant increase in persons seeking a deferral of fees, which increases the administrative burden and creates a situation where it is highly unlikely the amount will ever be recovered. Consideration should be given to its abolition. It would be cost neutral as the cost of pursuing a \$100 fee is easily outweighed by the administrative cost of the manual processing involved that inevitably results in the amount being written off.

The Regulations should be rewritten to allow amendments to be made so that additions or changes can be readily made and understood.

It has been difficult to determine whether the new fee regime has had an impact on filings given the variables involved.

In summary, there needs to be reconsideration to the policy, structure and approach to fees, to make them simpler, easier to understand, apply fairly and equitably and allow amendment to the existing regulations that does not increase complexity.

ATTACHMENT B

Statistical Data

The Federal Court has not been able to provide all the information that is requested by the Department. However, most of what has been requested is able to be given. The following information is provided.

- **The number of initiating and any other applications, disaggregated by type, where possible, for the periods of 1 July 2010 to 31 May 2011 and 1 November 2010 to 31 May 2011, and data from comparative periods for the two previous years.**

Attachment B1 is a number of charts setting out the number of filings for the period January 2006 to December 2010 in the Federal Court. The charts give figures about national filings and also disaggregate according to law type. The charts show new filings excluding those matters where the filing fee was exempt or waived, and also the new filings regardless of whether the filing fees were exempt or waived. This information is more detailed than what is requested and it should be of assistance.

- **The number of fees imposed at the reduced rate (where fee exemptions or waivers previously applied), disaggregated by law type for the period 1 November 2010 to 31 May 2011, and data from comparative periods for the two previous financial years when exemptions and waivers applied.**
- **Information about the number and profile of litigants who are corporations for the period 1 July 2010 to 31 May 2011 and comparative periods for the previous two financial years including information about the number of deferrals and waivers granted during this period.**

Attachment B2 provides the information requested for both the Federal Court and the Federal Magistrates Court. The Attachment includes information about Corporations.

- **The number of fees deferred, disaggregated by law type for the period 1 July 2010 to 31 May 2011 and comparative period for the previous two financial years.**
- **Information about fees that were not paid and debt recovery action take.**

The Federal Court is unable to provide this information. Statistical information of this nature is not able to be obtained from the Court's case management system or manually as it is done on a case by case basis.

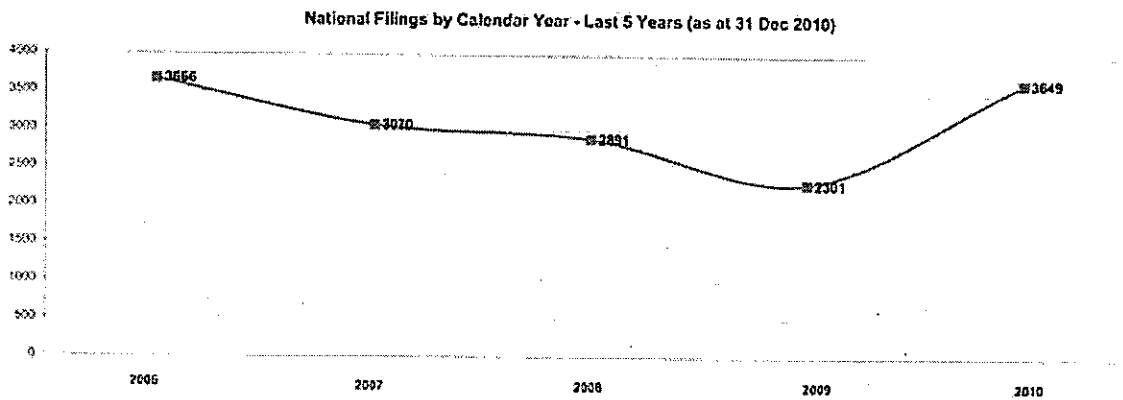
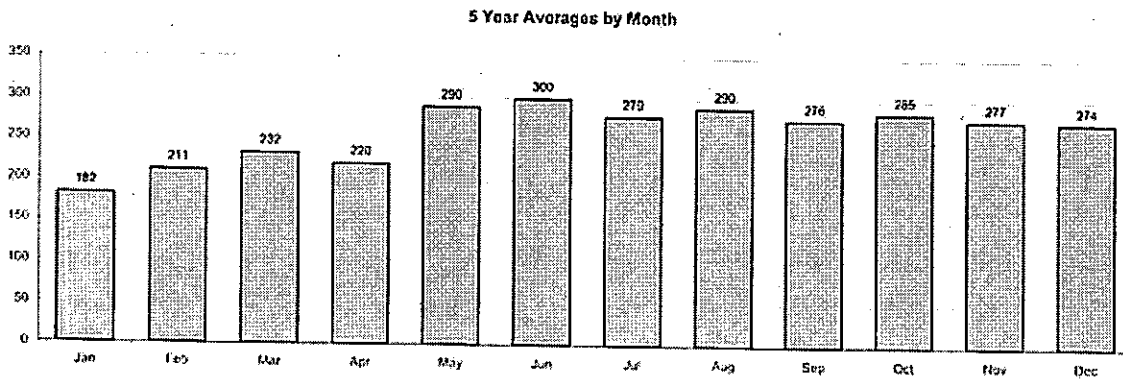
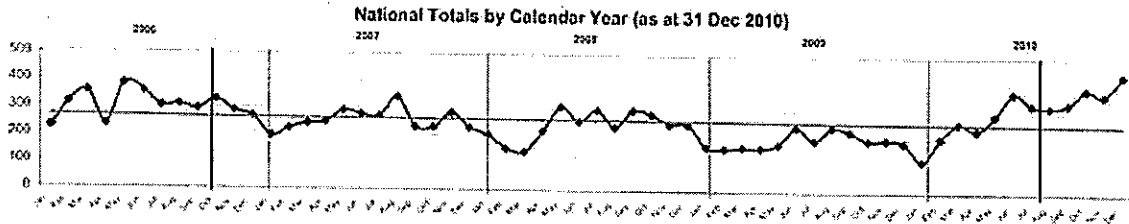
ATTACHMENT B1 FEDERAL COURT OF AUSTRALIA



New Matters Created in the Last 5 Calendar Years in the Federal Court (excluding those where the filing fee was exempt or waived)

(Jan 2006 to Dec 2010)

Green lines represent major fee increases on 1 Oct 2006 and 1 Jul 2010

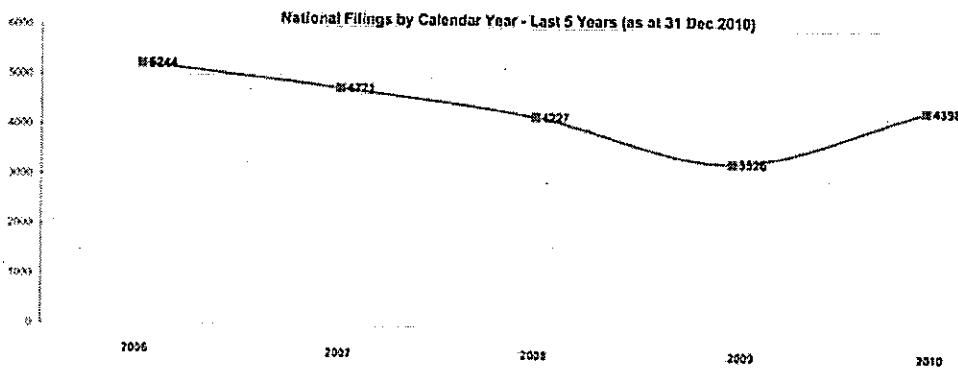
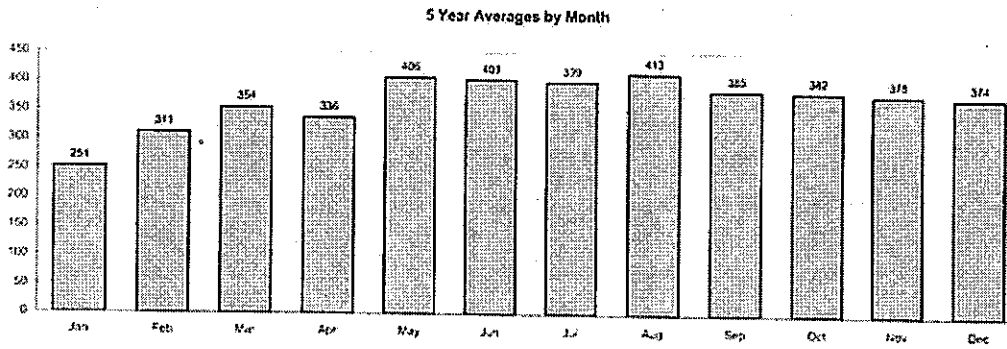
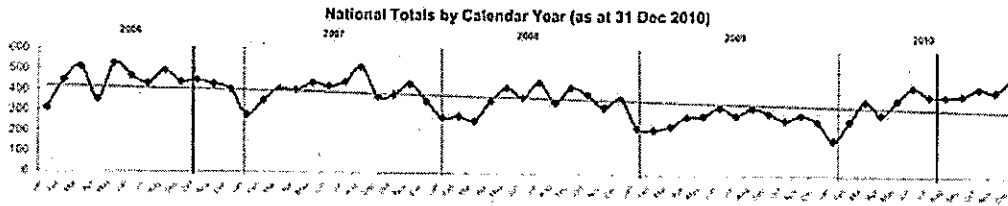


ATTACHMENT B1 FEDERAL COURT OF AUSTRALIA

New Matters Created in the Last 5 Calendar Years in the Federal Court (Regardless of whether the filing fee was exempt or waived)

(Jan 2006 to Dec 2010)

Green lines represent major fee increases on 1 Oct 2006 and 1 Jul 2010

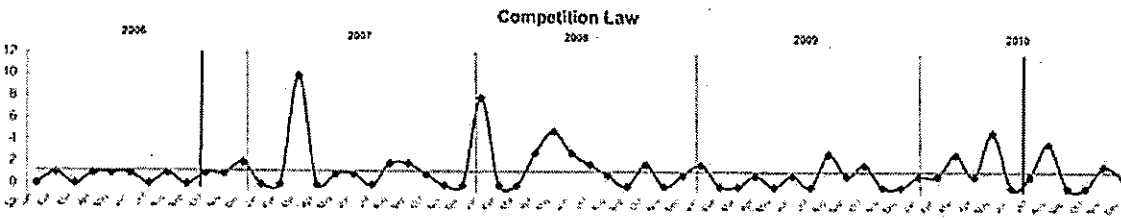
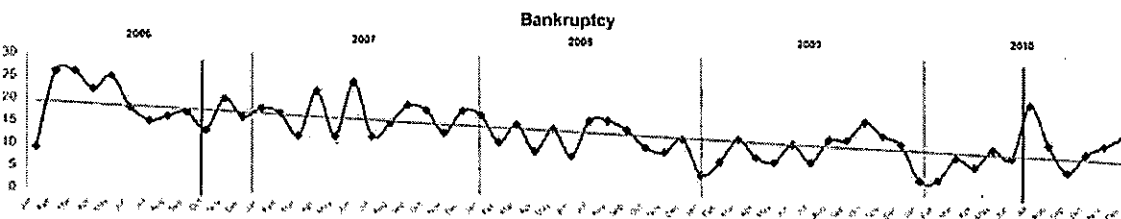
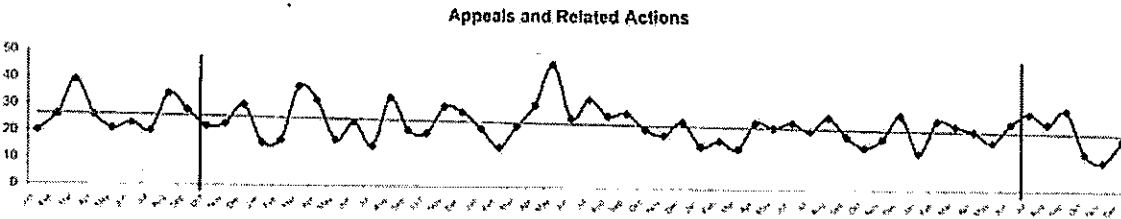
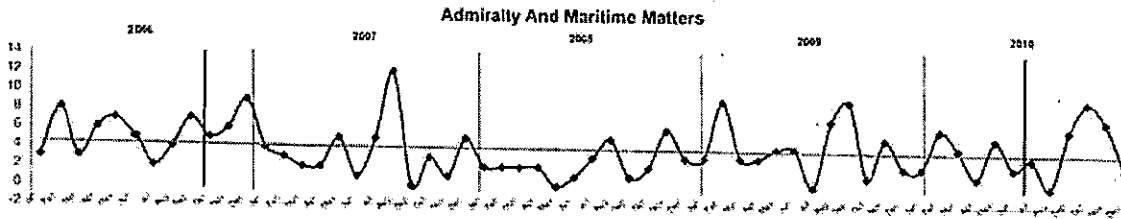
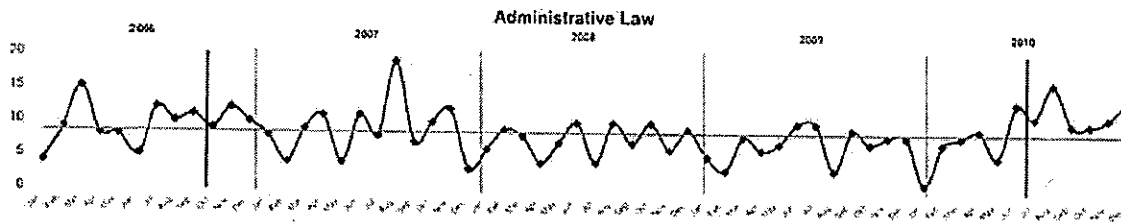


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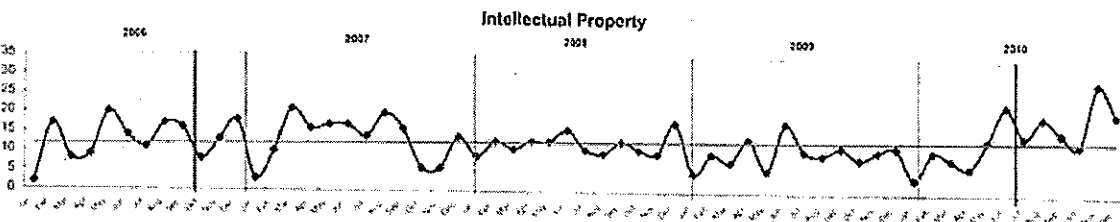
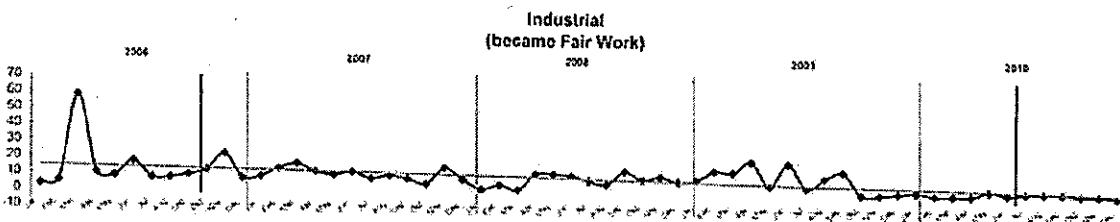
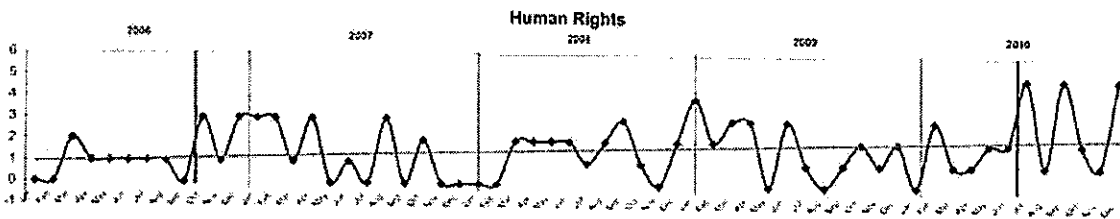
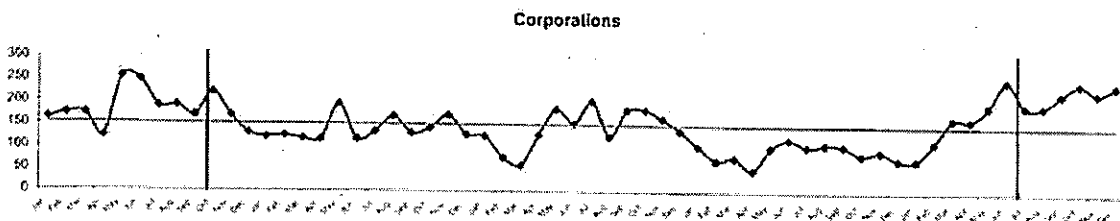
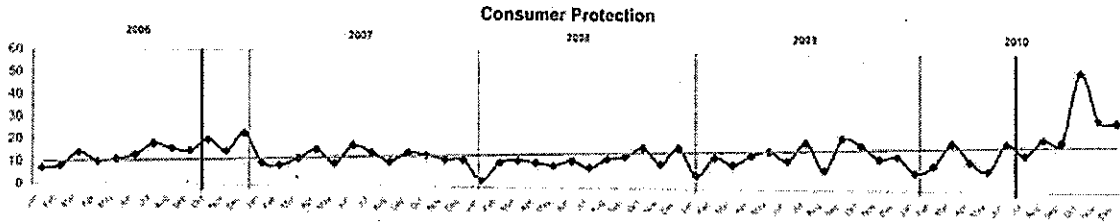
New Matters Created in the Last 5 Calendar Years in the Federal Court (excluding those where the filing fee was exempt or waived)

(Jan 2006 to Dec 2010)

Green lines represent major fee increases on 1 Oct 2006 and 1 Jul 2010



**ATTACHMENT B1
FEDERAL COURT OF AUSTRALIA**

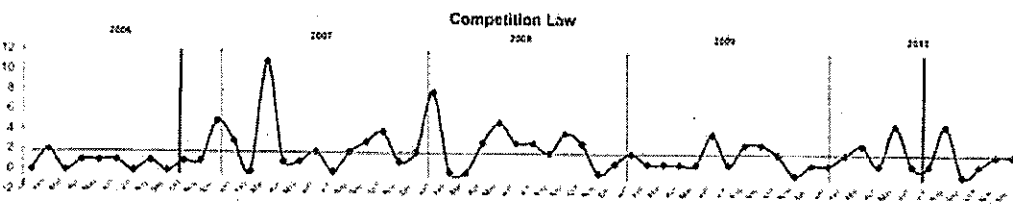
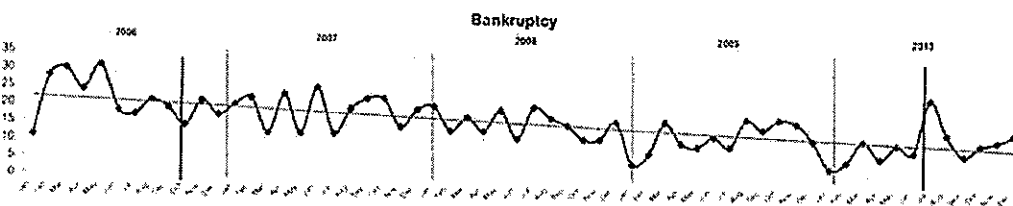
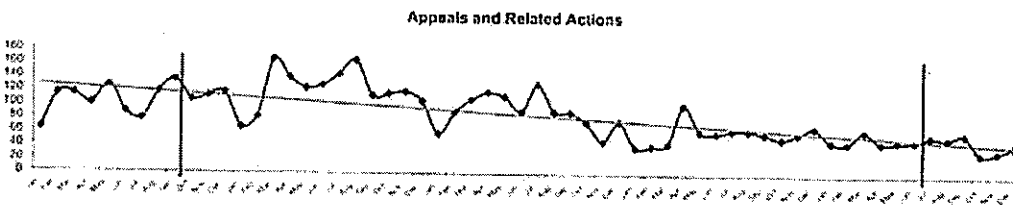
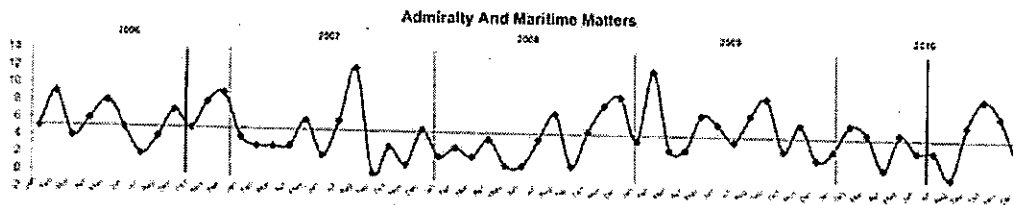
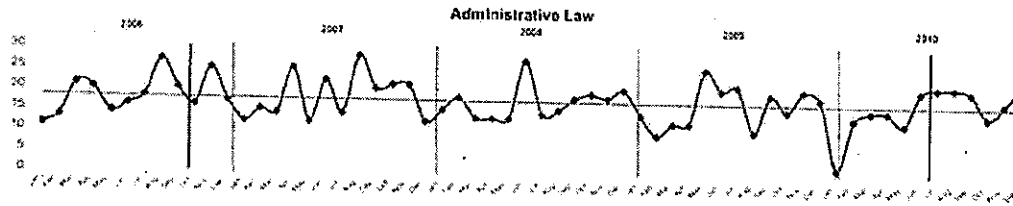


ATTACHMENT B1 FEDERAL COURT OF AUSTRALIA

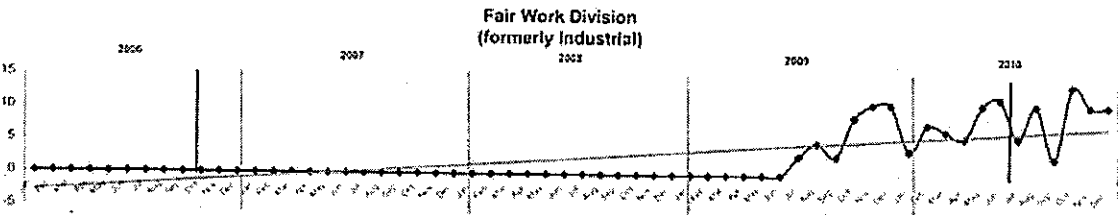
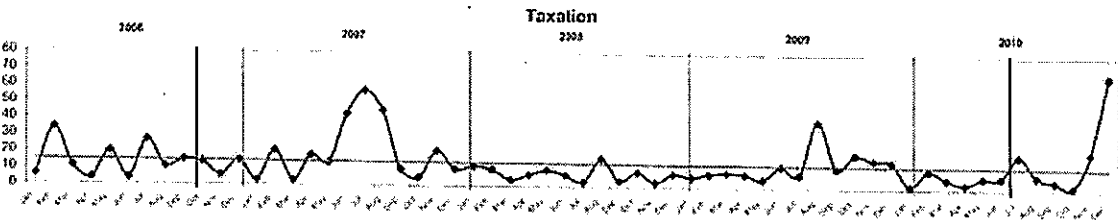
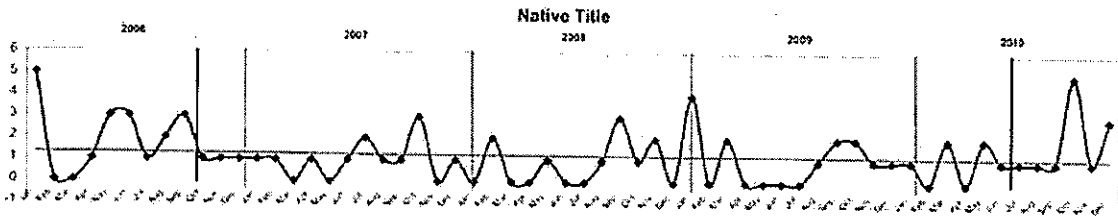
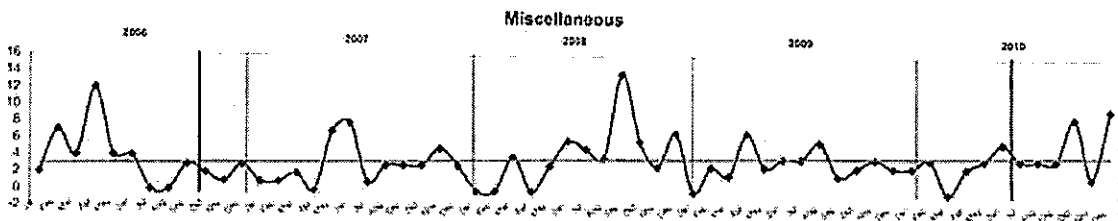
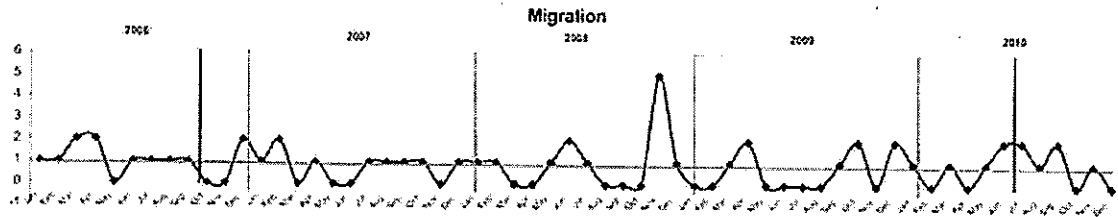
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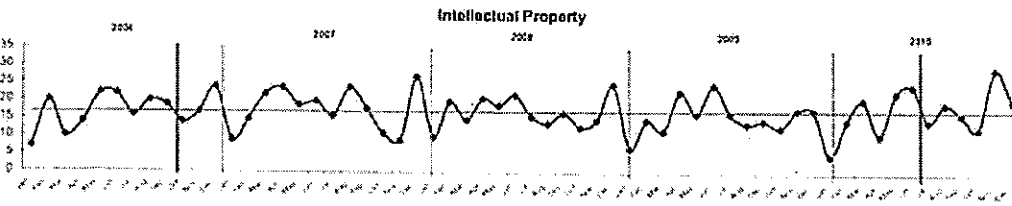
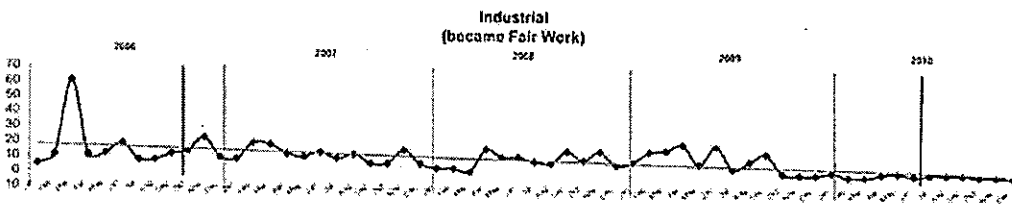
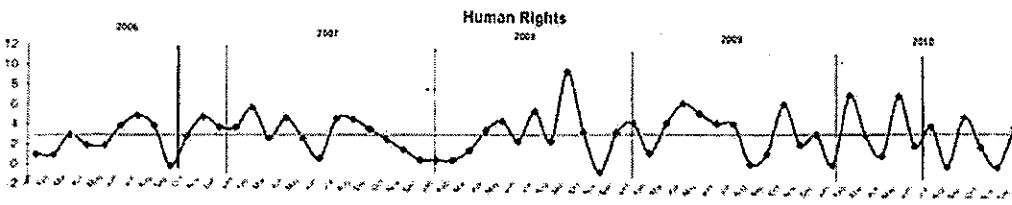
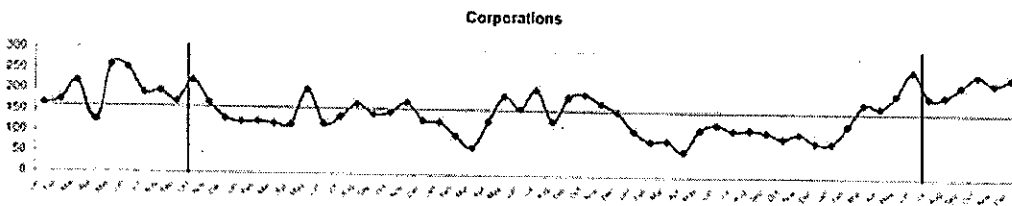
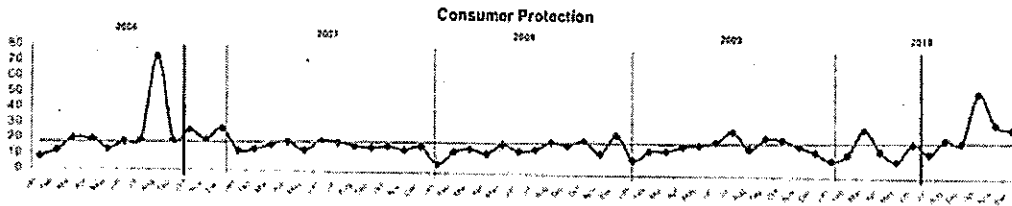
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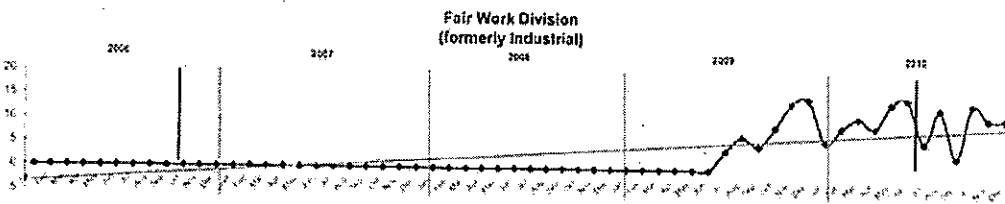
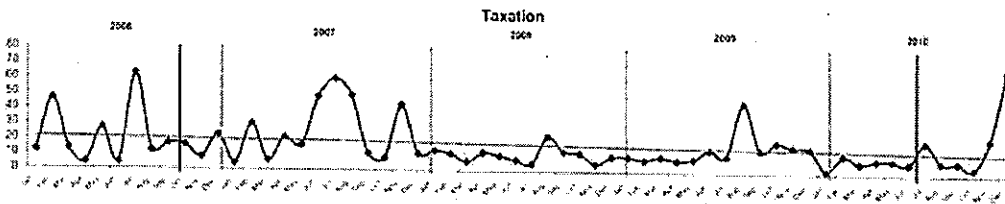
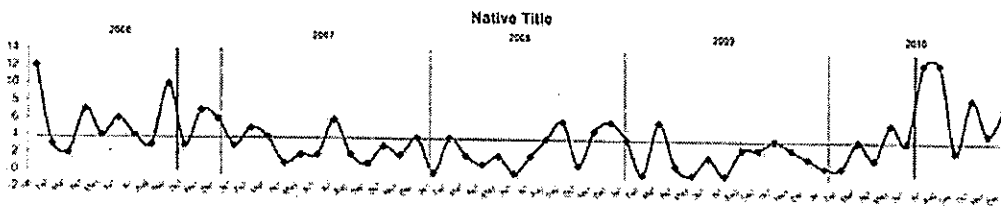
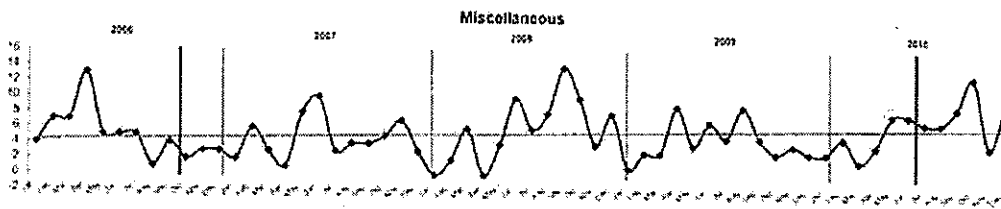
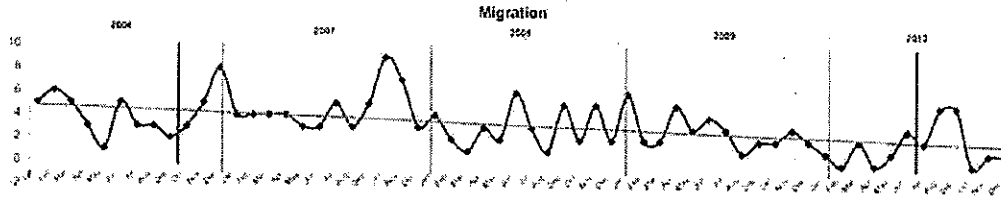
**ATTACHMENT B1
FEDERAL COURT OF AUSTRALIA**



ATTACHMENT B1 FEDERAL COURT OF AUSTRALIA



**ATTACHMENT B1
FEDERAL COURT OF AUSTRALIA**



Value of Exemptions and Waivers by Fee type for the FCA between 01 November 2010 and 31 May 2011

Fee Type	Total Value of All Fees Charged	Value of Exemptions (general)	Values of Waivers (hardship)	Amounts Charged	Total Fees Collected (\$)	Total Foregone (\$)	Numbers of Exemptions for Corporate fees	Numbers of Waivers for Corporate fees	Total Number of Corporate Exemptions & Waivers
Application Fees	\$4,509,826.4	\$282,455.0	\$291,581.0	\$3,935,790.4	\$3,914,074.8	\$574,036.0	22	9	31
Setting Down Fees	\$1,145,130.0	\$92,669.0	\$104,183.0	\$948,278.0	\$786,846.0	\$136,852.0	1	1	2
Hearing Fees	\$1,301,741.0	\$43,804.0	\$712.0	\$1,257,225.0	\$991,605.0	\$44,516.0	0	0	0
Other Fees	\$20,598.0	\$7,469.0	\$73.0	\$213,129.0	\$191,061.0	\$7,542.0	0	0	0
Totals	\$7,177,295.4	\$426,397.0	\$395,549.0	\$6,354,422.4	\$5,883,586.8	\$822,946.0	23	10	33

between 01 November 2009 and 31 May 2010

Fee Type	Total Value of All Fees Charged	Value of Exemptions (general)	Values of Waivers (hardship)	Amounts Charged	Total Fees Collected (\$)	Total Foregone (\$)	Numbers of Exemptions for Corporate fees	Numbers of Waivers for Corporate fees	Total Number of Corporate Exemptions & Waivers
Application Fees	\$3,139,137.0	\$562,424.0	\$253,610.0	\$2,323,103.0	\$2,321,222.0	\$816,834.0	246	14	260
Setting Down Fees	\$1,053,834.0	\$121,978.0	\$191,815.0	\$740,441.0	\$729,467.0	\$313,393.0	4	1	5
Hearing Fees	\$534,465.0	\$24,391.0	\$9,399.0	\$530,703.0	\$495,034.0	\$33,790.0	4	6	10
Other Fees	\$149,607.0	\$14,024.0	\$2,218.0	\$149,607.0	\$132,580.0	\$16,242.0	0	2	2
Totals	\$4,877,043.0	\$722,817.0	\$456,642.0	\$3,743,854.0	\$3,678,303.0	\$1,179,459.0	254	23	277

between 01 November 2008 and 31 May 2009

Fee Type	Total Value of All Fees Charged	Value of Exemptions (general)	Values of Waivers (hardship)	Amounts Charged	Total Fees Collected (\$)	Total Foregone (\$)	Numbers of Exemptions for Corporate fees	Numbers of Waivers for Corporate fees	Total Number of Corporate Exemptions & Waivers
Application Fees	\$3,021,224.5	\$532,185.2	\$260,587.6	\$2,228,451.7	\$2,228,451.7	\$792,772.8	185	11	196
Setting Down Fees	\$1,078,554.0	\$109,830.0	\$256,912.0	\$711,812.0	\$705,539.0	\$366,742.0	0	4	4
Hearing Fees	\$991,985.0	\$20,000.0	\$43,185.0	\$985,555.0	\$925,038.0	\$63,185.0	0	15	15
Other Fees	\$135,078.0	\$6,216.0	\$2,089.0	\$135,078.0	\$126,773.0	\$8,305.0	0	1	1
Totals	\$4,826,841.5	\$668,231.2	\$562,773.6	\$3,660,896.7	\$3,585,801.7	\$1,231,004.8	185	31	216

Note: "Other" fees include Issuing a Subpoena, Mediation fees and Taxation of a Bill of Costs.

Value of Exemptions and Waivers by Fee type for the FMC (general Federal law) between 01 November 2010 and 31 May 2011

Fee Type	Total Value of All Fees Charged	Value of Exemptions (general)	Values of Waivers (hardship)	Amounts Charged	Total Fees Collected (\$)	Total Foregone (\$)	Numbers of Exemptions for Corporate fees	Numbers of Waivers for Corporate fees	Total Number of Corporate Exemptions & Waivers
Application Fees	\$4,319,750.0	\$77,361.0	\$59,909.6	\$4,182,479.4	\$4,160,506.2	\$137,270.6	3	3	6
Setting Down Fees	\$225,487.0	\$25,759.0	\$22,595.0	\$177,133.0	\$70,519.0	\$48,354.0	0	0	0
Hearing Fees	\$59,044.0	\$1,019.0	\$6,617.0	\$51,409.0	\$27,995.0	\$7,635.0	0	0	0
Other Fees	\$48,228.0	\$814.0	\$238.0	\$47,176.0	\$42,012.0	\$1,052.0	0	0	0
Totals	\$4,652,509.0	\$104,952.0	\$89,359.6	\$4,458,197.4	\$4,301,032.2	\$194,311.6	3	3	6

between 01 November 2009 and 31 May 2010

Fee Type	Total Value of All Fees Charged	Value of Exemptions (general)	Values of Waivers (hardship)	Amounts Charged	Total Fees Collected (\$)	Total Foregone (\$)	Numbers of Exemptions for Corporate fees	Numbers of Waivers for Corporate fees	Total Number of Corporate Exemptions & Waivers
Application Fees	\$2,394,139.0	\$47,281.0	\$62,271.0	\$2,284,587.0	\$2,284,141.0	\$109,552.0	1	4	5
Setting Down Fees	\$130,077.0	\$6,705.0	\$18,774.0	\$104,598.0	\$57,216.0	\$25,479.0	0	0	0
Hearing Fees	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	0	0	0
Other Fees	\$43,839.0	\$2,901.0	\$1,782.0	\$43,839.0	\$38,265.0	\$4,683.0	1	0	1
Totals	\$2,568,055.0	\$56,887.0	\$82,827.0	\$2,433,024.0	\$2,379,622.0	\$139,714.0	2	4	6

between 01 November 2008 and 31 May 2009

Fee Type	Total Value of All Fees Charged	Value of Exemptions (general)	Values of Waivers (hardship)	Amounts Charged	Total Fees Collected (\$)	Total Foregone (\$)	Numbers of Exemptions for Corporate fees	Numbers of Waivers for Corporate fees	Total Number of Corporate Exemptions & Waivers
Application Fees	\$2,123,250.0	\$39,642.1	\$77,671.9	\$2,005,936.0	\$2,004,893.0	\$117,314.0	3	3	6
Setting Down Fees	\$230,205.0	\$23,244.0	\$67,497.0	\$139,464.0	\$70,179.0	\$90,741.0	0	0	0
Hearing Fees	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	\$0.0	0	0	0
Other Fees	\$28,456.0	\$891.0	\$297.0	\$28,456.0	\$26,597.0	\$1,188.0	0	0	0
Totals	\$2,381,911.0	\$63,777.1	\$145,465.9	\$2,173,856.0	\$2,101,669.0	\$209,243.0	3	3	6

Note: "Other" fees include Mediation fees and Filing a Response.

ATTACHMENT C – FEDERAL COURT OF AUSTRALIA
Federal Court of Australia Regulations 2004 – Suggested Amendments
Consequential to Implementation of Federal Court Rules 2011 (FCR 2011)

Regulation	Change	Comment	Suggestion
<p>3. Definitions</p> <p>Definition of “Notice of Motion”</p>	<p>No longer any Notices of Motion</p>	<p>Replaced with “Interlocutory Application” (defined in Schedule 1 [Dictionary] FCR 2011 as “an application, other than a cross-claim, in a proceeding already started”) however ‘Corporations’ interlocutory process and ‘Bankruptcy’ interim applications also need to be encompassed by the definition and some applications which may be commenced by interlocutory application are covered by specific items in Schedule 1 of the Regulations (eg items 10 and 13). There are a number of different type of interlocutory application approved as forms under the FCR 2011.</p>	<p>Insert a new definition - interlocutory application means an application, other than a cross-claim, in a proceeding already started, regardless of whether it is in a form of interlocutory application approved under subrule 1.52(2) of the Federal Court Rules 2011 or in some other form, and including an interlocutory process within the meaning of Federal Court (Corporations) Rules 2000 and an interim application under the Federal Court (Bankruptcy) Rules 2005.</p> <p>[See also suggestion under “Schedule 1 Fees” below]</p>
<p>5 Fees other than setting-down and hearing fees – liability to pay</p> <p>(2)(c) (i), (ii), (iii) & (iv)</p>	<p>Refers in (ii), (iii) & (iv) to Order 62 of the repealed Federal Court Rules and who pays taxation fee in items 24 and 25 of Schedule 1 of</p>	<p>The former convoluted provisions and processs have been simplified in Part 40 of FCR 2011. Under Part 40, on the filing of a bill of costs an estimate is made and notice of estimate</p>	<p>A simple approach would be: “5(2)(c) If the Registrar gives notice under rule 40.24 of the Federal Court Rules 2011 that a bill of costs is to be taxed: (i) having directed under paragraph 40.21(2)(c) of those Rules that the taxation of the bill should proceed; or (ii) a resolution not having been</p>

ATTACHMENT C – FEDERAL COURT OF AUSTRALIA

<p>(2)(d) (i), (ii) & (iii)</p>	<p>the Regulations. Refers in (ii) & (iii) to Order 62 of the repealed Federal Court Rules and who pays taxation fee in items 24 and 25 of Schedule 1 of the Regulations.</p>	<p>given. A party may object to the estimate and, in that event but subject to a security deposit being paid, the Registrar may direct:</p> <ul style="list-style-type: none"> • the parties attend for a confidential conference; or • a provisional taxation be carried out; or • taxation of the bill proceeds. <p>If a confidential conference is held, and a resolution is not reached the Registry must give notice that a taxation of the bill is to proceed.</p> <p>If a provisional taxation is carried out and a party gives notice requesting a full taxation the Registrar must give notice that a taxation of the bill is to proceed.</p> <p>More than one party may file an objection or request a full taxation.</p>	<p>achieved at a confidential conference; the fee mentioned in items 24 or 25 of Schedule 1 (taxation of a bill of costs) is to be paid by the party who filed the notice of objection and paid the security payment under subrule 40.21(1) of those Rules. If more than one party has filed a notice of objection and paid a security payment, then the fee mentioned in items 24 or 25 is to be paid by those parties in such proportions as ordered by the Registrar.</p> <p>5(2)(d) If the Registrar gives notice under rule 40.24 of the Federal Court Rules 2011 that a bill of costs is to be taxed following:</p> <ul style="list-style-type: none"> (i) a provisional taxation takes place and (iii) a party having filed a notice requesting a full taxation; <p>the fee mentioned in items 24 or 25 of Schedule 1 (taxation of a bill of costs) payable for taxation under items 24 or 25 of Schedule 1 is to be paid by the party who requested the full taxation. If more than one party requested the full taxation, then the fee mentioned in items 24 or 25 is to be paid by those parties in such proportions as ordered by the Registrar."</p>
<p>Schedule 1 – Fees Item 11</p>	<p>No longer any Notices of Motion</p>	<p>See comments in relation to "Regulation 3 Definitions" above.</p>	<p>Amend to: "Item 11 Filing of an interlocutory application, except an application mentioned in items 10 or 13"</p>
<p>Schedule 1 – Fees Item 23</p>	<p>No longer only subpoena to</p>	<p>FCR 2011 provides for the issue with leave, of</p>	<p>Amend to: "Item 23 For the issuing of a subpoena</p>

ATTACHMENT C – FEDERAL COURT OF AUSTRALIA

	produce and subpoena to give evidence	a subpoena to give evidence, a subpoena to produce documents and a subpoena to give evidence and produce documents	to give evidence, produce documents, or give evidence and produce documents” [Alternatively subpoena could be defined in regulation 3 to mean all three types of subpoena with the reference in item 23 then only to “Subpoena”]



FEDERAL MAGISTRATES COURT OF AUSTRALIA

Federal Magistrates Court of Australia
Commonwealth Law Courts
305 William Street
Melbourne Vic 3000

20 September 2011

Dr Albin Smrdel
Assistant Secretary
Federal Courts Branch
Access to Justice Division
Attorney-Generals Department

Via Email "Smrdel, Albin"

Dear Dr Smrdel

Review of recent changes to court fees

I refer to your letter of 21 June 2011 in which you outline some of the specific issues being considered in the context of the review. You note that the review is intended to examine the practical operation of the changes in fee structures and their implementation and have requested comments from the Federal Magistrates Court.

As you would appreciate, the Family Court and the Federal Court continue to provide a range of shared services to the Federal Magistrates Court. These arrangements include making staff available as well as providing shared registry services. Accordingly, comments in relation to the practical operation of the changes and their implementation are more appropriately matters for the Family Court and the Federal Court in light of the shared services. I have seen a copy of the submission made by the Family Court and the Federal Court and concur with the comments each of them have provided in relation to the operational challenges that the new fee regime has presented.

In addition to the issues raised in the submission from the other courts I wish to highlight wider issues of particular relevance to the Federal Magistrates Court.

Greater harmonisation

There is a degree of confusion which impact on implementation of fees in light of the different terminology and drafting styles adopted in the fee regulations of the courts. There needs to be greater harmonisation in the light of the shared jurisdictions. This is particularly so in respect of the Federal Magistrates Court which exercises jurisdiction across both family law and general federal law. The *Federal Magistrates Regulations 2000* seeks to incorporate aspects of the other fee regulations which adopt different terminology and drafting styles.

Fees in relation to small claims proceedings - Fair Work Act 2009

Uncertainty has arisen in relation to Schedule 1 item 20 fee (small claims FWA) and whether the application fee is the only fee payable or whether such application types attract other fees such as a mediation, setting down or hearing fee. In view of the nature of such claims and the small monetary

limit placed on such applications, it would be useful if there was an amendment to clarify that such applications only attract an initial filing fee with a specific exclusion of other items.

Reduced fees in relation to small claims proceedings - National Consumer Credit Protection Act 2009

Currently there is no reduced fee for filing a small claims application in the consumer jurisdiction. This issue has been raised previously by way of correspondence dated 10 February 2011, a copy of which is attached. No small claims (consumer law) applications have been filed in the Federal Magistrates Court since the conferral of this jurisdiction which may be reflective of the absence of a reduced fee item for such applications. To facilitate the filing of such applications in the Court a specific item should be included for filing such applications which is comparable with the current filing fee imposed for such applications if filed in the state courts. There should also be specific exclusion of other items applying to such application in view of the limited monetary claim being sought.

See - Attachment 1

Enforcement pecuniary penalty

The recovery of fines/penalties is an issue of significance, particularly in the industrial law jurisdiction. In some instances applicant agencies pursue the payment of fines and the court plays no further part after the imposition of the fine/ penalty. In most instances the only option is by way of the instigation of further proceedings by way of contempt. The federal courts are not supported by legislation similar to that which applies in the state jurisdictions and as a result the enforcement of fines/ penalties is problematic. See attached Federal Court decision which highlights such difficulties.

See – Attachment 2

Fees for enforcement - general federal law jurisdiction

I have been asked to specifically raise the current fees in relation to enforcement proceedings (general federal law) The Federal Magistrates Court adopts Order 37 of the *Federal Court Rules* which requires the filing of a motion seeking the issue of a writ and filing such a motion attracts a fee (fee of \$509 corporation and \$254 individual) . I understand in the state courts there are no fees for motions for default judgments, or writs of execution. Moreover execution of enforcement matters in general federal law is not exempted under the *Federal Magistrates Court Regulations 2000* whereas Reg 7(d)(xi) exempts a fee for an application for an enforcement order in the family law context.

Photocopying fee

There is no specific items for photocopying fees and charges in the *Federal Magistrates Court Regulations 2000*. The reason for this is no doubt due to the fact that registry services are provided by the Federal Court and Family Court. I understand there is some uncertainty as to the basis for recovery of such fees in relation to Federal Magistrates Court matters although the *Financial Management and Accountability Act 1997* is the source of power which is relied upon.

Filing, hearing etc fees - individual v corporation

Issues have arisen as to the correct fee payable for certain organisations/agencies and whether they should be classified as an 'individual' or a 'corporation'. As you would appreciate there are additional fees payable for corporations. Many associations, particularly in the industrial law context, are not strictly corporations but union or employee representative.

Particular issues which have arisen in the context of offshore migration applicants

Specific challenges have been presented in the collection and recovery of reduced and deferred fees for applicants who are in immigration detention. These issues have been highlighted in the submission from the Federal Court with reference to the decision of Yates J in *Rosson v Tesoriero* [2011] FCA 449. There is a need for further consideration of the discretion conferred on the Court as found in Regulation 11(1C) of the *Federal Magistrates Regulations 2000* in light of the issues raised in the judgment.

Thank you for seeking comments. I am happy to provide any further clarification on these issues.

Yours sincerely

Adele Byrne
Principal Registrar
Federal Magistrates Court of Australia



FEDERAL MAGISTRATES COURT OF AUSTRALIA

Telephone: 1300 352 000
Facsimile: (03) 8600 4445

Owen Dixon Commonwealth Law Courts Building
305 William Street
Melbourne VIC 3000

10 February 2011

Attention *Sara Samios*

via email :

Dear Dr Smrdel

Jurisdiction under the Australian Consumer Law ('ACL')

As you are aware, the Federal Magistrate Court is able to exercise federal jurisdiction in relation to civil claims brought under the new Australian Consumer Law (ACL). There is provision for litigants to *opt in* to have certain proceedings dealt with under a small claims procedure at their local magistrate's court or the Federal Magistrates Court.

The amount of compensation sought must be less than \$40,000 for a consumer to *opt in* to a small claims procedure. Currently, such applications do not attract a reduced fee and litigants seeking to pursue a small claim application in the Federal Magistrates Court are required to pay the full filing or other fee(s) as payable under the *Federal Magistrates Regulations 2000*.

The Court was advised when the legislation implementing the first phase of the new ACL was introduced, that consideration was being given by Treasury to imposing no fee in relation to applications under section 74 and 96 of the Consumer Credit Bill. It was stated that the policy reason for this was to ensure that consumers had access to the courts when seeking hardship variations or postponements. I understand that subsequently it was decided not to proceed with this 'no fee' proposal and consequently such applications also attract the full fee(s) as payable.

I have been asked to write to you to seek clarification on issues surrounding fees payable under the ACL and whether consideration could be given to a reduced fee for small claims proceedings in the Federal Magistrates Court. As you are aware small claims filed pursuant to the *Fair Work Act 2009* attract a reduced fee. I also understand there is a reduced fee payable for claims filed in the local courts and the current fees may act as a disincentive to litigants filing ACL claims in the Federal Magistrates Court.

I will also be writing to you separately in respect of issues surrounding the fees for enforcement applications.

I am happy to further discuss

Yours, sincerely

Adele Byrne
Principal Registrar

FEDERAL COURT OF AUSTRALIA

Australian Industrial Group v Automotive, Food, Metals, Engineering, Printing and Kindered Industries Union of Australia & Ors [2001] FCA 774

PRACTICE AND PROCEDURE – contempt – enforcement of an order to pay a fine – whether Attorney-General, District Registrar or moving party should enforce the order - consideration of role of Attorney-General in contempt matters

Australian Meat Industry Employee's Union v Mudginberri Station Proprietary Limited (1986) 161 CLR 98 - considered

Witham v Holloway (1995) 183 CLR 525 - considered

Attorney-General v Times Newspapers [1974] AC 273 - cited

United Telecasters Sydney v Hardy (1991) 23 NSWLR 323 - cited

Con-Mech (Engineers) Ltd v Amalgamated Union of Engineering Workers (Engineering Section) (1973) ICR 620 - considered

Seaward v Paterson (1897) 1 Ch 545 - considered

**AUSTRALIAN INDUSTRIAL GROUP v AUTOMOTIVE, FOOD, METALS,
ENGINEERING, PRINTING AND KINDERED INDUSTRIES UNION OF
AUSTRALIA AND OTHERS**
N1357 of 1999

JUDGE: MERKEL J
DATE: 22 JUNE 2001
PLACE: MELBOURNE

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

N1357 OF 1999

**BETWEEN: THE AUSTRALIAN INDUSTRY GROUP
APPLICANT**

**AND: AUTOMOTIVE, FOOD, METALS, ENGINEERING,
PRINTING AND KINDERED INDUSTRIES UNION OF
AUSTRALIA
FIRST RESPONDENT**

**AUSTRALIAN WORKERS' UNION
SECOND RESPONDENT**

**COMMUNICATIONS, ELECTRICAL, ELECTRONIC,
ENERGY, INFORMATION, POSTAL, P LUMBING AND
ALLIED SERVICES UNION OF AUSTRALIA
THIRD RESPONDENT**

**CRAIG JOHNSTON
FOURTH RESPONDENT**

**DEAN MIGHELL
FIFTH RESPONDENT**

**CESAR MELHEM
SIXTH RESPONDENT**

JUDGE: MERKEL J

DATE: 22 JUNE 2001

PLACE: MELBOURNE

REASONS FOR JUDGMENT

1 On 29 May 2000 I imposed fines of \$20,000 on the fourth respondent, Craig Johnston, and the fifth respondent, Dean Mighell, as punishment for contempt of court. The fines were ordered to be paid to the District Registrar within 30 days. The conduct that constituted the contempt was the wilful disobedience and public defiance of an order of the Court. In imposing the fines (see [2000] FCA 708) I said at [15]:

"15. ...I propose to order that Mighell and Johnston be punished for their contempt by the imposition of a fine upon each of them in the sum of \$20,000. The fines are to be paid to the District Registrar of the Court within 30 days

(see O 35 R 5(1)). I do not regard it as appropriate that I order that, in default of payment, a term of imprisonment be served. There are adequate enforcement procedures for the recovery of a fine imposed by the Court (see s 53 of the Federal Court of Australia Act 1976 (Cth), O 37 R 7 and R 8 of the Rules of the Federal Court, O 66 of the Rules of the Supreme Court of Victoria and Guthrie v Robertson (1987) 13 FCR 336)). I should indicate that, in fixing the amount of the fines I have taken into account the financial means of Mighell and Johnston, including their current respective gross salaries as union officials (which exceeds \$50,000 in the case of Mighell and which, currently, is "around" \$50,000 in the case of Johnston), and the fact that the enforcement procedures available include orders for the attachment of earnings (see O 72 of the Rules of the Supreme Court of Victoria).

16. *I propose to reserve liberty to apply to resolve any difficulties that may arise in relation to enforcement. In that regard I note that O 37 R 8 of the Rules of the Federal Court permits a "party interested in the execution or enforcement of an order" to apply to the Court ex parte for directions as to its execution or enforcement."*

2 Mr Mighell paid his fine but Mr Johnston did not. Because Mr Johnston did not pay his fine an issue arose whether any and, if so, which of the persons interested in the enforcement of the penalty order should take steps to enforce it.

3 The position taken by the District Registrar, to whom the fine was payable, was that the applicant ("AIG") should assume responsibility for enforcement of the penalty order, and that AIG should apply to the Court for such directions or further orders as may be appropriate. AIG's position was that although it was the moving party that had obtained the penalty order it was under no obligation to enforce payment of the penalty which would be paid into Consolidated Revenue.

4 AIG requested the Attorney-General of the Commonwealth to assume responsibility for the enforcement of the penalty order. The request met with a negative response. The Attorney-General's view was that the matter concerned "private interests". The Attorney-General, through his adviser, wrote to AIG's solicitors as follows:

"The proceedings in which your client has been involved concern the private interests of your client and the respondents rather than those in which the Commonwealth has a direct interest. I have noted your comments about the public interest involved but it is not appropriate for the Attorney-General to intervene in private proceedings before the Federal Court unless there are special circumstances where the decision of the Court could impact on the legislative or executive powers or other direct interests of the Commonwealth.

I note that the District Registrar has advised you that your client should apply

to the Court for such further orders as it thinks appropriate to enforce the order of the Court. In these circumstances, where there are adequate enforcement procedures available to the applicant, the Attorney-General does not propose to intervene in this matter."

5 While there might be an issue whether the Attorney-General, rather than AIG or the District Registrar, has any duty to take steps to enforce the order, it is surprising that the Attorney-General has taken the view that a proceeding for punishment for contempt of the Federal Court is a "private proceeding" in relation to "private interests" and that when there is continuing wilful disobedience and public defiance of an order of the Federal Court that is not a matter that impacts on any "direct" interest of the Commonwealth.

6 The Attorney-General's view is at odds with decisions of the High Court, which accept that contempts of this kind are criminal in nature. In *Australian Meat Industry Employees' Union v Mudginberri Station Proprietary Limited* (1986) 161 CLR 98 at 107 ("*Mudginberri*") Gibbs CJ, Mason, Wilson and Deane JJ referred to the "public interest in the exercise of the contempt power in cases of disobedience to an order". Their Honours observed (at 108) that where disobedience is accompanied by public defiance, the "public injury...calls into play a penal or disciplinary jurisdiction" to vindicate the court's authority.

7 In *Witham v Holloway* (1995) 183 CLR 525 Brennan, Deane, Toohey and Gaudron JJ observed (at 533) that:

"...the public interest in the administration of justice requires compliance with all orders and undertakings, whether or not compliance also serves individual or private interests."

McHugh J (at 539) stated:

"However, it is difficult to accept the claim that the disobedience of a court order is a matter that concerns only the parties to the action. An order by way of fine, committal or sequestration of property for disobeying a court order cannot be regarded as a matter that concerns only the parties to the action. The fine, committal or sequestration vindicates the authority of the court and deters other suitors from disobeying the orders of the courts. Whether the object of particular civil proceedings is coercive, remedial or purely punitive, an order fining or imprisoning the contemnor or sequestrating the property of that person serves the public interest in maintaining the authority of the courts of justice."

8 The Attorney-General's view of his role in relation to the judicial power of the Commonwealth is also at odds with long standing authority that the Attorney-General is the

appropriate officer of the state to represent and safeguard the public interest in vindicating the authority of its courts. In an often cited passage in *Attorney-General v Times Newspapers* [1974] AC 273 at 311, Lord Diplock stated:

"[T]he Attorney-General accepts the responsibility of receiving complaints of alleged contempt of court from parties to litigation and of making an application in his official capacity for committal of the offender if he thinks this course to be justified in the public interest. He is the appropriate public officer to represent the public interest in the administration of justice. In doing so he acts in constitutional theory on behalf of the Crown, as do Her Majesty's judges themselves; but he acts on behalf of the Crown as 'the fountain of justice' and not in the exercise of its executive functions."

In *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323 at 330 Samuels AP, citing the above passage, commented upon the "unique position" occupied by an Attorney-General in the Australian legal system.

9 It is also difficult to understand how the Attorney-General could form the view that the failure to pay a \$20,000 fine to the benefit of the Consolidated Revenue does not *directly* affect the interests of the Commonwealth.

10 As a result of the continuing failure of Mr Johnston to pay the fine imposed upon him, and the failure of any person who has an interest in the enforcement of the penalty to take any steps to enforce it, the District Registrar requested the matter be listed for directions. A letter in the following terms was sent to all interested persons:

"At the request of the District Registrar the above matter has been listed for directions before Justice Merkel at 10.15 am on 20 June 2001.

His Honour has requested that the persons that have an interest in the enforcement of the orders made on 29 May 2000 in relation to the fourth respondent, Craig Johnston, be informed of the hearing. Those persons appear to include Mr Johnston, the District Registrar, AIG and the Attorney-General of the Commonwealth.

Without in any way limiting the matters that any of those persons may wish to address on 20 June his Honour has requested that the following matters be addressed:

- *whether a duty exists in relation to seeking enforcement of the orders and, if so, by whom is the duty owed;*
- *if a duty exists, the steps (if any) the Court ought to take in the events that have occurred;*
- *if no duty exists, the steps (if any) that ought to be taken in respect of the enforcement of the orders;*

- *whether it is arguable that a further contempt might have occurred in connection with the failure to comply with the orders or to seek to enforce them;*
- *the directions (if any) that are appropriate for the further conduct of the matter.*

Anyone wishing to make submissions concerning the above matters are directed by his Honour to file with the Court and serve on the other interested persons identified above a short outline of those submissions by 5.00 pm on Tuesday, 19 June 2001."

11 The Attorney-General, consistently with the mistaken view he has taken of his role and of the interest of the Commonwealth, stated through the Australian Government Solicitor that he did not "see a need to be involved in the Directions hearing". AIG, consistently with its position, submitted that it did not regard itself as under a duty to enforce the penalty order and that any further directions were a matter for the Court.

12 There is some support for the position taken by AIG. In *Con-Mech (Engineers) Ltd v Amalgamated Union of Engineering Workers (Engineering Section)* [1973] ICR 620 ("*Con-Mech*") the National Industrial Relations Court (presided over by Sir John Donaldson) considered the practical problems that exist in the field of industrial relations in the penalty enforcement process. *Con-Mech* concerned an order sequestering a union's assets to pay a fine for breach of a court order. The court stated at 625:

"As between the immediate parties the dispute may seem to be of a private nature, but it is rare indeed that it does not affect a large number of other people. In some cases it affects the community as a whole. Furthermore, far from the parties intending to avoid each other after the conclusion of the litigation, the whole context of the dispute will almost invariably concern the terms on which they shall work together in the future. In such circumstances, an aggrieved party to the dispute may well be prepared to seek an order of the court in support of his rights. But if that order is not at first effective, he is most loth further to exacerbate relations by bringing proceedings for contempt of court. It is at this point that the public interest is involved to a much greater extent than is the case in non-industrial disputes. Voluntary forbearance by a litigant to enforce compliance with a court order in a non-industrial context will not usually undermine the authority of the court. In the industrial context, such forbearance, which may well result from industrial pressure, will quickly give rise to a general belief that the orders of the court are unforceable. Such a result would be gravely injurious to the authority of any court and thus to the public interest.

With a view to avoiding such a situation and at the same time relieving the complainant of any opprobrium which might otherwise attach, this court has always imposed a duty on those who obtain injunctive orders of reporting any

breach of those orders. But hitherto, if it became necessary to issue writs of sequestration, the complainant was required to procure their issue himself, thus following the High Court practice. This close association of the complainant with enforcement procedures seems to us to be highly undesirable in an industrial context. In such a context the interest in enforcement is primarily that of the public and not of the complainant. We have therefore considered whether there may not be jurisdiction for the court to issue the writs of its own motion upon being satisfied that contempt of court is proved."

The court concluded that it had an inherent jurisdiction to act in the public interest by itself assuming responsibility for issuing writs of sequestration in respect of the union's assets.

13 The District Registrar, represented by counsel, submitted that the District Registrar is not responsible for enforcement of the penalty order and he is not a party or a person interested in its execution or enforcement. Counsel for the District Registrar submitted:

"Where (as here) the Order imposing the fine does not have a default provision and the Court determines to take action to recover the unpaid fine, the Court is able to authorise or direct the District Registrar to enforce a judgment (or order) for the payment of money into court by one or more of the means specified in Order 66 Rule 2(1) of the Rules of the Supreme Court of Victoria: s 53 of the Federal Court Act; Order 37 Rule 7 of the Federal Court Rules and Order 66.02(4) of the Rules of the Supreme Court and Guthrie, supra.

If any such authorisation or direction was given, then the authorisation or direction:

- (1) ought comply with the requirements of Order 66 of the Supreme Court Rules and, where relevant, the other relevant Orders, namely Order 71 or Order 72;*
- (2) should include a direction that any proceeding, step or other process undertaken by the District Registrar pursuant to that authorisation or direction should be made returnable before a Judge.*

If directed, the District Registrar would obey any such authorisation or direction."

14 The passage cited above in *Con-Mech* offers some support for those submissions. Although the court did not consider the role of the Attorney-General, which was subsequently clarified in *Attorney-General v Times Newspapers Ltd*, it saw enforcement of its contempt jurisdiction as being in the public rather than the parties' interest. *Con-Mech* is also an example of the flexibility of the orders available to a court in the exercise of its contempt jurisdiction: see *Mudginberri* at 114.

15 In one sense the enforcement issues described above ceased to be a problem because
shortly before the hearing Mr Johnston paid his fine. However, the underlying problem of
responsibility for enforcement of a court order punishing a person for contempt remains.

16 If a person wilfully disobeys and publicly defies an order to pay a fine imposed for
contempt, the disobedience and defiance may constitute a further contempt. Further, conduct
calculated to defeat the effect of a court order and treating the order as unworthy of notice
may also constitute a contempt: see *Seaward v Paterson* [1897] 1 Ch 545 at 554-555 per
Lord Lindley. For example if a person, such as an Attorney-General, has a *duty* to enforce a
penalty order (which may also include committal to prison in default of payment) and refuses
to discharge that duty, with the consequence that there will be no enforcement of the order, a
serious issue of obstructing the course of justice may arise.

17 I have made the above observations as it is clear that, in future, a court ought to make
specific provision for enforcement of any order punishing a person for contempt. Plainly, if
the position taken by the Attorney-General is maintained, it will be necessary for the Court in
its order to make provision for the enforcement of that order. In most cases it will be
sufficient if the order provided that, in default of payment, the District Registrar must apply
to the Court for directions concerning the enforcement of the order.

18 The failure by all persons interested to seek to enforce the penalty order punishing
Mr Johnston for his wilful contempt of court had the potential to bring the administration of
justice into disrepute. That is especially so in view of Mr Johnston's continuing wilful and
public defiance of the order. However, as the fine has now been paid, albeit one year late,
and there was an unresolved difference of view as to who was responsible for its
enforcement, it is not appropriate to take any further action.

I certify that the preceding eighteen
(18) numbered paragraphs are a true
copy of the Reasons for Judgment
herein of the Honourable Justice
Merkel.

Associate:

Dated: 22 June 2001

Counsel for the Applicant: Mr Frank Parry
Solicitor for the Applicant: Cutler Hughes
Counsel for the Respondent: Mr Mordy Bromberg
Solicitor for the Respondent: Maurice Blackburn Cashman
Appearing for the District-Registrar: Ms Michelle Gordon
Date of Hearing: 20 June 2001
Date of Judgment: 22 June 2001