4

The courts

Introduction

4.1 During the inquiry, the Committee received submissions from the main Commonwealth courts: the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court of Australia. The Committee also received submissions from the Administrative Appeals Tribunal (AAT) and the Family Court of Western Australia (FCWA). Although the latter court is administered by the Western Australian Government, it is funded by the Commonwealth.

4.2 One matter that concerned the Committee is that all these organisations are in financial difficulties. For example, in 2007-08, expenditure for the FCWA totalled $16.9 million, against funding of $15.7 million.[1] The following table gives the financial performance (surplus/deficit) of these bodies.[2]

Table 4.1 Financial performance of selected Commonwealth courts ($ 000)

Court	2003-04	2007-08
Administrative Appeals Tribunal	52	-132
Family Court of Australia	207	1,438
Federal Court of Australia	1,717	-3,351
Federal Magistrates Court of Australia	908	-1,849
High Court of Australia	440	-913

Source *Courts' annual reports for the respective years.*

1 Family Court of Western Australia, sub 34, p 2. The Court is a division of the Department of the Attorney-General and does not have separate financial statements.

2 A reference to courts also refers to tribunals, apart from the section, 'constitutional issues'.

4.3 The table shows that all of these organisations shifted from delivering financial surpluses to deficits over the period in question. The only exception was the Family Court, which ran a surplus in 2007-08. In evidence, the Family Court stated that it ran deficits in 2005-06 and 2006-07. It expected to incur losses from 2009-10 and that they would increase over time.[3] The AAT noted that its budgetary position was also expected to significantly deteriorate:

> We have a $600,000 approved deficit this year, that is, 2008-09. I estimate that will blow out to probably about $1.5 million the year after and then start escalating into the never-never thereafter. The only way that we can continue to operate will be to quite savagely reduce the number of hearings that we hold.[4]

4.4 In this climate, it is not surprising that two of the courts (the High Court and the FCWA) are pursuing reviews of their baseline funding.[5]

4.5 Given the deterioration in the courts' financial performance and their special role in our system of government, the Committee wished to investigate the effect of the dividend on their performance in greater detail.

The effect of budget pressures

4.6 Similar to most other agencies, the courts noted the difference between the indexation measures that the Department of Finance and Deregulation (Finance) used to adjust for inflation, and the price increases in the products and services that they purchased. In relation to the indices (often referred to as wage cost indices – WCIs), the High Court stated:

> WCIs are based on changes to values of a basket of salary and related costs as they relate to 'safety net amounts' for employee remuneration in a defined group of industries. It is neither a calculation of actual, average changes in employee remuneration generally nor an indicator of employee cost movements in the public sector. It is also not based on actual movements in supplier costs. However, WCIs are applied across both employee and non-employee costs in the Commonwealth, to produced basal increases

3 Mr Richard Foster, transcript, 20 August 2008, pp 56-57.

4 Mr Douglas Humphreys, transcript, 8 September 2008, p 37.

5 High Court of Australia, sub 14, pp 2-3; Mr Andrew Phelan, transcript, 20 August 2008, p 60; Family Court of Western Australia, sub 34, p 5.

> in appropriations, before the application of the efficiency dividend to the result.
>
> For several years the average national wage increase has been much higher than has been reflected in WCIs, even before the application of the efficiency dividend. Similar disparities have prevailed between funding and actuality for supplier costs. The WCI is a poor surrogate measure of supplier cost increases, especially in 'heated' areas like rent, other accommodation costs and ICT [information and communications technology].[6]

4.7 The AAT made a similar point, stating that, 'the annual inflator is considerably less than annual cost increases'. It reported that its wage and accommodation costs have been increasing by at least 4% annually.[7]

4.8 Similar to other agencies, the courts also stated that they had a significant proportion of fixed costs and needed to find the savings to meet the efficiency dividend and the indexation gap from the remainder of their budget. They argued that this results in the efficiency dividend having a disproportionate impact. For instance, judges are appointed by the Government and their salaries are set by the Remuneration Tribunal. Further, the courts rent specialised premises from the Commonwealth and pay market-based rates set by Finance.[8]

4.9 The Federal Court noted:

> Thus in total 53% of the Court's 2008-09 budgeted expenditure is of a 'fixed' nature and the Court's ability to reduce these costs is extremely limited. This means that the efficiency dividend can, in effect, only be applied to the remaining 47% of the Court's costs, effectively doubling the dividend that has to be applied to these costs.[9]

4.10 For example, assume that a court must find efficiencies of 3.25% across all its budget,[10] but cannot control its judicial salaries nor its accommodation costs, and that these comprise 50% of its budget. Then that court must find efficiencies of 7.5% across its other activities, such as its registries, its information technology (IT) spending, its corporate services, its pay scales for administrative staff and training and development.

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6 High Court of Australia, sub 14, p 3.

7 Administrative Appeals Tribunal, sub 17, p 3.

8 Federal Court of Australia, sub 65, p 2.

9 Ibid.

10 This comprises a 1.25% efficiency dividend and an indexation gap of 2%.

4.11 The Family Court and the Federal Magistrates Court made a similar point in their submissions.[11]

4.12 This chapter will now consider how these budget pressures have affected the courts' operations.

Information technology

4.13 Several of the courts gave evidence that their IT resources were considerably below benchmark levels. Taking into account agency size, perhaps the AAT has been in the most difficult position. It stated in evidence:

> Our case management system was over 10 years old when the depreciation funding was introduced. The department of finance in their wisdom said that, because it was an asset that was fully utilised, there was no need to provide depreciation funding for it. We soldiered on for another eight years with the system. It was a mainframe with lovely blue and white screens—a beautiful piece of technology from the 1960s! It did the job. When we came to replace that piece of technology we put in an NPP [new policy proposal]. It was rejected …
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> We had to fund that out of reserves …
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> … having gone out to tender, bought a new system and put it in, we do not have the money to bring it up to the levels we would like to in terms of e-filing and all those sorts of things. All we have done is replaced the base. I have to try and find some money to do other things with it …[12]
>
> We had the Oakton consulting group come in and do a review of our IT system recently. They indicated that we were significantly underspending on IT. They said that, to bring us up to industry benchmark levels—and this does not include the capital costs of going and buying other modules—we would need a capital injection of $840,000 and we needed $905,000 per annum thereafter for ongoing costs to bring us up to acceptable industry standards. Basically, they said I needed to employ another six IT staff.[13]

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11 Family Court of Australia, sub 2-2, p 2; Federal Magistrates Court of Australia, sub 18, p 3.

12 Mr Douglas Humphreys, transcript, 8 September 2008, pp 40-41.

13 Ibid, p 50.

4.14 Apart from the Federal Magistrates Court (which receives IT services from the Family Court), the other Commonwealth courts all noted they had significant shortfalls in IT resources. The High Court stated in evidence that it did not have any IT staff.[14] The Federal Court reported that it did not expect it would be able to provide the new sort of e-services that the Court's clients would come to expect in the near future.[15]

4.15 The Family Court, which provides IT services to some of the other courts, also stated that it had difficulty in meeting new demands and was considerably short staffed in IT:

> We also got Oakton to perform an IT benchmarking report … In the Federal Magistrates Court specifically, there has been enormous growth over the last three or four years which we have been managing within our existing resources. We are servicing something like 200 additional users just in that court alone and within our existing resources. Oakton basically recommended that we should increase our IT resources by up to 16 FTE in an attempt to provide a higher level of service, but at the bottom end they said it was absolutely essential that we increase our FTE resources by something like four to six FTE just to maintain existing services. We have not acted on those recommendations, and we are still managing through people just working harder and smarter to continue to provide the services.[16]

4.16 The Federal Court reported that the courts and tribunals have attempted to secure funding for IT enhancements through new policy proposals, but have generally been unsuccessful.[17]

4.17 A major component of the work of the courts and tribunals is receiving and processing applications from parties who wish to use their services. Not only are IT services integral to running these operations, but they are also likely to be a key source of innovation and efficiency. The Committee is concerned about the status of these bodies' IT arrangements. However, the Committee also appreciates that the courts and tribunals are balancing the competing demands of infrastructure and service delivery as best they can under current circumstances.

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14 Mr Andrew Phelan, transcript, 20 August 2008, p 63.

15 Mr Warwick Soden, transcript, 8 September 2008, p 37.

16 Mr Richard Foster, transcript, 20 August 2008, p 58.

17 Mr Gordon Foster, transcript, 8 September 2008, p 44.

New policy proposals

4.18 Similar to most other agencies that made submissions to the inquiry, the courts expressed dissatisfaction about the process for new policy proposals. The High Court stated that, because the courts were small organisations, their proposals tended to be for small amounts and they were often asked to absorb them.[18]

4.19 In evidence, the AAT gave the example of submitting a new policy proposal to be compliant with the Australian Government Information Technology Security Manual (ACSI 33). The request was approved but not funded.[19] In other words, the AAT was requested to upgrade its IT security from existing resources.

4.20 The Family Court gave its own example:

> … the costs associated with the development of the business case and scoping study for the proposed Commonwealth Law Courts in Newcastle are being met from within the court's operating budget, and we have had to contribute $750,000 to that process, as has the Federal Magistrates Court. We put up an NPP to get funding for a process and it ended up costing us $750,000 for the process to commence. That is one of the issues we have with NPPs.[20]

4.21 In this case, the Family Court received a one-off sum of $200,000 for the project in the 2007-08 Budget.[21] The Court has had to meet the bulk of the total costs from its own resources.

4.22 At the same time, however, the Family Court acknowledged that it had received some funding from new policy proposals and that its chances of success were influenced by government policy:

> We have been successful in the sense that the government provided something like $9.4 million to us for court security, and there was another $5 million for the other courts for court security. We got some extra funding for piloting a new method to do with child responsive models for looking after children in the breakdown of family relationships. So it is not really fair to say we have not been successful.

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18 Mr Andrew Phelan, transcript, 20 August 2008, p 59.

19 Mr Douglas Humphreys, transcript, 8 September 2008, p 47.

20 Mr Richard Foster, transcript, 20 August 2008, p 57.

21 Australian Government, Budget 2007-08, Budget Paper No 2, viewed at http://www.budget.gov.au/2007-08/bp2/html/expense-04.htm on 30 October 2008.

> I do not think we have been as successful as we would have liked, but I think it is primarily because the whole focus has been on trying to shift, and the resources have gone into the front end of the system. You do not establish 65 family relationship centres without having some impact on the back end of the system, where we probably are. So I think at a moment in time that could be the reason why perhaps we have not been as successful as we might have wished.[22]

4.23 In order to explore this issue further, the Committee examined all the new policy proposals that had been approved for these bodies for the last five years that related to departmental expenses. The table below lists them.

Table 4.2 New policy proposals for courts and tribunals for departmental expenses since 2003-04

Year	Topic	Agency	Amount ($m)
2008-09	Nil		
2007-08	Helping separated parents and children	Family Court	1.8
		Magistrates Court	2.7
	Newcastle courts – strategic assessment	Family Court	* 0.2
	Indigenous liaison pilot program	FCWA	0.2
2006-07	*Anti-Terrorism Act (No 2) 2005*	AAT	0.1
		Federal Court	0.2
	Child support reforms – external review	Magistrates Court	0.8
	Criminal cartel enforcement	Federal Court	0.6
	Additional resources	AAT	1.7
	Additional resources for new responsibilities	Magistrates Court	3.4
2005-06	Workplace relations – jurisdiction changes	Magistrates Court	3.5
		Federal Court	2.9
	Court security	Family Court	2.0
		FCWA	0.3
		AAT	0.1
		High Court	0.1
	Increased family law capacity	Magistrates Court	1.2
	Records management etc	High Court	1.2
2004-05	Increased surveillance warrants	AAT	0.4
2003-04	Additional resources	FCWA	1.1
	Additional resources	Magistrates Court	1.1

Source *Budget Paper No 2, 2003-04 to 2008-09, Mid Year Economic and Fiscal Outlook, 2003-04 to 2007-08 and related portfolio budget statements. All amounts cover at least three years and are averaged over the years in which funding is allocated. The exception is the starred amount, which was only for one year. Transfers of funds between courts not included. Appropriations to make up for unrealised savings from failed tribunal*

22 Mr Richard Foster, transcript, 20 August 2008, p 65.

mergers not included. Capital measures not included. The proposed Health and Social Services Access Card was subsequently withdrawn (as were the AAT's funds).

4.24 Perusing the table, it appears that the Family Court's comments are a reasonable reflection on the extent to which these organisations received funding for new policy proposals, at least up until 2007-08. From 2003-04 to 2007-08, they received a total of $25.4 million in ongoing new policy funds.[23] This equates to $5.1 million per annum. During this period, their average annual total expenses would have been approximately $325 million per annum. Therefore, they were experiencing revenue growth of approximately 1.6% through new policy proposals in this period.

4.25 Assuming that the indexation gap was 2% during this time, with the efficiency dividend at 1.25%, the courts were looking to meet a real funding shortfall of 3.25%. If new policy funds were 1.6%, then the courts would be looking to meet the remainder (1.65%), through productivity gains. This analysis assumes that the courts' workload was static during this period. The Committee examines the courts' workload later in the chapter.

4.26 In 2008-09, these courts received no new policy funds, as well as having to meet the additional 2% efficiency dividend. Therefore, they were looking to meet a funding shortfall of 5.25%, which has been a significant management challenge for them.

Regional services

4.27 A theme throughout the inquiry has been that cutting back on regional services and regional presence is a common way for many agencies to trim their budgets. Often, the courts stated that they had a significant commitment to their regional work, but that they are making cuts in this area. For example, the FCWA stated that it had already made cuts and that regional locations had a lower level of service than metropolitan areas, especially in child-related matters.[24]

4.28 The AAT reported in evidence that the budget reductions would affect the number of hearings it would hold and the amount of travel it would be able to do. It also noted that fewer regional hearings would not be consistent with client expectations:

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23 This is the sum of the amounts in the right hand column, excluding the starred amount.

24 Family Court of Western Australia, sub 34, p 5.

> That slowdown will be exponential as we wind back our capacity to hold hearings and, indeed, do regional work up in Townsville, Cairns and over to Darwin—travel and things like that. We just cannot do it. We can use, as best we can, technology but there is a limit to what you can do. I think there is a reasonable expectation, certainly amongst the members of the public, that they will get to see somebody face to face rather than through a telephone hearing or videoconferencing to have their matter finally determined.[25]

4.29 The High Court stated that it has considered stopping its travel as a way of cutting costs, but its public role means it has a duty to be seen around the country:

> … a body like the High Court, which is a national constitutional body with a seat in Canberra, also has a responsibility to be seen by all of the Australian people and therefore chooses and wishes to continue to circuit to places where, in raw terms, our workload is hardly as efficient as it would be by bringing everybody into Canberra and not visiting Adelaide, not visiting Perth, not visiting Brisbane et cetera.[26]

4.30 The Committee is strongly of the view that the courts' regional work is integral to their role and function. The Committee also agrees with the AAT that judicial and tribunal proceedings are more likely to be effective if parties attend them in person. Further, requiring parties to travel an excessive distance to a court is a form of cost shifting onto the community. In addition, requiring multiple parties and their legal representatives to travel is likely to be more costly than arranging for the court itself to travel.

Security

4.31 A further area in which some courts were making cuts was in security. The Federal Court and AAT stated in evidence that they only partly complied with the Protective Security Manual and the Australian Government Information Technology Security Manual. The AAT estimated that the cost for it to comply with these requirements was $1.8 million.[27]

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25 Mr Douglas Humphreys, transcript, 8 September 2008, pp 37-38.

26 Ibid.

27 Mr Gordon Foster, transcript, 8 September 2008, p 53 and Mr Douglas Humphreys, transcript, 8 September 2008, pp 48 & 53.

4.32 Security is an important risk for the courts to manage, both in terms of operations and reputation. In May this year, a woman threatened self-harm with a knife and a pair of scissors during a Federal Court hearing in William Street in Sydney. The Court was using standard commercial premises while its main complex was being renovated. The temporary court rooms did not have metal detectors or x-ray equipment.[28]

4.33 Although the judge was participating through a video link from Adelaide, the incident demonstrated that security is an increased risk for the courts. The Federal Court stated in evidence that prohibited items (not necessarily weapons) are regularly identified at court entrances. It also stated that it cannot implement the blanket security measures it would like. Rather, it uses a risk management approach to minimise the chances of an incident.[29] The AAT uses a similar system and explained it in detail:

> It is important to note that we are only in Commonwealth law court buildings in two locations: Brisbane and Hobart. In the other locations we are in commercial tenancy buildings … We do not have airport type security in those locations, and the figure I quoted to you [$1.8 million] does not include the installation of that. In fact, it would be physically impossible to install that in a commercial building because of the way the access and egress are structured. What it means is that if we have a matter that we identify as being of potential concern we will go to a Federal Court building or, if we go out to Parramatta, we have been very grateful that we can get access to the Family Court, where we will then hold the proceedings. But that does not alleviate the possibility of the unexpected, and we just have to risk manage that.[30]

4.34 The Federal Court noted in evidence that expectations about security standards in courts have increased.[31] Once again, the Committee appreciates that the court administrators are balancing their competing priorities as best they can within their budgets. The Committee is confident that the courts give security a high priority in planning decisions. As the Federal Court said in evidence:

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28 *The Australian*, 'Woman takes knife into court', viewed on 5 November 2008 at http://www.theaustralian.news.com.au/story/0,25197,23779344-5006784,00.html.

29 Mr Warwick Soden and Mr Gordon Foster, transcript, 8 September 2008, pp 53-54.

30 Mr Douglas Humphreys, transcript, 8 September 2008, p 55.

31 Mr Warwick Soden, transcript, 8 September 2008, p 54.

> The security issue is always one that is under review with our areas, also in terms of the security we partially do not comply with. It is, again, something that we are very conscious of.[32]

Cuts versus efficiencies

4.35 During the inquiry, the courts advised the Committee about the various measures they were taking to meet their budgetary demands. Overall, most of their actions would be categorised as cuts, rather than efficiencies or innovations that would provide long-term benefit to their organisations.

4.36 For example, the FCWA stated it stopped being able to meet the dividend two years ago.[33] Although it had been able to innovate to some extent by introducing digital recording equipment to replace the production of transcripts (saving $30,000 annually),[34] it had made cuts to its regional services. Regional Western Australia receives fewer counselling services, fewer court circuits and does not use the new case management model for child-related proceedings. It appears that the Court's main options in future are to either run a deficit or cut more services.

4.37 The court that provided the most evidence about improvements to its managerial practices was the Family Court. For example, the Court stated that it had instigated quarterly budget reviews to help it meet its financial targets.[35] It has also cut the number of managerial layers in the organisation and introduced electronic filing for a number of its processes. Further, it had established a call centre to handle inquiries from the public:

> One of the reasons that I think we could effectively reduce our client service staff around the country by 30 was through the establishment of a national inquiry centre, which is located in our Parramatta registry. There are about 30 staff in that national inquiry centre. What that effectively meant when it was established within our existing resources was that every telephone inquiry which was previously going to a registry went to that central location. It meant that there was great efficiency provided in the registries, where people could actually attend to people at the counter rather than spending a lot of time on the telephone. Our inquiries, by their very nature, are lengthy. Someone rings up

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32 Mr Gordon Foster, transcript, 8 September 2008, p 53.

33 Mr Liam Carren, transcript, 22 October 2008, p 6.

34 Mr Gavan Jones, transcript, 22 October 2008, p 3.

35 Family Court of Australia, sub 2-2, p 4.

> and says, 'I have just separated. What do I do next? How do I get a divorce?' It takes a long time to deal with them. That workload has been shifted out of the registry. It has been streamlined. There is better training and technology to support them, and that has been a significant saving.[36]

4.38 However, the Family Court did note that its scope for further process improvements was limited because it had very little spare funding for discretionary projects. Between 2005-06 and 2008-09, project funding had decreased 80% to less than $0.5 million.[37] It has also implemented a number of cost-cutting measures such as requiring all staff to travel economy between various destinations and reducing its full time equivalent staff by 26 through discontinuing contract personnel.[38]

4.39 The AAT is probably at the other end of the spectrum. In evidence, it stated that it was expecting to meet its financial requirements largely through cutting regional hearings and its use of part time Members.[39] It had purchased a new core IT system with which it was very satisfied, but it had no spare resources to add the various modules that would help it innovate.[40] The AAT had also implemented cost-cutting measures such as travelling economy class, reimbursing actual expenses rather than issuing travel allowance and driving between Sydney and Canberra. It noted that, by travelling economy, its Members were not receiving the travel entitlements to which they were entitled under the Remuneration Tribunal's determinations.[41]

4.40 The Federal Magistrates Court and the Federal Court both stated in evidence that, while they had recently invested in electronic services, they did not expect such discretionary funds to be available in future.[42]

4.41 A significant form of disinvestment occurred at the FCWA in 2007-08. The court had maintained a building trust account to pay for lifecycle works. In order to cover its operating deficit of $1.2 million in that year, the FCWA closed the trust account, releasing $1.3 million. Although this court

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36 Mr Richard Foster, transcript, 20 August 2008, pp 61-62.

37 Family Court of Australia, sub 2-2, p 3.

38 Mr Richard Foster, transcript, 20 August 2008, p 58.

39 Mr Douglas Humphreys, transcript, 8 September 2008, p 37.

40 Ibid, pp 41-42.

41 Ibid, p 53.

42 Mr John Mathieson, transcript, 8 September 2008, p 46 and Mr Warwick Soden, transcript, 8 September 2008, p 37.

has been able to provide services for the present, it has reduced its ability to maintain its assets in the future.

Performance information

4.42 Given that all these courts are in financial difficulty or soon expect to be, the Committee examined the performance information of some of them to determine whether this might be driven by workload. The High Court presented the most informative documentation on this to the Committee.

High Court of Australia

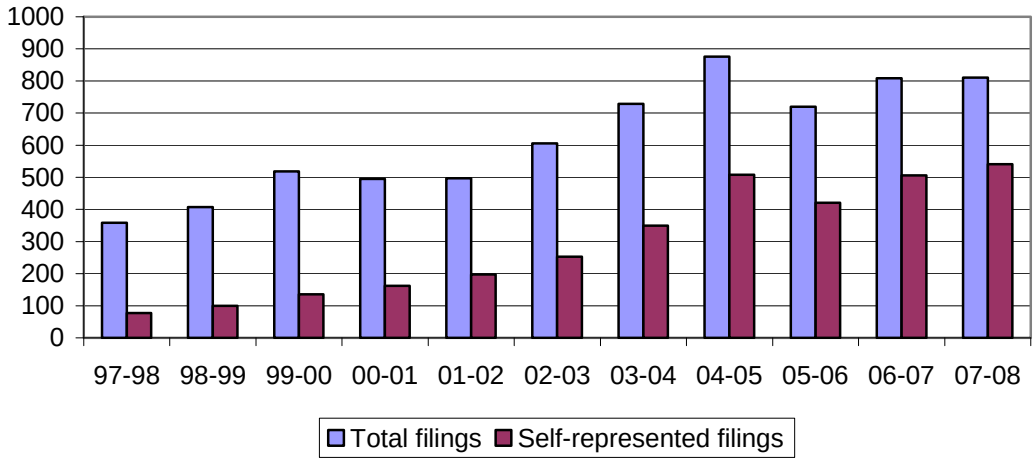
4.43 The Court contrasted the increasing number of applications for special leave to appeal against its largely steady resources. The High Court is unique in Australia because it does not have to hear all appeals that come to it. Rather, it has an initial filter whereby litigants request the Court's leave (special leave) to have their matter heard.[43] The criteria for this decision are largely up to the Court, but it must at least consider whether there is a question of law involved of public importance and whether there is a difference of opinion between courts that needs to be resolved.[44]

4.44 Therefore, the Court has some measure of control over the number of full hearings that it holds and the amount of judicial time occupied on this activity. However, it cannot control the number of special leave applications that it must consider. An increase in applications for special leave has a significant effect on the time of both judges and registry staff. Figure 4.1 demonstrates the growth in special leave applications.

43 Section 21 of the *Judiciary Act 1903*.

44 Section 35A of the *Judiciary Act 1903*.

Figure 4.1 Applications for special leave to appeal, High Court of Australia

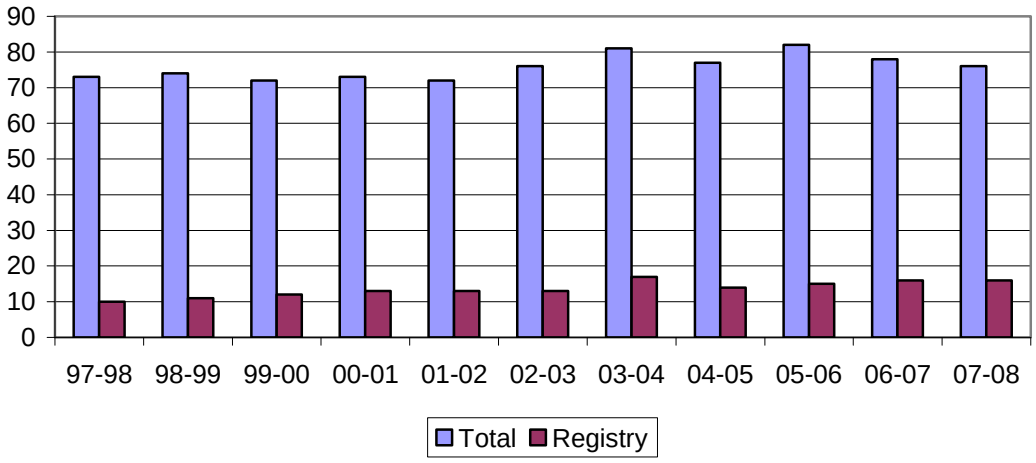


Source *High Court of Australia, sub 14-2, p 1.*

4.45 Also presented in the graph is the increase in the proportion of special leave applications made by self-represented litigants. These parties often make additional demands on court staff. Their level of knowledge about the law and court processes is less comprehensive, meaning that court staff may need to give them additional assistance.

4.46 There are two ways, in particular, that the High Court could respond to this increase in special leave applications. The first would be to shift staff internally to its registry. Figure 4.2 shows that this has occurred.

Figure 4.2 Staff numbers at the High Court of Australia

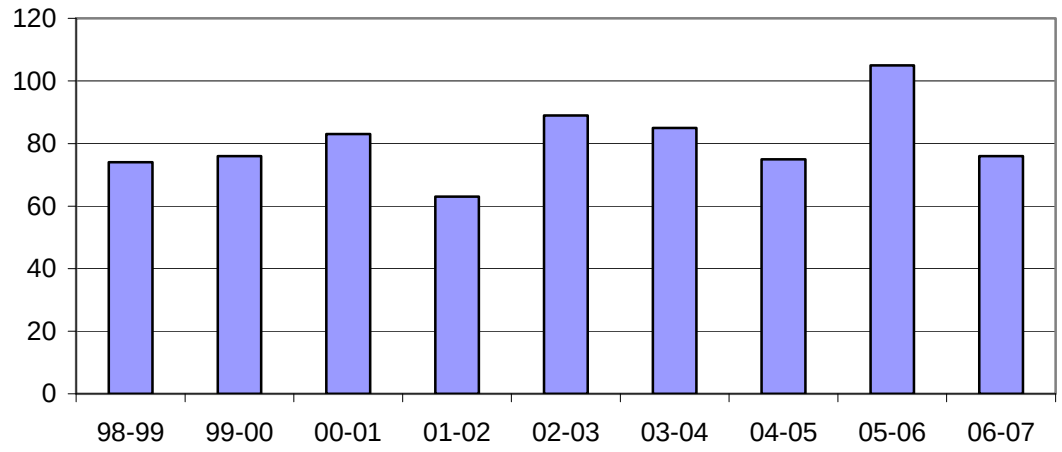


Source *High Court of Australia, sub 14-2, p 2.*

4.47 Total staff at the High Court has stayed relatively static over the period in question. However, registry staff as a share of total staff has increased from 13.7% (10 out of 73) to 21.1% (16 out of 76). It appears that the Court has been able to process the increased number of special leave applications by internally diverting resources to its registry. The Court has most likely either cut services or found efficiencies in its other areas of operation to make this adaptation.

4.48 The other area in which the Court could handle this increase in special leave applications would be to reduce the number of cases it decided. Figure 4.3 shows how this statistic has changed over time.

Figure 4.3 Full Court decisions (other than special leave applications), High Court of Australia



Source *High Court of Australia, Annual Report 2006-07, p 10.*

4.49 Over the past 10 years, there does not appear to have been an overall downwards trend, which would be expected if the Justices of the High Court had to allocate more of their time to special leave applications at the expense of Full Court work. Rather, what may be occurring is that the Court is changing the proportion of cases to which it grants special leave to appeal in order to maintain a constant Full Court workload.

4.50 To a considerable extent, however, it appears that the Court is still considering special leave applications on their merits. Figure 4.1 shows there was a spike in special leave applications in 2004-05. Because these applications take some time to be decided and then proceed to the Full Court, it would be expected that the cases that proceed to a hearing would not be decided until the following year. Consistent with this, figure 4.3 shows a spike in cases decided in 2005-06.

4.51 If one were to view the High Court as an organisation that has two parts to its business – special leave applications and Full Court decisions – then the Court has demonstrated that its workload has increased. It has coped with increased special leave applications while broadly maintaining its Full Court work.

Family, Federal and Federal Magistrates Courts

4.52 Overall, the Committee decided that it could not make any conclusions about these courts because the Family and Federal Courts provide services to the Federal Magistrates Court. The Family Court also assists the FCWA.

4.53 This means that comparisons over time for the Family Court and Federal Court are difficult to make, even after taking into account changes in the individual courts' workload. This is because they must also respond to the increased workload of the Federal Magistrates Court (and the FCWA, in the case of the Family Court). The Family Court in evidence stated that its IT team needed to keep up with growth in the Federal Magistrates Court.[45]

4.54 The Committee notes that the courts are aware of the effects of this cross-provision of services on their performance. For example, the Family Court has discussed this effect in its annual reports.[46]

4.55 As one of the Parliament's main accountability committees, this Committee saw value in investigating further the close relationship between these courts.

4.56 The Committee noted that there is a high degree of cooperation between these courts. However, one disadvantage of the combined model is that the lines of accountability between them can become blurred. An example occurred in relation to the Family Court and the FCWA. The Family Court stated that the FCWA owed it $1.5 million for IT services.[47] The FCWA responded:

> The IT service for our operational base is called Casetrack. Up until three years ago we had never made a contribution towards that. We are thankful that the Family Court of Australia have supported us over the years. In the last three financial years we have made a small contribution at their request. It is still nowhere near the actual cost of running Casetrack and the licensing of

45 Mr Richard Foster, transcript, 20 August 2008, p 58.

46 Family Court of Australia, *Annual Report 2003-04*, p 19, *Annual Report 2006-07*, p 38.

47 Mr Richard Foster, transcript, 20 August 2008, p 58.

> Casetrack. We are hopeful that, as part of our funding review, we will be able to come up with a formal agreement with the Family Court of Australia for the provision of IT services.[48]

4.57 It appears that as the Family Court's financial circumstances have changed over time, it has decided to charge for a service that it previously provided free of charge. However, due to mixed accountability, it is unable to withhold the service until it secures payment.

4.58 Given the rapid growth in the Federal Magistrates Court and the financial difficulties that these courts are facing, there has been an increased risk of these blurred accountabilities impairing these courts' performance.[49]

4.59 The Committee notes that the Government has released a review of the federal family law courts by public sector management consultant Des Semple for consultation. Submissions have been invited by February 2009. The review recommends combining the Family Court and Federal Magistrates determining family law matters into a single family law court, with two Divisions – one comprising existing Family Court judges to handle appeals and complex cases, and one to which these Federal Magistrates would be offered appointment (the general Division). It also suggests offering appointment to a lower Division in the Federal court to Federal Magistrates exercising general federal law jurisdiction.[50]

4.60 The Committee does not see any need to make a recommendation in advance of the response to the Semple review. If for some reason these issues remain, then the Committee believes that the courts should give clearer performance and financial information in their annual reports about how services are shared and funded between them.

Committee comment

4.61 A common theme in submissions from the courts was that they had a significant proportion of fixed costs, often around 50%. A substantial proportion of these fixed costs were judicial salaries and related expenses. The argument was that the courts had no control over the appointment of these office holders and no control over their salaries. The courts'

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48 Mr Gavan Jones, transcript, 22 October 2008, p 5.

49 Between 2003-04 and 2007-08, the Federal Magistrates Courts' expenses rose from $32.3 million to $77.8 million, an increase of 140.9%. Source: the Court's annual reports for these years, p 72 and p 84 respectively.

50 Attorney-General's Department, *Future Governance Options for Federal Family Law Courts in Australia* (2008), pp 8-10. Alex Boxsell, 'Courts merger starts with management', *Australian Financial Review*, 28 November 2008, p 50.

conclusion was that this aspect of their work should be exempt from the efficiency dividend. The courts argued that they faced an additional hardship because they had to find additional efficiencies outside judicial salaries in order to make up for the efficiencies they could not find in these fixed costs.[51]

4.62 However, the Committee is not convinced by this line of reasoning. Firstly, the Government appoints judges and tribunal members. In general, the Committee would assume that all such appointments would be in line with the courts' workload. No evidence was given that this was not the case. Further, the Budget papers include adjustments to the courts' estimates when they gain or lose judges.[52]

4.63 Secondly, although the Remuneration Tribunal externally sets judicial salaries, no evidence was given that the rates of increase have been unreasonable. Rather, recent salary increases for judges have been a little over 4% annually.[53] This is in line with increases for other staff employed in the courts who have been delivering efficiencies for their organisations.[54] The Additional Estimates supplement the courts' funding when the Tribunal increases judicial salaries.[55]

4.64 What the courts were effectively requesting through the 'fixed cost argument' was that the work of judges should be exempt from the efficiency dividend. In the view of the Committee, insufficient evidence was tendered during the inquiry with which to make a considered recommendation on this point. However, the Committee notes that judges do comment on the efficiency of court proceedings and the attitudes that counsel and parties take in relation to using a court's time.[56] They also

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51 Family Court of Australia, sub 2, pp 2-3, Mr Liam Carren, Department of the Attorney General of Western Australia, transcript, 22 October 2008, p 8, Federal Magistrates Court of Australia, sub 18, pp 2-3, Federal Court of Australia, sub 65, p 2.

52 For example, Australian Government, *Budget Measures 2007-08*, Budget Paper No 2, p 87.

53 Increases in judicial salaries for 2006, 2007 and 2008 have all been between 4% and 4.5% under the Remuneration Tribunal's determinations, *Judicial and Related Offices – Remuneration and Allowances*.

54 For example, between 2003-04 and 2007-08, the bottom pay point of Executive Level 1 salaries rose in compound annual terms by 4.1% at the AAT, 4.8% in the Family Court, 4.2% in the Federal Court and 5.4% in the Federal Magistrates Court. This last court probably had higher increases because its salaries were lower in absolute terms. There may have been some 'catch-up' in its increases. Source: the courts' annual reports for these years.

55 For example, see Australian Government, *Portfolio Additional Estimates Statements2007-08, Attorney-General's Portfolio*, pp 54, 144, 162, and 174.

56 Marsha Jacobs, 'Two judges would have been better: Owen', *Australian Financial Review*, 31 October 2008, p 46. Mason P in in *Cockburn & Ors v GIO Finance Limited* [2001] NSWCA 155 stated that counsel appeared to take court listings as seriously as a fixture at a golf club.

comment on possible innovations to court processes to improve case management.[57]

4.65 Given this judicial support for operational efficiency, a blanket exemption for their work from an efficiency incentive does not appear warranted.

4.66 Overall, the Committee does not believe there is sufficient evidence to conclude that there are operational or financial reasons to treat the courts as a special case in relation to the efficiency dividend and the indexation gap. However, in presenting workload and other performance information to the Committee, the High Court did demonstrate an increasing workload that it appears to have managed within current resources so far.

4.67 As is the case with all government bodies, the courts should request supplementary funding from the Government and Parliament if they genuinely believe their effectiveness is being compromised by insufficient resources. The High Court[58] and the FCWA[59] have both taken this approach and the Committee supports their requests in principle.

Constitutional issues

Separation of powers

4.68 In countries where English is an official language, the judiciary is generally recognised as a separate branch of government, independent from the executive and the legislature.[60] At the Commonwealth level in Australia, judicial power is vested in the courts alone by section 71 of the Constitution.

4.69 During the inquiry, the High Court questioned the extent to which its appropriation should be subject to control by the executive and the legislature. It raised the point that its new policy proposals were grouped with the rest of those in the Attorney-General's portfolio.

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57 James Eyers 'More power to manage: Sackville', *Australian Financial Review*, 8 August 2008, p 54.

58 Mr Andrew Phelan, transcript, 20 August 2008, p 55.

59 Family Court of Western Australia, sub 34, p 5.

60 Chapter 2 in Martin Shapiro, *Courts: A comparative and political analysis* (2001). In this section, a reference to courts excludes tribunals due to the constitutional nature of the discussion.

> One of the things we are suggesting … is a separate appropriation for the High Court, being separate from the executive appropriations in which it currently resides. Parliament has its own appropriations. We are lumped in with the executive. I think that raises some fairly significant separation of powers issues for us particularly when it comes to seeking funding and offsets, as I have already referred to …
>
> When we come to new policy proposals we are confronted with the issue that Mr Foster has also raised, and that is the thresholds for new policies and the need for anything that is minor to be largely offset within the portfolio. That is where we come right up against the separation of powers issue, where the court believes it is manifestly inappropriate for increases in funding through NPPs for the High Court to be offset by reductions in the executive branch of government … [61]

4.70 The High Court's point is that, under the budget rules, ministers are encouraged to present offsets when they make a new policy proposal. These offsets usually come from the agency involved, but can also come from other agencies within the minister's portfolio. The Attorney-General has the courts in his/her portfolio, as well as executive-style agencies. Therefore, the chance of a court getting new funding can depend on what the Attorney wishes to do with the funding of executive bodies and vice versa.

4.71 The High Court did not want to be totally separated from the Attorney-General. The Court acknowledged that there was value in the Attorney-General continuing to represent the courts within Cabinet in resolving political issues.[62]

4.72 In evidence, the other courts generally did not comment on this matter. The only other court to express an opinion was the Family Court, which accepted that it worked within the Attorney-General's portfolio. In relation to the observation that its new policy proposals must be prioritised by the Attorney-General's Department within the portfolio, the Court stated:

> In answering that question, I would say that the Attorney-General's Department is very supportive of what we do and what we propose. As a matter of principle, I do not have any issue in

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61 Mr Andrew Phelan, transcript, 20 August 2008, pp 56, 59.

62 Mr Andrew Phelan, transcript, 20 August 2008, p 61.

> terms of NPPs—for example, the Attorney-General considering those and putting them in some sort of order of priority in relation to his or her portfolio. In the broader picture I do not think we have any real exception to the fact that we will work through the Attorney- General's Department for NPPs.[63]

4.73 In examining separation of powers in the budget context, the Committee considered the practice in other countries where English is an official language and found that they vary widely.[64] At one end of the spectrum are the United Kingdom, Ireland and New Zealand. In these countries, court administration is controlled by the executive.[65]

4.74 At the other end of the spectrum is the United States. There, Congress passed legislation to create the Judicial Conference, a representative body of federal judges. The Conference is supported by an independent body, the Administrative Office of the United States Courts. One of the Conference's regular duties is to develop a budget for the federal courts and propose it to Congress. The Chair of the Judicial Conference Committee on the Budget, who is a judge, testifies before the relevant Congressional Committee.[66] Under this model, the judiciary takes more of a political role and is directly accountable to the legislature.

4.75 The country representing the middle ground is Canada. The Courts Administration Service has been created as a separate agency to support the courts. Section 7 of the *Courts Administration Service Act 2002* vests the powers and roles of this body in the Chief Administrator. This official also prepares budget submissions for the courts after consulting with the judicial heads of each court. Under section 8, these judicial heads can direct the Chief Administrator in his/her role.

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63 Mr Richard Foster, transcript, 20 August 2008, p 60.

64 The United States, the United Kingdom, New Zealand, Canada and Ireland.

65 For example, the Courts Service in Ireland is accountable to the Minister for Justice, Equality and Law Reform (Courts Service, 'About Us – Frequently Asked Questions about the Courts Service', viewed on 4 November 2008 at http://www.courts.ie/courts.ie/library3.nsf/WebPageCurrentWeb/39EE41AE3259894B80256DA90036F8BD?OpenDocument&l=en. In New Zealand, the Ministry of Justice provides court administration services. In the United Kingdom, Her Majesty's Courts Services administers the courts. It is an executive agency within the Ministry of Justice, which means it is subject to ministerial direction: Her Majesty's Court Service, 'Her Majesty's Court Service,' viewed on 28 November 2008 at http://www.hmcourts-service.gov.uk/.

66 For example, see the Statement of Honourable Julia S. Gibbons, Chair Committee on the Budget of the Judicial Conference of the United States Before the Subcommittee on Transportation, Treasury, Housing and Urban Development, the Judiciary, District of Columbia and Independent Agencies of the Committee on Appropriations of the United States House of Representatives, 12 April 2005, viewed on 4 November 2008 at http://www.uscourts.gov/Press_Releases/judgegibbons041505.pdf.

4.76 Of these three models, Australia is closest to the Canadian example. Court administrations in Australia are legally separate from the executive. For example, the Chief Justice of the Federal Court is responsible for the administrative affairs of the Court and is assisted in them by the Court's chief executive officer. [67] Similar provisions apply for other courts. [68]

4.77 The Committee would not like to see the judiciary being involved in negotiating its appropriation directly with the Parliament. The judiciary's high standing in the community is predicated on its independence, which in turn is based on its exclusion from political matters. However, the Committee would very much like to increase the public recognition of the courts' needs in setting their budgets.

4.78 The best solution to this problem would be to establish an independent commission to assess the courts' roles, their needs and the quality of their management and systems. Such a commission could recommend funding for the courts, but ultimate responsibility for the Budget would rest with the executive. This is consistent with constitutional principles. Section 56 of the Constitution requires the Governor-General to endorse appropriation bills.

Recommendation 4

4.79 **The Attorney-General establish an independent body to recommend funding levels for the Commonwealth courts. The courts should be treated as a separate 'portfolio' under the Attorney-General in the Budget process and in the Budget papers.**

4.80 On a related issue, the Committee notes that the appropriation bills for the ordinary annual services of the Government include the appropriations for the courts but not the Parliament. The Parliamentary departments have their own appropriation bills. The Committee is not aware if there is a court decision on whether the courts constitute the ordinary annual services of the Government. But since judicial power is exclusively vested in the courts, the Committee believes that the Government should at least investigate this matter.

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67 Sections 18A and 18B of the *Federal Court of Australia Act 1976*.

68 For example, sections 38A and 38D of the *Family Law Act 1975* and sections 17 and 19 of the *High Court of Australia Act 1979*.

Recommendation 5

4.81 **The Government investigate whether the courts' appropriations should be included in the appropriation bills for the ordinary annual services of the Government.**

Family Court of Western Australia

4.82 Due to the prevailing circumstances when the Family Court was established, the State of Western Australia was not included in the Court's jurisdiction. Instead, the Government of Western Australia created its own family court, the FCWA, which was funded by the Commonwealth. The two governments signed an agreement in May 1976 governing the establishment, funding and operation of the FCWA.[69]

4.83 The main funding provisions in the agreement state:

- when requested by the Commonwealth, the State must provide estimates of expenditure and must update the estimates when it expects they will change (clause 9);
- the State and Commonwealth must agree on matters to be funded and the amounts to be spent on them (clause 10);
- the Commonwealth shall pay these amounts in advance for a period between one and three months (clause 12); and
- if the State has incurred a greater cost than expected, it shall notify the Commonwealth, which will reimburse this amount (clause 14).[70]

4.84 As the FCWA noted, there is no mention of the efficiency dividend in the agreement.[71]

4.85 During the inquiry, the Committee considered whether there was a significant inconsistency between the agreement and the Commonwealth's practice of imposing the efficiency dividend and its wage cost indices on the FCWA's budget.

4.86 The terms of the agreement are broad. It merely states that the State and the Commonwealth are to agree on the matters to be funded and the amounts to be spent on them. If the Commonwealth wishes to use the

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69 The Commonwealth of Australia and the State of Western Australia, *Agreement Pursuant to Section 41(1) of the Family Law Act 1975* (1976).

70 Ibid, pp 5-7.

71 Family Court of Western Australia, sub 34, p 3.

dividend and wage cost indices as the basis for its negotiations, then that is a matter for the Commonwealth. It is up to the State of Western Australia as to how it responds and conducts the negotiations from its perspective.

4.87 As noted earlier, the FCWA has requested a review of its baseline funding. This also appears to be within the broad terms of the agreement and is a reasonable management response to that Court's financial difficulties. Therefore, the Committee does not wish to make a recommendation specific to the FCWA.