RULE OF LAW
INSTITUTE OF AUSTRALIA

10 April 2013

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Inquiry into the impact of federal court fee increases since 2010

The Rule of Law Institute of Australia (RoLIA) thanks the Committee for the opportunity to make a submission on the impact of federal court in fee increases since 2010 on access to justice in Australia.

The Institute is an independent and not-for-profit body. It does not receive any government funding.

The objectives of the Institute include:

- Fostering the rule of law in Australia, including the freedom of expression and the freedom of the media
- Reducing the complexity, arbitrariness and uncertainty of Australian laws
- Promoting good governance in Australia by the rule of law
- Encouraging truth and transparency in Australian Federal and State governments, and government departments and agencies
- Reducing the complexity, arbitrariness and uncertainty of the administrative application of Australian laws.

The Institute makes the following submission on the Issues Paper.

Level 4, 131 Macquarie Street
Sydney, New South Wales
Australia 2000
Telephone: (02) 9251 8000 Fax: (02) 9251 5788
@RoLAustralia | www.facebook.com/RoLAustralia
www.linkedin.com/company/rule-of-law-institute-of-australia

SUBMISSION

Underlying Principles

It is a core principle of the rule of law that justice must be accessible to all. In proposing a "twelve point institutional definition" of the requirements for the rule of law, Professor de Q Walker has written:

> "The courts should be accessible, so that a person's ability to vindicate legal rights is not made illusory by long delays or excessive costs."[1]

RoLIA notes that in the paper prepared by the Attorney-General's Department dated September 2009, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (the Paper), then Attorney-General Robert McClelland endorsed the importance of this principle, although advocating the cost benefits to government of early resolution of disputes and stating that the costs of "formal dispute resolution ... - to Government and to the user – should be proportionate to the issues in dispute."

While RoLIA supports the emphasis in the Paper on providing alternate pathways to provide fair and equitable outcomes to legal disputes, it is critical that the court system nevertheless be affordable. High user costs should not be employed as a deterrent to utilising the federal courts processes or as a method of user-pays funding of the court system.

Nor should the complexity of the legal issues be the sole determinant of the costs of accessing the court system. The fact that citizens are subjected to increasingly complex legislation should not mean that the costs of challenging or seeking clarity of that legislation be passed on to them. RoLIA notes with concern that even the *Federal Court and Federal Magistrates Court Regulation 2012* which is devoted to federal court fees is itself 49 pages long.

While legislative drafting often entails a fine balance between the ideals of simplicity and precision, the cost of understanding the application of legislation to particular fact scenarios should not be passed on to the "consumer" where the fault lies with the "manufacturer" of those laws.

The escalation in federal court fees

RoLIA's analysis of the increases in federal court fees from 2010 to 2013 shows that fees have risen sharply over that period. Clause 2.20 of the *Federal Court and Federal Magistrates Court Regulation 2012* and clause 2.13 of the *Family Law (Fees) Regulation 2012* (collectively) "the Regulations" make provision for a biennial increase in a number of the fees based on the Consumer Price Index. On its face, the linkage between court fees and the CPI is unobjectionable. However, that assumes that the fees set when the Regulations came into effect (thereby establishing the baseline for those fees) were reasonable. That is not the case.

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1. Walker, G de Q, The Rule of Law: *Foundation of Constitutional Democracy*, Melbourne University Press, Melbourne 1988 at p.40.

In particular, the filing fee for divorce applications jumped from $550 in 2010 to $577 in 2012 and then suddenly to $800 in 2013. Of particular concern is the increase in the reduced fee over that period, being the fee payable by those persons who meet the criteria in Clause 2.06 of the *Family Law (Fees) Regulation 2012*. In 2010 and 2012 the fee payable by those persons was $60 but in 2013 it escalated to $265. Although divorce applications are one of the most common applications made to courts in Australia, with over 46,000 applications being made to Federal Magistrates Court in 2011-2012, they are also one of the most traumatic to those concerned.

It is antithetical to the principle of access to justice that divorce applications should be made financially inaccessible. Often, divorce is accompanied by serious economic consequences for the parties and the filing fee may add to those difficulties by effectively penalising the person who makes the application for divorce. Moreover, if the justification for increases in certain court federal court fees is to reflect the complexity of those matters, then the rise is divorce application fees is unwarranted, as it is one of the simpler matters courts deal with in a generally streamlined process. The effect of this fee may be to make divorce unaffordable for some people with a detrimental effect on their lives and possibly lead to other costs such as health costs.

Similarly, fees for setting down for hearing and daily hearing fees in the Family Law jurisdiction as well as other federal court jurisdictions must be affordable. While an emphasis on early resolution of disputes through alternate dispute resolution processes("ADR") such as family dispute resolution (FDR) can offer great benefits to the parties as well as the court system[2], some matters are complex or intractable and cannot be resolved in that way. Access to justice should not denied to applicants because of their financial vulnerability. A determination by a court may not only provide finality for the parties concerned, it can provide other, broader benefits such as establishing precedents, evidencing open justice[3] and elucidating the law. In any event, despite the focus in the Paper on ADR processes, RoLIA is concerned that even fees for accessing those processes have increased.

The funding crisis of federal courts

RoLIA acknowledges that the financial position of federal courts is alarming, as discussed in the Report into *Strategic Review of Small and Medium Agencies in the Attorney-General's Portfolio* dated January 2012. On page 27 of the Report it states that:

> "when viewed as a group, the Federal Court, the Family Court and the Federal Magistrates Court predict increasing deficits over the Forward Estimates period with the combined annual projected deficit reaching $19.5m or around 8% of combined Forward Estimates appropriations in 2014-15".

The Report discusses the reasons behind the declining financial position of federal courts and proposes a number of alternate administrative and funding models which would mean less expenses in some areas, such as reporting on their activities.

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[2] According to the Strategic Framework for Access to Justice in the Federal Civil Justice System, the cost to Government of providing FDR averaged $1000 - $1500 per service whereas the average cost of finalising a dispute in the family Court was around $9,000 as well as the cost of legal aid.

[3] Although this will be more relevant to non-family law matters where confidentiality is not a consideration.

The concerns expressed by Justice Keane of the High Court on his departure as Chief Justice of the Federal Court indicates the depth of the current funding crisis of the Federal Court. Speaking in February 2013, his Honour stated:

> "'User-pays theories are great for the ministry of finance but, for a long time - since Magna Carta - to no one will we sell justice ... The idea that one of the essential things that a state provides is justice is actually one of the core values of our tradition. And to have to pay very substantial fees to get in the door of a court is a matter of concern. [The Federal Court] does not impose the fees and we don't keep the money."

He also expressed the view that "it is pretty fair to say that ... [the Federal Court's] position is that we would prefer not to see the fee increases happening."[4]

The fact that, according to Attorney-General Mark Dreyfus, federal courts face the prospect of having to reduce their services in regional areas unless supported by these substantial fee rises signals a further blow for access to justice.[5] All Australians, regardless of where they live, should be able to access the court system.

RoLIA's position is that the rise in federal court filing fees has confused two issues: access to justice and budgeting. The rise in fees is not just a financial issue, it is a threat to a fundamental principle of the rule of law. Provision of justice through a functioning, adequately resourced justice system is a core responsibility of government. Budget crises require budgetary responses, not inroads into the rule of law and access to justice.

If RoLIA can be of any further assistance please do not hesitate to contact me.

Yours faithfully

Kate Burns
Chief Executive Officer

[4] As reported by Lucy Battersby in *the Sydney Morning Herald* 11 February 2013.
[5] See note 4.