FEDERAL COURTS FEES UP – ACCESS TO JUSTICE DOWN

BY MICHAEL LEGG*

Access to justice has been expressed as a human right, with justice being equated with 'a fair and public hearing by a competent, independent and impartial tribunal established by law'.[1] An important challenge is ensuring that access to justice is a reality and not just an aspiration. The main obstacle to access to justice in 2013 is cost.

What then should we make of a government that steeply increases the costs of resorting to the federal courts for average citizens while at the same time pushing citizens towards alternative dispute resolution (ADR) processes, such as mediation?

A subtle shift is underway in Australia. It was first signalled by the 2009 Attorney-General's Access to Justice Taskforce, which sought to broaden what access to justice means.[2] More recently, the former Attorney-General for Australia at the time of the fee increases stated:[3]

> "Access to justice extends beyond the courts. It incorporates everything we do to try to resolve the disputes we encounter – from the little things, such as using information found on the internet, calling a helpline or asking for help from a friend or family member, through to the big things, like filing an application in a court. …
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> Court fees have the capacity to send pricing signals to people that the courts should not be the first port of call for resolving disputes and to encourage them to use ADR processes where appropriate".

This shift coincides with significantly increased court fees in federal jurisdictions: the Federal Court, the Family Court and the Federal Circuit Court (formerly the Federal Magistrates Court).[4] This means the vast range of matters these courts deal with – from divorce, family law and child support to

bankruptcy, administrative law, human rights, privacy, consumer matters and copyright – are becoming more expensive for the hundreds of thousands of Australians who use the federal courts every year. While fees vary across the federal courts and some fee reductions or waivers are available to low income earners, the cost of commencing proceedings in the Federal Court was, for example, increased to $938 from July 2012 and increased again to $1080 from January 2013, while setting a matter down for hearing was increased to $1875 and then to $2155.

The January 2013 fee increases were a 15% increase on prevailing fees for individuals. The fee increases also included a 40% increase on prevailing fees for corporations and established a new category of fees for listed corporations that was 150% of the fee for a corporation.[5] The January 2013 court fee increases are forecast to allow the Federal Government to raise $76.9 million in new revenue over the next four years.

Individual disputants will weigh the need for litigation with other concerns such as its expense. When the new court fees, individually and cumulatively, are compared with the full-time adult average weekly total earnings in Australia of about $1500,[6] it is clear that court fees would be a substantial expenditure for the average Australian. When combined with the other costs associated with litigation it is difficult to disagree with former Chief Justice Doyle of the Supreme Court of South Australia who has observed that 'the average person can't afford to get involved in substantial civil litigation, even a fairly well-off person'.[7] Court fees are not the only cost in seeking access to justice, but the higher they are the greater the burden imposed on individuals.

This may mean that an individual who otherwise needs access to the court system but cannot afford it has no choice but to turn away. The increased fees apply across

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the board regardless of whether ADR is appropriate for the particular dispute. The decision of the individual may also have more far-reaching social ramifications - "[b]asic civil liberties have been won and secured by people who sometimes stand up for their rights and assert them".[8] The respect for the rule of law, protection of rights and promulgation of precedents will all be harmed if the courts cannot be meaningfully accessed. Government must be conscious of this connection between the decision of the individual disputant and the larger public policy concerns.

The realpolitik is that the Federal Government is redefining access to justice to include a host of activities other than the provision of publicly-funded courts as well as legitimising the use of higher fees to deter citizens from using the courts. The mantra of access to justice is invoked here to obscure the government's self-imposed fiscal constraints.

Encouraging resilience, self-reliance, and educating people about how to resolve disputes amongst themselves or with the help of a third party are worthy goals. Broadening the range of dispute resolution options and encouraging their use may allow for compromises that better satisfy all disputants' interests compared to going to court. Relationships may be preserved and creative solutions adopted. Disputants and lawyers

should be thinking hard about what dispute resolution method promises to best achieve their aims. But ADR, let alone phone calls and internet searches, cannot be equated with access to justice. With ADR, unlike a court, the dispute is not necessarily decided according to law. It may be, but that is not known because ADR is usually conducted in secret. Other interested parties, including the media, are not able to be present. The procedural protections mandated by and for courts do not necessarily apply.

For the fundamental right of access to justice to be upheld disputants should be able to make a genuine choice about whether ADR or the courts better meet their needs.

Enabling disputing parties to make that choice means ensuring they are aware of the relative advantages and disadvantages of various forms of ADR as well as litigation. The civil justice system performs an important role in underwriting our civil rights, accordingly there will be times when litigation is a necessity. Educating citizens and training lawyers about the various methods available for resolving disputes is the way in which ADR and the courts can be used most effectively.

Under the current approach the government is running the risk of creating a two-tiered system of justice; with the "haves", mainly corporations and governments, able to afford litigation if they can't achieve their aims through mediation and the "have nots", the rest of us, forced to accept whatever ADR offers because we cannot afford to litigate. Moreover, removing the ability to resort to the Courts for one side of a dispute can then infect the equality of the parties' bargaining positions when undertaking ADR.

Raising the financial bar to accessing the courts, which provide the fair and public hearing that is a human right, undermines access to justice.

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REFERENCES

1. See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 99 UNTS 171 (entered into force 23 March 1976) art 14. See also *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810 at 71 (1948) art 8.
2. Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, p 3–4.
3. Former Attorney-General for Australia, The Hon Nicola Roxon MP, *Launch of Your Guide to Dispute Resolution*, Canberra, 23 July 2012. See also Attorney-General for Australia, Mark Dreyfus QC MP, *Defending Justice in Modern Australia: A fair go under the law*, John Curtin Institute of Public Policy, Perth, 20 May 2013.
4. *Federal Court and Federal Magistrates Court Regulation 2012* (Cth) and *Family Law (Fees) Regulation 2012* (Cth).
5. *Explanatory Statement Select Legislative Instrument 2012 No 280* p2.
6. Australian Bureau of Statistics, 6302.0 - Average Weekly Earnings, Australia, Nov 2012.
7. Victorian Law Reform Commission, *Civil Justice Review*, Report No 14 (2008) 434.
8. The Hon Michael Kirby, 'Mediation: Current Controversies and Future Directions' (August 1992) *Australian Dispute Resolution Journal* 139, 146.