RJD:po'n

29 August 2011

The Hon Paul Lucas MP
Deputy Premier, Attorney-General, Minister for Local Government and Special Minister of State
PO Box 15185
City East Qld 4002

Dear Deputy Premier

**Re: Uniform Civil Procedure (Fees and Other Legislation) Amendment Regulation (No 1) 2011**

The Bar Association calls upon the Government to suspend operation of this regulation (gazetted 26 August, operational 1 September) pending proper consultation and review.

This regulation entails massive increases in court filing fees, and the introduction of very substantial setting down and hearing fees in civil matters.

To say, as you do, the proposed introduction of such latter fees were mentioned in the bowels of the budget papers is no answer to the criticisms I essay below.

The enactment of the regulation, both in the manner it was introduced without proper consultation, and in substance, on any view, represents a cynical exercise of government power undertaken with utter disregard for due process or the interests of the general public.

Strong words you may think. Read on.

**Summary:**

A summary of our complaint is this:

- No notice - the Bar Association received a copy of the regulation after it was passed by Governor in Council on 25 August and on the same date it was gazetted, namely 26 August. Despite the subject matter, there was no prior consultation with the Association. We are, by reputation, as you have acknowledged, a model consultant.
- Avoidance of consultation - the Office of the Director General of Justice and Attorney General knew of our interest in what had only been mentioned to us in passing as a proposal. At the regular court users' group meeting held 30 June 2011, the proposal to introduce civil court fees was raised. The Association's representative sought clarification on what level of fees was proposed and queried whether the Government had consulted the Association on their introduction. At a subsequent meeting of the court users' group on 11 August 2011, the Director General's officer informed

the meeting that the regulations were still being drafted. The Association's representative stated that the Association had not been consulted and should be. On 22 August the Director General's officer spoke with the Chief Justice about the matter and produced to him a copy of the then draft regulation. The Chief Justice has told me that he informed such officer that he ought speak immediately about the matter with me as Association President. This also was not done. On that history we must conclude avoidance of consultation was deliberate.

- Implications of substance - there has been a 50% increase, over fees last revised in July 2010, for filing initiating process in the Supreme and District Court. Moreover, the full filing fee now applies to counterclaims (which are usually defensive in character). A substantial fee for issuing a subpoena has been introduced. What possible justification could there be for all that? Worse still, setting down fees and hearing fees have been introduced. There is little scope for reduction or exemption. Cynically again, the only body exempt from these fees or the filing fees is the State where it is litigating as a court user. In a conventional case the setting down fees vary from $1,125 at lowest in the District Court to $2,500 at highest in the Supreme Court. The daily fees for hearing (for the second and subsequent days) go from the same low of $810 to the same high of $1,800 (then doubling if a matter proceeds for more than nine days).
- Fees not used for the court -- without derogating from the lastmentioned complaints of substance, the court will not be receiving the new fees but rather they will be used to fund other measures, in respect of which the litigant paying the fees has no direct or indirect interest, namely the running of the Murri Court. The Murri Court is a proper policy measure but plainly ought be funded from consolidated revenue.

**Proper Consultation with the Bar Association:**

The State government has no reason to question the critical role and objective assistance afforded by the Bar Association in considering policy measures in the justice sphere.

The Association, with over 1000 members, is a broad church of legal expertise, of all political persuasions, which is a frequent constructive and usually decisive source of commentary in respect of proposals and drafting in the legal arena.

You, rightly, publically on a number of occasions, have praised the apolitical objective assistance the Bar Association has provided the government in legislative endeavours. Correspondingly, I have publically praised successive Attorneys General of the government for their consultation.

Plainly the government sought to avoid consultation with the Association on this issue. No prescience would have been required as to what our response would have been, particularly to the detail of this proposal.

Worse still, the Department knew of the Association's particular interest as noted above but studiously avoided involving us. We can only infer that occurred within the direction of executive government. That, with respect, was unforgiveable and those involved ought be censured.

**The Substance of the Proposal:**

I have made the point in the summary above but let me expand to drive it home.

The overarching comment is that both the increase in filing fees and introduction of the setting down and daily fees are tantamount to a new tax being imposed on Queenslanders in respect of services to which they ought be entitled in the event that, usually through no particular choice, they are forced to litigate. No-one engages in civil litigation, paying the legal costs therefor, unless it is a necessity (vexatious litigants aside).

Suffice it to say the consumer price index has not increased 50% in 12 months.

In relation to the setting down and daily fees the argument may come from some to the effect that such fees exist in the federal courts, and in some other state courts. Several points can be made about that:

- Merely because it exists elsewhere does not mean it is good policy (see examples further below).
- The fees in the Family Court are significantly lower ($608 setting down fee and $608 daily fee for all matters, compared with $1,125 to $2,500, and $450 to $3,000). They are lower again in the Federal Magistrates Court.
- A quite different regime exists in the state courts in Queensland, compared with the Federal Court and interstate courts, which already entails significant additional cost to claimants who come to be plaintiffs or applicants in state court disputes. In a personal injury claims sphere there is a pre-proceeding process in all cases. In all other claims in an initiated court proceeding the parties, in effect, are compelled to engage in alternative dispute resolution measures, usually mediation, to resolve disputes short of trial. These measures are apt but why demand more of litigants. The pre-proceeding measures introduced into New South Wales by the previous government have now been suspended or scrapped by the new government there.
- There are different cost regimes across the states and territories. In Queensland recoverable costs (referred to as standard, or party and party costs) usually only amount to 50% to 65% of the true out of pocket expense, that being due to scales which restrict recovery between parties. In New South Wales the gap between the two measures of cost is very narrow if non-existent.
- The opportunity for gaining a reduced fee provided by the regulation is narrow, being confined, in effect, to pensioners or those with government benefit cards, or also those with a legal aid certificate.
- As to the latter opportunity, again it is a cynical inclusion in the regulation given that civil legal aid in this state for superior court litigation has been non-existent for the last 25 years, the profession having to take up the slack with pro bono and speculative briefing.
- Any other reduction in fees is left by the regulation to the registrar, without descent to relevant circumstances other than general hardship.

Let me take two examples. To avoid any charge of over-statement, I will adopt a relatively modest claim, say of $250,000, in the District Court. The analysis below entails the additional fees that will be imposed by the measures introduced.

Assume the usual circumstances of no reduced fees being capable of being garnered. Assume also the need for a four day trial.

Example 1 – Suzie Home-Owner wishes to sue an insurance company for failing to pay under an insurance policy in respect of her home which has been inundated by flooding. Under the regulation, the increased filing fee is $185, the setting down fee is $1,125 and the daily hearing fees $1,350. The total increase in the fees therefore is $2,660. Suzie must pay this before she is entitled to have a trial.

Example 2 – Barry Business-Owner and his family conduct their business in a corporate name. A customer has failed to pay a debt. The company wishes to sue to recover same. The increased filing fee is $375, the setting down fee is $2,250 and the daily hearing fees $2,700. The total is $5,325.

If the above litigation was required to be conducted in the Supreme Court the fees would be at least one-third more.

Each of such notional plaintiffs must pay such additional sum before the defendant party to a trial.

Undoubtedly there will be some cases where litigants will consider the additional fees as the straw that breaks the camel's back. No doubt defendants will be alive to the disadvantage.

There are many personal injury plaintiffs who will not trigger any of the reduced fee opportunities. Most injured persons attempt to return to work, even if part-time. Many have savings. Means testing would remove many of them from the reduced fee categories.

Moreover, claimant workers who after court decision fall between the statutory mandatory final offers, will have an additional statutory fee to bear from their adjudicated damages.

**Conclusion:**

I apologise for the length of this letter. The point, however, is an important one.

This regulation ought be repealed or suspended until proper consultation with stakeholders and the public ensues. That has not taken place. At the very least the regulation ought be redrafted.

Before writing this letter I contacted your senior policy advisor on Saturday and asked to be furnished with an explanation as to what had occurred. I was happy to receive that from you or the Director General. I have received no such explanation.

Yours faithfully

**Richard Douglas S.C.**
**President**

cc. *The Hon. Chief Justice de Jersey*
*Her Honour Chief Judge Wolfe*
*Director- General, Department of Justice & Attorney- General*
*Jarrod Bleijie MP, Shadow Minister for Justice & Attorney- General*
*Queensland Law Society*
*Australian Lawyers Alliance (Queensland)*
*Queensland Council for Civil Liberties*