

## Legal Affairs and Community Safety Committee

Report No. 61, 56<sup>th</sup> Parliament

Exempt subordinate legislation tabled on 21 October 2019

### 1 Aim of this report

This report summarises the Legal Affairs and Community Safety Committee's findings following its examination of the exempt subordinate legislation within its portfolio areas tabled on 21 October 2019. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992*.

### 2 Subordinate legislation examined

The committee examined the following exempt subordinate legislation:

Subordinate legislation	Date tabled	Disallowance date
Public Trustee (Fees and Charges Notice) (No. 1) 2019	21 October 2019	18 March 2020

### 3 Committee consideration of the exempt subordinate legislation

#### 3.1 Policy objectives of the exempt subordinate legislation

The Public Trustee may, by gazette notice, fix fees and charges for services that the Public Trustee performs or provides.<sup>1</sup> Such a fees and charges notice is subordinate legislation and exempt subordinate legislation.<sup>2</sup>

The fees and charges in this notice are for services performed or provided by the Public Trustee including the administration of deceased estates, trustee services, acting as attorney under the *Powers of Attorney Act 1998*, and administration under the *Guardianship and Administration Act 2000*.

The *Public Trustee Act 1978* provides that the fees and charges must be reasonable having regard to the circumstances in which the service is provided.<sup>3</sup> According to the explanatory notes, the fees and charges are being increased by applying the Government indexation rate of 2.25%.<sup>4</sup>

#### 3.2 Lawfulness of the exempt subordinate legislation

The *Parliament of Queensland Act 2001* requires the committee to consider the lawfulness of the Public Trustee (Fees and Charges Notice) (No. 1) 2019.<sup>5</sup>

<sup>1</sup> *Public Trustee Act 1978*, s 17(1).

<sup>2</sup> *Public Trustee Act 1978*, s 17(6).

<sup>3</sup> *Public Trustee Act 1978*, s 17(3).

<sup>4</sup> Explanatory notes, p 2.

<sup>5</sup> See *Parliament of Queensland Act 2001*, s 93(1)(c).

### 3.2.1 Notification of the exempt subordinate legislation

Exempt subordinate legislation must be notified by publication of the subordinate legislation in the *Queensland Government Gazette* (gazette).<sup>6</sup>

The committee notes that there were two gazettals of what purports to be the same notice (Public Trustee (Fees and Charges Notice) (No. 1) 2019). This is an unusual circumstance.

The first version was published in the gazette on 28 June 2019 (Gazette No. 54 from p 365) and the second version on 26 July 2019 (Gazette number 77 from p 541).

The two gazetted notices contain variations, including some of substance, such that they could reasonably be considered to be two different versions, and so two different notices.

The differences between the two versions include:

- the addition of a clause
- correcting incorrect internal cross-references
- substituting a different (increased) amount for a specific hourly fee.

See the Appendix for a full comparison.

Both notices could be seen as being authorised by section 17(1) of the *Public Trustee Act 1978*.<sup>7</sup>

### 3.2.2 Tabling of the exempt subordinate legislation

Subordinate legislation must be tabled in the Legislative Assembly within 14 sitting days after it is notified.<sup>8</sup>

The required period for tabling (within 14 sitting days as required by section 49(1) of the *Statutory Instruments Act 1992*) expired on 23 October 2019 (for both gazettal dates).

The second version was tabled within this time. The notice tabled by the Attorney-General and Minister for Justice on 21 October 2019 bears a header referencing the later gazette number and date. As well, its contents match the later (26 July) version.

The notice gazetted on 28 June 2019 was never tabled.

### 3.3 Purported commencement of the exempt subordinate legislation

Each notice states that it commences on 1 July 2019 and that all previous fees and charges notices are revoked. The explanatory notes state that the new fees will commence on 1 July 2019.<sup>9</sup>

#### 3.3.1 Questions

If the two versions are properly to be regarded as two documents - two different notices, what are the consequences?

##### 3.3.1.1 *Effect of the 28 June notice*

Section 49 of the *Statutory Instruments Act 1992* states:

- (1) *Subordinate legislation must be tabled in the Legislative Assembly within 14 sitting days after it is notified under section 47.*
- (2) *If subordinate legislation is not tabled under subsection (1), it ceases to have effect.*

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<sup>6</sup> *Statutory Instruments Act 1992*, s 47.

<sup>7</sup> Section 17(1) of the *Public Trustee Act 1978* provides that the public trustee may, by gazette notice, fix fees and charges for services the public trustee performs or provides.

<sup>8</sup> *Statutory Instruments Act 1992*, s 49.

<sup>9</sup> Explanatory notes, p 2.

It can be argued that the notice gazetted on 28 June, having never been tabled, has ceased to have effect, by virtue of section 49(2).

In which case, questions arise as to whether it was effective at any time to:

- revoke the 2018 notice
- increase the fees and charges, and if so, for what period.

Relevant here is section 51 of the *Statutory Instruments Act 1992*, which provides for the 'limited saving of operation of subordinate legislation that cease to have effect' in these terms:

- (1) *This section applies if subordinate legislation ceases to have effect because it is not tabled or is disallowed.*
- (2) *The subordinate legislation is taken never to have been made or approved and any law or provision of a law repealed or amended by the legislation is revived.*
- (3) *However, subsection (2) does not affect anything done or suffered under the legislation before it ceased to have effect.*

### 3.3.1.2 Effect of the 26 July notice

Assuming that the version gazetted on 26 July is effective (as being authorised by section 17(1) of the Act), other issues arise regarding the effective date of the (second) notice and of the increased fees and charges.

- Section 2 of the notice states that the notice commences on 1 July 2019.
- The notice is made pursuant to section 17 of the *Public Trustee Act 1978* (the Act). Section 17(2) states:

*The fees and charges have effect from the day the notice is gazetted or a later day stated in the notice.*

- In section 3, the notice states that all previous fees and charges notices are revoked.
- Section 32 of the *Statutory Instruments Act 1992* provides that:
  - a statutory instrument which is required to be notified by gazettal (as here) commences on the day on which it is notified or published.
  - If such a statutory instrument is notified or published on a day after the day or time fixed by the statutory instrument for its commencement, the statutory instrument is valid, but commences on the day on which it is notified or published.

[Similar Public Trustee (Fees and Charges) notices in recent previous years have not contained a provision effecting the revocation of previous notices.]

In short, by virtue of section 17(2) of the Act, the fees and charges would have effect from the second gazettal date of 26 July 2019, but not before.

Section 17(2) operates in this case to postpone the effective date of the new *fees and charges*, but not the effective date of the notice as a whole. However, by virtue of section 32 of the *Statutory Instruments Act 1992* the commencement date of the second version is taken to be 26 July 2019 (notwithstanding section 2 of the notice itself).

It seems clear that the new increased fees, set out in the 26 July 2019 notice, could not apply until that date.

Areas of uncertainty arise regarding both revocation and the legislative basis for charging of fees.

### **3.3.2 Response from the Public Trustee**

Given the uncertainty as to the validity and effectiveness of each of the two notices and as to what fees and charges can properly be applied between 1 July and 25 July 2019, the committee contacted the Public Trustee to seek a response to the following issues:

- Was the 28 June notice (having not been tabled) effective to revoke the 2018 notice?

- Does the 26 July notice revoke the 28 June notice? (Given section 51 of the *Statutory Instruments Act 1992* was there anything in effect capable of being revoked?)
- Was there sufficient legislative basis at all for fees and charges at any level, or at any increased level, from 1 July 2019 until the new fees and charges took effect on 26 July?
- Is the statement in the explanatory notes that *The new fees will commence on 1 July 2019* still accurate?

In response, the Public Trustee advised:

Was the 28 June Notice effective to revoke the 2018 Notice?

*By operation of s 32 of the Statutory Instruments Act 1992 (Act) the 28 June Notice commenced on 1 July 2019. On its commencement, clause 3 of the Notice operated to revoke all previous notices, including the Public Trustee (Fees and Charges Notice) (No. 1) 2018 gazetted on 29 June 2018 (2018 Notice). The subsequent revocation of the 28 June Notice does not affect the revocation of the 2018 Notice.*

Does the 26 July Notice revoke the 28 June Notice?

*The 26 July Notice was notified and tabled in accordance with the requirements of the Act. By operation of s 32 of the Act, the 26 July Notice commenced on 26 July 2019 and remains effective. On commencement of the 26 July Notice, its clause 3 operated to revoke all previous notices including the 28 June Notice.*

Was there sufficient legislative basis at all for fees and charges at any level, or at any increased level, from 1 July 2019 until the new fees and charges took effect on 26 July?

*The 28 June Notice was effective from 1 July 2019 till its revocation on 26 July 2019. The fixing of fees and charges by the 28 June Notice is not affected by the notice's later revocation. Accordingly, the 28 June Notice was effective to fix the fees and charges for the period 1 to 26 July 2019.*

*The Public Trustee has identified that the only fee which was different between the two notices relates to the fees charged for property management services including inspections by building inspectors, effects officers or trusts officers. The Notice of 28 June incorrectly provided that this fee was calculated at the rate of \$158.45 per hour subject to a minimum of \$162.00 instead of the increased hourly rate of \$162.00.*

*A review of customer records indicates that approximately \$363.75 in fees were incorrectly charged to 23 Public Trustee customers as a result of the error in the first notice. Appropriate adjustments will be made to customer accounts as soon as practicable.*

Is the statement in the explanatory notes that 'The new fees will commence on 1 July 2019' still accurate?

*The Explanatory Notes to the 26 July Notice incorrectly state the commencement date of the notice as 1 July 2019. As noted above, by operation of s 32(2) of Act, the 26 July Notice commenced on the 26 July 2019.<sup>10</sup>*

### 3.4 Explanatory notes

Under the heading *Consistency with fundamental legislative principles*, the explanatory notes state:

*The subordinate legislation has been drafted with regard to the fundamental legislative principles in the Legislative Standards Act 1992.<sup>11</sup>*

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<sup>10</sup> Public Trustee, correspondence dated 4 March 2020, pp 1-2.

<sup>11</sup> Explanatory notes, p 2.

This statement does no more than state compliance with a general requirement to which all Queensland legislation should adhere.<sup>12</sup> The statement does not comply with the requirements for explanatory notes set out in Part 4 of the *Legislative Standards Act 1992* which, inter alia, require explanatory notes to include:

*... a brief assessment of the consistency of the legislation with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.*<sup>13</sup>

In this instance, the statement in the explanatory notes does not address the issue of consistency and reasons for any inconsistency.

The explanatory notes otherwise comply with part 4 of the *Legislative Standards Act 1992*.

#### **4 Recommendation**

The committee recommends that the House notes this report.

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<sup>12</sup> *Legislative Standards Act 1992*, s 4.

<sup>13</sup> *Legislative Standards Act 1992*, s 24(1)(i).

Appendix

**PUBLIC TRUSTEE (FEES AND CHARGES NOTICE) (NO. 1) 2019**

**COMPARATIVE TABLE OF CHANGED PROVISIONS**

(Varied text is highlighted in yellow)

Page	28 June	26 July
3	<p><b>6 Remission of fees</b></p> <p>The fees in this gazette notice apply to the types of services specified herein. However, pursuant to s 8 of the <i>Public Trustee Regulation 2012</i> the public trustee may remit any or all of the fees in any particular estate or matter otherwise payable. The public trustee's approved community service obligations address the ability of clients of limited means to pay fees for the level of service required by them, by exercising the authority in s 8 of the <i>Public Trustee Regulation 2012</i> to remit the fees payable by those clients to an appropriate level.</p>	<p><b>6 Remission of fees</b></p> <p>The fees in this gazette notice apply to the types of services specified herein. However, pursuant to s 8 of the <i>Public Trustee Regulation 2012</i> the public trustee may remit any or all of the fees in any particular estate or matter otherwise payable. The public trustee's approved community service obligations address the ability of clients of limited means to pay fees for the level of service required by them, by exercising the authority in s 8 of the <i>Public Trustee Regulation 2012</i> to remit the fees payable by those clients to an appropriate level.</p>
3	<p><b>7 Application of part 2</b></p> <p>This part applies to deceased estates and matters accepted for administration on or after the date of commencement. <del>with the exception of the additional service fees referred to in s 11.</del></p>	<p><b>7 Application of part 2</b></p> <p>This part applies to deceased estates and matters accepted for administration on or after the date of commencement, with the exception of the additional service fees referred to in s 11.</p>
5	<p><b>14 Fees payable under s 12</b></p> <p>The annual fees payable under s 12 are:</p>	<p><b>14 Fees payable under s 13</b></p> <p>The annual fees payable under s 13 are:</p>
5	<p><b>18 Fee payable under this part</b></p> <p>Subject to s 17 the fee payable shall be:</p>	<p><b>18 Fee payable under this part</b></p> <p>Subject to s 19 the fee payable shall be</p>
12	<p>Samay Zhouand</p> <p><b>Acting Public Trustee of Queensland</b></p>	<p>Samay Zhouand</p> <p><b>Acting CEO and The Public Trustee of Queensland</b></p>
22	<p>Inspections by building inspectors, effects officers or trust officers:</p> <p>Calculated at the rate of \$158.45 per hour for the time taken, subject to a minimum of</p>	<p>Inspections by building inspectors, effects officers or trust officers:</p> <p>Calculated at the rate of \$162.00 per hour for the time taken, subject to a minimum of</p>



Peter Russo MP

**Chair**

**March 2020**

**Legal Affairs and Community Safety Committee**

<b>Chair</b>	Mr Peter Russo MP, Member for Toohey, Chair
<b>Deputy Chair</b>	Mr James Lister MP, Member for Southern Downs, Deputy Chair
<b>Members</b>	Mr Stephen Andrew MP, Member for Mirani
	Mr Jim McDonald MP, Member for Lockyer
	Mrs Melissa McMahon MP, Member for Macalister
	Ms Corrine McMillan MP, Member for Mansfield