



PARLIAMENT OF WESTERN AUSTRALIA

**JOINT STANDING COMMITTEE
ON
DELEGATED LEGISLATION**

TWENTY-EIGHTH REPORT:

Supreme Court Amendment Rules (No. 2) 1997

Presented by the Hon Robert Laurence Wiese MLA (Chairman)

**28
November 1997**

Joint Standing Committee on Delegated Legislation

Members

Hon Bob Wiese MLA (Chairman)
Hon Nick Griffiths MLC (Deputy Chairman)
Hon Simon O'Brien MLC
Hon Barbara Scott MLC
Hon Jim Scott MLC
Mr Ted Cunningham MLA
Mr Norm Marlborough MLA
Mr Iain MacLean MLA

Advisory/Research Officer

Andrew Mason

Committee Clerk

Jan Paniperis

Terms of Reference

It is the function of the Committee to consider and report on any regulation that:

- (a) appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*
- (b) unduly trespasses on established rights, freedoms or liberties;*
- (c) contains matter which ought properly to be dealt with by an Act of Parliament;*
- (d) unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

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Report of the Joint Standing Committee on Delegated Legislation

in relation to

Supreme Court Amendment Rules (No. 2) 1997

1

Introduction

In the exercise of its scrutiny function the Committee reviewed the *Supreme Court Amendment Rules (No. 2) 1997* (“the Amendment Rules”) made under the *Supreme Court Act 1935*. Under the Committee’s Joint Rules it is the function of the Committee to consider and report on any regulations that unduly trespass upon established rights, liberties and freedoms (the reference to “regulations” includes “rules”). As the Amendment Rules impact financially upon litigants, a question has arisen as to whether they affect the principle of “Access to Justice”. The Committee has considered the Amendment Rules in this context and now reports its views to Parliament.

2

The Amendment Rules

The Amendment Rules primarily increase a number of fees to be taken in the Central Offices of the Supreme and District Courts. The Amendment Rules are attached and marked “Annexure A”.

The power to fix fees is derived from section 169 of the *Supreme Court Act 1935*. This section provides that “the Judges of the Supreme Court, or a majority of them, with the concurrence of the Treasurer may by order fix the fees and percentages to be taken in the Supreme Court.....”. The fees so fixed are applicable in the District Court by virtue of section 87 of the *District Court of Western Australia Act 1969*, which provides for the *Rules of the Supreme Court* for the time being to apply to the District Court, unless and until some other provision is made by the District Court Judges under section 88 of the *District Court of Western Australia Act 1969*. This latter power has not been exercised by the District Court Judges.

The Amendment Rules increase fees in connection with the administrative services provided by the Courts in relation to the processes involved in the preparation and disposal of civil litigation. For example the Amendment Rules increase the fee payable for commencing proceedings from \$265 to \$500. There are various increases in respect of the various components of the appeal process. Other increases include an increase in the fee payable for the taxation of costs awarded to a party. Where the amount claimed in a bill of costs is \$2 000 or more the fee has been increased from 2.5% to 7.5% of the amount at which the bill is drawn.

The Supreme Court provided the Committee with explanatory material and further information

in response to a query from the Committee. This information indicates that the Amendment Rules are the result of a review of fees undertaken by the Supreme Court Fees Review Committee at the request of Treasury in 1996. The Fees Review Committee made recommendations for a range of increases on 20 September 1996. After consultation between the Judges of the Supreme Court and the Chief Judge of the District Court some of these recommendations were accepted and a determination was made by the Judges in the exercise of their powers under section 169 of the *Supreme Court Act 1935* and with the concurrence of the Treasurer the Amendment Rules were made.

3 “Users Pays” v. “Access to Justice”

The explanatory material and further information provided by the Supreme Court states that in reviewing the fees the Court was mindful of the need to balance the principles of “Access to Justice” and “User Pays”. It is readily apparent that striking a balance between two such widely divergent principles is a difficult matter. On the one hand the Judges have expressed the view that the provision of court services in the trial of alleged offenders and the resolution of civil disputes is a core function of government, central to the maintenance of a democratic society under the rule of law. Whilst the provision of these core services are subject to the recovery of a reasonable portion of the costs of court administration by means of fees, the fees should not be so high as to deny or unreasonably limit access to justice. On the other hand the view has been expressed that the resources that underpin the provision of these core services are finite and cost recovery should be reasonable. What is a reasonable level of cost recovery that does not limit access to justice is a matter which the Supreme Court grappled with in reviewing the fees.

In this context the Supreme Court sought the views of the Auditor General’s office in correspondence, copies of which were provided to the Committee. In response the Acting Deputy Auditor General outlined a number of factors that he viewed as relevant from an audit perspective in delineating the application of the User Pays principle whilst recognising the importance of Access to Justice. Amongst others these factors include:

3.1 *Is there a more relevant categorisation or further sub-categorisation of matters considered by the Supreme Court and District Court than criminal and civil matters?*

(there are no fees for criminal matters, save in respect of appeals from Courts of Petty Sessions - can there be a further categorisation of matters such that there is greater cost recovery for some categories and less for others?);

3.2 *When addressing whether further sub-categorisation can take place, is there a discernable profile of matters?*

The Auditor General gave the example of a category of matters involving resolution of “commercial disputes” for which it may be reasonable and equitable for the parties to bear a very significant proportion of costs involved. In response to this suggestion the Chief Justice is of the view that it is superficial to say that in “commercial disputes” the parties should bear a very significant proportion of costs as a diverse group of litigants is covered by such terminology. Access to justice of individual plaintiffs, such as consumers, would be greatly compromised by a substantial increase in fees;

3.3 *Would higher court fees encourage speedier and alternative methods of dispute resolution?*

3.4 *What is the comparative fee policy and practices in other comparable jurisdictions, both within Australia and internationally?*

The Committee has noted that the review of fees conducted by the Supreme Court involved consideration of the fees set in other Supreme Courts and the Family Court of Australia which identified that Court fees in Western Australia were below the national average. It is also understood that consideration was given to the relativity of Supreme and District Court fees to fees in other courts and tribunals in the State;

3.5 *Should a person's ability to pay be a factor in the setting of fees? To what extent would say a 20% increase in fees detrimentally affect a persons capacity to access justice? Would such an increase be material in terms of a litigant's total legal costs? Would it influence a litigant's decision to bring a matter to trial?*

In response to this the Chief Justice expressed the view that the total costs of litigation are already a considerable burden on many members of the community and that the challenge should be to reduce those total costs. The Committee also highlights to the House that the fee increases under consideration are in most cases of much greater magnitude than 20%. The taxing fee has been increased by 300% and the fee for commencing proceedings by approximately 89%;

3.6 *Should commercial disputes incur the same court fees irrespective of the amount in dispute?; and*

3.7 *What is the cost to the State of civil matters dealt with by the Court and what is the value of fees recovered in relation to these matters?*

In this respect the Committee has been advised that the cost of the relevant services in 1996-97 provided by the Supreme Court was \$7.35 million and by the District Court was \$5.66 million. The Supreme Court received \$1.57 million in court fees in the same period and the District Court received \$2.21 million. Based on projections the fee increases are estimated to generate an additional \$400,000 for the Supreme Court and \$2 million for the District Court.

These factors highlight some of the issues that require consideration in determining the appropriate level of fees in the context of the principle of Access to Justice. In view of the current motion for disallowance of the Amendment Rules before the Legislative Council the Committee felt it appropriate to bring these issues to the attention of the House to facilitate debate. A copy of the Deputy Auditor General's letter to the Chief Justice dated 6 December 1996 is attached and marked "Annexure B". a copy of the Chief Justice's response dated 16 April 1997 is attached and marked "Annexure C".

4

Undue Trespass on Established Rights?

In examining whether the Amendment Rules unduly trespass on established rights the Committee noted the judgment was determined by those associated with the process. The review of the level of fees was based on a review of the fees by the Supreme Court Fees Review Committee which comprises various administrative officers within the Court who report back to the Chief Justice. It is noted that not all of the recommendations were accepted by the Judges. Further consideration was given to the issue of balancing the competing principles of “Access to Justice” and “User Pays”. The Office of the Auditor General was consulted. For example a hearing fee which is used in some other jurisdictions was rejected as the Judges did not consider it appropriate that fees should be charged for the time spent by judicial officers in the hearing and determination of cases.

In the circumstances the Committee resolved to take no further action.

“ ANNEXURE A ”

Draft 1 14 May 1997

SUPREME COURT ACT 1935
SUPREME COURT AMENDMENT RULES (No. 2) 1997

Made by the Judges of the Supreme Court.

3507/36

Citation

1. These rules may be cited as the *Supreme Court Amendment Rules (No. 2) 1997*.

Commencement

2. These rules come into operation on 21 July 1997.

Principal rules

3. In these rules the *Rules of the Supreme Court 1971** are referred to as the principal rules.

[* Reprinted as at 21 November 1994.
For amendments to 14 May 1997 see 1996 Index to Legislation of Western Australia, Table 4, pp. 260-61.]

Second Schedule amended

4. The Second Schedule to the principal rules is amended by deleting forms 13, 14, 16 and 44.

Fifth Schedule amended

5. (1) Part I of the Fifth Schedule to the principal rules is amended in item 1 —

(a) in paragraph (a) —

- (i) by deleting “, including filing a draft notice of appeal;” and
- (ii) by inserting the following after “1A” —

“ . 1B ”;

and

(b) by deleting paragraph (b) and the corresponding fee of “265.00” and substituting the following —

“

(b) Filing a counterclaim; or

(c) Issuing a third party notice or a notice under O.19, R.8 500.00

”.

(2) Part I of the Fifth Schedule to the principal rules is amended by deleting item 1A and substituting the following items —

“

1A (a) An application to extend a period of time fixed by law including an application to extend time before proceedings are commenced;

Supreme Court Amendment Rules (No. 2) 1997

	(b)	An application to limit a period of time within which proceedings may be taken;	
	(c)	An application for leave to serve a writ or notice of a writ out of jurisdiction;	
	(d)	An application to swear to the death of a person;	
	(e)	An application to remove a local court appeal into the Full Court; or	
	(f)	An application for inclusion in the Expedited list	200.00
1B	(a)	Application for leave to appeal	200.00
	(b)	Application for leave to appeal made to the Full Court after an application of the kind referred to in item 1B (a) has been made	200.00
	(c)	Filing a draft notice of appeal in accordance with O.63A, R.3 (1) (b)	300.00
	(d)	Commencing an appeal —	
		(i) where a draft notice of appeal in respect of which a fee has been paid under item 1B (c) stands as the notice of appeal	Nil
		(ii) in any other case	500.00
	(e)	Filing a cross-appeal	500.00

(3) Part I of the Fifth Schedule to the principal rules is amended in item 3A by deleting “200.00” and substituting the following —

“ 500.00 ”.

(4) Part I of the Fifth Schedule to the principal rules is amended in item 4 by deleting “70.00” and substituting the following —

“ 100.00 ”.

(5) Part I of the Fifth Schedule to the principal rules is amended in item 5 —

(a) in paragraph (a) by deleting “20.00” and substituting the following —

“ 50.00 ”;

(b) in paragraph (b) (ii) by deleting “2.5%” and substituting the following —

“ 7.5% ”; and

(c) in the NOTE to the item by deleting “2.5%” and substituting the following —

“ 7.5% ”.

Supreme Court Amendment Rules (No. 2) 1997

(6) Part I of the Fifth Schedule to the principal rules is amended in item 6 by deleting "10.00" and substituting the following —

" 20.00 "

(7) Part I of the Fifth Schedule to the principal rules is amended in item 8 —

(a) in paragraph (b) by deleting "70.00" and substituting the following —

" 200.00 "; and

(b) in paragraph (c) by deleting "20.00" and substituting the following —

" 50.00 "

(8) Part I of the Fifth Schedule to the principal rules is amended in item 9 by deleting "50.00" and substituting the following —

" 150.00 "

(9) Part I of the Fifth Schedule to the principal rules is amended in item 10 —

(a) by deleting paragraph (a) and the corresponding fee of "5.00"; and

(b) in paragraph (h) by deleting "20.00" and substituting the following —

" 50.00 "

Dated: 22 May 1997 1997.

David Malcolm

Chief Justice's signature

J. G. Young
W. P. Pidgeon

Ellis
Sam

Sam
R. J. M. Anderson
W. P. Pidgeon

W. P. Pidgeon
W. P. Pidgeon

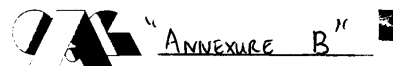
Judges' signatures

- DAVID . K. MALCOLM
- G. A. KENNEDY
- W. P. PIDGEON
- D. A. IRELAND
- M. J. MURRAY
- R. J. M. ANDERSON
- N. J. OWEN
- K. WHITE
- GRAEME SCOTT
- C. D. STEYTLER
- K. H. PARKER
- D. C. HEENAN
- A. J. TEMPLEMAN
- C. WHELAN

I concur in the foregoing rules and order -



TREASURER



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memo on
for
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Our Ref: 0777

The Hon Mr Justice DK Malcolm AC
Chief Justice of Western Australia
Chief Justice's Chambers
Supreme Court of Western Australia
Barrack Street
PERTH WA 6000

Dear Chief Justice

FEES IN THE SUPREME COURT AND DISTRICT COURT

Thank you for your letter of November 13, 1996 in which you sought views and comments from an audit perspective about the complex issue of setting court fees in the Supreme and District Courts.

I relate to the sentiments that cost recovery should be reasonable but not so high as to deny or unreasonably limit access to justice. Similarly while community access to justice is fundamental to society, the resources that underpin that right are nevertheless finite. Accordingly, determining what is a reasonable level of costs that litigants should pay is clearly difficult and inherently subjective.

In the context of criminal law where no fees are taken by the Supreme Court or the District Court save in respect of appeals from Courts of Petty Sessions, this practice appears sustainable as criminal matters are clearly a core function of Government, central to the maintenance of society as we know it.

On the other hand, civil matters appear to warrant consideration of wider issues. If it is accepted the primary beneficiaries of civil trials are those directly involved it may be arguable they should bear the bulk of the court costs rather than have them borne by the community at large who may receive little discernible benefit from the court's deliberations. An influencing issue in this latter respect could be factors such as the extent of precedent setting which benefits the wider community.

Factors which appear to have relevance from an audit perspective in delineating the application of the user pay principle while recognising access to justice are outlined below.

Contextual issues

- Are there comparable core government services and what is the fee policy applied? For example, representation to parliamentarians and the ombudsman do not attract fees while freedom of information requests do.
- Is there a more relevant categorisation or further sub categorisation of matters considered by the Supreme Court and District Court than Criminal and Civil matters?
- Is there a discernible profile of matters? For example, for a significant proportion of civil matters involve resolution of commercial disputes which case it may be reasonable and equitable for the parties to bear a very significant proportion of costs involved.
- Are there particular views held by stakeholders including the general community and the legal profession?
- What is the comparative fee policy and practices in other comparable jurisdictions, both within Australia and internationally?
- When were court fees last reviewed and on what basis did this occur?
- Would higher court fees encourage speedier and alternative methods of dispute resolution (Sackville Report: Access to Justice p. 386)?

Access and Equity Issues

- Should a person's ability to pay be a factor in the setting of fees? To what extent would say a 20% increase in fees detrimentally affect a persons capacity to access justice? Would such an increase be material in terms of a litigants total legal costs? Would it influence a litigants decision to bring a matter to trial?
- To what extent does the Court's authority to waive all or part of the fees provide an effective tool to assist litigants of below ordinary means to access justice?
- Are unmeritorious matters brought before the Courts and if so, would a higher level of court fees provide some relief?
- Should commercial disputes incur the same court fees irrespective of the amount in dispute?
- Does the fee structure relate to court services provided? Are litigants paying for services not required?


Cost Related Issues

- What is the cost to the State of civil matters dealt with by the Court?
- What is the value of fees recovered in relation to these matters?
- What is the average cost to a litigant of bringing a matter to trial?
- What proportion do court fees represent of a litigants total legal costs?

On another matter, in March 1996, you suggested that we may like to consider conducting a performance examination of the superior courts' caseload management. We are now in a position to explore this possibility and will contact your Chambers shortly to arrange a suitable time to discuss this. We have also written to the Chief Judge requesting a similar meeting.

In the meantime, should you have any concerns or questions please contact me on 222 7500.

Yours sincerely



PETER WILKINS
A/DEPUTY AUDITOR GENERAL
PUBLIC SECTOR PERFORMANCE
December 6, 1996

" ANNEXURE C "

16 April 1997

Our Ref: SCRA2014
Your Ref: 0777

Mr Gordon Robertson
Deputy Auditor General
Public Sector Performance
4th Floor Dumas House
2 Havelock Street
WEST PERTH WA 6005

Dear Mr Robertson,

Fees in the Supreme Court and District Court

I refer to the letter dated 6 December 1996 which I have received from Mr Peter Wilkins, A/Deputy Auditor General.

The contents of your letter have been carefully reviewed by the Judges of this Court and I have also consulted the Chief Judge of the District Court.

The question of Court fees is a difficult and sensitive area in the context of which recognition of the true role of the courts and the limited relevance of the "user pays" policy are vital matters of concern to the courts as the third arm of government.

In my opinion the service operated by the courts in the trial of alleged offenders and the resolution of civil disputes of various kinds is a core function of government, central to the maintenance of a democratic society under the rule of law. The determination of the applicable law and the application of that law to the facts of a given case is a governmental function. While the parties to a civil trial who directly benefit might be the parties directly involved, society is also the beneficiary because a governmental mechanism exists by which the law can be developed and proclaimed in individual cases for the benefit of society as a whole. It is in this context that the judiciary is the third arm of government.

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Chief Justice's Chambers, Supreme Court of Western Australia

16 April, 1997

The fees which are charged to litigants other than those who are involved in criminal proceedings are intended to provide for a reasonable recovery of portion of the costs involved in operating the Registry which provides administrative services in relation to the processes involved in the preparation and disposal of cases.

In my opinion, there are risks in "a further sub-characterisation of matters". It is superficial to say that in "commercial disputes" the parties should bear a very significant proportion of costs. Quite often, in so-called commercial disputes there is a diverse group of litigants involved, not all of whom have substantial resources. The asbestosis/mesothelioma cases against one of Australia's largest companies had major commercial overtones. Consumer litigation in the trade practices area is another. The access to justice of individual plaintiffs, such as consumers, would be greatly compromised by a substantial increase in fees.

One justification put forward by Mr Wilkins is that higher fees can be imposed because they represent only a small proportion of the total costs involved. This is a questionable justification. The total costs are already a considerable burden on many members of the community. Our challenge is to reduce those costs.

Yours sincerely,

A handwritten signature in black ink, appearing to read "D.M.", with a small mark below it.

The Hon Justice David Malcolm AC
Chief Justice of Western Australia

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