

# LAW REFORM

## Tax law reform — another obstacle for access to justice

The federal government publicly released its new tax package (inclusive of the Goods and Services Tax (GST)) in August 1998. Since its release, the Federation of Community Legal Centres (Vic.) has expressed concern about the potential impact of the changes on access to legal aid and access to justice issues. The Federation expressed its concerns to the National Secretariat of Legal Aid Directors (National Legal Aid), seeking information that they might have received as to the potential impact of the GST on legal aid and community legal centres (CLCs). In reply, National Legal Aid forwarded information that they had received from Federal Treasury — a single page fact sheet entitled 'How will the GST apply to legal services?'

As this information was not sufficiently detailed, the Federation wrote to the Attorney-General on 24 August 1998, outlining a series of specific questions regarding the impact of the proposed GST on legal aid and CLCs. Due to the timing of the federal election, and the subsequent announcement of the current Senate inquiries into the GST, a formal acknowledgment of the correspondence was not provided to the Federation until 6 January 1999. However, no response to the specific issues raised in the original correspondence has been received as yet.

In December 1998, the Senate announced that a Senate Select Committee would be established to inquire into and report on the broad economic effects of the government's taxation reform legislation. One of the specific issues the committee was to inquire into was the effect of the proposals on the cost of access to justice.

### Effect on legal fees

The government has acknowledged that the GST will apply to legal fees, in line with the treatment of most other services. It has been estimated by both the Law Society of New South Wales and the Law Council of Australia, that the effect of a GST on private solicitors' fees will involve a net 8% increase in the cost of engaging private practitioners and that this will be passed on to the consumer in the form of increased fees. The reason for the increase is that for a typical legal firm, there are very



few business inputs which attract sales tax, and as a result, the effective after-GST cost of legal services is likely to increase by close to the full 10%. For most law firms, there is a low level of non-labour input, and therefore the amount of GST that most law firms will be able to offset from input tax credits is relatively small.

### What does this mean for legal aid work undertaken by private legal practitioners?

Given that private legal practitioners are the largest providers of legal aid services, it is likely that the introduction of a GST will have a significant impact on the ability of private practitioners to continue to provide such services at the same level. The impact will be felt in both:

- legally aided matters undertaken by the private profession;
- pro bono and discounted services undertaken by the private profession which are not eligible for legal aid.

### Matters funded by Legal Aid Commissions

The government has advised that where individuals are eligible to receive legal aid, there will be little, if any, GST implications. Treasury has advised that as Legal Aid Commissions (LACs) are public benevolent institutions (PBIs), LACs will be able to claim input tax credits for the GST components included in a private practitioner's bill.

However, there is considerable concern that the status of LACs as either PBIs or charitable institutions is still in some doubt. This would invalidate the above advice from Treasury, and would have the effect that any GST borne by LACs, whether through their operating expenses, or capital equipment purchases, or through the bills received from the private profession for legally

aided matters, will significantly diminish the pool available for disadvantaged people seeking to access their rights. This point of confusion must be clarified and, if necessary, remedied, before the tax legislation is passed by the Senate.

If the position is that LACs are in fact PBIs, then LACs will be in the position of having to claim input tax credits for every account of every matter they assign to the private profession. There is no indication as to the length of time it will take for LACs to receive the financial recompense due to them as a result of these input tax credits. As LACs operate within extremely tight budgets, with limited cash reserves, the delay in receiving the credits due to them will further restrict their ability to carry out their statutory functions.

In addition, the process of claiming input tax credits for every account rendered by the private profession will result in a significant increase in the administrative costs for LACs. There has been no indication that LACs will receive additional funding to assist them in meeting this additional administrative burden. LACs will find it extremely difficult to cover this additional cost out of existing budgetary allocations.

This administrative burden will also be a major issue for private practitioners undertaking legally aided matters. The vast majority of legal firms in Australia which provide legal aid services are in fact small to medium sized practices, which can be more accurately characterised as small businesses. Sixty six percent of law firms employ less than five people, and a further 29% employ less than 20 people (ABS 1995/6 — Survey of legal services).

There is widespread opinion that the private profession plays a significant role in legal aid service delivery by accepting grants of legal aid assistance to handle particular matters at a vastly reduced rate than they would otherwise charge. The legal aid scale is not an accurate reflection of the amount a private solicitor would charge a fully paying client to handle a matter.

For privately funded matters, private practitioners will be able to factor the additional administrative burden of collecting the GST into a final bill.

However for legally aided matters, with fixed legal aid scale fees, the additional administrative burden will have to be borne by the practitioner, thus providing an added disincentive for them to undertake legally aided work.

#### *Pro bono and discounted services from the private profession*

Treasury has indicated that where legal aid services are provided free of charge, no GST will be payable. On 23 March 1999, in answer to a question from Senator Barney Cooney, Assistant Treasurer Rod Kemp indicated that if pro bono work is provided by the private profession absolutely free of charge, then no GST will apply. However, the situation appears to be very different in relation to the pro bono services provided by the private profession in the form of discounted services provided in relation to those matters no longer eligible for grants of legal aid.

As a result of funding cuts to legal aid announced in the 1996 federal budget (\$120 million over three years), LACs were forced to significantly tighten eligibility guidelines in order to restrict the matters for which legal aid assistance would be provided. The sort of matters which are no longer to be eligible for grants of legal aid include equal opportunity and discrimination matters, employment disputes, immigration matters (particularly asylum applications), debt and bankruptcy matters, motor vehicle accident property damage disputes, tenancy disputes, civil disputes under \$5000, and various summary criminal law matters.

As a result, increasing numbers of disadvantaged people on social security and low incomes, have been forced to rely on the limited resources of CLCs, or endeavour to pay for the services of a private practitioner. In the case of the latter, services may be provided either completely free of charge, or as is more often the case, at discounted rates.

The affect of the new tax system will be that increasing numbers of people will be unable to afford and access the services of a private solicitor (with the consequent 8% increase in fees) for matters for which eligibility for legal aid is no longer available. Accordingly, the gap between privately funded legal service delivery and legally aided service delivery will widen, with the level of unmet legal need in the community, already regarded by many as being at crisis levels, increasing. Increasing de-

lays and inefficiencies in various court jurisdictions arising from increased numbers of unrepresented litigants will be a natural flow-on effect.

#### **Effect on community legal centres**

The administrative burden on LACs mentioned above will also be an issue that will confront CLCs, given the likelihood that they will be regarded as PBIs, and therefore GST free. CLCs will be required to claim input tax credits for all purchases and operating expenses. The administrative burden of doing so will place an added strain on centres which already operate close to budget with few cash reserves. Delays in receipt of reimbursements for the input tax credits will be extremely difficult for CLCs to manage.

In addition, there are real concerns that the production and retail of community legal education publications will be regarded as commercial activities, and therefore a GST will apply to their cost to the community. The production of CLE materials which provide essential information to those in need in the community has been a significant part of the work of CLCs. Many of these publications are retailed by CLCs in order to cover production costs and future publication. These publications are not retailed with a view to making a profit. They are priced at minimal cost to allow for maximum accessibility by the community.

By adding to the cost of these publications in this way, the access to these materials will be restricted, as those most in need of the information contained in these publications, who cannot afford to access legal advice, will find it more difficult to purchase these publications. It is submitted that the production and retail of community legal education materials are non-commercial activities, as they are not profit-driven, and they seek to deliver essential information to the community at minimal cost.

#### **Conclusion**

The paucity of information that has been released to the community as to the full impact of the proposed new taxation system on community and welfare organisations is of major concern. Nowhere is this more telling than in relation to the potential impact on access to justice and legal aid issues. However, it seems clear that the proposed GST

will further restrict access to justice and the legal system for those people who are deemed to be ineligible for grants of legal aid assistance, and who do not have sufficient resources to afford private legal representation. At a time when the impact of the 1996 federal government budget cuts to legal aid is resulting in increasing numbers of disadvantaged Australians finding it impossible to obtain legal aid assistance, and consequently in increasing levels of unmet legal need, the proposed 'new tax system' will represent a whole new barrier to people attempting to access the legal system.

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