

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 282

Issued by Authority of the Attorney-General

Judiciary Act 1903

High Court of Australia (Fees) Regulation 2012

Section 88(ca) of the *Judiciary Act 1903* (the Judiciary Act) provides, in part, that the Governor-General may make regulations prescribing the fees payable in respect of proceedings in the High Court and the execution of the process of the High Court.

The *High Court of Australia (Fees) Regulations 2004* (the 2004 Regulations) prescribes certain fees for court proceedings and makes provision about the payment of those fees.

The purposes of the *High Court of Australia (Fees) Regulation 2012* (the Regulation) are to replace the 2004 Regulations and to implement a range of reforms to court fees, including:

- general increases to existing civil law fees by 15 percent, increasing fees payable by corporations by around 40 percent, and introducing a separate higher fee for a corporation that is a publicly listed company
- removing the reduced fee of \$100 now payable by legal aid recipients and people on Commonwealth income support, and providing that those persons need not pay court fees (other than some photocopying fees), and
- other reforms to streamline fees administration.

These measures are part of wider reforms announced in the 2012-13 Budget which also include reforms for the Federal Court of Australia, the Family Court of Australia and the Federal Magistrates Court of Australia.

The High Court of Australia was consulted on the content of the Regulation. The consultation involved exchange of correspondence and discussions.

The Office of Best Practice Regulation was consulted on the measures and advised that no Regulation Impact Statement was required.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on 1 January 2013.

Details of the Regulation are as follows:

Part 1 – Preliminary

Section 1 – Name of regulations

This section provides that the name of the Regulation is the *High Court of Australia (Fees) Regulation 2012*.

Section 2 – Commencement

This section provides that the Regulation commences on 1 January 2013.

Section 3 – Definitions

This section provides for definitions of terms used in the Regulation. One significant new definition is explained below.

‘publicly listed company’

This term is defined to mean a company that is listed on a stock exchange or financial market in any country. Filing and hearing fees for civil law matters are set at higher levels for a publicly listed company.

Section 4 – Meaning of *corporation*

This section provides that the term ‘corporation’, where it is used in the Regulation, includes the bodies mentioned in subsection 4(1), with the exceptions set out in subsection 4(2).

Paragraphs 4(1)(a) to (c), and (e), and the exception in subsection 4(2)(a) in relation to corporation sole that is not a public authority, reflect the meaning of ‘corporation’ under section 57A of the *Corporations Act 2001* (the Corporations Act). While the term ‘corporation’ had been defined, under the 2004 Regulations, to mean a corporation within the meaning of the Corporations Act, some strata corporations which satisfy that definition are excluded by State laws from the Corporations Act.

Paragraphs 4(1)(d) also includes a public authority, defined as a body or authority of the Commonwealth or of a State or Territory, within the meaning of the term ‘corporation’, so that government agencies will pay fees under the Regulation at the corporation rate.

Paragraphs 4(2)(b) and (c) provide that a small business and also an unincorporated not-for-profit association is not a corporation for the purpose of court fees. A small business is defined as a business with no more than 19 employees, and a total turnover of less than \$2 million each financial year. A not-for-profit association is defined as a society, club, association or body that is not formed for the purpose of trading or securing pecuniary profit from its transactions for its members. A corporation that is a small business or an unincorporated not-for-profit association pay fees under the Regulation at the non-corporate rate.

Section 5 – Application

This section provides that the Regulation applies to fees for filing documents lodged on or after 1 January 2013 and to fees relating to requests on or after 1 January 2013 for a hearing or for obtaining a document or the provision of a service.

Part 2 – Fees

Division 2.1 – Fees—general

Section 6 – Purpose of Part

This section provides that Part 2 sets out matters relating to fees in the High Court.

Section 7 – Fees

Subsection 7(1) provides for Schedule 1 to the Regulation to set out court fees payable in the High Court.

Subsection 7(2) provides that the rate of the fee charged depends on whether the person being charged is a publicly listed company, a corporation or an individual. Some fee items do not have separate rates for publicly listed companies and corporations and the fee rate is the rate specified.

Subsection 7(3) provides that where multiple persons are liable to pay the fee, then the fee rate charged is the highest rate. For example, if a document is filed by two applicants – a corporation and a natural person – the fee charged is the rate for a corporation.

Division 2.2 – Liability to pay fees

Section 8 – Fees other than hearing fees

This section specifies who is liable to pay a fee other than a hearing fee and when they are liable to pay the fee. This section provides that a filing fee, a fee for obtaining a document, and a fee for a service, is payable by the person for whom the document is filed or obtained or for whom the service is provided, and that it is payable before the document is filed or obtained or before the service is provided.

Section 9 – Hearing fees

This section specifies who is liable to pay a hearing fee and when the fee is payable.

Subsection 9(1) provides that a hearing fee in relation to a proceeding is payable by the person who commences the proceeding.

Subsection 9(2) provides that the court, a justice of the court, or a registrar can order that another party to the proceeding is liable to pay the fee or part of the fee instead of the person liable to pay the fee.

Subsection 9(3) provides that fee items 108 and 109 must be paid when the document to which the hearing relates is filed. For example, if a civil notice of appeal is filed, then fee item 109 must be paid for the first day of a Full Court hearing when the notice of appeal is filed.

Subsection 9(4) provides that fee item 110 must be paid:

- no later than two business days before the hearing day, if the hearing is the second or subsequent business day after the day the document is filed, or
- no later than 9.30am on the hearing day if the hearing is the next business day after an earlier hearing day.

Subsection 9(5) provides that fee item 111 must be paid:

- at the time of filing the document to which the hearing relates, if the hearing is later during the day on which the document is filed (or the next following business day)
- no later than two business days before the hearing day, if the hearing is the second or subsequent business day after the day the document is filed, or
- no later than 9.30am on the hearing day if the hearing is the next business day after an earlier hearing day.

Division 2.3 – When fee is not payable

Section 10 – When fee is not payable

This section sets out the circumstances or proceedings where specified fees are not payable.

Subsection 10(1) provides that a fee is not payable where another person has paid the fee.

Subsection 10(2) provides that no fees are payable where a convention to which Australia is party provides that no fee is to be payable.

Subsection 10(3) provides that Full Court hearing fees are not payable where the proceeding is an interlocutory proceeding.

Subsection 10(4) provides that no hearing fees are payable if the sole purpose of the hearing is the delivery of a reserved judgment.

Division 2.4 – Exemptions from liability to pay fee

Section 11 – Persons exempt from paying fees

This section provides a fee exemption for the same categories of persons who paid the reduced fee under regulation 9 of the 2004 Regulations. These categories of persons are:

- recipients of legal aid under a scheme or service approved by the Attorney-General
- persons holding certain concession cards
- persons serving a term of imprisonment or otherwise detained in a public institution
- persons aged less than 18 years, and
- persons receiving youth allowance, Austudy payments or benefits under the ABSTUDY scheme.

The *High Court of Australia (Fees) Amendment Regulations 2010 (No. 2)*, which commenced on 1 November 2010, introduced a reduced fee of \$100 for persons in the above categories. Prior to 1 November 2010, persons in those categories did not pay court fees (other than for photocopying). This section effectively reverts to the arrangements existing prior to introduction of the reduced fee.

This section also extends the categories of persons who are exempt from paying court fees to include persons who have been granted assistance under Part 11 of the *Native Title Act 1993*. Such persons were not eligible to pay the reduced fee in the High Court under the 2004 Regulations. The inclusion of such persons provides consistency with the Federal Court of Australia, where such persons, who have, since November 2010, paid the reduced fee of \$100 are, under the *Federal Court and Federal Magistrates Court Regulation 2012*, exempt from paying court fees as of 1 January 2013.

Section 12 – Financial hardship fee

This section provides that a registrar can specify that a person may pay the financial hardship fee mentioned for an item in Schedule 1 to the Regulation, if payment of the fee would cause financial hardship to the person after considering their income, day-to-day living expenses, liabilities and assets. These considerations are the same as those considered under regulation 10 of the 2004 Regulations.

The financial hardship fee in Schedule 1 is one-third of the full fee for individuals, rounded down to the nearest \$5.

Division 2.5 – Payment of fees

Section 13 – Deferral of payment of fee

This section allows the registrar to defer the time for payment of a filing fee or a hearing fee if in the registrar's opinion the need to file the document or conduct the hearing is so urgent it overrides the requirement to pay the fee at the time set out in the Regulation. This consideration is the same as the consideration under regulation 11 of the 2004 Regulations but extends to hearing fees.

Subsection 13(3) requires, where the time for payment of a fee has been deferred, the fee to be paid within 28 days after the day payment is deferred, or within another period approved in writing by a registrar. These time periods apply instead of the time for payment of the fee under paragraph 8(2)(b) and subsections 9(3), (4) and (5).

Subsection 13(4) clarifies that a fee can only be deferred once.

Section 14 – What happens if fee is not paid

This section sets out what happens if a fee is not paid and it is not deferred under section 13.

Subsection 14(2) provides that if the fee must be paid before or at the time of the filing of a document or the provision of the service for which the fee is payable, the document must not be filed or the service provided until the whole fee is paid.

Subsection 14(3) provides that, in the case of an unpaid hearing fee in relation to a proceeding:

- the court or a justice of the court may order that no proceeding, or no proceeding other than a specified proceeding, is to take place without permission
- a person, other than the person required to pay the fee, may pay the fee (without affecting any power for the making of an order for costs for the fee), and
- the court or a justice of the court may vacate the hearing day.

Division 2.6 – Miscellaneous

Section 15 – Refund of fees

This section sets out the circumstances in which a fee can be refunded.

Subsections 15(1) and (2) provide an entitlement to a refund of an amount in relation to the payment of a fee if a person pays more than he or she is required to pay for the fee under the Regulation. The amount to be refunded, under that entitlement, is the difference between the amount paid by the person and the amount the person is required to pay the fee.

Subsections 15(3) and (4) provide an entitlement to a refund of a hearing fee paid by a person where the hearing does not occur; or only occurs for making formal orders; or the hearing day has not been fixed and the proceedings are discontinued or otherwise determined. To obtain a refund when a hearing does not occur or occurs only to make formal orders, the person who has paid the fee must notify a registrar in writing that the hearing will not occur at least 10 business days before the hearing day. In the case of any hearing day fixed less than 10 business days before the hearing day, the person must have notified a registrar in writing at least two business days before the hearing day.

Section 16 – Biennial increase in fees

This section provides for automatic biennial increase of the court fees set out in Schedule 1 to the Regulation, commencing from 1 July 2014. The fees will be increased biennially in accordance with upwards movement in the All Groups Consumer Price Index published by the Australian Statistician.

Section 17 – Notice of decision and AAT review

This section (subsection 17 (4)) provides a right of appeal to the Administrative Appeals Tribunal (AAT) from a decision of a registrar about a decision under section 12 (the financial hardship fee).

The section requires a registrar to give a notice of the decision to the person who is seeking to pay the financial hardship fee (subsection 17(1)), within 28 days after making the decision (subsection 17(2)). The notice must set out the decision and, for any decision not to allow a person to pay the financial hardship fee, a statement that the person can apply to the AAT for review of the decision under section 12 and the reasons for the decision (subsection 17(3)).

Subsection 17(5) provides that failure to advise of rights of appeal to the AAT does not affect the validity of the decision made by the registrar.

Section 18 – Debt due to Commonwealth

This section provides that if a fee is not paid in accordance with the Regulation, then it immediately becomes a debt due to the Commonwealth. This includes where a fee is not paid at the end of a deferral period.

Part 3 – Repeal and transitional

Section 19 – Repeal

Subsection 19(1) repeals the 2004 Regulations.

Subsection 19(2) provides that the 2004 Regulations continue to apply to a fee for a service, a hearing, or the obtaining of a document, requested prior to 1 January 2013.

Schedule 1 – Fees

Part 1 – Filing fees and hearing fees

Schedule 1 lists the fees payable for the filing of documents, a hearing conducted by the court, or the provision of a document or service.

The fees listed are the fees prescribed under the 2004 Regulation, as increased every two years in accordance with regulation 14 of the 2004 Regulations, with the following changes.

The fee amounts in Schedule 1 of the 2004 Regulations are updated to reflect fee increases as part of the 2012-13 Budget, with fees generally increased by 15 percent and by 40 percent for corporations. These increases are applied to fee amounts listed in the *Australian Government Notices Gazette*, No. GN 22, 6 June 2012.

No fee increases are made to criminal law matters other than rounding to the nearest \$5 as this would make transactions easier to administer.

Publicly listed companies

Schedule 1 prescribes a separate fee category for publicly listed companies in civil law matters, set at 150 percent of the fee for a corporation.

Reduced fee

The reduced fee at item 110 of the 2004 Regulations is not included in the Regulation. This is consistent with removal of the reduced fee and reintroduction of fee exemptions for specified categories of persons in the Regulation.

Financial hardship fee

Schedule 1 specifies the fee amounts for the financial hardship fee pursuant to section 12.

Fee item 108

Fee item 108 refers to the same hearing fee as fee item 301 of the 2004 Regulations. Consolidating this fee item into Part 1 makes it easier to find and emphasises that this fee is payable in relation to a proceeding.

Fee item 109

Fee item 109 consolidates fee item 302 in the 2004 Regulations (as increased in accordance with the Budget) with the fee payable under fee item 304 for the first hearing day. This is because both fee items in those 2004 Regulations relate to the first hearing day. It is administratively simpler to pay both fees at the same time by prescribing only one fee.

Fee Item 110

Fee item 110 refers to the same hearing fee as fee item 304 of the 2004 Regulations, except it is only payable for the second and subsequent hearing days. The cost of the first day hearing is covered by fee item 109. Consolidating this fee item into Part 1 makes it easier to find and emphasises that this fee is payable in relation to a proceeding.

Fee item 111

Fee item 111 refers to the same hearing fee as fee item 303 of the 2004 Regulations. Consolidating this fee item into Part 1 makes it easier to find and emphasises that this fee is payable in relation to a proceeding.

Part 2 – Fees for obtaining a document or service

Fee Item 206

Fee item 206 is placed in Part 2 of Schedule 1, which re-categorises the item as a fee for a service rather than a filing fee. In the 2004 Regulations, this fee item was in Part 1 of Schedule 1.

Fee Item 207

Fee item 207 is placed in Part 2 of Schedule 1, which re-categorises the item as a fee for a service rather than a filing fee. In the 2004 Regulations, this fee item was in Part 1 of Schedule 1.

Fee item 208

Fee item 208 introduces a fee for a request about whether a named person is involved in proceedings before the court. The fee amount specified in column 3 of Part 2 is payable for each request, of up to 10 names.