

HIGH COURT OF AUSTRALIA (FEES) REGULATIONS 2022

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

under section 88 of the *Judiciary Act 1903*

PURPOSE AND OPERATION OF THE INSTRUMENT

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

The *High Court of Australia (Fees) Regulations 2022* (the instrument) sets out the fees payable for proceedings in the High Court of Australia and for the execution of the process of the Court. The instrument also contains provisions about the administration of fees, including the indexation of fees and how fees may be deferred, refunded or waived. Schedule 1 lists the specific amounts payable.

The instrument repeals and replaces the *High Court of Australia (Fees) Regulation 2012* (2012 instrument) which was due to sunset on 1 April 2023 as a result of section 50 of the *Legislation Act 2003*. Section 50 of the *Legislation Act* provides that all legislative instruments registered after 1 January 2005 are automatically repealed on the first 1 April or 1 October falling on or after the tenth anniversary of their registration. The instrument remakes the 2012 instrument in substantially the same form, with minor changes to clarify the operation of the provisions, modernise the language used and bring the instrument in line with the Office of Parliamentary Counsel's current drafting practices.

The instrument is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The instrument commenced when the 2012 instrument was repealed on 1 April 2023.

CONSULTATION

Consistent with the requirements under section 17 of the *Legislation Act*, consultations occurred from January to September 2022 with the High Court of Australia and with relevant line areas of the Australian Attorney-General's Department. Consultations involved the exchange of correspondence and discussions. Stakeholders were asked to provide input into the remake of the instrument and to identify any areas that may require amendments. As a result of the consultation, minor amendments were made to the 2012 instrument to clarify the operation of certain provisions.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation (OBPR) assessed that a Regulation Impact Statement was not required for the instrument as it is unlikely to have more than a minor regulatory impact (OBPR reference 22-01769).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

High Court of Australia (Fees) Regulations 2022

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *High Court of Australia (Fees) Regulations 2022* (the instrument) sets out the fees payable for filing documents and for the service and execution of processes of the High Court of Australia. The instrument also contains provisions regarding the administration of fees, including the indexation of fees and how fees may be deferred, refunded, reduced or waived. Schedule 1 lists the specific amounts payable.

The instrument replaces the *High Court of Australia (Fees) Regulation 2012* which is due to sunset on 1 April 2023. This is due to the operation of section 50 of the *Legislation Act 2003*. Section 50 of the *Legislation Act* provides that all legislative instruments registered after 1 January 2005 are automatically repealed on the first 1 April or 1 October falling on or after the tenth anniversary of their registration. Following a review, it was determined that the *High Court of Australia (Fees) Regulation 2012* remained fit-for-purpose. The instrument remakes the 2012 regulation with minor changes to clarify the operation of the provisions, modernise the language used and bring the instrument in line with the Office of Parliamentary Counsel's current drafting practices.

Human rights implications

The instrument does not engage any of the applicable rights or freedoms, including the implied right to access justice.

The fee amounts payable by court users will continue to be indexed annually in line with the Consumer Price Index. There are no fee increases introduced by the instrument. The instrument will

also continue to provide fee exemptions for eligible persons and fee reductions for persons who, by reason of financial hardship, are unable to pay the full fee amount.

Conclusion

The instrument is compatible with human rights as it does not raise any human rights issues.

Details of the instrument are set out in **Attachment A**.

Details of the *High Court of Australia (Fees) Regulations 2022*

PART 1 – Preliminary

Section 1 – Name

This section provides that the name of the instrument is the *High Court of Australia (Fees) Regulations 2022*.

Section 2 – Commencement

This section provides that the whole of the instrument commences on 1 April 2023.

Section 3 – Authority

This section provides that the instrument is made under the *Judiciary Act 1903*.

Section 88(ca) of the Judiciary Act provides 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.

Section 3A – Schedule 2

This section provides that each instrument specified in Schedule 2 is amended or repealed as set out in that Schedule, and that any item in that Schedule has effect according to its terms. In accordance with Schedule 2, the *High Court of Australia (Fees) Regulation 2012* is repealed.

Section 3B – Definitions

This section provides definitions for terms commonly used in the instrument. For clarity a definition for the word ‘*Court*’ was added in this instrument, which was not in the 2012 instrument. ‘*Court*’ means the High Court of Australia.

Section 4 – Meaning of corporation

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

Per paragraphs (1)(d) and (2)(a), a corporation includes a ‘*public authority*’ but does not include a ‘*corporation sole that is not a public authority*’. Subsection 4(3) provides the meaning of ‘*public authority*’ for the purposes of paragraphs (1)(d) and (2)(a). A ‘*public authority*’ includes a body or authority of the Commonwealth or of a State or Territory, a person representing a body or authority of

the Commonwealth or of a State or Territory, a Minister for the Commonwealth or for a State or Territory and a statutory office holder.

The reference to the *Financial Management and Accountability Act 1997* (FMA Act) in sub paragraph 4(3)(a)(iii) was also updated so it now refers to the *Public Governance, Performance and Accountability Act 2013*, which replaced the FMA Act.

Per paragraph (2)(b), a corporation does not include a ‘*small business*’. Subsection 4(4) provides the meaning of ‘*small business*’ for the purpose of paragraph (2)(b). A ‘*small business*’ means a business with no more than 19 employees and a total turnover of less than \$2 million each year.

Per paragraph 2(c), a corporation does not include ‘*an unincorporated not-for-profit association*’. Subsection 4(5) provides the meaning of ‘*not-for-profit association*’ for the purpose of paragraph 2(c). A ‘*not-for-profit association*’ means 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.

PART 2 – Fees

Division 2.1 – General

Section 6 – Purpose of Part

This section provides that for the purposes of section 88 of the Judiciary Act, Part 2 sets out matters relating to fees.

Section 7 – Fees

Subsection 7(1) provides that Schedule 1 of the instrument sets out the fees payable in the High Court. This includes filing fees, fees for hearings before the Full Court or a single Justice of the Court, fees for obtaining a document and fees for providing a service. The documents and services mentioned in paragraphs (c) and (d) are those listed in Part 2 of Schedule 1.

Subsection 7(2) provides that the rate of the fee charged depends on whether the person liable to pay a fee 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 – Persons liable to pay fees

This section sets out who is liable to pay a fee, unless the Court, a Justice of the Court or a Registrar directs otherwise.

Subsections 8(2) and 8(6) provide that a filing fee, a fee for obtaining a document and a fee for a service are payable by the person for whom the document is filed or obtained or for whom the service is provided.

Subsections 8(3) to (5) specify who is liable to pay a hearing fee. Unless the Court orders otherwise, a hearing fee is payable by the person who commences the proceeding and a hearing fee for a hearing of an interlocutory application is payable by the person who commences the interlocutory proceeding.

Subsection 8(3) provides that a hearing fee in relation to a proceeding is payable by the person who commences the proceeding.

Subsection 8(4) provides that the hearing fee for a hearing before a single Justice for an interlocutory application is payable by the party who is making the application for interlocutory orders.

Subsection 8(5) 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 hearing fee or part of the hearing fee instead of the person liable to pay the fee.

Division 2.3 – When fees are not payable

Section 10 – When fees are 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 an international convention that is in force for Australia provides that no fee is to be payable. The 2012 instrument referred to ‘an international convention *to which Australia is party*’ but this was changed to ‘an international convention *that is in force for Australia*’. This is the more accurate wording given Australia could be party to a convention that is not yet in force for Australia;

Subsection 10(3) provides that hearing fees for hearings before the Full Court 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 and financial hardship fees

Section 11 – Persons exempt from paying fees

Subsection 11(1) specifies when a person is exempt from paying a filing fee or hearing fee. A person is exempt from paying a filing fee or hearing fee if, at the time the fee is payable, the person:

- has been granted legal aid, for the proceeding for which the fee would otherwise be payable, under a scheme or service established under a law of the Commonwealth or of a State or Territory or approved by the Attorney-General;
- is the holder of any of the following cards issued by the Commonwealth: a health care card, a pensioner concession card, a Commonwealth seniors health card and any other card that certifies the holder's entitlement to Commonwealth health concessions;
- is serving a term of imprisonment or is otherwise detained in a public institution or is in immigration detention (within the meaning of the *Migration Act 1958*);
- is younger than 18 years old;
- is receiving youth allowance, Austudy payments under the *Social Security Act 1991* or benefits under the ABSTUDY Scheme; or
- has received funding for the proceeding, for which the fee would otherwise be payable, under Part 11 of the *Native Title Act 1993*.

Individuals in closed detention and those permitted to live in the community while under a residence determination are covered by the exemption in paragraph 11(1)(c).

Subsection 11(2) clarifies that the exemption applies to the concession card holder and not to a dependant of the person who is issued the card.

For the purpose of paragraph (1)(a)(ii), the list of legal aid schemes and services approved by the Attorney-General can be found on the Attorney-General's Department's website.

Section 12 – Financial hardship fees

This section provides that, instead of the full fee, an individual may pay the financial hardship fee specified for an item in Schedule 1 if in the opinion of a Registrar, at the time the full fee is payable, payment of the full fee would cause the individual financial hardship.

In assessing whether payment of the full fee would cause the individual financial hardship, the Registrar must consider the individual's income, day-to-day living expenses, liabilities and assets.

This section also provides that a decision of the Registrar under this section is reviewable by the Administrative Appeals Tribunal (AAT) pursuant to section 17 of the instrument.

Division 2.5 – Payment of fees

Section 12A – When fees must be paid

This section specifies when fees are payable.

Subsection 12A(1) provides that a filing fee must be paid *before* the relevant document is filed.

Subsections 12A(2) to (4) specify when hearing fees are payable.

Subsection 12A(2) provides that fee items 108 and 109 must be paid *at the time* the document to which the hearing relates is filed. For example, if a notice of appeal in relation to a criminal proceeding is filed, then fee item 108 must be paid for the first day of a Full Court hearing *at the time* the notice of appeal is filed.

Subsection 12A(3) 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 12A(4) 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.

Subsections 12A(5) and (6) provide that a fee mentioned in Part 2 of Schedule 1 for obtaining a document or service must be paid *before* the document is obtained or the service is provided.

Section 13 – Deferral of payment of fees

This section provides that the requirements in preceding section 12A do not apply if the Registrar defers the time for payment of a filing fee or a hearing fee.

The Registrar may defer the time for payment of the filing or hearing fee if, in the Registrar's opinion, the need to file the document or to conduct the hearing is so urgent that it overrides the requirement to pay the fee at the time set out in the instrument.

Where the time for payment of a fee has been deferred, subsection 13(3) requires the fee to be paid within 28 days after the day payment is deferred, or within another period approved in writing by the Registrar. These time periods apply instead of the time for payment of the fee under subsections 12A(1) to (4).

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

Section 14 – What happens if fees are not paid

This section sets out what happens if a fee is not paid in the time required by section 12 and payment of the fee is not otherwise deferred under section 13.

Subsection 14(2) provides that if the fee must be paid before the filing or obtaining of a document or the provision of the service for which the fee is payable, the document must not be filed, and the document or service must not be 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, on application by a party to the proceeding, order that no proceeding, or no proceeding other than a specified proceeding, is to take place without leave;
- a person, other than the person required to pay the fee, may pay the fee without affecting any power of the Court or a Justice of the Court to make 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 they are required to pay for the fee under the instrument. The amount to be refunded, under that entitlement, is the difference between the amount paid by the person and the fee amount the person is required to pay.

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, the person who has paid the fee must notify a Registrar in writing at least 10 days before the hearing day, that the hearing will not occur. 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 – Annual increase in fees

This section provides for the automatic annual increase of the court fees set out in Schedule 1 to the instrument, commencing from 1 July 2023. The fees are increased annually in accordance with upwards movement in the All Groups Consumer Price Index published by the Australian Statistician. The fees in Schedule 1 reflect the indexation for the 2022-23 financial year.

To provide an example on the operation of subsection 16(4), if the amount to be rounded is \$52.50, the amount is to be rounded down to \$50. If the amount to be rounded is \$18.50, the amount is to be rounded down to \$18.

Section 17 – Notice of decision and AAT review

This section provides that a person liable to pay a fee can apply to the AAT for review of a Registrar's decision under section 12 (financial hardship fees).

This section requires a Registrar to give a notice of their decision, to the person who is seeking to pay the financial hardship fee, within 28 days after making the decision. The notice must set out the decision.

If the decision in question is to not allow a person to pay the financial hardship fee, the notice must also set out a statement that the person can apply to the AAT for review of the decision and the reasons for the decision.

If the decision in question is to not allow a person to pay the financial hardship fee, failure to advise the person of their rights to an AAT review and to provide reasons for the decision does not affect the validity of the Registrar's decision.

Section 18 – Debt due to Commonwealth

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

PART 3 – Application, saving and transitional provisions

Division 3.1 – Application, saving and transitional provisions in relation to the commencement of this instrument

Section 19 – Definitions

This section provides that 'old regulations' means the *High Court of Australia (Fees) Regulation 2012* as in force immediately before the commencement day of the instrument.

Section 20 – Application provision

This section provides that the instrument applies in relation to the liability of a person to pay any of the following fees:

- a filing fee, for filing a document on or after 1 April 2023;
- a hearing fee, for a hearing for which the document to which the hearing is related is filed on or after 1 April 2023;
- a fee for obtaining a document (other than the fee mentioned in item 204 of Schedule 1);
- a fee mentioned in item 204 of Schedule 1 for a service requested on or after 1 April 2023; and
- any other fee under this instrument for a service provided on or after 1 April 2023.

Section 21 – Saving provision

This section clarifies that the *High Court of Australia (Fees) Regulation 2012* continues to apply in relation to the liability of a person to pay a fee incurred under that instrument before 1 April 2023.

This means that unpaid fees, the liability for which were incurred under the 2012 instrument, remain payable even after the 2012 instrument is repealed.

This express saving provision is consistent with the operation of section 7 of the *Acts Interpretation Act 1901* which provides that a liability that is accrued or incurred under the original instrument is not affected by the subsequent repeal of the instrument. Section 7 of the Acts Interpretation Act applies to this instrument because of section 13 of the *Legislation Act 2003*.

Section 22 – Things done under the old regulations

This section provides that if something was done under the *High Court of Australia (Fees) Regulation 2012* and could be done for the same purpose under the instrument, the thing has effect under the instrument.

Subsection 21(2) provides that such a thing can include, but is not limited to, a notice or a determination being given or made.

This section is included in the instrument to transition things from being done under the 2012 instrument to being done under the new instrument.

Section 23 – Conduct, event or circumstances occurring before the commencement

This section specifies that a function or duty may be performed, or a power exercised, under the instrument in relation to conduct engaged in, events that occurred or circumstances that arose before 1 April 2023. For example, a fee may be paid in accordance with section 13 if the Registrar deferred the payment of the fee before 1 April 2023, or a person may pay a financial hardship fee in respect of a hearing on or after 1 April 2023 if the Registrar determines before that day that the person may pay that fee.

Subsection 23(2) provides that this section does not limit section 22 of the instrument or section 7 of the *Acts Interpretation Act 1901*.

This section is included in the instrument to transition things from being done under the 2012 instrument to being done under the new instrument.

SCHEDULE 1 – Fees

Part 1 of Schedule 1 sets out the filing fees and hearing fees payable in relation to proceedings in the Court. Part 2 of Schedule 1 sets out the fees payable for obtaining documents or services in relation to proceedings in the Court. The fees listed in this Schedule are indexed every year in accordance

with section 16 of the instrument. The fees reflect the indexed amounts for the 2022-23 financial year.

SCHEDULE 2 – Repeals

Schedule 2 provides that the whole of the *High Court of Australia (Fees) Regulation 2012* is repealed