

EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 243

Issued by the Authority of the Attorney-General

Federal Court of Australia Act 1976
Federal Court of Australia Amendment Regulations 2010 (No. 2)

The *Federal Court of Australia Act 1976* (the Act) establishes the Federal Court of Australia (the Court) as a federal court under Chapter III of the *Constitution*.

Subsection 60(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act. In particular, the subsection provides that regulations may be made prescribing the fees to be paid in respect of proceedings in the Court or the service or execution of process of the Court by officers of the Court.

The *Federal Court of Australia Regulations 2004* (the Principal Regulations) prescribe certain fees for court proceedings and make provisions about the payment of those fees.

The purpose of the Regulations is to amend the Principal Regulations to replace fee exemptions and waivers with low flat fees.

Under the Regulations, a person who was previously exempt from the payment of court fees under certain specified categories in the Principal Regulations will instead pay a low flat fee ('reduced fee') of \$100. However, where a standard fee ('full fee') is lower than the reduced fee, that full fee will be payable in place of the reduced fee. After paying either a full fee or a reduced fee, a person does not need to pay any further fees within that proceeding (except for photocopying fees), provided he or she continues to fall within one of the categories.

A Registrar or authorised officer has discretion to waive payment of the reduced fee by a person who falls within one of the categories, and has paid a fee in a proceeding, is then involved in a separate but related proceeding.

The Regulations also provide that the reduced fee is payable by an individual or corporation in financial hardship, where the fee that would otherwise be payable is more than \$100. This fee replaces the full fee waiver in the Principal Regulations. Assessment of financial hardship will continue to be a matter for a Registrar or authorised officer.

These changes are part of a package of measures the government is implementing in the 2010-11 Budget for its Strategic Framework for Access to Justice, which is based on principles of accessibility, appropriateness, equity, efficiency and effectiveness. The access to justice measures in the 2010-11 Budget are focussed on directing people away from high-cost litigation to early intervention services, which help people resolve disputes before they escalate into larger problems.

The Regulations additionally set out rules for paying photocopying fees so that only certain categories of people are exempt from paying a fee for a first copy of the document or a copy required for the preparation of appeal papers. The full fee for photocopying, as set out in item 20 of the Principal Regulations, is otherwise payable.

Details of the Regulations are set out the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commenced on 1 November 2010.

The Federal Court of Australia has been consulted in relation to these regulations. The Law Council of Australia and National Legal Aid have been consulted in relation to the policy behind these regulations. This level of consultation is appropriate because the amendments arise out of a 2010-2011 Budget decision.

Authority: Subsection 60(1) of the *Federal Court of Australia Act 1976*

Details of the Federal Court of Australia Amendment Regulations 2010 (No. 2)

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Federal Court of Australia Amendment Regulations 2010 (No. 2)*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on 1 November 2010.

Regulation 3 – Amendment of *Federal Court of Australia Regulations 2004*

This regulation provides for the amendment of the *Federal Court of Australia Regulations 2004* (the Principal Regulations) as set out in Schedule 1.

Regulation 4 – Transitional

This regulation provides that the system of fee exemptions described in paragraphs 1(1)(a) to (c) of Schedule 3 to the Principal Regulations continues to apply to proceedings commenced before 1 November 2010. As a result, the reduced fees replacing exemptions (in regulation 10A in item [10] below) will only apply to proceedings commenced on or after 1 November 2010.

Schedule 1 – Amendments

Item [1] Subregulation 3 (1), after definition of *filing fee*

This item inserts a definition of ‘full fee’ to refer to a fee in Schedule 1 to the Principal Regulations that has not been reduced or waived. The term is defined for ease of reference when describing how the reduced fee will operate in comparison with the standard or ‘full’ fee under the amendments in item [10] below.

Item [2] Subregulation 3 (1), after definition of *prescribed*

This item inserts a definition of ‘reduced fee’ for the purposes of the amendments in item [10] below. The ‘reduced fee’ is defined as the fee in item 28 of Schedule 1 to the Principal Regulations, which is inserted by item [21] below. The amount of the reduced fee is \$100.

Item [3] Subregulation 3 (1), after definition of *setting-down fee*

‘Working day’ is defined in identical terms in subregulations 9(4) and 15(4) of the Principal Regulations. This item replaces the definitions in these subregulations with one definition that applies to the Principal Regulations as a whole.

Item [4] Regulation 8

This item changes the date for calculating biennial increases to 1 July 2010 because all fee amounts in the regulations were updated to include previous biennial increases by the *Federal Court of Australia Amendment Regulations 2010 (No. 1)*, which came into effect on 1 July 2010. This item also ensures that the reduced fee, inserted by item [21] below, will not be subject to the biennial increase in fees.

Item [5] Subregulation 9 (4)

This item removes the definition of ‘working day’ from this regulation. The definition in this subregulation applied to regulation 9 but was replaced by a definition that applies to the Principal Regulations as a whole, in accordance with item [3] above.

Items [6]-[8] Subregulations 10 (1), (2) and (3)

These items allow authorised officers to defer listed fees in the same way as the Registrar. ‘Authorised officer’ is defined in regulation 3 of the Principal Regulations. This will give the Federal Court sufficient flexibility to manage its workload. This is consistent with the approach taken in regulation 10 of the *Federal Magistrates Regulations 2000*.

Item [9] Subregulation 11 (2)

This item sets out rules for paying photocopying fees. These rules apply to persons who continue to be exempt from paying other fees under subclause 1(1) of Schedule 3 (which is subclause 1(2) of Schedule 3 to the Principal Regulations), which has been renumbered by item [26] below. These rules also apply to persons who come within regulations 11A and 11B, (inserted by item [10] below). All of these persons are liable to pay fees for photocopying as set out in item 20 of Schedule 1 of the Principal Regulations, but do not need to pay a fee for a first copy of the document or a copy required for the preparation of appeal papers. This item also corrects a drafting error in the *Federal Court Amendment Regulations 2010 (No. 1)* that had inadvertently extended these copy fee exemptions to all court users.

Item [10] After regulation 11

This item inserts new regulations 11A, 11B and 11C into the Principal Regulations. Regulation 11A provides for the payment of a reduced fee by persons who were exempt from payment under paragraphs 1(1)(a), (b) and (c) of Schedule 3 to the Principal Regulations. Regulation 11B replaces fee waivers in circumstances of financial hardship, previously provided for under paragraphs 1(1)(d) and (e) of Schedule 3 to the Principal Regulations, with reduced fees. Regulation 11C provides rules in the event that a person’s eligibility to pay the reduced fee changes during the course of a proceeding. The amount of the reduced fee is \$100 and is inserted by item [21] below.

Regulation 11A – Reduction of fees - general

Regulation 11A applies to persons who were exempt from paying a fee as a consequence of subregulation 11(1) as it applied to paragraphs 1(1)(a), (b) and (c) of Schedule 3 to the Principal Regulations before this amendment took effect.

Subregulation 11A(1) provides that regulation 11A applies to persons in one of the categories set out in paragraphs 11A(1)(a), (b) and (c). It replicates and replaces the categories currently set out in paragraphs 1(1)(a), (b) and (c) of Schedule 3 to the Principal Regulations. These categories are:

- recipients of legal aid (paragraph 11A(1)(a))
- persons who have been granted assistance under Part 11 of the *Native Title Act 1993* (paragraph 11A(1)(b)), and
- persons holding certain concession cards or in receipt of certain benefits, persons serving a term of imprisonment or otherwise lawfully detained, and persons aged less than 18 years (paragraph 11A(1)(c)).

Subregulation 11A(2) relocates subclause 1(5) of Schedule 3 to the Principal Regulations, which defined the ‘holder of a card’. It provides that a holder of a card referred to in paragraph 11A(1)(b) does not include a dependant of the holder of the card.

Subregulation 11A(3) provides the general rule that, on the first occasion a fee is payable by a person described in subregulation 11A(1), the reduced fee of \$100 will be payable instead of the full fee.

Subregulation 11A(4) qualifies the general rule under subregulation 11A(3). It provides that where the full fee is less than the \$100 reduced fee, the full fee is payable on the first occasion a fee would be payable in a proceeding. This ensures that a person described in subregulation 11A(1) will not pay a higher fee than a person who is required to pay the full fee.

Subregulation 11A(5) provides that, once a person described in subregulation 11A(1) has paid a fee in a proceeding under subregulation 11A(3) or 11A(4) (or the fee has been waived under subregulation 11A(6), which is described below), that person is not required to pay any further fees in connection with the proceeding. This means that a person described in subregulation 11A(1) only needs to pay a fee once in a proceeding. A copy fee under item 20 of Schedule 1 is excluded from this rule and will instead be provided for in subregulation 11(2), inserted by item [9] above.

Subregulations 11A(6) and (7) provides a Registrar or an authorised officer with discretion to waive payment of a fee in a proceeding by a person described in subregulation 11A(1) in circumstances where the person has already paid a fee in a related proceeding. The waiver is not expected to be applied to all related proceedings. Under subregulation 11A(6), the Registrar or authorised officer will need to be satisfied that the proceedings are closely connected and that the waiver is appropriate. Subregulation 11A(6) further provides that fees for copying services and fees for appeals cannot be waived under this discretion. Subregulation 11A(7) sets out factors that the Registrar or authorised officer must take into account in deciding whether to waive payment of a fee in a related proceeding.

Subregulation 11A(8) provides that, for the purpose of regulation 11A, an appeal will be treated as a new proceeding. This means that a fee is payable under subregulation 11A(3) on the first occasion a fee is payable in an appeal by a person described in subregulation 11A(1), even if the person has paid a fee in the matter at first instance.

Regulation 11B – Reduction of fees - hardship

Regulation 11B applies to individuals and corporations who previously qualified for a waiver of fees under paragraphs 1(1)(d) and 1(1)(e) of Schedule 3 to the Principal Regulations before this amendment took effect.

Subregulation 11B(1) provides that a Registrar or an authorised officer can impose the reduced fee instead of a full fee where the Registrar or authorised officer considers that payment of the fee would cause financial hardship. The criteria replicate and replace the criteria for granting waivers under paragraphs 1(1)(d) and 1(1)(e) of Schedule 3 to the Principal Regulations.

Paragraph 11B(1)(a) provides that the full fee continues to be payable by the person if the full fee is less than the reduced fee. Paragraph 11B(1)(b) provides that the reduced fee would otherwise be payable instead of the full fee.

Subregulation 11B(2) provides that a person covered by subregulation 11B(1) will only be required to pay one reduced fee at the time that a matter is set down for hearing. The person will not be required to pay any hearing fees, regardless of the number of hearing days. This exception ensures that litigants will not be burdened with a large number of fees to cover each day of hearing.

Regulation 11C - Change in circumstances

This item inserts a new regulation 11C to provide for circumstances where a person's eligibility under subregulation 11A(1) to pay a reduced fee changes after commencement of a proceeding. This ensures that the requirement for a person to pay a fee will be determined by the person's circumstances when the fee is payable, rather than their circumstances at the commencement of the proceeding.

Regulation 11C(1) applies to a person who has paid a full fee, or a reduced fee under regulation 11B, in a proceeding and subsequently becomes eligible to pay a reduced fee under regulation 11A. It ensures that subregulation 11A(5) applies to the person as if the person had paid a fee under subregulations 11A(3) or 11A(4). This means that no further fees would be payable by the person in the proceeding.

Regulation 11C(2) applies to a person whose circumstances change so that the person no longer comes within a category described in subregulation 11A(1). It provides that the person would be liable to pay all fees that become payable after the change in circumstances.

It is not necessary to include provisions relating to changes in a person's financial circumstances for the purposes of regulation 11B, as an assessment of eligibility will be made on each occasion that a fee is payable. Therefore, for each assessment made under regulation 11B, a Registrar or authorised officer will need to take changing circumstances into account.

Item [11] Paragraph 15 (1) (b)

This item makes a minor punctuation change required as a result of the deletion of paragraph 15(1)(c) by item [12] below.

Item [12] Paragraph 15 (1)(c)

This item amends the circumstances in which a hearing fee or setting down fee should be refunded. This is replaced by the rules set out in subregulations 15(1A) and 15(1B) inserted by item [13] below.

Item [13] After subregulation 15 (1)

This item inserts new subregulations 15(1A) and 15(1B) into the Principal Regulations. Subregulation 15(1A) provides a general rule for refunding fees where an individual has paid more than is required under the Principal Regulations. This amendment ensures that a person who has paid a full fee, but is only required to pay a reduced fee, is entitled to a refund of the amount that was overpaid. Subregulation 15(1B) defines the refund amount as the difference between the fee paid by a person and the amount the person is required to pay for the fee.

Item [14] Subregulation 15 (4)

This item removes the definition of ‘working day’. The definition in subregulation 15(4) applied only to regulation 15 but was replaced by a definition that applies to the Principal Regulations as a whole, in accordance with item [3] above.

Item [15] Paragraphs 16 (1) (a) and (b)

This item ensures that a decision by a registrar or authorised officer in regulations 11A or 11B, inserted by item [10] above, may be reviewed by the Administrative Appeals Tribunal.

This item also ensures that a decision by an authorised officer under the amendment to regulation 10 of the Principal Regulations as amended by items [6], [7] and [8] above, is reviewable by the Administrative Appeals Tribunal.

This item also removes the reference to paragraph 1(1)(d) of Schedule 3 to the Principal Regulations and renumbers the reference to subclause 1(4) of Schedule 3 to the Principal Regulations. These changes reflect numbering changes made by items [26] to [28] and items [30] to [31].

Item [16] Paragraph 16 (3) (a)

This item updates the reference to subclause 1(4) of Schedule 3 to the Principal Regulations, as a result of a numbering change made by item [27] below.

Item [17] Paragraph 16 (3) (b)

This item makes a minor punctuation change as a result of the insertion of additional paragraph 16(3)(c) by item [18] below.

Item [18] After paragraph 16 (3) (b)

This item requires reasons to be provided to an individual where a decision has been made not to reduce a fee. This reflects changes to the Principal Regulations made by item [10] above.

Item [19] Subregulation 17

This item removes an outdated reference to a paragraph that no longer exists within subsection 18A(4) of the Act.

Item [20] Schedule 1, item 1

The fee for election petitions under Schedule 4 to the *Aboriginal and Torres Strait Islander Act 2005* is provided for in item 5 of Schedule 1 to the Principal Regulations. This item ensures that the filing fee in item 1 of Schedule 1 to the Principal Regulations does not apply to these election petitions.

Item [21] Schedule 1, after item 27

This item inserts new item 28 into Schedule 1 of the Principal Regulations. Item [21] specifies the amount of the reduced fee that is payable under regulations 11A and 11B, inserted by item [10] above. This fee is set at \$100.

Item [22] Schedule 1, at the foot

This item inserts a note to explain which fees are subject to biennial increase in accordance with the formula in Schedule 2 to the Principal Regulations. The note reflects the content of the amendments to regulation 8, made by item [4] above.

Item [23] Schedule 2, clause 1, definition of ‘fee’

This item updates the definition of ‘fee’ that applies in Schedule 2 to the Principal Regulations so that it does not include the reduced fee, implemented by item [21] above. The effect of this amendment is that the reduced fee is not subject to the biennial increase in fees.

Item [24] Schedule 2, clause 1, definition of ‘relevant period’

This item amends the baseline date for calculation of biennial fee adjustments from 1 July 2004 to 1 July 2010 in accordance with the amendment to regulation 8 made by item [4] above.

Item [25] Schedule 3, subclause 1 (1)

This item removes the previous system of fee exemptions for litigants in various disadvantage categories and fee waivers in circumstances of financial hardship. These exemptions are replaced by reduced fees in accordance with regulations 11A and 11B, inserted by item [10] above. The categories of disadvantaged persons described in paragraphs 1(1)(a) to (c) of Schedule 3 to the Principal Regulations (for the purposes of determining who should be eligible for fee exemptions) are replicated in regulation 11A, in connection with eligibility to pay a reduced fee under subregulation 11A. The conditions for a fee waiver under paragraphs 1(1)(d) and (e) of Schedule 3 to the Principal Regulations are replicated in regulation 11B in connection with eligibility to pay a reduced fee.

Items [26]-[28] Schedule 3, subclauses 1(2) and 1(3)

These items renumber subclauses within clause 1 of Schedule 3 to the Principal Regulations and also renumber references to two subclauses, to reflect the omission of subclause (1), set out in item [25] above.

Item [29] Schedule 3, subclause 1(4)

This item allows authorised officers to waive fees for appeals concerning an issue, other than a procedural issue, that is substantially the same as an issue of concern in another appeal. This item ensures that both authorised officers and Registrars may waive listed fees. This will give the Court sufficient flexibility to manage its workload.

Items [30] and [31] Schedule 3, subclause 1(4)

These items renumber subclause 1(4) of Schedule 3 to the Principal Regulations and also renumber a reference to subclause 1(3) of Schedule 3 to the Principal Regulations to reflect the omission of subclause (1), set out in item [25] above.

Item [32] Schedule 3, subclause 1(5)

This item removes subclause 1(5) of the Principal Regulations, consistent with the amendment to item [10] which relocates this provision as subregulation 11A(2).