EXPLANATORY STATEMENT

Select Legislative Instrument 2010 No. 244

Issued by the Authority of the Attorney-General

Federal Magistrates Act 1999
Federal Magistrates Amendment Regulations 2010 (No. 2)

The *Federal Magistrates Act 1999* (the Act) establishes the Federal Magistrates Court (the Court) as a federal court under Chapter III of the Constitution.

Subsection 120(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, subsection 120(3) of the Act provides for the prescribing of fees to be paid in respect of proceedings in the Federal Magistrates Court.

The *Federal Magistrates Regulations 2000* (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 $60 for a family law matter and $100 for a general law matter. 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 on the first occasion that a fee is payable, a person does not need to pay any further fees within that proceeding, provided that he or she continues to fall within one of the categories.

A Registrar or authorised officer also 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, and is then involved in a separate but related proceeding.

These Regulations also provide that the reduced fee is payable by a person in financial hardship, where the fee that would otherwise be payable is more than the reduced fee. 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 also raise the fee for filing, by a person other than the applicant, a document seeking the making of final orders different from those sought by the applicant in a proceeding under the *Family Law Act 1975* about a financial matter or a matter under Part VII. This fee was increased from $176 to $243, the same amount as the equivalent application fee. This change ensures that this fee also matches the equivalent fee for family law applications and responses in the Family Court of Australia and in state and territory courts exercising federal family law jurisdiction, in accordance with amendments to the *Family Law Regulations 1984*. This ensures that the amount of this fee is consistent across all family law courts. It is appropriate that family law applications and responses have the same fee, because both are effectively applications for final orders in connection with children or property.

The Regulations also provide that a hearing fee may be refunded where a fee is paid for a particular hearing day, but the hearing does not proceed on that day. For example, hearing fees will be refunded where they are paid in advance for multiple hearing days, and the hearing is concluded early so that subsequent hearing days are not required. The Regulations also ensure that no fees are payable where a hearing is conducted only to formalise the making of final orders.

Details of the Regulations are set out in 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 Magistrates Court 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 120(1) of the *Federal Magistrates Act 1999*

ATTACHMENT

Details of the *Federal Magistrates Amendment Regulations 2010 (No. 2)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Federal Magistrates 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 Magistrates Regulations 2000*

This regulation provides for the amendment of the *Federal Magistrates Regulations 2000* (the Principal Regulations) as set out in Schedule 1.

Regulation 4 – Transitional

This regulation provides that the system of fee exemptions described in regulation 8 of the Principal Regulations will continue to apply to proceedings commenced before 1 November 2010. As a result, the reduced fees replacing exemptions (in regulation 8D in item [9] below) will only apply to proceedings commenced on or after 1 November 2010.

Schedule 1 – Amendments

Item [1] Regulation 3, after definition of *enforcement fee*

This item inserts a definition of 'family law matter' to refer to a matter arising out of the Family Law Act. This term is defined for ease of reference when referring to these family law matters in items [2], [3] and [21] below. It is necessary to make a distinction between a 'family law matter' and a 'general law matter' (which is defined in item [2] below) to establish different reduced fees for each of these types of matters, as set out in item [21], which inserts items 21 and 22 into Schedule 1 to the Principal Regulations.

Item [2] Regulation 3, after definition of *financial matter*

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. This term is defined for ease of reference when describing how the reduced fee operates in comparison with the standard or 'full' fee under the amendments in item [9] below.

This item also inserts a definition of 'general law matter' to refer to a matter that is not a family law matter. This term is defined for ease of reference when referring to these general law matters in items [3] and [21] below. It is necessary to make a distinction between a 'family law matter' (which is defined in item [1] above) and a 'general law matter' to establish different reduced fees for each of these types of matters, as set out in item [21] below, which inserts items 21 and 22 into Schedule 1 to the Principal Regulations.

Item [3] Regulation 3, after definition of *mediation fee*

This item inserts a definition of 'reduced fee' for the purposes of the amendments in item [9] below. The reduced fee is defined as the fee in items 21 and 22 of Schedule 1, inserted by item [21] below. The amount of the reduced fees is $60 for a family law matter and $100 for a general law matter.

Item [4] Regulation 3, after definition of *setting-down fee*

'Working day' is defined in subregulation 5(5) of the Principal Regulations. This item places this definition within regulation 3, so that it applies to the Principal Regulations as a whole.

Item [5] Subregulation 5(5)

This item removes this subregulation, which defines 'working day', as a consequence of the amendment in item [4] above.

Item [6] Paragraph 7(2)(h)

This item makes a minor punctuation change, resulting from the removal of subregulation 7(3) in item [7] below.

Item [7] Paragraph 7(3), including the note

This item removes this subregulation and note as a result of the amendments in item [9] below, which replace fee exemptions with reduced fees.

Item [8] Regulation 8

This item removes this regulation as a result of the amendments in item [9] below, which replace fee exemptions with a reduced fee.

Item [9] Regulations 8D, 9, 9A and 10

This item inserts new regulations 8D, 9 and 9A into the Principal Regulations. Regulation 8D provides for the payment of a reduced fee by persons who were previously exempt from payment under subregulation 8(1) of the Principal Regulations before this amendment took effect. Regulation 9 replaces fee waivers in circumstances of financial hardship, previously provided for under regulation 9 of the Principal Regulations, with reduced fees. Regulation 9A 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 for a general law matter and $60 for a family law matter, as inserted by item [21] below.

Regulation 8D – Reduction of fees – general

Regulation 8D applies to persons who were exempt from paying a fee under subregulation 8(1) of the Principal Regulations before this amendment took effect.

Subregulation 8D(1) provides that regulation 8D applies to persons in one of the categories set out in paragraphs 8D(1)(a) and (b). It replicates and replaces the categories previously set out in paragraph 8(1) the Principal Regulations. These categories are:

- recipients of legal aid (paragraph 8D(1)(a)), 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 8D(1)(b)).

Subregulation 8D(2) relocates previous subregulation 8(3) of the Principal Regulations, which defined the 'holder of a card'. It provides that a holder of a card referred to in paragraph 8D(1)(b) does not include a dependant of the holder of the card.

Subregulation 8D(3) provides the general rule that, on the first occasion a fee is payable by a person described in subregulation 8D(1), the reduced fee will be payable instead of the full fee.

Subregulation 8D(4) qualifies the general rule under subregulation 8D(3). It provides that where the full fee is less than the 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 8D(1) would not pay a higher fee than a person who is required to pay the full fee.

Subregulation 8D(5) provides that, once a person described in subregulation 8D(1) has paid a fee in a proceeding under subregulation 8D(3) or 8D(4) (or the fee has been waived under subregulation 8D(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 8D(1) would only need to pay a fee once in a proceeding.

Subregulations 8D(6) and (7) provide a Registrar or an authorised officer with discretion to waive payment of a fee in a proceeding by a person described in subregulation 8D(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 8D(6), the Registrar or authorised officer will need to be satisfied that the proceedings are closely connected and that the waiver is appropriate. Subregulation 8D(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.

Regulation 9 – Reduction of fees – hardship

Regulation 9 applies to persons who previously qualified for a waiver of fees under regulation 9 of the Principal Regulations before this amendment took effect.

Subregulation 9(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 regulation 9 of the Principal Regulations.

Paragraph 9(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 9(1)(b) provides that the reduced fee is otherwise be payable instead of the full fee.

Subregulation 9(2) provides that a person covered by subregulation 9(1) is only required to pay one reduced fee at the time that a matter is set down for hearing. The person would not be required to pay any hearing fees, regardless of the number of hearing days. This exception ensures that litigants in circumstances of financial hardship will not be burdened with a large number of fees to cover each day of hearing.

Regulation 9A – Change in circumstances

Regulation 9A provides for circumstances where a person's eligibility under subregulation 8D(1) to pay a reduced fee changes after commencement of a proceeding. This ensures that the requirement for a person to pay a fee would be determined by the person's circumstances when the fee would be payable, rather than their circumstances at the commencement of the proceeding.

Regulation 9A(1) applies to a person who has paid a full fee, or a reduced fee under regulation 9, in a proceeding and subsequently becomes eligible to pay a reduced fee under regulation 8D. It ensures that subregulation 8D(5) applies to the person as if the person had paid a fee under subregulations 8D(3) or 8D(4). This would mean that no further fees would be payable by the person in the proceeding.

Regulation 9A(2) applies to a person whose circumstances change so that the person no longer comes within a category described in subregulation 8D(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 9, as an assessment of eligibility will be made on each occasion that a fee is payable. Therefore, for each assessment made under regulation 9, a Registrar or authorised officer will need to take changing circumstances into account.

Regulation 10 – Deferral of fee payment

This item also replaces regulation 10 of the Principal Regulations, which deals with deferral of fees. Regulation 10 revises the deferral power. It enables a Registrar or an authorised officer to defer all or part of a fee in cases of urgency, where payment of a fee would be oppressive or unreasonable, having regard to a person's financial circumstances, or where a person is being represented by a practitioner who is acting pro bono. This regulation provides that a fee for which payment is deferred must be paid within 30 days after the deferral or within another period determined by the Registrar or authorised officer. This amendment uses similar terminology to regulation 10 of the *Federal Court of Australia Regulations 2004*, which provides broader scope for deferral than regulation 10 of the Principal Regulations currently allows.

Item [10] Subregulation 10A(1)

This item inserts a reference to subregulation 5(2A) to ensure that the invoicing arrangements described in this regulation apply to the daily hearing fees that commenced on 1 July 2010.

Item [11] Subregulation 11(1A)

This item inserts references to subregulations 11(1B) and 11(1C) to ensure that the consequences of non-payment under the subregulations listed do not apply where the invoicing arrangements in regulation 10A apply. This item also removes a reference to subregulation 11(1), which was deleted by item [12] below.

Item [12] Subregulation 11(1)

This item replaces the rule under subregulation 11(1) of the Principal Regulations. It inserts new subregulation 11(1B) to provide that where a fee that is payable for the filing of a document or provision of a service is unpaid, the document must not be filed or the service must not be provided. This provision is similar in effect to the previous subregulation 11(1) of the Principal Regulations, but instead uses terminology that is based on subregulation 14(1) of the *Federal Court of Australia Regulations 2004* so that terminology is consistent between the different court regulations. Subregulation 11(1B) is subject to regulation 10 (inserted by item [9] above) and subregulation 11(1C) discussed below.

This item also inserts new subregulation 11(1C) which provides that where a fee is unpaid, the Federal Magistrates Court, a Federal Magistrate or a Registrar has the discretion to allow the filing of a document or the provision of a service where the fee payable is not paid. The aim of subregulation 11(1C) is to ensure that the Federal Magistrates Court has flexibility to deal with a matter in circumstances where the general rules and existing exceptions are not sufficient. This subregulation is equivalent to existing subregulation 14(2) of the *Federal Court of Australia Regulations 2004.* If a fee remained unpaid, it would become a debt payable to the Commonwealth under subregulation 11(3) of the Principal Regulations.

Item [13] Subregulations 12(1) and 12(2)

This item removes references to ‘hearing fee’ in these subregulations to correspond with the insertion of a new approach for refunding hearing fees, in accordance with item [14] below.

Item [14] After subregulation 12(2)

This item inserts a new subregulation 12(2A) to provide that a hearing fee may be refunded where a fee is paid for a particular hearing day but the hearing does not proceed on that day. For example, this item will apply where hearing fees are paid in advance for multiple hearing days and the hearing is concluded early, so that subsequent hearing days are not required. This item also ensures that no fees are payable where the hearing is conducted only to formalise the making of final orders.

Item [15] After subregulation 12(4)

This item inserts new subregulations 12(5) and 12(6) into the Principal Regulations. Subregulation 12(5) 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 12(6) 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 [16] Subregulation 13(1)

This item inserts references to subregulations 8D(6), 9(1), and 10(1) into subregulation 13(1) of the Principal Regulations. Subregulation 13(1) requires a Registrar or authorised officer, who makes a decision under one of the provisions mentioned, to give notice of that decision to the person liable to pay the fee to which the decision relates. The amendments ensure that a decision by a Registrar or authorised officer about whether to waive a subsequent related fee under subregulation 8D(6), to impose a reduced fee under subregulation 9(1), or to defer a fee under subregulation 10(1) (in item [9] above), can be reviewed by the Administrative Appeals Tribunal, in accordance with regulation 13 of the Principal Regulations.

Item [17] Regulation 14

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 Magistrates Amendment Regulations 2010 (No. 1)*, which came into effect on 1 July 2010. It also ensures that the reduced fee, inserted by item [21] below, will be subject to the biennial increase in fees.

Item [18] Subregulation 15(1), definitions of ‘fee’ and ‘relevant period’

This item updates the definition of ‘fee’ that applies within regulation 15 of the Principal Regulations so that it does not include the reduced fee, implemented by item [21] below. The effect is that the reduced fee is not subject to the biennial increase in fees.

This item also amends the baseline date for calculation of biennial fee adjustments from 1 July 2006 to 1 July 2010 in accordance with the amendment made to regulation 14 by item [17] above.

Item [19] Schedule 1, items 10 and 11

This item amends the descriptions of the hearing fees in items 10 and 11 of Schedule 1 to the Principal Regulations to provide that the fee is payable for a day or part of a day. This amendment ensures the hearing fees are payable even if a hearing does not take a full hearing day.

Item [20] Schedule 1, item 13

This item raises the fee in item 13 of Schedule 1 to the Principal Regulations for filing, by a person other than the applicant, a document seeking the making of final orders different from those sought by the applicant in a proceeding under the *Family Law Act 1975* about a financial matter or a matter under Part VII. This fee is increased from $176 to $243, the same amount as the equivalent application fee.

This change ensures that this fee also matches the equivalent fee for family law applications and responses in the Family Court of Australia and in state and territory courts exercising federal family law jurisdiction, in accordance with the amendments made to the *Family Law Regulations 1984*. This ensures that the amount of this fee is consistent across all family law courts. It is appropriate that family law applications and responses have the same fee because both are effectively applications for final orders in connection with children or property.

Item [21] Schedule 1, after item [20]

This item inserts new items 21 and 22 into Schedule 1 of the Principal Regulations to specify the amount of the reduced fee payable under regulations 8D and 9, inserted by item [9] above. The amounts of these fees are $60 for a family law matter (item 21) and $100 for a general law matter (item 22).

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 regulation 15 of the Principal Regulations. The note reflects the content of the amendment to regulation 14, made by item [17] above.