

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2011 No. 112**

*Administrative Appeals Tribunal Act 1975*

*Administrative Appeals Tribunal Amendment Regulations 2011 (No. 1)*

The *Administrative Appeals Tribunal Act* (the Act) establishes the Administrative Appeals Tribunal as a merits review tribunal to review decisions made under federal legislation, where jurisdiction is conferred on the Tribunal by statute.

Section 70 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, 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.

Section 70(2) provides that the regulations may make provision prescribing fees to be payable in respect of applications to the Tribunal or in relation to the refund of fees so paid where a proceeding terminates in a manner favourable to the applicant. Section 70(2) also provides that regulations prescribing fees may prescribe different fees in respect of different classes of applications.

The *Administrative Appeals Tribunal Regulations 1976* (the Principal Regulations) prescribe certain fees for Tribunal proceedings and make provision for the payment and refund of those fees.

The *Administrative Appeals Tribunal Amendment Regulations 2010 (No. 2)* (the 2010 Regulations) amended the Principal Regulations to replace fee exemptions and waivers with low flat fees. Reviews of decisions pertaining to certain subject matter remain fee exempt. Four errors were made during this amendment process. The *Administrative Appeals Tribunal Amendment Regulations 2011 (No. 1)* (the Regulations) have corrected these errors.

First, paragraph 19(8)(b) did not specifically require that a fee had to be paid in order for a refund of a fee to be payable when an applicant is successful in the Tribunal.

Secondly, regulation 4 (Transitional) of the 2010 Regulations provides:

*Paragraphs 19(6)(a) and (b) of the Administrative Appeals Tribunal Regulations 1976, as in force on 31 October 2010, apply to proceedings commenced before 1 November 2010.*

The intent of regulation 4 was to ensure that, for proceedings commenced with the Tribunal prior to 1 November 2010, the fees system that existed before the 2010 Regulations would apply. The provisions relating to the refund of fees—subregulations 19(7) and 19AA(9)—were not included in regulation 4. Prior to the 2010 Regulations, if proceedings in the Tribunal terminated in a manner favourable to the applicant a full refund of the fee paid was payable. The 2010 Regulations amended the Principal Regulations to the effect that, if proceedings in the Tribunal terminate in

favour of the applicant, a refund equal to the difference between the application fee and \$100 is payable. For example, if the application fee was \$777 a refund of \$677 is payable. Further, if the application fee is \$100 or less then no refund is payable.

The omission of provisions relating to the refund of fees in regulation 4 of the 2010 Regulations left the Tribunal and applicants in a state of uncertainty with proceedings that commenced prior to 1 November 2010 but terminated—or will terminate—in favour of the applicant on or after 1 November 2010. The Regulations have clarified this matter by providing that the fees system that existed before the 2010 Regulations applies to applications lodged prior to 1 November 2010, irrespective of when they terminate in favour of the applicant.

The third error the Regulations have corrected is typographical in nature. Subregulation 19(7) of the Principal Regulations previously cross-referenced subregulation 19(6AA). Subregulation 19(6AA) does not exist. Subregulation 19(7) now correctly cross-references subregulation 19(6A).

The fourth amendment the Regulations have made is to paragraph 19AA(8)(e) of the Principal Regulations to ensure that applicants who may transfer from the Small Taxation Claims Tribunal to the Taxation Appeals Division, and vice versa, receive the full refund they are entitled to. Further detail on the Regulations is at **Attachment A**.

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

The Administrative Appeals Tribunal has been consulted on the making of the Regulations. This level of consultation is appropriate given the Regulations are merely to correct minor errors.

The majority of changes in the Regulations are taken to have commenced on 1 November 2010. Consistent with the requirements of subsection 12(2) of the *Legislative Instruments Act 2003*, no person will be disadvantaged, and no liabilities will be imposed on a person other than the Commonwealth, by the retrospective operation of the changes made in Schedule 1. The Office of Legislative Drafting and Publishing has provided written certification that the Governor-General has the power to make the retrospective elements of the Regulations. One minor amendment to correct a cross-reference commenced on the day after the Regulations were registered.

Authority: Section 70 of the *Administrative Appeals Tribunal Act 1975*

**ATTACHMENT A**

## **Administrative Appeals Tribunal Amendment Regulations 2011 (No. 1)**

### Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Administrative Appeals Tribunal Amendment Regulations 2011 (No. 1)*.

### Regulation 2 – Commencement

This regulation provides for the amendments which correct the errors relating to fees to have commenced on 1 November 2010. This regulation also provides that all other amendments to the Principal Regulations commenced on the day after the Regulations were registered.

### Regulation 3 – Amendment of *Administrative Appeals Tribunal Regulations 1976*

This regulation provides for the amendment of the Principal Regulations as set out in Schedule 1.

### Regulation 4 – Amendment of *Administrative Appeals Tribunal Regulations 1976*

This regulation provides for the amendment of the Principal Regulations as set out in Schedule 2.

### Schedule 1 – Amendments taken to have commenced on 1 November 2010

#### **Item [1] Paragraph 19(8)(b)**

This item corrects an inaccuracy in the paragraph. Paragraph 19(8)(b) previously provided: ‘A person is entitled to a refund... if: the Tribunal certifies that proceedings have terminated in a manner favourable to the applicant’. As previously drafted, paragraph 19(8)(b) did not explicitly require an application fee to have been paid in order for a refund to be payable. The Regulations clarify this by inserting ‘the person paid an application fee and’ before ‘the Tribunal’ into paragraph 19(8)(b).

#### **Item [2] Subregulation 19(9)**

This item provides for the refund of Tribunal application fees in two situations, based on the date the application for review was lodged with the Tribunal. First, a full refund of the application fee is payable if the proceedings terminate in favour of the applicant and the application for review was lodged before 1 November 2010. Secondly, a refund of the difference between the application fee and \$100 is payable if proceedings terminate in favour of the applicant and the application for review was lodged on or after 1 November 2010. For example, the first situation applies to an application for review lodged on 31 October 2010 which terminates in favour of the applicant on 30 July 2011. In this first situation, if the application fee was \$777, a full refund of the application fee is payable. The second situation applies to an application for review lodged on 2 November 2010 which terminates in favour of the applicant on 30 July 2011. In this second situation, if the application fee was \$777, a refund of \$677 is payable.

**Item [3] Paragraph 19AA(8)(e)**

The Tribunal deals with reviews of taxation decisions in two ways. First, if the disputed amount is over \$5,000, the proceeding is heard in the Taxation Appeals Division (TAD). Secondly, if the disputed amount is under \$5,000, the proceeding is heard in the Small Taxation Claims Tribunal (STCT). Sometimes a proceeding may commence in the STCT but it is later realised the disputed amount is over \$5,000 and the proceeding is transferred into the TAD. An application for review in the TAD is currently \$777 (the 'standard application fee'). An application for review in the STCT is currently \$77 (the 'lower application fee'). If an application for review of a taxation decision is transferred from the STCT to the TAD, the difference between the standard application fee and the lower application fee is payable (currently \$700: the 'additional fee').

The change made by item 3 confirms that the appropriate refund is paid when an applicant transfers between the STCT and the TAD. As previously drafted, paragraph 19(8)(e) provided that a person is entitled to a refund if the person paid the standard application fee or the additional fee, and the proceedings terminate in favour of the person. Paragraph 19(8)(e) now provides that a person has paid the standard application fee, or the lower application fee and the additional fee, to ensure it covers all types of fees and refunds payable when a proceeding is transferred between the STCT and the TAD. Item 3 also changes 'manner favourable to the person' to 'manner favourable to the applicant'. This is because a person other than the applicant may pay the fee (and therefore be entitled to the refund), but the entitlement to a refund is contingent upon the applicant being successful in the Tribunal.

**Item [4] Paragraph 19AA(9)(e)**

This change is the equivalent to the change made to subregulation 19(9). A full refund is available to an applicant if the application was lodged prior to 1 November 2010 but a reduced refund is payable if the application was lodged after 1 November 2010.

Schedule 2 – Amendment commencing on day after registration

**Item [1] Subregulation 19(7)**

This item corrects a typographical error. Subregulation 19(7) previously cross referenced subregulation 19(6AA). Subregulation 19(6AA) does not exist. This item inserted the correct cross reference, which is to subregulation 19(6A).