

EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 279

Issued by Authority of the Attorney-General

Family Law Act 1975

Federal Magistrates Act 1999

Family Law (Fees) Regulation 2012

Subsection 125(1) of the *Family Law Act 1975* provides that the Governor-General may make regulations, not inconsistent with that Act, prescribing matters required or permitted by the Family Law Act to be prescribed for carrying out or giving effect to that Act, and in particular prescribing court fees payable in respect of proceedings under that Act, including provisions for fee exemptions and refunds.

Subsection 120(1) of the *Federal Magistrates Act 1999* provides that the Governor-General may make regulations prescribing matters required or permitted by the Federal Magistrates Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to that Act, and in particular, subparagraph 120(3)(a) provides for the prescribing of fees to be paid in respect of proceedings in the Federal Magistrates Court (the FMC), including fee waivers, exemptions and refunds.

Pursuant to subsection 125(1) of the Family Law Act, the Governor-General made the *Family Law Regulations 1984* prescribing, amongst other matters, court fees payable in respect of proceedings under the Family Law Act. Pursuant to subsection 120(1) of the Federal Magistrates Act, the Governor-General made the *Federal Magistrates Regulations 2000* prescribing court fees payable for proceedings in the FMC, including proceedings under the Family Law Act.

The purpose of the *Family Law (Fees) Regulation 2012* (the Regulation) is to provide a single court fees regulation in family law applying to proceedings under the Family Law Act in the Family Court, the FMC and other courts that exercise jurisdiction under that Act, and also to implement a range of reforms to court fees in proceedings under that Act, including:

- an increase in the fee for an application for a divorce in the FMC from \$577 to \$800, and general increases to most other existing fees by approximately 20 percent
- removing the reduced fee of \$60 now payable by legal aid recipients and people on Commonwealth income support, and providing that those persons need not pay court fees (with the exception of filing a divorce or nullity of marriage application), and

- introducing new fees targeting resource intensive processes to encourage court users to utilise alternative dispute resolution processes.

These measures are part of wider reforms to the federal courts announced in the 2012-13 Budget which also include similar reforms for the High Court of Australia, the Federal Court of Australia and proceedings in the FMC that are not proceedings under the Family Law Act.

The *Family Law Amendment Regulation 2012 (No. 4)* and *Federal Court and Federal Magistrates Court Regulation 2012* will, respectively, repeal the fee-related provisions in the Family Law Regulations and repeal and replace the Federal Magistrates Regulations in full.

The Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia were 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 announced in the 2012-13 Budget 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 1.01 – Name of regulation

This section provides that the title of the Regulation is the *Family Law (Fees) Regulation 2012*.

Section 1.02 – Commencement

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

Section 1.03 – Definitions

This section provides for definitions of terms used in the Regulation. Some undefined terms are defined in the Family Law Act. Significant new or amended definitions are explained below.

‘conciliation conference’

The term is defined to mean a conference, attended by the parties with either a registrar or a family dispute resolution practitioner, where the parties try to reach agreement on the matters in issue in the proceeding. In the case of a conference

attended by a family dispute resolution practitioner, only a conference in which the parties are not required to pay the fees of the practitioner is a conciliation conference.

Conciliation conferences are usually conducted by a registrar of the relevant court in which proceedings are commenced. In some circumstances, including where the geographic location of the parties makes access to a registrar difficult, the conference may be conducted by a family dispute resolution practitioner and the courts pay for the practitioner's services.

'Family Court'

The term is defined to include the Family Court and a Family Court of a State. The term includes the Family Court of Western Australia.

'interim order application'

The term is defined to include an application for an interlocutory order, an interim order, an order that would only apply for a specified period during the proceeding, and interim or partial property orders under Part VIII or VIIIAB of the Family Law Act. It includes an application for an interim order that is sought with other types of orders, for example, an application for an interim order contained in an application commencing proceedings.

An interim order application does not include an application for an order of a procedural nature, for example, directing that a party file a document within a specified timeframe.

A fee for filing an interim order application is specified at fee item 9 of Schedule 1 to the Regulation.

Section 1.04 – Application

Subsection 1.04(1) provides that the Regulation applies to a fee for a service requested or the filing of a document lodged, under the Family Law Act, on or after 1 January 2013.

Subsection 1.04(2) provides for the application of particular provisions of the Regulation to some services requested before 1 January 2013.

In the case of a service requested before 1 January 2013, paragraph 1.04(2)(a) permits payment of the fee for the service to be deferred under section 2.10 (for example, payment of the fee would, because of subsection 2.10(4), be able to be deferred, after 1 January 2013, for a second time).

In the case of hearing days scheduled in 2012 to be heard on or after 1 January 2013, paragraph 1.04(2)(b), where the hearing of the proceeding commences, entitles a person to a refund of fees paid for any unused hearing days in 2013 if the proceeding settles or is discontinued or, for some other reason, the hearing day does not proceed. This refund only applies to hearing days where the hearing has commenced.

Part 2 – Fees

Division 2.1 – Fees—general

Section 2.01 – Purpose of Part

This section provides that Part 2 of the Regulation sets out matters relating to court fees.

Section 2.02 – Fees

This section provides for Schedule 1 to the Regulation to set out court fees payable in a proceeding under the Family Law Act.

Subsection 2.02(2) clarifies that where a person files a document seeking both an interim order and other matters, the fee payable is both the fee for the interim order (item 9 of Schedule 1) and the fee in Schedule 1 for filing the document covering the other matter.

Subsection 2.02(3) provides that where multiple persons are liable to pay the fee, then the fee rate charged is the highest rate. For example, if an application for final orders in parenting proceedings (fee item 4 in Schedule 1) is jointly commenced by a parent and a grandparent and the parent is eligible for the fee exemption under section 2.04 but the grandparent is not, the fee charged is the full fee in Schedule 1. Where a joint application for divorce is filed and one party is eligible for the reduced fee prescribed in 2.06 and the other party is not, then the fee payable is the general fee set out in the relevant item in Schedule 1.

Division 2.2 – Liability to pay fee

Section 2.03 – Persons liable to pay fee

This section specifies the persons who are liable to pay a fee set out in Schedule 1.

Subsection 2.03(1) provides that a fee is payable by the person who commences the proceeding, with the exceptions that the fees for filing a response to an application or an interim order application are payable by the person for whom the application is filed, and the fee for issuing a subpoena is payable by the person who requests that the subpoena be issued.

Subsection 2.03(2) allows any party to the proceeding to pay a fee on their own initiative, whether or not the fee is payable by them. The provision also enables a judge, a federal magistrate or a registrar to order that another party must pay a fee (or part of a fee) instead of the person by whom the fee is payable.

Division 2.3 – Exemptions from liability to pay fee

Section 2.04 – Persons exempt from paying fee – general

This section provides a fee exemption (except for an application for a divorce order or decree of nullity of marriage prescribed by fee items 1 and 2) for the same categories of persons who paid the reduced fee under regulation 11A of the Family Law Regulations and regulation 8D of the Federal Magistrates 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 *Family Law Amendment Regulations 2010 (No. 3)* and the *Federal Magistrates Amendment Regulations 2010 (No. 2)*, which commenced on 1 November 2010, introduced a reduced fee of \$60 for persons in the above categories in family law proceedings. Prior to 1 November 2010, persons in those categories did not pay court fees prescribed in the regulations. This section effectively reverts to the arrangements existing prior to introduction of the reduced fee, except in relation to divorce or nullity of marriage orders. Fees for a divorce or nullity of marriage application are covered by section 2.06 of the Regulation for persons in the above categories.

This provision extends to exempt the fee for filing a consent order (fee item 6 of Schedule 1 to the Regulation) where a person is eligible under the section. Under the Family Law Regulations, a consent order fee could not be reduced to \$60.

Section 2.05 – Persons exempt from paying fee – financial hardship

This section provides a fee exemption (except for an application for a divorce order or decree of nullity of marriage prescribed by fee items 1 and 2 of Schedule 1 to the Regulation) where the registrar or authorised officer is of the opinion that payment of the fee would cause financial hardship to an individual. In considering whether payment of a fee would have that effect, the registrar or authorised officer is required to consider the individual's income, day-to-day living expenses, liabilities and assets. These considerations are the same as those considered in exercising the power under regulation 11B(1) of the Family Law Regulations and regulation 9(1) of the Federal Magistrates Regulations to reduce court fees on the basis of financial hardship.

This provision extends to exempt the fee for filing a consent order (fee item 6 of Schedule 1) where a person is eligible under the section. Under the Family Law Regulations, a consent order fee could not be reduced to \$60.

Persons who would suffer financial hardship if they were to pay the general fee for a divorce or nullity of marriage application (the fee specified in paragraphs (a) of column 3 for fee items 1 and 2 of Schedule 1) are covered by section 2.06.

Section 2.06 – Reduced fee for filing application for divorce or nullity of marriage order

This section would provide for circumstances in which the reduced fee for an application for divorce or nullity of marriage would be payable. Column 3 of fee items 1 and 2 of Schedule 1 prescribe a ‘general fee’ (paragraphs (a) of column 3) and a ‘reduced fee’ (paragraph (b) of column 3) for each fee item. Both reduced fees are one-third of the general fee, rounded down to the nearest \$5. The reduced fee is only payable by persons who are eligible under this section. In all other cases, they pay the general fee for an application for divorce or nullity of marriage.

Subsection 2.06(1) provides that if a person is exempt from paying fees set out in Schedule 1 because of the operation of section 2.04 of the Regulation (namely, they fall into a specified category of persons such as recipients of legal aid), then the person may pay the reduced fee for a divorce or nullity of marriage application.

Subsection 2.06(2) enables a registrar or an authorised officer to determine that a person may pay the reduced fee 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 prescribed in section 2.05.

Division 2.4 – When fee is not payable

Section 2.07 – Fee not payable by liable person if already paid

This section provides that a person who is liable to pay the fee does not have to pay the fee if another person has paid the fee. This can include another party to the proceedings or a person unrelated to the proceeding. For example, the applicant would not have to pay the fee where a respondent pays a conciliation conference fee to ensure the matter proceeds.

Section 2.08 – Proceedings in which fee is not payable

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

Subsection 2.08(1) provides that no fees are payable for the following proceedings:

- divorce orders in relation to a marriage that was previously dissolved or annulled under the Family Law Act or the *Matrimonial Causes Act 1959*
- which an international convention to which Australia is party provides that no fee is payable

- matters under the *Family Law (Child Abduction Convention) Regulations 1986*, and
- an application to set aside a subpoena.

Subsection 2.08(2) provides that a fee in Schedule 1 is not payable for an objection to a subpoenaed document being inspected or copied.

Subsection 2.08(3) provides that fees are not payable for matters under the Family Law Act as itemised in the subsection. These matters reflect the same fee exemptions in regulation 7(d) of the Federal Magistrates Regulations, with the exception of matters involving interlocutory and interim orders.

Interim and interlocutory order applications are charged a fee as prescribed by item 9 of Schedule 1 to the Regulation.

The term ‘interim order application’ is defined in section 1.03 of the Regulation.

Paragraph 2.08(3)(p) maintains that procedural orders would be exempt from fees.

Division 2.5 – Payment of fees

Section 2.09 – When fee must be paid

Filing fee

Subsection 2.09(1) provides that the fee for filing a document must be paid before the document is filed.

Setting down fee

Subsection 2.09(2) provides that the fee for setting down a proceeding for a hearing must be paid no later than 28 days before the hearing day or, for a proceeding set down for hearing within 28 days, within the period or at the time approved by the registrar or authorised officer of the court.

Hearing fee

Subsection 2.09(3) provides that the fee for a hearing of a proceeding must be paid no later than close of business on the day that is two business days before the hearing day or, for a hearing fixed within two business days, no later than 9.30am on the hearing day.

Conciliation conference fee

Subsection 2.09(4) provides that the fee for a conciliation conference must be paid no later than 28 days before the day of the conference or, for a conference scheduled within 28 days, before the conference commences.

Fee for other service

Subsection 2.09(5) provides that fees for other services must be paid before the service is provided.

Section 2.10 – Deferral of payment of fees

This section allows a registrar or an authorised officer to defer the time for payment of a fee.

Subsection 2.10(2) allows the time for payment of a fee to be deferred where a registrar or authorised officer is of the opinion that:

- it would be oppressive or otherwise unreasonable, having regard to the financial circumstances of the person required to pay the fee, to require payment of the fee at the time required under section 2.09, or
- in the case of a fee for the filing of a document (other than the filing of a response), the need to file the document is so urgent that it overrides the requirement to pay the fee before the document is filed.

Subsection 2.10(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 or authorised officer. These time periods apply instead of the time for payment of the fee under section 2.09.

Subsection 2.10(4) clarifies that the time for payment of a fee may be deferred more than once.

Subsection 2.10(5) permits a registrar or authorised officer to impose conditions on the deferral of the time for payment of a fee.

Section 2.11 – 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 2.10.

Subsection 2.11(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 2.11(3) permits the court for the relevant proceeding, a judge, federal magistrate or a registrar of that court to allow the document to be filed or the service to be provided even though the fee, or part of the fee, has not been paid.

Subsections 2.11(4) and (5) provides that, in the case of an unpaid (or partially unpaid) conciliation conference fee, a hearing fee or a setting down fee:

- the relevant court, a judge, federal magistrate or a registrar of that 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 relevant court, a judge, federal magistrate or a registrar of that court may vacate the hearing day or conciliation conference.

Division 2.6 – Miscellaneous

Section 2.12 – Refund of fee

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

General

Subsections 2.12(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 for the fee.

Subsection 2.12(3) provides an entitlement to a refund of the amount paid by a person as a fee where another person has paid the fee, or where the fee is not payable under the Regulation.

Setting down fee

Subsection 2.12(4) provides that a setting down fee is not refundable if the first day hearing fixed by the setting down, or a hearing day scheduled in place of that first hearing date, does not occur.

Refunds are still available for second and subsequent hearing days, in accordance with the Regulation.

Hearing fees – hearing not commenced

Subsections 2.12(5) and (6) provide an entitlement to a refund of a hearing fee paid by a person for a hearing that has not commenced in relation to a proceeding if the person notifies the registrar or an authorised officer in writing at least 10 business days before the hearing day that the hearing will not occur, or will occur only for the making of formal orders. In the case of any hearing day fixed less than 10 business days before the hearing day, the person must have notified the registrar or authorised officer in writing at least two business days before the hearing day.

A registrar or authorised officer has, under subsection 2.12(7), a discretion to refund a hearing fee for a hearing that has not commenced in relation to a proceeding if the person, through no fault on his or her part, has not notified the registrar or authorised officer in writing, within the relevant time limit, that the hearing will not occur (or will occur only for the making of formal orders).

Subsection 2.12(8) defines ‘formal orders’ for the purposes of subsections 2.12(5) and 2.12(7) as orders finalising the proceedings that were to be the subject of the hearing.

Hearing fees – hearing commenced

Subsection 2.12(9) provides an entitlement to a refund of a hearing fee for any unused hearing days where the hearing has commenced. For example, if a person were to pay hearing fees for 10 hearing days in advance, but the proceeding settles or discontinues after five hearing days (or if the proceedings are fully heard within those five hearing days), the person would be entitled to a refund of the hearing fees paid for unused hearing days. As it is anticipated that the entitlement would usually arise when a multi-day hearing finishes early, no advance written notification to the registrar is required. The provision enables litigants to be able to prepay all their hearing fees in one transaction rather than paying individually each day, and be assured that the hearing fees paid for any unused hearing days are refundable.

Conciliation conference fee

Subsection 2.12(10) provides an entitlement to a refund of a conciliation conference fee where the conference does not proceed because the proceedings in relation to the conference are settled or discontinued before the conference could be held.

Section 2.13 – 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 2.14 – Notice of decision and AAT review

This section (subsections 2.14(1) and (5)) provides for rights of appeal to the Administrative Appeals Tribunal (AAT) from a decision of a registrar or authorised officer about the payment of a fee in the Regulation under:

- sections 2.05 (exemption from payment on the ground of financial hardship)
- section 2.10 (deferral of the time for payment of a fee)
- subsection 2.06(2) (payment of the reduced fee for a divorce or nullity of marriage application), and
- subsection 2.12(7) (refund of a hearing fee where notification within required time limit has not occurred).

The section requires a registrar or authorised officer to give a notice of the decision to the person required to pay the fee (subsection 2.14(1)) within 28 days after making

the decision (subsection 2.14(2)) setting out the decision and, for particular decisions, a statement that the person may apply to the AAT for review of the decision and the reasons for the decision (subsections 2.14(3) and (4)).

Subsection 2.14(6) provides that failure to advise of rights of appeal to the AAT does not affect the validity of the decision made by the registrar or authorised officer.

Section 2.15 – Debt due to Commonwealth or State

Subsection 2.15(1) provides that if a fee is not paid in accordance with the Regulation, then it immediately becomes a debt due to the Commonwealth. This would include where a fee is not paid at the end of an invoice period or deferral period (and no further deferral is granted).

Subsection 2.15(2) provides that subsection (1) is subject to the following:

- if the fee is payable in relation to a proceeding in a Family Court of a State – then it is recoverable by the State as a debt due to that State, and
- if the fee is payable in relation to the proceeding in a court of summary jurisdiction of a State or Territory – then it is recoverable by the State or Territory as a debt due to that State or Territory.

Schedule 1 – Fees

Schedule 1 lists the fees payable for the filing of documents or provision of a service in respect of proceedings under the Family Law Act. The fees are the fees prescribed under the Family Law Regulations and the Federal Magistrates Regulations, as increased every two years in accordance with regulation 21AA of the Family Law Regulations and regulation 14 of the Federal Magistrates Regulations, with the following changes:

- consolidation of fees in both the Family Law Regulations and the Federal Magistrates Regulations into one Schedule
- fee amounts are updated to reflect fee increases as part of the 2012-13 Budget, with most fees generally increased by 20%. These increases apply to fee amounts listed in the *Australian Government Notices Gazette*, No. GN 22, 6 June 2012
- introduction of new fee items as part of the 2012-13 Budget, and
- removal of the reduced fees under those Regulations.

Proposed specific changes to fee items and new fee items are set out below.

Item 1

This item specifies the reduced fee for a divorce or nullity of marriage application that is payable in the Family Court by a person eligible under section 2.06.

Item 2

This item specifies the reduced fee for a divorce application that is payable in the FMC or other courts that may hear these applications by a person eligible under section 2.06.

Item 8

This item introduces a fee for filing an application for leave to appeal under section 94 or 94AAA of the Family Law Act, at the same rate as the fee for filing an appeal. The fee for filing the appeal at item 7 is not payable if the fee for leave to appeal at item 8 has been paid.

Item 9

This item introduces a fee for filing an application seeking an interim order. The fee is charged in addition to the fee for final orders at item 4 or item 10, if an interim order is sought in conjunction with the final order. The term ‘interim order application’ is defined in section 1.03.

The fee only applies where an application for interim orders is filed. For example, no fee applies if a court made interim orders arising out of the filing of a notification of family violence.

Item 10

This item introduces a fee for applications which seek final orders in respect of both children and financial orders under Part VIII, Part VIIIA or Part VIIIAB of the Family Law Act (other than orders for spousal maintenance).

For example, if a person were to seek an order to spend time with a child and also an order to distribute property he or she owns with a spouse, then the applicable fee is fee item 10, and not fee item 4.

Item 19

This item introduces a fee for issuing a subpoena.

Item 20

This item introduces a fee for conciliation conferences in financial proceedings under Part VIII or VIIIAB of the Family Law Act.