

Explanatory Statement

Issued by the authority of the Attorney-General

Administrative Appeals Tribunal Act 1975

*Administrative Appeals Tribunal Amendment (Family Assistance Law Review Fees)
Regulations 2019*

Authority

The *Administrative Appeals Tribunal Amendment (Family Assistance Law Review Fees) Regulations 2019* (the Amendment Regulation) is made under section 70 of the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The Amendment Regulation is a legislative instrument for the purposes of subsection 8(5) of the *Legislation Act 2003*.

Legislative background

The Administrative Appeals Tribunal (AAT) was established by the AAT Act and commenced operations on 1 July 1976 as a general tribunal to engage in independent merits review of administrative decisions under Commonwealth legislation. The AAT Act and the *Administrative Appeals Tribunal Regulation 2015* (the Principal Regulation) sets out the AAT's functions, powers and procedures. To make a valid application for review, the AAT must have the jurisdiction to review the matter and the person who makes the application, or on whose behalf the application is made, must be eligible to apply to the AAT.

Certain applications for review of a decision have prescribed fees associated with the application as set out in Part 6 of the Principal Regulation. Under regulation 21 of the Principal Regulation, the application fee may be subject to a concession where certain circumstances apply. Particular applicants are exempt from paying a fee or are eligible to pay a reduced fee. These include applications in the social security, veterans' affairs and workers' compensation jurisdiction which are fee exempt. The standard application fee can be reduced to \$100 if an applicant has been granted legal aid, holds a health card or other card that certifies entitlement to Commonwealth health concessions, is in gaol or otherwise lawfully detained, is under 18 years of age or is receiving youth allowance or other student support benefits or the AAT is satisfied that paying the full fee would cause the applicant financial hardship (regulation 21(h)).

Where an application fee is payable, the application cannot proceed until the fee is paid. The AAT may also dismiss an application for review where the prescribed application fee is not paid within the specified time. However, for certain administrative decisions, no fee is prescribed in relation to an application for review with the AAT. These administrative decisions include certain decisions made under the family assistance law within the meaning of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Administration Act).

Purpose and operation of amendments

The Amendment Regulation amends the Principal Regulation to expressly clarify that a fee is payable in relation to an application to the AAT for ‘AAT single review’, as defined under section 138 of the Administration Act, of a decision made under family assistance law. ‘AAT single review’ decisions refer to those decisions, predominantly affecting child care service and provider approval, specified in subsection 138(1) of the Administration Act that have been internally reviewed.

A fee is not be payable in relation to an application to the AAT for ‘AAT first review’, as defined under section 111 of the Administration Act, or ‘AAT second review’, as defined under section 128 of the Administration Act. ‘AAT first review’ and ‘AAT second review’ reflect the merits review model of the former Social Security Appeals Tribunal (SSAT) before its amalgamation into the general administrative division of the AAT where SSAT appeals could be made to the AAT. ‘AAT first review’ and ‘AAT second review’ is available for review of decisions that do not relate to the approval framework for child care service providers. These classes of decision are and will remain application fee exempt. As relevant to child care payments, these are largely decisions relating to the entitlement of individuals to family assistance, including child care subsidy.

The measure simply gives effect to the general intention of the exemption that applies to family assistance matters as it relates to individuals (typically parents) seeking review of their family assistance entitlement. The fee exemption was not intended to provide an exemption to child care service providers seeking review of decisions relating to their approval. The intent of the application fee exemption in relation to decisions made under the Administration Act was not to inadvertently provide special dispensation to sole traders, private businesses and proprietary limited companies (the typical applicants in single review proceedings seeking review of decisions to cancel child care subsidy approval) with capacity to pay an application fee.

The types of applications which the measure clarifies are not fee exempt relate only to child care service providers seeking merits review of decisions relating to their approval, including decision to cancel their approval and decisions to refuse an application for initial approval. In most of these matters, the applicants are legally represented, some have amicus or lay representatives assisting them and in a number of such matters before the AAT, applicants have retained junior counsel. The general profile of these applicants is either as directors of corporate entities, joint or sole traders in private business arrangements (non-incorporated entities) who have the resources to engage and retain legal representation including counsel at each stage of the proceedings before the Tribunal (even at the pre-hearing conference levels and interlocutory stages).

The measure gives effect to the general intention of the fee exemption. The fee exemption was not intended to provide an exemption to child care service providers. The types of applications which the measure clarifies are not fee exempt are child care service providers seeking merits review decisions relating to their approval under the family assistance law. Notably, child care service providers can still avail themselves of fee waiver provisions if applicable to their circumstances.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation has agreed a RIS is not required for the Amendment Regulation (OBPR ID 24479).

Commencement

The Amendment Regulation commences on the day after it is registered on the Federal Register of Legislation.

Consultation

The Attorney-General has consulted with the Minister for Education the Hon Dan Tehan MP in developing the Amendment Regulation. The AAT has also been consulted on the measure and the pending change to its jurisdiction. The AAT has indicated that any consequential operational changes associated with the measure are easily implemented from the Tribunal's operational perspective.

Detailed explanation of the Amendment Regulation provisions

Section 1 – Name of Amendment Regulation

This section provides that the title of the Amendment Regulation is the *Administrative Appeals Tribunal Amendment (Family Assistance Law Review Fees) Regulations 2019*.

Section 2 – Commencement

This section provides for the Amendment Regulation to commence on the day after the Amendment Regulation is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Amendment Regulation is made under section 70 of the *Administrative Appeals Tribunal Act 1975*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1

Item 1 repeals and replaces table item 3 to regulation 22 of the Principal Regulation with new table item 3 to regulation 22 of the Principal Regulation.

New table item 3 of regulation 22 of the Principal Regulation would provide that “[a] decision under the family assistance law within the meaning of the *A New Tax System (Family Assistance) (Administration) Act 1999* for which application is made for AAT first review or AAT second review within the meaning of that Act.”

The purpose of item 1 is to make clear that no fee is payable in relation to an application for review of a decision under family assistance law, where the application is made for ‘AAT first review’, as defined under section 111 of the Administration Act, or ‘AAT second review’, as defined under section 128 of the Administration Act.

Item 2

Item 2 inserts a note at the end of regulation 22 of the Principal Regulation.

The new note at the end of regulation 22 provides that “Item 3 does not cover a decision under the family assistance law within the meaning of the *A New Tax System (Family Assistance) (Administration) Act 1999* for which application is made for AAT single review within the meaning of that Act.”

The purpose of the note at the end of regulation 22 is to make clear that a fee is payable in relation to an application to the AAT for ‘AAT single review’, as defined under section 138 of the Administration Act. The intention of this measure is to clarify that child care service providers seeking ‘AAT single review’ of a decision under family assistance law that would affect their approval are required to pay the standard application fee, as provided by sub-regulation 20(1) of the Principal Regulation. The exception would be where a concessional circumstance, under regulation 21 of the Principal Regulation, applies.

Item 3

Item 3 inserts new regulation 34 in Part 8 of the Principal Regulation.

New regulation 34 is titled “Administrative Appeals Tribunal Amendment (Family Assistance Law Review Fees) Regulations 2019—application”.

New regulation 34 would provide that “[t]he amendments made by the *Administrative Appeals Tribunal Amendment (Family Assistance Law Review Fees) Regulations 2019* apply in relation to application to the Tribunal made on or after the day this section commences for review of a decision under the family assistance law within the meaning of *A New Tax System (Family Assistance) (Administration) Act 1999*.”

The purpose of new regulation 34 is to make clear that the Amendment Regulation applies to applications to the AAT for review of decisions made under family assistance law that are made on or after the day new regulation 34 commences.

Statement of Compatibility with Human Rights

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

Administrative Appeals Tribunal Amendment (Family Assistance Law Review Fees) Regulations 2019

This 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 Legislative Instrument

The purpose of the *Administrative Appeals Tribunal Amendment (Family Assistance Law Review Fees) Regulations 2019* (the Amendment Regulation) is to amend the *Administrative Appeals Tribunal Regulation 2015* (Principal Regulation) to make clear that a fee is payable in relation to an application to the Administrative Appeals Tribunal (AAT) for ‘AAT single review’ of a decision made under family assistance law, however, a fee is not payable in relation to application to the AAT for ‘AAT first review’ or ‘AAT second review’ of a decision made under family assistance law.

‘AAT first review’ and ‘AAT second review’ is available for review of decisions that do not relate to the approval framework for child care service providers. These classes of decision are and will remain application fee exempt. As relevant to child care payments, these decisions are largely decisions relating to the entitlement of individuals to family assistance, including child care subsidy.

The measure simply gives effect to the general intention of the exemption that applies to family assistance matters as it relates to individuals (typically parents) seeking review of their family assistance entitlement. The fee exemption was not intended to provide an exemption to child care service providers seeking review of decisions relating to their approval.

The intent of application fee exemption in relation to decisions made under the Administration Act was not to inadvertently provide special dispensation to sole traders, private businesses and proprietary limited companies (the typical applicants in single review proceedings seeking review of decisions to cancel child care subsidy approval) with capacity to pay an application fee.

Human rights implications

Right to an effective remedy - Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR)

This Legislative Instrument engages the right to access to justice, which is implied in the right to effective remedy under Article 2(3) of the ICCPR.

Article 2(3) of the ICCPR protects the right to effective remedy for violation of rights or freedoms recognised by the ICCPR, and provides for a person’s right to be determined by competent judicial authorities, by administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State. This Legislative Instrument clarifies that a fee is payable for an application for ‘AAT single review’ of a decision made under family assistance law within the meaning of the *A New Tax System (Family Assistance)*

(Administration) Act 1999 (Administration Act). The purpose of the measure is to reflect accurately the policy intent that applications made by childcare service providers seeking review of decisions affecting their approval on “single review” under the family assistance law be subject to the standard application fee as set out in regulation 20 of the Principal Regulation.

The Legislative Instrument maintains the existing position that no fee is payable for an application for ‘AAT first review’ or ‘AAT second review’ of a decision made under family assistance law within the meaning of the Administration Act.

The measure supports and confirms the existing application fee model which reflects the principle that those fee payers with the ability to pay more should do so, and conversely, those without the ability to pay should still be able to seek access to justice and remedial relief. Applying the standard fee to child care service providers seeking review of decisions to cancel their child care subsidy approval aims to maximise cost recovery from business owners and corporate entity users, while maintaining the status quo on fee exemption in the social security context thereby mitigating any barrier to justice for those users. Introducing a filing fee for this category of applicant reflects the full, efficient cost of the Tribunal’s activities in providing merits review services (with exemptions and fee waivers still available where necessary to safeguard access to justice).

Fee waivers will continue to apply, permitting the waiver of fees for applicants, including child care service providers to which the standard fee applies, on grounds of financial hardship, with the additional provision of automatic waivers to certain categories of applicants.

Imposing an application fee for applicants seeking AAT single review strikes an appropriate balance between access to justice and user pays principles. It is reasonable to require those who are seeking a commercial benefit and have capacity to pay for Tribunal services to contribute to the cost of those services. Notably, the imposition of a fee for this defined category of case would not preclude applicants who nominally fall within this category but do not have the resources to pay the application fee from applying for a waiver of that fee on grounds of financial hardship. Such waiver will be granted if the Registrar, a District Registrar or a Deputy Registrar, having regard to the income, day to day living expenses, liabilities and assets of the person liable to pay the fee, forms the opinion that payment of the fee would cause financial hardship to the person.

Right to a fair hearing - Article 14 of the International Covenant on Civil and Political Rights ICCPR

This Legislative Instrument engages the right to a fair hearing under Article 14 of the ICCPR.

The right to a fair hearing is protected by Article 14 of the ICCPR. The right applies to both criminal and civil proceedings, to cases before both courts and tribunals and to military disciplinary hearings. The right to a fair hearing is concerned with procedural fairness, and encompasses notions of equality in proceedings, the right to a public hearing and the requirement that hearings are conducted by an independent and impartial body. The right also relevantly encompasses the right to have equal access to the courts, regardless of citizenship or other status including that no one is to be barred from accessing courts or tribunals (subject to limited exceptions based on objective and reasonable grounds such as, for example, the prevention of vexatious litigation). Effective realisation of this right may extend to the

regulation of fees or costs associated with accessing a curial or administrative forum that could indiscriminately prevent access to justice.

The measure is expositional only. It does not impose an additional or new fee on applicants seeking review of decisions by the AAT. The existing application fee for certain categories of applicant does not deny access to justice in violation of Article 14, and is reasonable, proportionate and directed to a legitimate policy purpose. The imposition of application fees for applicants seeking first review of decision under the family assistance law who predominantly fall into the category of private business owners and corporate entities with clear capacity to pay is consistent with the general philosophy of the fee framework in the Tribunal. This fee framework is designed to ensure that those who do not face apparent access to justice barriers pay an application fee while ensuring there is no pecuniary impediment placed in the way of disadvantaged or vulnerable applicants seeking review of an administrative decision. Importantly, existing fee waiver provisions will continue to apply, permitting the waiver of fees for applicants, including those seeking AAT single review, on grounds of financial hardship, with the additional provision of automatic waivers to certain categories of applicant.

Conclusion

The *Administrative Appeals Tribunal Amendment (Family Assistance Law Review Fees) Regulations 2019* 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* and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

Christian Porter
Attorney-General