

## Chapter 1<sup>1</sup>

### New and continuing matters

- 1.1 This chapter provides assessments of the human rights compatibility of:
- bills introduced into the Parliament between 30 November and 3 December 2020; and
  - legislative instruments registered on the Federal Register of Legislation between 11 November and 1 December 2020.<sup>2</sup>

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 15 of 2020*; [2020] AUPJCHR 181.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

## Response required

1.2 The committee seeks a response from the relevant minister with respect to the following instrument.

### **Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416]<sup>3</sup>**

<b>Purpose</b>	This instrument increases the application fees charged by the Federal Circuit Court for migration litigants, and introduces a partial fee exemption enabling individuals to pay a reduced application fee where paying the full fee would cause financial hardship
<b>Portfolio</b>	Attorney-General
<b>Authorising legislation</b>	<i>Federal Circuit Court of Australia Act 1999 and Federal Court of Australia Act 1976</i>
<b>Last day to disallow</b>	15 sitting days after tabling (tabled in the House of Representatives on 12 November 2020 and the Senate on 30 November 2020). Notice of motion to disallow must be given by 18 February 2021 in the House of Representatives and 22 February 2021 in the Senate <sup>4</sup>
<b>Right</b>	Fair hearing (access to justice)
<b>Status</b>	Seeking additional information

### **Increased application fees in the Federal Circuit Court**

1.3 The instrument amends the Federal Court and Federal Circuit Court Regulation 2012 to increase the application fee for a migration matter in the Federal Circuit Court from \$690 to \$3,330.<sup>5</sup> The instrument further provides that where the Registrar or authorised court officer determines that payment of the full fee would cause financial hardship to a person, the person may instead pay a reduced fee of

3 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Federal Court and Federal Circuit Court Amendment (Fees) Regulations 2020 [F2020L01416], Report 182 of 2020; [2020] AUPJCHR 182.

4 In the event of any change to the Senate or House's sitting days, the last day for the notice would change accordingly.

5 Schedule 1, item 11, section 201A. The current application fee for filing in the Federal Circuit Court (\$690) is set out in Federal Court and Federal Circuit Court Regulation 2012, Schedule 1, Part 2.

\$1,665,<sup>6</sup> or if the reduced fee would also cause financial hardship, the person may be exempt from paying any fee.<sup>7</sup> In considering whether payment of a fee would cause financial hardship, the person's income, day-to-day living expenses, liabilities and assets must be considered.<sup>8</sup>

## Preliminary international human rights legal advice

### ***Right to a fair hearing***

1.4 Increasing the application fee for migration matters filed in the Federal Circuit Court by \$2,640 (or, by 483 per cent) may, in some cases, engage and limit the right to a fair hearing. The right to a fair hearing provides that in the determination of a person's rights and obligations in a 'suit at law', everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>9</sup> In migration matters relating to the determination of a person's existing rights under law (for example, an appeal of a decision to cancel a person's visa), the right to a fair hearing is engaged.<sup>10</sup>

1.5 One dimension of the right to a fair hearing is the right to access to justice.<sup>11</sup> The cost of engaging in legal processes in the determination of one's rights and obligations under law is, in turn, a component of the right to access to justice. The United Nations Human Rights Committee has stated that the imposition of fees on parties to legal proceedings which would de facto prevent their access to justice might give rise to issues under the right to a fair hearing.<sup>12</sup> The findings of

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6 Schedule 1, item 11, section 201A.

7 Schedule 1, item 3, subsection 2.06A(2).

8 Schedule 1, item 3, subsection 2.06A(3).

9 International Covenant on Civil and Political Rights, article 14. The right to a fair hearing applies where domestic law grants an entitlement to the persons concerned (see, *Kibale v Canada* (1562/07) [6.5]). The term 'suit at law' relates to the determination of a right or obligation, and not to proceedings where a person is not contesting a negative decision (for example, a decision to refuse to give a worker a promotion would not necessitate a determination of a matter in which the person had an existing entitlement). See, *Kolanowski v Poland* (837/98) [6.4].

10 Schedule 1, item 11, new item 201A of Schedule 1 of the Federal Court and Federal Circuit Court Regulation 2012 provides that the Federal Circuit Court of Australia has jurisdiction pursuant to section 476 of the *Migration Act 1958*, and jurisdiction in relation to non-privative clause decisions under section 44AA of the *Administrative Appeals Tribunal Act 1975* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*.

11 See, United Nations Development Programme, *Programming for Justice: Access for All (a practitioner's guide to a human rights-based approach to access to justice)* (2005).

12 See, UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, U.N. Doc. CCPR/C/GC/32 (2007) [11]; and *Lindon v Australia*, Communication No. 646/1995 (25 November 1998) [6.4].

comparable jurisdictions are also relevant in this context. In this regard, the European Court of Human Rights has found that the amount of the fees assessed in light of the particular circumstances of a case (including the applicant's ability to pay them) and the phase of the proceedings at which that restriction has been imposed, are material in determining whether a person has enjoyed the right of access to justice and had a fair hearing.<sup>13</sup> As this instrument significantly increases the application fees for migration matters in the Federal Circuit Court, this may have the effect that, in cases where an individual is unable to file an application for their migration matter in the Federal Circuit Court because they cannot afford to pay the application fee, their right to a fair hearing may be limited.

1.6 The right of access to justice may be permissibly limited where such a limitation seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and proportionate. The statement of compatibility does not recognise that this measure may engage the right to a fair hearing, and so no assessment of its engagement is provided.

1.7 With respect to the objective of the measure, the explanatory statement only states that this amendment will bring the Federal Circuit Court's application fees 'in line with the Federal Circuit Court's placement in Australia's court hierarchy'.<sup>14</sup> However, it is not clear that this would constitute a legitimate objective for the purposes of international human rights law. With respect to the proportionality of the measure, it is important to note that the instrument provides that the Registrar or court officer may reduce the fees by half, or to nil, if they consider that payment of the full or reduced fee would, at the time the fee is payable, cause 'financial hardship' to the person. As such, it would appear that there is capacity for the application fee to be reduced or waived in full in some cases. The instrument states that in considering whether payment of a fee would cause financial hardship to an individual, the Registrar or authorised officer must consider the individual's income,

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13 European Court of Human Rights, *Kreuz v Poland* (Application No. 28249/95) (2001) [60]. In *Kijewska v Poland* (Application No. 73002/01) (2007) at [46], the court considered that the refusal by a court to reduce a fee for lodging a civil claim may constitute a disproportionate restriction on an applicant's right of access to a court, and be in breach of article 6 of the European Convention on Human Rights. Further, in *Ciorap v Moldova* (Application No. 12066/02) (2007) at [95], the court considered that the nature of the complaint or application in question was a significant consideration in determining whether refusing an application for waiver of court fees was a breach of article 6 (in this case, the applicant had sought to lodge a complaint about being force-fed by authorities while detained in prison).

14 Explanatory statement, p. 1. The application fee for filing a migration matter in the Administrative Appeals Tribunal is currently \$1,826. Administrative Appeals Tribunal, 'Fees', <https://www.aat.gov.au/apply-for-a-review/migration-and-refugee/migration/fees> (accessed 25 November 2020). The cost for filing an appeal in the Federal Court of Australia from a decision of the Administrative Appeals Tribunal is \$4,840. Federal Court of Australia, 'Fees Payable from 1 July 2020', <https://www.fedcourt.gov.au/forms-and-fees/court-fees/fees> (accessed 25 November 2020).

day-to-day living expenses, liabilities and assets.<sup>15</sup> However, no information is provided as to how assessments of a person's financial hardship would be conducted and what guidance is or would be provided to court officers in making such assessments of financial hardship. It is also not clear whether owning non-liquid assets such as a car, laptop, or a home would mean a person might not be eligible for a fee waiver, and what level of liquid assets would make a person eligible.

1.8 In order to assess the compatibility of this measure with the right to access to justice further information is required, in particular:

- (a) the objective sought to be achieved by increasing the application fee for migration matters in the Federal Circuit Court, and how this seeks to address a pressing or substantial need;
- (b) what would be regarded as 'financial hardship' in the context of an application for (i) a 50 per cent reduction in the application fee, and (ii) waiver of the full application fee;
- (c) what guidance, if any, is or would the Registrar or authorised court officer be provided with in determining whether payment of a full (or partial) migration matter application fee would cause an applicant financial hardship;
- (d) what other safeguards, if any, would operate to assist in the proportionality of this measure.

### **Committee comment**

**1.9 The committee notes that the instrument increases the application fees charged by the Federal Circuit Court for migration litigants and, significantly, introduces partial or full fee exemptions where paying the full fee would cause financial hardship. The committee notes that, in some cases, an increase in court application fees may engage and potentially limit the right to a fair hearing, which includes the right to access to justice. The committee notes that this aspect of the right may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**1.10 As the statement of compatibility does not recognise that this measure may engage and limit the right to a fair hearing, no information has been provided as to whether the fee increase would adversely impact on the right of some applicants to access proceedings in the Federal Circuit Court.**

**1.11 In order to form a concluded view on the human rights implications of this measure, the committee seeks the Attorney-General's advice as to the matters set out in paragraph [1.8].**

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15 Schedule 1, item 3, subsection 2.06A(3).

## Bills and instruments with no committee comment<sup>1</sup>

1.12 The committee has no comment in relation to the following bills which were introduced into the Parliament between 30 November and 3 December 2020. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:<sup>2</sup>

- Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill 2020;
- Customs Tariff Amendment (Incorporation of Proposals and Other Measures) Bill 2020;
- Designs Amendment (Advisory Council on Intellectual Property Response) Bill 2020
- Electoral Amendment (Territory Representation) Bill 2020;
- Industrial Chemicals Environmental Management (Register) Bill 2020
- Industrial Chemicals Environmental Management (Register) Charge (Customs) Bill 2020;
- Industrial Chemicals Environmental Management (Register) Charge (Excise) Bill 2020;
- Industrial Chemicals Environmental Management (Register) Charge (General) Bill 2020;
- Industrial Chemical Legislation Amendment Bill 2020;
- Migration Amendment (Common Sense Partner Visa) Bill 2020;
- National Collecting Institutions Legislation Amendment Bill 2020;
- National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2020;
- National Emergency Declaration Bill 2020;
- National Emergency Declaration (Consequential Amendments) Bill 2020;
- Regulatory Powers (Standardisation Reform) Bill 2020;

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 15 of 2020*; [2020] AUPJCHR 183.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

- Telecommunications Amendment (Infrastructure in New Developments) Bill 2020
- Treasury Laws Amendment (2020 Measures No. 6) Bill 2020.

1.13 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 11 November and 1 December 2020.<sup>3</sup> The committee has reported on one legislative instrument from this period earlier in this chapter. The committee has determined not to comment on the remaining instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

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3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: <https://www.legislation.gov.au/AdvancedSearch>.

