

1993

**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

MAGISTRATES COURT (AMENDMENT) BILL (No. 3) 1993

EXPLANATORY MEMORANDUM

Circulated by authority of

**Terry Connolly MLA
ATTORNEY GENERAL**

MAGISTRATES COURT (AMENDMENT) BILL (No. 3) 1993

OUTLINE

The *Magistrates Court Act 1930* (the Principal Act) provides for matters relating to the Magistrates Court of the Territory.

Section 257 of the Principal Act provides that the Minister may, by notice in writing published in the *Gazette*, determine fees for the purposes of the Act. The Magistrates Court (Amendment) Bill (No. 3) 1993 will amend the Principal Act to introduce a new fees and charges regime which widens the power of determination and provides a review mechanism of decisions that are made in relation to fees and charges and which introduces other new provisions in respect of fees and charges.

At present, powers to determine fees exist also in the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Small Claims Act 1974*. Consequential amendment of these Acts will mean that there will be one power of determination located in the Principal Act. The new fees and charges regime located in the Principal Act will, for ease of administration and clarity, apply to all matters in the Magistrates Court and the Small Claims Court. Under section 4A of the *Small Claims Act 1974* the Magistrates Court is known as the Small Claims Court when exercising jurisdiction under the Small Claims Act and, similarly, the Registrar and Deputy Registrars of the Magistrates Court are known as the Registrar and Deputy Registrars of the Small Claims Court when performing duties or functions under that Act.

The Magistrates Court (Amendment) Bill (No. 3) 1993 will also make a number of amendments of the Principal Act for the purposes of style.

FINANCIAL CONSIDERATIONS

The amendments themselves have some financial impact in that they provide for exemptions from payment of or remission or refund of some fees and for some measures for the protection of the revenue. The determinations of fees and charges that may be made under the determining power will have financial implications for parties before the courts.

DETAILS OF INDIVIDUAL CLAUSES

Clauses 1, 2 and 3 are formal provisions relating to the short title of the Bill and its commencement and defining the term "Principal Act" to mean the *Magistrates Court Act 1930*.

Clause 4 will omit the definition of "determined fee" from subsection 5(1) of the Principal Act. References to "determined fee" in the Principal Act will be omitted by this Bill making the definition unnecessary.

Clause 5 will make a technical amendment of subsection 26(1) and will omit subsections 26(2), (3) and (4), the substance of which is picked up by sections 248C and 248E. Section 26 deals with the laying of an information before a Magistrate

in respect of an offence. A fee is currently payable by certain informants on the laying of the information. Subsections 26(2) and (3) provide exemptions from payment of the fee and subsection 26(4) provides that the Court shall order a convicted defendant to pay an amount equal to that fee by way of costs where, in circumstances set out in that subsection, the informant has not paid the fee.

Clause 6 will amend section 144, which deals with the provision of copies of informations, minutes or memorandums of convictions or orders and formal convictions or orders, for the purposes of style and will remove the requirement that copies be supplied upon the payment of any determined fee. Subsection 248B(1) requires that fees and charges be paid, in advance, in accordance with the determination.

Clause 7 Liability for payment of fees and charges determined under the Principal Act is currently based on section 245 but will be based on new section 248B. Only subsection 147(2C) of the Principal Act, which currently imposes liability to pay a determined fee when a person is in default of compliance with an order, imposes liability independently of section 245 and the amendment proposed by clause 7 will correct this anomaly by ensuring that section 248B is the only source of the liability for the payment of fees and charges.

Clause 8 will amend the heading to Part XIII.

Clause 9 will repeal sections 245 and 245A of the Principal Act. Section 245 deals with liability to pay fees and section 245A deals with remission of fees in certain circumstances. The substance of these sections is picked up by sections 248B and 248C with the exception of subsection 245A(2), the provisions of which are omitted. (Section 257 of the Principal Act currently contains the power to make determinations. Clause 12 will repeal that section, the provisions of which will be reflected in subsection 248A(1).)

Clause 10 will insert new "Part XIII A - FEES AND CHARGES" containing sections 248A, 248B, 248C, 248D, 248E and 248F.

As indicated earlier, the Magistrates Court (Amendment) Bill (No. 3) 1993 and the Bills consequentially amending the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Small Claims Act 1974* will have the effect of locating within the Principal Act the power to make fees and charges determinations in respect of the Magistrates Court and the Small Claims Court. Presently, powers to determine fees and charges are contained in the Principal Act, the *Magistrates Court (Civil Jurisdiction) Act 1982* and the *Small Claims Act 1974*. It is, consequently, necessary to make determinations under each of the determining powers in those Acts. This is cumbersome and can be confusing. The amalgamation of powers into one power to make determinations located in the Principal Act will simplify the determining process and remove any confusion the present system may be causing. Provisions relating to payment, waiver of payment, exemption, refund,

remission and deferral of liability for payment of fees and charges will also be contained in the Principal Act.

Section 248A

This section deals with the determination of fees and charges.

Subsection 248A(1) provides the power for the Minister to determine fees and charges by notice in writing published in the *Gazette*. This provision, in effect, replaces section 257 of the Principal Act, section 307B of the *Magistrates Court (Civil Jurisdiction) Act 1982* and section 50A of the *Small Claims Act 1974* with a provision enabling the determination of fees and charges in respect of any matter associated with or incidental to proceedings in and the operation of the Court enabling the Minister to make one determination of fees and charges which will cover the Magistrates Court and the Small Claims Court. The Minister may, under the power, determine different fees in respect of proceedings or other matters in the Magistrate Court to those that may be determined for matters before that Court sitting as the Small Claims Court.

Subsection 248A(2) allows a high degree of flexibility by providing that a determination may provide for exemptions from payment of filing fees or fees for the service and execution of process, in whole or in part, and for the remission, refund or deferral of liability for the payment of fees or charges, in whole or in part, by the Registrar of the Court.

Determinations currently are disallowable instruments and will, under subsection 248A(3), be disallowable instruments for the purposes of section 10 of the *Subordinate Laws Act 1989*.

Section 248B

This section deals with the payment of fees and charges.

Subsection 248B(1) imposes the obligation, subject to section 248B, to pay a fee or charge and to pay the fee or charge in advance in accordance with the determination. At present, subsections 245(1) and (2) of the Principal Act impose, generally, a liability to pay, in advance, fees determined in respect of proceedings and matters under the Principal Act, subsection 292(1) of the *Magistrates Court (Civil Jurisdiction) Act 1982* imposes an obligation to pay with subsection 292(2) of that Act requiring the Registrar not to accept a document lodged for filing in a proceeding unless the fee has been paid and subsection 46(1) of the *Small Claims Act 1974* imposes the liability to pay fees in respect of the Small Claims Court. Subsection 248B(1), together with relevant consequential amendments of the above Acts, will effectively replace these provisions with a general requirement for fees and charges to be paid and to be paid in advance.

Subsection 248B(2) requires payment to be made on notification from the Registrar if a fee or charge cannot be calculated until a function is performed or a facility or service provided. This provision reflects and extends, to all relevant

fees and charges, subsection 245(3) of the Principal Act and subsection 292(3) of the *Magistrates Court (Civil Jurisdiction) Act 1982*.

Subsection 248B(3) makes it clear that the Registrar or the Court is not obliged to perform a function or provide a facility or service if a fee or charge payable in advance is not paid when due.

Subsection 292(1A) of the *Magistrates Court (Civil Jurisdiction) Act 1982*, which relates to the obligation to pay fees in respect of applications under subsection 13A(1) of the *Motor Traffic Act 1936* and subsections 36(2) and 40(1) of the *Motor Traffic (Alcohol and Drugs) Act 1977*, has not been restated as the power to determine fees and charges and the obligation to pay them are wide enough to cover fees in respect of these matters.

Section 248C

This section deals with the circumstances when fees and charges are not required to be paid.

Subsection 248C(1) provides that a fee or charge may be remitted, refunded or liability for its payment deferred in accordance with the determination.

Subsection 248C(2) deals with the circumstances, additional to those which might be set out in a determination, in which determined fees and charges are not payable. No determined fee or charge will be payable by a person -

(a) if the person otherwise liable to pay the fee or charge is -

(i) exempt from paying the fee or charge under subsection 93(1) of the *Legal Aid Act 1977*; or

(ii) legally assisted under a scheme or service provided or approved by the Attorney-General; or

(b) if the Registrar waives payment of the fee or charge in whole or in part because he or she considers that it would impose hardship on the person liable to pay the fee or charge - to the extent of the waiver.

(c) No fee for filing a document or for the service or execution of process will be payable in relation to proceedings -

(i) under Part X of the Principal Act, which deals with the making of restraining orders;

(ii) for an application arising out of a conviction or order in respect of an offence;

(iii) under the *Children's Services Act 1986*;

- (iv) under the *Domestic Violence Act 1986*;
 - (v) under the *Guardianship and Management of Property Act 1991*;
 - (vi) under the *Maintenance Act 1968*; or
 - (vii) under the *Workers' Compensation Act 1951*.
- (d) Nor will fees and charges be payable for the laying of an information -
- (i) by the Director of Public Prosecutions acting in the performance of an official function;
 - (ii) by a police officer acting in the performance of an official function; or
 - (iii) for an offence under subsection 255(1) of the Principal Act, which deals with contempt in the face of the Court.
- (e) Under paragraph 248C(2)(e), fees and charges will not be payable for inspection under section 306A of the *Magistrates Court (Civil Jurisdiction) Act 1982* of a record relating to a default judgment by -
- (i) a party to the proceedings in which judgment was given or entered; or
 - (ii) the legal representative of such a party.

In relation to the exemption contained in subparagraph 248C(2)(a)(i), paragraph 245A(1)(a) of the Principal Act presently reflects subsection 93(1) of the *Legal Aid Act 1977* which provides, in effect, that no fees are payable in respect of a proceeding on behalf of a legally assisted person in a court or tribunal. Paragraph 245A(1)(b) of the Principal Act and paragraph 292(4)(a) of the *Magistrates Court (Civil Jurisdiction) Act 1982*, in respect of court fees, currently provide, in respect of proceedings, exemptions similar to but slightly narrower than that contained in subparagraph 248C(2)(a)(ii). The exemption referred to in paragraph 248C(2)(b) reflects provisions already in paragraph 245A(1)(c) of the Principal Act, paragraph 292(4)(b) of the *Magistrates Court (Civil Jurisdiction) Act 1982* and subsection 46(3) of the *Small Claims Act 1974* in respect of the fee to institute proceedings, extends to all fees and charges and introduces the concept that fees or charges may be waived in part. The exemption set out in subparagraph 248C(2)(c)(i) reflects the present exemption in subsection 245(4) of the Principal Act. Those exemptions set out in subparagraphs 248C(2)(c)(ii) and (c)(iv) reflect present exemptions in the *Magistrates Court (Civil Jurisdiction) Act 1982*, at paragraphs 292(5)(a) and 292(5)(b) respectively. The exemption under subparagraph 248C(2)(c)(iii) reflects the exemption contained in section 175 of the *Children's Services Act 1986* which provides that no court fees are payable under section 292 of the *Magistrates Court (Civil Jurisdiction) Act 1982* in

respect of proceedings instituted under the Children's Services Act. Section 248C introduces the exemption set out in subparagraph 248C(2)(c)(v) in respect of proceedings under the *Guardianship and Management of Property Act 1991*. The exemptions contained in subparagraphs 248C(2)(c)(vi) and (vii) complement the provisions of paragraphs 4(c) and (d) of the *Magistrates Court (Civil Jurisdiction) Act 1982*.

While the exemptions set out in paragraph 248C(2)(c) reflect existing exemptions, apart from that relating to the Guardianship and Management of Property Act, they are limited to exemption from payment of fees for filing a document or for service or execution of process in relation to proceedings.

The exemptions set out in paragraph 248C(2)(d) reflect those presently provided for in subsections 26(2) and (3) of the Principal Act.

The exemption set out in paragraph 248C(2)(e) reflects that presently contained in subsection 306A(2) of the *Magistrates Court (Civil Jurisdiction) Act 1982*.

Under the new fees and charges regime, the exemptions set out in subsection 248C(2) will apply generally to proceedings rather than to proceedings under particular legislation. For example, the exemption from payment of fees in domestic violence proceedings will apply to all such proceedings in the Court rather than as at present where the exemption is expressed to refer to proceedings under the *Magistrates Court (Civil Jurisdiction) Act* only.

Section 248D

This section deals with recovery of fees and charges not otherwise paid in civil proceedings in the Court.

Subsections 248D(1) and (2) provide that, in the circumstances where, in civil proceedings, a filing fee or fee for service and execution of process is not payable because of the application of an exemption provided in a determination or in circumstances where a party has received legal assistance or because the fee has been remitted, refunded or waived in whole or in part, and judgment is given or entered, or an order is made, in favour of that party and that party's costs are payable by the other party, that other party is liable to pay to the Registrar an amount equal to the fees that would otherwise have been payable by the successful party. This provision refers to the filing fees and fees for service and execution of process rather than continue the use of the imprecise term "court fees" used in subsection 292(4A) of the *Magistrates Court (Civil Jurisdiction) Act 1982* and widens that provision to include fees unpaid in circumstances other than those set out in subsection 292(4) of that Act but otherwise reflects the provisions of subsection 292(4A).

Subsection 248D(3) ensures that the section does not apply when the Court sits as the Small Claims Court. Section 29 of the *Small Claims Act 1974* deals with costs in that court.

Section 248E

This section deals with recovery of fees and charges not otherwise paid in criminal proceedings in the Court.

Subsections 248E(1) and (2) provide that where a determined fee for the laying of an information is not payable because the information is laid by the Director of Public Prosecutions, by the police, by a person who is not required to pay the fee on hardship grounds or because the person is in receipt of legal aid or because the information laid is in respect of an alleged contempt of court, a convicted defendant who is ordered to pay a fine shall pay to the Registrar, in addition to the fine, an amount equal to the amount of the fee not paid for the laying of the information.

This provision restates the combined effect of subsections 26(2), (3) and (4) and subsection 245A of the Principal Act with one addition. Under subsection 245A(2) of the Principal Act, the fee would not be payable only if the Registrar is satisfied that payment would impose hardship on a person. New section 248E, which replaces subsection 26(4), extends the obligation on a convicted defendant to pay also when an informant has been exempted from payment because of receiving legal assistance.

Section 248F

Section 248F provides a person who claims to be entitled to a remission, refund, deferral of liability for payment or waiver of payment of fees and charges with a right to apply to a Magistrate for a review of the decision of the Registrar. No fee or charge is payable in relation to an application for review.

Clause 11 will amend section 255C of the Principal Act consequentially and for the purposes of style. Section 255C is concerned with the supply of transcripts and copies of transcripts of proceedings in the Court.

Clause 12 will repeal section 257 of the Principal Act. Section 257 contains the power for the Minister to determine fees and this power will be found in new section 248A.

Clause 13 will ensure that the existing determination continues in force until the first determination made under subsection 248A(1) commences and makes a consequential provision in relation to the interpretation of the Principal Act.