

Impact Analysis Statement

Summary IAS

Details

Lead department	Department of Justice and Attorney-General
Name of the proposal	<i>Appeal Costs Fund Regulation 2024</i>
Submission type	Summary IAS
Title of related legislative or regulatory instrument	<i>Appeal Costs Fund Regulation 2024</i>
Date of issue	June 2024

What is the nature, size and scope of the problem? What are the objectives of government action?

The ACF Act

The ACF Act establishes, and provides for the administration of, the Appeal Costs Fund (Fund) to assist in the payment of legal costs, in certain circumstances, incurred by litigants through no fault of their own, including for example, where:

- any civil or criminal proceedings are rendered abortive by the death or illness of the relevant judicial officer; or
- an appeal on a question of law, or on the ground of a miscarriage of justice, against the conviction of a person convicted on an indictment succeeds and a new trial is ordered.

The Fund is administered by an Appeal Costs Board (Board), constituted under the ACF Act. The amounts received for the fund are amounts paid to the department as part of its vote under the *Financial Accountability Act 2009* and made available by the department for use under the ACF Act (that is, consolidated revenue).

Section 26 of the ACF Act provides for a general regulation-making power, including the making of a regulation that provides for: the making of payments out of the Fund and the fixing of maximum payments out of the Fund; the assessment of costs for the purposes of the ACF Act in circumstances not provided for under the rules of the appropriate court or where a party to an appeal refuses or neglects to tax the party's costs; officers by whom bills of costs may be assessed for the purposes of the ACF Act in different courts or in different jurisdictions of a court; the preparation and service of bills of costs proposed to be assessed for the purposes of the ACF Act; the fees and allowances payable under the ACF Act and the purposes for which those fees and allowances are payable; and records to be kept by the proper officer, for the purposes of the ACF Act and the keeping of those records.

Claim of payment from the Fund

The Board considers applications from parties in civil and criminal proceedings for payment out of the Fund, for costs of certain appeals and failed proceedings.

Section 14 of the ACF Act provides that payments must not be made out of the Fund except upon and in accordance with a certificate from the Board. The Board cannot issue a certificate for payment unless it is satisfied that the payment is authorised under the ACF Act and that the provisions of the ACF Act, in relation to a claim for the payment, have been complied with.

The amount payable from the Fund will be determined in accordance with the provisions relating to the circumstances in which the entitlement for payment arose. For example, an entitlement for payment from the Fund may arise where proceedings have been aborted or discontinued and a new trial ordered, through no fault of the applicant (section 22 of the ACF Act). In these circumstances the person will be entitled to

the costs the Board considers have been thrown away or partly thrown away by the person or on the person's behalf in the proceedings. Another example is where a court grants an indemnity certificate (sections 20B and 20D of the ACF Act), in this scenario a person will be entitled to an amount assessed or agreed on under the relevant provision, but not exceeding the maximum payable as prescribed by regulation.

Provisions about the Board

The Board consists of three members: a chairperson, a member representative of the Bar Association of Queensland (BAQ) and a member representative of the Queensland Law Society (QLS). Section 6 of the ACF Act provides that members of the Board are to be paid the fees and allowances prescribed under a regulation. Section 5(5) of the ACF Act provides that the staff, employed under the *Public Service Act 2022*, to assist the Board may be paid from the Fund.

Sunset Review

Under section 54 of the *Statutory Instruments Act 1992* (SI Act), the *Appeal Costs Fund Regulation 2010* (Existing Regulation) is due to expire on 31 August 2024.

The Existing Regulation was due to expire on 31 August 2020 under the SI Act; however, issues regarding the operation of the ACF Act were identified during the sunset review of the Existing Regulation. The Department of Justice and Attorney-General (department) commenced a review of the ACF Act and extensions of the expiry of the Existing Regulation were subsequently permitted each following year under section 56A(2) of the SI Act, on the basis that the ACF Act was subject to review.

The *Justice and Other Legislation Amendment Act 2023* (JOLA Act) amends the ACF Act to address the issues identified during the review. On 20 September 2023, the JOLA Act received assent.

Amendments to the ACF Act that commenced on assent of the JOLA Act:

- provide that Legal Aid Queensland (LAQ) may no longer receive payments from the Fund;
- remove categories of claim on the Fund under section 15 (compensation from the Fund following a successful civil appeal based on a question of law) and section 17 (relating to claims in limited circumstances on a successful appeal from a decision of a Magistrates Court); and
- provide for a one year period to apply for payment from the Board after an indemnity certificate for the payment is granted; or, if a person is entitled to the payment without the grant of an indemnity certificate, the day on which the entitlement arises. An application outside of the one year period may be allowed by the Board.

Amendments to the ACF Act under the JOLA Act that commence by proclamation (proposed to be 1 July 2024) streamline the current fees under the ACF Act by removing them from the ACF Act and combining them with certain originating process fees under the *Justices Regulation 2014* and the *Uniform Civil Procedure (Fees) Regulation 2019*.

The Existing Regulation prescribes various matters to support the operation of the Act, including:

- prescribing how to make a claim for payment under an indemnity certificate or sections 22 and 23 of the ACF Act and prescribing the maximum amounts payable from the Fund in relation to certain claims (the amount of \$15,000 is prescribed for each of the listed claims under the Existing Regulation);
- requiring that applications to the Board for payment from the Fund must be in the approved form and accompanied by the prescribed documents, the Board may also request further evidence from the claimant that the Board reasonably requires to decide a claim under the Existing Regulation; and
- prescribing the fees payable to the Board members at Schedule 1 of the Regulation. Clause 12 also provides that a Board member who is a public service officer is not entitled to a fee. The fee amounts provide for a nominal amount for Board members to attend meetings of the Board as provided for under the ACF Act.

Prescribing maximum amounts payable from the Fund ensures the effective and efficient administration of the Fund under the ACF Act. The Fund is financed through consolidated revenue. Limiting the amount of funds payable from the Fund to the prescribed amounts, recognises the need for a costs recovery for litigants in certain circumstances in the context of competing Government funding priorities.

Requiring certain information to support a claim and allowing the Board to request further information, enables the Board to access necessary information efficiently and transparently for the purposes of assessing applications for payment from the Fund in accordance with the ACF Act.

The fee amounts provide for a nominal amount for Board members to attend meetings of the Board as provided for under the ACF Act.

What options were considered?

A sunset review requires consideration of the option of 'allowing the regulation to expire' against alternatives. Accordingly, three options were considered:

- **Option 1:** Allowing the Existing Regulation to expire without introducing a new regulation.
- **Option 2:** Remaking the Existing Regulation without changes.
- **Option 3:** Remaking the Existing Regulation with changes.

Option 1: Allowing the Existing Regulation to expire without introducing a new regulation

Not making the Regulation and allowing the Existing Regulation to expire is not a suitable policy option, as a statutory regulatory response is required to specify how the provisions of the ACF Act are to be applied.

Option 2 - Remaking the Existing Regulation without changes

Remaking the Existing Regulation without changes would not improve the efficiency and effectiveness of the Existing Regulation. Changes are required to provide for current drafting practices and administrative processes; clarify existing provisions; and reflect the amendments to the ACF Act under the JOLA Act.

Option 3 - Remaking the Existing Regulation with changes

The making of the proposed Regulation is necessary for the continued effective and efficient operation of the ACF Act. It is proposed that the Regulation will remake the Existing Regulation with minor changes to reflect current drafting practices and administrative processes; clarify existing provisions; and reflect the amendments to the ACF Act under the JOLA Act.

The Regulation incorporates the following consequential amendments arising from the changes to the ACF Act under the JOLA Act:

- omitting the additional fees provisions and the prescribed additional fees on documents provided for under the Existing Regulation to reflect the removal of the additional fee from the ACF Act on 1 July 2024; and
- omitting the provisions under the Existing Regulation related to the categories of claims on the Fund previously provided for under sections 15 and 17 of the ACF Act, to reflect the removal of those provisions from the ACF Act on 20 September 2023.

Minor changes to reflect current drafting practices and administrative processes, and to clarify existing provisions include: clarifying the documents to accompany claims for payments to reflect the documents requested by the Board under further information provisions; clarifying the information to be included in a notice requesting further information issued by the Board (for example, when and how the information is to be provided); and removing outdated procedural requirements in relation to requests to a proper officer for documents.

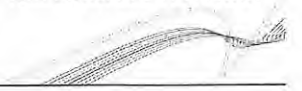
There is no change to the prescribed maximum amounts payable from the Fund or the fees paid to the Board as these amounts are still considered appropriate.

What are the impacts?

The Regulation maintains the status quo as it will remake the Existing Regulation with minor changes to reflect current drafting practices and administrative processes; clarify existing provisions; and reflect the amendments to the ACF Act under the JOLA Act. Therefore, the impact to stakeholders is negligible.

Who was consulted?

Relevant Heads of Jurisdiction, the Board, the BAQ and the QLS were consulted on a draft of the 2024 Regulation. Feedback was considered in drafting the Regulation.



What is the recommended option and why?

Option 3 is recommended. The making of the proposed Regulation is necessary for the continued effective and efficient operation of the ACF Act and avoids unnecessary burden on affected stakeholders.

Impact assessment

	First full year	First 10 years**
Direct costs – Compliance costs	<p>There are no additional compliance costs arising from the making of the Regulation.</p> <p>Legal costs associated with making an application for payment from the Fund to the Board are incurred by an applicant. The amount of costs incurred vary based on the rate at which legal fees are charged, the complexity of the claim and time taken to prepare an application.</p>	
Direct costs – Government costs	<p>There are no additional government costs arising from the making of the Regulation.</p> <p>Payments made from the Fund for the financial year ending 2023 totalled \$2,319,000.</p> <p>It is expected that payments from the Fund for the financial year ending 2024 will be reduced as a result of recent changes under the JOLA Act providing that LAQ may no longer receive payments from the Fund; and removing categories of claim on the Fund under section 15 (compensation from the Fund following a successful civil appeal based on a question of law) and section 17 (relating to claims in limited circumstances on a successful appeal from a decision of a Magistrates Court) of the ACF Act.</p>	

Signed

Jasmina Joldić PSM
 Director-General
 Department of Justice and Attorney-General

Date: 6.06.2024

Yvette D'Ath MP
 Attorney-General and Minister for Justice and
 Minister for the Prevention of Domestic and
 Family Violence

Date: 10-06-2024