

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration (Visa Pre-application Process) Charge Act 2023

Migration (Visa Pre-application Process) Charge Regulations 2024

The *Migration (Visa Pre-application Process) Charge Act 2023* (the Charge Act) is an Act relating to the imposition of a charge on the registration of a person as a registered participant in a visa pre-application process.

Section 11 of the Charge Act provides that the Governor-General may make regulations, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Charge Act.

In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The *Migration (Visa Pre-application Process) Charge Regulations 2024* (the Regulations) prescribe the amounts of charge payable by those who register in a particular visa pre-application process conducted under subsection 46C(1) of the *Migration Act 1958* (the Migration Act). Subsection 46C(1) of the Migration Act was inserted by the *Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Act 2023* (the Amendment Act). The Amendment Act empowers the Minister to conduct a visa pre-application process (referred to generally as a 'ballot'), involving the random selection of registered participants who will then be permitted to lodge an application for a relevant visa.

The Amendment Act, along with the Charge Act, set up the legislative framework for the visa pre-application process and were assented to on 26 October 2023. The Amendment Act commenced by Proclamation on 29 March 2024, with the Charge Act commencing immediately thereafter.

The Charge Act allows regulations to be made prescribing different charge amounts for different ballots or for different classes of ballots, and for different classes of persons. Importantly, the Charge Act establishes a ceiling of AUD100 as the maximum charge that may be prescribed for a particular ballot. The Charge Act also provides for automatic indexing of this ceiling in accordance with annual movements in the Consumer Price Index. The amount prescribed for a particular ballot may be nil.

The *Migration Amendment (Subclass 192 (Pacific Engagement Visa) Regulations 2024* amend the *Migration Regulations 1994* to create a new Subclass 192 (Pacific Engagement) visa (Pacific Engagement visa). The Pacific Engagement visa is the first visa to utilise the visa pre-application process as a requirement to lodge a valid visa application. It is anticipated that other visas may use this ballot process in the future.

The Regulations prescribe an amount of AUD25 as the charge for registration as a registered participant in a ballot for the new Pacific Engagement visa. The charge must be paid at the

time of registration. If the charge is not paid at this time, the person is taken to never have been registered as a registered participant in the visa pre-application process.

A small charge for registration in a ballot for the Pacific Engagement visa is necessary to ensure those who register are genuine and have given consideration to their capacity to take up a relevant visa, should they be successful in being selected in the ballot. Without this small charge, ballots may become inundated with participants who do not follow through by applying for the relevant visa. This will result in an inefficient process that may not deliver the annual program target for grants of the relevant visa. It is intended the Regulations may be amended in the future to prescribe an amount of charge to register for a ballot for other visas that opt in to using the visa pre-application process as a criterion for making a valid visa application.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. The Charge Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions listed at [Attachment A](#). The Charge Act was necessary due to the possibility the charges may amount to a tax rather than a fee for service, as it is not possible to determine the relationship between the amount of the charge and the cost of conducting the ballot. This is because it is not known how many participants there will be in any ballot. Accordingly, it was appropriate to legislate the charge on the basis that it is, or may be, a tax. Under section 55 of the Constitution, a law imposing taxation must not deal with any other matter.

The instrument is subject to disallowance under section 42 of the *Legislation Act 2003* (the Legislation Act). A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

The Office of Impact Analysis (OIA) was consulted and advised that the Regulations are implementing a previous decision of Government and no further analysis is required. The OIA reference number is OBPR22-02320.

Consultation in relation to the *Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Act 2023* and associated *Migration Amendment (Subclass 192 (Pacific Engagement) Visa) Regulations 2024* was undertaken with the Department of Foreign Affairs and Trade. Consultation was also undertaken with the Department of Employment and Workplace Relations, the Department of Prime Minister and Cabinet, the Department of Social Services, the Department of Education and the Department of Finance in relation to the development of the Pacific Engagement visa program. No further consultation in relation to the Regulations was considered necessary as the proposed Regulations are machinery in nature, and only a small charge is prescribed as a deterrent for disingenuous ballot registrations.

The Regulations commence immediately after the commencement of the Charge Act.

Further details of the Regulations are set out in [Attachment C](#).

The Charge Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the Legislation Act.

AUTHORISING PROVISIONS

Section 11 of the *Migration (Visa Pre-application Process) Charge Act 2023* (the Charge Act) relevantly provides that the Governor-General may make regulations (the Regulations), prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Charge Act.

In addition, the following provisions of the Charge Act may also be relevant:

- section 6, which imposes a charge on the registration of a person as a registered participant in a visa pre-application process under subsection 46C(1) of the *Migration Act 1958*;
- subsection 8(1), which provides the amount of charge imposed on the registration of a person as a registered participant in a visa pre-application process is the amount prescribed by the Regulations;
- subsections 8(2) and (3), which provide the Regulations may prescribe different amounts in relation to different visa pre-application processes; or different classes of visa pre-application process; or different classes of persons.

Statement of Compatibility with Human Rights

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

Migration (Visa Pre-application Process) Charge Regulations 2024

This Disallowable 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 Disallowable Legislative Instrument

The *Migration (Visa Pre-application Process) Charge Regulations 2024* (Charge Regulations) are made under the *Migration (Visa Pre-application Process) Charge Act 2023* (the Charge Act) and sets out the amount of charge for the registration of a person as a registered participant in a visa pre-application process to be conducted under subsection 46C(1) of the *Migration Act 1958* (the Migration Act). The framework for the visa pre-application process was created by amendments to the Migration Act made by the *Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Act 2023* (the Amendment Act) which, along with the Charge Act, was assented to on 26 October 2023 and commences on 29 March 2024.

The Charge Regulations are part of the legislative package that implements the Government's election commitment to boost Pacific permanent migration. The Government is creating the Subclass 192 (Pacific Engagement) visa (PEV) to offer permanent residency to eligible persons, and their immediate family members, who have been randomly selected through a PEV pre-application process.

The PEV will be the first visa program where the applicant will be required to have been randomly selected through a visa pre-application process, also referred to as a 'ballot', in order for the applicant, and the applicant's immediate family members, to apply for a PEV. The PEV itself is being created by amendments to the *Migration Regulations 1994* (the Migration Regulations) made by the *Migration Amendment (Subclass 192 (Pacific Engagement) Visa) Regulations 2024* (Amendment Regulations). The rules that apply to the conduct of the PEV pre-application process are set out in the *Migration (Subclass 192 (Pacific Engagement) Visa Pre-application Process) Determination 2024* (the PEV Determination).

The Charge Act introduces the ability to prescribe, in regulations made under the Charge Act, a charge for registration in a visa-pre application process. The amount is capped at AUD100 and the specific amount of charge for each visa pre-application process will be determined at a level appropriate to the specific visa program, and may be nil. This amount is subject to

indexation in accordance with the formula provided in the Charge Act, which ensures that the maximum charge updates annually to reflect changes in the Consumer Price Index.

If a visa pre-application charge is payable in respect of the registration of a person as a registered participant in a visa pre-application process, the charge is to be paid at the time of registration. If the charge is not paid at that time, the person is taken to never have been registered as a registered participant in the visa pre-application process.

The Charge Regulations prescribe that the amount of charge payable for each registration of a person as a registered participant in the PEV pre-application process is AUD25 payable at the time of registration. There are no provisions for remissions, refunds, waivers or exemptions to the AUD25 ballot registration charge in the PEV pre-application process.

The Charge Regulations will be amended each time a visa pre-application process is used in a visa program to specify the charge payable for a person as a registered participant in that particular visa pre-application process. A Statement of Compatibility with Human Rights will accompany any such amendments.

Human rights implications

The Charge Regulations may engage the following rights:

- the rights of equality and non-discrimination in Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).

Rights of equality and non-discrimination

The Charge Regulations may engage the rights of equality and non-discrimination in Article 2(2) of the ICESCR and Article 26 of the ICCPR.

Article 2(2) of the ICESCR states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment 18, the UN Human Rights Committee (UNHRC) stated that:

The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].

Similarly, in its General Comment on Article 2 of the ICESCR, the United Nations Committee on Economic Social and Cultural Rights has stated that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

Neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking residence or employment. The UNHRC, in its General Comment 15 on the position of aliens under the ICCPR, stated that:

The [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR].

As such, Australia is able to set requirements for the entry of non-citizens into Australia, and does so on the basis of reasonable and objective criteria.

Eligibility to apply for the PEV, and hence the permanent residence in Australia that it provides, is limited to those who register, and are successfully selected, in the applicable visa pre-application process, which requires them to pay the AUD25 ballot registration charge at the time of registration in that process. This may engage the rights to non-discrimination.

The visa pre-application framework is aimed at promoting equitable access to the PEV, where there are limited places that will be in high demand. The Statement of Compatibility with Human Rights that accompanies the Amendment Regulations explains why the use of the visa pre-application process is reasonable and proportionate to the aims of the PEV program.

The reason for imposing a charge for the registration in the applicable PEV pre-application process is that it will assist in managing integrity of registrations and is appropriate to ensure that those who register are genuine and have given serious consideration to their capacity to

take up the PEV and Australian permanent residence, should they be successful in being selected in the ballot.

The AUD25 visa pre-application charge is not expected to have a significant impact on the ability of a person to register for a ballot or adversely affect the rights of equality and non-discrimination of such persons. The Charge Act establishes that the maximum amount that can be prescribed in the Charge Regulations may vary from nil to AUD100 per registration in a visa pre-application process. The AUD25 PEV ballot registration charge is at the lower end of this cap, which recognises the intent and purpose of the PEV, which is to provide fair and equitable access to Australian permanent residency for eligible citizens of participating Pacific island countries and Timor-Leste of all skill, experience and education levels, while also ensuring only genuine applicants wish to register in the ballot and pay the registration charge.

The imposition of an AUD25 ballot registration charge for the purposes of the PEV pre-application process is therefore considered to be reasonable, necessary and proportionate to the aims the of the PEV.

Conclusion

The Charge Regulations are compatible with human rights because, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon Andrew Giles MP
Minister for Immigration, Citizenship and Multicultural Affairs

Details of the Migration (Visa Pre-application Process) Charge Regulations 2024

Part 1 – Preliminary

Section 1 - Name

This section provides that the title of the Regulations is the *Migration (Visa Pre-application Process) Charge Regulations 2024*.

Section 2 - Commencement

This section provides for the commencement of the instrument.

Subsection 2(1) provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table.

Table item 1 provides the whole of the instrument will commence immediately after the commencement of the *Migration (Visa Pre-application Process) Charge Act 2023*.

The note below the table covered by subsection 2(1) makes it clear that the table relates only to the provisions of the instrument as originally made. The table will not be amended to deal with any later amendments to the instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of the instrument. Information may be inserted in this column, or information in it may be edited, in any published version of the instrument. There is currently no information in column 3 of the table.

Section 3 - Authority

This section provides that the instrument is made under the *Migration (Visa Pre-application Process) Charge Act 2023* (the Charge Act).

Section 4 - Definitions

This section provides for the definitions used in the Regulations.

Part 2 – Amounts of charge

Section 5 – Purpose of this Part

Section 5 provides that for the purpose of subsection 8(1) of the Charge Act, Part 2 of the Regulations sets out the amount of charge payable for the registration of a person as a registered participant in a visa pre-application process conducted under subsection 46C(1) of the *Migration Act 1958* (the Migration Act).

Subsection 8(1) of the Charge Act provides that the amount of charge imposed on the registration of a person as a registered participant in a visa pre-application process is the amount prescribed by the regulations.

Section 6 – Amount of charge – Subclass 192 (Pacific Engagement) visa

Section 6 provides the amount of charge that is payable for each registration of a person as a registered participant in a visa pre-application process in relation to a Subclass 192 (Pacific Engagement) visa is AUD25.

The note to section 6 refers to subsection 46C(22) of the Migration Act and provides that if a charge is not paid at the time of registration, the person is taken never to have been registered. (Under subsection 46C(22) of the Migration Act, if a charge is payable to register in a visa pre-application process, and that charge is not paid at the time of registration, the person will not be registered. The person will not be included in the ballot and will not be eligible for selection.)

A small charge for registration in a visa pre-application process is appropriate to ensure that those who register are genuine and have given consideration to their capacity to take up a relevant visa, should they be successful in being selected in the ballot. Without this small charge, ballots may become inundated with participants who do not follow through by applying for the relevant visa. This will result in an inefficient process that may not deliver the annual program target for grants of the relevant visa.

It is intended that other visas may prescribe a different amount within the limit permitted, or may prescribe a nil amount, if they utilise the visa pre-application process as a criterion for making a valid visa application.

There are no provisions for remissions, refunds, waivers or exemptions to the AUD25 registration charge in the Pacific Engagement visa pre-application process.

Part 3 – Application, saving and transitional provisions

Part 3 provides for the application, saving and transitional provisions to the Regulations.

Division 1 – Application, saving and transitional provisions in relation to the commencement of this instrument

Section 7 – Application provision – Subclass 192 (Pacific Engagement) visa

Section 7 provides that section 6 of the Regulations applies in relation to registrations occurring on or after the commencement of that section. The effect of this is that all people wishing to register for a Pacific Engagement visa ballot must pay the registration charge of AUD25 to be registered as a registered participant in a Pacific Engagement visa pre-application process.