

## EXPLANATORY STATEMENT

Issued by the Minister Immigration and Multicultural Affairs

*Migration Act 1958*

*Migration Amendment (Visa Application Charge Refund) Regulations 2024*

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

Subsection 45B(1) of the Migration Act provides that the amount of the visa application charge (VAC) is the amount, not exceeding the VAC limit, prescribed by the *Migration Regulations 1994* (the Migration Regulations) in relation to the application.

Section 45C of the Act provides for matters for which the regulations may provide in relation to the VAC. Paragraph 45C(2)(b) of the Migration Act provides that the regulations may provide for the remission, refund or waiver of the VAC or an amount of the VAC.

Division 2.2A of the *Migration Regulations 1994* (the Migration Regulations) deals with the VAC and related matters. Regulation 2.12C prescribes the amount of VAC in relation to an application for a visa of a class to which an item of Schedule 1 relates. Regulation 2.12F deals with refunds of the first instalment of the VAC.

The purpose of the *Migration Amendment (Visa Application Charge Refund) Regulations 2024* (the Regulations) is to amend the Migration Regulations to provide access to a partial refund of the VAC for Student (Temporary) (Class TU) visa applicants from specified countries in the Pacific and Timor-Leste, to offset the impact of the increased VAC applied by the *Migration Amendment (Visa Application Charges) Regulations 2024* (the VAC Regulations) from 1 July 2024.

These Regulations provide that a partial refund, being the difference between the VAC payable on or after 1 July 2024 and the VAC that would have applied if the application was made on 30 June 2024, is available in relation to Student visa applications where the primary applicant (the student) is the holder of a valid passport issued by a specified Pacific country or Timor-Leste.

The following table sets out the amounts of VAC components that would have been payable on 30 June 2024, the VAC that is payable on or after 1 July 2024, and the partial refund amount available under regulation 2.12FA, in relation to components of the first instalment of the VAC.

<b>VAC first instalment component</b>	<b>On 30 June 2024</b>	<b>From 1 July 2024</b>	<b>Partial refund amount</b>
Base application charge	\$710	\$1,600	<b>\$890</b>
Additional applicant charge for any other applicant who is at least 18	\$530	\$1,190	<b>\$660</b>
Additional applicant charge for any other applicant who is less than 18	\$175	\$390	<b>\$215</b>

The partial refund arrangements in the Regulations are intended to assist with the cost of applying for a Student visa for prospective students from the Pacific and Timor-Leste. The Regulations reflect the importance of deepening Australia's connections with those countries; supporting wider education opportunities within the region, thereby contributing to Pacific economies; and providing opportunities for cultural, educational and skills exchange, in support of a peaceful, prosperous and resilient Pacific region.

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

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations. The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

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 A](#).

The Office of Impact Analysis (OIA) was consulted in relation to the Regulations, and assessed that the Regulations do not trigger the Australian Government Impact Analysis requirements. The OIA reference number is OIA24-06930.

The Regulations do not operate retrospectively and subsection 12(2) of the *Legislation Act 2003* (the Legislation Act) is not engaged. This is because the proposed Regulations commence the day after they are registered, consistent with paragraph 12(1)(a) of the Legislation Act.

The Department of Home Affairs consulted with the Department of Foreign Affairs and Trade and other Commonwealth agencies during and after the 2024-25 Budget process to support the Government's decision to provide a partial refund of the VACs for Student visa applications by prospective students from the Pacific and Timor-Leste. This consultation is appropriate and accords with consultation requirements in subsection 17(1) of the Legislation Act. Consistent with usual departmental practice, advice in relation to the changes made by these Regulations will be provided for clients and other stakeholders on the Department's website and through other communication channels.

The amendments in the Regulations commence on the day after the instrument is registered.

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

The Regulations amend the Migration Regulations, which are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;
- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and
- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

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

## **ATTACHMENT A**

### **Statement of Compatibility with Human Rights**

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

#### ***Migration Amendment (Visa Application Charge Refund) 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**

International education is a huge national asset for Australia – economically, socially and diplomatically. However, in the last two years, unmanaged growth in this sector has created population pressures and threatened the sector’s reputation. To support integrity and manage growth in the international education sector, the Government agreed to increase Student (Subclass 500) and Student Guardian (Subclass 590) visa application charges (VAC) from 1 July 2024.

The purpose of the *Migration Amendment (Visa Application Charge Refund) Regulations 2024* (the Regulations) is to amend the *Migration Regulations 1994* (the Migration Regulations) to mitigate the impact of the increase to the VAC (from 1 July 2024) for Student (Subclass 500) visa and Student Guardian (Subclass 590) visa applicants from the Pacific and Timor-Leste.

To ensure the VAC increase does not pose a barrier for these applicants, the Regulations provide for a partial VAC refund for Student and Student Guardian visa applicants from the Pacific and Timor-Leste, for the difference between the VAC payable as at 30 June 2024 (\$710 for the base application charge) and the VAC which came into effect on 1 July 2024 (\$1,600 for the base application charge).

The partial refund is available in relation to all applicants for a Student (Temporary) (Class TU) visa, including both Subclass 500 and Subclass 590, where the primary applicant is the holder of a valid passport issued by one of the following countries:

- Federated States of Micronesia
- Fiji
- Kiribati
- Nauru
- Palau
- Papua New Guinea

- Republic of the Marshall Islands
- Samoa
- Solomon Islands
- Timor-Leste
- Tonga
- Tuvalu
- Vanuatu

### **Human rights implications**

This Disallowable Legislative Instrument may engage the following rights:

- The right to education in Article 13(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), read with Article 2(2) of the ICESCR
- The right to non-discrimination in Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR)

Articles 2(2) and 13(1) of the ICESCR and Article 26 of the ICCPR may be engaged by establishing a partial refund of the Student visa VAC for applicants from specific countries, at the exclusion of other applicants who will not be eligible for a refund.

Article 2(2) of 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.*

Article 13(1) of the ICESCR relevantly states:

*The States Parties to the present Covenant recognize the right of everyone to education.*

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.*

Similarly, in its General Comment 18 on Article 26 of the ICCPR, 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].*

In most instances, Pacific and Timor-Leste applicants for a Student visa are outside Australia, and the increase in the VAC for those applicants will not engage the applicable rights and freedoms.

Where Pacific and Timor-Leste visa applicants are in Australia, the increase to the VAC may engage the right to education. By providing for a partial refund of the VAC, the Regulations will promote the right to education by removing a potential barrier for applicants from Pacific and Timor-Leste. International education is a key support that Australia provides to the Pacific and Timor-Leste, providing opportunities to increase skills to bring home to their countries.

However, to the extent that the refund will only be available to citizens from Pacific and Timor-Leste countries, the measure will limit the right to non-discrimination in the right to education, as it is discriminating on the basis of national origin. This limitation is compatible with the nature of the right and is solely for the purpose of promoting general welfare in a democratic society. To the extent that the Regulations differentiate on the basis of nationality or citizenship, this is reasonable and proportionate to the meeting of a legitimate Government objective. This is because providing a partial refund on the Student visa VAC for Pacific island countries and Timor-Leste is aimed at deepening Australia's connections with those countries; supporting wider education opportunities within the region, thereby contributing to Pacific economies; and providing opportunities for cultural, educational and skills exchange, in support of a peaceful, prosperous and resilient Pacific region.

To the extent that Student visa applicants from other nationalities are not eligible for a refund, any differential treatment is reasonable and objective. As the VAC is a small component of the cost of education in Australia, the VAC increase is unlikely to have a material impact on the students choosing Australia as their country of education and will not impermissibly limit the right to education in Australia. As such, the unavailability of a refund is unlikely to impact on the accessibility of Student visas for other cohorts. The amendments to provide refunds for Pacific

island countries and Timor-Leste applicants are directed to supporting educational opportunities for applicants from those countries who want to undertake education in Australia and supporting a peaceful, prosperous and resilient Pacific region.

### **Conclusion**

The Disallowable Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are compatible with the nature of the right.

**The Hon Tony Burke MP**  
**Minister for Immigration and Multicultural Affairs**

**Details of the *Migration Amendment (Visa Application Charge Refund) Regulations 2024***

**Section 1 – Name of Regulations**

This section provides that the name of the instrument is the *Migration Amendment (Visa Application Charge Refund) Regulations 2024* (the Regulations).

**Section 2 – Commencement**

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

The Regulations do not operate retrospectively and section 12(2) of the *Legislation Act 2003* (the Legislation Act) is not engaged. The Regulations commence the day after they are registered, consistent with paragraph 12(1)(a) of the Legislation Act, which relevantly provides that a legislative instrument commences ‘at the start of the day after the instrument is registered’.

The Regulations are also not retrospective in the extended sense as they do not operate to defeat a reasonable expectation concerning an existing right. Instead, regulation 2.12FA operates to create a new legal entitlement, albeit based on an event that at least in some cases will have occurred before the Regulations commence – ie. where paragraph 2.12FA(1)(a) operates to extend regulation 2.12FA in relation to any application for a Student (Temporary) (Class TU) visa made on or after 1 July 2024.

**Section 3 – Authority**

This section provides that the instrument is made under the *Migration Act 1958* (the Migration Act).

**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.

The instrument that is amended is the *Migration Regulations 1994* (the Migration Regulations).



## **Schedule 1 – Amendments**

### ***Migration Regulations 1994***

#### **Item [1] – At the end of regulation 2.12F**

This item inserts new subregulation 2.12F(9) in regulation 2.12F of the Migration Regulations. Regulation 2.12F deals with refunds of the first instalment of the visa application charge (VAC). New subregulation 2.12F(9) provides that if an amount paid in relation to an application for a visa is refunded as a partial refund under regulation 2.12FA (as inserted by item [2] of the Regulations), the amount that would be payable under regulation 2.12F is to be reduced by an amount equal to the amount of the partial refund.

The effect of this provision is to ensure that if a person is paid a partial refund of the VAC under regulation 2.12FA, any VAC refund that may be available under regulation 2.12F is limited to the amount that has not already been refunded to the payer under regulation 2.12FA.

In this way, regulation 2.12FA and subregulation 2.12F(9) work together to ensure that a person may be paid a partial or full refund of the VAC in certain circumstances, but not an amount greater than the VAC that was originally paid when making the visa application.

#### **Item [2] – After regulation 2.12F**

This item inserts new regulation 2.12FA in Division 2.2A of the Migration Regulations to provide for a partial refund of the VAC paid in relation to a Student (Temporary) (Class TU) visa application, to be payable in certain circumstances.

Subregulation 2.12FA(1) provides that the Minister must refund the difference between the VAC amount paid on or after 1 July 2024, and the amount that would have been paid if the visa application had been made on 30 June 2024, if the following requirements are met:

- an amount of VAC was paid (by way of the first instalment) for an application made on or after 1 July 2024 for a Student visa; and
- one of the following circumstances apply:
  - the application was made by a person (the *primary applicant*) seeking to satisfy the primary criteria for the grant of the visa;
  - the application was combined, in a way permitted by Schedule 1 to the Migration Regulations, with the application made by the primary applicant (whether the primary applicant's application was made before, on or after 1 July 2024); or
  - the application was made by a person who is a member of the family unit of another person (the *primary visa holder*) who holds a Student visa, having satisfied the primary criteria for that visa; and

- the amount of VAC paid on or after 1 July 2024 is more than the amount of the first instalment of the VAC that would have been payable if the application had been made on 30 June 2024; and
- the Minister receives a written request from a person mentioned in subregulation 2.12FA(2) for a refund of the difference; and
- the Minister is satisfied that, at the time of the request, the primary applicant or the primary visa holder held a valid passport issued by a specified country; and
- no amount has been refunded under regulation 2.12F in relation to the application.

Subregulation 2.12FA(2) provides that for the purposes of paragraph 2.12FA(1)(d), the written request must be from:

- the person who paid the amount (the *payer*); or
- if the payer has a serious physical or mental incapacity—the payer’s legal personal representative; or
- if the payer is a bankrupt within the meaning of the *Bankruptcy Act 1966*—the trustee of the estate of the payer.

Subregulation 2.12FA(2) is consistent with similar provisions in regulation 2.12F of the Migration Regulations, except for circumstances where the payer has died. In these circumstances, a written request for a full refund of the VAC may be made under regulation 2.12F of the Migration Regulations.

The note to subregulation 2.12FA(2) refers the reader to regulation 2.12K of the Migration Regulations. Regulation 2.12K (as amended by item [3]) operates to determine who the *payer* is when considering a request for a partial refund under regulation 2.12FA.

Under subregulation 2.12FA(3), the Minister must not make a refund to the legal personal representative of a payer who has died unless the request for the refund is accompanied by satisfactory evidence of the payer’s death. This evidence may include, for example, a legal will or letters of administration.

Subregulation 2.12FA(4) requires the refund to be paid to the person who made the request for the refund, or provided to a person who made the request for the refund for payment to the applicant’s deceased estate.

Subregulation 2.12FA(5) provides that, if, in the opinion of the Minister, there is no doubt about the identity of the payer, and the refund is paid to the payer or a person mentioned in paragraph 2.12FA(2)(b) or (c), a receipt that is given by the person to whom the refund is paid is, for all purposes, a valid discharge of any liability of the Commonwealth in relation to the payment of the amount of the refund.

Subregulation 2.12FA(6) provides that the refund may be paid in Australian currency or if the amount was paid in another currency, in that other currency.

Subregulation 2.12FA(7) provides that, in this regulation, *specified country* means:

- Federated States of Micronesia;
- Fiji;
- Kiribati;
- Nauru;
- Palau;
- Papua New Guinea;
- Republic of the Marshall Islands
- Samoa;
- Solomon Islands;
- Timor-Leste;
- Tonga;
- Tuvalu;
- Vanuatu.

Paragraph 2.12FA(1)(e) relevantly provides that one of the requirements for a partial refund to be payable under regulation 2.12FA is that the Minister is satisfied that, at the time a refund request is made, the primary applicant for the Student visa (or the primary visa holder) holds a passport issued by a specified country.

### **Item [3] – Regulations 2.12K and 2.12L**

This item inserts references to regulation 2.12FA into regulations 2.12K and 2.12L of the Migration Regulations.

Regulation 2.12K provides the situations in which a person is taken to have paid an instalment of the VAC for the purposes of determining whether a VAC refund may or must be paid to that person.

Regulation 2.12L requires a legal representative to give satisfactory evidence, for the purposes of regulations 2.12F and 2.12H, that they are the legal representative of the payer. As amended, regulations 2.12K and 2.12L also operate for the purposes of regulation 2.12FA.