

EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Multicultural Affairs

Migration (Visa Pre-application Process) Charge Act 2023

Migration (Visa Pre-application Process) Charge Amendment (Work and Holiday Visa) 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 Amendment (Work and Holiday Visa) Regulations 2024* (the Regulations) amend the *Migration (Visa Pre-application Process) Charge Regulations 2024* (the Charge Regulations) to prescribe an amount of charge for registration as a registered participant in a visa pre-application process conducted under subsection 46C(1) of the *Migration Act 1958* (the Migration Act) in relation to a Subclass 462 (Work and Holiday) visa.

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.

The Charge Act imposes a charge on the registration of a person as a registered participant in a visa pre-application process. 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 Charge Regulations. The Charge Act also establishes \$100 as the maximum charge amount that may be prescribed for a particular ballot, which is automatically indexed by the annual Consumer Price Index.

The *Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024* amend the *Migration Regulations 1994* to introduce a requirement that to make a valid application for a Subclass 462 (Work and Holiday) visa, applicants who hold a passport issued by a specified foreign country, must have been randomly selected in a ballot conducted by the Minister in respect of the relevant country.

The purpose of the ballot is to provide fair and equitable access to the visa where the demand for a Subclass 462 visa is significantly high. Arranging for ballots to be conducted

in relation to specific countries assists in ensuring the number of visa applications better aligns with the number of intended visa grants agreed to through bilateral arrangements with those countries. Where demand is high, the use of a ballot allows the program to function efficiently with random selection being the fairest way to manage and distribute the visas available.

The Regulations prescribe an amount of \$25 as the charge for registration as a registered participant in a ballot process for a Subclass 462 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 Subclass 462 visa is necessary to ensure those who register are genuine and have given consideration to their capacity to take up a 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 Work and Holiday program as agreed with these countries. Additionally, without a small charge, ballots could be at greater risk of disingenuous registrations jeopardising the integrity of the ballot process. The \$25 ballot fee is only a marginal amount compared to the visa application charge for the Subclass 462 visa.

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 no Impact Analysis is required. The OIA reference number is OBPR22-03816.

Consultation was not 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 \$25 charge is consistent with other visa programs that utilise the ballot process, like the Subclass 192 (Pacific Engagement) visa for which the Charge Regulations were initially introduced.

The Regulations commence on 16 September 2024.

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 Amendment (Work and Holiday Visa) 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 Amendment (Work and Holiday Visa) Regulations 2024* (the Charge Amendment Regulations) amend the *Migration (Visa Pre-application Process) Charge Regulations 2024* (the Charge Regulations) which were made under the *Migration (Visa Pre-application Process) Charge Act 2023* (the Charge Act) to prescribe an 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*.

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 amendments made by the Amendment Act empower 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.

The Charge Amendment Regulations are part of the legislative package that implements the visa pre-application process for the Subclass 462 (Work and Holiday) visa (WHV) for specified foreign countries to provide fair and equitable access to the WHV program where the visa demand is significantly high. The WHV program aims to provide young adults with a temporary visa to holiday in Australia for 12 months, during which they can undertake short-term work and study. The WHV program is for eligible passport holders from countries that have agreed to participate in the program. Bilateral arrangements are negotiated between Australia and each participating country which set out eligibility requirements and the maximum number of visas that will be granted to eligible passport holders of that country in a program year. Demand for Subclass 462 visas from certain countries is expected to significantly exceed the numbers of visas agreed to under the WHV program with those countries.

The Charge Amendment Regulations prescribe that the amount of charge payable for each registration of a person as a registered participant in the WHV pre-application process is \$25 payable 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. There are no provisions for remissions, refunds, waivers or exemptions to the \$25 registration charge in the WHV pre-application process. This is consistent with other visa programs that utilise a ballot process.

The visa pre-application registration charge is subject to a maximum charge amount of \$100. The maximum charge amount is indexed 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.

The reason for imposing a charge for the registration in the applicable WHV 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 apply for, and take up, a WHV, should they be successful in being selected in the visa pre-application process. Without this small charge, ballots may become inundated with participants who do not follow through by applying for the relevant visa. This would result in an inefficient process that may not deliver the WHV program as agreed with these countries. Additionally, without a small charge, ballots could be at greater risk of disingenuous registrations jeopardising the integrity of the ballot process.

Human rights implications

The Charge Amendment Regulations may engage the following rights:

- the right to 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).

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.

For passport holders of specified foreign countries, eligibility to apply for the WHV is limited to those who register and are successfully selected in the applicable visa pre-application process, which requires them to pay the \$25 registration charge at the time of registration in that process. This may engage the rights to non-discrimination, including in relation to the ability of a passport holder of a specified foreign country located outside of Australia, to obtain a WHV that would allow them to enter and remain in Australia, as well as to undertake periods of study or work on that visa.

The visa pre-application framework is aimed at promoting equitable access to the WHV for passport holders of those partnering countries that are expected to demonstrate high demand for the agreed number of visa places. The Statement of Compatibility with Human Rights that accompanies the *Migration Amendment (Subclass 462 (Work and Holiday) Visa) Regulations 2024* explains why the use of the visa pre-application process is reasonable and proportionate for passport holders of selected partnering countries in the WHV program.

As noted above, the \$25 visa pre-application charge is aimed at ensuring the integrity of the registration process and is not expected to have a significant impact on the ability of a person to register for a visa pre-application process if they wish to participate in the WHV program 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 \$100 per registration in a visa pre-application process. The \$25 visa pre-application registration charge implemented by the Charge Amendment Regulations is at the lower end of this cap and represents a small additional charge compared to the Visa

Application Charge for the WHV, which all WHV applicants have to pay, while also ensuring only genuine applicants who wish to apply for a WHV register in the visa pre-application process.

The imposition of a \$25 registration charge for the purposes of the WHV pre-application process is therefore considered to be reasonable, necessary and proportionate to provide fair and equitable access to the WHV for country programs where demand is likely to significantly exceed the agreed number of visa places for that country in a given year.

Conclusion

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

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

Details of the Migration (Visa Pre-application Process) Charge Amendment (Work and Holiday Visa) 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 Amendment (Work and Holiday Visa) 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 on 16 September 2024.

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. Column 3 of the table confirms only that the date of commencement of the instrument is 16 September 2024.

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 - Schedules

This section provides 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.

Schedule 1 – Amendments

Migration (Visa Pre-application Process) Charge Regulations 2024

Item [1] - At the end of Part 2

This item adds new section 6A at the end of Part 2 of the *Migration (Visa Pre-application Process) Charge Regulations 2024* (the Charge Regulations). Section 6A 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 462 (Work and Holiday) visa is \$25.

The note to section 6A refers to subsection 46C(22) of the *Migration Act 1958* 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 necessary to assist in managing the integrity of registrations and to ensure those who register are genuine and have given consideration to their capacity to take up a visa, should they be successful in being selected in the ballot. Without this small charge, ballots may become inundated with disingenuous participants registering, and being selected, in the ballot. This would result in an inefficient process that may not deliver the Work and Holiday program as agreed through bilateral arrangements with these countries.

There are no provisions for remissions, refunds, waivers or exemptions to the \$25 registration charge in the Subclass 462 visa pre-application process.

Item [2] - At the end of Part 3

Part 3 of the Charge Regulations provides for the application, saving and transitional provisions. Item 2 adds new Division 2 at the end of Part 3.

Section 8 is added to Division 2 to provide that new section 6A of the Charge Regulations applies in relation to registrations occurring on or after the commencement of that section. The effect of this is that all people registering for a Subclass 462 visa ballot must pay the registration charge of \$25 to be registered as a registered participant in a Subclass 462 visa pre-application process.