

# **Migration Regulations (Amendment) 1997 No. 91**

## EXPLANATORY STATEMENT

### STATUTORY RULES 1997 No. 91

Issued by the Authority of the Minister for Immigration and Multicultural Affairs

Migration Act 1958

Migration Regulations (Amendment)

Section 504 of the Migration Act 1958 provides that the Governor-General may make regulations, not inconsistent with the Act, to prescribe all matters which are required or permitted to be prescribed by the Act or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Without limiting the generality of section 504, paragraphs 504(1)(a) and (b) of the Migration Act provide that regulations may provide for the charging and recovery of fees in respect of any matter under the Migration Act or the Migration Regulations, and that the Regulations may make provision for the remission, refund or waiver of fees which may be prescribed by the Migration Regulations, and for exempting persons from the payment of such fees.

These Regulations are part of a package of measures which introduce the visa application charge. These other measures include:

- the imposition of liability to pay visa application charge - proclamation of the Migration (Visa Application) Charge Act 1997; and
- amendment of other Acts in the Immigration and Multicultural Affairs portfolio to provide for matters incidental to the imposition of visa application charge - proclamation of Schedule 1 of the Migration Legislation Amendment Act (No. 1) 1997.

Regulations supporting the visa application charge may be made pursuant to the following powers that are inserted into the Migration Act by the Migration Legislation Amendment Act (No. 1) 1997:

- section 45B provides that the amount of the visa application charge is to be the amount that is prescribed in the Migration Regulations, that it must not exceed the visa application charge limit established by section 5 of the Migration (Visa Application) Charge Act 1997, and that it may be nil;
- section 45C permits regulations to be made concerning instalments of the visa application charge (including specifying how instalments are to be calculated and when instalments are to be paid); and the administration of the visa application charge, including the recovery of the visa application charge where it has not been paid, the method of payment of the visa application charge, the calculation of the amount of the visa application charge, when the visa application charge is to be paid, the remission, refund or waiver of the visa application charge in cases where the Migration Regulations may provide that a particular applicant is to pay less than the full amount of charge, the exemption of persons from the payment of the visa application charge, and the crediting of an amount of the visa application charge that has been paid in respect of one application towards payment of another application;
- paragraph 46(1)(ba) of the Migration Act enables the Migration Regulations to provide for circumstances where an application is valid if the visa application charge has not been paid; and

- subsection 64(2) of the Migration Act provides for any unpaid amount of visa application charge to be paid within a prescribed period.

Section 4 of the Acts Interpretation Act 1901 authorises, amongst other things, the making of regulations that will commence at the same time as the Act that confers the power to make the regulations. The regulations that are the subject of this memorandum commenced on 1 May 1997 which was the proclamation date for the Migration (Visa Application) Charge Act 1997 and Schedule 1 of the Migration Legislation Amendment Act (No. 1) 1997.

The purpose of the Regulations is to amend the Migration Regulations to implement a visa application charge to be paid by most applicants for permanent visas and some applicants for temporary visas. The new charge comprehensively replaces the existing fees and charges that are paid by visa applicants: namely, the visa application fee, the English Education Charge, and the Migrant Health Services Charge.

Visa application charge will be payable in two instalments that are prescribed in Schedule 1 to the Migration Regulations: see regulation 10 which deletes existing references to application fees and substitutes new provisions prescribing the amount of visa application charge. In practice, only those applicants who satisfy the criteria for the grant of a visa will be required to pay the prescribed second instalment: see new regulation 2.12G (inserted by regulation 6).

These regulations also delete references in the Migration Regulations to existing fees and charges and insert new provisions dealing with the visa application charge: see regulations 3 to 9 and 11 to 12. In particular, the new provisions will deal with incidental matters arising from visa application charge, including such matters as refunds and partial refunds, waiver of payments in prescribed circumstances, and payment of charge outside Australia in foreign currencies.

In general, those visa applications that are made before the commencement of these Regulations will be liable to pay all the fees and charges that apply under the existing legislation but will not be liable for visa application charge, and those visa applications that are made after commencement of these Regulations will be liable to pay visa application charge but will not be liable for existing fees and charges.

Two transitional provisions are made with respect to visa applications made before the commencement of these Regulations.

Amended regulation 2.11 permits the Minister to invite an unsuccessful applicant who has paid the visa application charge to make another application (for a visa of another class) without paying the visa application charge again. A transitional provision [see regulation 13] is needed to confer a comparable benefit upon those applicants whose first application was made before the commencement of these Regulations and for which an application fee was paid.

Regulation 14 provides that existing regulations 2.07A and 5.39 (which are repealed by these Regulations and which deal with the refund of visa application fees) continue to apply with respect to visa applications that were made before the commencement of these Regulations and for which fees have been paid.

Details of the Regulations are set out in the Attachment.

The Regulations commence on 1 May 1997.

## ATTACHMENT

### Regulation 1 - Commencement

This regulation provides that these Regulations commence on 1 May 1997. This coincides with the commencement by proclamation of the Migration (Visa Application) Charge Act 1997 which imposes liability to pay the visa application charge, and the commencement by proclamation of Schedule 1 of the Migration Legislation Amendment Act (No. 1) 1997 which amends the Migration Act 1958 to make provision for matters incidental to the imposition of visa application charge.

### Regulation 2 - Amendment

This regulation provides for the Migration Regulations (the Regulations) to be amended as set out in these Regulations.

### Regulation 3 - Regulation 2.07 (Application for visa - general)

Subregulation 3.1 omits the existing reference to the "fee" payable on an application for a visa and substitutes reference to the "visa application charge" which is being introduced by these regulations. The existing visa application fee is being subsumed by the new visa application charge.

Subregulation 3.2 omits subregulation 2.07(2) which set out circumstances in which the fee was not payable.

### Regulation 4 - Regulation 2.07A (Refund of application fee in certain circumstances)

Regulation 4 omits regulation 2.07A which provided for the fee to be refunded in certain circumstances. This provision is no longer required because visa application fees will no longer be collected after the introduction of the visa application charge. New regulations 2.12F, 2.12H and 2.12I, which are inserted by regulation 6 of these Regulations, make provision for the refund of visa application charge.

(Regulation 14 of these Regulations provides transitional arrangements for the refund of some fees that are covered by regulation 2.07A.)

### Regulation 5 - Regulation 2.11 (Special provision for certain applications refused outside Australia)

It sometimes happens that a person makes an application for a class of visa for which the person does not satisfy the criteria for grant, but the Minister or a delegate forms the view that the applicant appears to satisfy the criteria for the grant of a different class of visa. Regulation 2.11 permits the Minister to invite the applicant to make a further visa application with a reduced application fee (if the fee for the second application is greater than for the first) or with no fee (if the application fee for the first application is the same as or greater than for the second application).

This amendment omits existing subregulations 2.11(5) and (6) which provided for the amount of the fee to be paid if a non-citizen is invited by the Minister to make a further application.

New subregulations 2.11(5) and (6) are substituted to provide for the amount of visa application charge that is payable if a non-citizen is invited by the Minister to make a further application.

(Regulation 13 of these Regulations provides for the transitional situation in which the first application is made before the commencement of these Regulations, and the second application is made after commencement.)

#### Regulation 6 - New Division 2.2A

This regulation inserts a new Division 2.2A into the Migration Regulations to deal with matters associated with the visa application charge, including the amount of charge, the period during which the charge must be paid, when a charge is not required to be paid and refund provisions.

#### Regulation 2.12C - Amount of visa application charge (Act, section 45B)

This regulation provides that the visa application charge is the sum of the two amounts that are specified in subitem (2) of an item of Schedule 1 of the Migration Regulations where:

- \* the first instalment must be paid when the application is made; and
- \* the second instalment must be paid before the grant of the visa.

#### Regulation 2.12D - Prescribed period for payment of unpaid amount of visa application charge (Act, subsection 64(2))

This regulation sets out the period of time within which the second instalment of the visa application charge must be paid - either 28 days or 70 days from the date when the applicant is taken to have received notice from the Minister under subsection 64(2) of the Migration Act. The shorter period applies to mail posted and delivered within Australia, and the longer period applies to all other mail.

#### Regulation 2.12E - Payment of first instalment of -visa application charge not required for certain combined applications

This regulation provides that an applicant is not liable to pay the first instalment of the visa application charge if the application is combined with another application, where allowed by these Regulations, and the first instalment of the visa application charge for the other application has been paid.

#### Regulation 2.12F - Refund of first instalment of visa application charge

Subregulation 2.12F(1) specifies the circumstances in which the Minister must refund the first instalment of the visa application charge. These circumstances are where:

- \* the application is unnecessary;
- \* the application is made because of a mistake by Immigration;
- \* the applicant dies before the application is decided; or
- \* the application is for a visa of Class TN (Long Stay (Visitor)), TR (Short Stay (Visitor)) or UB (Medical Treatment (Visitor)) and the successful applicant is suffering financial hardship.

Subregulation 2.12F(2) permits the Minister to refund the first instalment of the visa application charge if the application is made because of a mistake by the applicant. The circumstances in which such refunds will be made will be set by policy and are expected to develop over time as meritorious cases are identified. The provision is not intended to apply to circumstances where the applicant has now changed his or her mind and subsequently considers that the application

was a mistake, such as where the application is refused and the applicant claims that the application would never have been made if he or she had known it was not going to be successful, or where a visa is granted and the applicant subsequently claims that the application was a mistake because of disappointed expectations.

Subregulation 2.12F(3) provides for the refund to be paid either to the applicant or to the applicant's legal personal representative if the applicant has died.

Subregulation 2.12F(4) provides that where there is a refund under subregulation (3), the receipt given by the applicant's personal legal representative extinguishes any Commonwealth liability under regulation 2.12F.

Subregulation 2.12F(5) provides for the refund to be paid in a currency other than Australian currency if the first instalment of the visa application charge was paid in that other currency.

Regulation 2.12G - When payment of second instalment of visa Application charge not required

Subregulation 2.12G(1) prescribes the circumstances in which a visa applicant will not be liable to pay the second instalment of the visa application charge. These circumstances are where:

- \* the applicant withdraws the application before the second instalment is paid; or
- \* the application is refused and has been finally determined (that is, the applicant's rights to merit review are exhausted).

Subsection 2.12G(2) provides that, for the purposes of this regulation, if a court remits an application to the Minister for decision, the application is not taken to be finally determined. This has the result that the second instalment of visa application charge will still be payable if the Minister decides to grant a visa after the application has been remitted by a court.

Regulation 2.12H - Refund of second instalment of the visa application charge

Subregulation 2.12H(1) specifies the circumstances in which the Minister must refund the second instalment of the visa application charge. These circumstances are where:

- \* the applicant withdraws the application before the application is decided;
- \* the applicant dies before entering Australia as the holder of that visa;
- \* the application is refused and is finally determined (that is, merit review is exhausted);
- \* the visa is cancelled before the applicant enters Australia as the holder of that visa; or
- \* the visa is granted and otherwise ceases before the applicant enters Australia as the holder of that visa.

Subregulation 2.12H(2) provides that where the application has been refused and finally determined, the application is not taken to be finally determined if a court remits an application to the Minister for decision. This has the result that the second instalment of visa application charge will still be payable if the Minister decides to grant a visa after the application has been remitted by a court.

Subregulation 2.12H(3) provides for the refund to be paid either to the applicant or to the applicant's legal personal representative if the applicant has died.

Subregulation 2.12H(4) provides that where there is a refund under subregulation (3), the receipt given by the applicant's personal legal representative extinguishes any Commonwealth liability under regulation 2.12H.

Subregulation 2.12H(5) provides for the refund to be paid in a currency other than Australian currency if the second instalment of the visa application charge was paid in that other currency.

#### Regulation 2.12I - Partial refund of second instalment of visa application charge

Subregulation 2.12I(1) sets out the circumstances under which the Minister must make a partial refund of the second instalment of the visa application charge. The amount of the refund (which is listed in new Schedule 8A) has been calculated as the part of the revenue received from the second instalment of visa application charge that is used to offset the Commonwealth's costs in providing English language tuition for the applicant under the Immigration (Education) Act 1971. A refund of this amount is given if:

- \* the applicant dies before commencing an English language course;
- \* the visa is granted but later cancelled before the applicant commences an English language course;
- \* the visa is granted but ceases to have effect before the applicant commences an English language course; or
- \* the applicant, upon testing before or at enrolment in an English language course, is refused entry to the course because the applicant is found to have functional English.

Subregulation 2.12I(2) provides that the amount of refund is in Schedule 8A to the Migration Regulations.

Subregulation 2.12I(3) provides for the refund to be paid either to the applicant or to the applicant's legal personal representative if the applicant has died.

Subregulation 2.12I(4) provides that where there is a refund under subregulation (3), the receipt given by the applicant's personal legal representative extinguishes any Commonwealth liability under regulation 2.12I.

Subregulation 2.12I(5) provides for the refund to be paid in a currency other than Australian currency if the second instalment of the visa application charge was paid in that other currency.

#### Regulation 7 - Division 5.7 (Fees)

This regulation ensures that the word "Charges" is included in the heading for Division 5.7 of the Migration Regulations.

#### Regulation 8 - Regulation 5.36 (Payment of visa application charges, and fees, in foreign currencies)

Regulation 5.36 of the Migration Regulations currently provides for the payment in foreign countries of prescribed fees in foreign currencies. The purpose of regulation 8 of these regulations is to extend this payment provision to cover the payment outside Australia of visa application charges.

Subregulation 8.1 amends existing subregulation 5.36(1) to remove the words "payable under these Regulations" as they are redundant

Subregulation 8.2 inserts a new subregulation 5.36(4) which defines the term "fee" for the purposes of regulation 5.36 to include an instalment of the visa application charge.

#### Regulation 9 - Regulation 5.39 (Refund of fees)

This regulation omits existing regulation 5.39 which provides for refund of the amount of the fee paid where a person has made an unnecessary or mistaken application for a visa or an entry permit. This provision is no longer required because visa application fees will no longer be collected after the commencement of these regulations.

(Regulation 14 of these regulations provides transitional arrangements for those applications currently covered by regulation 5.39.)

#### Regulation 10 - Schedule 1 (Classes of visas)

Schedule 1 of the Migration Regulations prescribes a number of matters that relate to the making of a valid visa application. Each of the 69 items in Schedule 1 relates to a single class of visa, which in turn refers to one or more subclasses in Schedule 2. Regulation 10 of these regulations (subregulations 10.1 to 10.56) omits the existing subitem (2) (which deals with visa application fees) from every item in Schedule 1 of the Migration Regulations and substitutes a new subitem (2) specifying the amount of visa application charge.

The visa application charge is payable in two instalments. The first instalment is payable at the time when a valid visa application is made, and the second instalment is collected after the decision-maker has determined that the applicant meets all criteria for grant of the visa (new regulation 2.12G ensures that no one whose visa application is refused will be required to pay the second instalment of visa application charge).

Subject to three exceptions, the amount of the first instalment of the visa application charge is the same as the existing visa application fee.

The first exception relates to the amount of the first instalment for permanent visa applications that are made overseas and for temporary visas of Class TO (Prospective Marriage): the existing visa application fee of \$600 is replaced by a first instalment visa application charge of \$1000 for all applicants in the following classes:

- Item 110 1 - Adoption (Migrant) (Class AA)
- Item 1108 - Child (Migrant) (Class AH)
- Item 1110 - Concession & Family (Migrant) (Class AJ)
- Item 1112 - Distinguished Talent (Migrant) (Class AL)
- Item 1114 - Employer Nomination (Migrant) (Class AN)
- Item 1116 - Family of NZ Citizen (Migrant) (Class AP)
- Item 1117 - Former Citizen (Migrant) (Class AQ)
- Item 1118 - Former Resident (Migrant) (Class AR)
- Item 1120 -Independent (Migrant) (Class AT)
- Item 1120A - Interdependency (Migrant) (Class BI)\*

- Item 1121 - Labour Agreement (Migrant) (Class AU)\*\*
- Item 1124 - Parent (Migrant) (Class AX)
- Item 1125 - Preferential Relative (Migrant) (Class AY)
- Item 1129 - Spouse (Migrant) (Class BC) \*
- Item 12 15 - Prospective Marriage (Temporary) (Class TO)

\* No first instalment is prescribed for dependent children who apply separately from their parents in these visa classes.

\*\* The first instalment of the visa application charge for orphan relatives and special need relatives in Class AY remains at \$600.

The second exception is at item 1222 - Student (Temporary) (Class TU) visa: the first instalment of the visa application charge will be \$280 but the visa application fee is currently \$250. The extra \$30 is charged to allow indirect cost recovery by the Commonwealth for the provision of student services information by the Department of Employment, Education, Training and Youth Affairs.

The third exception is subparagraph 1119(2)(a)(v) for a holder of a Prospective Marriage (Temporary) (Class TO) visa who is applying for a General (Residence) (Class AS) visa after entering Australia. In that case the visa application fee is currently \$600 but the visa application charge will be only \$500. This decrease is made because the applicant would already have paid \$1000 as the first instalment of the visa application charge for the Prospective Marriage (Temporary) (Class TO) visa. Consequently the total of first instalments of visa application, charge for such applicants will be \$1500, the same amount that most onshore spouse applicants pay for a General (Residence) (Class AS) visa.

The amount of the second instalment of visa application charge is equivalent to the amount of the charge that is currently payable under the Migration (Health Services) Charge Act 1991 plus the amount of the English Education Charge that is currently payable under the Immigration (Education) Charge Act 1992. No visa applicant will pay more as a second instalment under these Regulations than he or she would have been required to pay under the existing charge legislation for these two charges.

Regulation 11 - Schedule 2 (Provisions with respect to the grant of subclasses of visas)

Schedule 2 of the Migration Regulations prescribes criteria for the grant of visas by visa subclass. This regulation inserts a note in each of those subclasses where a second instalment of the visa application charge is applicable to serve as a reminder that the charge must be paid before the visa can be granted.

Regulation 12 - New Schedule 8A

Under subregulation 2.121(1), the Minister must make a partial refund of the second instalment of the visa application charge where an applicant does not undertake a course of English language tuition provided under the Immigration (Education) Act 1971.

New Schedule 8A sets out the amount of that refund. The refund is the same amount as the applicant would have received in a refund of the English Education Charge prior to the commencement of these Regulations.



Regulation 13 - Transitional - visa application charge on further visa application Migration Regulations, regulation 2.11)

Regulation 2.11 of the Migration Regulations applies when a person has applied for a visa of a class specified in the application, the application is refused because the applicant did not satisfy the prescribed criteria for the grant of that class of visa, and the Minister invites the applicant to make a further application. An invitation is made when it is apparent that the applicant would satisfy the criteria for the grant of a visa of a different class to the one applied for originally.

Regulation 5 of these Regulations amends regulation 2.11 so that it operates with respect to the payment of visa application charge.

This regulation provides for the transitional situation in which the first application was made before the commencement these Regulations and an application fee was paid but where the further application is made after the commencement of these Regulations and a visa application charge must be paid. Subregulation 13.1 defines this transitional situation.

Subregulation 13.2 provides that where the first instalment of the visa application charge payable on the further application exceeds the amount of the visa application fee that was paid in respect of the first application, the actual amount of the first instalment of the visa application charge that is payable is reduced by the difference.

Subregulation 13.3 provides that there is no entitlement to a refund if the first instalment of visa application charge that is payable in respect of the further application is less than the amount of application fee than was paid in respect of the first application.

Regulation 14 - Transitional - continued operation of regulations 2.07A and 5.39 of the Migration Regulations

Regulations 2.07A and 5.39, which provide for the refund of the visa application fee in certain cases, are omitted by these Regulations because a visa application fee is no longer prescribed.

Regulation 14 is a transitional regulation which provides that regulations 2.07A and 5.39 will continue to apply to allow refunds of the visa application fee in respect to applications for visas and entry permits that were made before the commencement of these Regulations.