

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Migration Act 1958

Migration Amendment (Merits Review) Regulations 2021

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.

Subparagraph 504(1)(a)(i) of the Migration Act authorises regulations to make provision for the charging of fees payable in connection with the review of decisions made under the Migration Act or the *Migration Regulations 1994* (the Migration Regulations).

The *Migration Amendment (Merits Review) Regulations 2021* (the Regulations) amend the Migration Regulations to increase the fee for certain applications to the Administrative Appeals Tribunal (AAT) from \$1,826 to \$3000. The fee applies to applications for review of decisions relating to visas other than protection visas, and includes decisions in relation to sponsorships and nominations. The new fee is subject to annual increase, from 1 July 2022, in line with existing legislated indexation arrangements.

The increase to the fee is part of a funding package for the AAT and the Federal Circuit Court (FCC) announced in the 2021-22 Federal Budget. As part of the package, revenue from the increased fee will offset expenditure to provide additional resources to the AAT and the FCC to reduce the migration related backlogs that have developed as a result of significant increases in application rates.

Despite the temporary impact of the COVID-19 pandemic on visa applications, the FCC retains a significant backlog of approximately 14,000 matters on hand as at 30 April 2021 in the migration caseload, while the Migration and Refugee Division (MRD) of the AAT has approximately 58,000 active applications.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It is appropriate for matters of detail, such as fees, to be set out in delegated legislation. The Migration Act expressly provides for these matters to be prescribed in regulations.

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 Best Practice Regulation (the OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation reference is 43411.

Consultation in relation to the amendments was undertaken in the context of the 2021-22 Federal Budget. The Department consulted with the Attorney-General's Department and the AAT. Consultation with external stakeholders such as migration agents and peak bodies was not conducted as the change does not alter review rights, but merely increases the cost of applying for review. In accordance with existing provisions, the Registrar of the AAT can reduce the fee by 50 percent if the fee would cause severe financial hardship to the review applicant. In addition, successful applicants for review are entitled to a refund of 50 percent of the fee. In these circumstances, and noting that the measure was developed as part of a funding package within the 2021-22 Federal Budget, it was decided that it was not necessary, appropriate or reasonably practicable to consult with external stakeholders. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The Regulations commence on the day after registration on the Federal Register of Legislation and the new fee applies to applications made to the AAT on and from 1 July 2021.

The Department follows standard practices to notify clients about the changes, including updating its website and notifying peak bodies.

Further details of the Regulations are set out in Attachment B.

The Migration 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.

Statement of Compatibility with Human Rights

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

Migration Amendment (Merits Review) Regulations 2021

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 Amendment (Merits Review) Regulations 2021* (the Regulations) would amend the *Migration Regulations 1994* (the Migration Regulations) to increase the fee for certain applications to the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (AAT). The fee applies to applications for review of decisions relating to visas other than protection visas, and includes decisions in relation to sponsorships and nominations. These are Part 5 reviewable decisions under the *Migration Act 1958* (the Act).

The increase to the fee is part of a funding package for the AAT and the Federal Circuit Court (FCC), as announced in the 2021-22 Federal Budget. As part of the package, revenue from the increased fee will offset expenditure to provide additional resources to the AAT and the FCC to reduce the migration related backlogs that have developed as a result of significant increases in application rates as well as the prospective increase in matters that will be heard in the FCC. The increase in the fee will enhance the decision making capacity of the AAT and the FCC for migration matters and thus provide a more timely service by both bodies

The Regulations do not alter the type or nature of decisions that qualify for merits review under the Act, but provide that the prescribed fee required to be paid by an individual in seeking a review is increased from \$1,826 to \$3,000. In accordance with existing provisions, the Registrar of the AAT can reduce the fee by 50 percent if the fee would cause severe financial hardship to the review applicant; and successful applicants for review remain entitled to a refund of 50 percent of the fee (regulation 4.14 of the Migration Regulations).

Human rights implications

This Disallowable Legislative Instrument engages the *International Covenant on Civil and Political Rights* (ICCPR), in particular:

- Articles 2(1) and 2(3) together with Articles 14(1) and 26 provide the right to equality before the law without discrimination and with an effective remedy; and
- Article 13 provides the right against expulsion of aliens.

Rights to non-discrimination, an effective remedy and equality before the law

Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(3) of the ICCPR states:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
- (c) To ensure that the competent authorities shall enforce such remedies when granted.*

Article 14(1) of the ICCPR states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

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 2(1) obliges Australia to ensure the rights of the Covenant to all individuals within its territory and subject to its jurisdiction without discrimination. Article 2(3) obliges Australia to provide an effective remedy where there have been violations to the ICCPR. Articles 14 and 26 provide for equality before the law, an entitlement to a fair and public hearing and without discrimination to the protection of the law.

The Regulations are limited to increasing the fee payable by individuals for lodging a Part 5 reviewable decision under the Act and the changes do not alter or otherwise diminish the effectiveness of remedies or access to the law currently provided to individuals.

To the extent that Articles 2(1) and 2(3) are engaged by virtue of Articles 14 and 26 of the ICCPR on the basis that a person's access to the law is limited by their financial capacity and thus their ability or incentive to make an AAT application, does not amount to prohibited

discrimination. The UN Human Rights Committee has recognised 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 Covenant'.

The fee increase is for the legitimate objective of reducing the migration related backlogs in the AAT and the FCC, thereby enhancing their decision making capacity and providing individuals with more timely service by both bodies. Any limitation to access to the law because of financial capacity is reasonable, necessary and proportionate given the Regulations do not alter the existing partial fee exemption arrangements which provide the AAT Registrar with the ability to refund 50 percent of the application fee in circumstances where the fee would cause financial hardship to the individual. This would also address any unintended result of the fee increase preventing or disincentivising individuals from seeking review. .

Expulsion

Article 13 of the ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Regulations are limited to increasing the fee payable for lodging a Part 5 reviewable decision under the Act and it does not fetter an individual's existing right to submit reasons and have their case reviewed by a competent authority. It is acknowledged that the fee increase may prevent or disincentivise individuals from seeking review by reason of their financial capacity, and without such review, they could otherwise be lawfully removed from Australia under the Act. While this may engage Article 13, importantly, the fee increase is reasonable, necessary and proportionate as it continues to be accompanied by partial fee exemption arrangements which allow individuals to pay a reduced fee (50 percent) where paying the full fee would cause financial hardship.

Additionally, the fee increase does not affect individuals who are protection visa applicants (including permanent protection, temporary protection and safe haven enterprise visa applicants), nor does it affect the full fee exemption for a review of a bridging visa decision that resulted in an individual being placed in immigration detention.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**The Hon. Alex Hawke MP,
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**

Details of the *Migration Amendment (Merits Review) Regulations 2021*

Section 1 – Name

This section provides that the name of the instrument is the *Migration Amendment (Merits Review) Regulations 2021* (the Regulations).

Section 2 – Commencement

This section provides for the commencement of the instrument.

The instrument commences on the day after registration on the Federal Register of Legislation.

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 for how the amendments in the Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Subregulation 4.13(1)

This item increases the fee for applications to the Administrative Appeals Tribunal (AAT) for review of decisions other than decisions relating to protection visas. The fee increases from \$1,826 to \$3,000.

Subregulation 4.13(1) of the *Migration Regulations 1994* (the Migration Regulations) previously stated a fee of \$1,764. However, that fee was increased on 1 July 2019 and on 1 July 2020 in accordance with regulation 4.13A and regulation 4.13B of the Migration Regulations, which provide for annual indexation in line with the All Groups Consumer Price Index.

The fee is applicable to applications for review of *Part-5 reviewable decisions*. The review rights are provided for by Part 5 of the Migration Act and Division 4.1 of the Migration Regulations. *Part-5 reviewable decisions* are set out in section 338 of the Migration Act and regulation 4.02 of the Migration Regulations. This covers all visa related decisions, including sponsorship and nomination decisions, for which the Migration Act or Migration Regulations provides a right of review, with the exception of decisions relating to protection visas (including *fast track reviewable decisions*). Review of protection visa decisions is covered by Part 7 of the Migration Act and Division 4.2 of the Migration Regulations, while the review

of *fast track reviewable decisions* is covered by Part 7AA of the Migration Act and Division 4.4 of the Migration Regulations.

The increase in the fee to \$3000 from \$1826 represents a reasonable fee for the merits review conducted by the AAT in relation to *Part-5 reviewable decisions*, and this increase is part of a package that will increase the decision making capacity of the AAT and in the Federal Circuit Court (FCC) for migration matters.

The original fee structure for review of *Part-5 reviewable decisions* was implemented in the Migration Regulations on 1 June 1999. The regulations removed internal, departmental reviews, and set the fee for review at the Migration Review Tribunal (MRT) at \$1,400. Since 1 July 1999, the fees for review of *Part-5 reviewable decisions* have only increased by a total of \$426 (approximately 30%).

The MRT and the Refugee Review Tribunal (RRT) were abolished on 1 July 2015 and their jurisdiction was transferred to a new Migration and Refugee Division (MRD) of the AAT.

For context, in 2013 when biennial increases were introduced, the MRT and RRT received 22,289 applications combined. In the latest program year not affected by the pandemic (program year 2018-19), the MRD received 36,172 applications. Noting the relatively small movement in fees over the previous twenty years and the significant escalation in the caseload and the increase in administrative expenses over time, the increased fee is reasonable and necessary for improving the rate at which migration reviews are conducted.

The increase to the fee only applies to applicants lodging a review of a *Part 5-Reviewable decision*. Relevantly, this means that the increase does not affect the fee for *Part 7-reviewable decisions* (protection visa decisions), nor does it introduce a fee for *fast track reviewable decisions* (Part 7AA of the Act). Further, an application for review of a *Part 7-reviewable decision* does not attract a fee unless the matter is unsuccessful and the regulations do not affect this.

In cases where the Registrar of the AAT is satisfied that the fee for review of a *Part-5 reviewable decision* would cause financial hardship, an existing provision in the Migration Regulations (subregulation 4.13(4)) provides for a 50 percent reduction in the fee. In addition, successful review applicants are entitled to a refund of 50 percent of the fee (regulation 4.14).

The quantum of the new fee was determined following consultation between the Attorney-General's Department and the Department of Home Affairs in relation to the costs of assessing and determining an application for review, such as:

- the cost of AAT members and staff performing the particular services, and supporting the provision of the services (e.g. salaries, office accommodation)
- the cost of equipment used in the provision of the services (including depreciation costs)
- an appropriate allocation of general indirect costs which are not specifically attributable to the provision of the services (e.g. corporate overheads and central support services such as human resources and IT).

The objective is to raise revenue by imposing a fee for service (not amounting to taxation) that will make a meaningful contribution to offsetting the cost of increasing the resources and efficiency of the MRD and the FCC. Within the context of the Federal Budget, the fee of \$3000 is intended to strike an appropriate balance between the additional financial burden on individual applicants for review and the need to provide a high quality, efficient and timely review process, which will ultimately benefit all applicants for merits and judicial review.

Item [2] – Regulation 4.13A

Item [3] – At the end of regulation 4.13A

These items amend regulation 4.13A so that the annual indexation of the fee specified in regulation 4.13 does not occur on 1 July 2021. The annual indexation resumes on 1 July 2022.

Regulation 4.13A provides for annual indexation of the application fee in accordance with the formula set out in regulation 4.13B. The indexation first occurred on 1 July 2019 and then again on 1 July 2020, resulting in the previous fee of \$1,826. The increase that would otherwise have occurred on 1 July 2021 was cancelled, because the fee is being increased to \$3000 on that day.

Item [4] – In the appropriate position in Schedule 13

This item inserts a new Part 100 into Schedule 13 to the Migration Regulations to provide for the operation of the amendments made by the Regulations.

Clause 10001 provides that the increased application fee of \$3,000 applies to applications for review made on or after 1 July 2021.