

EXPLANATORY STATEMENT

Minister for Home Affairs

Migration Act 1958

Migration Amendment (Subclass 500 Visas) 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. Further, subsection 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class.

The *Migration Amendment (Subclass 500 Visas) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to focus on the requirement that a Subclass 500 (Student) applicant must intend to genuinely enter and stay in Australia as a student, by removing the requirement that Subclass 500 (Student) visa applicants intend to genuinely stay in Australia temporarily (genuine temporary entrant requirement).

The Subclass 500 (Student) visa (Subclass 500 visa) allows international students to enter, study and work in Australia for the duration of the visa holder's studies. Previously, in order for a Subclass 500 visa to be granted, an applicant needed to satisfy the requirement that they intend to genuinely stay in Australia temporarily. This formed part of the assessment of whether an applicant is a genuine student.

However, as many international students intend to seek permanent residence in Australia following the completion of their studies, the requirement created confusion and potentially discouraged future migration to Australia. A Subclass 500 visa can be a legitimate pathway to permanent residence, where a student's study may provide them the skills to fill Australian skill shortages.

This amendment is one of a range of measures that will work together to improve the quality and integrity of Australia's international education system. The purpose of this amendment is to strengthen the assessment of the student's intention to genuinely study in Australia and more effectively identify any non-genuine international students seeking to enter Australia for purposes other than study. As amended, the genuine student criterion supports an assessment by the decision-maker that the visa applicant is a genuine applicant for entry and stay as a student, having regard to a number of salient factors, including the applicant's circumstances, immigration history, compliance with visa conditions and any other relevant matter.

A Ministerial Direction made under section 499 of the Migration Act provides further guidance on assessing the genuine student criterion, ensuring the integrity of Australia's international education program is maintained.

The matters dealt with in the Amendment 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 settings in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions. 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 has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Amendment Regulations are compatible with human rights. A copy of the statement is at Attachment A.

The Office of Impact Analysis (OIA) has been consulted in relation to the regulatory impact of the amendments. The Office has advised that an Impact Analysis is not required. The consultation reference is OBPR23-04044.

The Department of Education and the international education sector's views were provided through the Education Visa Consultative Committee and Council for International Education and were broadly supportive of the reform. The consultation undertaken accords with section 17 of the *Legislation Act 2003* (the Legislation Act).

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

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

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

The amendments commence on 23 March 2024.

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

Statement of Compatibility with Human Rights

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

Migration Amendment (Subclass 500 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 Government is committed to improving the quality and integrity of Australia's international education system and ensuring students are genuinely in Australia with the primary purpose of completing a course of study.

The Subclass 500 (Student) visa (Subclass 500 visa) allows international students (and members of their family unit) to enter, study and work in Australia for the duration of the primary visa holder's studies. Previously, in order for a Subclass 500 visa to be granted, an applicant needed to satisfy the requirement that they intend genuinely to stay in Australia temporarily. This formed part of the assessment of the requirement that the applicant be a genuine applicant for entry and stay in Australia as a student, or, for members of the student's family unit, that the applicant be a genuine applicant for entry and stay as a member of the family unit of a person who holds a student visa.

However, as many international students intend to seek permanent residence in Australia following the completion of their studies, this requirement created confusion and potentially discouraged future permanent migration to Australia. This requirement is no longer appropriate as the migration program allows for some student visa holders to proceed on a permanent residence pathway on completion of their studies in order to meet skills shortages, and those students may have that intention at the time they apply for a Subclass 500 visa.

This Disallowable Legislative Instrument, the *Migration Amendment (Subclass 500 Visa) Regulations 2024* (the Amendment Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to remove the requirement that Subclass 500 visa applicants must have a genuine intention to stay in Australia temporarily, leaving the existing requirement that the primary applicant must be a genuine student. As part of this amendment, some factors which were previously required to be considered in assessing the genuine temporary stay requirement will now be considered directly in assessing whether the applicant intends to stay in Australia as a student. The aim is to focus the assessment on the student's intention to genuinely study in Australia. This addresses any non-genuine applicants seeking to enter Australia for purposes other than study. The decision-maker will consider a number of existing factors set out in the Subclass 500 visa criteria, including the applicant's circumstances, immigration history, compliance with visa conditions and any other relevant matter, in assessing whether the

applicant is a genuine student, or for members of the student's family unit, whether the applicant is a genuine applicant for entry and stay as a member of the family unit of a person who holds a student visa.

These amendments form part of Government's commitment to improve students' educational and employment outcomes and reduce skills shortages in critical industries, and ensure students are genuinely in Australia with the primary purpose of completing a course of study.

Human rights implications

The amendment made by the Amendment Regulations removes the requirement that applicants for a Subclass 500 visa must intend only a temporary stay in Australia. The effect of removing this requirement is that some international students (and members of their family unit) who would not have satisfied this requirement because they intended to pursue legitimate pathways to permanent residence may now be able to be granted a Subclass 500 visa. The grant of a Subclass 500 visa to enable them to study in Australia may broadly support their human rights, including the right to education contained in article 13 of the *International Covenant on Economic, Social and Cultural Rights*.

Neither the ICESCR nor the *International Covenant on Civil and Political Rights* (ICCPR) give a right for non-citizens to enter Australia for the purposes of seeking residence or employment. The United Nations Human Rights Committee, 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.

To the extent that the amendment may affect the way various factors are taken into account in assessing the reasons for the visa applicant's stay, this may result in the visa application being refused where the person is assessed as not being a genuine applicant for entry and stay as a student or the family member of such a person. This will not amount to a limitation on their right to education if they were not intending to study in Australia. Persons who wish to enter or remain in Australia for other purposes, such as work, will need to apply for a visa suitable for their circumstances. The amendment therefore does not unduly limit the rights of visa applicants who are in Australia and is consistent with Australia's ability to set requirements for the entry and stay of non-citizens based on reasonable and objective criteria.

Conclusion

The Amendment Regulations are compatible with human rights.

The Hon Clare O'Neil MP
Minister for Home Affairs

Details of the *Migration Amendment (Subclass 500 Visas) Regulations 2024*

Section 1 - Name

This section provides that the name of the Amendment Regulations is the *Migration Amendment (Subclass 500 Visas) Regulations 2024*.

Section 2 - Commencement

This section provides that the Amendment Regulations commence on 23 March 2024.

Section 3 - Authority

This section provides that the Amendment Regulations are made under the *Migration Act 1958*.

Section 4 - Schedules

This section provides for how the amendments made by the Amendment Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Clause 500.212 of Schedule 2

This item omits the word ‘because’ from clause 500.212 of Schedule 2 to the Migration Regulations. This amendment facilitates changes to the structure of clause 500.212 made by the following amendments.

Item [2] – Paragraph 500.212(a) of Schedule 2

This item omits the words “the applicant intends genuinely to stay in Australia temporarily” from paragraph 500.212(a) of Schedule 2 to the Migration Regulations.

Previously, an applicant seeking to meet the primary criteria for grant of a Subclass 500 (Student) visa was required to be a genuine applicant for entry and stay as a student, because of the matters set out in in paragraph 500.212(a) (being a genuine temporary entrant), paragraph (b) (compliance with visa conditions) and paragraph (c) (any other relevant matter). The requirement in paragraph (a), to genuinely intend to stay in Australia temporarily, is no longer appropriate as the migration program allows for some student visa holders to proceed on a permanent residence pathway on completion of their studies in order to meet skills shortages, and those students may have that intention at the time they apply for a Subclass 500 visa. The requirement that the applicant intends genuinely to stay in Australia temporarily is therefore removed.

The factors in previous subparagraphs 500.212(a)(i), (ii) and (iii), relating to an applicant's circumstances, immigration history and intentions of any guardians, must still be taken into account as part of the assessment of whether the applicant is a genuine applicant for entry and stay as a student, rather than a specific assessment of whether the applicant intends genuinely to stay in Australia temporarily. The matters in paragraph (b) (compliance with visa conditions) and paragraph (c) (any other relevant matter) also remain as matters to be considered in assessing whether the applicant is a genuine applicant for entry and stay as a student.

Item [3] – Subparagraph 500.212(a)(iv) of Schedule 2

This item repeals subparagraph 500.212(a)(iv) in Schedule 2 to the Migration Regulations.

Subparagraph 500.212(a)(iv) provides that in assessing whether an applicant for a Subclass 500 (Student) visa met the requirement to intend genuinely to stay in Australia temporarily, a decision maker could have regard to any other relevant matter. As this requirement is being removed from clause 500.212 (see item 2, above), the subparagraph is no longer required.

Existing paragraph 500.212(c) provides for a decision maker to have regard to any other relevant matter when assessing the requirement that an applicant for a Subclass 500 visa must be a genuine applicant for entry and stay as a student.

Item [4] - (Paragraph 500.212(b) of Schedule 2) and Item [5] - (Paragraph 500.212(c) of Schedule 2)

These items make technical amendments to clause 500.212 of Schedule 2 to the Migration Regulations, consequential to the removal of the words “the applicant intends genuinely to stay in Australia temporarily” by item 3, above, and minor restructuring of clause 500.212.

Item [6] – Clause 500.312 of Schedule 2

This item omits the word “because” from clause 500.312 of Schedule 2 to the Migration Regulations. This amendment facilitates changes to the structure of clause 500.312 made by the following amendments.

Item [7] – paragraph 500.312(a) of Schedule 2

This item omits the words “the applicant intends genuinely to stay in Australia temporarily” from paragraph 500.312(a) of Schedule 2 to the Migration Regulations.

This amendment has the same effect in respect of the criteria to be satisfied by an applicant seeking to meet the secondary criteria for grant of a Subclass 500 visa (family members) as the amendment to the criteria for an applicant seeking to meet the primary criteria made by item 3 of the Schedule, above. Please see the notes on item 3.

A secondary applicant may also intend to seek a permanent visa in Australia on completion of the primary applicant's studies, provided they remain a member of the applicant's family unit. The applicant is required to be a genuine applicant for entry and stay as a member of the family unit of a person who holds a student visa as a primary applicant, but is no longer required to intend genuinely to remain in Australia temporarily.

Item [8] – Subparagraph 500.312(a)(iv) of Schedule 2

This item repeals subparagraph 500.312(a)(iv) in Schedule 2 to the Migration Regulations.

Subparagraph 500.312(a)(iv) provided that in assessing whether an applicant for a Subclass 500 visa met the requirement to intend genuinely to stay in Australia temporarily, a decision maker could have regard to any other relevant matter. As this requirement is being removed from clause 500.312 (see item 7, above), the subparagraph is no longer required.

Existing paragraph 500.312(c) provides for a decision maker to have regard to any other relevant matter when assessing the requiring that an applicant for a Subclass 500 visa must be a genuine applicant for entry and stay as a member of the family unit of a person who holds a student visa as primary applicant.

Item [9] - (Paragraph 500.312(b) of Schedule 2) and Item [10] - (Paragraph 500.312(c) of Schedule 2)

These items make technical amendments to clause 500.312 of Schedule 2 to the Migration Regulations, consequential to the removal of the words “the applicant intends genuinely to stay in Australia temporarily” by item 7, above, and minor restructuring of clause 500.312.

Item [11] – In the appropriate position in Schedule 13

This item inserts new Part 122 in Schedule 13 of the Migration Regulations. The purpose of Part 122 is to provide for the application of the amendments made by the Amendment Regulations.

Clause [12201] Operation of Schedule 1

Clause 12201 provides that the amendments made by Schedule 1 apply in relation to an application for a Subclass 500 visa made on or after 23 March 2024.

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