

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Subclass 485 (Temporary Graduate) Visa Replacement Stream and Other Measures) Regulations 2022

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.

In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The *Migration Amendment (Subclass 485 (Temporary Graduate) Visa Replacement Stream and Other Measures) Regulations 2022* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to provide an opportunity for former international students to obtain another Subclass 485 (Temporary Graduate) visa - a kind of temporary work visa granted after study in Australia - in circumstances where they were unable to stay in Australia for the full period of grant of their previous Subclass 485 visa due to COVID-19 international travel restrictions. In particular, the regulations:

- create a new stream within the Subclass 485 (Temporary Graduate) visa to allow holders of those visas to obtain another Subclass 485 visa if they were unable to stay in Australia for the full period of grant of their previous visa due to the international travel restrictions in force from 1 February 2020 to 14 December 2021. Australia's borders fully reopened to Subclass 485 visa holders on 15 December 2021;
- make consequential amendments to ensure that holders of the replacement visa can continue to qualify for a further Subclass 485 visa based on residence in regional Australia; and
- make other minor changes to clarify eligibility for the Subclass 485 visa.

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, as can be seen in the authorising provisions listed at Attachment A. These include, for example, subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class.

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 respond quickly to emerging situations such as the COVID-19 pandemic.

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 Best Practice Regulation (the OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation reference number is 2201569.

The Department of Home Affairs (the Department) consulted with the Department of Education, Skills and Employment, Treasury, the Department of Finance and the Department of Prime Minister and Cabinet. No external consultation was undertaken as the amendments are either beneficial for affected persons or do not substantially alter existing arrangements. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The amendments commence on 1 July 2022.

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

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

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.

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly 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 Migration Act.

In addition, the following provisions of the Migration Act may also be relevant:

- subsection 31(1), which provides that the regulations may prescribe classes of visas;
- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- subsection 31(4), which provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;
- subsection 31(5), which provides that the regulations may specify that a visa is a visa of a particular class;
- subsection 40(1), which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 41(1), which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
- subsection 45A, which provides that the regulations may prescribe that a non-citizen who makes an application for a visa is liable to pay a visa application charge if, assuming the charges were paid, the application would be a valid visa application;
- subsection 46(3), which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application;
- subsection 46(4), which provides that, without limiting subsection 46(3), the regulations may prescribe:
 - (a) the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
 - (b) how an application for a visa of a specified class must be made; and
 - (c) where an application for a visa of a specified class must be made; and
 - (d) where an applicant must be when an application for a visa of a specified class is made; and
- subsection 504(2) which provides that section 14 of the *Legislation Act 2003* does not prevent, and has not prevented regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the regulations have taken effect.

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 485 (Temporary Graduate) Visa Replacement Stream and Other Measures) Regulations 2022

The *Migration Amendment (Subclass 485 (Temporary Graduate) Visa Replacement Stream and Other Measures) Regulations 2022* (the Amendment Regulations) are 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 Temporary Graduate (Subclass 485) visa is for international students who have recently graduated from an Australian education or training institution. It allows international graduates (and members of their family unit), to live, study and work in Australia temporarily. Subclass 485 visas are usually granted for a period between one and four years, depending on the visa stream and qualification level. Hong Kong and British National Overseas passport holders may stay for five years.

There are two main streams of the Subclass 485 visa:

- the Graduate Work stream, open to graduates who nominate a skilled occupation that is specified by the Minister for this purpose and closely related to the applicant's Australian educational qualification(s), and obtain a positive skills assessment in relation to the nominated occupation; and
- the Post-Study Work stream, open to international students who have recently graduated with an eligible higher education degree from an Australian educational institution, regardless of their field of study.

In most cases, a person is only eligible to be granted one Subclass 485 visa in their lifetime. However, the holder of a Subclass 485 visa in the Post-Study Work stream is eligible to apply for a second visa in this stream if they studied on a Student visa in a regional area for the relevant qualification and then lived, worked (if relevant), and studied (if relevant) exclusively in a regional area for the two years preceding the application for the second visa.

The Amendment Regulations amend the *Migration Regulations 1994* (the Migration Regulations) as follows.

Subclass 485 visa in the Replacement stream

The Amendment Regulations provide for the creation of the Replacement stream which will allow holders and former holders of Temporary Graduate (Subclass 485) visas who have lost time in Australia as a result of COVID-19 international travel restrictions to apply for a 'replacement' Subclass 485 visa of the same duration as their original visa.

Visas in the Replacement stream will be granted for the same stay period as the original visa held, as per the visa stream, and level of the applicant's qualification where applicable, regardless of how long was spent in Australia on the original visa. In effect, affected visa holders who are granted a Subclass 485 visa in the Replacement stream will be able to live, work and study in Australia on a new Subclass 485 visa, building on the skills and qualifications they gained as international students in Australia.

The Replacement stream will be open for application to current and former Subclass 485 visa holders, regardless of their location at the time of application, where the primary visa holder:

- was outside Australia when the original Subclass 485 visa was granted; entered Australia on the original visa before 15 December 2021; and then departed Australia after this entry but before 15 December 2021 while holding the original visa; or
- was in Australia when the original Subclass 485 visa was granted; and was outside of Australia at any time between 1 February 2020 and 14 December 2021 while holding the original visa.

This reflects the period of international travel restrictions impacting affected visa holders, noting that from 15 December 2021, Australia reopened to fully vaccinated eligible visa holders, including Subclass 485 visa holders, without them needing to apply for a travel exemption.

Secondary visa holders, that is, persons who were granted a Subclass 485 visa on the basis of being the member of the family unit of the primary visa holder, will also be eligible for the Replacement stream if the primary visa holder is eligible.

A cut-off date of 1 January 2027 will be imposed on applications for the Replacement stream. This will give all potential applicants a reasonable period of time in which to take advantage of the opportunity to apply for the Replacement stream, given that Subclass 485 visas are granted, in some circumstances, for periods of up to five years.

The Replacement stream will not be open to applications for persons who were already on their second Subclass 485 visa in the Post-Study Work stream during the period of international travel restrictions. This is because there were only very small numbers in this cohort, visas are only able to be applied for and granted in Australia, and this cohort were unlikely to have departed Australia during the period of international travel restrictions.

The Replacement stream will not be open to applications by persons who have had a Subclass 485 visa, or a visa granted after the applicant held a Subclass 485 visa, cancelled, except those who requested in writing that the Minister cancel their visa, or whose visa cancellation decision was set aside by the Tribunal. This ensures that visa holders who departed Australia and then sought access to their superannuation funds through requesting cancellation of their Subclass 485 visa are still eligible for the Replacement stream.

Second Subclass 485 visa in the Post-Study Work stream

The amendments made by the Amendment Regulations are also intended to preserve the eligibility of persons who held a Subclass 485 visa in the Post-Study Work stream to progress to a second Subclass visa in the Post-Study Work stream, where their ability to meet the requirements for this second visa was disrupted by the COVID-19 pandemic-related international travel restrictions.

The Amendment Regulations do this by making consequential amendments to the criteria for the grant of a second Subclass 485 visa to add references to the new Replacement stream visa. This will allow holders of a Subclass 485 visa in the Replacement stream, who originally held a Subclass 485 visa in the Post-Study Work stream, to qualify for a second Subclass 485 visa in the Post-Study Work stream if they have studied on their Student visa, and lived on their Subclass 485 visa in the Replacement stream, in regional areas of Australia.

That is, if a person wishes to progress to a second Post-Study Work stream visa, then instead of the person having to meet the existing regional residence requirements in the Migration Regulations on their first Post-Study Work stream visa (which they are unlikely to meet if their time in Australia on their first visa was disrupted by COVID-19), they now have a new opportunity to meet those requirements on their Replacement stream visa. This allows visa holders who wish to continue living in regional areas of Australia on a further Subclass 485 visa the opportunity to do so in circumstances where otherwise they would have missed that opportunity as a result of the disruptions caused by the COVID-19 pandemic.

Human rights implications

This Disallowable Legislative Instrument provides former Subclass 485 visa holders, who lost time in Australia on their previous Subclass 485 visa due to COVID-19 international travel restrictions, the opportunity for them (and their family unit members) to live, study and work in Australia on a new Subclass 485 visa in the Replacement stream.

In addition, this Disallowable Legislative Instrument provides a pathway for Subclass 485 visa holders in the Post-Study Work stream to meet existing eligibility requirements for a second Post-Study Work stream visa in circumstances where they would not otherwise be able to meet these requirements due to the time they lost in Australia on their previous visa. In doing so, the amendments do not impose any new requirements on persons who wish to progress to this second visa to allow them to continue living, working and studying in regional Australia; rather they add references to the new Replacement stream into the existing criteria to allow visa holders a new opportunity to meet those criteria.

This Disallowable Legislative Instrument therefore promotes the following human rights:

- the right to work in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- the right to education in Article 13 of the ICESCR

Right to work

The amendments engage the right to work in Article 6(1) of the ICESCR.

Article 6(1) of the ICESCR states:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

The amendments establish a Replacement stream for Subclass 485 visa holders who lost time in Australia because of the international travel restrictions associated with the COVID-19 pandemic. Subclass 485 visas in the Replacement stream will be granted for the same stay period as the original visa held, regardless of how long was spent in Australia on the original visa, and will permit holders to live, work and study in Australia.

The amendments will also allow holders of a Subclass 485 visa in the Replacement stream, who originally held a Subclass 485 visa in the Post-Study Work stream, to qualify for a second Subclass 485 visa in the Post-Study Work stream if they have studied and lived in regional areas of Australia. These amendments mirror existing provisions in the Migration Regulations to allow eligible Subclass 485 visa holders to continue to work and live in regional areas of Australia, whilst also supporting the economic development of Australia's regions.

The amendments promote the right to work because they provide eligible visa applicants with further opportunities to seek or continue work anywhere in Australia on a Subclass 485 visa in the Replacement stream, or in regional Australia if seeking to qualify for a further stay on a third Subclass 485 visa, which will be the second visa in the Post-Study Work stream. If applicants are already engaged in employment, a further Subclass 485 visa provides them with the opportunity to continue this employment and further the development of their knowledge and skills.

Right to education

The amendments engage the right of everyone to an education in Article 13 of the ICESCR.

Article 13(1) of the ICESCR states:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Article 13(2) of the ICESCR states in part:

The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: [...]

(c) higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular the progressive introduction of free education.

The United Nations Committee on Economic, Social and Cultural Rights in General Comment No. 13 specifies that the right to education includes that educational institutions be accessible, physically as well as economically, to everyone without discrimination.

The introduction of the Replacement visa stream broadly supports the right to education insofar as it aims to mitigate the impact of the COVID-19 pandemic and associated international travel restrictions on affected Subclass 485 visa holders by providing them (and members of their family unit) with an opportunity to apply for, and be granted, an additional Subclass 485 visa to live, work and study in Australia.

Conclusion

The Amendment Regulations are compatible with human rights.

Andrew Giles

Minister for Immigration, Citizenship and Multicultural Affairs

Details of the Migration Amendment (Subclass 485 (Temporary Graduate) Visa Replacement Stream and Other Measures) Regulations 2022

Section 1 - Name

This section provides that the name of the Regulations is the *Migration Amendment (Subclass 485 (Temporary Graduate) Visa Replacement Stream and Other Measures) Regulations 2022*.

Section 2 - Commencement

This section provides that the Regulations commence on 1 July 2022.

Section 3 - Authority

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

Section 4 - Schedules

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

Schedule 1 - Amendments

Migration Regulations 1994

Overview

The Regulations amend the *Migration Regulations 1994* (the Regulations) to make a number of changes to the operation of the Subclass 485 (Temporary Graduate) visa (the Subclass 485 visa). The Subclass 485 visa allows international students, who have recently completed qualifications in Australia, to remain temporarily in Australia to work, study or travel. The most significant change is the creation of an opportunity for former international students to obtain another Subclass 485 visa if the previous Subclass 485 visa they held was affected by the Australian COVID-19 international travel restrictions in force from 1 February 2020 to 14 December 2021. Visa holders who were unable to stay in Australia for the full period of grant of their previous Subclass 485 visa due to COVID-19 international travel restrictions can obtain another Subclass 485 visa via the Replacement stream. Related to this measure, the existing pathway from a Subclass 485 visa in the Post-Study Work stream to a second visa in that stream, based on study and residence in regional Australia, is replicated for holders of a Subclass 485 visa in the Replacement stream who might otherwise lose the opportunity to qualify under the regional concessions for another Subclass 485 visa. The Regulations also make other minor adjustments to Subclass 485 visa settings.

Item [1] – Sub-subparagraph 1229(2)(a)(i)(A) of Schedule 1

This item amends sub-subparagraph 1229(2)(a)(i)(A) in Schedule 1 to the Regulations. Subitem 1229(2) specifies the amount of visa application charge (VAC) that must be paid by an applicant for a Subclass 485 visa. The purpose of the amendment is to specify the first instalment VAC that is applicable to primary applicants who hold a Subclass 485 visa in the Replacement stream and who are applying for a second Subclass 485 visa in the Post-Study Work stream.

A further consequence of the amendment to sub-subparagraph 1229(2)(a)(i)(A) is the specification of the first instalment VAC that is applicable to applicants who are family members of the primary applicant and who make a combined application with the primary applicant.

The VACs for the new cohorts described above are the same as the VACs for applicants applying for a second Subclass 485 visa in the Post-Study Work stream while holding the first Subclass 485 visa in the Post-Study Work stream, or applying in a combined application as a family member of the primary applicant.

As of 1 July 2022 the VACs are:

- base application charge (payable by the primary applicant) - \$680
- additional applicant charge for an applicant who is over 18 - \$340
- additional applicant charge for an applicant who is under 18 - \$175

These VACs reflect the annual increase based on CPI indexation, implemented on 1 July 2022 by the *Migration Amendment (Visa Application Charges) Regulations 2022*, which commence on 1 July.

The amendments are consequential to the creation of a pathway to a second Subclass 485 visa in the Post-Study Work stream, via a Subclass 485 visa in the Replacement stream.

The VACs applicable to applications for the Subclass 485 visa in the new Replacement stream are the standard VACs that are applicable to all other Subclass 485 visa applications (set out at subparagraph 1229(2)(a)(ii)). From 1 July 2022, following the CPI increase, those VACs are:

- base application charge (payable by the primary applicant) - \$1730
- additional applicant charge for an applicant who is over 18 - \$865
- additional applicant charge for an applicant who is under 18 - \$435

Item [2] – At the end of paragraph 1229(3)(f) of Schedule 1

This item amends a provision in Schedule 1 to the Regulations that specifies where an applicant may be located when applying for a Subclass 485 visa. The combined effect of paragraph 1229(3)(f) and paragraph 1229(3)(g) is that some applicants are required to be in Australia (other than in immigration clearance) while others may be in or outside Australia, but not in immigration clearance.

The purpose of the amendment is to allow applicants for a Subclass 485 visa in the Replacement stream, and also their family members making a combined application, to be in Australia (other than in immigration clearance) or outside Australia at the time of application. The reason for this change is that members of the eligible cohort, who lost time on their Subclass 485 visa by being outside Australia during the period of travel restrictions (1 February 2020 to 14 December 2021), may now be located in Australia or overseas. The amendment allows these applicants to apply for the Subclass 485 visa regardless of their location.

Item [3] – Paragraph 1229(3)(la) of Schedule 1

This item repeals and substitutes paragraph 1229(3)(la) in Schedule 1 to the Regulations. The amendment is consequential to the creation of a pathway to a second Subclass 485 visa in the Post-Study Work stream via a Subclass 485 visa in the Replacement stream. The effect of the amendment is that, to apply for a second Subclass 485 visa in the Post-Study Work stream, the applicant must continue to hold the first visa in that stream or, alternatively, must hold a Subclass 485 visa in the Replacement stream which was granted on the basis of previously holding a Subclass 485 visa in the Post-Study Work stream.

Item [4] – After paragraph 1229(3)(la) of Schedule 1

This item inserts new paragraph 1229(3)(lb) in Schedule 1 to the Regulations. New paragraph 1229(3)(lb) provides that an applicant seeking to satisfy the primary criteria for the grant of a Subclass 485 visa in the Replacement stream must meet the requirements of subitem 1229(5) (see item 6 below).

Item [5] – At the end of paragraph 1229(4)(a) of Schedule 1

This item inserts three new subparagraphs in paragraph 1229(4)(a) of Schedule 1 to the Regulations. Paragraph 1229(4)(a) sets out a series of alternative criteria, at least one of which must be satisfied by an applicant who is seeking to apply for a Subclass 485 visa on the basis that they will satisfy the primary criteria for the grant of the visa. The three new subparagraphs cater for the new pathways to a Subclass 485 visa:

- subparagraph 1229(4)(a)(vi) refers to an applicant who holds a Subclass 485 visa in the Replacement stream and is applying for a second Subclass 485 visa in the Post-Study Work stream;
- subparagraph 1229(4)(a)(vii) refers to an applicant, who holds a Subclass 485 visa granted on the basis of satisfying the primary criteria, and who is applying for a Subclass 485 visa in the Replacement stream;
- subparagraph 1229(4)(a)(viii) refers to an applicant who previously held a Subclass 485 visa granted on the basis of satisfying the primary criteria, and who is applying for a Subclass 485 visa in the Replacement stream. An additional rule for this cohort is that, at the time of application, the applicant must hold a substantive visa or a Bridging A (Class WA) or Bridging B (Class WB) visa that was granted on the basis of a valid application for a visa. This rule is included because there may be a significant gap between the expiry of the first Subclass 485 visa and an application for a Subclass 485 visa in the Replacement stream. In the interim, the former Subclass

485 visa holder may have been granted a different substantive visa, or a bridging visa related to an application for a different substantive visa. Those persons are not excluded from applying for a Subclass 485 visa in the Replacement stream, provided that they are not unlawful non-citizens or holders of a bridging visa other than a Bridging A (Class WA) or Bridging B (Class WB) visa that was granted on the basis of a valid application for a visa.

Item [6] – After subitem 1229(4) of Schedule 1

This item inserts new subitem 1229(5) in Schedule 1 to the Regulations. The purpose of subclause 1229(5) is to specify requirements that must be met by an applicant who is seeking to apply for a Subclass 485 visa on the basis that the applicant satisfies the primary criteria for the grant of a Subclass 485 visa in the Replacement stream. The requirements are as follows:

- paragraph 1229(5)(a) - the application must be made before 1 January 2027. This means that an applicant who wishes to apply for another Subclass 485 visa to replace the visa that was disrupted by the COVID-19 travel restrictions must do so before 1 January 2027. The date was chosen to allow a reasonable period of time for all eligible persons to take advantage of the opportunity to apply for a visa in the Replacement stream, without disrupting other arrangements that they may have made in the interim, such as obtaining a different visa in Australia or undertaking study or work overseas;
- paragraph 1229(5)(b) - the applicant must hold or have previously held a Subclass 485 visa, granted on the basis that the holder satisfied the primary criteria, and the visa must have been in effect on or after 1 February 2020, which was when the COVID-19 international travel restrictions commenced. In addition, that Subclass 485 visa must have been granted before 15 December 2021, when the border fully reopened to holders of Subclass 485 visas;
- paragraphs 1229(5)(c) and (d) - the applicant must have been outside Australia, while holding the Subclass 485 visa, at some point during the period of the travel restrictions (1 February 2020 to 14 December 2021); and, if the visa was granted outside Australia (which became a possibility from 19 September 2020), the applicant must have entered Australia during the period of travel restrictions and then departed. This rule reflects the fact that a visa holder who does not enter Australia will not lose any time in Australia because Subclass 485 visas granted to primary applicants outside Australia have a stay period that only commences when the visa holder first enters Australia. For primary visa holders who did lose time in Australia, it is sufficient to have been outside Australia for one day during the relevant period. This rule was chosen to simplify the criteria for the Replacement stream; and
- paragraph 1229(5)(e) - the Subclass 485 visa, and any subsequently held visa, must not have been cancelled, unless the visa holder requested the cancellation (under paragraph 2.43(1)(g) of Part 2 of the Regulations) or the cancellation decision was set aside by the Administrative Appeals Tribunal.

Item [7] – Division 485.2 of Schedule 2 (note to the heading)

This item inserts a note to explain that, if an applicant applies for a Subclass 485 visa in the Replacement stream, the criteria in Subdivision 485.21 (the criteria common to all applicants seeking to satisfy the primary criteria) are the only criteria that must be satisfied. There are no additional Schedule 2 criteria that are specific to applicants in the Replacement stream. The reason for this is that the rules relating to eligibility for the Replacement stream are set out in subitem 1229(5) in Schedule 1 to the Regulations (items 4 to 6 above). An applicant who meets the requirements of subitem 1229(5) will be able to apply for a Subclass 485 visa in the Replacement stream. The applicant will then only need to satisfy the common criteria in Subdivision 485.21, including health and character criteria.

Item [8] – Paragraphs 485.211(b) and (c) of Schedule 2

This item repeals and substitutes paragraphs 485.211(b) and (c) of Schedule 2 to the Regulations. The purpose of the paragraphs is to limit the number of Subclass 485 visas that can be held by one person on the basis of satisfying the primary criteria. The amendments are consequential to the creation of the new Replacement stream.

The effect of paragraph 485.211(b) is that a person who has held one Subclass 485 visa in the Graduate Work stream can be granted one Subclass 485 visa in the Replacement stream (subject to meeting the applicable criteria), making a total of two visas for that person as a primary applicant.

The effect of paragraph 485.211(c) is that a person who has held one Subclass 485 visa in the Post-Work Study stream can be granted one Subclass 485 visa in the Replacement stream (subject to meeting the applicable criteria), and a person who has held one Subclass 485 visa in the Post-Work Study stream followed by a Subclass 485 visa in the Replacement stream can be granted a second Subclass 485 visa in the Post-Study Work stream (subject to meeting the applicable criteria). This allows a total of three visas to be held as a primary applicant. A third visa is allowed in this situation because the policy supports regional areas of Australia and applicants must be living in those areas (see item 13 below).

Item [9] – Subclause 485.212(2) of Schedule 2

This item repeals and substitutes subclause 485.212(2) of Schedule 2 to the Regulations to exempt applicants for a Subclass 485 visa in the Replacement stream from the English language criteria. The reason for the exemption is that these applicants met the criteria in order to be granted their first Subclass 485 visa. It is not necessary to assess English language skills a second time.

Item [10] – Subclause 485.213(2) of Schedule 2

This item amends subclause 485.213(2) of Schedule 2 to the Regulations to exempt applicants who hold a Subclass 485 visa in the Replacement stream, and who are applying for a second Subclass 485 visa in the Post-Study Work stream, from the requirement to apply for an Australian Federal Police (AFP) check. The reason for the exemption is that these applicants, and their included family members who are over the age of 16, will provide an AFP check in order to be granted a Subclass 485 visa in the Replacement stream. As the primary applicant is required to hold the visa in the Replacement stream at the time of applying for the second Subclass 485 visa in the Post-Study Work stream (see item 3 above),

it was not considered necessary to obtain further AFP checks. This approach mirrors the existing exemption for applicants who hold their first Subclass 485 visa in the Post-Study Work stream and are applying for a second Subclass 485 visa in the Post-Study Work stream. However, there is no exemption from AFP checks for applicants for a Subclass 485 visa in the Replacement stream, because it could be a longer time since those applicants provided an AFP check, e.g. first Subclass 485 visa could have been applied for in 2019 and the application for a Subclass 485 visa in the Replacement stream could be made in 2026.

Item [11] – Subclause 485.231(1A) of Schedule 2

This item amends subclause 485.231(1A) of Schedule 2 to the Regulations, so that applicants for a second Subclass 485 visa in the Post-Study Work stream, who hold or held a Subclass 485 visa in the Replacement stream, are exempt from criteria relating to educational qualifications and the Australian Study Requirement. The reason for the exemption is that the applicants satisfied the relevant criteria when they were granted their first Subclass 485 visa in the Post-Study Work stream. There is no need to assess those criteria again.

Item [12] – Subclause 485.231(3) of Schedule 2

This item amends subclause 485.231(3) of Schedule 2 to the Regulations to clarify the operation of the Australian Study Requirement in relation to applicants who are applying for their first Subclass 485 visa in the Post-Study Work stream. The amended subclause requires the study leading to an eligible qualification (Bachelor Degree, Bachelor (Honours) Degree, Masters by Coursework Degree, Masters by Research Degree, Masters (Extended) Degree, or Doctoral Degree) to be completed in the prescribed period (6 months or 12 months) ending immediately before the day the application is made. This was the position until the operation of subclause 485.231(3) was inadvertently altered by the *Migration Amendment (COVID-19 Concessions) Regulations 2020*.

The *Migration Amendment (COVID-19 Concessions) Regulations 2020* amended subclause 485.231(3) to allow more time for applicants to satisfy the Australian Study Requirement, to take account of the impact of the COVID-19 pandemic. The drafting of this amendment had the unintended consequence that the Australian Study Requirement could be satisfied in the relevant period by completing a diploma or trade qualification which, coupled with a Bachelor Degree or post-graduate degree completed at an earlier time, could allow an applicant to satisfy the criteria for a Subclass 485 visa in the Post-Study Work stream. The amendment restores the intended policy position, which is that the Post-Study Work stream is only available to persons who complete the study for an eligible Bachelor Degree or post-graduate degree in the prescribed period ending immediately before the day the application was made. The amendment does not affect any application made before 1 July 2022 in reliance on the previous effect of the provision.

Item [13] – At the end of Subdivision 485.23 of Schedule 2

This item inserts new clauses 485.234 and 485.235 in Schedule 2 to the Regulations to allow holders of Subclass 485 visas in the Replacement stream to qualify for a second Subclass 485 visa in the Post-Study Work stream. Holders of a first Subclass 485 visa in the Post-Study Work stream can qualify for a second visa in that stream if they studied on a student visa in a regional area for the relevant qualification (Bachelor degree or higher) and then live, work (if relevant) and study (if relevant) exclusively in a regional area for the period of two years immediately preceding the application for the second visa (see the criteria at

clause 485.232 and clause 485.233). These arrangements were introduced by the *Migration Amendment (Temporary Graduate Visas) Regulations 2020* with effect from 20 January 2021. The second visa is granted for one year or two years depending on the regional area in which the applicant lived, worked and studied (see clause 485.511 and clause 485.512).

The new criteria at clauses 485.234 and 485.235 mirror the post 20 January 2021 criteria at clauses 485.232 and 485.233. The policy intention is to provide incentives (the ability to obtain an additional Subclass 485 visa in the Post-Study Work stream) for international students and Subclass 485 visa holders to study and live in a regional centre or other regional area, while also providing a less generous incentive (the ability to obtain an additional Subclass 485 visa in the Post-Study Work stream but for a shorter grant period) to study and live in any other area apart from Sydney, Melbourne and Brisbane. Hence this policy is designed to support regional Australia, international education providers in regional Australia, and to reduce congestion in Sydney, Melbourne and Brisbane.

The amendments ensure that all former holders of a Subclass 485 visa in the Post-Study Work stream, who obtain a Subclass 485 visa in the Replacement stream, will have an opportunity to qualify for a second Subclass 485 visa in the Post-Study Work stream to enable those persons and their families to live, work and study in regional areas of Australia. Although it is the second Subclass 485 visa in the Post-Study Work stream it is the third Subclass 485 visa overall, i.e. visa in the Post-Study Work stream followed by visa in the Replacement stream followed by another visa in the Post-Study Work stream.

Clause 485.234 – criteria for the grant of a two year Subclass 485 visa in the Post-Study Work stream to an applicant who held a Subclass 485 visa in the Replacement stream

The criteria for the grant of a Subclass 485 visa in the Post-Study Work stream that will be granted for two years are set out below. An applicant who cannot satisfy all of these criteria may, as an alternative, be eligible for a one year Subclass 485 visa in accordance with the criteria at clause 485.235.

Applicant must have qualified for the first visa by studying in a regional centre or other regional area

The applicant must have held a Subclass 485 visa in the Post-Study Work stream (the first visa) that was granted on the basis of study undertaken in a *regional centre or other regional area* at an educational institution located in the *regional centre or other regional area* (paragraph 485.234(1)(a)).

Applicant held Subclass 485 visa in the Replacement stream

The applicant must hold the Subclass 485 visa in the Replacement stream (the second visa) when the application for the third visa is made (paragraph 485.234(1)(b)).

Applicant must declare in the application for the Subclass 485 visa in the Post-Study Work stream that the applicant, and any family member making a combined application with the applicant, intend to live only in a regional centre or other regional area and, if the applicant or family member also intends to work or study—to work or study only in a regional centre or other regional area (paragraph 485.234(1)(c))

The purpose of the declaration on the application form is to reinforce the need for an ongoing commitment to live in a *regional centre or other regional area*. The declaration is also appropriate because it is a condition of the visa that visa holders, including family members, must, while in Australia, live, work and study only in a *regional centre or other regional area*.

Applicant must have lived only in a regional centre or other regional area while undertaking the study that led to the grant of the first visa (paragraph 485.234(2)(a))

Applicant must have lived only in a regional centre or other regional area for a period of at least two years immediately before applying for the third visa (paragraph 485.234(2)(b))

If the applicant worked or studied during that two year period immediately before applying for the third visa, all of that work or study must have occurred in a regional centre or other regional area (paragraph 485.234(2)(c))

These criteria require a demonstrated commitment to a *regional centre or other regional area*. The applicant must have lived and studied at a campus in a *regional centre or other regional area*, prior to the grant of the first Subclass 485 visa in the Post-Study Work stream. Typically, this would mean two or three years living in that area. The applicant for a third visa may have continued living in that area, or in some other area that is also a *regional centre or other regional area*, while holding the first Subclass 485 visa or the Subclass 485 visa in the Replacement stream. However, a break in the continuity of residence is permissible provided that the holder of a Subclass 485 visa in the Replacement stream lived, worked and studied only in a *regional centre or other regional area* for at least the period of two years immediately before applying for the third visa. There is no obligation to work or study while holding a Subclass 485 visa in the Replacement stream, but if the holder chooses to work or study during the two year period, the work or study must be undertaken in a *regional centre or other regional area*. This could include remote work for an employer located elsewhere and distance education provided by an educational institution located elsewhere.

At the time of decision on the application for the third visa, the applicant must be living, and working or studying (if relevant), only in a regional centre or other regional area (subclause 485.234(3))

This criterion provides an additional level of assurance about the commitment of the applicant to continue living, and working or studying (if relevant), only in a *regional centre or other regional area* while holding the third visa.

Clause 485.235 – criteria for the grant of a one year Subclass 485 visa in the Post-Study Work stream to an applicant who held a Subclass 485 visa in the Replacement stream

The criteria for the grant of a Subclass 485 visa in the Post-Study Work stream that will be granted for one year are set out below.

Applicant must have qualified for the first visa by studying in a designated regional area

The applicant must have held a Subclass 485 visa in the Post-Study Work stream (the first visa) that was granted on the basis of study undertaken in a *designated regional area* at an educational institution located in the *designated regional area* (paragraph 485.235(1)(a)).

Applicant held a Subclass 485 visa in the Replacement stream

The applicant must hold the Subclass 485 visa in the Replacement stream (the second visa) when the application for the third visa is made (paragraph 485.235(1)(b)).

Applicant is not eligible for a two year visa (paragraph 485.235(1)(c))

The purpose of paragraph 485.235(1)(c) is to avoid any overlap arising from the fact that a person who meets the criteria for a two year visa would otherwise also automatically meet the criteria for a one year visa. The paragraph ensures if the person satisfies the criteria for the two year visa at clause 485.234, they are not eligible for a one year visa under clause 485.235.

Applicant must have lived only in a designated regional area while undertaking the study that led to the grant of the first visa (paragraph 485.235(2)(a))

Applicant must have lived only in a designated regional area for a period of at least two years immediately before applying for the third visa (paragraph 485.235(2)(b))

If the applicant worked or studied during that two year period immediately before applying for the third visa, all of that work or study must have occurred in a designated regional area (paragraph 485.235(2)(c))

At the time of decision on the application for the third visa, the applicant must be living, and working or studying (if relevant), only in a designated regional area (subclause 485.235(3))

Applicant must declare in the application for the visa that the applicant, and any family member making a combined application with the applicant, intend to live only in a designated regional area and, if the applicant or family member also intends to work or study—to work or study only in a designated regional area (paragraph 485.235(4)).

The rationale for these provisions is the same as for the equivalent provisions in clause 485.234 set out above.

Item [14] – Paragraph 485.411(1)(a) of Schedule 2

Item [15] – At the end of subclause 485.411(1) of Schedule 2

These items amend clause 485.411 of Schedule 2 to the Regulations which deals with the location of the applicant when the Subclass 485 visa is granted. The general rule for the Subclass 485 visa is that primary applicants must be in Australia, but not in immigration clearance. This reflects the purpose of the visa, which is to allow former international students to extend their stay in Australia following the recent successful completion of study in Australia. However, there are exceptions to the general rule to provide more flexibility during the COVID-19 concession period as set out in paragraphs 485.411(1)(b) and (c). The

effect of items [14] and [15] is that applicants for a visa in the Replacement stream are another exception. This new exception recognises that some applicants for the Replacement stream will be in Australia and others will be overseas. The intention is to provide flexibility to grant the visa in Australia (but not in immigration clearance) or outside Australia. Although this is already the position during the concession period, the concession period is likely to end before the replacement visa program closes to applications on 31 December 2026.

Item [16] – Subclause 485.411(3) of Schedule 2

This item amends subclause 485.411(3) of Schedule 2 to the Regulations to clarify that, in cases where a Subclass 485 visa can be granted to an applicant located in Australia, the applicant must not be in immigration clearance (e.g. in the process of entering at an airport). This is a standard provision for most visas that are able to be granted in Australia and it was an oversight that it was not previously included in subclause 485.411(3).

Item [17] – After clause 485.512 of Schedule 2

This item inserts new clauses 485.512A and 485.512B into Schedule 2 to the Regulations. The purpose of the new clauses is to specify the duration of a Subclass 485 visa in the Post-Study Work stream that is granted to an applicant who holds or held a Subclass 485 visa in the Replacement stream. The clauses mirror the structure of existing clauses 485.511 and 485.512.

Clause 485.512A provides that, for an applicant who is granted a Subclass 485 visa in the Post-Study Work stream on the basis of meeting the requirements in clause 485.234, the visa is a temporary visa permitting the holder to travel to, enter, and remain in Australia until the later of:

- the end of two years from the day the visa is granted; and
- the end of two years from the day that the Subclass 485 visa in the Replacement stream would have otherwise ceased to be in effect.

As noted above (see item [3]), an applicant for a second Subclass 485 visa in the Post-Study Work stream must hold the first visa in that stream or must hold a Subclass 485 visa in the Replacement stream when they apply. The visa in the Replacement stream could cease during the time taken to process the application for the second visa in the Post-Study Work stream, or it could still be in effect when that visa is granted. In the first scenario, the visa will be valid for two years from the day it is granted. In the second scenario, the visa will be valid until two years after the day when the visa in the Replacement stream would have otherwise ceased to be in effect. This formula reflects subsection 82(2) of the Migration Act, which provides that a substantive visa (other than a special purpose visa) ceases to be in effect if another substantive visa comes into effect. Accordingly, the grant of the second Subclass 485 visa in the Post-Study Work stream will cease the Subclass 485 visa in the Replacement stream. By expressing the visa period for the second visa in the Post-Study Work stream as ending two years after the visa in the Replacement stream would otherwise (i.e. if not for subsection 82(2) of the Migration Act) have ceased to be in effect, the provision ensures that applicants are not disadvantaged by the grant of another visa before the previous visa has expired.

New clause 485.512B provides that, for an applicant who is granted a Subclass 485 visa in the Post-Study Work stream on the basis of meeting the requirements in clause 485.235, the visa is a temporary visa permitting the holder to travel to, enter, and remain in Australia until the later of:

- the end of one year from the day the visa is granted; and
- the end of one year from the day that the Subclass 485 visa in the Replacement stream would have otherwise ceased to be in effect.

The rationale for this structure is the same as for clause 485.512A, explained above.

For applicants who satisfy the secondary criteria as family members of a primary applicant who is granted a Subclass 485 visa in the Post-Study Work stream, the end date of the visa will be aligned with the end date of the primary holder's visa. This will be implemented under clause 485.513.

Item [18] – Clause 485.513 of Schedule 2

This item amends clause 485.513 of Schedule 2 to the Regulations. The amendment is consequential to the amendment at item [17]. The effect of the amendment is that Subclass 485 visas, other than a second Subclass 485 visa in the Post-Study Work stream, confer permission to travel to, enter, and remain in Australia until a date specified by the Minister when the visa is granted. A second visa in the Post-Study Work stream is valid until the date specified in the Regulations, as discussed at item [17].

Item [19] – Subclause 485.613(1) of Schedule 2

This item amends subclause 485.613(1) of Schedule 2 to the Regulations. The amendment is consequential to the creation of a pathway from a Subclass 485 visa in the Replacement stream to a second Subclass 485 visa in the Post-Study Work stream. The effect of the amendment is to maintain the policy that visa condition 8610 (see next item) is imposed on all second visas in the Post-Study Work stream and also on Subclass 485 visas held by family members of the primary visa holder.

Item [20] – Subclause 8610(1) of Schedule 8

Item [21] – Subclause 8610(3) of Schedule 8

These items amend visa condition 8610. The amendments are consequential to the creation of a pathway from a Subclass 485 visa in the Replacement stream to a second Subclass 485 visa in the Post-Study Work stream. The purpose of visa condition 8610 is to ensure that the holder of a second Subclass 485 visa in the Post-Study Work stream, and their family members who hold a Subclass 485 visa, live, work and study only in areas that correspond to the visa criteria that were satisfied by the primary visa holder:

- if the primary visa holder satisfied the criteria at clause 485.232 or clause 485.234 – the primary holder and the family members who satisfied the secondary criteria must, while in Australia, live, work and study only in a part of Australia that was a *regional centre or other regional area* at the time the visa was granted; and
- if the primary visa holder satisfied the criteria at clause 485.233 or clause 485.235 – the primary holder and the family members who satisfied the secondary criteria must,

while in Australia, live, work and study only in a part of Australia that was a *designated regional area* at the time the visa was granted.

There is no obligation to work or study while holding a Subclass 485 visa, but if the holder chooses to work or study on a second Subclass 485 visa in the Post-Study Work stream, the work or study must be undertaken in a permitted area. This could include remote work for an employer located elsewhere and distance education provided by an educational institution located elsewhere.

The purpose of condition 8610 is to ensure that visa holders follow through on the declaration made by the primary applicant when the application was made (existing paragraph 485.232(1)(c) and subclause 485.233(4), and paragraph 485.234(1)(c) and subclause 485.235(4) – see item [13] above).

A visa may be cancelled under paragraph 116(1)(b) of the Migration Act if a visa holder does not comply with a condition of the visa. Cancellation under this power is discretionary and would take account of all the relevant circumstances. Even if a visa is not cancelled, a failure to comply with the visa condition may affect eligibility for other visas that the visa holder may wish to apply for in the future.

Item [22] – In the appropriate position in Schedule 13

This item inserts Part 111 in Schedule 13 to the Regulations. The purpose of Part 111 is to provide for the application of the amendments made by the Regulations. Clause 11101 provides that the amendments apply in relation to an application for a Subclass 485 visa made on or after 1 July 2022.

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