Migration and Refugee Division Commentary

Student

SUBCLASSES 570–576:

COURSES AND ENROLMENT (PRE 1 JULY 2016)

Overview[1]

This commentary relates to the enrolment criterion for student (Class TU) visa applications made before 1 July 2016. See the Subclass 500 commentary for student visa applications made on or after 1 July 2016.

With exceptions, the *Migration Regulations 1994* (Cth) (the Regulations) require applicants for student visas to be enrolled in, or offered a place in, a full-time registered course of study in order to lodge a valid student visa application and to satisfy the time of decision visa criteria. A student visa may also be granted on the basis of a package of courses, comprised of a preliminary or enabling course (or courses) followed by the principal course, as explained in the Regulations. Students who are granted a student visa must maintain enrolment in a registered course, as a condition of the visa.

There are course / enrolment requirements in Schedule 1 (visa application requirements), Schedule 2 (visa criteria) and Schedule 8 (visa conditions). While the course / enrolment requirements in Schedule 1 and Schedule 8 are noted, the focus of this commentary will be on Schedule 2 time of decision visa criteria.

The Education Services for Overseas Students (ESOS) legislative framework, administered by the Department of Education, regulates the registration of courses for overseas students studying in Australia on student visas. At its core this framework includes:

- the *Education Services for Overseas Students Act 2000* (Cth) (the ESOS Act);
- the *Education Services for Overseas Students Regulations 2001* (Cth) (the ESOS Regulations) and;
- the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2018 established under s 33 of the ESOS Act (The National Code).[2]

Foreign Affairs/Defence[3] and secondary school exchange[4] students are not required to be enrolled in a registered course of study. Such cases rarely come before the Tribunal, and therefore the requirements are not considered in any detail in this commentary.[5]

As a result of amendments made in March 2012 and November 2014, certain applicants ('eligible higher degree student', 'eligible university exchange student' and 'eligible vocational education and training (VET) student') seeking to study degrees and certain other higher

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Currently registered education providers must be compliant with the National Code 2018 from its commencement on 1 January 2018. The 2018 National Code also applies to applications for registration or renewal of registration submitted by providers on or after 1 January 2018, enforcement action undertaken by an ESOS agency on or after 1 January 2018 and student complaints or appeals initiated on or after 1 January 2018. The 2017 National Code continues to apply to applications for registration or renewal of registration submitted by providers before 1 January 2018, enforcement action undertaken by an ESOS agency before 1 January 2018 and any student complaint or appeal initiated before 1 January 2018.
[3] Subclass 576 Foreign Affairs or Defence Sector.
[4] Within Subclass 571 Schools Sector.
[5] Essentially, Foreign Affairs (formerly AusAID) and Defence students must have the support of the AusAID/Foreign Minister or Defence Minister respectively, and secondary exchange students must have the approval of the State or Territory education authority that administers the relevant secondary school student exchange program. For discussion of the requirements for Foreign Affairs and Defence students, please see the Subclasses 570–576: Various Issues commentary.

education sector courses[6] or non-award courses at universities or the VET sector are also subject to different requirements concerning courses and enrolment. These requirements are dealt with separately at the end of this commentary (see below).

The statutory requirements

Schedule 1 requirements

- With exceptions, a student visa application made on form 157A or 157E[7] must be accompanied by satisfactory evidence that the applicant is enrolled in or has been offered a place in a registered full-time course of study: of a type that has been specified in a legislative instrument under reg 1.40A; and
- the provider of which is not a suspended provider.[8]

The exceptions are, essentially, Foreign Affairs, Defence and secondary exchange students, and in certain circumstances postgraduate students awaiting the marking of their thesis.

Schedule 2 criteria

There are two time of decision criteria concerned with enrolment in a course of study, and are broadly reflective of the Schedule 1 requirement:

- **Clause 57X.222**, read with the definition of 'course of study' in cl 57X.111 and with some exceptions, requires an applicant to provide a certificate of enrolment for a full-time registered course of study (or for Subclass 570, a full-time ELICOS that has been gazetted under reg 1.40A), the provider of which is not a suspended provider (an acceptable course).
- **Clause 570.232** and its equivalents for the other student subclasses (cl 571.232, 572.231, 573.231, 574.231 and 575.231) require the applicant to be enrolled in, or the subject of a current offer of enrolment in, a full-time registered course of study that is
  - a principal course; and
  - of a type that was specified for the subclass in a reg 1.40A instrument in force at the time of application.

It is this latter requirement that provides the specific link between the student's study plan and the subclass.[9]

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[6] Advanced diploma in the higher education sector was added to the definition of 'eligible higher degree student' in cl 573.111 for applications made on or after 23 November 2014 by *Migration Legislation Amendment (2014 Measures No 2) Regulations 2014* (Cth) (SLI 2014, No 163).

[7] Form 157A is the standard student visa application form and may be used for onshore or offshore applications, for all student visa subclasses except Subclass 580 (Student Guardian). Form 157P may be used by certain onshore applicants as specified by an instrument in writing for the purposes of sch 1, item 1222(1)(aa)(ii). Form 157E may be used by offshore applicants from specific countries as specified in a legislative instrument for the purposes of sch 1, item 1222(1)(a)(ii).

[8] sch 1, item 1222(3)(c)(i)–(ii).

[9] Clause 570.232 and its equivalents were introduced on 1 March 2002, to more clearly provide a link between the principal course and the subclass: *Migration Amendment Regulations 2002* (Cth) (No 1) (SR 2002, No 10). They were amended on 1 December 2003 to clarify the policy intention that an offer in a principal course of study must be a current offer: *Migration Amendment Regulations 2003 (No 9)* (Cth) (SR 2003, No 296); and again on 1 July 2005 to ensure that a student visa applicant is not affected by the reassignment of a type of course to a different subclass, i.e. that the applicant should be eligible

For visa applications made on or after 24 March 2012 certain applicants ('eligible higher degree students', 'eligible university exchange students' and 'eligible non-award students') are not required to meet cls 573.231, 574.231 and 575.231 but are subject to an equivalent time of application criterion[10] – see below for further discussion. For visa applications made on or after 23 November 2014 applicants who meet the definition of 'eligible VET student' are not required to meet cl 572.231, but are subject to an equivalent time of application criterion.[11]

Schedule 8 conditions

Condition 8202(2)(a) requires the visa holder to be 'enrolled in a registered course'. Students who already hold a student visa are subject to the requirements of condition 8202.[12] In addition, condition 8516 requires that the holder must continue to be a person who would satisfy the criteria for the grant of the visa which, in the context of the enrolment criteria for student visas, is similar in effect to condition 8202(2)(a).

The statutory requirements involve a number of key concepts which are discussed in detail below:

- Registered full-time course of study;
- Of a type specified under reg 1.40A;
- Suspended education provider;
- Principal course; and
- Enrolment and certificate of enrolment.

Registered full-time course of study

With the exception of Foreign Affairs, Defence, and secondary exchange students, the only courses that can satisfy the Schedules 1 and 2 course requirements are registered full-time courses of study.

Meaning of 'registered course'

Regulation 1.03 defines 'registered course' as:

> *... a course of education or training provided by an institution, body or person that is registered, under Division 3 of Part 2 of the Education Services for Overseas Students Act 2000, to provide the course to overseas students.*[13]

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at time of decision for the subclass that was relevant at the time of application: *Migration Amendment Regulations 2005 (No 3)* (Cth) (SLI 2005, No 133). A technical amendment was made on 8 October 2005 to avoid an ambiguity: *Migration Amendment Regulations 2005 (No 8)* (Cth) (SLI 2005, No 221). Clause 572.231 was amended by SLI 2014, No 163 to reflect the extension of streamlined processing arrangements to Subclass 572.

[10] *Migration Legislation Amendment Regulation 2012 (No 1)* (Cth) (SLI 2012, No 35).

[11] cls 572.212, 572.231 as amended by SLI 2014, No 163.

[12] For discussion of Condition 8202, please see the Visa Condition 8202 commentary.

[13] Regulation 1.03 previously referred to s 9 of the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act), but was amended by *Migration Legislation Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 33). This amendment applies in relation to visa applications made on or after 23 March 2013: sch 6, item 1302(1). The purpose of this amendment was to ensure that the definition of 'registered course' correctly referenced the amended ESOS Act. Section 9 of the ESOS Act was

Providers can only be registered where they have been recommended for approval by a designated authority[14] to provide courses of education or training to overseas students. A current list of registered providers and courses appears in the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) kept under s 14A of the ESOS Act. Thus, inclusion of a course on CRICOS is evidence that the course is registered.

CRICOS

The CRICOS is required to contain certain information about the provider, and about the course, including the duration, level (e.g. Certificate IV) and field of study.[15] 'Field of study' comprises a 'Broad field' (e.g. Food Hospitality & Personal Services), 'Narrow Field' (e.g. Personal Services) and 'Detailed Field' (e.g. Hairdressing).[16] The register may be accessed at: http://cricos.education.gov.au/. An example of a CRICOS entry showing course details is attached at the end of this commentary.

'Full-time'

The courses specified in Schedules 1 and 2 must be registered *full-time* courses of study. For registered courses, the reference to full-time is somewhat superfluous, because *all* registered courses are full-time: under the ESOS legislation, only courses which can be undertaken on a full-time basis can be registered on CRICOS.[17]

The factual question that arises under Schedules 1 and 2 is whether the applicant has provided the necessary evidence (discussed below) of enrolment or offer of enrolment in a registered full-time course of study. Because only full-time courses can be registered, evidence that the applicant's course is registered on CRICOS will usually suffice to establish that the course is an acceptable course for the purposes of the Schedules 1 and 2 course requirements.[18]

repealed by the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2012* (Cth).

[14] The relevant 'designated authorities' are tabled in s 7A of ESOS Act.

[15] ESOS Act s 14A(4), *Education for Overseas Students Regulations 2001* (Cth) (ESOS Regulations), reg 2.01.

[16] Since 2007, the education levels and fields of study used in CRICOS follow the Australian Standard Classification of Education (ASCED) 2001 developed by the Australian Bureau of Statistics, see explanatory notes for international student enrolment data attribute categories at https://internationaleducation.gov.au/research/International-Student-Data/Pages/ExplanatoryNotesforAEIStudentEnrolmentData.aspx (accessed 23/12/2019).

[17] National Code Part B Standard 11. The full-time requirement for CRICOS is reflected in the expected duration of the course as registered on CRICOS, which cannot exceed the time required for completing the course on a full-time basis. For ELICOS, a course duration *range* may be specified on CRICOS as the study duration will vary according to each student's learning goals which will be reflected in the expected duration of study specified on the student's Confirmation of Enrolment (CoE). For these courses the duration range is indicated in CRICOS in the *course name*, with the maximum duration specified as *course duration*. For example, CRICOS Course Code 063537A - Course name: Academic English (Intermediate to Advanced) (10 to 20 weeks); Duration: 20 weeks. Although only full-time courses can be registered on CRICOS, Standard 8 of the National Code gives providers flexibility to vary a student's enrolment load throughout the course. Thus, students may take a normal, reduced, or increased study load in each study period, as long as they complete the course within the specified course duration.

[18] The evidentiary requirements are discussed below. As already noted, the requirement that the course be *registered* does not apply to Subclass 576, or secondary exchange students under Subclass 571; however the *full-time* requirement does apply: sch 1, item 1222(3)(c)(iii) definition of 'course of study'; sch 2, cls 571.111(b) and 576.111 definition of 'course of study'. If the Foreign Affairs, Defence, or secondary exchange student's course is in fact a registered course, this would usually suffice to establish that the course is full-time.

Online and distance learning

Courses delivered *entirely* online or by distance learning cannot be registered on CRICOS.[19] However, courses with a distance or online component can be registered where the designated authority is satisfied that those courses meet the minimum requirements as specified in Standard 8 of the National Code, namely a registered provider must not deliver more than one third of the units[20] (or equivalent) of a higher education or VET course by online or distance learning to an overseas student and students must be enrolled in at least one fact-to-face teaching subject in any compulsory study period, unless the student is completing the last unit of their course.[21]

Courses of a type specified under reg 1.40A

The courses referred to in Schedule 1 item 1222(3)(c)(i) and (ii) and Schedule 2 cl 570.232 and its equivalents (cls 571.232, 572.231, 573.231, 574.231, 575.231)[22] must, with limited exceptions, be of a type that has been specified in an instrument made under reg 1.40A. The criterion in cl 570.232 and its equivalents specifies that the principal course (explained below) must be of a type that was specified in the instrument in force *at the time the application was made*. The exceptions to this requirement are for applicants seeking to satisfy the streamlined processing requirements for Subclasses 572, 573, 574 and 575,[23] or applicants for Subclass 576 (Foreign Affairs or Defence Sector) visas.[24]

Where the above exceptions do not apply, reg 1.40A requires the Minister to specify by written instrument the types of courses for each subclass of student visa. For cl 570.232 and its equivalents (cls 571.232, 572.231, 573.231, 574.231, 575.231), the relevant subclass is identified by reference to the applicant's principal course (explained below) at the time of decision, and the instrument that was in force at the time of application. The 'Courses' tab on the Register of Instruments: Student Visas provides a listing of reg 1.40A instruments, with hyperlinks to the notices, to help determine the relevant instrument at any particular point in time. Although changes to specified course types under reg 1.40A are relatively infrequent,[25] it is important to check the Register for the relevant instrument in each case.

Apart from ELICOS, which cuts across education sectors, the *subclasses* and *types of courses* specified for each subclass in the current instrument broadly reflect the different education sectors:[26]

[19] National Code Part B Standard 8.18.
[20] Under Part D Standard 9.4 of the National Code 2017, providers may allow a student to undertake no more than 25 per cent of the student's total course by distance and/or online learning.
[21] National Code Part B Standards 8.19–8.20.
[22] And also, uniquely, cl 570.222.
[23] regs 1.40A(2)(b)(ia)–(iii) (i.e. applications made on or after 24 March 2012 for Subclass 573 or 574 by applicants who satisfy the sch 2 requirements as an 'eligible higher degree student' or for Subclass 575 by applicants who satisfy the sch 2 requirements as an 'eligible non-award student' ('eligible university exchange student') or applications made on or after 23 November 2014 for Subclass 572 by applicants who satisfy the sch 2 requirements as an 'eligible VET student'.
[24] reg 1.40A(2)(a). An applicant can only meet the requirements of Subclass 576 where they meet cl 576.229, which requires that they have the support of the Foreign Minister or the Defence Minister for the grant of the visa.
[25] At the time of writing, 11 Gazette Notices or instruments had been issued since the regime commenced in August 2001; however the broad structure has remained relatively unchanged. The most significant changes have involved ELICOS (prior to 1 November 2004 only non-award ELICOS were specified for Subclass 570) and Masters by Coursework (specified for Subclass 574 Postgraduate Research prior to 1 July 2004). Subclass 574 was originally Masters and Doctorate Sector, and renamed Postgraduate Research Sector in December 2003.
[26] As to which type of course an applicant is enrolled in within the meaning of the instrument, in *Singh v MIBP* (2016) 240 FCR 1, the Federal Court, in remitting the matter back to the Federal Circuit Court for consideration, commented that the question of

- *Subclass 570 Independent ELICOS* – Non-Award ELICOS and Certificates I–IV in ELICOS;
- *Subclass 571 Schools Sector* – Primary and Secondary School and Secondary Exchange Programs;
- *Subclass 572 VET Sector* – Certificates I–IV other than ELICOS; VET Diploma, Advanced Diploma, Graduate Certificate and Graduate Diploma;
- *Subclass 573 Higher Education Sector* – Higher Education Diploma and Advanced Diploma; Bachelor Degree; Higher Education Graduate Certificate and Graduate Diploma; Associate Degree and Masters by Coursework;
- *Subclass 574 Postgraduate Research Sector* – Masters by Research and Doctoral Degree;
- *Subclass 575 Non-Award Sector* – Full time courses other than ELICOS not leading to an Australian Award.

'Non-award course' is defined in reg 1.03 of the Regulations to mean a course of education or training that is not an award course. 'Award course' means a course of education or training leading to (a) the completion of a primary or secondary education program; or (b) a degree, diploma, trade certificate or other formal award.

'ELICOS' is defined in reg 1.03 to mean an English Language Intensive Courses for Overseas Students that is a registered course (discussed below).

With the exception of Subclass 570 ELICOS, the *type* of course specified by the Minister by instrument under reg 1.40A (e.g. Diploma, specified for Subclass 572 VET Sector) corresponds to the *level* of course specified on CRICOS.

ELICOS

Registered ELICOS are now specifically identified in CRICOS as Detailed Field ELICOS,[27] and cut across course levels. While the vast majority of registered ELICOS are non-award, they are offered across a range of course levels. However, only non-award ELICOS and Certificates I–IV in ELICOS are specified under the current instrument made under reg 1.40A for Subclass 570 Independent ELICOS. For other ELICOS the relevant visa subclass will be the subclass for the *level* of course in CRICOS that corresponds to the type of course specified under reg 1.40A. For example, for an ELICOS Graduate Certificate course the relevant subclass will be Subclass 573 Higher Education Sector. As there are in practice only very few ELICOS that fall outside Subclass 570, such cases are rarely likely to come before the Tribunal. Nevertheless, it is important to ensure that only non-award and Certificate I–IV ELICOS are identified as Subclass 570.

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whether the applicant's Diploma was a 'higher education course' for the purpose of cl 573.231 was one of construction of the Act and relevant instrument, and not a question for the educational institution offering the course to finally determine (at [44]). See also *Shrestha v MIBP* [2017] FCCA 1875 in which the Court followed *Singh* in holding that the Tribunal erred in failing to explain how it reasoned that the elements of the relevant instrument applied to the facts of the case.

[27] There is no statutory requirement for this nomenclature in CRICOS, and ELICOS is not part of the ASCED classification system (see above n 15). The relevant ASCED classification is Broad field 09 Society and Culture, Narrow Field 15 Language and Literature, Detailed Field 01 *English Language*. In July 2011 the document known as the 'National Standards for ELICOS Courses and Providers' was incorporated into the 'ELICOS Standards' as a legislative instrument under s 176B(1) of the ESOS Act.

Further, because an applicant must be assessed according to their principal course (discussed below), an ELICOS will qualify for Subclass 570 only if taken as a stand-alone principal course, and not as a prerequisite for another course (such as a degree course).

Not a suspended education provider

The course referred to in Schedules 1 and 2 must be with a provider that is not a suspended education provider. 'Suspended education provider' means an education provider for which a suspension certificate is in effect under Division 2 of Part 6 of the ESOS Act.[28]

Under Division 2 of Part 6 of the ESOS Act, the Immigration Minister may give a registered provider an 'Immigration Minister's suspension certificate' if, in the Minister's opinion, a significant number of overseas students or intending overseas students in respect of the provider or an associated provider are entering or remaining in Australia for purposes not contemplated by their visas.[29]

Where such a certificate has been given (or revoked) the Secretary must cause the Register to be altered appropriately.[30] It is likely that a suspended provider (and their registered courses) would be removed from the Register while the suspension was in place.[31] Thus, inclusion of a course and provider on CRICOS would appear to be strong evidence that the provider is not a suspended provider for the purposes of Schedule 1 item 1222(3)(c) and Schedule 2 cl 57X.222.[32]

Principal Course

Requirement for a principal course

With limited exceptions (see above), cl 570.232 and its equivalents (cls 571.232, 572.231, 573.231, 574.231 and 575.231) require, at the time of decision, an applicant to be enrolled in, or to be the subject of a current offer of enrolment in, a full-time registered course of study that is 'a principal course' and is of a type that was specified for the subclass in a reg 1.40A instrument in force at the time of application. It is this Schedule 2 criterion that essentially determines the subclass of visa that the applicant can be granted as it creates a specific link between the applicant's study program and the subclass.

[28] reg 1.03.
[29] ESOS Act s 97. Only the Minister personally can exercise this power: s 97(5).
[30] ESOS Act s 103. Interestingly, although the relevant course for Foreign Affairs, Defence, and secondary exchange students does not have to be a registered course of study, for sch 1 it does have to be with a provider which is not a suspended education provider: see sch 1, item 1222(3)(c)(iii). Thus, although the course need not be a registered course, it appears that the provider must be a registered provider.
[31] Information provided by DEEWR (as the Department of Education was then known) Director of Compliance by phone, 28 January 2008. The Director explained that if an Immigration Minister's suspension certificate were issued under s 97, DEEWR would consult with the Department of Immigration as to the appropriate way to 'alter' CRICOS for ESOS Act s 103. He noted that the Education Minister has issued similar certificates under pt 6 div 1 (Conditions, suspension and cancellation) s 83(3)(b) of that Act and in these cases CRICOS is amended under s 96 by removing the suspended provider's name from the register, and that it is likely that a similar approach would be followed for s 103. By contrast, where conditions are imposed on a provider by the Education Minister under s 83(3)(a) these are recorded on CRICOS on the Institution Details screen. There are no provisions for the Immigration Minister to impose conditions.
[32] It does not appear that formal procedures for the issuance of suspension certificates have yet been developed – which is unsurprising given the power is expected to be used rarely. In the absence of such procedures, it may be possible that a provider suspended under div 2 might remain on CRICOS, but with an appropriate notation on the Institution Details Screen, as is the practice when conditions are imposed under div 1. If there is an uncertainty as to whether a provider has been suspended, please contact MRD Legal Services.

Thus, it is the applicant's principal course of study that will determine the relevant education sector, which in turn will determine the subclass. Note that as this is a time of decision criterion, the principal course that is the subject of the enrolment, or offer of enrolment, may be different from that assessed by the primary delegate. In some cases, the course may fall within a different education sector, and thus subclass.

For visa applications made on or after 24 March 2012, students meeting the definition of 'eligible higher degree student' (for either Subclass 573 or 574) or 'eligible university exchange / non-award student[33] (for Subclass 575) are not subject to cls 573.231, 574.231 and 575.231 respectively. For visa applications made on or after 23 November 2014, students meeting the definition of 'eligible VET student' for Subclass 572 are not subject to cl 572.231. However, to meet those definitions a student must still be enrolled in a principal course of a kind specified for the particular subclass of visa that falls within the relevant definition (see below for further discussion).

'Principal course' is explained in reg 1.40. Under that provision, if an applicant for a student visa proposes to undertake a course of study that is a registered course, the course is the principal course.[34]

Packaged course

A student visa may also be granted on the basis of a 'package of courses'. Where an applicant is proposing to undertake two or more related courses of study, reg 1.40(3) explains how a decision-maker is to determine which course is the principal course. It provides that if either one of the courses of study (course A) is a prerequisite to another of the courses (course B); or one of the courses of study (course B) may be taken only after the completion of another of the courses (course A); course B, not course A, is the principal course. Thus, package courses comprise a preliminary, enabling course (or courses) followed by the principal course.

Whether one course is a 'prerequisite' for another course requires consideration of whether one course is required as a prior condition to doing another course.[35] The term 'prerequisite' conveys a notion of some necessity imposed externally on the visa applicant, rather than a particular personal election or choice.[36] Evidence of the rules of the relevant educational institution or entry requirements for a particular course would be relevant to determining whether one course is a prerequisite to doing another course in a proposed package of courses.

[33] For visa applications made on or after 22 March 2014, the term 'eligible university exchange student' was replaced by 'eligible non-award student', as not all relevant course providers were in the university sector: *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30).
[34] The definition of 'principal course' under reg 1.40 is currently prescribed for provisions of div 1.8 (Special provisions for student visas), sch 2 pts 570–575 and sch 5A, but relevantly does not include pt 576 (Foreign Affairs or Defence Sector). For the requirements for Subclass 576, please see the Subclasses 570–576: Various Issues commentary. The definition of principal course also applies to select non student visas – namely Subclass 442 (Occupational Trainee) visa for applications made prior to 24 November 2012, and Subclass 402 (Training and Research) visa for applications made on after 24 November 2012: inserted by *Migration Legislation Amendment Regulation 2012 (No 4)* (Cth) (SLI 2012, No 238), sch 1, item 25.
[35] *Lodhawala v MIBP* [2015] FCCA 238 at [22], referring to the Shorter Oxford English Dictionary, 6th edition meaning of 'prerequisite'.
[36] *Lodhawala v MIBP* [2015] FCCA 238 at [22]. The Court rejected the applicant's claim that the principal course was a Masters of Business Administration (MBA) in circumstances where the applicant had commenced, but was unable to complete, an MBA and was proposing to do an Advanced Diploma of Business to develop skills necessary to complete the MBA.

For example, if an applicant is proposing to study a preliminary non-award academic English course followed by a bachelor degree course, where completion of the English course is a requirement for the bachelor degree course, it is the bachelor degree course (a gazetted higher education sector course) that is the principal course. As the applicant must be enrolled in, or be the subject of a current offer of enrolment in, a course of study that is a principal course, the applicant in that example would be eligible for the grant of a Subclass 573 (Higher Education Sector) visa rather than a Subclass 570 (ELICOS Sector) visa.

In order to be assessed for a package of courses, an applicant must provide either:

- certificates of enrolment (CoE) in respect of both (or all) courses; or
- a CoE in respect of the preliminary course (or courses) and a letter of offer from the course provider for the principal course.

Multiple courses that are not 'packaged'

While packaged courses are clearly contemplated by the Regulations and Departmental guidelines, it is unclear whether a student visa can be granted in respect of more than one course where the courses are unrelated and do not otherwise constitute a 'package'.[37] The uncertainty arises because the definition of 'principal course' only encompasses multiple courses where one of the courses is either a pre-requisite for the other or one course may be taken only after the completion of another: regs 1.40(2) and (3).

While there is some peripheral support for multiple unrelated courses in Departmental policy,[38] a fundamental difficulty with having a course of study in multiple unrelated courses is that the limited definition of principal course in reg 1.40(3)(b) provides no obvious way of determining which of those unrelated courses is the principal course. Such a determination is critical to the decision maker clearly identifying the relevant subclass,[39] as it is for identifying and assessing other time of decision requirements. While this may not present an issue where the unrelated courses are specified for the same subclass (e.g. two separate diploma courses), it may create difficulties where the courses traverse two or more subclasses, as it cannot be identified with certainty which is the applicable subclass. This in turn can present difficulties in other parts of the student visa assessment, such as identifying the relevant evidentiary requirements under Schedule 5A (this issue is discussed in further

[37] The definition of 'principal course' appears only to encompass a single registered course or multiple courses where one is a pre-requisite for the other (regs 1.40(2) and (3)). There is no guidance on this issue for departmental decision makers in PAM3, however it is understood in practice a visa would be granted for the duration of only one course in this instance. Where other criteria refer to more than one course (for example cl 57x.223(2)(a)(i)(A) requirements for evidence relating to 'each course of study that the applicant proposes to undertake', as amended by *Migration Amendment Regulations 2004 (No 6)* (Cth) (SR 2004 No 269)) they should be read as relating to each course of a 'package of courses' or the principal course only where there is evidence of enrolment in only one course or two unrelated courses.

[38] PAM3 only briefly discusses the notion of multiple 'non-packaged' (or unrelated) courses and what discussion there is arises in the context of guidance about the length of time the Department considers appropriate for a visa to be granted. The guidelines state that where there are two or more consecutive courses with no pre-requisite evident, the length of the visa grant should be for the combined duration of the courses, provided that the courses are in the same sector; the courses are in same broad subject area; and no more than 2 months will elapse between each course (with the exception of courses ending in November/December, where the next course commences February/March). Where courses appear unrelated, PAM3 suggests it should be considered whether it is more appropriate to grant the visa corresponding only to the first of those courses. PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Granting visas> Packaged courses at [145.2] (re-issue date 21/5/15). PAM3 goes on to note that if decision makers have concerns regarding students who appear to be enrolling in multiple unrelated courses to prolong their stay in Australia, those concerns should be addressed through the genuine temporary entrant criterion.

[39] Such as in cl 573.231.

detail in the Subclasses 570–576: Genuine Student – Relevant Assessment Levels and Schedule 5A Criteria commentary).

Having regard to these considerations, in cases involving multiple unrelated courses, the better view appears to be to confine the assessment to one course of study, (typically the first) and proceed on the basis that this course is the principal course. Any subsequent course not considered to fall within the Tribunal's assessment would instead be the subject of a further subsequent student visa application.

Multiple courses for streamlined processing arrangements

Applicants seeking to satisfy the definition of 'eligible higher degree student' for Subclasses 573 and 574, or the definition of 'eligible VET student' for Subclass 572, can undertake multiple courses provided they satisfy the prescribed enrolment requirements in the relevant definition for each of those courses.[40] Specifically, if an applicant proposes to undertake another course of study before, and for the purposes of, their principal course of study, the applicant must also be enrolled in that other course and that course must be provided by the same eligible education provider or an 'educational business partner' of that eligible education provider.[41]

Where an applicant is seeking to undertake a course prior to the commencement of their principal course, and they do not satisfy the specific enrolment requirements in the definition of 'eligible higher degree student' or 'eligible VET student' (for example, because the first course is not with an eligible education provider or educational business partner), the applicant will not be eligible for streamlined processing under cl 572.223(1A), 573.223(1A) or 574.223(1A) and will instead be subject to the non-streamlined (Schedule 5A) processing requirements.[42]

For further discussion of streamlined processing, see the discussion below.

Enrolment

There are two related criteria that must be met at the time of decision that contain specific enrolment requirements. At the time of decision an applicant for a student visa must:

- **provide a certificate of enrolment** relating to the applicant undertaking an acceptable course (or for Subclass 570 an acceptable ELICOS) – cl 57X.222; and
- **be enrolled in, or the subject of an offer of enrolment in** a course of study that is a principal course, and specified in a legislative instrument made under reg 1.40A for the subclass at the time of application – cls 570.232, 571.232, 572.231, 573.231, 574.231, 575.231.

Thus, only cl 57X.222 specifically requires a certificate of enrolment, which may be for any acceptable course. Clause 570.232 and its equivalents for the other student visa subclasses specify the principal course thus providing the link between the subclass and the applicant's study program, but do not require a certificate of enrolment. If the applicant is seeking a visa

[40] See cls 572.111, 573.111, 574.111.
[41] See cls 572.111, 572.112, 572.212, 573.111, 573.112, 573.212, 574.111, 574.112, 574.212.
[42] cls 572.223(2), 573.223(2), 574.223(2).

to undertake only one course, the relevant course for both provisions will be the same and the applicant will be able to satisfy both by providing a certificate of enrolment. However, an applicant who proposes to undertake a package of courses may have a certificate of enrolment for the preliminary course but only an offer of enrolment for the principal course.[43]

If there is no evidence of enrolment or of an offer of enrolment before the Tribunal at the time of its decision, a decision may be made to refuse to grant a visa on the basis that the enrolment criterion is not satisfied,[44] notwithstanding that the primary decision was based on the lack of satisfaction of a different criterion. Where there is no evidence of enrolment or an offer of enrolment before the Tribunal there will be nothing to link the Class TU application to a particular subclass, because none of the Schedule 2 criteria which provide this link will be satisfied.

Note that for visa applications where streamlined processing arrangements are available, 'eligible VET students', 'eligible higher degree students' and 'eligible university exchange students' are not required to meet cls 572.231, 573.231, 574.231 and 575.231, as relevant, however these definitions contain their own enrolment requirements. In addition, these applicants are still subject to the requirement at cl 57X.222 – see below for further discussion.

Clause 57X.222 – Certificate of Enrolment and Electronic Confirmation of Enrolment

Certificate of enrolment

Certificate of enrolment (CoE) is defined in reg 1.03 to mean a paper copy, sent by an education provider to an applicant for a student visa, of an 'electronic confirmation of enrolment' relating to the applicant.

With exceptions, for cl 57X.222 the applicant must provide a CoE relating to the applicant undertaking an acceptable course (or for cl 570.222 an acceptable ELICOS), i.e., a full-time registered course of study, the provider of which is not a suspended provider.

The exceptions are:

- if a failure in electronic transmission has prevented the education provider from sending the certificate and the Minister is satisfied that the applicant needs to travel urgently, the applicant must give the Minister satisfactory evidence that they are enrolled in an acceptable course;[45]
- if the application was made on form 157E (applications made outside Australia in limited circumstances),[46] the applicant must be enrolled in an acceptable course (or acceptable ELICOS);[47]
- secondary exchange students must be enrolled in an acceptable course;[48]

[43] 'Principal course' and 'package of courses' are explained above.
[44] cls 570.232, 571.232, 572.231, 573.231, 574.231, 575.231.
[45] sch 2, cl 57X.222(2).
[46] sch 1, item 1222(1)(a).
[47] sch 2, cl 57X.222(3), except for Subclass 574 (cl 574.222(4)).

- in certain circumstances, if a postgraduate student is required to remain in Australia during the marking of a postgraduate thesis, the applicant must satisfy the Minister that the relevant institution requires the student to remain in Australia for that purpose;[49]
- for Foreign Affairs or Defence students, cl 576.229 instead requires the applicant to have the support of the Foreign Minister or the Defence Minister for the grant of the visa.

As cl 57X.222 is a time of decision criterion, the applicant may provide the CoE at any time up to the time of decision, and the CoE must be considered at the latest point in time. The CoE relates particularly to the course of study for which the visa is to be granted, and establishes that the applicant is enrolled in that particular course.

Expiry and cancellation of CoEs

Where a CoE has been cancelled or has expired, it may not be relied upon to satisfy cl 57X.222. Although cl 57X.222 does not expressly refer to a CoE that is 'current' or 'valid', there must be a valid CoE in existence at the time of decision.[50]

Electronic Confirmation of Enrolment (eCoE)

An Electronic Confirmation of Enrolment (eCoE), in relation to an applicant for a student visa, is defined in reg 1.03 to mean confirmation that:

- states that the applicant is enrolled in a registered course; and
- is sent by an education provider, through a computer system under the control of the Education Minister, to
  - a diplomatic, consular or migration office maintained by or on behalf of the Commonwealth outside Australia; or
  - an office of a visa application agency that is approved in writing by the Minister for the purpose of receiving applications for a student visa; or
  - any office of Immigration in Australia.

An eCoE system has been in place since July 2000. The eCoE is a component of the Provider Registration and International Students Management System (PRISMS) and allows education providers registered on CRICOS to submit confirmation of enrolment forms electronically. This computerised system allows the Department to monitor overseas students and gives greater security against fraud of confirmation of enrolment. Tribunal officers can access an applicant's eCoE through the Department's ICSE database. Tribunal officers can also access PRISMS. The paper CoE includes a unique code that can be used

[48] sch 2, cl 571.222(4).
[49] cls 574.222(3)–(3A).
[50] In *Singh v MIAC* [2009] FMCA 1149, the Court held that to accept that an applicant could rely on an expired CoE at the time of decision would defeat the purpose of cl 572.222, which as provided by the Explanatory Statement to the amendments introducing cl 572.222, is to ensure that an applicant provides evidence that they are enrolled in a full-time course of study: at [40]–[55]. See also *Lamichhane v MIAC* [2013] FCCA 1172.

to verify the genuineness of the certificate, by matching the code against the eCoE held in ICSE.

Thus, in most cases an eCoE will satisfy the cl 57X.222 requirement, because it is generated by the enrolment information on PRISMS as evidence of enrolment in a registered, full-time course. However, if in doubt, decision-makers should check with the education provider.

Expiry and cancellation of eCoEs

Onshore eCoEs have an expiry date the same as the course end date. However, if it is not clear from an applicant's study plans and academic results that they are a continuing student in the course, decision makers may require the student to supply a letter from their education provider.

Education providers may cancel eCoEs that they have issued. The Department of Education may also cancel eCoEs where a course is suspended or cancelled from CRICOS. A cancelled eCoE cannot be used for any visa related purpose.

Clause 570.232 and equivalents – enrolled in, or the subject of an offer of enrolment

With the exception of Subclass 572–575 applicants subject to streamlined processing, all applicants for a Subclass 570–575 visa must meet the time of decision requirement in cls 570.232, 571.232, 572.231, 573.231, 574.231 and 575.231 that the applicant is enrolled, or is the subject of a current offer of enrolment, in a course of study that is a principal course, and specified under reg 1.40A for the subclass at the time of application.

It is a question of fact as to whether the applicant satisfies this requirement. Conditional or qualified offers of enrolment are not sufficient where there is no evidence that the applicant has met the conditions of the offer.[51]

Further, it does not require any particular form of evidence. Unlike the requirement in cl 57x.222 relating to provision of a CoE (discussed above), the requirement in cl 570.232 and its equivalents makes no reference to a CoE. What is required is that the applicant is either **enrolled** or **the subject of a current offer of enrolment**. In practical terms, this means that an applicant may satisfy this Schedule 2 requirement in the absence of a CoE, provided there is other evidence of enrolment or the applicant is the subject of a current offer of enrolment.

To determine whether the applicant **is enrolled** in the principal course, a CoE would usually suffice; however, for the reasons explained above, a CoE may not always be reliable evidence that the applicant is enrolled at the time of decision, and it may be necessary to seek further evidence from the education provider, or alternatively to invite the applicant to provide such evidence.

[51] See *Zhu v MIBP* [2017] FCCA 83 where the applicant, in response to an invitation from the Tribunal seeking evidence of a current enrolment or offer of enrolment in the higher education sector, provided a conditional offer letter for an Advanced Diploma of Translating course. The letter indicated that a full offer letter would only be provided upon the applicant submitting satisfactory IELTS results. The applicant failed to provide these results and, in turn, did not receive a full offer letter. The Tribunal affirmed the delegate's decision. The Court found that the Tribunal did not take into account an irrelevant consideration in considering the conditionality of the offer.

Secondary exchange students, who do not need to be enrolled in a registered course, would usually rely on the Acceptance Advice of Secondary Exchange Students (AASES) form. Departmental Guidelines state that Foreign Affairs/Defence students should provide a statement from Foreign Affairs or Defence confirming their status, the relevant assistance scheme and any included dependants and giving details of enrolment.[52]

Enrolment in a registered course may cease as a result of termination by the education provider and also by withdrawal from a course or discontinuance by a student communicated to the education provider.[53] Whilst it is not essential that the student's withdrawal or discontinuance be accepted by the provider for there to be a cessation of enrolment, it does not necessarily follow that a student ceases to be enrolled where a withdrawal is not acknowledged by the provider, or is refused, or is not communicated to the provider.[54]

To determine whether the applicant is **the subject of an offer of enrolment**, relevant evidence could include a letter of offer or a conditional CoE or other evidence from the provider. The requirement that the offer be current means that the offer remains available to them and has not been withdrawn or otherwise cancelled at the time of decision.

Can an applicant be 'enrolled' without CoE or eCoE evidence?

It is possible for a student to be 'enrolled' in a course without having a CoE. However, in most cases it is highly unlikely to occur given that education providers have strict obligations under the ESOS Act and ESOS Regulations to register international students when they become enrolled.

Under the ESOS Regulations a 'confirmation of enrolment' means the information a registered provider must give the Secretary (of the Department of Education) under s 19 of the ESOS Act when a person becomes an accepted student of the provider.[55] The registered education provider has 31 days in which to give the Secretary the name and any other prescribed details[56] of each person who becomes an accepted student of that provider.[57] In this context 'accepted student' means a student who is accepted for enrolment, or enrolled, in a course provided by the provider; and who is, or will be, required to hold a student visa to undertake or continue the course.[58] This information must be provided to the Secretary electronically using PRISMS.[59]

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[52] PAM3 - GenGuide G - Student visas – Visa application and related procedures – Applying for a Student Visa – Enrolment (and electronic Confirmation of Enrolment) – Evidence of Enrolment (re-issue date 16/02/16).
[53] *Zhang v MIAC* [2010] FMCA 809.
[54] In *Zhang v MIAC* [2010] FMCA 809, the student had advised the education provider that he would not be continuing his studies and did not thereafter return to complete his course. In the unusual circumstances of that case, the Court held that, for the purposes of substantial compliance with condition 8202(2), it was open for the Tribunal to accept the information from the education provider that the applicant had withdrawn and did not attend thereafter, and to find that he was not enrolled in a registered course, in the absence of any evidence (other than the applicant's assertions) that he returned to the course and completed it and his failure to provide any documentary evidence to that effect. The Court held that even if a provider's acceptance of the student's withdrawal was essential, there was evidence of such acceptance: at [82]–[83].
[55] ESOS Regulations, reg 1.03
[56] The prescribed details are specified in reg 3.01 of the ESOS Regulations. These include the range of matters typically found on a CoE. For example: the student's details; the unique identifier of the student's course; the course location; the agreed starting day of the course; the day when the student is expected to complete the course; and the amount of any tuition fees that the provider received for the student for the course.
[57] Education providers also have obligations under s 21(1) of the ESOS Act to keep records of each accepted student who is enrolled with the provider or who has paid any tuition fees for a course provided by the provider.
[58] ESOS Act s 5
[59] ESOS Act s 19(3) and ESOS Regulations, reg 1.03. PRISMS is defined as the electronic system of that name used to process information given to the Secretary in the form approved under s 19(3) of the ESOS Act.

In general terms, where a student is enrolled with an education provider and becomes an accepted student, the education provider must give the Secretary the prescribed information via PRISMS. This information constitutes the 'confirmation of enrolment'. Any international student claiming to be enrolled with an education provider should therefore be able to provide evidence of the confirmation of enrolment. The information should be accessible through PRISMS.

Clause 57x.223 – enrolment requirements for the genuine student criteria

A CoE or evidence of an offer is necessary to determine the applicable subclass so as to identify any applicable Assessment Level for Schedule 5A and indirectly other elements of cl 57x.223, such as the Genuine Temporary Entrant requirement. Evidence of enrolment is also required to satisfy the alternative evidentiary requirements for streamlined processing, and may also be required for certain Schedule 5A requirements.

Evidence of enrolment for determining subclass / evidentiary requirements

In order to determine the applicable Schedule 5A evidentiary requirements for the individual applicant, it is necessary to identify the relevant subclass and assessment level, which itself is dependent upon the particular course in which the applicant is enrolled, or the subject of an offer of enrolment. As discussed above, for students not subject to streamlined processing, the applicable subclass is determined by reference to the requirement in cl 570.232 and its equivalents (cls 571.232, 572.231, 573.231, 574.231 and 575.231) that the applicant be enrolled in, or be the subject of a current offer of enrolment in, a full-time registered course of study that is 'a principal course' and is of a type that was specified for the subclass in an instrument in force at the time the application was made. In this context, it is not necessary for the applicant to provide a CoE or even be enrolled at the relevant time, as an offer of enrolment would be sufficient.

However, more specific enrolment evidence (such as CoEs) will be required where the applicant is seeking to meet the streamlined processing requirements for Subclass 572–575 (see below).

Schedule 5A enrolment requirements

With limited exceptions, Schedule 5A requires applicants to give either a CoE or evidence that the applicant has been offered a place in each course proposed to be undertaken under the visa.[60] This requirement does not apply to: secondary exchange students; applicants for Subclass 576 (Foreign Affairs or Defence Sector) visas; applications made using form 157E (visa applications made outside Australia in limited circumstances)[61] and certain applicants for Subclass 574 (Postgraduate Research Sector) visas.[62]

[60] cl 5A108(1).
[61] Form 157E is an electronic application form which can only be used in offshore applications made by certain students from specific countries (eligible users are specified by legislative instrument). For the current instrument see 'Sch1-1222(1)(a)(ii)' tab of the Register of Instruments: student visas.
[62] cl 5A108(2): Subclass 574 visa applicants that made their application in Australia, who at the time of application held a Subclass 560, 562 or 574 visa, and in connection with a course of study or with a matter arising from the course, the relevant educational institution requires the applicant to remain in Australia during the marking of a postgraduate thesis.

In addition to this general requirement, some clauses in Schedule 5A also require applicants to provide evidence of enrolment as part of the 'Other Requirements' assessment. For example, cl 5A409 (Subclass 572, Assessment Level 3) requires applicants to give evidence that they are enrolled in a VET course; or are enrolled in a course that is a prerequisite to a VET course and are either enrolled in, or have an offer of a place, in a VET course.

Limit on total ELICOS study

It is a time of decision criterion for the grant of most student visas that if an applicant is subject to a certain assessment level, the aggregate period(s) of, ELICOS that the applicant is seeking to undertake, together with the period(s) of any previous ELICOS undertaken as the holder of a student visa, or any subsequent bridging visa, does not exceed a certain period.[63]

The relevant assessment level and prescribed period of ELICOS study vary and depend on the date of visa application and, in some instances, the subclass of student visa held when undertaking previous ELICOS study.[64] This criterion is not relevant for students subject to streamlined processing, as they are not subject to assessment levels.

In *Diba v MIAC*, the Court held that if an applicant has undertaken more than the prescribed period of ELICOS study at the time of decision, whether or not at that point the applicant proposes further periods of ELICOS study, then this criterion will not be satisfied.[65]

Applicants eligible for streamlined processing

Streamlined processing arrangements were introduced in the higher education sector for visa applications made on or after 24 March 2012.[66] These arrangements were extended to the VET sector for visa applications made on or after 23 November 2014.[67] Applicants who satisfy the definitions of 'eligible VET student' (for Subclass 572), 'eligible higher degree student' (for Subclasses 573 and 574) and 'eligible university exchange student' / 'eligible non-award student'[68] (for Subclass 575) are subject to different requirements relating to courses and enrolment from those discussed above. Applicants meeting the relevant definition do not have to meet the Schedule 5A evidentiary requirements, but instead are eligible for 'streamlined processing', which involves reduced evidentiary requirements with respect to English language abilities and financial capacity requirements (see the

[63] cls 570.229, 571.235, 572.234, 573.234, 574.234, 575.234, 576.232. Clause 576.232 was repealed by SLI 2014, No 30 from 22 March 2014.
[64] The applicable version of the criterion depends on whether the visa application was made on or after 22 March 2014, between 24 March 2012 and 21 March 2014, or between 1 December 2003 and 23 March 2012. Clause 576.232 differs at all points in time from the equivalent criteria in other subclasses.
[65] *Diba v MIAC* [2010] FMCA 354. A submission that the criterion has no application where an applicant is not "seeking to undertake" an ELICOS was expressly rejected by the Court (at [14], [17]–[20]). This interpretation was confirmed in *Dhungana v MIBP* [2016] FCCA 731 and upheld on appeal: *Dhungana v MIBP* [2016] FCA 1411. Special leave to appeal to the High Court was refused: *Dhungana v MIBP* [2017] HCASL 51.
[66] SLI 2012, No 35
[67] SLI 2014, No 163.
[68] For visa applications made prior to 22 March 2014, streamlined processing under Subclass 575 applied to an 'eligible university exchange student'. This term was replaced by 'eligible non-award student' by SLI 2014, No 30, for visa applications made on or after 22 March 2014. The change in terminology is intended to reflect the fact that the streamlined processing arrangements have been extended for Subclass 575, to selected low risk non-university providers: Explanatory Statement to SLI 2014, No 30, at 10.

Subclasses 570–576: Genuine Student – Relevant Assessment Levels and Schedule 5A Criteria commentary for discussion of the evidentiary requirements).

Who is an eligible higher degree student?

An applicant will be an 'eligible higher degree student' for a Subclass 573 or 574 visa if the following are met:

- *Subclass 573* – the applicant is enrolled in a principal course of study for the award of a bachelor's degree or a masters degree by coursework or, for visa applications made on or after 23 November 2014, an advanced diploma in the higher education sector,[69]
  Subclass 574 – the applicant is enrolled in a principal course of study for the award of a masters degree by research or a doctoral degree; and
- the principal course of study is provided by an eligible education provider, and
- if the applicant proposes to undertake another course of study before, and for the purposes of, the principal course of study:
  - the applicant is also enrolled in that course, and
  - that course is provided by the eligible education provider or an educational business partner of the eligible education provider.[70]

Who is an eligible university exchange student / non-award student?

An applicant will be an 'eligible university exchange student' / 'eligible non-award student' for a Subclass 575 visa if the following are met:

- the applicant is enrolled in a full-time course of study that is not leading to an award and is not an ELICOS course, and
- the course of study is provided by an eligible education provider, and
- the course of study is part of a formal exchange program or a study abroad program.[71]

Who is an eligible vocational education and training student?

An applicant will be an 'eligible VET student' for a Subclass 572 visa if the following are met:

- the applicant is enrolled in a principal course of study for the award of an advanced diploma in the VET sector;
- the principal course of study is provided by an eligible education provider, and
- if the applicant proposes to undertake another course of study before, and for the purposes of, the principal course of study:

[69] cl 573.111 as amended by SLI 2014, No 163. See *Singh v MIBP* [2018] FCA 29, for a discussion of the factors that are relevant to assessing whether a particular courses falls within the higher education sector for Subclass 573.
[70] cls 573.111, 574.111 respectively.
[71] The terms 'formal exchange program' and 'study abroad program' are not further defined in the Act or Regulations.

- the applicant is also enrolled in that course, and
- that course is provided by the eligible education provider or an educational business partner of the eligible education provider.[72]

Evidentiary requirements for applicants subject to streamlined processing

An applicant seeking to meet the streamlined processing requirements as an eligible VET student, eligible higher degree student or eligible university exchange / non-award student is subject to specific time of application and time of decision criteria.[73] An applicant who does not satisfy these requirements at the time of decision will need to be assessed against the Schedule 5A requirements relevant to their subclass and assessment level. For applications made on or after 22 March 2014, to access the streamlined processing arrangements a person must meet the relevant definition at time of application and time of decision.[74] That is, after 22 March 2014, an applicant who was not an 'eligible higher degree student' at time of application cannot access the streamlined processing requirements, even if, by the time of decision, they have an enrolment in a relevant higher degree course.

Time of application requirements

It is a time of application requirement for eligible VET students, eligible higher degree students and eligible university exchange / non-award students, that the applicant has a COE in each course of study for which the applicant is an eligible higher degree student or eligible university exchange / non-award student.[75] In practical terms, this means that to satisfy the time of application criterion, an applicant must provide evidence of CoEs in each course, or courses, for which they seek to meet the relevant definition. Note that for applications made prior to 22 March 2014, there is no link between the streamlined processing criteria applicable at time of application, and relevant time of decision criteria. For these cases, it is possible to not meet the relevant time of application streamlined processing criterion, but still meet the streamlined processing time of decision criteria.

Time of decision requirements

To be assessed against the streamlined evidentiary requirements in cl 572.223(1A), 573.223(1A), 574.223(1A) or 575.223(1A), an applicant must, at the time of decision, have a CoE in each course of study for which he or she is an eligible VET student, eligible higher degree student or eligible university exchange / non-award student.

For visa applications made on or after 24 March 2012 but before 22 March 2014, an applicant may still meet the streamlined processing requirements at the time of decision,

[72] cl 572.111 as amended by SLI 2014, No 163. See also *Singh v MIBP* [2018] FCA 29 for a discussion of factors relevant to assessing whether a particular courses falls within the higher education sector for Subclass 573. The same factors would appear to be relevant to determining whether a courses falls within the VET sector.
[73] See definitions of 'eligible VET student' at cl 572.111, 'eligible higher degree student' at cls 573.111 and 574.111 and definition of 'eligible university exchange student' and 'eligible non-award student' at cl 575.111; the requirement for a confirmation of enrolment at time of application per cls 572.212, 573.212, 574.212 and 575.212; the requirement for a confirmation of enrolment at time of decision, and the evidentiary requirements, at cls 572.223(1A), 573.223(1A), 574.223(1A), 575.223(1A) and the exclusion of these students from cls 572.231, 573.231, 574.231 and 575.231 (which refers to applicants who do not meet the streamlined processing requirements).
[74] cl 572.223(1A) inserted by SLI 2014, No.163 for applications made on or after 23 November 2014 and cl 573.223(1A) as amended by SLI 2014, No 30 for visa applications made on or after 22 March 2014.
[75] cls 572.212, 573.212, 574.212 , 575.212.

notwithstanding that he or she did not satisfy the time of application requirements specific to eligible higher degree / university / non-award students. While there is a clear time of application requirement for streamlined processing, for applications made between these dates the time of decision requirement is that the applicant is 'an eligible higher degree student' or 'an eligible university exchange student' who 'has a confirmation of enrolment in the course of study (or courses of study for subclasses 573 and 574) for which the applicant is such a student'. As there is no temporal connection between the relevant time of application and time of decision criterion, an applicant would not necessarily be prevented from satisfying the time of decision requirement without, for example, being required to provide evidence in accordance with cl 573.212 and its equivalents. In this respect, cl 573.212 would simply not apply as opposed to it not being satisfied. Provided an applicant was an eligible higher degree student at time of decision, and held a CoE in each course for which they were eligible, cl 573.231 (or its equivalents) would also not apply.

What is the applicable instrument in streamlined processing cases?

The definitions of eligible VET student, eligible higher degree student and eligible university exchange / non-award student require the applicant to be enrolled in a course provided by an 'eligible education provider'. For Subclass 572, 573 and 574 applicants, if the applicant proposes to undertake another course prior to the principal course, that course can be provided by either an 'eligible education provider' or an 'educational business partner'. These providers (and partners) are specified in writing by the Minister (see the 'EdProviders' tab on the Register of Instruments: Student Visas for the applicable instrument).[76]

Given there are both time of application and time of decision criteria which rely on the definitions of eligible higher degree student or eligible university exchange / non-award student in each relevant Part to Schedule 2,[77] which in turn rely on the definitions of 'eligible education providers' and 'educational business partners', there is a question as to what is the relevant instrument for the purposes of these definitions. It appears that the relevant criterion (time of application or time of decision) must be considered by reference to the instrument in force at the relevant point in time. For more detailed discussion see 'What is the relevant instrument' under 'Streamlined processing arrangements' in the Subclasses 570–576: Genuine Student – Relevant Assessment Levels and Schedule 5A Criteria commentary.

Relevant case law

Judgment	Judgment summary
Dhungana v MIBP [2016] FCCA 731	Summary
Dhungana v MIBP [2016] FCA 1411	

[76] See cls 573.111, 573.112, 574.111, 574.112, 575.111, 575.112.
[77] See cls 573.111, 574.111, 575.111 for definitions; cls 573.212, 574.212, 575.212 for time of application criteria; cls 573.223, 574.223, 575.223 for time of decision criteria.

Diba v MIAC [2010] FMCA 354	Summary
Lamichhane v MIAC [2013] FCCA 1172	
Lodhawala v MIBP [2015] FCCA 238	Summary
Shrestha v MIBP [2017] FCCA 1875	Summary
Singh v MIAC [2009] FMCA 1149	Summary
Singh v MIBP [2016] FCA 611; (2016) 240 FCR 1	
Singh v MIBP [2018] FCA 29	Summary
Zhang v MIAC [2010] FMCA 809	Summary
Zhu v MIBP [2017] FCCA 83	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2002 (No 1) (Cth)	SR 2002, No 10
Migration Amendment Regulations 2003 (No 9) (Cth)	SR 2003, No 296
Migration Amendment Regulations 2004 (No 6) (Cth)	SR 2004, No 269
Migration Amendment Regulations 2005 (No 3) (Cth)	SLI 2005, No 133
Migration Amendment Regulations 2005 (No 8) (Cth)	SLI 2005, No 221
Migration Legislation Amendment Regulation 2012 (No 1) (Cth)	SLI 2012, No 35
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238
Migration Legislation Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 33
Migration Amendment (AusAID) Regulation 2013 (Cth)	SLI 2013, No 268
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30
Migration Legislation Amendment (2014 Measures No 2) Regulation 2014 (Cth)	SLI 2014, No 163

Available decision templates

The following templates are relevant to enrolment:

- **57X Student Visa Refusal – No Enrolment.** This template is intended for use in reviews of decisions to refuse a Class TU (Subclass 570–575) Student visa where the applicant has no current enrolment or offer of enrolment in a principal course of study, and so the Tribunal's decision is to affirm the refusal. It is suitable for use in cases where the visa application was made on or after 1 January 2004. This template is **not suitable** for visa applications made on or after 24 March 2012 where an issue has arisen as to whether the applicant meets the definition of 'eligible higher degree student' (at cl 573.111 or 574.111) or the definition of 'eligible university exchange student' or 'eligible non-award student' (at cl 575.111).
- **570 Student Visa Refusal – Assessment Level.** This template, and the other five related subclass Assessment Level templates, is for use where the issue in dispute is whether the applicant is a genuine student because they meet the Schedule 5A requirements and/or other matters specified in cl 570.223 (or 571.223, 572.223, 573.223, 574.223 or 575.223). Enrolment will often be a consideration in these cases.

Last updated/reviewed: 22 November 2022

Attachment A

Example of a CRICOS entry

Canberra Institute of Technology - Advanced Diploma of Management

Course Name:	Advanced Diploma of Management
Course Sector:	VET
CRICOS Course Code:	069593M
Dual Qualification:	No
Field Of Education - 1st Qualification	
Broad Field:	08 - Management and Commerce
Narrow Field:	0803 - Business and Management
Detailed Field:	080301 - Business Management
Course Level:	Advanced Diploma
Foundation Studies:	No
Work Component:	No
Course Language:	English
Duration (Weeks):	104
Estimated Total Course Cost:	$AU 20,400 (includes tuition fees plus any additional compulsory costs)
State:	Australian Capital Territory

Course Location(s):	Canberra Institute of Technology - City Campus [00001K] - Location owned and operated by provider

SUBCLASSES 570–576: GENUINE STUDENT – RELEVANT ASSESSMENT LEVELS AND SCHEDULE 5A CRITERIA (PRE 1 JULY 2016)

Overview[1]

This commentary relates to the 'genuine student' criterion as it applied to Student (Class TU) visa applications made before 1 July 2016. For discussion of this issue in relation to student visa applications made on or after 1 July 2016, see the Subclass 500 commentary.

The *Migration Regulations 1994* (Cth) (the Regulations) require primary applicants for a student visa to demonstrate at the time of decision they are 'genuine applicants for entry and stay as a student' (cl 57X.223, or 576.222 for Subclass 576). There are two limbs to this criterion. First, the decision-maker must be satisfied that the applicant intends genuinely to stay in Australia temporarily, having regard to factors set out in a Ministerial direction and other relevant matters. This only applies to visa applications made on or after 5 November 2011. The second limb requires the applicant to provide evidence that he or she has the minimum level of English language proficiency and financial capacity required to undertake the proposed course or courses of study, as well as any additional requirements, such as relevant educational qualifications.

In most cases, unless the applicant is eligible for streamlined processing arrangements, in order to meet the second limb, applicants must provide evidence in accordance with Schedule 5A to the Regulations.[2] Schedule 5A is divided according to student visa subclasses and assessment levels, determined by reference to the applicant's nationality and proposed study program, and sets out evidentiary requirements for English language proficiency, financial capacity, and 'other requirements' for each assessment level within each subclass.

The requirements for each of these factors vary depending on the subclass and assessment level, and in some respects the date of visa application. The various permutations are framed in precise terms and an accurate assessment in any particular case will call for a careful examination of the relevant provisions of Schedule 5A. This commentary does not attempt to cover each subclass and assessment level in detail. It is intended to provide a general overview only, with some additional discussion of issues that commonly arise. Members should contact MRD Legal Services for further information on specific issues.

A number of Schedule 5A provisions refer to matters (such as assessment levels and courses) that are specified by the Minister by an instrument in writing (formerly Gazette

[1]Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.

[2] For visa applications made before 24 March 2012, the exceptions relate to applicants who are persons designated under reg 2.07AO, which was inserted by *Migration Amendment Regulations 2004 (No 6)* (Cth) (SR 2004, No 269), with effect from 27 August 2004, to allow certain temporary protection and temporary humanitarian stay visa holders to apply for a range of mainstream visas, including student visa Subclasses 571, 572, 573, 574 and 580. For these applicants, the English language proficiency and financial capacity requirements are not referable to sch 5A: see cls 571.223(2)(b), 572.223(2)(b), 573.223(2)(b) and 574.223(2)(b). From 24 March 2012, persons designated under reg 2.07AO were no longer permitted to apply for student visas: *Migration Legislation Amendment Regulation 2012 (No 1)* (Cth) (SLI 2012, No 35) regs 2 and 6, and sch 4 item 4. Regulation 2.07AO affected a very limited class of persons and is not addressed in detail in this commentary. It was repealed with effect from 23 March 2013: *Migration Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 32). For visa applications made on or after 24 March 2012 exceptions to the sch 5A requirements relate to 'eligible higher degree students' and 'eligible university exchange students' (now called 'eligible non-award students') in the Subclasses 573, 574 and 575 streams and for visa applications made on or after 23 November 2014, exceptions relate to 'eligible vocational education and training students' in Subclass 572.

Notices).[3] The applicable instruments are available through the Register of Instruments – Student Visas.

Where applicants are eligible for streamlined processing arrangements, assessment levels and evidentiary requirements under Schedule 5A do not apply. Instead, applicants must meet English proficiency, financial capacity and other requirements as specified in Schedule 2, which are equivalent in nature to those for Assessment Level 1 in Schedule 5A.

In all cases, the second limb of the 'genuine student' criterion also requires decision-makers to have regard to the applicant's stated intention to comply with visa conditions as well as any other relevant matter. In addition, for visa applications made on or after 1 January 2010, the applicant in most cases must satisfy the decision-maker of further specified matters relating to financial capacity.[4]

Genuine intention to stay temporarily

Clauses 57x.223(1)(a), 576.222(1)(a) and 580.226(1)(a) require that the Minister be satisfied at the time of decision that the primary applicant intends genuinely to stay in Australia temporarily, having regard to:

- the applicant's circumstances
- the applicant's immigration history
- if the applicant is a minor – the intentions of their parent, legal guardian or spouse, and
- any other relevant matter.

These provisions were introduced on 5 November 2011 and apply to visa applications made on or after that date.[5] These requirements are in addition to the other 'genuine student' requirements in the Regulations.

The Explanatory Statement to the amending regulations that introduced the 'genuine intention to stay temporarily' indicates that the new criterion was intended to provide a clear statutory basis for assessing an applicant's genuineness about staying in Australia temporarily, in addition to the existing requirements relating to their genuineness as an applicant for a student visa. According to the Explanatory Statement, the decision maker is required to consider the circumstances of the applicant to ascertain whether the applicant genuinely intends to come to Australia and then return home, following the completion of

[3] '*Gazette Notice*' was relevantly defined in reg 1.03 of the Regulations to mean a notice under reg 1.17, which provides that 'The Minister may, by notice published in the *Gazette*, specify matters required by individual provisions of these Regulations to be specified for the purposes of those provisions'. Both provisions have since been repealed for visa applications made on or after 22 March 2014: *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30). Since 1 January 2005, all legislative instruments made after that day are registered on the Federal Register of Legislation (FRL) (or, prior to 6 March 2016, the Federal Register of Legislative Instruments) established and maintained under s 15A of the *Legislation Act 2003* (Cth) (LA), and are not required to be published in the Gazette unless a provision enacted, made or amended on or after 1 January 2005 expressly requires such publication: s 56 of the LA. In effect, registration on the FRL substitutes for any pre 1 January 2005 statutory requirement for publication of a notice in the Gazette so that, in general, notification in the Commonwealth Gazette is no longer required. References to Gazette Notices in sch 5A provisions that were introduced after the enactment of the LA have now been amended to read 'an instrument in writing': *Migration Legislation Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 116), effective from 1 July 2009. This amendment removed the unintended requirement for publication in the Gazette (in addition to the requirement to register on FRL): Explanatory Statement to SLI 2009, No 116 sch 3 item 1.

[4] For applications made prior to 24 March 2012, this requirement does not apply to applicants who were persons designated under reg 2.07AO.

[5] *Migration Amendment Regulations 2011 (No 6)* (Cth) (SLI 2011, No 199).

their studies. Relevant matters might include information that may mean the applicant has little incentive to return at the end of their proposed stay, or information that may mean the applicant has significant incentive to return at the end of their proposed stay.[6] This explanation does not sit easily with the circumstance that student visas can be part of a legitimate pathway to permanent residence.

The expression 'intends genuinely to stay in Australia temporarily' has been interpreted as requiring that the applicant must unqualifiedly intend his or her stay to be temporary.[7] In *Saini v MIBP* Judge Cameron held that an intention to remain in Australia if qualified to do so at the end of the student visa, would not amount to an intention to stay temporarily, because the intention to stay temporarily would not be unqualified.[8] Part of the Court's reasoning appeared to explain how this may be reconciled with the fact that student visas can be part of a pathway to permanent residence, stating that the requirement was not inconsistent with a person having that intention 'at that time' (i.e. when applying for the visa), but subsequently deciding to seek to stay lawfully after the period of that visa.[9] In upholding his Honour's judgment, Justice Logan held that what is required is an evaluation of intention at the time of decision, and if at this time there is a settled intention to later seek a visa that will lead other than to temporary residence, that intention is not consistent with an intention genuinely to stay temporarily.[10]

There is also an equivalent criterion for secondary applicants, with the exception of secondary applicants for Subclass 580 (Student Guardian) visas.[11] Again, it applies to visa applications made on or after 5 November 2011.

The expression 'intends genuinely to stay in Australia temporarily' for the purposes of cl 57X.223(1)(a) does not exclude from consideration whether the applicant is a genuine student.[12] Although the question of whether an applicant is a 'genuine student' is a separate criterion in other subclauses (such as cl 572.223(2)(b)), it is clear that the terms of cl 57X.223(1)(a) contemplates consideration of an applicant's intention to stay 'as a student' in determining whether that stay will be temporary or not.[13] This is by reference to both the chapeau of cl 57X.223(1) and consideration of 'any other relevant matter' in cl 57X.223(1)(a)(iv).[14]

[6] Explanatory statement to SLI 2011, No 199 sch 2 items 1, 3, 5, 7, 9, 11, 13.
[7] *Saini v MIBP* [2015] FCCA 2379 at [23], upheld on appeal in *Saini v MIBP* (2016) 245 FCR 238.
[8] *Saini v MIBP* [2015] FCCA 2379 at [23].
[9] *Saini v MIBP* [2015] FCCA 2379 at [21].
[10] *Saini v MIBP* (2016) 245 FCR 238 at [30]. Justice Logan expressly disagreed with the contrary interpretation of this criterion in *Khanna v MIBP* [2015] FCCA 1971. While *Khanna* was overturned on appeal in *MIBP v Khanna* [2016] FCA 142, that judgment did not expressly address the construction of cl 572.223(1)(a).
[11] cls 57x.326(aa), 576.325A, inserted by SLI 2011, No 199.
[12] *Tandukar v MICMSMA* [2019] FCCA 3510 at [50]–[51]. The Court followed the reasoning in *Saini v MIBP* (2016) 245 FCR 238 finding that the '*chapeau*' in cl 572.223(1) informs the proper construction and consideration of cl 572.223(1)(a). Upheld on appeal in *Tandukar v MICMSMA* [2020] FCA 1267.
[13] See *Tandukar v MICMSMA* [2020] FCA 1267 at [41] where the Court found that if the applicant's intention is to stay in Australia solely for the purposes of engaging in study, the intended presence is temporary and for a limited identified purpose. If her engagement in study is merely a pretence for extending the duration of her presence here, the intended presence is more permanent and not at all temporary. Also see *Ali v MIBP* [2017] FCCA 2478 at [40] where the Court held that the question of whether an applicant is a genuine student is not to be determined only by reference to the particular course of study in which an applicant is enrolled.
[14] *Tandukar v MICMSA* [2020] FCA 1267 at [33]–[34].

Relevant considerations when determining 'genuine intention'

When determining whether the genuine temporary entrant criterion is met, decision makers must have regard to Ministerial Direction No 53 *Assessing the genuine temporary entrant criterion for Student visa applications* (Direction No 53) made pursuant to s 499 of the *Migration Act 1958* (Cth) (the Act).[15] From 1 July 2015, the reference in Direction No 53 to the Migration Review Tribunal has effect on and after that date as if it were a reference to the Administrative Appeals Tribunal (AAT).[16]

Direction No 53 specifies a series of factors which must be considered by decision makers, set out under headings corresponding with the matters set out in cls 57x.223(1)(a), 576.222(1)(a) and 580.226(1)(a). Broadly speaking, these cover:

- the applicant's circumstances in their home country
  - whether the applicant has sound reasons for not studying in their home country
  - the extent of personal ties to their home country[17]
  - the economic circumstances of the applicant
  - military service commitments
  - political and civil unrest.
- the applicant's potential circumstances in Australia
  - the applicant's ties with Australia
  - evidence that the student visa program is being used to circumvent the intentions of the migration program
  - whether the student visa is being used to maintain ongoing residence[18]
  - whether the primary and secondary applicants have entered into 'a relationship of concern' for student visa purposes[19]
  - the applicant's knowledge of living in Australia and their intended course of study and the associated education provider.
- the value of the course to the applicant's future

[15] Section 499 permits the Minister to give written directions to a person or body about the performance of functions or the exercise of powers under the Act. Such person or body must comply with the direction: s 499(2A). The Minister, however, is not empowered to make directions that would be inconsistent with the Act or Regulations.
[16] s 15DA(1) of sch 9 to *Tribunals Amalgamation Act 2015* (Cth) (No 60, 2015).
[17] 9(b) of Direction No 53 provides that decision makers should have regard to the extent of the applicant's personal ties to their home country and whether those circumstances would serve as a significant incentive to return to their home country. In *Patel v MIBP* [2019] FCCA 2436 at [76], upheld on appeal in *Patel v MICMSMA* [2020] FCA 346, the Court considered that the expressions 'significant incentive' and 'strong incentive' in the context of 9(b) of Direction No 53 were reasonably synonymous and found no material error in the manner the Tribunal had applied the Direction. See in contrast *Singh v MIBP* [2018] FCCA 3423 at [32]–[33], where the Court held that a significant incentive was somewhat less than a strong incentive, and by considering that the applicant's family did not provide a strong incentive to return, the Tribunal imposed a higher standard than Direction No 53 required and therefore fell into jurisdictional error for failing to ask the correct question.
[18] See *Tandukar v MICMSMA* [2020] FCA 1267 at [41] where the Court accepted that the Tribunal's finding that the applicant was merely seeking to prolong her stay in Australia was a rational and reasonable basis for inferring that she was not a genuine applicant for entry and stay as a student.
[19] that is, a contrived relationship.

  - whether the proposed course is consistent with the applicant's current level of education and whether it will assist the applicant's employment prospects in their home country[20]
  - the relevance of the course to the student's past or future employment
  - remuneration the applicant could expect to receive in a country other than Australia as a result of the study
- the applicant's immigration history
  - previous visa applications for Australia and other countries
  - previous travel to Australia and other countries
- the intention of a parent, legal guardian or spouse of the applicant (if the applicant is a minor)
- any other relevant matters.[21]

The Direction is set out in full at Attachment A to this commentary.

Direction No 53 indicates that it should not be used as a checklist, but rather that the matters it lists are intended to guide decision makers to weigh up an applicant's circumstances as a whole in reaching a finding about whether they satisfy the genuine temporary entrant criterion.[22] The Full Federal Court in *Kumar v MIBP* confirmed that the direction is not intended to be construed as a checklist and the Tribunal is not required to make express findings in respect of each factor, though a failure to make a finding might constitute evidence of jurisdictional error in particular circumstances.[23]

The Full Federal Court judgment in *MIAC v Khadgi,*[24] which dealt with consideration of the discretionary factors in reg 2.41 in the context of a s 109 cancellation, provides useful guidance on the requirements of decision makers 'to have regard to' mandatory considerations. Following *Sharma v MIBP*, the comments are equally applicable to consideration of Direction No 53.[25] In *Khadgi,* the Court noted in particular:

- The decision maker must engage in an 'active intellectual process' in which each of the prescribed circumstances receives 'genuine' consideration.[26] However, it is not

[20] In *Singh v MIBP* [2017] FCCA 1901 the Tribunal had considered the applicant's academic qualifications obtained in India and was not satisfied that undertaking a Diploma in Hospitality was related or relevant to the applicant's previously completed qualifications. The Court at [14] held that the Tribunal misapplied Direction No 53 by limiting its consideration of the applicant's change of course by reference to the statement that it was 'not satisfied that undertaking a Diploma in Hospitality course is related or relevant to the applicant's previously completed education'. Further, Direction No 53 requires decision makers to allow for reasonable changes to career or study pathways, which the Tribunal did not mention.
[21] See *Randhawa v MIMAC* [2013] FCCA 1207. Although considered in the context of the second limb of the genuine student criterion, the Court confirmed that term 'any other relevant matter' is not in any way circumscribed and what constitutes a relevant matter will depend on the particular circumstances of the case.
[22] Direction 53, pt 2 para 1; confirmed in *Nguyen v MIBP* [2013] FCCA 1864 and *Saini v MIBP* [2015] FCCA 2379.
[23] *Kumar v MIBP* [2020] FCAFC 16 at [96]. The 'particular circumstances' which the Court referred to, at [97], are where it can be established that it was necessary to make the finding in order to exercise the Tribunal's jurisdiction, and the failure to make the finding deprives the applicant of the possibility of a successful outcome. See also *Jan v MHA* [2019] FCA 1837 at [24] where the Court held that the direction was not intended to express a complete list to be traversed in every case and if a factor is considered to not be significant in a particular case, it need not be brought to account, and *Singh v MIBP* [2018] FCCA 3423 at [17] – [18] where the Court found that while the direction is not intended to be construed as a checklist, the factors are all matters for the decision-maker to think about and weigh up. The factors do not necessarily all have to be satisfied to any particular degree for a person to be found to be a genuine temporary entrant.
[24] *MIAC v Khadgi* (2010) 190 FCR 248.
[25] *Sharma v MIBP* [2015] FCCA 575 at [12]–[18] where the Court also applied established authority in *Applicant WAEE v MIMIA* [2003] FCAFC 184 and *Steed v MIEA* [1981] FCA 162.
[26] *MIAC v Khadgi* (2010) 190 FCR 248 at [57].

essential for the decision maker to compartmentalise its reasons and to set out those reasons by reference to each factor specified. While that may often be convenient and appropriate, it is not the only way for the decision maker to demonstrate that it has had regard to all of those criteria.[27] Further, in any given case, facts and matters raised might be relevant to more than one of the factors.[28]

- Although the decision maker must have regard to each of the factors, not all of them will be central or fundamental to every case.[29] The weight to be given to any one factor or group of factors is a matter for the decision maker and will vary from case to case[30]; and the extent to which the decision maker is required to engage with each factor will often depend on the matters put forward by the applicant.[31]
- The failure to give any weight to a factor that is of great importance in the particular case may support an inference that the decision maker did not have regard to that factor. On the other hand, the decision maker is entitled to be brief in its consideration of a matter which has little or no practical relevance to the circumstances of a particular case.[32] Thus, if the applicant does not address a particular factor or factors with evidentiary material and submissions, there may be little or no material to consider and evaluate, and therefore little to say about those factors.[33]

While there must be consideration of all the factors in Direction No 53, the degree to which the decision-maker must go into each of the factors in the decision record will depend upon the nature of the information before him or her and the matters raised by the applicant.[34] For example, where an applicant gives no evidence about their circumstances in their home country and the visa application identifies relatives in the home country with no further information, the reference to consideration of factors in paras 9 and 10 of the Direction about circumstances in the applicant's home country may be quite brief. This was confirmed in *Tariwal v MIBP*[35] where the Federal Circuit Court held the Tribunal was under no duty to enquire about matters in Direction No 53 when assessing whether the applicant was a genuine temporary entrant, in circumstances where the applicant was on notice of the contents of the Direction and did not raise any issues.

Facts and matters raised may also be relevant to more than one factor specified in the Direction. In these circumstances it must be clear that the decision-maker has considered the facts and matters against each factor to which that information relates.

[27] *MIAC v Khadgi* (2010) 190 FCR 248 at [69]; *Nguyen v MIBP* [2013] FCCA 1864.
[28] *MIAC v Khadgi* (2010) 190 FCR 248 at [68].
[29] *MIAC v Khadgi* (2010) 190 FCR 248 at [62].
[30] *MIAC v Khadgi* (2010) 190 FCR 248 at [68].
[31] *MIAC v Khadgi* (2010) 190 FCR 248 at [84], where the Court observed that the extent to which the Tribunal in that case was compelled to engage with the reg 2.41 criteria was inevitably heavily influenced by the terms of Ms Khadgi's responses to the invitations extended to her by both the delegate and the Tribunal to address those criteria.
[32] *MIAC v Khadgi* (2010) 190 FCR 248 at [58]–[59].
[33] *MIAC v Khadgi* (2010) 190 FCR 248 at [83].
[34] In *Bala v MIBP* [2019] FCA 600 at [17] – [18], although the Tribunal did not expressly refer to various factors in Direction No 53, the Court found that the Tribunal had considered them but that those matters did not warrant mention, separately or collectively, as they were not sufficiently germane to the Tribunal's decision or relevant to the application. In contrast, see *Singh v MIBP* [2018] FCCA 3423 at [66] where the Court was not prepared to infer that factors in Direction No 53 in relation to which the applicant had not provided any evidence had been considered by the Tribunal where they were not expressly referred to in its reasons.
[35] *Tariwal v MIBP* [2017] FCCA 991.

Whether a decision must reflect in detail each of the various factors in Direction No 53 will vary depending on the circumstances of each case. For example, in *Sharma v MIBP*, the Court held that the Tribunal did not fail to take into consideration the matters it had to consider even though it did not extensively or expressly refer to all the factors in Direction No 53 and simply stated that it would have regard to that Direction before considering in its findings and reasons the applicant's circumstances, stated career goals, immigration history, the courses he had undertaken, the qualifications he had acquired in Australia and the value of those courses to him.[36] Similarly in *Bala v MIBP*, the Federal Court found that express reference to particular matters in Direction No 53 was not necessarily required where those matters were not sufficiently germane to the Tribunal's decision or relevant to the application.[37]

Direction No 53 makes clear that, in addition to the factors it specifies, decision makers should take into account any other relevant information provided by the applicant or otherwise available, and consider whether further inquiries should be undertaken.[38] It also outlines circumstances in which it may be appropriate for the decision maker to seek further information from applicants, including if the applicant or a relative 'has an immigration history of concern', if they intend to study in a field unrelated to their previous studies or employment, or if there are inconsistencies in the information they have provided in their student visa application.[39]

Evidentiary requirements – Schedule 5A

In addition to the 'genuine intention to stay temporarily' criterion, most applicants must give to the Minister (or Tribunal on review) evidence in accordance with the applicable requirements of Schedule 5A and the assessment level to which the applicant is subject.[40] The exceptions to this are Subclass 576 applicants,[41] and certain applicants for Subclass 572, 573, 574 and 575.[42] The requirements to be met by these applicants are discussed below.

Assessment levels

'Assessment level' is defined by reg 1.03 of the Regulations and is determined by reference to the student's nationality and proposed course of study. Broadly speaking an 'assessment level' means the level of assessment (being 1, 2, 3, and additionally for visa applications made before 22 March 2014, 4 and 5) specified for a kind of eligible passport for each education sector. With some exceptions, most students are subject to an assessment level

[36] *Sharma v MIBP* [2015] FCCA 575 at [16]–[18]
[37] *Bala v MIBP* [2019] FCA 600 at [17] – [18]. Although the Tribunal did not expressly refer to factors 9(d) – (e), 11(d) and 15 of Direction No 53, the Court found that the Tribunal had considered them. See also *Patel v MIBP* [2019] FCCA 2436 at [71], upheld on appeal in *Patel v MICMSMA* [2020] FCA 346.
[38] Direction 53, pt 2 paras 2–3. See also *Randhawa v MIMAC* [2013] FCCA 1207. In *Aziz v MICMSMA* [2019] FCA 1397 at [20] – [24], the Court rejected the applicant's argument that the Tribunal must have regard to aspects of Departmental policy (PAM3) that appeared more favourable to the applicant. The Court held that the Tribunal is only positively bound to consider the factors in Direction No 53, and is not bound to have regard to, and to apply, Departmental policy.
[39] Direction 53, pt 2 para 4.
[40] cl 57x.223.
[41] There is only one assessment level for Subclass 576.
[42] Specifically, 'eligible vocational education and training students', 'eligible higher degree students' and 'eligible university exchange students' (now called 'eligible non-award students'), discussed below.

and this determines the evidentiary requirements that the student must meet to be granted the visa.

Assessment levels are set by the Minister, and essentially reflect the level of risk posed by applicants in relation to whether they are genuine students.

Regulation 1.41(1) requires the Minister to specify in a written instrument assessment levels for a kind of eligible passport, in relation to each subclass of student visa, to which an applicant for a student visa who seeks to satisfy the primary criteria will be subject.[43] However, assessment levels do not apply (and therefore do not have to be specified) for visa applications made on or after 24 March 2012 in relation to an eligible passport held by an applicant for a Subclass 573 or 574 visa who is an 'eligible higher degree student' or by an applicant for a Subclass 575 visa who is an 'eligible university exchange student' or an 'eligible non-award student'.[44] Assessment levels also do not apply (and do not have to be specified) for visa applications made on or after 23 November 2014 in relation to an eligible passport held by an applicant for a Subclass 572 visa who is an 'eligible vocational education and training student'.[45]

Passports that are 'eligible passports' are also specified by the Minister in a written instrument.[46]

In specifying the assessment level, the Minister must consider the risk posed by applicants who hold a kind of eligible passport in terms of their being genuine students and their engaging in conduct in Australia (including omissions) that is not contemplated by the visa.[47]

For visa applications made before 22 March 2014, there are five assessment levels for each student visa subclass, with level 1 representing the lowest risk and consequently the easiest criteria to meet and level 5 representing the highest risk and consequently the hardest criteria to meet. For visa applications made on or after 22 March 2014, the number of assessment levels is reduced to three,[48] with assessment level 1 specified for those representing a low risk, assessment level 2 for medium risk and assessment level 3 for high risk.[49]

Determining the applicant's assessment level

The determination of the relevant assessment level depends upon the visa application date. For further assistance see ATTACHMENT B: Practical guide to determining assessment levels and Schedule 5A criteria below.

In brief, for visa applications made on or after 27 March 2010, the *assessment level* is determined by reference to all courses that the applicant proposes to undertake. Thus, where an applicant is seeking to 'package' two or more courses, it is necessary to have

[43] For applications made prior to 24 March 2012 applicants for Subclass 571, 572, 573 or 574 visas who were designated under reg 2.07AO are exempted from this requirement (reg 1.41(1)). In relation to persons designated under reg 2.07AO generally, please see fn.2 above.
[44] reg 1.41(1A). Regulation 1.41(1A) was amended, and references to 'eligible university exchange student' were replaced with 'eligible non-award student' for visa applications made on or after 22 March 2014: SLI 2014, No 30.
[45] reg 1.41(1A)(aa), inserted by *Migration Legislation Amendment (2014 Measures No 2) Regulation 2014* (Cth) (SLI 2014, No 163).
[46] regs 1.03, 1.40.
[47] reg 1.41(2).
[48] See regs 1.03, 1.41, 1.42 as amended by SLI 2014, No 30.
[49] reg 1.41(4)(a) as amended by SLI 2014, No 30.

regard to all courses of study the applicant is enrolled in, or is subject of a current offer of enrolment, including courses other than the principal course.

For visa applications made on or after 27 March 2010, an applicant for a student visa who seeks to satisfy the primary criteria 'is subject to the *highest assessment level* at the time of application for the *relevant course of study* for the subclass of student visa',[50] and 'must give evidence in accordance with the requirements set out in Schedule 5A for the highest assessment level for the relevant course of study for the subclass of student visa'.[51] 'Relevant course of study' and 'highest assessment level' are defined in reg 1.03 of the Regulations.

For visa applications made before 27 March 2010 the assessment level is determined by reference to the applicant's 'principal course', as defined in reg 1.40 of the Regulations, as at the time of decision.

Visa applications made on or after 27 March 2010

'*Relevant course of study*' for a subclass of student visa, is defined to mean a type of course for the subclass of student visa that the Minister has specified in a legislative instrument made under reg 1.40A.[52]

'*Highest assessment level*', for an applicant for a student visa, is defined to mean:

- if the applicant proposes to undertake a single registered course of study – the assessment level for that course;
- if the applicant proposes to undertake 2 or more registered courses of study that do not include an ELICOS[53] – the highest assessment level for those courses;
- if the applicant proposes to undertake 2 or more registered courses of study that include an ELICOS – the highest assessment level for those courses, not including the ELICOS.[54]

The Explanatory Statement to the legislation that introduced this concept of 'highest assessment level' explains that its purpose was 'to clarify the assessment level that is relevant for each subclass of visa in relation to the proposed courses of study' ensuring 'that the applicant for a student visa is required to satisfy the highest assessment level in relation to their proposed course of study'.[55]

The concept of 'highest assessment level' does not apply to Subclass 570 (ELICOS) or Subclass 576 (Foreign Affairs[56] or Defence Sector) applicants. This is because Subclass

[50] reg 1.42(1) as amended by *Migration Amendment Regulations 2010 (No 2)* (SLI 2010, No 50).
[51] reg 1.44(1) as amended by SLI 2010, No 50.
[52] reg 1.03 definition inserted by SLI 2010, No 50. With exceptions, reg 1.40A requires the Minister to specify by an instrument in writing the types of courses for each subclass of student visa. The exceptions relate to Subclass 576, for which no courses are specified, for visa applications made on or after 24 March 2012, applicants who meet the definition of 'eligible higher degree student' for Subclass 573 or 574 or the definition of 'eligible university exchange student' (now called 'eligible non-award students') for Subclass 575, and also, for visa applications made on or after 23 November 2014, applicants who meet the definition of 'eligible vocational education and training student' for Subclass 572.
[53] ELICOS is defined in reg 1.03 as an English Language Intensive Course for Overseas Students that is a registered course. Whether a particular course is a course of that kind is a question of fact for the Tribunal: *Singh v MIAC* [2010] FMCA 1006 at [19].
[54] reg 1.03 definition inserted by SLI 2010, No.50.
[55] Explanatory Statement to SLI 2010, No 50 sch 2 item 4.
[56] AusAID references were amended to refer to 'Foreign Affairs' by *Migration Legislation Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 82), which repealed interim naming measures in reg 1.04AA and made relevant

570 is only granted to applicants taking ELICOS as a stand-alone course, and the relevant Schedule 2 criterion for Subclass 576 does not refer to 'highest assessment level'.[57] Nor does it apply to 'eligible vocational and educational training students', 'eligible higher degree students', 'eligible university exchange students' or 'eligible non-award students', because these students are not subject to assessment levels.[58]

Relevant time for determination

It is not clear from the terms of reg 1.42(1) itself whether the highest assessment level is to be determined by reference to the applicant's proposed course(s) of study at the time of application or the time of decision.

On its face, the reference in reg 1.42(1) to the 'highest assessment level at the time of application' suggests that the assessment level is to be determined by reference to the applicant's proposed course of study as at the time of application and a subsequent change of study plan will not change the assessment level against which the applicant is to be assessed.[59] This construction of reg 1.42(1) would represent a significant shift from the pre-27 March 2010 position (discussed below).

The alternative view, now adopted by the Department, is that the highest assessment level is assessed by reference to the proposed course of study at the time of decision.[60] On this view, reference to 'the time of application' is a reference to the Minister's specification of assessment levels as at that time (i.e. the instrument in force at time of application). Several factors support this construction. First, in the context of the Schedule 2 criteria the 'highest assessment level' is relevant to a time of decision criterion.[61] Second, it is clear from the terms of reg 1.43(1) that the assessment level must be assessed by reference to the passport or passports held at the time of decision. Finally, this construction may better reflect the purpose underlying the use of assessment levels in the regulations in that the degree of 'immigration risk' is arguably more accurately assessed by reference to the applicant's circumstances as they exist at the time of decision.

While there has been no judicial authority on this issue, this alternative view has formed the basis of a consent remittal in the Federal Magistrates Court.[62] On this view, a change of study plan during the processing of the application could potentially affect both the relevant subclass and the applicable assessment level. Therefore, it should not be assumed that the relevant Schedule 5A provisions will necessarily be those considered by the delegate.

amendments to provisions to reflect the change in terminology. These amendments and the change in terminology apply to visa applications made on or after 1 July 2014 and visa applications not finally determined before that date.

[57] cl 576.222(2). For Subclass 576 applicants, the assessment level for all courses is, in practice, assessment level 2.

[58] cls 572.223(1A), 573.223(1A), 574.223(1A), 575.223(1A).

[59] The Explanatory Statement to the amending regulations appears to support this view. It states that the effect of the new reg 1.42(1) is to ensure that the applicant 'satisfies the highest assessment level for the course of study that relates to the student visa at the time of application' and notes that an applicant 'would be at the time of application subject to the highest assessment level': Explanatory Statement to SLI 2010, No 50 sch 2, item 11.

[60] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student visa assessment > Student visa subclasses and assessment levels > Change of course or course package after lodgement (re-issue date 16/2/16). This approach represented a departure from the Department's previous position, as reflected in earlier versions of PAM3 [cf. 18/8/2012 stack].

[61] See cl 57X.223.

[62] See 'Statement of matters to justify the making of consent order for the purposes of practice direction 1 of 2012' attached to the consent orders in [redacted].

Determining the highest assessment level for 'packaged courses'

Applicants seeking to undertake a package of courses (i.e. more than one course for the visa) are subject to the highest assessment level for those courses (not including ELICOS). For example, a Nepalese applicant who applied for a student visa in July 2013 and is seeking to package a Bachelor Degree course with an enabling or prerequisite Certificate IV course (and is not an 'eligible higher degree student')[63] would be subject to assessment level 3 for the Bachelor Degree course (Subclass 573) and assessment level 4 for the Certificate IV course (Subclass 572).[64] In that case, the applicant must be assessed against assessment level 4.

Determining the highest assessment level for multiple unrelated courses that are not 'packaged'

Although this does not appear to be a circumstance contemplated by the Regulations, an applicant may present evidence of enrolment in more than one course which is not part of a 'package of courses'. This will occur where, of the multiple courses an applicant is enrolled in, there is no pre-requisite or requirement to complete one before the other. In these circumstances, it is not clear whether the same approach of determining the appropriate assessment level for packaged courses should be adopted.

The definition of 'highest assessment level' in the Regulations makes no reference, in the context of 2 or more courses of proposed study, to those courses having to be part of a 'package'. On one view therefore, all courses that the applicant proposes to take that are registered courses should be considered when determining the 'highest assessment level'. However, it would also appear open for decision makers, as a finding of fact, to determine which course (or courses) is properly the subject of the visa application and determine the relevant assessment level (and evidentiary requirements) having regard to that course of study only.

Departmental guidelines (PAM3) only briefly discusses the notion of multiple 'non-packaged' (or unrelated) courses and what discussion there is arises in the context of guidance about the length of time the Department considers appropriate for a visa to be granted. The guidelines state that where there are two or more consecutive courses with no pre-requisite evident, the length of the visa grant should be for the combined duration of the courses, provided that the courses are in the same sector; the courses are in the same broad subject area; and no more than 2 months will elapse between each course (with the exception of courses ending in November/December, where the next course commences February/March). Where courses appear unrelated, PAM3 suggests it should be considered whether it is more appropriate to grant the visa corresponding only to the first of those courses.[65]

[63] As explained below, an assessment level does not apply in relation to these students.
[64] Based on the instrument in force at time of application – IMMI 12/05, commencing 24 March 2012 and applicable to visa applications made on or after that date (and before 22 March 2014). See Register of Instruments – student visas for other instruments.
[65] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Granting student visas> Package courses (re-issue date 16/2/16). Departmental policy goes on to note that if decision makers have concerns regarding students who appear to be enrolling in multiple unrelated courses to prolong their stay in Australia, those concerns should be addressed through the genuine temporary entrant (GTE) criterion.

While this seems to at least peripherally contemplate the idea of multiple unrelated courses, the question of whether multiple unrelated courses can be considered as part of the genuine student assessment is unsettled. While multiple unrelated courses may be reconcilable with some aspects of the student visa assessment, the approach presents difficulties in relation to other elements of the Regulations.

In the context of the assessment level determination, multiple unrelated courses are not on their face precluded from the 'highest assessment level' determination. Where consideration of one course over another would lead to a higher assessment level being applied, assessing the applicant on the basis of that higher assessment level is consistent with the underlying intention of the assessment level regime, which is ensuring that the applicant for a student visa is required to satisfy the highest assessment level in relation to their proposed course of study – although this of itself assumes that the visa is sought to be granted for the multiple courses of study.

However, one apparent difficulty with this analysis is that the limited definition of principal course in reg 1.40(3)(b) provides no obvious way of determining which of those unrelated courses is the principal course. Such a determination is critical to the decision maker clearly identifying the relevant subclass[66] and identifying and assessing the applicable Schedule 5A requirements. While this may not present an issue where the unrelated courses are specified for the same subclass (e.g. two separate diploma courses), it would create difficulties where the courses traverse two or more subclasses. Multiple unrelated courses may also raise uncertainty regarding the relevant period the applicant is proposing to study for the purposes of assessing the Schedule 5A financial requirements.

Having regard to these considerations, it appears the better view is to confine the assessment to one course of study, (typically the first) and proceed on the basis that this course is the principal course and undertake the Schedule 5A assessment by reference to this course only. Any subsequent course not considered to fall within the Tribunal's assessment would instead be the subject of a further subsequent student visa application.

Visa applications made before 27 March 2010

For visa applications made but not finally determined before 1 July 2004, or visa applications made on or after that date and before 27 March 2010, an applicant for a student visa who seeks to satisfy the primary criteria 'is subject to the assessment level specified by the Minister at the time of application in relation to the relevant subclass of student visa for the eligible passport that the applicant holds at the time of the decision',[67] and must give

[66] Such as in cl 573.231.

[67] reg 1.42(1) as amended by *Migration Amendment Regulations 2004 (No 3)* (Cth) (SR 2004, No 131); for visa applications made but not finally determined before 1 July 2004 or made on or after that date. Prior to 1 July 2004, the applicant was 'subject to the assessment level of the eligible passport that the applicant holds at the time of decision and the education sector in which the applicant intends to undertake his or her principal course of study': reg 1.42(1) as inserted by *Migration Amendment Regulations 2001 (No 5)* (Cth) (SR 2001, No 162) and amended by *Migration Amendment Regulations 2002 (No 1)* (Cth) (SR 2002, No 10). This version of reg 1.42(1) was unclear as to whether the assessment level was to be determined by reference to the gazette notice in force at the time of decision or the time of application. The Explanatory Statement to the 2004 amendment explains that the purpose of the amendment was to clarify the existing procedure relating to the appropriate assessment of a particular student visa application, which is referred to in a relevant Gazette Notice. That is, where a new assessment level takes effect after an applicant has lodged their student visa application, the assessment level that applied at the time of application should continue to apply to the applicant. The Explanatory Statement also notes that the term 'relevant subclass of student visa' is intended to mean the subclass of student visa appropriate to the applicant's proposed principal course, where the applicant is not sponsored by the AusAID Minister or the Defence Minister: Explanatory Statement

evidence about various specified matters, in accordance with the requirements set out in Schedule 5A for the subclass of visa and assessment level to which the applicant is subject.[68]

For these cases, the decision-maker must determine the applicable assessment level by reference to the instrument, made under reg 1.41(1), which applied at the time the visa application was lodged, and the type of 'eligible passport' held by the applicant at the time of decision, in relation to the subclass for the applicant's principal course.[69]

It should be noted that a change of study plan during the processing of the application could potentially affect both the relevant subclass and the applicable assessment level. Therefore, it should not be assumed that the relevant Schedule 5A provisions will necessarily be those considered by the delegate.

Determining assessment level when applicant is no longer enrolled

If the applicant is no longer enrolled, and does not have an offer of enrolment, in *any* course at the time of decision, there will be no basis on which to select a relevant subclass, and therefore no basis on which to select any particular part of Schedule 5A as the relevant part. In these circumstances, it may be more appropriate to address the enrolment criterion for each subclass,[70] rather than the 'genuine student' criterion.

Transitional arrangements for former Subclass 560 or 562 visa holders

Some applicants who are or were holders of a Subclass 560 or 562 visa[71] will not be subject to the assessment level specified by the Minister. Transitional arrangements provided for in regs 1.42(2) and (6) of the Regulations may apply to adjust the applicant's assessment level to assessment level 2 where the assessment level specified by the Minister is 3, 4 or 5. If this issue arises for consideration, please contact MRD Legal Services.

English language proficiency

Schedule 5A sets out evidentiary requirements in relation to the applicant's English language proficiency.[72] The criteria for English language proficiency for the different assessment levels can be met on a range of bases depending on the applicable Schedule 5A item, and the date of the visa application.[73] The relevant criteria may include, for example, past study, a level of proficiency that satisfies the course provider, International English Language Testing

to SR 2004, No 131, sch 4, item 2. As the 1 July 2004 amendment applies to all applications not finally determined before that date, the earlier version of reg 1.42(1) will no longer arise for consideration.

[68] reg 1.44(1) as in force before 27 March 2010.

[69] Prior to 1 July 2004, reg 1.42(1) expressly referred to the principal course of study; and the Explanatory Statement to the 2004 amendment states that the term 'relevant subclass of student visa' is intended to mean the subclass of student visa appropriate to the applicant's proposed principal course, where the applicant is not sponsored by the AusAID or Defence Minister: Explanatory Statement to SR 2004, No 131, sch 4 Item 2.

[70] See the Courses and Enrolment commentary for further discussion of this issue.

[71] The student visa subclasses prior to the introduction of the education sector specific student visa regime on 1 July 2001.

[72] For example, sch 2 cl 570.223(2)(a)(i) and sch 5A cl 5A201. It is for the applicant to provide the evidence. There is no obligation *per se,* on the decision-maker to provide an opportunity to an applicant to undertake a relevant IELTS test: *Wang v MIAC* [2009] FMCA 168.

[73] Note that for visa applications made on or after 5 November 2011 the requirements for Subclass 570 ELICOS Assessment Levels 4 and 5 differ from those that apply to applications made before that date: see SLI 2011, No 199. For applications made on or after 24 March 2012 the requirements for Subclass 571 Schools Sector Assessment Levels 3, 4 and 5 were similarly amended: SLI 2012, No 35. For applications made on or after 22 March 2014 Assessment Levels 4 and 5 have been repealed: SLI 2014, No 30.

System (IELTS) testing, IELTS testing followed by an English Language Intensive Course for Overseas Students (ELICOS) of specified duration, or a range of specified alternative tests to IELTS, for applicants from specified countries.

IELTS test 'taken less than 2 years before the date of the application'

In most cases where an IELTS test result is required, the applicant must give evidence that he or she achieved a specified score 'in an IELTS test that was taken less than 2 years before the date of the application'.[74] 'The application' in this context is the visa application.[75]

The phrase 'taken less than 2 years before the date of the application' means an IELTS test taken *no earlier than two years* before the date of the application.[76] Where a Schedule 5A requirement contains this wording, the applicant can meet the requirement on the basis of a relevant IELTS test result obtained from a test taken at any time in the period from 2 years before the visa application until the visa application is finally determined.

Alternative to IELTS test

In countries where the IELTS test is unavailable, provision has been made under the relevant Schedule 5A requirements and cl 5A102 to allow a student to submit the results of another specified test.[77] Clause 5A102 provides that the Minister may specify by instrument an alternative to the IELTS test, the country or countries in which the test may be taken by an applicant and the test score that must be achieved. Information on the instruments made under cl 5A102 is available on the 'Sch5A AltEng' tab of the Register of Instruments: Student Visas.[78]

For those assessment levels where the English language requirements may be satisfied by an alternative test, the Schedule 5A requirements generally specify that the relevant test score must have been achieved 'less than 2 years before the date of the application'. In this context 'less than 2 years before the date of the application' is taken to mean an alternative test taken no earlier than two years before the date of application.[79] Note however, that the alternative to the IELTS test as specified for Subclass 573 is worded differently from that for the other Subclasses and it is unclear whether this same interpretation can be applied to the alternative test provisions for Subclass 573.[80] PAM3 reflects the view that the alternative test cannot have been done more than 2 years before the date of application.[81] This would likely only be in issue in very rare circumstances. If it does arise, contact MRD Legal Services.

[74] For example, cl 5A404(a)(ii), 5A504(1)(a)(ii), 5A504(1)(aa)(i) ('less than 2 years before the time of making the application') as in force immediately before 22 March 2014. For discussion of when an application is made, please refer to Chapter 1 – Visa and related applications.
[75] *Shah v MIAC* [2009] FMCA 108 at [38]; *Fan Fan v MIAC* [2009] FMCA 123 at [43]; *Kamal v MIAC* [2009] FMCA 238 at [27] and *Rana v MIAC* [2009] FMCA 553 at [20].
[76] *MIAC v Kamal* (2009) 178 FCR 379 at [19].
[77] For example, cl 5A407(e) ('the applicant achieved, less than 2 years before the date of the application, the required score in a test that is specified in a legislative instrument made by the Minister under cl 5A102').
[78] The requirement to publish such notices in the Gazette may now be satisfied by registration on FRLI.
[79] *MIAC v Kamal* (2009) 178 FCR 379 at [19], which although considering a provision specific to IELTS tests appears equally applicable to this wording.
[80] For example cls 5A507(1)(a)(ii), 5A507(1)(aa)(i) and 5A507(1)(b)(ii) ('achieved, in an IELTS test that was taken less than 2 years before the date of the application, an Overall Band Score of at least [..] or the required score in an English language proficiency test that is specified in a legislative instrument made by the Minister under clause 5A102').
[81] PAM3: GenGuideG - Student visas - Visa application and related procedures > Student visa assessment > Genuine student - English proficiency for AL assessed applicants> Alternatives to undertaking an IELTS test (re-issue date 1/1/16).

The applicable instrument

Generally, it is the instrument in effect at time of decision that applies in relation to the alternative tests and scores specified under cl 5A102. However, for visa applications made before 22 March 2014, where the applicant is subject to assessment level 4 or 5 there is some uncertainty. At the time of writing, the current instrument, IMMI 14/080, specifies tests and scores by reference to the relevant clause of Schedule 5A, (eg 'Applicant referred to in cl 5A407(e)') with no specifications for assessment levels 4 and 5 which were repealed for visa applications made on or after 22 March 2014.[82] Prior to the repeal of assessment levels 4 and 5, the last instrument which specified alternative English tests for assessment levels 4 and 5 was IMMI 12/004, which was revoked on 22 March 2014 by IMMI 14/002, with the result that there is no alternative English test specified for an applicant who is subject to assessment level 4 or 5 and an applicant will not be able to meet these provisions.

The Department has adopted an alternative interpretation which implies terms into the instrument to limit the revocation of the previous instrument such that the instrument in effect immediately before 22 March 2014 (IMMI 12/004) is still in effect for visa applications made before 22 March 2014.[83] This interpretation relies upon an implication based on the express reference to the instrument commencing immediately after the commencement of the *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) and the fact that amendments to the assessment levels made by that Regulation apply to visa applications made on or after 22 March 2014. However, this interpretation is somewhat artificial and would be particularly problematic if extended to other instruments which commenced on 22 March 2014 which are in the same terms with no express wording referring to their application to specific visa applications.[84] It also is not assisted by the fact that it relies upon an implication drawn from the context of the commencement of an instrument which has now been revoked.

Successful completion of a course 'less than 2 years before the date of the application'

For some subclasses and assessment levels, an applicant may be able to satisfy the English language proficiency requirement by providing evidence that they 'had, less than 2 years before the date of the application':

- successfully completed a foundation course that was conducted in Australia and in English,[85] or
- successfully completed the requirements for a Senior Secondary Certificate of Education, in a course that was conducted in Australia and in English,[86] or

[82] Divisions 1 and 2 of pts 2-6 of sch 5A were repealed by item 131, SLI 2014, No 30.
[83] Advice of DIBP Student Visa Policy section, 8 April 2014.
[84] For example, IMMI 14/015, specifying types of courses for student visas
[85] For example, cl 5A404(d)(v) as in force immediately before 22 March 2014. A related alternative specifies successful completion of a course in foundation studies that is conducted outside Australia and in English and is specified by the Minister in an instrument in writing for the purpose of this requirement: e.g.cl 5A404(d)(vi) as in force immediately before 22 March 2014. No such courses have been specified.
[86] For example, cl 5A204(c)(i) as in force immediately before 5 November 2011. A related alternative specifies successful completion of the requirements for a Senior Secondary Certificate of Education in a course that was conducted outside Australia and in English, and is specified by the Minister in an instrument in writing for the purposes of this requirement: e.g. cl 5A204(c)(ii) as in force immediately before 5 November 2011. No such courses have been specified.

- as the holder of a student visa, successfully completed a substantial part of a course (other than a foundation course) that was conducted in English, and was leading to a qualification from the Australian Qualifications Framework (AQF) at the Certificate IV level or higher.[87]

'*Foundation course*' is defined in cl 5A101 to mean a registered course[88] that is registered as foundation studies. The term '*Senior Secondary Certificate of Education'* in this context is a generic title for senior secondary school qualifications issued by the state and territory governments. In NSW, for example, it refers to the award of the Higher School Certificate (HSC). Thus, a document certifying only that the applicant has completed the HSC Course would not suffice.[89] Similarly, although the requirement is concerned with the demonstration of English language proficiency, evidence of successful completion of a subject such as English as a Second Language at the HSC level would not of itself meet the requirements for the award of the 'Certificate'.[90] The 'AQF' is the national policy for regulated qualifications in Australian education and training. It incorporates the qualifications from each education and training sector into a single comprehensive national qualifications framework. The AQF was first introduced in 1995 to underpin the national system of qualifications in Australia encompassing higher education, vocational education and training (VET) and schools.[91]

The question of what might or might not constitute a 'substantial part' of a course is a matter of fact for the decision maker, to be determined according to the circumstances of the case.[92] It would be incorrect, however, to undertake a strict quantitative approach to this issue.[93]

[87] For example, cl 5A404(d)(iii) as in force immediately before 22 March 2014. Whether a particular course leads to a qualification from the AQF at the Certificate IV level or higher for these purposes is a question of fact. Relevant information is contained in the Australian Qualifications Framework, Second Edition, January 2013 accessible online: https://www.aqf.edu.au/sites/aqf/files/aqf-2nd-edition-january-2013.pdf. The previous editions (2011) and (2007) are also accessible online.

[88] Defined in reg 1.03 of the Regulations to mean 'a course of education or training provided by an institution, body or person that is registered, under Division 3 of Part 2 of the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act), to provide the course to overseas students'. A current list of registered courses appears in the Commonwealth Register of Institutions and Courses for Overseas Students kept under s 10 of the ESOS Act.

[89] *Liu v MIAC* [2008] FMCA 750. In that case the applicant had studied at a college in Sydney, which had issued him with a certificate 'to certify that [the applicant] has completed the Year 12 Higher School Certificate Course as per the NSW Board of Studies syllabus 2005. … Refer to academic transcript for results'. The transcript showed that he had achieved results exceeding 50 per cent in only four of 25 subjects in which he had been enrolled for years 11 and 12. He agreed that he did not possess the qualification identified by the Tribunal as necessary, but disputed that such a qualification was required. In agreeing with the Tribunal's interpretation, the Court observed that cl 5A404(d)(i) refers to a recognised type of educational certificate, which is issued after a process of assessment of results obtained after studying in a secondary education course: at [16]. See also *Li v MIAC* [2008] FMCA 941 where on similar facts the Court at [43] agreed with Smith FM that the intended meaning of Senior Secondary Certificate of Education in cl 5A404(d)(i) was the successful completion of the HSC (in NSW) according to Board of Studies requirements as the Tribunal had found. Note, however, that it is a question of fact in each case as to what, precisely, would constitute evidence of successful completion of the requirements for a Senior Secondary Certificate of Education such as the NSW Higher School Certificate.

[90] See *Li v MIAC* [2008] FMCA 941 at [46]–[49].

[91] Information about the AQF is available at http://www.aqf.edu.au/.

[92] *Mia v MIAC* [2010] FCA 1312 at [18], upholding *Mia v MIAC* [2010] FMCA 630 at [31], [33]. See also *Seneviratne v MIAC* [2009] FMCA 907, *Kabir v MIAC* [2010] FMCA 132 at [32], [35] and *Singh v MIAC* [2010] FMCA 1006. In *Seneviratne*, the Court held that the Tribunal did not err when it decided that 21 out of 72 points was not a substantial part of the course, and that it was open to the Tribunal to undertake a quantitative rather than a qualitative assessment of what the applicant had completed. In *Kabir* the Court stated that the question of what constitutes a 'substantial part' of a particular course may vary from course to course; and it is a matter of fact for the Tribunal as to whether 25, 27, 29, 31 or 33 percent (or some other percentage) might or might not constitute a 'substantial part' of a course. In *Singh* the applicant's student visa had expired in early November 2008. The applicant claimed to have completed a Certificate IV course in April 2009 but there was no evidence as to when he had started the course. The Court held that evidence of completion of the course did not establish that he had completed a substantial part of the course as the holder of a student visa. While that case turns on its facts, it does suggest that in the absence of information as to when the relevant course started, it may not be possible to establish that the applicant completed a 'substantial part' of the course while holding a student visa.

[93] *Maestro v MIBP* [2016] FCCA 1095 at [18]. In that case, the Court found that the Tribunal had fallen into error in proceeding on the basis that the applicant had to have completed at least 50% of the course in order to satisfy the criterion. Further, the degree to which the Tribunal is required to undertake a qualitative analysis will depend on the evidence and submissions in the

It would appear that, as a matter of syntax, the use of the past perfect tense ('had … completed') in these provisions limits the '2 years before the date of application' to a 2 year period immediately before that date and does not contemplate a period occurring after the visa application is made. In this respect, Schedule 5A requirements couched in this way would appear distinguishable from the 'IELTS test taken less than 2 years before the date of application' provision discussed above.[94]

Other ways to meet English language proficiency requirement

There are numerous other ways in which applicants may meet the evidentiary requirement for English language proficiency, depending on the applicable Schedule 5A item.

One basis that may be available is where the applicant has a level of English language proficiency that satisfies his or her education provider;[95] or that, together with at least 5 years of study in English undertaken in one or more of 7 specified predominantly English speaking countries.[96] This provision was considered in *Kabir v MIAC,*[97] where the Court clarified a number of issues relating to the expression 'at least 5 years of study' in this context.

The Court held:

- the term 'years' refers to the ordinary meaning of 'year' and not some special meaning such as 'academic years'
- when considering this requirement it is appropriate for the Tribunal to aggregate various periods[98]
- it would be wrong to simply adopt the nominal or specified full time length of a course as the length of 'study', rather, the Tribunal should take into account the period actually spent studying.[99] However, the period of 'at least 5 years' has to be a period 'of study', which relevantly means a period of 'application of the mind to the acquisition of learning'.[100] Thus, when calculating the relevant period 'of study', the Tribunal is not obliged to include periods with results of 0% and no grade awarded, because a 0% result and no grade is inconsistent with any 'study' being undertaken,

particular case. See also *Ashraf v MIBP* [2017] FCCA 1861 at [75] where the Court found that in the particular circumstances of that case, it was not impermissible for the Tribunal, based on the limited evidence from the applicant, to form the view that that the course was not substantially completed and the evidence did not require a qualitative assessment.

[94] See *MIAC v Kamal* (2009) 178 FCR 379 at [19].

[95] For example, cls 5A201, 5A204, 5A207, 5A210, 5A213 and 5A304. Note that cls 5A201 and 5A204 (for ELICOS applicants) were amended to reflect this requirement by SLI 2011 No 199 on 5 November 2011, for visa applications made on or after that date. The purpose of the amendment was to align the English proficiency requirement for AL5 and AL4 ELICOS applicants with the requirements of AL1 to AL3: Explanatory Statement to SLI 2011 No 199, sch 2, items 23–24. Clause 5A304 (Schools Sector AL4) was amended to reflect this requirement on 24 March 2012 for visa applications made on or after that date, providing consistency for the English proficiency requirement across AL1 to AL4 in the Schools Sector: SLI 2012, No 35; Explanatory Statement to SLI 2012, No 35, sch 4, item 61. Assessment Levels 4 and 5 were repealed for all visa subclasses for visa application made on or after 22 March 2014: SLI 2014, No 30.

[96] See cls 5A404(f), 5A504(1)(e), 5A604(2)(f) and 5A704(f) as in force immediately before 22 March 2014 and cls 5A407(f), 5A507(1)(e), 5A607(2)(f) and 5A707(f). The specified countries are Australia, Canada, New Zealand, South Africa, the Republic of Ireland, the United Kingdom, and the United States of America.

[97] *Kabir v MIAC* [2010] FMCA 132, not disturbed on appeal: *Kabir v MIAC* [2010] FCA 1164. The only issue on appeal was whether the Federal Magistrate, having found jurisdictional error, had erred in the exercise of his discretion to withhold relief. The substantive issues were not argued or considered.

[98] *Kabir v MIAC* [2010] FMCA 132 at [52]–[53].

[99] *Kabir v MIAC* [2010] FMCA 132 at [56]–[57].

[100] *Kabir v MIAC* [2010] FMCA 132 at [50] referring to the Shorter Oxford English Dictionary on Historical Principles, Vol. 2 (Oxford, 1973) p 2158.

but consistent with there being no application of the mind, nor acquisition of learning, or both, and mere enrolment is not 'study'[101]

- as the study must have been undertaken in Australia or one of the other specified countries, periods during which an applicant is overseas cannot be counted as periods 'of study' unless he or she is studying in one of the other nominated countries.[102]

Another basis for satisfying English language proficiency requirements can be where an applicant '*will undertake*' an ELICOS of no more than a specified duration before commencing his or her principal course, and has achieved a specified score in an IELTS test that was taken less than 2 years before the date of the application.[103] This requirement is intended for students with a lesser level of proficiency (as reflected in a lower IELTS test score than that required for other alternatives) and calls for evidence of a commitment to an ELICOS to be undertaken *in the future*, *and* before commencing the principal course.[104] Thus, evidence that an ELICOS was undertaken before the visa application was made[105] or that an ELICOS had already been completed at the time of the Tribunal's decision (even if completed before commencing the principal course) would not satisfy the requirement.[106] In addition, in this context the term 'will undertake' requires evidence that the applicant will commence *and complete* the ELICOS before commencing the principal course.[107]

In determining when the principal course commences for determining whether the ELICOS course will be undertaken *before* commencing the principal course, it has been held that a course, once started, may be halted and then re-engaged, but it only commences once.[108]

[101] *Kabir v MIAC* [2010] FMCA 132 at [58].
[102] *Kabir v MIAC* [2010] FMCA 132 at [59].
[103] See cls 5A404(b), 5A504(1)(b), 5A604(2)(b), 5A704(b) as in force immediately before 22 March 2014 and cls 5A407(b), 5A507(1)(b), 5A607(2)(b), 5A707(b). The second limb of this alternative (IELTS test taken 'less than 2 years before' the date of the application) is discussed above.
[104] See *Sapkota v MIAC* [2012] FMCA 77 at [44]–[45] for discussion of the policy objectives underpinning this kind of requirement.
[105] *Patel v MIAC* [2011] FMCA 875 upheld on appeal: *Patel v MIAC* [2012] FCA 376. Whilst the point was not argued, and the Court's reasoning is limited, the Court at first instance found no error in the Tribunal's finding that cl 5A404(b) refers to an ELICOS undertaken after the date of application and that the ELICOS undertaken before the application was made was 'irrelevant'. In upholding his Honour's judgment, Siopis J held that as cl 5A404(b) requires evidence that the visa applicant 'will undertake' the relevant ELICOS, it does not avail an applicant to provide evidence that he or she has already undertaken such a course, commenting that the rationale for this sequence is somewhat elusive, but that the construction of the requirement is clear: at [24]. See also *Wickramasinghe v MIBP* [2016] FCA 593, which followed *Patel v MIAC* [2012] FCA 376.
[106] *Sapkota v MIAC* [2012] FMCA 77 and *Singh v MIBP* [2014] FCCA 2948. In *Singh* the Court accepted that cl 572.223 clearly contains time of decision criteria and repeated the comments of Siopis J in *Patel v MIAC* [2012] FCA 376 that the rationale is 'elusive' but that the requirements of cl 5A404(b) were clear and that by completing the relevant ELICOS before a decision was made on his visa application, the applicant could not meet the requirements of that provision. There was no reference in *Singh* to the authority in *Sapkota*. In *Sapkota* the Court similarly concluded that to meet cl 5A404(b) an applicant must have a commitment to complete an ELICOS prior to the principal course but after the Tribunal's hearing and decision. In doing so the Court relied on an analysis of the policy objective of cl 5A404(b) (and equivalent sch 5A requirements). It considered that cl 5A404(b) was aimed at ensuring that student visa applicants who had a sufficient grasp of English (reflected by an IELTS score of 5) but not the requisite proficiency to undertake their principal course (reflected by an IELTS score of 5.5 – per cl 5A404(a)) would undertake further English language study (in the form of an ELICOS of a specified length) prior to and proximate to their principal course. Given that context, the Court considered that the ELICOS must be undertaken prior to the principal course but after the IELTS, reflecting its purpose – to ensure the applicant's English has improved following their IELTS result to a level which allows full engagement with and comprehension of their principal course. However, the Court's reasoning as to why, where this policy objective is otherwise met by an applicant's pattern of study, the ELICOS must necessarily commence after the Tribunal's decision is limited. The Court referred to *Singh v MIAC* [2010] FMCA 1006 and *Patel v MIAC* [2011] FMCA 875 with apparent approval, but suggested, incorrectly, that the Court in *Singh* was considering a different requirement. See also *Kalia v MIBP* [2015] FCCA 667 at [33].
[107] *Kalia v MIBP* [2015] FCCA 667 at [44], considering cl 5A404(b).
[108] *Zhu v MIBP* [2014] FCCA 2701 at [44], [49]. The applicant in *Zhu* had started a Bachelor's degree in Business (Management). He gave information to the Tribunal that he had cancelled his enrolment in the Bachelor's degree and provided two CoEs, for an ELICOS course and for a Bachelor's degree in Business (Management) with the same provider and same course number, but a different commencement date. The applicant argued that the new CoE related to the principal course and therefore it determined the commencement date and cessation date of the principal course for the purposes of cl 5A507(1)(b). The Court rejected this, finding that a course once started, may be interrupted and then re-engaged and where all other

This is so, even if a new confirmation of enrolment (CoE) has been issued. Enrolment in a course is an element leading to, or involved in, commencement, but the terms 'enrolment' and 'commencement' are not synonymous.[109]

Another permissible means of demonstrating English language proficiency is where the applicant is fully funded, has a level of English language proficiency that satisfies the proposed education provider and if the applicant is to undertake an ELICOS before commencing his or her principal course will undertake an ELICOS of no more than a specified duration.[110] Under cl 5A103, an applicant is fully funded if the applicant's course fees, living costs and travel costs will be met by one or more of the following:

- a multilateral agency
- the government of a foreign country
- the Commonwealth government, or the government of a State or Territory.

These costs are for the applicant's full period, assessed for the applicant alone.

Financial Capacity

Schedule 5A also sets out evidentiary requirements in relation to the applicant's financial capacity to undertake each course of study that he or she proposes to undertake, without contravening any condition of the visa relating to work. As the Schedule 5A requirements relate to a time of decision criterion, the financial capacity of a visa applicant has to be assessed by reference to the proposed course or courses of study which at the date of the decision the visa applicant proposes to undertake.[111] This is a question of fact for the Tribunal to be determined on the available evidence.[112]

Where the applicant proposes to undertake a package of courses, the financial capacity requirements must be assessed with reference to the cost and duration of all courses in the package.

Where the applicant proposes to undertake more than one course which are not part of a 'package of courses', there is a question as to whether all courses of study can, or should, be considered when assessing the financial capacity requirements.

While PAM3 provide some support for assessing the financial requirements against multiple unrelated courses, adopting such an approach gives rise to a number of issues relating to the determination of the applicable 'principal course' (for which the legislation assumes multiple courses of study will be related), determination of the relevant subclass, assessment level and ultimately, the evidentiary requirements – including the financial capacity requirements.

For similar reasons outlined earlier, the preferred view is that a student visa should only be granted in respect of more than one course where those courses are a 'package of courses' (i.e. where one is the pre-requisite of another or one may only be undertaken after the

indicators show that it was the same course it must be understood as having commenced at the initial start date, not date of resumption.

[109] *Zhu v MIBP* [2014] FCCA 2701 at [49].

[110] For example, cl 5A404(c) and 5A504(c) as in force immediately before 22 March 2014 and cls 5A407(c), 5A507(c).

[111] See *Shrestha v MIAC* [2008] FCA 1296 at [19].

[112] See *Chava v MIMAC* [2013] FCCA 1032. In that case, the Court held that the Tribunal was not required to accept the applicant's contradictory evidence regarding his enrolment.

completion of another).[113] Where an applicant provides evidence of multiple unrelated courses of study, it may be more appropriate to confine the assessment to one course of study (typically the first), and calculate the financial capacity requirements by reference to the cost and duration of that course only.[114] Any subsequent course not considered to fall within the Tribunal's assessment would instead be the subject of a further, subsequent student visa application.

As for English language proficiency, the evidentiary requirements for financial capacity can be met on a range of bases depending on the applicable Schedule 5A item, and the date of the visa application.[115] In general, the evidence required by Schedule 5A is evidence that the applicant has funds, and/or access to funds, that are sufficient to meet course fees, living costs, school costs (where relevant), and travel costs over the period specified for the applicable subclass and assessment level. For each subclass, the specified period is one of the following periods as defined in cl 5A101:

- the 'full period'
- 'first 12 months'
- 'first 24 months' (only for visa applications made before 22 March 2014)
- 'first 18 months' (only for visa applications made on or after 5 November 2011 and before 22 March 2014),[116] or
- 'first 36 months' (only for visa applications made before 5 November 2011).[117]

The relevant periods are explained in more detail below.

In addition, the applicant must also provide a declaration to the effect that he or she has access to funds that are sufficient to meet the specified expenses for the remainder of his or her proposed stay in Australia. For assessment level 1, only a declaration is required, covering the full period – there is no further evidentiary requirement.[118]

Funds from an acceptable source

For most assessment levels, some or all of the funds must be 'funds from an acceptable source', as defined in the Schedule 5A provisions for the applicable subclass and assessment level.[119] The definition of 'funds from an acceptable source' differs between subclasses and assessment levels. They include, for example, money deposits, loans from financial institutions or governments, and financial support from, among others, education providers, organisations specified by the Minister in writing, and certain not-for-profit organisations.

[113] See reg 1.40(3) and, for further discussion, see Courses and Enrolment.
[114] See MRT decision [redacted] for an example of where this has arisen as an issue for determination.
[115] Note that for visa applications made on or after 5 November 2011 (but before 22 March 2014) some of the financial capacity requirements for assessment levels 3 and 4 differ from those applicable to applications made before that date: see SLI 2011, No 199. For visa applications made on or after 22 March 2014, the only applicable period in the assessment levels is the first 12 months: cl 5A101 and other sch 5A provisions as amended by SLI 2014, No 30.
[116] SLI 2011, No 199; SLI 2014, No 30.
[117] SLI 2011, No 199.
[118] Note that for visa applications made on or after 1 January 2010 there is an additional sch 2 criterion requiring the decision-maker to be satisfied that the applicant has genuine access to the funds demonstrated or declared under sch 5A. The 'genuine access to funds' requirement is discussed further below.
[119] For example, cls 5A205(2) and 5A305(2) as in force immediately before 22 March 2014 and cls 5A208(2), 5A211(2), 5A308(2), 5A311(2).

In some cases, the applicant or other acceptable individual will be required to have held a money deposit for a specified period prior to the date of the visa application. In other cases, applicants may also be required to provide evidence that the regular income of any individual (including themselves) was sufficient to accumulate the level of funding provided for this purpose[120] (see 'accumulation of funds' below for further discussion).

Money deposits

'Money deposit' for the purposes of Schedule 5A means 'a money deposit with a financial institution'.[121] Whilst the term 'financial institution' is defined (see below), there is no further definition of 'money deposit'.

Having regard to the ordinary meaning of these terms, 'money' may include 'coin or certificates (such as banknotes, etc.) generally accepted in payment of debt and current transactions',[122] whilst 'deposit' may include 'to place for safekeeping or in trust'[123] or 'money placed in a financial institution'.[124] It would therefore appear that the term 'money deposit' is intended to encompass cash type assets placed in financial institutions, such as most commonly associated with general savings type deposit accounts. Evidence of a 'money deposit' may include, for example, deposit booklets, fixed term receipts, term deposit receipts, or statements or letters from financial institutions, as defined, confirming the amount of funds deposited in a particular account.

Non-cash assets, such as property or other possessions, life-insurance and superannuation policies, or investment in government bonds for example, would not appear consistent with the ordinary meaning 'money' and 'deposit', and may therefore fall outside of that term as defined in the Regulations.

Similarly, savings or deposits held in non-'financial institutions' would also fall outside the definition of 'money deposits'. For example, while an account held in the Indian Post Office Saving Scheme may possess *some* of the relevant characteristics, if the Indian Post Office is not a 'financial institution', as that term is defined in Schedule 5A, then such an account would not be a 'money deposit' in the relevant sense.

In certain circumstances, Schedule 5A requires that money deposits be held for by an individual for a specified period prior to the date of the visa application. For example, for Subclasses 570–575, most assessment level 3 and all assessment level 4 requirements require the money deposit to have been held by the individual for a period of at least 3 months immediately prior to the date of the visa application.[125] However, no period is specified for the Subclass 574 assessment level 3.

[120] See cls 5A205(1)(c), 5A305(1)(e), 5A405(1)(c), 5A505(1)(c), 5A605(1)(d), 5A705(1)(c) as in force immediately before 22 March 2014, and cls 5A208(1)(c), 5A308(1)(c), 5A408(1)(c), 5A508(1)(c), 5A608(1)(d), 5A708(1)(c).
[121] cl 5A101.
[122] Macquarie Dictionary online (http://www.macquariedictionary.com.au), accessed 17 November 2021.
[123] Macquarie Dictionary online (http://www.macquariedictionary.com.au), accessed 17 November 2021.
[124] Macquarie Dictionary online (http://www.macquariedictionary.com.au), accessed 17 November 2021.
[125] Definition of 'funds from an acceptable source': e.g. cls 5A205(2)(a), 5A305(2)(aa), 5A405(2)(aa), 5A505(2)(aa), 5A605(2)(aa), 5A705(2)(a) as in force immediately before 22 March 2014 and cls 5A208(2)(a), 5A308(2)(aa), 5A408(2)(aa), 5A508(2)(b), 5A708(2)(a). Note that for visa applications made 5 November 2011 – 21 March 2014, the relevant period for AL4 is reduced from 6 months to 3 months, bringing AL4 into line with AL3 in this respect: SLI 2011, No 199. For discussion of when an application is made, please refer to Chapter 1 – Visa and related applications.

Successful completion of part of a course

It should also be noted that for some assessment levels, the requirement to have funds from an acceptable source may alternatively be met if the applicant:

- has successfully completed 75% of the requirements for his or her principal course
- has applied for the visa in order to complete the course
- does not propose to undertake any further course, and
- has a money deposit held by a specified individual.

In these cases the definition of 'funds from an acceptable source' will be met without any prior period of possession of the money deposit.[126] As this alternative is only available to certain applicants who have 'applied for the visa in order to complete [his or her principal] course' it could not be relied upon in circumstances where the applicant had not *commenced* the principal course at the time of their visa application, even if they have successfully completed 75% of the requirements for the course at the time of decision.[127]

Financial institutions

The term 'financial institution' appears in both the definition of 'money deposit' and also in its own right in connection with the provision of 'loans' (see below). For applications made before 23 November 2014, it is defined as a body corporate that, as part of its normal activities, takes money on deposit and makes advances of money under a regulatory scheme governed by the central bank (or its equivalent) of the country in which it operates, which the Minister (or Tribunal on review) is satisfied provides effective prudential assurance'.[128] The question of whether a particular entity is a financial institution will be a finding of fact for the decision maker. As 'financial institution means a *body corporate*…', at the very least the relevant entity must not be a natural person (such as an individual acting as a loan shark, for example), nor should they be a business or government agencies unless they are acting in some other, incorporated, capacity.

In relation to the pre 23 November 2014 definition, it is the regulatory scheme governed by the central bank of the country which the Minister (or Tribunal on review) must be satisfied provides effective prudential assurance, not the individual body corporate.[129]

The definition of 'financial institution' was amended and moved from Schedule 5A to reg 1.03 for student visa applications made on or after 23 November 2014.[130] The amended definition incorporates the existing definition and adds the requirement that the body corporate takes money on deposit and makes advances of money 'in a way that the Minister is satisfied

[126] See cls 5A305(2), 5A405(2), 5A505(2), 5A605(2) as in effect immediately before 22 March 2014 and cls 5A308(2), 5A408(2), 5A508(2). The Explanatory Statement which introduced this alternative definition stated that its effect was 'to remove the savings period requirement for applicants who have successfully completed most of their principal course and are only seeking a further visa to complete this course': Explanatory Statement to *Migration Amendment Regulations 2003 (No 9)* (SR 2003, No 296) at [153], [163], [179], [192], [208], [218] and [230].
[127] In terms of what is relevant to the calculation of completed study for the sch 5A requirements, there is some judicial consideration which suggests credit for past study should be considered. In *Poudel v MIAC* [2013] FMCA 11, the Court, in *obiter dicta* at [40], observed that when calculating whether an applicant has completed at least 75% of the requirements for their principal course, requirements which they have completed prior to enrolment (which are not pre-requisites for enrolment) and then been granted credit for, should be counted as requirements that they have completed for their current course).
[128] cl 5A101.
[129] *Paudel v MIBP* [2014] FCCA 665 at [40]–[41].
[130] SLI 2014, No 163, sch 7.

complies with effective prudential assurance requirements'. This enables the Minister (or Tribunal on review) to consider whether the body corporate itself provides effective prudential assurance, not just the regulatory scheme under which it operates, but only for post 23 November 2014 student visa applications.

There is no legislative definition of 'effective prudential assurance'. Departmental guidelines (PAM3) describe it as 'the prudent management of capital and other assets of the relevant bank or financial institution to enable it to meet its financial obligations as and when they become due'.[131] PAM3 states that criteria to measure the effectiveness of prudential assurance will differ based on the circumstances relevant to the regulatory regime in each country, but notes the following as possible considerations:

- the institution has implemented appropriate credit risk management strategies
- the institution is approved by the country's central bank or has an official high credit rating from an independent body
- documents from the institution have been assessed previously by the Department and found not to represent legitimate funds available to a client
- the institution has been implicated in any unacceptable behaviour such as systematic fraud or bribery.

It should be noted that these points only appear relevant to assessing the effective prudential assurance of the institution or body corporate for the amended definition of 'financial institution' applicable to student visa applications made on or after 23 November 2014.

PAM3 also notes that some posts maintain a list of acceptable financial institutions and that such lists should be created on the basis of the relative financial standing of an institution, its credit rating and integrity.[132] These lists have no official status under the Act or Regulations and are not a substitution for a determination of fact whether a particular institution meets the relevant definition of 'financial institution'. It appears the current Department guidelines do not reflect the pre 23 November 2014 definition of 'financial institution' which will still apply to student visa applications made before that date. For student visa applications made before 23 November 2014 decision makers must ultimately bring their own mind to bear on the question of whether the relevant body corporate is one taking monetary deposits and making monetary advances and is operating under a regulatory scheme governed by the central bank of the country. As noted in *Paudel v MIBP*, the lists of 'acceptable financial institutions' do not say anything about the regulatory scheme governed by the central bank of the country to which the Minister's (or Tribunal's on review) satisfaction about providing 'effective prudential assurance' must be directed.[133] Consequently the lists are of limited relevance to the determination of whether a particular entity meets this definition of 'financial institution'.

[131] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student visa assessment > Assessing Genuineness > Genuine student financial capacity > Financial Institutions (re-issue date 1/1/16).
[132] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student visa assessment > Assessing Genuineness > Financial Institutions (re-issue date 1/1/16).
[133] See *Paudel v MIBP* [2014] FCCA 665 in which the Court found at [76]–[78] the Tribunal asked the wrong question by relying upon evidence about the 'banks' which were on or not on the 'Acceptable Institutions for Funds and Loans – Nepal' list, rather than the character of the regulatory regime.

Loans, overdrafts, lines of credit and credit cards

For a number of assessment levels, 'funds from an acceptable source' includes 'a loan from a financial institution…'[134] or 'a loan from the government of the applicant's home country'.[135]

Whilst schedule 5A contains no definition of the term 'loan', it has been held to encompass a legally enforceable agreement by which a financial institution promises to advance funds to a borrower on condition that the funds advanced be repaid.[136] It is not dependent upon any or all of the funds agreeing to be lent coming into the possession of the borrower, nor is it contingent upon there being a repayment schedule.[137] In this respect, the term 'loan' may encompass a range of financial arrangements such as an 'overdraft' or 'line of credit' as they would both appear to share the same broad characteristics of an enforceable agreement to provide funds on condition of repayment. There is also support, including in Departmental guidelines,[138] that to the extent there is a pre-approved limit that may be drawn upon when required and which the borrower need only make re-payments on the funds withdrawn, a credit card account or facility may also satisfy the meaning of 'loan' for the purposes of Schedule 5A.

It ultimately remains a question of fact for the decision maker whether a particular financial arrangement – whether *described* as a loan, overdraft, line of credit or otherwise – possesses the relevant characterises of a 'loan' within the meaning of Schedule 5A.

Note that evidence of a 'loan' from an entity other than a financial institution or government of the applicant's home country, for example from a private individual or business, would not satisfy the relevant Schedule 5A requirements.

Unlike with money deposits, there is no requirement for loans to have been held for any period of time prior to the visa application being made.

Other financial support

For certain assessment levels, an applicant may also satisfy the financial capacity requirements where evidence is provided of financial support from the applicant's proposed education provider, a government, a corporation, a multilateral agency, organisations specified by the Minister in writing or other acceptable non-profit organisations.[139] These are regarded as 'funds from an acceptable source'.

Support from education providers

To demonstrate that an applicant will have the 'financial support' of a proposed education provider, he or she must either have:

[134] cls 5A205(2)(c), 5A305(2)(b), 5A405(2)(c), 5A505(2)(b), 5A605(2)(b), 5A705(2)(c) as in force immediately before 22 March 2014 and cls 5A208(2)(b), 5A308(2)(b), 5A408(2)(b), 5A508(2)(c), 5A608(2)(b), 5A708(2)(b), 5A805(3)(b).
[135] cls 5A205(2)(d), 5A305(2)(c), 5A405(2)(d), 5A505(2)(c), 5A605(2)(c), 5A705(2)(d) as in force immediately before 22 March 2014 and cls 5A208(2)(c), 5A308(2)(c), 5A408(2)(c), 5A508(2)(d), 5A608(2)(c), 5A708(2)(c), 5A805(3)(c).
[136] *Patel v MIAC* (2013) 211 FCR 35 at [19].
[137] *Patel v MIAC* (2013) 211 FCR 35 at [19].
[138] PAM3 - GenGuideG - Student visas - Visa application & related procedures > Student visa assessment > Assessing Genuineness > Genuine student – Financial capacity > Commercial loans and similar > Credit cards and lines of credit (re-issue date 1/1/16).
[139] cls 5A205(2)(b), 5A305(2)(d), 5A405(2)(b), 5A505(2)(d), 5A605(2)(d), 5A705(2)(b) as in force immediately before 22 March 2014, and cls 5A208(2)(d), 5A308(2)(d), 5A408(2)(d), 5A508(2)(e), 5A608(2)(d), 5A708(2)(d).

- a scholarship awarded on the basis of merit and an open selection process, to a student enrolled in a course leading to a Certificate IV qualification or higher, and awarded to the greater of not more than 10% of overseas students in a course intake or not more than 3 overseas students in a course intake; or
- a waiver of their course fees where they are a part of an exchange program that involves a formal agreement between an education provider and education institute in a foreign country and the reciprocal waiver of course fees as a part of that agreement, and they have proposed full time study which will be credited to a course undertaken by them in their home country.[140]

Whilst Departmental guidelines provide that an applicant would be expected to provide documentary evidence from their proposed education provider describing and confirming the scholarship or waiver of course fees,[141] whether or not an applicant has the financial support of their proposed education provider will ultimately be a question of fact for the decision maker to be determined on all the available evidence.

Support from provincial, State, Commonwealth and foreign Governments

Certain applicants may also satisfy the Schedule 5A financial requirements if they receive financial support from the Commonwealth Government or government of a foreign country, the government of a State or Territory or a provincial or state government in a foreign country provided with the written support of the government of that country.[142] Whilst Departmental guidelines state that a letter from the relevant government agency would normally suffice, this is with specific reference to the national government of the applicant's home country only and it is unclear on what basis this distinction has been made.[143] Accordingly, as there is no prescribed form in which an applicant must demonstrate financial support from a government, it will be a question of fact for the decision having regard to all the available evidence.

Support from corporations

Funds from an acceptable source may also be demonstrated by an applicant who is employed by a corporation in a role to which their principal course is of direct relevance and which conducts activities outside the country in which it is based.[144] The requirement to be employed by a 'corporation' would therefore exclude employment by un-incorporated entities, for examples entities registered only as a business or sole-trader, and the requirement for it to be conducing activities outside of the country in which it is based therefore requires some international element to its operations. It will also require consideration of how the applicant's principal course is of direct relevance to their

[140] cls 5A205(2), 5A405(2), 5A505(2), 5A605(2), 5A705(2) as in force immediately before 22 March 2014 and cls 5A208(2), 5A408(2), 5A508(2), 5A608(2), 5A708(2).
[141] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student visa assessment > Assessing Genuineness > Genuine student - Financial capacity > Financial support from proposed education provider > Supporting documentation (re-issue date 1/1/16).
[142] Definition of 'funds from an acceptable source' in cls 5A205(2)(b), 5A305(2)(d), 5A405(2)(b), 5A505(2)(d), 5A605(2)(d) and 5A705(2)(b) as in force immediately before 22 March 2014 and cls 5A208(2)(d), 5A308(2)(d), 5A408(2)(d), 5A508(2)(e), 5A608(2)(d), 5A708(2)(d).
[143] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student visa assessment > Assessing Genuineness > Genuine student – Financial capacity > Source of funds-general requirements > Acceptable sources (re-issue date 1/1/16).
[144] cls 5A405(2)(b), 5A505(2)(d), 5A605(2)(d) as in force immediately before 22 March 2014 and cls 5A208(2)(d), 5A308(2)(d), 5A408(2)(d), 5A508(2)(e), 5A608(2)(d), 5A708(2)(d).

employment with that corporation. Evidence of a company's registration, such as an extract from the Australian Securities and Investments Commission (or an international equivalent) or an entity's charter of association may provide evidence of the former, while a job description or statement from the applicant's employer may provide evidence of the latter.

Support from multilateral agencies

An applicant may also satisfy the Schedule 5A requirements where they demonstrate financial support from a 'multilateral agency'. Multilateral agencies are not further defined for the purposes of Schedule 5A, however Departmental guidelines refer to 'an agency or organisation in which at least 3 countries participate',[145] and give the following examples: the United Nations, the World Bank and the Asian Development Bank.

Support from organisations specified by the Minister

The Minister may also specify in writing certain organisations for the purposes of providing an applicant with financial support.[146] At the time of writing, those organisations are the National Red Cross and Red Crescent Societies, the Ford Foundation, and Rotary International.[147] The applicable instrument specifying these organisations is available on the OrgsForFunds tab of the Register of Instruments: Student Visas.

Support from non-profit organisations

Financial support from an 'acceptable non-profit organisation' is also regarded as 'funds from an acceptable source'. 'Acceptable non-profit organisation' is relevantly defined in cl 5A101 to mean an organisation that actively and lawfully operates in Australia or overseas on a non-profit basis and has funds that are, or an income that is, sufficient to provide the financial support that it proposes to provide. Unlike corporations discussed above, there appears to be no requirement for non-profit organisations to be incorporated legal entities. Having regard to the ordinary meaning of the term 'organisation' however, it does appear to require that there at least be a body of people (as opposed to an individual, for example) organised for some end.[148] Whether such an organisation is operating in Australia or overseas on a non-profit basis and with funds or an income sufficient to provide financial support will be questions of fact for the decision maker, to be determined on the available evidence. Evidence of an organisation's structure, tax assessment or financial or accounting records may, for example, demonstrate where and on what basis it operates and whether it has the funds or income to provide the necessary financial support.

Declaration of access to funds

With the exception of assessment level 5, Schedule 5A requires a declaration by the applicant that they have access to funds from an acceptable source sufficient to meet their course fees, living costs and school costs for the remainder of their proposed stay in

[145] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > SVP legislated and policy terms (re-issue date 1/1/16).
[146] Definition of 'funds from an acceptable source': cls 5A205(2)(b), 5A305(2)(d), 5A405(2)(b), 5A505(2)(d), 5A605(2)(d), 5A705(2)(b) as in force immediately before 22 March 2014 and cls 5A208(2)(d), 5A308(2)(d), 5A408(2)(d), 5A508(2)(e), 5A608(2)(d), 5A708(2)(d).
[147] Gazette Notice 2 of 2004, dated 23 December 2003.
[148] Online Macquarie Dictionary, accessed 15 December 2021 (www.macquariedictionary.com.au).

Australia beyond a specified period. This requirement is in addition to the requirement in Schedule 2 that the applicant actually have access to the declared funds.

The relevant period for the Schedule 5A requirement depends upon the date of visa application and the applicable assessment level. For visa applications made before 22 March 2014, the period is either 24, 18 or 12 months for assessment levels 4, 3 or 2 respectively.[149] For visa applications made on or after 22 March 2014, the number of assessment levels is reduced to three and the period for assessment levels 2 and 3 is the same (12 months). Whilst assessment level 1 still requires a declaration from the applicant, there is no period specified beyond their proposed stay.[150]

There is no prescribed format in which the declaration must be made.

Accumulation of funds

For assessment levels 3 and 4 for each subclass, applicants are also required to provide evidence that the regular income of any individual (including themselves) was sufficient to accumulate the level of funding being provided by that individual.[151]

'Regular income' in these provisions refers to an inflow of money that, in the normal course of events, is recurring and periodic.[152] The expression 'regular income' does not include the proceeds of the one-off sale of an asset, such as a sale of land, or a combination of 'regular income' and the proceeds of the one-off sale of an asset.[153] The relevant Schedule 5A provisions are not concerned with the accumulation of wealth generally so as to include lottery winnings, bequests, gifts and the like.[154]

Where the applicant is relying upon funding provided by a loan, other than a loan to the applicant him or herself, and the loan amount is greater than the level of funding provided for the purposes of Schedule 5A, the decision-maker must consider whether the person's income is sufficient to accumulate the funding being provided, rather than the full loan amount.[155] This may be difficult to reconcile with a consideration of whether the person's regular income is sufficient to meet repayments on the loan. To the extent that an inability to meet repayments on such a loan would lead to the possibility of default and withdrawal of loan funds, this may be more easily addressed in relation to the requirement of whether the applicant will have access to the relevant funds. This is a separate requirement for visa applications made on or after 1 January 2010 (see below).

Where the applicant is relying upon funds provided in the form of a loan to the visa applicant him or herself, it has been held that the enquiry as to whether the person's income is

[149] The term 'first [12, 18, 24] months' is defined in cl 5A101.
[150] Relevant assessment level 1 provisions, eg cl 5A314, refer to the 'full period', which is defined in cl 5A101 in terms of the period of the proposed stay.
[151] See cls 5A205(1)(c), 5A305(1)(e), 5A405(1)(c), 5A505(1)(c), 5A605(1)(d) and 5A705(1)(c) as in force immediately before 22 March 2014 and cls 5A208(1)(c), 5A308(1)(c), 5A408(1)(c), 5A508(1)(c), 5A608(1)(d), 5A708(1)(c).
[152] *MIBP v Kaur* (2014) 227 FCR 548 at [23]. See also *Husnain v MIBP* [2016] FCCA 401, *Singh v MIAC* [2013] FMCA 132 at [62] and *Singh v MIBP* [2015] FCCA 132 at [24].
[153] *MIBP v Kaur* (2014) 227 FCR 548 at [23]. The Federal Court considered the interpretation of cl 5A405(1)(c), overturned the reasoning of the Federal Circuit Court in *Kaur v MIBP* [2014] FCCA 1002 and found no error in the Tribunal's conclusion that the proceeds for sale of land were not 'regular income' of the applicant's father.
[154] *MIBP v Kaur* (2014) 227 FCR 548 at [22]. This is consistent with Department guidelines in PAM3.
[155] *Sandhu v MIBP* [2014] FCCA 1129 at [51]–[53]. The requirement for evidence of regular income does not arise where the relevant funds are based on a loan to the visa applicant: *Saji v MIBP* [2015] FCCA 1170.

sufficient to accumulate the funding being provided does not arise.[156] In these circumstances the funds are being provided by the bank and not the visa applicant. As the bank is not an 'individual' within the meaning of the Schedule 5A provision requiring evidence of regular income, the obligation to consider the requirement to provide evidence of regular income sufficient to accumulate the funds does not arise.[157] This does not alter the application of the provision to circumstances where the applicant is relying upon a loan which has been made to another acceptable individual, such as a parent or spouse.

The Department's guidelines in relation to assessing whether the regular income is sufficient to accumulate the funds where funds are provided by way of a loan state that '[g]enerally, it should be unnecessary to verify the regular income of the individual providing funds if the source of funding is a bank loan, as the bank would have verified the income of the borrower before sanctioning the loan'.[158] However, the fact of a loan is not proof of a regular income within the Regulations.[159] A bank may be satisfied of capacity to repay a loan on the basis of assets other than regular income. Therefore, the fact of a loan, of itself, is not evidence of regular income which would satisfy this requirement and this aspect of the Department's guidelines should not be followed.

Evidence which suggests a loan may not be genuine, or that obligations arising under a loan may not be met, may also be relevant to Schedule 2 requirements that a decision maker is satisfied the applicant will have access to the funds declared or demonstrated in relation to Schedule 5A requirements, applicable to visa applications made on or after 1 January 2010.[160]

The requirements for the applicable subclass and assessment level in a particular case should be considered carefully and evidence evaluated accordingly.

Calculation of funds

In order to determine whether the evidence of an applicant's financial capacity meets the requirements of Schedule 5A, the decision maker must calculate the amount of funds the visa applicant requires to meet course fees, living costs and school costs (if the applicant has a school aged dependant) over the relevant period as well as travel costs. The calculation must be made in accordance with the applicable item in Schedule 5A.

Course fees

'*Course fees'*, for an applicant in relation to a period, is defined in cl 5A101 to mean 'the fees for each course proposed to be undertaken by the applicant in the period, as indicated by the proposed education providers in a letter or other document'. Decision-makers may therefore refer to an applicant's Confirmation of Enrolment (CoE) and/or 'offer of place letter' to determine the relevant course fees.

[156] *Saji v MIBP* [2015] FCCA 1170 at [54]–[56]. The Court was considering cl 5A405(1)(c) in relation to cl 572.223(2)(a), but the Court's reasoning would apply to other sch 5A clauses with similar wording.
[157] *Saji v MIBP* [2015] FCCA 1170 at [51]–[56].
[158] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student visa assessment > Assessing Genuineness> Genuine Student – Financial capacity > Evidentiary requirements > Funds and the individual's income stream (re-issue date 1/1/16).
[159] *Singh v MIBP* [2015] FCCA 132 at [25]. The Court noted that the loan indicated the bank was satisfied as to a capacity to repay the money, but it was not proof of regular income. See also *Saji v MIBP* [2015] FCCA 1170 at [30]–[33].
[160] See cls 57X.223(2), 576.222(2).

The Regulations do not specify how 'course fees' should be calculated where, for example, the course extends beyond the period for which evidence is required (the relevant period is discussed below), and the course fee structure does not clearly indicate what the fees would be for that period. In these circumstances further evidence may be required from the applicant and/or education provider.

The Regulations are also unclear as to how 'course fees' should be calculated where an applicant has pre-paid a portion of their course fees. The Department's guidelines for departmental officers state that any amount that the provider records on the CoE as prepaid may be deducted from the total course fees payable when calculating financial capacity for Schedule 5A purposes. The guidelines state that if otherwise satisfied that the applicant is genuine, officers may accept *prima facie* that the funds used to prepay course fees are acceptable. In cases of concern, officers are advised to request evidence from the applicant (or their agent) to demonstrate the source of funds used to prepay course fees. If an applicant provides evidence of the source of funds used to prepay course fees, this source should be consistent with Schedule 5A acceptable sources.[161] This practice does not have an express statutory basis and whether it accords with the relevant provisions would depend upon how the definition of 'course fees' in cl 5A101 is construed and in particular, whether the relevant course fees are those that are applicable to the course, or whether they are those yet to be paid. On the former view, the evidence would need to demonstrate that the source of the prepayment was an acceptable source (if relevant). However, it may also be arguable that where the course fees are wholly or partly prepaid, as indicated by the proposed education provider in a letter or other document, the relevant course fee for the purposes of Schedule 5A would be the balance as indicated in that document. On that view, it may be arguable that the source of the prepayment is irrelevant and does not need to be an acceptable source.

Ultimately, the course fees for the relevant period will be a question of fact, to be determined on the available evidence.

Living costs and school costs

'*Living costs*' and '*school costs*' are defined in cl 5A104.

An applicant's ***living costs*** for a period are taken to accrue at a specified amount per year (the 'basic rate') and will include additional costs for the applicant's spouse or de facto partner[162] (35% of the basic rate) and any dependent children of the applicant (20% of the basic rate for the first child and 15% of the basic rate for any further dependent children).[163]

For visa applications made before 1 January 2010, the 'basic rate' is specified in cl 5A104(1) as $12,000 per year. For visa applications made on or after 1 January 2010, the basic rate is an amount specified by the Minister in an instrument in writing.[164] There is some uncertainty

[161] PAM3 GenGuide G – Student Visas – Visa application and related procedures > Student Visa Assessment > Assessing Genuineness > Genuine Student – Financial capacity > Evidentiary requirements > Tuition/education costs (student) (re-issue date 1/1/16).).

[162] The reference to 'de facto partner' was added on 1 July 2009 to apply to applications made on or after that date, and includes reference to same sex couples: see *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) and *Migration Amendment Regulations 2009 (No 7)* (Cth) (SLI 2009, No 144) reg 3, sch 1, item 320. Before 1 July 2009 'spouse' as defined in the Regulations included an opposite sex de facto partner.

[163] cl 5A104(1).

[164] *Migration Amendment Regulations 2009 (No 14)* (Cth) (SLI 2009, No 331), reg 5 and sch 3 item 36. According to the Explanatory Statement, this amendment was intended to allow the amount to be regularly updated to more accurately reflect

as to whether the applicable instrument is that which is in force at the date of visa application or date of decision.

On one view, the relevant instrument is that in force at time of application as this allows applications to be made with some certainty about visa requirements, particularly relevant in this context where some provisions that refer to the amounts specified in these instruments require the funds to be held for extended periods prior to the visa application being made.[165] On this view, for applications made between 1 January 2010 and 30 June 2012 the amount specified for cl 5A104(1) is $18,000 per year. For applications made on or after 1 July 2012 the amount specified is $18,610 per year.

On the alternative view, reflected in Departmental guidelines, the relevant instrument is the 'current' instrument, i.e. the instrument which is in force at the time of decision.[166] This view is consistent with the underlying principle that the prescribed basic rate should reflect changes in cost of living over time. As the living cost component of Schedule 5A is in essence forward looking (that is for duration of the proposed stay in Australia) this appears to be the preferable interpretation.

Clause 5A104(2) provides that an applicant's *school costs* are taken to accrue at the rate of $8,000 per year for each child who is a 'school-age dependant' at the time and depending on the applicant's assessment level, this may apply whether or not the child is a 'family applicant'. Regulation 1.03 defines a 'school-age dependant' as a member of the family unit who has turned 5 but who has not turned 18. The Department's guidelines for departmental officers state that if at the time of the visa decision a child is not a school-age dependant but they will become so during the visa period, the school costs are to be included in relevant calculations for financial capacity from the time they do become a 'school-age dependant' until the visa ceases or they turn 18, whichever is the earlier.[167]

Travel costs

'Travel costs', for an applicant, are defined in cl 5A101 to mean the sum of costs for each of the applicant and any family applicant (a) of travelling to Australia if the applicant or family applicant is not in Australia when the application is made; and (b) of returning to the applicant's home country at the end of his or her stay. The Regulations do not specifically prescribe how these travel expenses are to be calculated. Note that for the purposes of Schedule 5A, 'travel costs' do not include such costs for members of the applicant's family who are not included as visa applicants.

living cost contributions as they change in Australia over time. Please see the Register of Instruments: Student visas ('FthrFund-LvngCost' tab) for copies of the relevant instruments. There are three such instruments: IMMI 09/138 which commenced on 1 January 2010,IMMI 12/054 which came into effect on 1 July 2012 and IMMI 14/004 which commenced on 22 March 2014.

[165] See for example cls 5A202, 5A302, 5A402, 5A502, 5A602, 5A702 and also see cls 5A205, 5A305, 5A405, 5A505 5A605, 5A705 as in force immediately before 22 March 2014 and cls 5A208, 5A308, 5A408, 5A508, 5A708 when read with relevant definitions of 'funds from an acceptable source' met by a money deposit. Considerations of that kind – clarity, certainty and legislative context – were given weight in *Aomatsu v MIMIA* (2005) 146 FCR 58, a judgment concerning instruments which specified 'occupations in demand' for certain skilled visas. *Aomatsu* also suggests that visa requirements should not be construed so as to impose unfair burdens upon visa applicants (at [54]).

[166] PAM3 GenGuide G – Student Visas – Visa application and related procedures > Student Visa Assessment > Assessing Genuineness > Genuine Student – Financial capacity > Evidentiary requirements > Living costs (student) (re-issue date 1/1/16).

[167] PAM3 GenGuide G – Student Visas – Visa application and related procedures > Student Visa Assessment > Assessing Genuineness > Genuine Student – Financial capacity > Evidentiary requirements > School costs for school age dependants > If not yet of school age (re-issue date 1/1/16).

The relevant period

The period over which a decision maker is required to determine an applicant's costs depends on the applicable assessment level, and the date the visa application was made. Generally, for onshore applications the period starts on the expected date of visa grant and ends at the date of the proposed period of stay *or* the end of the relevant period in the applicable Schedule 5A provision, whichever is the earlier.

- *For visa applications made on or after 5 November 2011 and before 22 March 2014*, the relevant period will be either the 'initial period', the 'first 12 months', the 'first 18 months',[168] the 'first 24 months',[169] or the 'full period'.
- *For visa applications made before 5 November 2011*, the relevant period will be either the 'initial period', the 'first 12 months', the 'first 24 months', or the 'first 36 months'.
- *For visa applications made on or after 22 March 2014*, the relevant period will be either the 'first 12 months' or the 'full period'.[170]

These terms are defined in cl 5A101 of Schedule 5A. For onshore cases, each period is specified to begin 'on the day that the student visa is expected to be granted to the applicant'. This means that a decision maker needs to calculate expenses from some future point in time. This may be relatively close to the time of the assessment, unless the circumstances of the case involve a particular factor that would involve delay in grant of the visa.

With the exception of the 'full period' and 'initial period', each period is stated to end on whichever is the earlier of either the relevant 12, 18, 24 or 36 months after the beginning of the period *or* the last day of the applicant's proposed stay in Australia. The 'full period' ends on the last day of the applicant's proposed period of stay in Australia and the 'initial period' ends on whichever is the earlier of either 12 months after the expected commencement of the principle course *or* the last day of the applicant's proposed stay in Australia.

If the ending date for calculation of expenses is based on 'the last day of the applicant's proposed stay in Australia' expenses should be calculated up to the date of expiry of the visa. It is Departmental policy that visas granted for courses of more than 10 months duration following a traditional academic year cease on 15 March in the year following course completion, that visas granted for courses of more than 10 months duration not following a traditional academic year cease 2 calendar months after the expected date of course completion, and that visas for courses of less than 10 months duration cease 1 calendar month after the expected date of course completion.[171]

Because of the lapse of time between the time of the primary decision and the time when a decision is made on review, it is important on review to take particular care when identifying the relevant period, and the funds needed, for the purposes of calculating costs. Indeed, decision-makers may face the situation where the beginning of the period is after the ending of the period. This occurs because in some cases the commencement date is tied to the visa

[168] SLI 2011, No 199.
[169] SLI 2011, No 199.
[170] SLI 2014, No 30.
[171] PAM3 GenGuide G – Student Visas – Visa application and related procedures > Granting student visas – Student visa grant – The student visa period (re-issue date 1/1/16).

grant and in others the end date is tied to the commencement of the course of study. The commencement of the course and the expected date of visa grant are close together for the departmental decision maker but they may be some time apart when the Tribunal is considering the matter. An example of this is where the period of assessment is the 'initial period' which may conclude 12 months after the expected commencement of the course of study. In this situation the Tribunal may determine that the period has ended and that the applicant does not have any costs in relation to course fees and living and school costs. The Tribunal would still need to consider the applicant's travel costs.

'Other requirements' of Schedule 5A

Schedule 5A identifies 'other requirements' which must be met by the applicant in order to establish that they are a 'genuine applicant for entry and stay as a student' as required by cls 57X.223(2) and 576.222(2). This is not to be confused with the Schedule 2 requirement for decision-makers to consider 'any other relevant matter' (see below). The Schedule 5A 'other requirements' are determined according to the relevant visa subclass and assessment level and may include, for example, evidence of prerequisite schooling, educational qualifications required by the education provider, the relevance of their studies, or specified age requirements. As with English language proficiency and financial capacity, an applicant's ability to meet applicable evidentiary 'other requirements' is an essential requirement for the grant of a student visa. Therefore, if any 'other requirement' is not met, the decision to refuse the visa must be affirmed.

Prior schooling

Items in Schedule 5A which require an applicant to have successfully completed schooling 'to' a certain level should be read as inclusive of the level specified.[172] For example, for Subclass 573 (Higher Education Sector), evidence that the applicant has successfully completed secondary schooling 'to the year 12 level (or its equivalent)'[173] would be evidence of successful completion of year 12 (or its equivalent). On this basis genuineness is demonstrated by a level of education suitable for the proposed course of study.

In assessing these requirements decision-makers may need to determine whether an applicant's previous schooling is 'equivalent' to a particular level in the Australian system of education. The legislation does not state how educational equivalence is to be determined, however, the Full Federal Court's decision in *Ou Yang v MIMIA*[174] may provide some guidance. The issue in that case was whether the applicant's proposed course of study was an inappropriate 'regression' having regard to his existing level of education, for the purposes of cl 571.223(2)(b)(c)'any other relevant matter'. In that context, Ryan and Finkelstein JJ stated that an acceptable comparison would require 'some examination of points at which [overseas education] could be regarded as equivalent to identified standards of educational progress in Australia' and that 'such an examination would refer at least to the number of years of formal education which had to be completed to arrive at comparable

[172] For example cls 5A403(1)(a), 5A406(1)(a), 5A503(a) and 5A506(a) as in force immediately before 22 March 2014 and cls 5A409(a), 5A509(a).
[173] cl 5A503(a) as in force immediately before 22 March 2014.
[174] *Ou Yang v MIMIA* (2003) 132 FCR 571.

benchmarks in the relevant system in each country'.[175] However, there may still be some difficulty for decision-makers in determining equivalency as there is little guidance on exactly what constitutes a 'comparable benchmark' and from where such information may be objectively obtained.

The Department's guidelines[176] instruct officers to refer to the 'Country Education Profiles' (CEPS) for guidance on the local equivalent of the required Australian qualification or level of education. However, it should be noted that this can only provide limited guidance because it is maintained by the Department of Education's Qualifications Recognition Policy Unit (QRPU) for equivalence against the AQF. The CEPs do give a brief description of secondary level schooling in some countries but do not offer any institutional specific assessment of equivalence to Australian schooling. There is no overarching organisation that assesses the equivalence of schooling generally, as QRPU does for tertiary qualifications. QPRU do not provide assessments of overseas schooling on a case by case basis, save some exceptions where schooling is undertaken at vocational institutions, such as is sometimes the case in China.

The Department's guidelines also state that 'under policy, a Certificate III awarded under the AQF is considered equivalent to Year 11 and a Certificate IV is considered equivalent to Year 12'.[177] However, it is doubtful whether Schedule 5A requirements concerning the completion of schooling to a particular level (or its equivalent) could be met by the completion of a Certificate III or IV course given that they refer to the completion of 'secondary schooling', as distinct from completion of or enrolment in a vocational education and training (VET) course, which is in some cases an alternative way of meeting the relevant Schedule 5A requirement[178] and in others an additional element of the requirement itself.[179]

TAFE and most universities conduct their own assessments of a student's schooling when determining whether bridging courses need to be undertaken to lift an applicant's schooling to the required level. As such, in the absence of any more specific legislative guidance, consideration may be given to asking the relevant education provider whether they regard the student's education to be equivalent to the required level.

Enrolment in a VET course

For Subclass 572 (VET) AL 3, 4 and 5 applicants, 'Other requirements' also include evidence that the applicant is enrolled in a VET course, or in a prerequisite to a VET course and is enrolled in, or has an offer of a place in, a VET course.[180] For AL 4, 'VET course' is defined to mean a VET diploma course, or a VET advanced diploma course, or 'a course of at least 1 year's duration that leads to the award of a qualification from the [AQF] at the Certificate IV level'.[181]

[175] *Ou Yang v MIMIA* (2003) 132 FCR 571 at [24].
[176] PAM3 – GenGuide G – Student Visas – Visa application & related procedures > Student Visa Assessment > Assessing Genuineness > Complex cases > Applicants studying at a lower level (re-issue date 1/1/16).
[177] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student Visa Assessment > Assessing Genuineness > Prerequisite schooling > Equivalencies to year 11 and 12.(re-issue date 1/1/16).
[178] For example see c 5A506 as in force immediately before 22 March 2014 and cl 5A509.
[179] For example see cls 5A403 and 5A406 as in force immediately before 22 March 2014 and cl 5A409.
[180] See cls 5A409(b), 5A406(1)(b), 5A403(1)(b) (as in force immediately before 22 March 2014) respectively.
[181] cl 5A406(2) as in force immediately before 22 March 2014.

Applicant's stated intention to comply with conditions and any other relevant matter

In assessing whether the applicant is a genuine applicant for entry and stay as a student, cls 57X.223(2) and 576.222(2) also requires decision-makers to have regard to the applicant's stated intention to comply with any conditions subject to which the visa is granted, and any other relevant matter.

Although the 'stated intention' element is awkwardly drafted, it would appear that any past history of non-compliance or periods of unlawfulness would be relevant, in that these considerations may affect whether the applicant's stated intention to comply is a genuine intention. In assessing this factor decision-makers should have regard to which (and the circumstances in which) conditions are attached to student visas.

It is for the decision-maker to determine whether there is 'any other relevant matter' that needs to be considered for the purposes of cls 57X.223 and 576.222. In *Randhawa v MIMAC*, the Federal Circuit Court confirmed that the term 'any other relevant matter' is not in any way circumscribed.[182]

The question before the Court in *Randhawa* was whether the Tribunal acted unreasonably when it had regard to the fact that the applicant had worked, but not studied, in the two years preceding the Tribunal's decision, during a period when the applicant did not hold a student visa. Judge Burchardt concluded that the applicant's failure to study, his explanations for it and the fact that he had driven a taxi between 2011 and 2013, were all capable of being a 'relevant matter' within the meaning of Regulations and that it was open to the Tribunal to have regard to these matters.[183]

Similarly, one of the issues considered by the Full Federal Court in *Ou Yang v MIMIA*[184] was whether 'regression' in a proposed course of study is a 'relevant consideration' for the purposes of 'other relevant matters'. In this case the applicant indicated in the visa application that he had attained a year 12 qualification at a middle school in China but he had applied to study years 10, 11 and 12 in Australia. While a majority of the Court ultimately found that the Tribunal erred in taking a 'purely arithmetical calculation' in assessing these matters, it did confirm that regression can be a relevant consideration, noting that 'a proposal to undertake a course of study from which an applicant is unlikely to derive an educational benefit leaves open the inference that an application for a visa could be made for a purpose unrelated to an applicant's academic advancement.'[185]

Departmental guidelines – applications made pre and post 5 November 2011

Prior to the introduction of the genuine temporary entrant criterion on 5 November 2011, the Department's guidelines stated that other matters that *could* be relevant in this context may include: the applicant's situation in their home country, the applicant's academic record, the applicant's links to Australia, the applicant's intention to remain in Australia, the applicant's use of fraudulent documents (other than in relation to evidence required under

[182] *Randhawa v MIMAC* [2013] FCCA 1207 at [37].
[183] *Randhawa v MIMAC* [2013] FCCA 1207 at [35], [37], [39].
[184] *Ou Yang v MIMIA* (2003) 132 FCR 571.
[185] *Ou Yang v MIMIA* (2003) 132 FCR 571 at [23], [28].

Schedule 5A), the applicant's intention to undertake a short course in Australia, and, for the Schools Sector, inappropriate study plans.[186] However, whether any particular factor is relevant will depend upon the circumstances. For example, the situation in the applicant's home country should be considered under the Schedule 2 'any other relevant matter' criterion only if the situation in that country is sufficient to indicate that the applicant's primary purpose in obtaining a student visa is not to study in Australia. Factors that may be considered include the political and/or economic situation in the home country that *may* be of a nature that would induce the applicant to apply for a Student visa as a means of obtaining entry to Australia for the purpose of applying for a permanent visa through the onshore humanitarian visa regime or for another purpose other than that of a genuine applicant for entry and stay as a student. However, if nothing in the applicant's home country gives rise to any concern, then the situation in that country is not a relevant 'other matter' and can therefore not be considered. The guidelines further indicated that 'any other relevant matter' would be used as a basis for visa refusal only in limited circumstances.[187]

The current guidelines indicate that a student's academic record may be relevant and, for Subclass 571 only, inappropriate study plans.[188] This very limited guidance reflects the introduction of the separate genuine temporary entrant criterion which involves consideration of the type of factors which may previously have been considered under this criterion. Decision makers should also bear in mind that the Courts have confirmed that the Department's guidelines on the interpretation and application of 'any other relevant matter' are not mandatory and do not contain all inclusive definitions.[189]

Access to funds

For visa applications made prior to 1 January 2010, there is no requirement for the applicant to demonstrate access to the relevant funds for the financial capacity requirements in Schedule 5A.[190]

For visa applications made on or after 1 January 2010, cls 57X.223(2) and 576.222(2) require the decision-maker to be satisfied that, while the applicant holds the visa, the applicant will have access to the funds demonstrated or declared in accordance with the requirements in Schedule 5A relating to the applicant's financial capacity.[191] While Schedule 5A requires the applicant to provide evidence and/or a declaration that they have sufficient funds to meet specified costs, for a specified period, this additional criterion requires the decision-maker to be satisfied that the applicant has genuine access to the funds demonstrated or declared before the visa can be granted.[192]

[186] See for example PAM3 GenGuide G – Student Visas – Visa application and related procedures >Student Visa Assessment > Assessing Genuineness > Schedule 2 'Other relevant matters' at [81.1] (15/08/2011 to 30/09/2011 stack).
[187] See for example PAM3 GenGuide G – Student Visas – Visa application and related procedures >Student Visa Assessment > Assessing Genuineness > Schedule 2 'Other relevant matters' at [80.3] (15/08/2011 to 30/09/2011 stack).
[188] PAM3 GenGuide G – Student Visas – Visa application and related procedures > Student Visa assessment > Assessing Genuineness > Genuine student - Schedule 2 'other relevant matters' factors (re-issue date 1/1/16).
[189] See *Randhawa v MIMAC* [2013] FCCA 1207 at [33], [35], [37],
[190] See for example *Ikram v MIBP* [2014] FCCA 201 at [26]–[27].
[191] cls 570.223(2)(c), 571.223(2)(a)(iii), 572.223(2)(a)(iii), 573.223(2)(a)(iii), 574.223(2)(a)(iii), 575.223(2)(c), 576.222(2)(c), inserted by SLI 2009, No 331. These provisions do not apply to applicants who are persons designated under reg 2.07AO, which was inserted SR 2004, No 269, with effect from 27 August 2004. For persons designated under reg 2.07AO generally, see fn 2.
[192] See the Explanatory Statement to SLI 2009, No 331.

Streamlined processing arrangements – alternative requirements to Schedule 5A

For applications made on or after 24 March 2012 applicants seeking to undertake study at university and who meet the definition of 'eligible higher degree student', 'eligible university exchange student' or 'eligible non-award student' are subject to streamlined processing arrangements, particularly in relation to the genuine student criterion. For applications made on or after 23 November 2014, applicants seeking to undertake an advanced diploma in a vocational education and training course who meet the definition of 'eligible vocational education and training student' are also subject to streamlined processing arrangements. Decision makers must still be satisfied that such persons meet the genuine temporary entrant criterion,[193] must still have regard to the applicant's stated intention to comply with any conditions subject to which the visa is granted, and any other relevant matter,[194] and must be satisfied the applicants have sufficient English language proficiency and financial capacity to undertake their proposed course of study. However, these applicants will generally not have to give evidence in accordance with Schedule 5A to demonstrate their English language proficiency and financial capacity, resulting in simplified evidentiary requirements.[195]

Defined terms

An '*eligible higher degree student*' is an applicant for a Subclass 573 or Subclass 574 visa where:

- the applicant is enrolled in a principal course of study for the award of a bachelor's degree or a master's degree by coursework, or for visa applications on or after 23 November 2014, an advanced diploma in the higher education sector (Subclass 573) or for the award of a master's degree by research or a doctoral degree (Subclass 574)
- the principal course of study is provided by an eligible education provider, and
- if the applicant proposes to undertake another course before, and for the purposes of, the principal course, the applicant is also enrolled in that course, and that course is provided by the eligible education provider or an educational business partner.[196] This requirement will be engaged where the course is a pre-requisite for the principal course.[197]

An '*eligible university exchange student*' or *'eligible non-award student'* is an applicant for a Subclass 575 visa where:

- the applicant is enrolled in a full-time course of study that is not leading to an award and is not an ELICOS, and

[193] See cls 572.223(1)(a), 573.223(1)(a), 574.223(1)(a), 575.223(1)(a).
[194] See cls 572.223(1A)(b), 573.223(1A)(b), 574.223(1A)(b), 575.223(1A)(b). See also *Randhawa v MIMAC* [2013] FCCA 1207. Although considered in the context of the second limb of the genuine student criterion, the Court confirmed that term 'any other relevant matter' is not in any way circumscribed and what constitutes a relevant matter will depend on the particular circumstances of the case.
[195] See cls 572.223(1A), 573.223(1A), 574.223(1A), 575.223(1A).
[196] See cls 573.111, 574.111. Clause 573.111 definition of 'eligible higher degree student' para (ia) inserted by SLI 2014, No 163 for applications made on or after 23 November 2014.
[197] *Shrestha v MIBP* [2016] FCCA 828 at [51].

- the course of study is provided by an eligible education provider and is part of a formal exchange program or a study abroad program.[198]

An '*eligible vocational education and training student*' (eligible VET student) is an applicant for a Subclass 572 visa where:

- the applicant is enrolled in a principal course of study for the award of an advanced diploma in the vocational education and training sector
- the principal course of study is provided by an eligible education provider, and
- if the applicant proposes to undertake another course before, and for the purposes of, the principal course, the applicant is also enrolled in that course, and that course is provided by the eligible education provider or an educational business partner.[199]

'*Eligible education provider*' and '*educational business partner*' are providers specified in an instrument made under cls 572.112, 573.112, 574.112 and 575.112 (see the 'EdProviders' tab in the Register of Instruments – Student Visas for applicable instrument).[200]

What is the relevant instrument?

'Eligible higher degree student', 'eligible university exchange student', 'eligible non-award student' and 'eligible VET student' are defined by reference to current enrolment.[201] At first glance it appears that time of application and time of decision criteria which rely on these definitions[202] must be considered with reference to the instrument specifying eligible education providers in force at the relevant time as reflected by the terms of the criterion. Taking this approach would mean, for example, for visa applications made on or after 22 March 2014, the relevant time of decision criterion that the applicant is *and was, at the time of application*, an eligible higher degree student/eligible non-award student[203] would require consideration of the instrument in force at time of application and the instrument in force at time of decision to determine whether the criterion was met and if a new instrument were made after the time of application, the decision maker would need to have regard to 2 different instruments.

However, based on the terms of the instruments that have been made to specify eligible education providers and eligible business partners for the relevant definitions, it appears the relevant instrument is not determined by the point in time relevant to the criterion. The most recent instrument specifying relevant organisations for the purposes of cls 572.112, 573.112, 574.112 and 575.112, IMMI 16/003, purports to revoke the previous instrument, but then proceeds to specify 'eligible education providers' and 'education business partners' only in relation to student visa applications made on or after a specific date. This has been the practice with instruments specifying education providers since IMMI 14/047 revoked the previous instrument IMMI 14/007 which specified education providers and business partners without any restriction to date of visa application, while IMMI 14/047 expressly specified education providers and business partners only for student visa applications made on or

[198] See cl 575.111 as in force immediately before 22 March 2014 for 'eligible university exchange student' and as amended to refer to 'eligible non-award student' by item 103, SLI 2014, No 30 for applications made on or after 22 March 2014.
[199] See cl 572.111, as amended by SLI 2014, No 163 for applications made on or after 23 November 2014.
[200] See cls 572.111, 572.112, 573.111, 573.112, 574.111, 574.112, 575.111, 575.112.
[201] See definitions at cls 572.111, 573.111, 574.111, 575.111.
[202] See cls 572.212, 573.212. 574.212, 575.212, 572.223, 573.223, 574.223, 575.223.
[203] cls 573.223(1A), 574.223(1A), 575.223(1A) as amended by SLI 2014, No 30.

after 1 July 2014. If the revocations of IMMI 14/007 and subsequent instruments specifying eligible education providers and business partners are taken at face value, there is no instrument specifying 'eligible education providers' and 'education business partners' for visa applications made before the date specified in the most recent instrument. This circumstance would effectively render the streamlined visa processing requirements for Subclasses 572, 573, 574 and 575 visas inoperable for visa applications made before the time specified in the most recent instrument, as no one could meet the relevant definitions in cls 572.112, 573.112, 574.112 and 575.112 in the absence of specification of eligible education providers.

In the absence of judicial consideration and applying principles of statutory interpretation that ambiguity in instruments and provisions may be interpreted so as to give them effect where possible, it appears open to interpret IMMI 14/047 and subsequent instruments specifying eligible education providers and business partners as only partially revoking the previous instrument. The effect of this interpretation is that, for post 22 March 2014 visa applications where the criterion requires that the applicant is *and was, at the time of application*, an eligible higher degree student / eligible non-award student or, for post 23 November 2014 visa applications, an eligible VET student,[204] enrolment with an eligible education provider is identified by reference to a *single* instrument for both points in time. Information on the applicable instrument is available under the 'EdProviders' tab in the Register of Instruments – Student Visas.

There are two things to note about the instrument IMMI 15/120. Firstly, there is a problem in relation to this instrument which should only affect a very specific group of visa applications. On its terms this instrument revokes the previous instrument IMMI 15/096 from its date of commencement, which is 15 August 2015, and specifies eligible education providers and educational business partners for student visa applications made on or after 17 August 2015. This has the effect that for student visa applications made on 15–16 August 2015 there are no eligible education providers or educational business partners specified and those applicants would not be able to meet the streamlined processing requirements. In the unlikely event that this may arise as an issue upon review, contact MRD Legal Services.

Secondly, there appears to be a drafting error in IMMI 15/120. In particular, as drafted, para 3 suggests that the education providers listed in 'Column 1 of Schedule B' are specified as educational business partners of themselves. This does not seem to make sense and leaves the list of 'Educational Business Partners' in Column 2 of Schedule B with no work to do. However, this can be regarded as a mere typographical error, and the 'slip rule' would apply so that the incorrect reference at para 3 to 'Column 1 of Schedule B' should be taken to be 'Column 2 of Schedule B'.

The streamlined procedures

Applicants meeting the definition of 'eligible VET student' for a Subclass 572 visa, 'eligible higher degree student' for a Subclass 573 or 574 visa or 'eligible university exchange

[204] cls 573.223(1A), 574.223(1A), 575.223(1A) as amended by SLI 2014, No 30 and cl 572.223(1A) as inserted by SLI 2014, No 163.

student' or 'eligible non-award student' for a Subclass 575 visa at the time of application, must have a CoE in each course of study for which they meet that definition.[205]

Applicants who at the time of decision meet one of the definitions, and have a CoE in each course for which they meet that definition, must simply:

- give the decision-maker evidence that they have a level of English language proficiency that satisfies the applicant's eligible education provider and the educational qualifications required by the eligible education provider
- satisfy the Minister that they are a genuine applicant for entry and stay as a student having regard to their stated intention to comply with any conditions subject to which the visa is granted and any other relevant matter, and
- satisfy the decision-maker that while they hold the visa, they will have sufficient funds to meet the costs and expenses required to support themselves and each member of their family unit (if any) during the proposed stay in Australia.[206]

For visa applications in relation to higher education and non-award visa subclasses made on or after 22 March 2014 and Subclass 572 visa applications made on or after 23 November 2014, the above simplified evidentiary requirements for English language proficiency and financial capacity are only available for applicants who meet one of the above definitions at time of application *and* time of decision.[207]

These simplified evidentiary requirements, set out in Schedule 2, are intended to be broadly commensurate with Assessment Level 1 requirements set out in Schedule 5A.[208]

PAM3 indicates that a CoE will meet the requirement for evidence of the relevant English language proficiency on the basis that it indicates that an applicant has the level of English and educational qualifications required by their proposed education provider.[209] However, this may depend on its content or on the availability of information about the practices of the provider in issuing confirmations of enrolment. PAM3 also indicates that generally a declaration on the part of the applicant may be regarded as sufficient to satisfy a decision maker that they meet the financial capacity requirement, however, decision makers have a discretion to request further information such as financial documents.[210]

Applicants who meet the definition of 'eligible higher degree student', 'eligible university exchange student', 'eligible non-award student' or 'eligible VET student' but do not have a CoE in each course for which they meet that definition must instead, and in common with applicants who do not meet the definition, meet the relevant Schedule 5A requirements.[211]

[205] See cls 572.212, 573.212, 574.212, 575.212.
[206] See cls 572.223(1A), 573.223(1A), 574.223(1A), 575.223(1A).
[207] cls 573.223(1A), 574.223(1A), 575.223(1A) as amended by SLI 2014, No 30 and cl 572.223(1A) as inserted by SLI 2014, No 163.
[208] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student Visa assessment > Student visa subclasses and assessment levels > Exemption from assessment level regime – Streamlined visa processing arrangements > Exempt from assessment level framework (re-issue date 1/1/16).
[209] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student Visa assessment > Assessing genuineness > Genuine student - Streamlined visa processing arrangements > English proficiency and pre-requisite schooling (re-issue date 1/1/16).
[210] PAM3 – GenGuide G – Student Visas – Visa application and related procedures > Student Visa assessment > Genuine student - Streamlined visa processing arrangements > Sufficient funds for support (re-issue date 1/1/16).
[211] See cls 572.223(1A)–(2), 573.223(1A)–(2), 574.223(1A)–(2), 575.223(1A)–(2). In practice it is unlikely that an applicant could meet the relevant definitions *without* having a CoE in each course for which they satisfy the definition, as enrolment in their course(s) is an element of the definition itself. It appears that the reference here to CoE is intended to address the

Where the applicant becomes an 'eligible higher degree student / exchange student' after the time of application

An applicant who was not an eligible higher degree or university exchange student at the time of application who subsequently becomes such a student by the time of decision is not precluded from satisfying the streamlined time of decision 'genuine student' criteria provided the visa application was made on or after 24 March 2012, but before 22 March 2014.

For these cases, there is no temporal connection between the relevant time of application and time of decision criterion, and as such an applicant would not necessarily be prevented from satisfying the relevant Schedule 2 criterion if, for example, they do not have evidence in accordance with cl 573.212.[212] In this respect, cl 573.212 would simply not apply as opposed to it not being satisfied. Provided an applicant was an eligible higher degree student at time of decision, and held a CoE in each course for which they were eligible, cl 573.231 would also not apply.[213]

Amendments to cls 573.223(1A), 574.223(1A) and 575.223(1A), applicable to visa applications made on or after 22 March 2014, require that the applicant is an eligible higher degree or non-award student at time of application *and* time of decision.[214] This means that an applicant subject to these provisions cannot access the streamlined 'genuine student' criterion by changing to or from a relevant course and/or course provider after the time of application.

There is no such issue for Subclass 572. Clause 572.223(1A) as introduced for visa applications made on or after 23 November 2014 requires that the applicant is an eligible VET student at time of application *and* time of decision.

The CoE requirements

Both the time of application and time of decision criteria relating to eligible higher degree, eligible university exchange/non-award and eligible VET students require applicants who meet the relevant definition to have a CoE in each course for which they meet the definition. However, in practice it is unlikely that an applicant could meet the definition *without* having a CoE in each relevant course, as enrolment in the relevant course(s) is an element of the definition itself.[215] Thus, although the applicant cannot meet the definition unless they are in fact enrolled in the relevant course(s), this requirement may serve as an evidentiary requirement and assist in establishing whether they do or do not meet the definition.

The time of decision CoE requirement appears to have been intended to address the situation where a person who was an eligible higher degree student has not maintained their enrolment in the relevant course(s). While the concept of an applicant who is an eligible

situation where a person who was an eligible higher degree student has not maintained their enrolment in the relevant course(s). The Explanatory Statement introducing these criteria states that one effect of the amendment is that 'if an applicant is an eligible [higher degree] student at time of application, but does not have a confirmation of enrolment for each course of study for which they are an eligible [higher degree] student at time of decision, the applicant is no longer considered to be an eligible [higher degree] student. In these circumstances, it is intended that the new cl 573.223(1A) would not apply to the applicant': Explanatory Statement to SLI 2012, No 35, sch 4 items 22, 33 and 44 and Explanatory Statement to SLI 2014, No 163, sch 4, item 8.

[212] See also cls 574.212, 575.212.

[213] See also cls 574.231, 575.231.

[214] SLI 2014, No 30.

[215] cls 572.212, 573.212, 574.212, 574.212, 575.212.

higher degree (or university exchange/non award or VET) student at time of application but does not have a CoE in each relevant course of study at time of decision appears to be somewhat confused, this is unlikely to have any practical consequences. This is because, on any view, if the applicant does not have the relevant CoE(s), they will not be able to benefit from the streamlined processing, whether because they are not an 'eligible higher degree student', 'eligible university exchange student', 'eligible non-award student' or 'eligible VET student' or because they do not have a CoE in each relevant course of study.[216]

Relevant case law

Judgment	Judgment summary
Ali v MIBP [2017] FCCA 2478	Summary
Aomatsu v MIMIA (2005) 146 FCR 58	Summary
Ashraf v MIBP [2017] FCCA 1861	Summary
Aziz v MICMSMA [2019] FCA 1397	
Bala v MIBP [2019] FCA 600	
Chava v MIMAC [2013] FCCA 1032	Summary
Fan Fan v MIAC [2009] FMCA 123	Summary
Husnain v MIBP [2016] FCCA 401	
Ikram v MIBP [2014] FCCA 201	Summary
Jan v MHA [2019] FCA 1837	
Kabir v MIAC [2010] FMCA 132	Summary
Kabir v MIAC [2010] FCA 1164	
MIAC v Khadgi [2010] FCAFC 145; (2010) 190 FCR 248	Summary
Kalia v MIBP [2015] FCCA 667	Summary
MIAC v Kamal [2009] FCAFC 98; (2009) 178 FCR 379	Summary
Kamal v MIAC [2009] FMCA 238	Summary
MIBP v Kaur [2014] FCA 1384; (2014) 227 FCR 548	Summary
Kaur v MIBP [2014] FCCA 1002	Summary
Khanna v MIBP [2015] FCCA 1971	Summary
MIBP v Khanna [2016] FCA 142	Summary
Kumar v MIBP [2020] FCAFC 16	Summary
Li v MIAC [2008] FMCA 941	Summary

[216] See cls 572.223(1A), (2), 573.223(1A), (2), 574.223(1A), (2), 575.223(1A), (2).

Liu v MIAC [2008] FMCA 750	Summary
Maestro v MIBP [2016] FCCA 1095	Summary
Mia v MIAC [2010] FMCA 630	
Mia v MIAC [2010] FCA 1312	
Nguyen v MIBP [2013] FCCA 1864	Summary
Ou Yang v MIMIA [2003] FCAFC 258; (2003) 132 FCR 571	Summary
Patel v MIAC [2011] FMCA 875	Summary
Patel v MIAC [2012] FCA 376	Summary
Patel v MIAC [2013] FCA 97; (2013) 211 FCR 35	Summary
Patel v MIBP [2019] FCCA 2436	
Patel v MICMSMA [2020] FCA 346	
Paudel v MIBP [2014] FCCA 665	Summary
Poudel v MIAC [2013] FMCA 11	Summary
Rana v MIAC [2009] FMCA 553	Summary
Randhawa v MIMAC [2013] FCCA 1207	Summary
Saini v MIBP [2015] FCCA 2379	Summary
Saini v MIBP [2016] FCA 858; (2016) 245 FCR 238	Summary
Saji v MIBP [2015] FCCA 1170	Summary
Sandhu v MIBP [2014] FCCA 1129	Summary
Sapkota v MIAC [2012] FMCA 77	Summary
Seneviratne v MIAC [2009] FMCA 907	Summary
Shah v MIAC [2009] FMCA 108	Summary
Sharma v MIBP [2015] FCCA 575	Summary
Shrestha v MIAC [2008] FCA 1296	
Shrestha v MIBP [2016] FCCA 828	Summary
Singh v MIAC [2010] FMCA 1006	Summary
Singh v MIAC [2013] FMCA 132	Summary
Singh v MIBP [2014] FCCA 2948	
Singh v MIBP [2015] FCCA 132	Summary
Singh v MIBP [2017] FCCA 1901	Summary

Singh v MIBP [2018] FCCA 3423	Summary
Steed v MIEA [1981] FCA 162	
Tandukar v MICMSMA [2019] FCCA 3510	Summary
Tandukar v MICMSMA [2020] FCA 1267	Summary
Tariwal v MIBP [2017] FCCA 991	Summary
Applicant WAEE v MIMIA [2003] FCAFC 184	Summary
Wang v MIAC [2009] FMCA 168	Summary
Wickramasinghe v MIBP [2016] FCA 593	
Zhu v MIBP [2014] FCCA 2701	Summary

Relevant legislative amendments

Title	Reference number
Tribunals Amalgamation Act 2015 (Cth)	No 60, 2015
Migration Legislation Amendment (2014 Measures No 2) Regulation 2014 (Cth)	SLI 2014, No 163
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32
Migration Legislation Amendment Regulation 2012 (No 1) (Cth)	SLI 2012, No 35
Migration Amendment Regulations 2011 (No 6) (Cth)	SLI 2011, No 199
Migration Amendment Regulations 2010 (No 2) (Cth)	SLI 2010, No 50
Migration Legislation Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 116
Migration Amendment Regulations 2009 (No 14) (Cth)	SLI 2009, No 331
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth)	No 144, 2008

Migration Amendment Regulations 2004 (No 6) (Cth)	SR 2004, No 269
Migration Amendment Regulations 2004 (No 3) (Cth)	SR 2004, No 131
Migration Amendment Regulations 2003 (No 9) (Cth)	SR 2003, No 296
Migration Amendment Regulations 2002 (No 1) (Cth)	SR 2002, No 10
Migration Amendment Regulations 2001 (No 5) (Cth)	SR 2001, No 162

Available decision templates

The following decision templates are available for use in matters dealing with cl 57x.223:

- **570 Student Visa Refusal – Assessment Level**
- **571 Student Visa Refusal – Assessment Level**
- **572 Student Visa Refusal – Assessment Level**
- **573 Student Visa Refusal – Assessment Level**
- **574 Student Visa Refusal – Assessment Level**
- **575 Student Visa Refusal – Assessment Level**

  These templates are for use in the review of decisions to refuse a Class TU Student visa where the issue in dispute is whether the applicant is a genuine student because they meet the Schedule 5A requirements and/or other matters, such as streamlined processing requirements where applicable, specified in cls 570.223, 571.223, 572.223, 573.223, 574.223 or 575.223. These templates are designed for six of the student visa subclasses, but are not suitable for AusAID/Foreign Affairs (Subclass 576)[217]; student guardians (Subclass 580) or persons designated under reg 2.07AO. The templates are suitable for visa applications lodged on or after 27 August 2004.

- **57X Student Refusal – Genuine Intention** – This template is intended for use in the review of a decision to refuse a Class TU (Subclass 570–576) Student visa where the issue in dispute is whether the applicant is a genuine student because they intend genuinely to stay in Australia temporarily (cls 570.223(1), 571.223(1), 572.223(1), 573.223(1), 574.223(1), 575.223(1), or 576.222(1)). The template is designed for use for all student visa subclasses but is not suitable for student guardians (Subclass 580) or persons designated under reg 2.07AO. It is suitable for visa applications lodged on or after 5 November 2011.

In cases where the refusal decision under review was based on the genuine student requirements but at the time of the Tribunal's decision the applicant is no longer the subject of any enrolment or offer of enrolment, the following template may also be relevant:

[217] AusAID references were amended to refer to 'Foreign Affairs' by SLI 2014, No 82, which repealed interim naming measures in reg 1.04AA and made relevant amendments to provisions to reflect the change in terminology. These amendments and the change in terminology apply to visa applications made on or after 1 July 2014 and visa applications not finally determined before that date.

- **57X Student Refusal – No Enrolment** – This template is intended for use in review of a decision to refuse a Class TU (Subclass 570–575) Student visa where the applicant has no current enrolment or offer of enrolment in a principal course of study, and so the Tribunal's decision is to affirm the refusal. It is suitable to be used in cases where the visa application was made on or after 1 January 2004.

Last updated/reviewed: 17 August 2022

Attachment A – Direction No 53

DIRECTION NO 53

Assessing the genuine temporary entrant criterion for Student visa applications

I, CHRIS BOWEN, Minister for Immigration and Citizenship give this Direction under section 499 of the Migration Act 1958.

Dated 3 November 2011

_____

Minister for Immigration and Citizenship

Note: Section 499(1) of the Act empowers the Minister to give to a person or body having functions or powers under the Act written directions not inconsistent with the Act or the Regulations, in accordance with which the person or body shall perform those functions and exercise those powers. The person or body must comply with the Direction.

Part 1 Preliminary

Name of Direction

This Direction is Direction No 53 - Assessing the genuine temporary entrant criterion for Student visa applications.

It may be cited as Direction No 53.

Commencement

This Direction commences on 5 November 2011.

Application

This Direction applies to delegates performing functions or exercising powers under section 65 of the *Migration Act 1958 (*"the Act") in relation to assessing the genuine temporary entrant criterion at Schedule 2 to the *Migration Regulations 1994* ("the Regulations") for Student visa applications.

This Direction also applies to members of the Migration Review Tribunal and the Administrative Appeals Tribunal who review the decisions of primary decision makers in relation to Student visa applications.

The genuine temporary entrant criterion must be satisfied by all applicants who make an application for a Class TU (Student) (Temporary) visa on or after 5 November 2011, except for applicants for permission to work (being persons who hold a Student visa subject to condition 8101 that was granted before 26 April 2008 and who have applied for a Student visa with permission to work) and secondary applicants for the Subclass 580 (Student Guardian) visa.

Preamble

The Australian Government operates a Student Visa Program that enables people who are not Australian citizens or Australian permanent residents to study in Australia. A person who wants to study under the Student Visa Program must obtain a Student visa before they can commence a course of study in Australia. Amongst other things, a successful applicant must be both a genuine temporary entrant and a genuine student.

An applicant who is a genuine temporary entrant will have circumstances that support a genuine intention to enter and remain in Australia temporarily, notwithstanding the potential for this intention to

change over time to an intention to utilise lawful means to remain in Australia for an extended period or permanently.

The genuine temporary entrant criterion for Student visa applications requires the Minister to be satisfied that the applicant intends genuinely to stay in Australia temporarily, having regard to:

(i) the applicant's circumstances; and

(ii) the applicant's immigration history; and

(iii) if the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant; and

(iv) any other relevant matter

This Direction provides guidance to decision makers on the factors that should be considered in weighing up: the applicant's circumstances; the applicant's immigration history, the intentions of a parent, legal guardian or spouse of a minor applicant, and any other relevant matter to determine whether the applicant genuinely intends to stay in Australia temporarily. This Direction is binding on all decision makers.

Decision makers must take a balanced approach between the need to make a timely decision on a Student visa application and the need to identify those applicants who, at time of decision, do not genuinely intend to stay in Australia temporarily.

Interpretation

Act means the *Migration Act 1958*.

Genuine temporary entrant means a person who satisfies the genuine temporary entrant criterion for Student visa applications.

Genuine temporary entrant criterion refers to clause 570.223(1)(a), 571.223(1)(a), 572.223(1)(a), 573.223(1)(a), 574.223(1)(a), 575.223(1)(a), 576.222(1)(a), 580.226(1)(a), 570.326(aa), 571.326(aa), 572.326(aa), 573.326(aa), 574.326(aa), 575.326(aa) or 576.325A at Schedule 2 to the Regulations.

Home country has the same meaning as the definition of that term in regulation 1.03 in Part 1 of the Regulations.

Regulations mean the Migration Regulations 1994.

Relative has the same meaning as the definition of that term in regulation 1.03 in Part 1 of the Regulations.

Spouse has the same meaning as the definition of the term in section 5F of the Act.

Student visa means a Student (Temporary) Class TU visa.

Part 2 Directions

ASSESSING THE GENUINE TEMPORARY ENTRANT CRITERION

1. Decision makers should not use the factors specified in this Direction as a checklist. Rather, they are intended to guide decision makers to weigh up the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the genuine temporary entrant criterion.
2. Decision makers should assess whether or not, on balance, the genuine temporary entrant criterion is satisfied, by:
   a. considering the applicant against all factors specified in this Direction; and
   b. taking into account any other relevant information provided by the applicant (or information otherwise available to the decision maker).

3. Decision makers may request additional information and/or further evidence from the applicant to demonstrate that they are a genuine temporary entrant, where closer scrutiny of the applicant's circumstances is considered appropriate.
4. Circumstances where further scrutiny may be appropriate include but are not limited to:
    a. Information in statistical, intelligence and analysis reports on migration fraud and immigration compliance compiled by the department indicates the need for further scrutiny.
    b. The applicant or a relative of the applicant has an immigration history of concern.
    c. The applicant intends to study in a field unrelated to their previous studies or employment.
    d. Apparent inconsistencies in information provided by the applicant in their Student visa application.
5. An application for a Student visa must be refused if, after weighing up the applicant's circumstances, immigration history and any other relevant matter, the decision maker is not satisfied that the applicant genuinely intends a temporary stay in Australia.

THE APPLICANT'S CIRCUMSTANCES

6. Decision makers must have regard to the applicant's circumstances in their home country and the applicant's potential circumstances in Australia.
7. For primary applicants of subclass 570, 571, 572, 573, 574, 575 and 576 Student visas, decision makers must also have regard to the value of the course to the applicant's future.
8. Weight should be placed on an applicant's circumstances that indicate that the Student visa is intended primarily for maintaining residence in Australia.

The applicant's circumstances in their home country

9. In considering the applicant's circumstances in their home country, decision makers must have regard to the following factors:
    a. Whether the applicant has sound reasons for not undertaking the study in the home country or region if a similar course is already available there. Decision makers should allow for any reasonable motives as established by the applicant.
    b. The extent of the applicant's personal ties to their home country (for example family, community and employment) and whether they would serve as a significant incentive to return to their home country.
    c. Economic circumstances of the applicant that would present as a significant incentive for the applicant not to return to their home country. This may include consideration of the applicant's circumstances relative to the home country and to Australia.
    d. Military service commitments that would present as a significant incentive for the applicant not to return to their home country.
    e. Political and civil unrest in the applicant's home country. This includes situations of a nature that may induce the applicant to apply for a Student visa as means of obtaining entry to Australia for the purpose of remaining indefinitely. Decision makers should be aware of the changing circumstances in the applicant's home country and the influence these may have on an applicant's motivations for applying for a Student visa.
10. Decision makers may have regard to the applicant's circumstances in their home country relative to the circumstances of others in that country.

The applicant's potential circumstances in Australia

11. In considering the applicant's potential circumstances in Australia, decision makers must have regard to the following factors:

a. The applicant's ties with Australia which would present as a strong incentive to remain in Australia. This may include family and community ties.

b. Evidence that the Student visa program is being used to circumvent the intentions of the migration program.

c. Whether the Student visa is being used to maintain ongoing residence.

d. Whether the primary and secondary applicant(s) have entered into a relationship of concern for Student visa purposes. Where it has been determined that an applicant and dependant have contrived their relationship for Student visa purposes, the decision maker can find that both applicants do not satisfy the genuine temporary entrant criterion.

e. The applicant's knowledge of living in Australia and their intended course of study and the associated education provider; including previous study and qualifications, what is a realistic level of knowledge an applicant could be expected to know and the level of research the applicant has undertaken into their proposed course of study and living arrangements.

Value of the course to the applicant's future

12. Decision makers must have regard to the following factors in considering the value of the course to the applicant's future:

a. Whether the student is seeking to undertake a course that is consistent with their current level of education and whether the course will assist the applicant to obtain employment or improve employment prospects in their home country. Decision makers should allow for reasonable changes to career or study pathways.

b. Relevance of the course to the student's past or proposed future employment either in their home country or a third country.

c. Remuneration the applicant could expect to receive in the home country or a third country, compared with Australia, using the qualifications to be gained from the proposed course of study.

THE APPLICANT'S IMMIGRATION HISTORY

13. An applicant's immigration history refers both to their visa and travel history.

14. In considering the applicant's immigration history, decision makers must have regard to the following factors:

a. Previous visa applications for Australia or other countries, including:

i. if the applicant previously applied for an Australian temporary or permanent visa, whether those visa applications are yet to be finally determined (within the meaning of subsection 5(9) of the Act), were granted, or grounds on which they were refused.

ii. if the applicant has previously applied for visas to other countries, whether they were refused a visa and the circumstances that led to visa refusal.

b. Previous travels to Australia or other countries, including:

i. if the applicant previously travelled to Australia, whether they complied with the conditions of their visa and left before their visa ceased, and if not, were there circumstances beyond their control.

ii. whether the applicant previously held a visa that was cancelled or considered for cancellation, and the associated circumstances.

iii. the amount of time the applicant has spent in Australia and whether the Student visa may be used primarily for maintaining ongoing residence, including whether the

applicant has undertaken a series of short, inexpensive courses, or has been onshore for some time without successfully completing a qualification.

iv. if the applicant has travelled to countries other than Australia, whether they complied with the immigration laws of that country and the circumstances around any non-compliance.

IF THE APPLICANT IS A MINOR — THE INTENTIONS OF A PARENT, LEGAL GUARDIAN OR SPOUSE OF THE APPLICANT

15. If the primary or secondary applicant for a subclass 570, 571, 572, 573, 574, 575 or 576 visa is a minor, decision makers must have regard to the intentions of a parent, legal guardian or spouse of the applicant.

ANY OTHER RELEVANT MATTERS

16. Decision makers must also have regard to any other relevant information provided by the applicant (or information otherwise available to the decision maker) when assessing the applicant's intention to temporarily stay in Australia. This includes information that may be either beneficial or unfavourable to the applicant.

Attachment B – Practical guide to determining assessment levels and Schedule 5A criteria

Practical guide to determining assessment levels and Schedule 5A criteria

This guide is designed to assist in determining assessment levels and Schedule 5A criteria applicable to student visa applications, as relevant to the 'genuine student' criteria (cl 57X.223). It assumes the applicant is **not** an eligible vocational education and training student / eligible higher degree student / eligible university exchange student or eligible non-award student.

Step 1 – Identify Relevant Subclass

Identify applicant's 'principal course' at time of decision (reg 1.40)

Check this course against 'Courses' instrument (reg 1.40A) in force at time of application

= *relevant subclass*

Step 2 – Identify Assessment Level

Confirm applicant is not an 'eligible vocational education and training student', 'eligible higher degree student', 'eligible university exchange student' or 'eligible non-award student'

Identify applicant's passport at time of decision

Identify subclass(es) for proposed course(s) of study:

- If applicant is proposing a single course: subclass for that course (from Step 1)
- If applicant is packaging multiple courses:
  - If visa application made before 27 March 2010 – subclass for principal course (from Step 1)
  - If visa application made on/after 27 March 2010 – subclasses for all proposed courses in package excluding any ELICOS course

Check passport and subclass(es) against 'Assessment Levels' instrument (reg 1.41) in force at time of application.

Assessment level =

- If single course: assessment level for that course
- If applicant is packaging multiple courses:
  - If visa application made before 27 March 2010: Assessment level for subclass for principal course
  - If visa application made on/after 27 March 2010: highest assessment for those courses, excluding any ELICOS course

Step 3 – Identify Schedule 5A requirements

Identify Part of Sch 5A that matches the *relevant subclass* (step 1)

In that Part identify the division that matches the applicable *Assessment Level* (step 2)

Step 1: identify relevant subclass

Summary of steps

1.1 Identify the principal course at time of decision, according to the definition in reg 1.40. This will depend on the applicant's offer of enrolment or actual enrolment and, where a package of multiple courses is proposed, which courses are pre-requisites or must be completed before the others. For further guidance in determining the principal course, see the Courses and Enrolment Commentary.

1.2 Once the principal course is established, check this course against the instrument made under reg 1.40A in force at the time of application to determine the relevant subclass – see 'Courses' tab in Register of Instruments – Student visas.

Examples

Miss A applied for the visa on 1 February 2010. At that time she was enrolled in a Certificate IV in Business, but currently she is enrolled in an Advanced Diploma of Business (Hospitality Management). The principal course is the Advanced Diploma. The instrument in force on 1 February 2010 was IMMI 05/055. In that instrument an Advanced Diploma is listed under Subclass 572 – that is the relevant subclass.

Mr B applied for the visa on 3 May 2011. He is currently enrolled in an Advanced Diploma of Engineering and has an offer of enrolment for a Bachelor of Engineering. The offer letter for the Bachelor degree indicates that completion of the Diploma is a pre-requisite for that course. Having regard to the definition of 'principal course' in reg 1.40, the Bachelor degree is the principal course. The instrument in force on 3 May 2011 was IMMI 10/069. In that instrument a Bachelor degree is listed under Subclass 573 – that is the relevant subclass.

Step 2: identify assessment level

Summary of steps

2.1 Identify the country of the applicant's passport, held at time of decision.

2.2 Identify the subclass(es) for the applicant's proposed course(s) of study. If the applicant is proposing to undertake a single course only, this will be covered by Step 1. If the applicant is proposing to undertake a package of courses, then:

- If the visa application was made before 27 March 2010, identify the subclass of the principal course (Step 1).
- If the visa application was made on or after 27 March 2010, identify the subclasses of all proposed courses (excluding any ELICOS courses).
- If the visa application was made on or after 24 March 2012, confirm the applicant is not an 'eligible higher degree student' (Subclass 573–574) or 'eligible university exchange student' or 'eligible non-award student' (Subclass 575) who is subject to streamlined procedures rather than Schedule 5A.
- If the visa application was made on or after 23 November 2014, confirm the applicant is not an 'eligible vocational education and training student' (Subclass 572) subject to streamlined procedures rather than Schedule 5A.

2.3 Check applicant's passport and subclass(es) of courses against the instrument made under reg 1.41 in force at the time of application – see 'Assmt Level' tab in the Register of Instruments – Student visas.

2.4 If the applicant is undertaking one course, the assessment level for the subclass corresponding to that course will apply. If the applicant is undertaking a package of courses, then:

- If the visa application was made before 27 March 2010, the assessment level for the subclass of the principal course will apply.
- If the visa application was made on or after 27 March 2010, the highest assessment level of any subclass and course (excluding ELICOS courses) will apply (see definition of 'highest assessment level' in reg 1.03).

Examples

Mrs C applied for the visa on 1 February 2010. She currently holds an Indian passport. At the time of application and time of decision she was enrolled in a Certificate IV in Hospitality. Following the steps in 'Step 1', the relevant subclass is 572. The instrument in force on 1 February 2010 for determining assessment levels was IMMI 08/051. It specifies that for Subclass 572 a person holding an Indian passport is subject to Assessment Level 4.

Mr D applied for the visa on 3 May 2011. He currently holds a Chinese passport. At the time of application he was enrolled in a Certificate IV in Information Technology, but now he is enrolled in an Advanced Diploma of Engineering and a Bachelor of Engineering. The certificate of enrolment for the Bachelor degree indicates completion of the Advanced Diploma is a prerequisite for that course. Having regard to his current enrolment, the principal course is the Bachelor degree and the relevant subclass is 573 (Step 1). The subclass for the Advanced Diploma is 572 (Step 2.2). The instrument in force on 3 May 2011 for determining assessment levels was IMMI 11/011. It specifies that for Subclass 573, a person holding a Chinese passport is subject to Assessment Level 3, and for Subclass 572 a person holding a Chinese passport is subject to Assessment Level 4. The highest assessment level (Assessment Level 4) will apply.

Mr E applied for the visa on 2 April 2014. He currently holds a Fijian passport. At the time of application Mr E was enrolled in a Diploma of Business with an education provider that was not a business partner with a university. He is currently enrolled in a Bachelor of Commerce at Bond University. Having regard to his current enrolment, the principal course is the Bachelor degree and the relevant subclass is 573 (Step 1). The applicant does not meet all the requirements for streamlined processing as an 'eligible higher degree student' and so must be assessed against Schedule 5A. The instrument in force on 2 April 2014 for determining assessment levels was IMMI 14/003. It specifies that for Subclass 573 a person holding a Fijian passport is subject to Assessment Level 3.

Step 3 – Identify schedule 5A requirements

Summary of steps

3.1 Identify the Part of Schedule 5A which matches the applicant's subclass identified in Step 1.

3.2 In that Part, find the Division which matches the assessment level identified in Step 2.

Examples

In the example above, Mr D's principal course is the Bachelor degree, and the relevant Subclass 573. His highest assessment level is assessment level 4 (that for the Subclass 572 course). The applicable part of Schedule 5A is therefore Part 5 (Subclass 573), Division 2 (AL4).

Mr G applied for the visa on 5 April 2011 and is enrolled in a Bachelor of Science. The relevant subclass is 573 (step 1). As the holder of an Egyptian passport the relevant assessment level is Assessment Level 3 (step 2). At the time of decision Mr G must meet the requirements in Part 5 (Subclass 573) Division 3 (AL3) of Schedule 5A.

Mr K applied for a visa on 1 March 2013 and holds an Indonesian passport. He is currently enrolled in an ELICOS course (English for Academic Purposes) and an Advanced Diploma of Accounting as a package of courses. The relevant subclass is 572 (Step 1) and the relevant assessment level is Assessment Level 2 (Step 2.2). At the time of decision Mr K must meet the requirements in Part 4 (Subclass 572) Division 4 (AL2) of Schedule 5A.

STUDENT VISAS – OVERVIEW

Introduction[1]

The student visa program contains one visa class, Class TU (Student). For visa applications made on or after 1 July 2016, this class consists of two subclasses: a student visa and a student guardian visa.[2] For visa applications made before 1 July 2016, this class is comprised of seven subclasses relating to different education sectors or levels of study and a student guardian subclass.

Visa applications can be made onshore or offshore. Most students will make their first application for a student visa outside Australia, although certain applicants can make their first student visa application onshore. Subsequent student visa applications are generally made onshore by all applicants.

In general terms, all primary applicants for student visas must demonstrate that they are genuine applicants for entry and stay as students, meet enrolment requirements, and provide evidence relating to financial capacity and English proficiency.

Once granted, student visas are subject to a range of conditions. Breach of a condition may expose the holder to cancellation of the visa pursuant to s 116 of the *Migration Act 1958* (Cth) (the Act) and exclusion from the grant of a further student visa for a three year period.[3] Cancellation on this basis is discretionary.[4] The applicable conditions are explored in more detail below, and in separate MRD Legal Services commentary pages.

Student Visa Applications made on or after 1 July 2016

For student visa applications made on or after 1 July 2016, item 1222(4) of Schedule 1 to the *Migration Regulations 1994* (Cth) (the Regulations) contains the following subclasses of the Class TU student visa:

- Subclass 500 (Student)
- Subclass 590 (Student Guardian)

Subclass 500 – Student

The Subclass 500 (Student) visa replaced the seven previous student visa subclasses and made criteria common to all applicants.[5] It contains a range of primary criteria which need to be satisfied at the time of decision, including that the applicant:

- is enrolled in a course of study;[6]
- is a genuine applicant for entry and stay as a student;[7]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (F2016L00523).
[3] PIC 4013 in sch 4 to the Regulations, which must be satisfied by student visa applicants, excludes certain persons from obtaining a further visa for a certain period unless there are compelling or compassionate circumstances. See the Public Interest Criterion 4013 commentary.
[4] For more detailed information on the scope and operation of cancellation under s 116 see the Visa Cancellation under s 116 and Student Visa Cancellation under s 116 commentaries.
[5] *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (F2016L00523).
[6] or satisfies particular criteria relating to postgraduate thesis marking applicants, Foreign Affairs students, and Defence students: cl 500.211.

- if required to do so, gives evidence that he or she meets specified English language proficiency requirements;[8]
- has genuine access to sufficient funds and, if required to do so, provides specified evidence of financial capacity;[9]
- gives evidence of adequate arrangements for health insurance in Australia;[10]
- if they are a school student (other than a school student participating in a secondary school student exchange program): is at least 6 years old at the time of application and meets secondary school age requirements where relevant;[11]
- satisfies applicable public interest criteria;[12] and
- satisfies special return criteria 5001, 5002 and 5010.[13]

For detailed discussion on the enrolment, genuine student, English proficiency and financial requirements for Subclass 500, see the Subclass 500 commentary.

Subclass 590 – Student Guardian

Subclass 590 is for applicants who are guardians of a student visa holder, generally those who have not turned 18. It replaced repealed Subclass 580.[14] An applicant for a Subclass 590 visa is nominated by the holder of a student visa.[15] There are a range of primary criteria that need to be satisfied at the time of decision. These include, in general terms, that the applicant is a parent, person with custody, or relative over 21 of the nominating student, who can provide for his or her general welfare, and appropriate accommodation and support. However, if the nominating student is over 18, there must be exceptional reasons why he or she needs the applicant to reside with him or her. Alternatively, the visa grant must significantly benefit the relationship between the government of Australia and the government of a foreign country.[16]

The applicant must also:

- have a genuine intention to reside in Australia with the nominating student, and the nominating student must have a genuine intention to reside in Australia with the applicant, not any other student guardian visa holder, parent, or person with custody;[17]

[7] he or she intends genuinely to stay in Australia temporarily, to comply with conditions, and any other matter: cl 500.212.
[8] specified in an instrument: cl 500.213.
[9] specified in an instrument: cl 500.214.
[10] cl 500.215.
[11] less than 17/18/19/20 years old to undertake year 9/10/11/12 respectively if the applicant is a school student, other than a secondary exchange student: cl 500.216.
[12] PIC 4001, 4002, 4003, 4004, 4010, 4013, 4014, 4020 and 4021 for all applicants; PIC 4012A, 4017 and 4018 for an applicant who has not turned 18; PIC 4019 if the applicant had turned 18 at the time of application; PIC 4005 if they are not a Foreign Affairs student or a Defence Student, PIC 4007 if they are a Foreign Affairs student or a Defence Student, and PIC 4003B if the visa application is made on or after 1 July 2022 and the applicant is undertaking a postgraduate research course: cl 500.217.
[13] cl 500.218.
[14] *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (F2016L00523).
[15] cl 590.111.
[16] cl 590.211.
[17] cl 590.212. The latter requirement does not apply where the applicant meets cl 590.211(4).

- establish compelling and compassionate reasons for the grant of the visa if any member of the applicant's family unit have not turned 6;[18]
- have made appropriate arrangements for the accommodation, support, and general welfare of each family member under 18 years old without a student visa;[19]
- be a genuine applicant for entry and stay as a student guardian having regard to a number of factors;[20]
- have genuine access to sufficient funds available to meet the costs and expenses of the applicant, each family member who will be in Australia, and in most cases, each nominating student. In addition, the applicant must give evidence of financial capacity that satisfies the requirements specified in the relevant instrument;[21]
- give evidence of adequate arrangements for health insurance in Australia;[22] and
- satisfy public interest criteria[23] and special return criteria.[24]

Student Visa Applications made before 1 July 2016

For student visa applications made before 1 July 2016, item 1222(4) of Schedule 1 to the Regulations contains the following subclasses of the Class TU student visa:

- 570 – Independent ELICOS (English Language Intensive Courses for Overseas Students) Sector
- 571 – Schools Sector
- 572 – Vocational Education and Training Sector
- 573 – Higher Education Sector
- 574 – Postgraduate Research Sector
- 575 – Non-Award Sector
- 576 – Foreign Affairs or Defence Sector[25]
- 580 – Student Guardian

Unlike subclasses 500 and 590, subclasses 570–576 and 580 contain time of application criteria for applicants in Australia. To make an application inside Australia, applicants must hold a substantive visa of a class specified in cl 57X.211 or cl 580.211, which includes student visas. Applicants who do not hold a substantive visa must meet additional requirements, one of which is that the last substantive visa was of a class specified and the application was made within 28 days[26] after the day that last substantive visa ceased or, if cancelled, after the day the cancellation was set aside or revoked.[27] In addition, these

[18] With an exception for an applicant who meets cl 590.211(4): cl 590.213.
[19] cl 590.214.
[20] cl 590.215.
[21] cl 590.216. See the 'financial' tab in the Register of Instruments: student visas.
[22] cl 590.217.
[23] 4001, 4002, 4003, 4004, 4005, 4010, 4013, 4014, 4019, 4020 and 4021: cl 590:218.
[24] 5001, 5002 and 5010: cl 590.219.
[25] See the Subclasses 570–576: Various Issues commentary for discussion in relation to this subclass.
[26] Or within a period specified in a legislative instrument made by the Minister.
[27] cls 57x.211(3), 580.211(3).

applicants must satisfy criterion 3005 in Schedule 3 to the Regulations, which requires that a visa has not previously been granted on the basis of the satisfaction of Schedule 3.[28] For further information on the 28 day requirement see the Subclasses 570–576: Various Issues commentary.

Certain applicants applying in Australia must also meet cl 57x.227 or cl 580.227.[29] This prevents an applicant entering Australia on a temporary visa other than a student visa and then obtaining a Class TU visa in Australia unless he or she establishes exceptional reasons for the grant of the visa. For further information on the 'exceptional reasons' requirement see the Subclasses 570–576: Various Issues commentary.

Subclasses 570–576

Registered Course of Study, Subclass, and Assessment Level

Most applicants are required to be enrolled or offered a place in a full-time registered course of study in order to lodge a valid student visa application and to satisfy the time of decision visa criteria.[30] For further information about enrolment in a full-time registered course of study see the Subclasses 570–576: Courses and Enrolment commentary.

The subclass an applicant can be granted depends on the education sector, that is, the level of education of the registered course. For instance, an applicant enrolled in high school can be granted a Subclass 571 (Schools Sector) visa, while an applicant enrolled in a bachelor degree can be granted a Subclass 573 (Higher Education Sector) visa. The criteria the applicant will need to satisfy for each of these subclasses will depend on the determined level of risk that he or she will not be a genuine student and/or will not comply with visa conditions. Unless eligible for streamlined processing arrangements, applicants are generally assigned an 'assessment level' based on nationality, qualification or type of course, and perceived risk of visa breach[31] which are set out in an instrument in writing (see Register of Instruments: Student Visas).

Genuine Student

Primary applicants must demonstrate at the time of decision that they are 'genuine applicants for entry and stay as a student'.[32] There are two limbs to this criterion. First, the decision-maker must be satisfied that the applicant intends genuinely to stay in Australia temporarily, having regard to factors set out in a Ministerial direction and other relevant matters.[33] The second limb requires the applicant to provide evidence that he or she has the minimum level of English language proficiency and financial capacity required to undertake the proposed course or courses of study, as well as any additional requirements, such as

[28] cls 57x.211(3)(d), 580.211(3)(d).
[29] Except Subclass 576 (AusAID or Defence Sector).
[30] The exceptions to these requirements are for Foreign Affairs/Defence (Subclass 576 Foreign Affairs or Defence Sector) and secondary school exchange within Subclass 571 Schools Sector.
[31] For visa applications made on or after 24 March 2012 certain applicants seeking to study higher education courses at specified institutions, bachelor or post-graduate degrees or a non-award course on a formal exchange or study abroad program will not be assigned an assessment level. Also, for visa applications made on or after 23 November 2014, certain applicants seeking to undertake vocational education and training sector courses at specified education providers, meeting the definition of 'eligible vocational education and training student' will not be assigned an assessment level.
[32] cls 57X.223, or 576.222 for Subclass 576.
[33] cls 57X.223(1) or (1A). This only applies to visa applications made on or after 5 November 2011.

relevant educational qualifications. In most cases, applicants must provide evidence in accordance with Schedule 5A to the Regulations.[34] For further information about the genuine student requirements and Schedule 5A see the Subclasses 570–576: Genuine Student – Relevant Assessment Levels and Schedule 5A Criteria commentary.

Subclass 580 – Student Guardian

The time of decision criteria are substantially the same as those listed above for Subclass 590 visas. These include the applicant's relationship to the nominating student,[35] the provision of appropriate accommodation and support for the student,[36] and adequate funds to cover such things as living and travel costs.[37] The applicant must also be a genuine applicant for entry and stay as a student guardian.[38]

Conditions Attached to Student Visas

Conditions imposed on a student visa depend on the visa subclass and assessment level, and may be mandatory[39] or discretionary.[40] They may also differ between the primary visa holder and his or her dependants. In some cases, visa holders can apply to change a condition, for instance, 'no work' to allow limited work rights in Australia.

The full list of conditions is found in Schedule 8 to the Regulations. The most commonly imposed conditions are:

- **8104** – must not engage in work for more than a specified period (usually 40 hours per fortnight);
- **8105** – must not engage in work for more than a specified period (usually 40 hours per fortnight) while the holder's course of study or training is in session, except for work that was specified as a requirement of the course when the course particulars were entered into the Commonwealth Register of Institutions and Course for Overseas Students (CRICOS).
- **8202** *(visa application made on or after 1 July 2016)*
  - must be enrolled in a registered course; and
  - must maintain enrolment in a registered course that, once completed, will provide a qualification from the Australian Qualifications Framework that is at the same level as, or at a higher level than, the registered course in relation to which the visa was granted;[41] and
  - neither of the following apply:

[34] Those applicants who are not assigned an assessment level, like applicants eligible for streamlined processing arrangements, will, in most cases, have to satisfy criteria going to these matters set out in the relevant Part of sch 2 to the Regulations.
[35] cls 580.222(2)–(3). That is, the parent, person with custody, or relative over 21 of the nominating student. For relatives over 21 the nomination must be supported in writing by the parent or person with custody of the nominating student.
[36] cl 580.222(2)–(3).
[37] cl 580.226. In this respect, the assessment level consideration relates to the nominating student rather than the applicant.
[38] cl 580.223, 580.226.
[39] s 41(1); reg 2.05(1).
[40] s 41(3); reg 2.05(2).
[41] cl 8202(3) allows a holder to change their enrolment from Australian Qualifications Framework level 10 to level 9.

(i) the education provider has certified that the holder has not achieved satisfactory course progress in accordance with s 19 of the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act) and the relevant standard of the National Code;[42] and

(ii) the education provider has certified that the holder has not achieved satisfactory course attendance in accordance with s 19 of the ESOS Act and the relevant standard of the National Code.[43]

- **8202** *(on or after 1 July 2007, but before 1 July 2016)*
  - must be enrolled in a registered course; and
  - neither of the following apply:

    (i) the education provider has certified that the holder has not achieved satisfactory course progress in accordance with s 19 of the ESOS Act and Standard 10 of *National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007* (the National Code); and

    (ii) the education provider has certified that the holder has not achieved satisfactory course attendance in accordance with s 19 of the ESOS Act and Standard 11 of the National Code 2007.
- **8208** *(visa application made on or after 1 July 2022)*
  - holder must not undertake critical technology related study[44] unless:
    - the Minister is satisfied that there is not an unreasonable risk of an unwanted transfer of critical technology[45] by the holder; and
    - the Minister has approved in writing the holder undertaking that critical technology related study.[46]
- **8516** – holder must continue to be a person who would satisfy the primary or secondary criteria, as the case requires, for the grant of the visa.

See the Visa Conditions 8104, 8105, Visa Condition 8202 and Student Visa Cancellations under s 116 commentaries for further information about these conditions.

Other commonly imposed conditions are **8501**,[47] **8506**,[48] **8517**[49] and **8533**.[50]

[42] See Standard 8 of the *National Code of Practice for Providers of Education and Training to Overseas Students 2018* (the National Code).
[43] See Standard 8 of the 2018 National Code.
[44] 'Critical technology related study' is a postgraduate research course that relates to critical technology (as defined in reg 1.03); or a bridging course required as a prerequisite to a postgraduate research course that relates to critical technology; or a thesis or research topic that is for a postgraduate research course and relates to critical technology: cl 8208(3). A 'postgraduate research course' is a course of study leading to the award of a masters degree (research) or a doctoral degree: cl 500.111.
[45] 'Unwanted transfer of critical technology' is any direct or indirect transfer of critical technology or communication of information about critical technology that would have one of the effects set out in reg 1.15Q(1)(c)-(): regs 1.03 and 1.15Q(1).
[46] This condition does not apply to the intended course of study or activities related to study in Australia evidenced in the holder's visa application: cl 8208(2). 'Critical technology' is technology of a kind specified by the Minister in an instrument in writing under reg 1.15Q(2), or property (whether tangible or intangible) that is part of, a result of, or used for the purposes of researching, testing, developing or manufacturing any technology specified by the Minister under reg 1.15Q(2): reg 1.03. At time of writing no instrument has been made under reg 1.15Q(2).
[47] Maintain health insurance while in Australia.
[48] Notify Department of Home Affairs at least 2 working days in advance of change of address.

Secondary Applicants

Student visas are among the few visas for which it is not a secondary criterion that the applicant has made a combined application with a primary visa applicant. It is possible for a person to apply for a student visa, and to meet the secondary criteria for the visa, on the basis of being a member of the family unit of a person who is already the holder of a Student visa. The exception is that from 1 July 2016 an application by a person claiming to be a member of the family unit of a person who is seeking to satisfy the primary criteria for the grant of a Subclass 590 visa must be made at the same time as, and combined with, the application by that person.[51]

The visa application

An application by a primary applicant must include the details of each person who is a member of their family unit at the time of application.[52] If a person becomes a member of the family unit of the primary applicant after the application is made but before it is decided, the primary applicant must give written notice to the Minister of the name, date of birth and citizenship of the family member as well as their relationship to the primary applicant.[53] The requirements to provide such details to the Minister apply whether or not the family member is an applicant or intends to be an applicant for a student visa.[54]

For visa applications made before 1 July 2014, in order to make a valid application a person claiming to be a member of a family unit of the primary applicant must be included as an applicant in the application, or their details must be included in the application or given to the Minister.[55] The only exception to this is if they become a member of the family unit after the primary visa applicant is granted the visa.[56]

The visa criteria

Related to these requirements, for visa applications made on or after 1 July 2016, the secondary criterion in cl 500.311 requires an applicant claiming to be a member of the family unit of a person who holds a student visa to have been included in the primary person's application under reg 2.07AF(3), or in information provided in relation to the primary person's application under reg 2.07AF(4) if they became a member of that person's family unit before the grant of that person's student visa. See attached Flowchart for further detail. For visa applications made between 1 July 2014 and 30 June 2016, this requirement was in time of application criterion in cl 57x.314.

Before 1 July 2014, the time of application criterion for Subclasses 570–576 in cl 57x.314 provided that if the applicant is not included in an application under reg 2.07AF(3) or the information under reg 2.07AF(4) (provided after application but before decision) as a

[49] Maintain adequate arrangements for the education of any school-age dependant in Australia for more than 3 months as a secondary visa holder.
[50] Notify education provider of residential address or change of address, and any change of education provider.
[51] Sch 1, item 1222(3)(f). Member of the family unit, for the purpose of student visas, is defined in reg 1.12(6). For further information, see the Member of a Family Unit (reg 1.12) commentary.
[52] reg 2.07AF(3).
[53] reg 2.07AF(4).
[54] reg 2.07AF(5).
[55] Sch 1, item 1222(3)(e). Repealed for visa applications made on or after 1 July 2014: item 1, sch 2 to *Migration Legislation Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 82).
[56] Sch 1, item 1222(3)(e), repealed as at 1 July 2014: SLI 2014, No 82.

member of the family unit of the primary applicant,[57] the applicant must give the Minister evidence that he or she became a member of the family unit after the decision to grant the visa to the primary applicant was made.[58] In *Bains v MIAC*[59] it was held that this criterion requires a secondary applicant to provide evidence of the relationship to the Minister after the grant of the primary applicant's visa if that hasn't already occurred pursuant to regs 2.07AF(3) or (4), rather than requiring the relationship to have commenced after the grant of the visa to the primary applicant.

The other secondary criteria to be satisfied by secondary applicants for student visas include:

- evidence of adequate arrangements for the education of school-age dependants staying over three months;
- that the applicant be a genuine applicant for entry and stay as a member of the family unit and meets certain financial requirements; and
- a number of public interest criteria, special return criteria, and a health insurance requirement.

The criteria for secondary applicants for student guardian visas include that the applicant is a member of the family unit of a person who satisfies the primary criteria and that the applicant has not turned 6.

Assessing the secondary applicant against the primary criteria

Where a secondary applicant does not meet the secondary criteria (for example because they are no longer a member of the family unit of the primary student visa holder), they can be assessed against the primary criteria, particularly where the secondary applicant has asked the Tribunal to do so. This is in line with the view taken by the Department in Subclass 57X cases.[60]

Merits Review

A decision to refuse to grant a student visa is reviewable under Part 5 of the Migration Act (a Part 5-reviewable decision) if the visa applicant made the visa application while in the migration zone.[61] In such cases, the visa applicant has standing to apply for review.[62] The visa applicant must be in the migration zone at the time the review application is lodged.[63]

A decision to cancel a student visa under s 116 of the Act is a Part 5-reviewable decision if the visa holder was in the migration zone at the time of cancellation.[64] The former visa

[57] That is, the visa application requirements discussed above.
[58] cl 57x.314. Under these criteria, a person who becomes a member of the family unit of a person who holds a visa of the relevant subclass, after the decision to grant that visa was made, is eligible for the grant of a visa of that subclass. Note, however, that pursuant to cl 573.314 as amended on 1 July 2004, a person who has become a member of the family unit of a person who holds a Subclass 574 visa is also eligible for a Subclass 573 visa: *Migration Amendment Regulations 2004* (No 2) (Cth) (SR 2004 No 93) sch 10, item 15.
[59] *Bains v MIAC* (2012) 205 FCR 217, overturning *Bains v MIAC* [2011] FMCA 452. Special leave to appeal was refused in *Bains v MIAC* [2013] HCASL 75. There was no consideration of the provisions of sch 1, item 1222(3)(e) which mirrored the sch 2 criterion.
[60] See Court remittal in [redacted] (Tribunal decision [redacted]).
[61] s 338(2).
[62] s 347(2)(a).
[63] s 347(3).
[64] s 338(3).

holder has standing to apply for review provided he or she is physically present in the migration zone when the application for review was made.[65]

A decision not to approve a visa holder undertaking critical technology related study for the purposes of visa condition 8208 is a Part 5-reviewable decision.[66] The person with standing to apply for review of such a decision is the visa holder.[67]

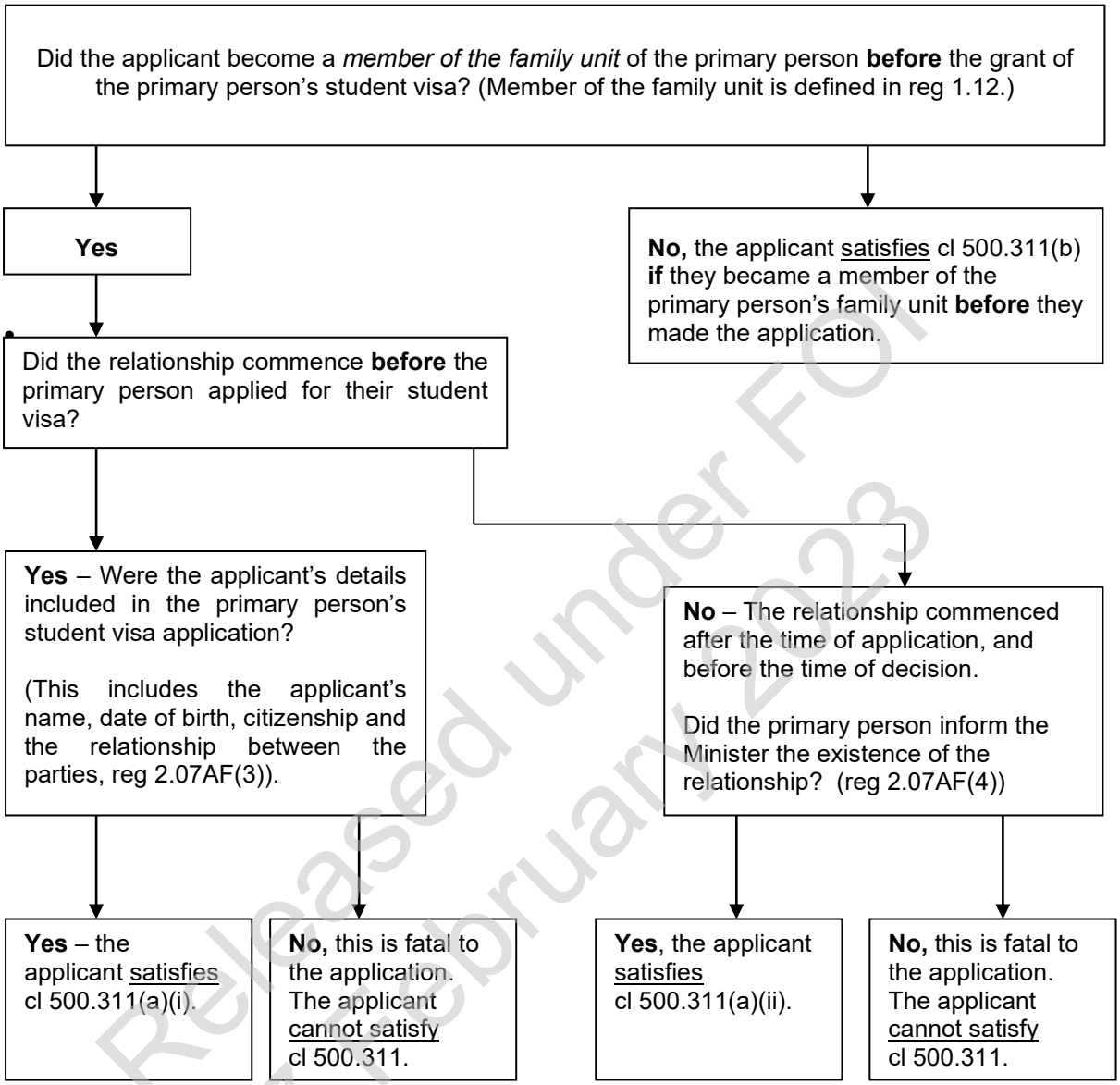
Relevant Case Law

Judgment	Judgment summary
Bains v MIAC [2011] FMCA 452	Summary
Bains v MIAC [2012] FCA 649; (2012) 205 FCR 217	Summary

Last updated / reviewed: 24 October 2022

[65] ss 347(2)(a), 347(3).
[66] s 338(9) and reg 4.02(4)(u) as amended by the *Migration Amendment (Postgraduate Research in Critical Technology) Regulations 2022* (Cth) (F2022L00866).
[67] reg 4.02(5)(t), inserted by F2022L00866.

Attachment A: Flowchart – Secondary criteria in cl 500.311



SUBCLASS 500 (STUDENT) VISA

Overview[1]

The Subclass 500 (Student) visa was introduced on 1 July 2016 as a simplified student visa to replace visa Subclasses 570 to 576.[2] It is one of two subclasses in the Student (Class TU) visa class. In addition, an associated Subclass 590 (Guardian) visa was introduced on 1 July 2016 for family members who are guardians for student visa holders under 18 (or over 18, if there are exceptional reasons), replacing the Subclass 580 (Student Guardian) visa.

All primary applicants for a Subclass 500 visa, irrespective of the level of education they wish to undertake, are required to meet a common set of time of decision criteria, including criteria relating to enrolment, genuine access to funds, and being a genuine applicant for entry and stay as a student. Decision-makers also have discretion to require certain applicants to provide specified evidence of English language proficiency as well as specified evidence of financial capacity,[3] based on an assessment of the applicant's individual circumstances and risk factors such as the applicant's country of origin and education provider.[4]

There are a number of secondary criteria to be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.[5] While this commentary largely focuses on the primary criteria for Subclass 500 applications, some of the content is equally applicable to secondary criteria, as there are a number of similarly worded criteria applicable to both types of applicants.[6]

Requirements for making a valid visa application

Item 1222 of Schedule 1 to the *Migration Regulations 1994* (Cth) (the Regulations) sets out the requirements for making a Class TU visa application.

An application is validly made if:

- it is made on the approved form[7]
- the visa application charge, payable at the time of application, is met[8]
- the application is made at the prescribed place, and the prescribed manner (if any)[9]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (F2016L00523).
[3] cls 500.213, 500.214.
[4] Explanatory Statement to F2016L00523, p.27.
[5] cl 500.3.
[6] In particular, cl 500.312 (applicant is a genuine applicant for entry and stay as a member of the family unit of a person who holds a student visa) replicates cl 500.212, and cl 500.313 (applicant will have genuine access to funds) replicates cl 500.214.
[7] item 1222(1). The approved form is specified in a legislative instrument made under reg 2.07(5). See the 'Sch1-1222(1) (from 1 -7-16)' tab of the Register of Instruments – Student Visas for the relevant instrument.
[8] Item 1222(2). There is nil charge payable for classes of persons specified in an instrument. See the 'Sch1-1222(2) (from 1-7-16)' tab of the Register of Instruments – Student Visas for the relevant instrument.
[9] Item 1222(3)(a). See the 'Sch1-1222(1) (from 1-7-16)' tab in the Register of Instruments – Student Visas for the relevant instrument.

- the applicant is inside or outside Australia, but not in immigration clearance.[10] There are additional requirements for applicants in Australia (discussed below)

- if the applicant seeks to satisfy the primary criteria for the grant of a Subclass 500 visa, the application is accompanied by evidence of the applicant's intended course of study in Australia, or activities related to study in Australia (for example, a confirmation of enrolment), being evidence that satisfies the requirements specified in an instrument,[11] and

- if the applicant seeks to satisfy the primary criteria for the grant of a Subclass 500 visa and will be under 18 years of age at any time while in Australia, the application is accompanied by evidence of intended arrangements for the applicant's accommodation, support and general welfare.[12]

If the applicant is a secondary applicant for a Subclass 500 visa, the application may be made at the same time and place as, and combined with, the primary application.[13]

All applicants in Australia must hold a substantive temporary visa[14] (other than a substantive temporary visa specified in an instrument)[15] to make a valid visa application, or alternatively must meet a number of requirements as follows:[16]

- their last substantive visa was a student visa, a special purpose visa, or a Diplomatic (Temporary) (Class TF) visa granted in certain circumstances

- the application was made within 28 days after their last substantive visa ceased to be in effect (or 28 days after they were notified of a decision by the Tribunal setting aside a decision to cancel the visa or not to revoke its cancellation), and

- they have not previously been granted a visa on the basis of an application made when they did not hold a substantive visa.

Visa Criteria

The criteria for a Subclass 500 visa are contained in Part 500 of Schedule 2 to the Regulations. They comprise primary and secondary criteria. The primary criteria must be

[10] Item 1222(3)(b).
[11] Item 1222(3)(c). See the 'Sch1-1222(3)(c) (from 1-7-16)' tab in the Register of Instruments – Student Visas for the relevant instrument.
[12] Item 1222(3)(d).
[13] Item 1222(3)(e).
[14] In *MIBP v Kumar* [2017] HCA 11, the Court considered similar provisions in relation to a Subclass 572 visa. In that case, the visa application was received by the Department on 13 January 2014. The applicant's temporary visa expired on 12 January 2014, and the Minister's delegate refused the visa on the basis that the applicant was not the holder of a substantive visa of a kind specified in cl 572.211(2). The applicant contended that the requirements of cl 572.211(2) were a thing that the Migration Act and Regulations 'allowed' to be done for the purposes of s 36(2) of the *Acts Interpretation Act 1901* (AIA) and s 36(2) applied. Section 36(2) relevantly provides that if an Act requires or allows a thing to be done and the last day for doing the thing is a Saturday, Sunday or holiday, then the thing may be done on the next day that is not a Saturday, Sunday or holiday. The High Court rejected this argument, and confirmed that the last day the applicant could have applied for the visa was 12 January 2014 as the extension of time provided for under s 36(2) does not apply in the context of determining whether an applicant meets a visa criterion of the kind specified in cl 572.211 [at 25]. This reasoning would apply equally for the purposes of item 1222(4) of sch 1 to the Regulations.
[15] See the 'Sch1-1222(4)' tab in the Register of Instruments – Student Visas for the relevant instrument.
[16] Item 1222(4).

met by at least one member of a family unit. There is no time of application criteria for either primary or secondary applicants.

The primary criteria, which need to be satisfied at the time of decision, are that the applicant:

- is **enrolled** in a course of study (or satisfies particular criteria relating to postgraduate thesis marking applicants, Foreign Affairs students[17] and Defence students[18])[19]

- is a **genuine applicant for entry and stay as a student** because the applicant intends genuinely to stay in Australia temporarily, intends to comply with any conditions of the visa, and because of any other relevant matter[20]

- if required to do so by the Minister, in writing or by use of a computer program available online, at any time, gives evidence that the applicant has a level of **English language proficiency** that meets the requirements specified in an instrument[21]

- will have **genuine access to sufficient funds** available to meet the costs and expenses of the applicant (and each member of the applicant's family unit who will be in Australia) during the applicant's intended stay in Australia, and, if required to do so by the Minister, in writing or by use of a computer program available online, at any time, gives evidence of financial capacity that satisfies the requirements specified in an instrument[22]

- gives evidence of adequate arrangements for **health insurance** during the period of the applicant's intended stay in Australia[23]

- if the applicant is a school student,[24] other than a school student participating in a secondary school student exchange program, is at least 6 years old at the time of application, and is less than 17/18/19/20 years old if proposing to undertake year 9/10/11/12 studies respectively[25]

- satisfies applicable **public interest criteria** (PIC 4001, 4002, 4003, 4004, 4010, 4013, 4014, 4020 and 4021 for all applicants; PIC 4012A, 4017 and 4018 for an applicant who has not turned 18; PIC 4019 if the applicant had turned 18 at the time of application; PIC 4005 if they are not a Foreign Affairs student or a Defence student, PIC 4007 if they are a Foreign Affairs student or a Defence student, and

[17] 'Foreign affairs student' is defined in reg 1.04A(3), and relevantly includes an applicant who has been approved by the Foreign Minister or AusAID Minister to undertake a full-time course of study or training under a scholarship scheme or training program approved by the Foreign Minister or AusAID Minister.
[18] 'Defence student' is defined in reg 1.04B as relevantly including an applicant who has been approved by the Defence Minister to undertake a full-time course of study or training under a scholarship scheme or training program approved by the Defence Minister.
[19] cl 500.211.
[20] cl 500.212.
[21] cl 500.213. See the 'English' tab in the Register of Instruments – Student Visas for the relevant instrument.
[22] cl 500.214. See the 'Financial' tab in the Register of Instruments – Student Visas for the relevant instrument.
[23] cl 500.215.
[24] That is, a student who is enrolled in, or intends to enrol in, a course of study at a primary or secondary school: cl 500.111.
[25] cl 500.216.

PIC 4003B if the visa application is made on or after 1 July 2022 and the applicant is undertaking a postgraduate research course)[26]

- satisfies **special return criteria** 5001, 5002 and 5010.[27]

There are a number of secondary criteria to be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria, including that the applicant:

- is a member of the family unit of a person who holds a student visa, having satisfied the primary criteria, and the secondary applicant either
  - was included as a member of the family unit in the primary application, as required by reg 2.07AF(3)
  - became a member of the family unit after the primary application was made, and before a decision was made on the application the Minister was informed of the secondary applicant's details, as required by reg 2.07AF(4), or
  - became a member of the family unit after the grant of a student visa to the person and before the secondary application was made[28]
- if they are a school-age dependant of the primary applicant and the proposed period of stay is more than 3 months – gives evidence that adequate arrangements have been made for the education of the applicant in Australia.[29]

There is also a requirement that the secondary applicant be a genuine applicant for entry and stay as a member of the family unit[30] and has genuine access to funds,[31] in addition to a number of public interest criteria, special return criteria, and a health insurance requirement.[32] Further, members of the family unit of a Foreign Affairs student or a Defence student must have the support of the Foreign Minister or Defence Minister, respectively, for the grant of the visa.[33]

Key issues

The key issues which arise in student visa cases include the requirement for applicants to be enrolled, to provide specified evidence of English language proficiency and financial capacity, and to demonstrate that they are 'genuine applicants for entry and stay as a student'. Many criteria in Subclass 500 replicate features of the criteria which applied to student visa applications made prior to 1 July 2016. Consequently, the interpretation of those

[26] cl 500.217. PIC 4003B was inserted into cl 500.217(6) by the *Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022* (Cth).
[27] cl 500.218.
[28] cl 500.311.
[29] cl 500.315.
[30] cl 500.312. Minister's Direction No 69, issued under s 499 of the Act, must be considered when assessing the genuine temporary entrant criterion for primary and secondary visa applicants in Student visa applications. Clause 15 of the Direction requires that, if the visa applicant is a minor, decision makers should have regard to the intentions of a parent or legal guardian, or the minor's partner.
[31] cl 500.313.
[32] cls 500.317, 500.318, and 500.314 respectively.
[33] cl 500.316.

criteria can be informed by relevant case law which considered the pre 1 July 2016 visa criteria.

Enrolment

Statutory requirements

Applicants must satisfy certain enrolment requirements in Schedule 1 in order to make a valid application, as well as meet a time of decision enrolment criterion in order to be granted a student visa. Visa holders must also maintain enrolment in a registered course as a condition of their visa.

Valid visa application requirements

An application must be accompanied by evidence of the applicant's intended course of study in Australia, or activities related to study in Australia, being evidence that satisfies the requirements specified in an instrument.[34] The relevant instrument *Evidence of Intended Course of Study*[35] requires an applicant seeking to satisfy the primary criteria for a Subclass 500 visa to provide the following evidence:

- a confirmation of enrolment for each of the applicant's intended courses of study offered by an education provider
- in the case of a Foreign Affairs or Defence student, a letter of support from the Foreign Minister or Defence Minister respectively
- in the case of a Secondary Exchange Student,[36] an AASES form[37] relating to the applicant
- a letter of offer for each enrolment in a course of study offered by an education provider if the applicant is in Australia, or
- a letter from the applicant's relevant education provider requiring the applicant to remain in Australia during the marking of his or her postgraduate thesis.

'Education provider', for a registered course in a location, means each institution, body or person that is a registered provider of the course in that location, for the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act).[38]

[34] Item 1222(3)(c) of sch 1 to the Regulations.
[35] See the 'Sch1-1222(3)(c) (from 1-7-16)' tab in the Register of Instruments – Student Visas for the applicable version of the instrument.
[36] That is, an overseas secondary school student participating in a secondary school student exchange program approved by the State or Territory education authority that administers the program (reg 1.03).
[37] That is, an Acceptance Advice of Secondary Exchange Student form from the relevant State or Territory education authority, containing a declaration made by the student's exchange organisation accepting the student, and a declaration made by the student's parents, or the person or persons having custody of the student, agreeing to the exchange (reg 1.03).
[38] reg 1.03.

Criteria for grant of visa

Primary applicants for a Subclass 500 visa need to either:

- be enrolled in a course of study
- if the application is made in Australia – seek to remain in Australia because the relevant educational institution requires the applicant to do so during the marking of a postgraduate thesis, or
- if the applicant is a Foreign Affairs or Defence student – have the support of the Foreign or Defence Minister respectively.[39]

'Course of study' is defined as a full-time registered course,[40] with different definitions for secondary exchange students and Foreign Affairs or Defence students.[41]

While an applicant need only supply a letter of offer of enrolment in order to make a valid application, in order to satisfy cl 500.211(a), at time of decision the applicant must be enrolled in a course of study. An offer of enrolment will not be sufficient.[42]

As this is a time of decision criterion, the course that is the subject of the enrolment may be different from that assessed by the primary delegate.

Conditions attached to a student visa

Subclass 500 visa holders are subject to a number of conditions.[43] Two commonly imposed conditions which contain an enrolment element are conditions 8202 and 8516.

Condition 8202 requires primary student visa holders to be enrolled in a full-time registered course, and maintain enrolment in a registered course that, once completed, will provide a qualification from the Australian Qualification Framework (AQF) that is at the same level as, or at a higher level than, the registered course in relation to which the visa was granted. This latter requirement will be met where the holder is enrolled in a course at AQF Level 10 and changes their enrolment to a course at the AQF Level 9.[44] Defence students, Foreign Affairs

[39] cl 500.211.
[40] cl 500.111. A registered course is defined in reg 1.03 as a course of education or training provided by an institution, body or person that is registered, under div 3 of pt 2 of the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act), to provide the course to overseas students.
[41] For a Foreign Affairs or Defence student, a course of study is a full-time course of study or training under a scholarship scheme or training program approved by the Foreign Minister or Defence Minister (respectively). For a secondary exchange student, a course of study is a full-time course of study under a secondary school exchange program administered by a State or Territory education authority.
[42] See, for example, *Ding v MHA* [2019] FCA 1036 at [42], where the Court noted it was difficult to see how an offer of enrolment could satisfy cl 500.211(a).
[43] See cl 500.611 for primary visa holders and cl 500.612 for secondary visa holders. Between 18 November 2017 and 5:56pm AEST on 5 December 2017, conditions 8303, 8304, 8564 and 8602 (which requires a visa holder not to have an outstanding public health debt) were mandatory conditions for primary and secondary visa holders. This was inserted by *Migration Legislation Amendment (2017 Measures No 4) Regulations* 2017 (Cth), which were disallowed at 5:56pm on 5 December 2017. As a result of the disallowance, condition 8602 no longer exists. Conditions 8204A and 8204B were also inserted by the *Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022* (Cth), however these were both repealed immediately after their commencement on 1 July 2022 by the *Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022* (Cth). The full list of conditions is found in sch 8 to the *Regulations*.
[44] cl 8202(3).

students and secondary exchange students need to be enrolled in a full-time course of study or training.[45]

In addition, condition 8516 requires that the holder continue to be a person who would satisfy the criteria for the grant of the visa, and therefore similarly requires holders to continue to be enrolled in a course of study.

For discussion of condition 8202, see the Visa Condition 8202 commentary. For discussion of condition 8516, see the Cancellation of student visas – s 116 commentary.

Registered full-time course of study

With the exception of Foreign Affairs, Defence and secondary exchange students, to satisfy the above enrolment requirements an applicant's course must be a registered full-time course of study. A registered course is defined in reg 1.03 as a course of education or training provided by an institution, body or person that is registered, under div 3 of Part 2 of the ESOS Act, to provide the course to overseas students.

Under div 3 of Part 2 of the ESOS Act, providers can only be registered by the ESOS agency for the provider[46] to provide courses at a location or locations to overseas students. A current list of registered providers and courses appears in the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) kept under s 14A of the ESOS Act. Thus, inclusion of a course on CRICOS is evidence that the course is registered. CRICOS can be accessed at: http://cricos.education.gov.au/

The registered course must also be a *full-time* course. Given that only full-time courses can be registered on CRICOS,[47] evidence that the course is registered on CRICOS should suffice to establish this requirement.

Courses delivered entirely by online or distance learning cannot be registered on CRICOS.[48] Courses with a distance or online component can only be registered where the ESOS agency is satisfied that these courses meet the minimum requirements as specified in Standard 8 of the National Code, namely a registered provider must not deliver more than one-third of the units (or equivalent) of a higher education or VET course by online or distance learning to an overseas student, and students must be enrolled in at least one face-to-face teaching subject in any compulsory study period unless the student is completing the last unit of their course.

[45] cl 8202(1).
[46] Section 6C of the ESOS Act sets out the ESOS agency for a provider.
[47] The National Code of Practice for Providers of Education and Training to Overseas Students 2018 (National Code 2018) (made under s 33(1) of the ESOS Act) provides that the registration of a course on CRICOS must include the expected duration of the course, and that the registered duration cannot exceed the time required for completing the course on the basis of the normal amount of full-time study (cl 11) (accessed on 06/12/2019).
[48] See National Code 2018, cl 8.18.

Confirmation of enrolment / letter of offer

With the exception of Foreign Affairs, Defence, secondary exchange and postgraduate thesis marking students, in order to make a valid application, applicants must provide confirmation of enrolment (CoE) of each intended course of study offered by an education provider i.e. a full time-registered course.[49] 'Confirmation of enrolment' means a confirmation by a registered provider that the student is enrolled in a registered course, as required by s 19 of the ESOS Act.[50] Alternatively, if the applicant is in Australia, a letter of offer for each enrolment in a course of study offered by an education provider will suffice.[51] The Court in *Zhu v MIBP*[52] held that a conditional offer of enrolment is not sufficient to constitute an 'offer of enrolment' for the purposes of cl 573.231, where there is no evidence that the applicant has met the conditions of the offer. Similar reasoning would apply to the 'letter of offer' requirement.

In practice, evidence of confirmation of enrolment is accessible on the Provider Registration and International Students Management System (PRISMS), as this is the computer system that registered providers must use to enter the information required under s 19 of the ESOS Act.[53]

Enrolled in a course of study

With the exception of postgraduate marking students, Defence students and Foreign Affairs students, all primary applicants must meet the time of decision requirement in cl 500.211 that the applicant is enrolled in a course of study.

Whether the applicant satisfies this requirement is a question of fact which does not require any particular form of evidence. A CoE would usually suffice for this purpose, provided it is still current.[54] If it is not clear from an applicant's study plans and academic results that they are a continuing student in the course, decision makers may check with the education provider.

Unlike the visa application requirement relating to provision of a CoE (discussed above), the requirement in cl 500.211 makes no reference to a CoE. What is required is that the applicant is enrolled. Therefore, an applicant may satisfy this requirement in the absence of CoE, provided there is other evidence of enrolment. That said, it is highly unlikely that an enrolled student would not have a CoE, given that education providers have strict obligations

[49] Item 1222(3)(c) of sch 1 to the *Regulations* and the relevant *Evidence of Intended course of study* instrument in the 'Sch1-1222(3)(c) (from 1-7-16)' tab of the Register of Instruments – Student Visas.
[50] Reg 1.03.
[51] The relevant *Evidence of Intended course of study* instrument in the Register of Instruments – Student Visas.
[52] [2017] FCCA 83.
[53] s 19(3) of the ESOS Act. The relevant computer system to enter this information for the purpose of s 19(3) of the ESOS Act is 'PRISMS', which is defined in the National Code 2018 as the system used to process information given to the Secretary of DET by registered providers. See also the Explanatory Statement to the *Education Services for Overseas Students Regulations 2019* (Cth) (ESOS Regulations).
[54] In *Singh v MIAC* [2009] 236 FLR 384, the Court held that to accept that an applicant could rely on an expired CoE at the time of decision would defeat the purpose of cl 572.222, which as provided by the Explanatory Statement to the amendments introducing cl 572.222, is to ensure that an applicant provides evidence that they are enrolled in a full-time course of study: at [40]–[55]. Although this decision relates to the pre 1 July 2016 student visa framework, this reasoning would apply given the similarities of the present statutory scheme. For further explanation of a CoE's status, see the Department of Education's PRISMS Provider User Guide (accessed on 25/05/2022).

under the ESOS Act and *Education Services for Overseas Students Regulations 2019* (Cth) (ESOS Regulations) to register international students when they become enrolled.[55]

In particular, a 'confirmation of enrolment' means the information a registered provider must give under s 19 of the ESOS Act when a person becomes an accepted student of the provider.[56] The registered education provider has 31 days in which to give the name and any other prescribed details[57] of each person who becomes an accepted student of that provider.[58] This information must be provided electronically using PRISMS.[59] Therefore, in usual circumstances where the provider is meeting their obligations under the ESOS Act and ESOS Regulations, any student claiming to be enrolled with an education provider should be able to provide evidence of the confirmation of enrolment. The information should be accessible through PRISMS.

Secondary exchange students, who do not need to be enrolled in a registered course, would likely rely on an AASES form as evidence.

Enrolment in a registered course may cease as a result of termination by the education provider and also by withdrawal from a course[60] or discontinuance by a student communicated to the education provider.[61] Whilst it is not essential that the student's withdrawal or discontinuance be accepted by the provider for there to be a cessation of enrolment, it may be possible that a student continues to be enrolled where a withdrawal is not acknowledged by the provider, or is refused, or is not communicated to the provider.[62]

Multiple courses

It is open for a student visa to be granted on the basis of a 'package of courses' i.e. more than one course of study, provided that the applicant is enrolled in a course of study at the time of decision as required by cl 500.211. This should be read as requiring enrolment in each course (and not just one).

[55] Note, however, that information accessed from PRISMS such as CoEs may be inaccurate in circumstances where the provider is not meeting their obligations. See, for example, *Wei v MIBP* [2015] HCA 51.
[56] Reg 1.03 of the Regulations defines 'confirmation of enrolment' as a confirmation by a registered provider that the student is enrolled in a registered course as required by s 19 of the ESOS Act.
[57] The prescribed details are specified in reg 9 of the ESOS Regulations. These include the student's details; the unique identifier of the student's course; the course location; the agreed starting day of the course; the day when the student is expected to complete the course; and the amount of any tuition fees that the provider received for the student for the course.
[58] Education providers also have obligations under s 21(1) of the ESOS Act to keep records of each accepted student who is enrolled with the provider or who has paid any tuition fees for a course provided by the provider.
[59] ESOS Act s 19(3). The relevant computer system to enter this information for the purpose of s 19(3) of the ESOS Act is 'PRISMS' which is defined in the National Code 2018 as the system used to process information given to the Secretary of DET by registered providers. See also the Explanatory Statement to the ESOS Regulations.
[60] *Bae & Anor v MIBP* [2017] FCCA 625. In this case, the Court rejected the applicant's argument that a withdrawal from a course before the time of decision meant he still had an ongoing offer of enrolment and found the applicant did not meet cl 572.231.
[61] *Zhang v MIAC* [2010] FMCA 809.
[62] In *Zhang v MIAC* [2010] FMCA 809, the student had advised the education provider that he would not be continuing his studies and did not thereafter return to complete his course. In the unusual circumstances of that case, the Court held that, for the purposes of substantial compliance with condition 8202(2), it was open for the Tribunal to accept in light of the information from the education provider that the applicant had withdrawn and did not attend thereafter, the absence of any evidence (other than the applicant's assertions) that he returned to the course and completed it and his failure to provide any documentary evidence to that effect and to find that he was not enrolled in a registered course. The Court held that even if a provider's acceptance of the student's withdrawal was essential, there was evidence of such acceptance: at [82] – [83].

Genuine applicant for entry and stay as a student

A primary applicant for a Subclass 500 visa needs to demonstrate that they are a genuine applicant for entry and stay as a student because:

- they intend genuinely to stay in Australia temporarily, having regard to their circumstances, their immigration history, the intentions of a parent/guardian/spouse (if the applicant is a minor), and any other relevant matter[63]

- they intend to comply with any conditions of the visa, having regard to their record of compliance with any conditions of previously held visas and their stated intention to comply with any conditions to which the visa may be subject,[64] and

- of any other relevant matter.[65]

There is also an equivalent criterion for secondary applicants,[66] as well as primary applicants for a Subclass 590 (Student Guardian) visa.[67]

Clause 500.212 has been the subject of considerable judicial consideration. A number of these authorities were considered by the Full Federal Court in *Dait v MICMSMA* which distilled four mutually inclusive propositions. [68] Those are:

- An applicant is only a genuine applicant for entry and stay as a student pursuant to cl 500.212 if they satisfy subclauses (a) and (b), in the light of 'any other relevant matter' pursuant to subclause (c).

- Subclauses (a), (b) and (c) address separate matters and require separate analyses.

- It follows that if an applicant fulfils the criterion in subclause (a), a decision-maker must proceed to subclause (b) in order to exercise their jurisdiction properly.

- An applicant is not a genuine applicant for entry and stay as a student if they fail to satisfy subclause (a), regardless of their satisfaction of subclause (b), and vice versa. If a decision-maker is satisfied that an applicant does not meet the criterion in either subclause (a) or (b), they need not proceed further. The decision-making process is complete because the applicant has failed to establish an essential element of the 'whole idea or conception' contained in cl 500.212: *Eros v MICMSMA*[69] (at [8]).

[63] cl 500.212(a).
[64] cl 500.212(b).
[65] cl 500.212(c).
[66] cl 500.312.
[67] cl 590.215. See also *EEG18 v MHA; EEI18 v MHA; EEJ18 v MHA* [2019] FCCA 2132.
[68] *Dait v MICMSMA* [2022] FCAFC 25 at [35]. In *Dait*, the Court rejected an argument that the Tribunal had misapplied cl 500.212 by concluding the appellant was not a genuine applicant for entry and stay as a student as required by cl 500.212 because she did not satisfy subcl 500.212(a), without making findings in relation to subcls 500.212(b) and (c)
[69] *Eros v MICMSMA* [2020] FCA 1061.

Intends genuinely to stay in Australia temporarily

The expression 'genuinely intends to stay in Australia temporarily' has been subject to judicial consideration and requires that the applicant must unqualifiedly intend his or her stay to be temporary.[70] In *Eros v MICMSMA*, the Federal Court applied *Saini v MIBP* (which concerned the equivalent pre 1 July 2016 student visa criteria) to find that cl 500.212(a) is only concerned with how long a visa applicant intends to stay in Australia.[71] In *Saini v MIBP* Judge Cameron held that an intention to remain in Australia if qualified to do so at the end of the student visa, would not amount to an intention to stay temporarily, because the intention to stay temporarily would not be unqualified.[72] In upholding his Honour's judgment, Justice Logan held that what is required is an evaluation of intention at the time of decision, and if at this time there is a settled intention to later seek a visa that will lead other than to temporary residence, that intention is not consistent with an intention genuinely to stay temporarily.[73]

When determining whether the genuine temporary entrant criterion is met, decision makers must have regard to Ministerial Direction No 69 *Assessing the genuine temporary entrant criterion for Student visa and Student Guardian visa applications* (Direction No 69) made pursuant to s 499 of the *Migration Act 1958* (the Act).[74] Direction No 69 recognises that an applicant who is a genuine temporary entrant will have circumstances that support a genuine intention to temporarily enter and remain in Australia, notwithstanding the potential for this intention to change over time to an intention to utilise lawful means to remain in Australia for an extended period of time or permanently.[75]

Direction No 69 specifies a series of factors which must be considered by decision makers, set out under headings corresponding with the matters set out in cl 500.212. Broadly speaking, these cover:

- the applicant's circumstances in their home country
  - whether the applicant has reasonable reasons for not studying in their home country

[70] *Saini v MIBP* [2015] FCCA 2379 at [23], upheld on appeal in *Saini v MIBP* [2016] FCA 858.
[71] *Eros v MICMSMA* [2020] FCA 1061 at [12]–[13]. In *Eros*, the Court held it was not open for the Tribunal to conclude that cl 500.212(a) was not met where it made findings that the applicant intended to stay temporarily but not for the purposes of study. See also *Ramanayake v MICMSMA* [2022] FedCFamC2G 5 at [32], where the Court found that the lack of a defined departure date, due to the applicant wishing to wait until the COVID-19 situation was normalised in his home country, will still meet the "temporary" nature of cl 500.212(a), and that the test in cl 500.212(a) is not whether an applicant had a defined departure date, but whether there was an intention to remain "temporarily".
[72] *Saini v MIBP* [2015] FCCA 2379 at [23]. See also *Inderjit v MICMSMA* [2019] FCAFC 217 at [34] – [36], where the Full Federal Court rejected the applicant's argument that the criterion of "any other relevant matter" in cl 500.212(a)(iv) excludes or limits the ability of a decision-maker to make or use any finding as to what an applicant for a visa intended, were he or she to have an opportunity to apply for permanent residence.
[73] *Saini v MIBP* [2016] FCA 858 at [30]. Justice Logan expressly disagreed with the contrary interpretation of this criterion in *Khanna v MIBP* [2015] FCCA 1971. While *Khanna* was overturned on appeal in *MIBP v Khanna* [2016] FCA 142, that judgment did not expressly address the construction of cl 572.223(1)(a). See also *Inderjit v MICMSMA* [2019] FCAFC 217 at [37] – [39] where the Federal Court agreed with Justice Logan in *Saini*.
[74] Section 499 permits the Minister to give written directions to a person or body about the performance of functions or the exercise of powers under the Act. Such person or body must comply with the direction: s 499(5). The Minister, however, is not empowered to make directions that would be inconsistent with the Act or Regulations.
[75] See Preamble to Direction No 69. In *EEG18 v MHA; EEI18 v MHA; EEJ18 v MHA* [2019] FCCA 2132 at [25] – [31], the Court held that it was illogical for the Tribunal to conclude that the applicants, a mother and her two children, were not genuine temporary entrants, in circumstances where they had first arrived in Australia on Visitor visas and the children were enrolled in a private school within 17 days of arrival.

  - the extent of personal ties to their home country[76]
  - the economic circumstances of the applicant
  - military service commitments
  - political and civil unrest
- the applicant's potential circumstances in Australia
  - the applicant's ties with Australia
  - evidence that the student visa programme is being used to circumvent the intentions of the migration programme
  - whether the student visa is being used to maintain ongoing residence
  - whether the primary and secondary applicants have entered into 'a relationship of concern' for student visa purposes[77]
  - the applicant's knowledge of living in Australia and their intended course of study and the associated education provider
- the value of the course to the applicant's future
  - whether the proposed course is consistent with the applicant's current level of education and whether it will assist the applicant's employment prospects in the home country
  - the relevance of the course to the student's past or future employment
  - remuneration the applicant could expect to receive in a country other than Australia as a result of the study
- the applicant's immigration history
  - previous visa applications for Australia and other countries
  - previous travel to Australia and other countries
- the intentions of a parent, legal guardian or spouse of the applicant (if the applicant is a minor and is a primary or secondary applicant for a subclass 500 visa)

[76] 9(b) of Direction No 69 provides that decision makers should have regard to the extent of the applicant's personal ties to their home country and whether those circumstances would serve as a significant incentive to return to their home country. The wording of this is similar to Direction No 53 which applied to student visa applications made before 1 July 2016. In *Patel v MIBP* [2019] FCCA 2436 at [76], upheld on appeal in *Patel v MICMSMA* [2020] FCA 346, the Court considered that the expressions 'significant incentive' and 'strong incentive' in the context of 9(b) of Direction No 53 were reasonably synonymous and found no material error in the manner the Tribunal had applied the Direction. See in contrast *Singh v MIBP* [2018] FCCA 3423 at [32]–[33], where the Court held that a significant incentive was somewhat less than a strong incentive, and by considering that the applicant's family did not provide a strong incentive to return, the Tribunal imposed a higher standard than Direction No 53 required and therefore fell into jurisdictional error for failing to ask the correct question.
[77] That is, a contrived relationship.

- any other relevant matters. [78]

The Direction can be accessed in full through the Student Visas - Register of Instruments.

Direction No 69 indicates that it should not be used as a checklist, but rather that the matters it lists are intended to guide decision makers when considering the applicant's circumstances as a whole and reaching a finding about whether they satisfy the genuine temporary entrant criterion.[79] In *Kaur v MHA*, the Federal Court confirmed that the function and purpose of the direction is as a guide to assist in applying the genuine temporary entrant criterion and a decision-maker is not required to check each identified factor in the Direction.[80] The Full Federal Court in *Kumar v MIBP*, when considering Direction No 53 (a similar Ministerial direction applying to student visa applications made before 1 July 2016), confirmed that the direction is not intended to be construed as a checklist and the Tribunal is not required to make express findings in respect of each factor, though a failure to make a finding might constitute evidence of jurisdictional error in particular circumstances.[81]

The Full Federal Court judgment in *MIAC v Khadgi,*[82] which dealt with consideration of the discretionary factors in reg 2.41 in the context of a s 109 cancellation, provides useful guidance on the requirements of decision makers 'to have regard to' mandatory considerations. In *Khadgi,* the Court noted in particular:

- The decision maker must engage in an 'active intellectual process' in which each of the prescribed circumstances receives 'genuine' consideration.[83] However, it is not essential for the decision maker to compartmentalise its reasons and to set out those reasons by reference to each factor specified. While that may often be convenient and appropriate, it is not the only way for the decision maker to demonstrate that it has had regard to all of those criteria.[84] Further, in any given case, facts and matters raised might be relevant to more than one of the factors.[85]

[78] In *Kaur v MICMSMA* [2020] FCCA 2606 at [27] – [30] the Court cautioned against the use of the United Nations Human Development Index in considering an applicant's circumstances and their intention to return to their home country, as it may distract attention from an applicant's particular circumstances or lead to an absurd result. See also *Ji Hyang Lee v MICMSMA* [2021] FCCA 1084 at [23] – [27], where the Court considered that use of the United Nations Human Development Index, although not an irrelevant consideration, should be discouraged, particularly when comparing countries with very high human development.
[79] Direction No 69, Part 2 at [1].
[80] *Kaur v MHA* [2019] FCA 2026 at [30]. In *Saini v MIBP* [2015] FCCA 2379 at [33] the Court stated that the Tribunal was required to decide the applicant's claim on balance and specific reference to particular listed matters in Direction No 53 (a similar Ministerial direction applying to student visa applications made before 1 July 2016) was not necessarily required and the fact they were not discussed individually was, without more, insufficient basis to conclude they were not considered. See also *Bala v MIBP* [2019] FCA 600 at [17] – [18], where the Court held there was no error in the Tribunal not referring explicitly in its decision record to factors in Direction No 53 which were of no apparent relevance to the application on the evidence before it.
[81] *Kumar v MIBP* [2020] FCAFC 16 at [96]. The 'particular circumstances' which the Court referred to, at [97], are where it can be established that it was necessary to make the finding in order to exercise the Tribunal's jurisdiction, and the failure to make the finding deprives the applicant of the possibility of a successful outcome. See also *Jan v MHA* [2019] FCA 1837 at [24] where the Court held that the direction was not intended to express a complete list to be traversed in every case and if a factor is considered to not be significant in a particular case, it need not be brought to account, and *Singh v MIBP* [2018] FCCA 3423 at [17] – [18] where the Court found that while the direction is not intended to be construed as a checklist, the factors are all matters for the decision-maker to think about and weigh up. The factors do not necessarily all have to be satisfied to any particular degree for a person to be found to be a genuine temporary entrant.
[82] *MIAC v Khadgi* (2010) 190 FCR 248.
[83] *MIAC v Khadgi* (2010) 190 FCR 248 at [57].
[84] *MIAC v Khadgi* (2010) 190 FCR 248 at [69]; *Nguyen v MIBP* [2013] FCCA 1864.
[85] *MIAC v Khadgi* (2010) 190 FCR 248 at [68].

- Although the decision maker must have regard to each of the factors, not all of them will be central or fundamental to every case.[86] The weight to be given to any one factor or group of factors is a matter for the decision maker and will vary from case to case;[87] and the extent to which the decision maker is required to engage with each factor will often depend on the matters put forward by the applicant.[88]

- The failure to give any weight to a factor that is of great importance in the particular case may support an inference that the decision maker did not have regard to that factor. On the other hand, the decision maker is entitled to be brief in its consideration of a matter which has little or no practical relevance to the circumstances of a particular case.[89] Thus, if the applicant does not address a particular factor or factors with evidentiary material and submissions, there may be little or no material to consider and evaluate, and therefore little to say about those factors.[90]

While there must be consideration of all the factors in Direction No 69, the degree to which the decision-maker must go into each of the factors in the decision record will depend upon the nature of the information before him or her and the matters raised by the applicant.[91] For example, where an applicant gives no evidence about their circumstances in their home country and the visa application identifies relatives in the home country with no further information, the reference to consideration of factors in paragraphs 9 and 10 of the Direction about circumstances in the applicant's home country may be quite brief. This was confirmed in the case of *Tariwal v MIBP*[92] where the Federal Circuit Court held the Tribunal was under no duty to enquire about matters in Direction No 53 when assessing whether the applicant was a genuine temporary entrant, in circumstances where the applicant was on notice of the contents of the Direction and did not raise any issues.

Facts and matters raised may also be relevant to more than one factor specified in the Direction. In these circumstances it must be clear that the decision-maker has considered the facts and matters against each factor to which that information relates.

Whether a decision must reflect in detail each of the various factors in Direction No 69 will vary depending on the circumstances of each case. For example, in *Sharma v MIBP*, which concerned Direction No 53, the Court held that the Tribunal did not fail to take into consideration the matters it had to consider even though it did not extensively or expressly

[86] *MIAC v Khadgi* (2010) 190 FCR 248 at [62].
[87] *MIAC v Khadgi* (2010) 190 FCR 248 at [68].
[88] *MIAC v Khadgi* (2010) 190 FCR 248 at [84], where the Court observed that the extent to which the Tribunal in that case was compelled to engage with the reg 2.41 criteria was inevitably heavily influenced by the terms of Ms Khadgi's responses to the invitations extended to her by both the delegate and the Tribunal to address those criteria. See also *Patel v MIBP* [2019] FCCA 2436 at [71], upheld on appeal in *Patel v MICMSMA* [2020] FCA 346.
[89] *MIAC v Khadgi* (2010) 190 FCR 248 at [58] – [59].
[90] *MIAC v Khadgi* (2010) 190 FCR 248 at [83]; *Bala v MIBP* [2019] FCA 600 at [17]; *Patel v MIBP* [2019] FCCA 2436 at [71], upheld on appeal in *Patel v MICMSMA* [2020] FCA 346.
[91] In *Kaur v MHA* [2019] FCA 2026 at [31], the Court found that factors in Direction No 69 which a decision-maker must take into account are those which have been the subject of substantial, clearly articulated claims made by the applicant, or a claim engaging a factor listed in the direction that is apparent on the face of the material before the Tribunal. In *Bala v MIBP* [2019] FCA 600 at [17] – [18], although the Tr bunal did not expressly refer to various factors in Direction No 53, the Court found that the Tribunal had considered them but that those matters did not warrant mention, separately or collectively, as they were not sufficiently germane to the Tribunal's decision or relevant to the application. In contrast, see *Singh v MIBP* [2018] FCCA 3423 at [66] where the Court was not prepared to infer that factors in Direction No 53 in relation to which the applicant had not provided any evidence had been considered by the Tribunal where they were not expressly referred to in its reasons.
[92] *Tariwal v MIBP* [2017] FCCA 991.

refer to all the factors in Direction No 53 and simply stated that it would have regard to that Direction before considering in its findings and reasons the applicant's circumstances, stated career goals, immigration history, the courses he had undertaken, the qualifications he had acquired in Australia and the value of those courses to him.[93] Similarly in *Bala v MIBP*, the Federal Court found that express reference to particular matters in Direction No 53 was not necessarily required where those matters were not sufficiently germane to the Tribunal's decision or relevant to the application.[94]

Direction No 69 makes clear that, in addition to the factors it specifies, decision makers should take into account any other relevant information provided by the applicant or otherwise available, and consider whether further inquiries should be undertaken.[95] It also outlines circumstances in which it may be appropriate for the decision maker to seek further information from applicants, including if the applicant or a relative 'has an immigration history of concern', if they intend to study in a field unrelated to their previous studies or employment, or if there are inconsistencies in the information they have provided in their student visa application.[96]

Stated intention to comply with conditions and any other matter

In assessing whether the applicant is a genuine applicant for entry and stay as a student, cl 500.212(b) also requires that the applicant intends to comply with any conditions subject to which the visa is granted, having regard to their record of compliance with any condition of a visa previously held and their stated intention to comply with any condition to which the visa may be subject. In assessing cl 500.212(b), decision-makers should have regard to which (and the circumstances in which) conditions are attached to student visas.

Further, under cl 500.212(c) decision-makers should also have regard to any other relevant matter in determining whether an applicant is a genuine applicant for entry and stay as a student. It is for the decision-maker to determine whether there is 'any other relevant matter' that needs to be considered. In *Eros v MICMSMA*, the Federal Court indicated that consideration of whether a person's stay in Australia is "as a student" is relevant to cl 500.212(c).[97] In *Randhawa v MIMAC* (which concerned the equivalent pre 1 July 2016 criteria) the Federal Circuit Court confirmed that the term 'any other relevant matter' is not in any way circumscribed.[98]

[93] *Sharma v MIBP* [2015] FCCA 575 at [16] – [18]. See also *Singh v MHA* [2019] FCCA 3556 at [43] – [44] where the Court held there was no error in the Tribunal noting that the absence of information in relation to a number of factors in Direction No 69 precluded those matters from forming part of its consideration, in circumstances where the applicant had lost their entitlement to attend a hearing after failing to respond to a s 359(2) invitation within the prescribed period and the Tribunal made findings on the relevant factors in Direction No 69 based on the material before it.
[94] *Bala v MIBP* [2019] FCA 600 at [17] – [18]. Although the Tribunal did not expressly refer to factors 9(d) – (e), 11(d) and 15 of Direction No 53, the Court found that the Tribunal had considered them. See also *Patel v MIBP* [2019] FCCA 2436 at [71], upheld on appeal in *Patel v MICMSMA* [2020] FCA 346.
[95] Direction No 69, Part 2 at [2] – [3]. In *Aziz v MICMSMA* [2019] FCA 1397 at [20] – [24], the Court rejected the applicant's argument that the Tribunal must have regard to aspects of Departmental policy (PAM3) that appeared more favourable to the applicant. The Court held that the Tribunal is only positively bound to consider the factors in Direction No 53, and is not bound to have regard to, and to apply, Departmental policy.
[96] Direction No 69, Part 2 at [4].
[97] *Eros v MICMSMA* [2020] FCA 1061 at [32].
[98] *Randhawa v MIMAC* [2013] FCCA 1207 at [39].

The question before the Court in *Randhawa* was whether the Tribunal acted unreasonably when it had regard to the fact that the applicant had worked, but not studied, in the two years preceding the Tribunal's decision, during a period when the applicant did not hold a student visa. Judge Burchardt concluded that the applicant's failure to study, his explanations for it and the fact that he had driven a taxi between 2011 and 2013, were all capable of being a 'relevant matter' within the meaning of the regulations and that it was open to the Tribunal to have regard to these matters.[99]

Similarly, one of the issues considered by the Full Federal Court in *Ou Yang v MIMIA*[100] was whether 'regression' in a proposed course of study is a 'relevant consideration' for the purposes of 'other relevant matters'. In this case the applicant indicated in the visa application that he had attained a year 12 qualification at a middle school in China but he had applied to study years 10, 11 and 12 in Australia. While a majority of the Court ultimately found that the Tribunal erred in taking a 'purely arithmetical calculation' in assessing these matters, it did confirm that regression can be a relevant consideration, noting that 'a proposal to undertake a course of study from which an applicant is unlikely to derive an educational benefit leaves open the inference that an application for a visa could be made for a purpose unrelated to an applicant's academic advancement.'[101]

Departmental guidelines state that the decision-maker should only refuse to grant a visa under cl 500.212(c) if the applicant satisfies all other Schedule 2 criteria, including genuine temporary entrant, but there are other relevant factors that might indicate the applicant is not a genuine student. For example, if the study plan for a school student is inappropriate.[102] However, these guidelines are not binding on the Tribunal and decision makers must consider all relevant factors.

English language proficiency

Applicants may be required by the Minister, in writing or by use of a computer program available online, at any time, to provide evidence that the applicant has a level of English language proficiency that meets the requirements specified in an instrument.[103]

The requirement to provide evidence of English language proficiency can be made by a decision-maker 'at any time', although it is likely that this will ordinarily occur at the time of application.[104] Under s 349(1) of the Act, the Tribunal has the powers and discretions conferred on the person who made the decision and could therefore potentially require an applicant to provide evidence of English language proficiency on review. Once a requirement

[99] *Randhawa v MIMAC* [2013] FCCA 1207at [35], [37].
[100] *Ou Yang v MIMIA* (2003) 132 FCR 571.
[101] *Ou Yang v MIMIA* (2003) 132 FCR 571 at [23] and [28].
[102] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.3 Genuine applicant for entry and stay as a student – 4.6.3.4 Any other relevant matter (re-issued 21/09/2018).
[103] cl 500.213(1).
[104] The Explanatory Statement to F2016L00523 notes that it was intended to make a computer program available at the time of application, under which an applicant's country of origin and education provider, will be assessed, and a requirement made to provide evidence if the applicant comes within the risk settings in the program (pp.36 – 37). It is arguable that a request for evidence of English language proficiency may be made, even if an applicant has already provided evidence in the application without any express requirement to do so, for example where there are doubts about whether the applicant actually sat the test, or problems with reporting of test results: see *Tran v MIBP* [2016] FCCA 1984 at [45] in the context of a similar provision in cl 457.223(4)(ec), although this has not been considered in the context of cl 500.213.

to provide the specified evidence has been made, it is unclear whether it can be reversed at a later time.[105]

As these requirements are set out in a legislative instrument, decision makers should ensure they always check which is the relevant instrument that applies to a particular application.

The relevant instrument, *English Language Tests and Evidence Exemptions for Subclass 500 (Student) Visas*[106] (the English Instrument) sets out evidentiary requirements relating to English language test providers, test scores, countries where an applicant may take a Test of English as a Foreign Language (TOEFL) paper-based test,[107] and the time periods in which an English test must be taken.

There is also a maximum time period in which an English test must be taken. Under IMMI 16/019, this is two years immediately before the date the application is made, or two years immediately before a decision is made on the application.[108] The expression before 'a decision is made on the application' in item 1(d)(ii) of IMMI 16/019 is ambiguous as to whether it is a reference to the decision of the delegate, or the decision of the Tribunal on review. On the plain meaning of the words, both interpretations would be open. In the absence of judicial consideration on this point, construing this expression beneficially to the applicant to mean two years immediately before the Tribunal's decision, so as to allow an applicant more time in which to take the test, would likely be favoured by a court. On this view, it would be open to an applicant to undertake an English test while the matter is on review and provide evidence of it to the Tribunal before it makes its decision. However it is unclear whether the Tribunal can request an applicant to undertake a new English test on review, as distinct to requesting *evidence* of it under cl 500.213(1).

In contrast, under IMMI 18/015, an applicant must have completed the English test:

- if evidence of the test is provided at the time of the visa application – 2 years immediately before the date of the visa application, or
- if evidence of the test is not provided at the time the visa application is made – 2 years immediately before a decision to grant or refuse the visa application is made.[109]

As IMMI 18/015 appears directed towards ensuring there is recent evidence of English language proficiency available to the decision maker, this purpose appears best served by reading the words 2 years immediately before 'a decision to grant or refuse the visa' in item 6(1)(c)(ii) as '…the decision of the Tribunal'. Although the Tribunal does not make a decision 'to grant or refuse the visa',[110] it does exercise all the powers and discretions that

[105] If the Tr bunal is reviewing a decision to refuse a visa on the basis that the delegate required evidence of English proficiency and so cl 500.213 was not met, and if the Tribunal were to decide that it did not require evidence of English proficiency, it could not remit the matter on the basis that cl 500.213 did not apply, as it is not a permissible direction under s 349(2)(c) and reg 4.15.
[106] See the 'English' tab in the Register of Instruments – Student Visas for the relevant instrument.
[107] The TOEFL paper-based test was removed in IMMI 18/015, which applies to visa applications made on or after 6 June 2018. IMMI 16/019 continues to apply to visa applications made before 6 June 2018 and not finally determined by 6 June 2018.
[108] Item 1(d)(ii) of IMMI 16/019.
[109] Item 6(1)(c)(ii) of IMMI 18/015.
[110] The Tribunal's powers on review are to affirm, vary, remit in relation to a prescribed matter, set aside and a substitute with a new decision or to dismiss or reinstate an application: s 349(2).

are conferred by the Act on the person who made the decision that is under review. In that sense, its decision to affirm a decision of a delegate refusing to grant a visa may, in the limited context of IMMI 18/015, be akin to it refusing the visa application. This appears to have been the view of the Federal Circuit Court in [redacted] (Tribunal decision [redacted]), a matter that was remitted by consent on the basis that the Tribunal had failed to accept evidence of English language proficiency obtained by the applicant after the date of the delegate's decision but prior to the Tribunal's decision being made. In its order remitting the matter back to the Tribunal to determine according to law, it was recorded that the Minister had noted that 'a decision to grant or refuse the visa application' in 6(1)(c) of IMMI 18/015 referred to both a decision by a delegate and to a decision of the Tribunal.

Exemption from requirement

Certain applicants are exempted from the requirement to provide this evidence of English language proficiency.[111] The requirement does not apply to:[112]

- an applicant who is a citizen of, and holds a valid passport issued by the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland

- an applicant who is enrolled in a principal course of study and that principal course of study is registered to be delivered in a language other than English, a registered ELICOS course as defined in reg 1.03 of the Regulations, a registered school course, or a registered post-graduate research course[113]

- an applicant who is a Foreign Affairs, Defence or secondary exchange student

- an applicant who, in the two years before applying for a Subclass 500 visa, has successfully completed the requirements for a Senior Secondary Certificate of Education,[114] in a course that was conducted in Australia in English, or a substantial component[115] of a course leading to a qualification from the Australian Qualifications Framework at the Certificate IV level or higher that was conducted in Australia in English while the applicant was holding a student visa, or

[111] cl 500.213(2) makes provision for specified classes of applicants to be exempted from the requirement in cl 500.213(1).
[112] Item 2 of IMMI16/019 and item 6(2) of IMMI18/015.
[113] cl 500.111 provides that a postgraduate research course means a course of study leading to the award of a master's degree (research or a doctoral degree).
[114] The term '*Senior Secondary Certificate of Education*' in this context is a generic title for senior secondary school qualifications issued by the state and territory governments. In NSW, for example, it refers to the award of the Higher School Certificate (HSC). Thus, a document certifying only that the applicant has completed the HSC Course would not suffice: *Liu v MIAC* (2008) 218 FLR 150.
[115] The question of what might or might not constitute a substantial component of a course is a matter of fact for the decision maker, to be determined according to the circumstances of the case. For example, in *Singh v MHA* [2019] FCCA 249 at [17], in considering a challenge to the reasonableness of the Tribunal's finding that the applicant was not within the class of persons exempted in item 6(2)(d)(ii) of IMMI 18/015, the Federal Circuit Court considered that completing 40% of a course was arguably not the same as completing a 'substantial component' of a course. See also, for example, (in the context of a similarly worded 'substantial part' in the pre 1 July 2016 criterion): *Mia v MIAC* [2010] FCA 1312 at [18], upholding *Mia v MIAC* [2010] FMCA 630 at [31], [33] and *Seneviratne v MIAC* [2009] FMCA 907. Also see *Maestro v MIBP* [2016] FCCA 1095 and *Ashraf v MIBP* [2017] FCCA 1861 where the Federal Circuit Court considered a similarly worded 'substantial part' in the context of cls 572.223(3)(a) and 5A507(1)(d)(iii). The Court held in both these matters that 'substantial' in this context generally requires a 'considerable level of completion' and also highlighted that a strict quantitative approach to the concept of 'substantial part' should not be taken.

- an applicant who has successfully completed a minimum of five years of study in English undertaken in one or more of the following countries: Australia, Canada, New Zealand, South Africa, the Republic of Ireland, the United Kingdom and/or the United States of America.

With respect to the final class of persons and the expression 'at least five years of study', in *Kabir v MIAC*[116] the Court held:

- the term 'years' refers to the ordinary meaning of 'year' and not some special meaning such as 'academic years'
- it is appropriate for the Tribunal to aggregate various periods[117]
- it would be wrong to simply adopt the nominal or specified full time length of a course as the length of 'study'; rather, the Tribunal should take into account the period actually spent studying.[118] However, the period of 'at least 5 years' has to be a period 'of study', which relevantly means a period of 'application of the mind to the acquisition of learning'.[119] Thus, when calculating the relevant period 'of study', the Tribunal is not obliged to include periods with results of 0% and no grade awarded, because a 0% result and no grade is inconsistent with any 'study' being undertaken, but consistent with there being no application of the mind, nor acquisition of learning, or both; and mere enrolment is not 'study'[120]
- as the study must have been undertaken in Australia or one of the other specified countries, periods during which an applicant is overseas cannot be counted as periods 'of study' unless he or she is studying in one of the other nominated countries.[121]

The second class of applicants identified above, relates to an applicant who is enrolled in one of a number of types of principal courses of study. Under IMMI 18/015, 'principal course' is defined in the instrument to mean the main course of study to be undertaken by an overseas student, noting that a principal course would normally be the final course of study where the overseas student arrives in Australia with a student visa that covers multiple courses. However, under IMMI 16/019 'principal course of study' is not defined and there is no clear way of determining which course is a principal course. Departmental policy indicates that under policy, the principal course is the course with the highest AQF level in a package of courses.[122] Prior to 1 July 2016, this was defined in reg 1.40 of the Regulations. Relevantly, if an applicant proposed to undertake two or more related courses, if either one of the courses of study (course A) was a prerequisite to another of the courses (course B); or one of the courses of study (course B) could be taken only after the completion of another of

[116] *Kabir v MIAC* [2010] FMCA 132, not disturbed on appeal: *Kabir v MIAC* (2010) 118 ALD 513. This judgment related to an equivalent pre 1 July 2016 criterion.
[117] *Kabir v MIAC* [2010] FMCA 132 at [52] – [53].
[118] *Kabir v MIAC* [2010] FMCA 132 at [56] – [57].
[119] *Kabir v MIAC* [2010] FMCA 132 at [50] referring to the Shorter Oxford English Dictionary on Historical Principles, Vol. 2 (Oxford, 1973) p. 2158.
[120] *Kabir v MIAC* [2010] FMCA 132 at [58].
[121] *Kabir v MIAC* [2010] FMCA 132 at [59].
[122] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.2.2 Packages and principal courses (re-issued 21/09/2018).

the courses (course A); course B, not course A, was the principal course. Consistent with this, the correct approach to this issue would therefore seem to be to determine whether one course is required as a prior condition to doing another course. The course that is not a pre-requisite would be the principal course.

Genuine access to sufficient funds and financial capacity

All primary applicants are required to have genuine access to sufficient funds to meet the costs and expenses of the applicant (and any family member who will be in Australia) during the applicant's intended stay.[123] In addition, an applicant must also, if required to do so by the Minister, in writing or by the use of a computer program available online, give evidence of financial capacity that satisfies the requirements specified in an instrument, and have genuine access to these funds.[124] As is the case for the English language proficiency requirements, request for evidence of financial capacity can be made 'at any time', although it is intended that it will ordinarily occur at the time of application. Similarly, it is unclear if such a request can be reversed.

As this is a time of decision criterion, it should be assessed by reference to the course or courses of study the visa applicant is enrolled in at the date of the decision.

Genuine access

An applicant must have genuine access to funds of a kind mentioned in cl 500.214(2) and cl 500.214(3) (if applicable).[125]

In assessing whether an applicant will have genuine access to funds, departmental policy indicates that decision makers may consider the circumstances of the applicant/person providing the funds, such as their employment history, income and assets, the nature of the relationship between the persons, and if the person providing the income has provided support for another visa applicant.[126]

Where applicants have to provide evidence of financial capacity under cl 500.214(3), the decision maker also needs to be satisfied that the applicant will have genuine access to those funds. Assessment of this criterion would be informed by the type of evidence provided by an applicant. For example, a money deposit held by an applicant would generally satisfy this requirement. However, if the money deposit is held by a third party, consideration should be given to the applicant's relationship to the account holder and whether the applicant would have genuine access to the funds.

[123] cls 500.214(1), (2).
[124] cls 500.214(1), (3).
[125] cl 500.214(1).
[126] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.5.8 Genuine access to funds (re-issued 21/09/2018).

Sufficient funds to meet costs and expenses (cl 500.214(2))

Clause 500.214(2) applies to all applicants seeking to satisfy the primary criteria and requires that, while the applicant holds the visa, sufficient funds will be available to meet the costs and expenses of the applicant during the applicant's intended stay in Australia, and the costs and expenses of each member of the applicant's family unit (if any) who will be in Australia.

The expressions 'sufficient funds' and 'costs and expenses' are not defined for this purpose. Applicants must simply satisfy the decision-maker that while they hold the visa, they will have genuine access to sufficient funds to meet the costs and expenses required to support themselves and each member of their family unit during the proposed stay in Australia. If necessary, decision-makers may consider requesting information such as financial documents to satisfy themselves that this requirement is met.

Where the applicant is enrolled in multiple courses, this requirement should be assessed with reference to the cost and duration of all courses.

Evidence of financial capacity (cl 500.214(3))

In addition to the above requirement, an applicant needs to have genuine access to funds of a kind mentioned in cl 500.214(3) if applicable i.e. if the Minister requests evidence of financial capacity that satisfies the requirements specified in an instrument. The relevant instrument, *Evidence of Financial Capacity for Subclass 500 (Student) Visas and Subclass 590 (Student Guardian) Visas* (the Financial Instrument), specifies a range of evidence that applicants seeking to satisfy the primary criteria for a Subclass 500 visa must provide, including:[127]

- sufficient funds to meet the following costs or expenses of the applicant
  - travel expenses
  - specified annual living costs and expenses for the first 12 month period of the applicant's stay in Australia or a pro rata equivalent
  - course fees, minus any amount already paid, for the first 12 month period of the applicant's stay in Australia or a pro rata equivalent, and
- sufficient funds available to meet the following costs or expenses of each member of the family unit making a combined application with the primary applicant
  - travel expenses
  - specified annual living costs and expenses for the first 12 month period of the applicant's stay in Australia or a pro rata equivalent

[127] s 6(2)–(4) of LIN 19/198. See the 'Financial' tab in the Register of Instruments – Student Visas for the relevant instrument.

  - specified annual school fees for each school aged dependent for the first 12 month period of the applicant's stay in Australia or a pro rata equivalent, or

- the primary applicant's parents or spouse have personal annual income that is above an amount specified in the instrument, or

- the applicant's completed AASES form, as defined in reg 1.03 of the Regulations.

In most cases, it will first be necessary to calculate the applicant's relevant costs or expenses. 'Sufficient funds' in this context also requires the relevant amount of funds to be in the form specified in the Instrument: money deposit with a financial institution; loan with a financial institution; government loans; or scholarship or financial support (see source of funds below).[128] In the alternative, decision makers can consider whether there is evidence that the applicant's parents or spouse have 'personal annual income' above a certain level, as this will be sufficient to satisfy cl 500.214(3). These concepts are discussed further below.

As these requirements are set out in a legislative instrument, decision makers should ensure they always check which version of the instrument applies to a particular application.

Calculation of funds

In considering whether an applicant has sufficient funds to meet costs and expenses for the purposes of cl 500.214(3) and the Financial Instrument, it is necessary for the decision maker to calculate the amount of funds required by the applicant to meet course fees, living costs, travel expenses and school costs (if the applicant has a school aged dependent). Please refer to the Subclass 500 student funds calculator to calculate the total funds an applicant must show under s 6(2) of LIN 19/198 and cl 500.214(3).

Living costs and expenses

The Financial Instrument specifies the 'living costs and expenses' of an applicant and each member of a family unit (where applicable). For applications made from 1 July 2016, the annual living costs for a student (i.e. primary applicant) intending to stay for 12 months or more are $21,041 AUD; for a spouse or de facto, $7,362 AUD; and for a dependent child $3,152 AUD. A pro rata equivalent calculation is specified for applicants intending to stay for a period of less than 12 months.[129]

Unlike previous instruments where the period over which a decision maker is required to assess these costs for 'the first 12 month period of the applicant's stay', the current instrument sets out annual costs for applicants intending to stay for 12 months or more. Whether the applicant intends to stay 12 months or more should be calculated from the time of decision. As the amount is specified, the Tribunal need only consider the length of the applicant's intended stay rather than calculate expenses from some future point in time.

[128] s 10 of LIN 19/198. See the 'Financial' tab in the Register of Instruments – Student Visas for the relevant instrument.
[129] Currently in s 11 of LIN 19/198. The pro rata equivalent is calculated by dividing the annual amount by 365, and multiplying the resulting number by the number of days the applicant is intending to stay in Australia.

Course fees

Course fees are calculated by reference to the length of the applicant's period of study in Australia, minus any amount already paid. If the duration, or remainder, of the applicant's period of study is less than 12 months, the course fees are for the course of study or the remaining components of the course of study. If the duration, or remainder, of study is more than 12 months, the course fees are for the first 12 months of the period of study in Australia. While 'course fees' is not defined, this clearly relates to the course fees for the course of study in which the applicant is enrolled. This is a question of fact to be determined on the available evidence e.g. the CoE. If the evidence does not clearly indicate what the fees will be for the first 12 month period of the applicant's study in Australia (for example where the course is longer than 12 months), further evidence may be required from the education provider.

Whether the applicant has pre-paid a portion of their course fees is a question of fact to be determined on the available evidence. There does not appear to be a requirement that the pre-paid fees were paid from the sources of funds specified in LIN 19/198 (see below). Where the course fees are wholly or partly prepaid, the relevant course fee would be the balance. This appears consistent with the purpose of the financial capacity requirement, that is, to ensure that applicants have sufficient funds to cover their costs in Australia, and reduce the risk of experiencing financial hardship in Australia.[130]

The 'period of study' is defined in the notes section to s 6(2)(b)(iii) of the current instrument (LIN 19/198). The period commences depending on when the applicant's first course of study commences, and ends on the final day of the applicant's final course of study. If the applicant's first course of study commenced after the date of application, the period of study commences on the first day of the first course of study. If the applicant's first course of study commenced before the date of application, the period of study commences on the date of application. In some cases, it may mean that the applicant has already paid all course fees as the first 12 months of study has already elapsed by the time the applicant appears before the Tribunal.

Travel expenses

This term is not defined. However, it presumably includes the costs of traveling to Australia (for offshore applicants) and leaving Australia before the expiry of the visa. Departmental guidelines state that travel expenses are communicated externally so applicants are aware of the funds required to include in the calculation of funds. These are currently set out in Departmental guidelines as $2,000 for offshore applicants and $1,000 for onshore applicants.[131]

School fees

[130] Explanatory Statement to the F2016L00523, p.38.
[131] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.5.4 Sufficient funds for travel, living, course (tuition) and school fees) – Travel costs (re-issued 21/09/2018).

Where a family member in a combined application is a school-age dependant, the applicant needs to demonstrate that they have sufficient funds to meet all school fees for each such dependant based on the length of that dependant's intended stay in Australia. 'School-age dependant' means a member of the family unit of the person who has turned 5, but has not turned 18.[132] Section 6(2)(c)(iv) specifies either annual school costs of $8296 if the school-age dependant intends to stay in Australia for more than 12 months, or a pro rata equivalent if the school-age dependant intends to stay in Australia for less than 12 months (in accordance with the pro rata calculation specified in section 11), or nil if the school-age dependant is enrolled in a course at a State or Territory school where the fees have been waived and the primary applicant is enrolled in a course as a doctoral degree student, Foreign Affairs student, Defence student, or Commonwealth sponsored student. The Department's guidelines state that if at the time of the visa decision a child is not a school-age dependant but they will become so during the first 12 months of the intended stay, the school costs are to be included in relevant calculations for financial capacity from the time they do become a school-age dependant until the end of the first 12 months.[133]

Source of funds

All of the funds required by an applicant to meet their relevant costs and expenses must also satisfy the requirements of s 10 of the current instrument. This specifies a limited range of evidence of financial capacity which is required, namely: a money deposit with a financial institution, a loan with a financial institution, government loans and scholarship or financial support.

Financial institution

The term 'financial institution' appears in both the definition of 'money deposit' and also in connection with the provision of loans.

It is defined in reg 1.03 of the Regulations as a body corporate that, as part of its normal activities, takes money on deposit and makes advances of money under a regulatory regime governed by the central bank (or its equivalent) of the country in which the body corporate operates; and that the Minister is satisfied provides effective prudential assurance. In addition the body corporate must take money on deposit and make advances of money 'in a way that the Minister is satisfied complies with effective prudential assurance requirements', enabling the decision maker to consider whether the body corporate itself provides effective prudential assurance.

There is no definition of 'effective prudential assurance' but Departmental guidelines describe prudential assurance as referring to the prudent management of capital and other assets of the relevant bank or financial institution to enable it to meet its financial obligations as and when they become due'.[134] The policy further states that criteria to measure the

[132] reg 1.03.
[133] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.5.4 Sufficient funds for travel, living, course (tuition) and school fees) – If not yet of school age (re-issued 21/09/2018).
[134] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.5.4 Sufficient funds for travel, living, course (tuition) and school fees – Financial institutions (re-issued 21/09/2018).

effectiveness of prudential assurance will differ based on the circumstances relevant to the regulatory regime in each country, but notes the following as possible considerations:

- the institution has implemented appropriate credit risk management strategies
- the institution is approved by the country's central bank or has an official high credit rating from an independent body
- documents from the institution have been assessed previously by the Department and found not to represent legitimate funds available to a client
- the institution has been implicated in behaviour such as fraud or bribery.

Departmental guidelines also note that some posts maintain a list of acceptable financial institutions and that such lists should be created on the basis of the relative financial standing of an institution, its credit rating and integrity.[135] These lists have no official status under the Act or Regulations and are not a substitution for a determination of fact whether a particular institution meets the relevant definition of 'financial institution'.

As financial institution means a *body corporate*, at the very least the relevant entity must not be a natural person (such as an individual acting as a loan shark, for example), nor should they be a business or government agencies unless they are acting in some other, incorporated, capacity.

Money deposits

Having regard to the ordinary meaning of these terms, 'money' may include 'coin or certificates (such as banknotes, etc.) generally accepted in payment of debt and current transactions',[136] whilst 'deposit' may include 'to place for safekeeping or in trust' or 'money placed in a financial institution.[137] It would therefore appear that the term 'money deposit' is intended to encompass cash type assets placed in financial institutions, such as most commonly associated with general savings type deposit accounts. Evidence of a 'money deposit' may include, for example, deposit booklets, fixed term receipts, term deposit receipts, or statements or letters from financial institutions confirming the amount of funds deposited in a particular account.

Non-cash assets, such as property or other possessions, life-insurance and superannuation policies, or investment in government bonds for example, would not appear consistent with the ordinary meaning 'money' and 'deposit', and may therefore fall outside of that term.

Similarly, savings or deposits held in non-'financial institutions' would also fall outside the definition of 'money deposits'.

Loans

[135] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.5.4 Sufficient funds for travel, living, course (tuition) and school fees – Financial institutions (re-issued 21/09/2018).

Evidence of financial capacity may also be in the form of a loan with a financial institution or a government loan. It is a question of fact for the decision maker whether a particular financial arrangement possesses the relevant characteristics of a loan.

Whilst there is no definition of the term 'loan', it has been held (in the context of the pre 1 July 2016 student visa framework) to encompass a legally enforceable agreement by which a financial institution promises to advance funds to a borrower on condition that the funds advanced be repaid.[138] It is not dependent upon any or all of the funds agreeing to be lent coming into the possession of the borrower, nor is it contingent upon there being a repayment schedule.[139] In this respect, the term 'loan' may encompass a range of financial arrangements such as an 'overdraft' or 'line of credit' as they would both appear to share the same broad characteristics of an enforceable agreement to provide funds on condition of repayment. There is also support, including in Departmental guidelines,[140] that to the extent there is a pre-approved limit that may be drawn upon when required and which the borrower need only make re-payments on the funds withdrawn, a credit card account or facility may also satisfy the meaning of 'loan'.

Scholarship or financial support

A scholarship or financial support will also satisfy the requirement for evidence of financial capacity. 'Scholarship' is not defined although ordinarily a scholarship would be awarded by an education provider, government or international organisation.

'Financial support' is also not defined and on one view, the type of entity which can provide support to the applicant is unconfined. However, given the stringent evidentiary requirements which otherwise apply, the better view would be to confine this to financial support from an institution providing support to students, rather than financial support that is provided by any individual generally.

Personal annual income

As an alternative to providing evidence of sufficient funds to meet the applicable costs and expenses of the applicant (and each member of the family unit where there is a combined application), an applicant can provide evidence that their parents or spouse have personal annual income that is above an amount specified in s 6(3) of LIN 19/198.[141]

Section 6(3)(b) specifies the following annual income amounts: $62,222 AUD where there is no secondary applicant, or $72,592 AUD if one or more of the members of the applicant's

[136] Macquarie Dictionary online (http://www.macquariedictionary.com.au), accessed 1 June 2016.
[137] Macquarie Dictionary online (http://www.macquariedictionary.com.au), accessed 1 June 2016.
[138] *Patel v MIAC* (2013) 211 FCR 35 at [19].
[139] *Patel v MIAC* (2013) 211 FCR 35 at [19].
[140] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.5.4 Sufficient funds for travel, living, course (tuition) and school fees – Loan (re-issued 21/09/2018).
[141] See s 6(1) of the relevant instrument in the 'Financial' tab in the Register of Instruments – Student Visas.

family are seeking to satisfy the secondary criteria for a Subclass 500 visa (or for Subclass 590 applicants).[142]

In addition, s 6(3)(a) provides that the only acceptable evidence of this annual income amount is official Government documentation of personal income that has been issued in the 12 months immediately before the application is made, such as a tax assessment or country equivalent.[143]

It is unclear whether 'personal annual income' includes the proceeds of the one-off sale of an asset, or the combination of 'personal income' and the proceeds of the one-off sale of an asset. Under the pre 1 July 2016 student visa framework, such proceeds were excluded from the definition of 'regular income', as well as income from lottery winnings, gifts and the like.[144] This may also be the case in this context, given that 'annual income' suggests a recurrent character.

Secondary applicants

Intends genuinely to stay in Australia temporarily

When assessing whether secondary applicants are a genuine temporary entrant in cl 500.312, the Tribunal is required to consider the secondary applicant's relationship with the primary applicant[145] as well as Direction No 69. As condition 8202 (relating to enrolment) is not imposed on secondary applicants when they hold a student visa as a dependent, matters relating to studying and the value of the course, namely the factors in 9(a) and 12(a)–(c) of Direction No 69, are not relevant considerations. A secondary applicant's previous study history may be a useful consideration in determining a genuine intention to stay temporarily.[146]

Relevant case law

Judgment	Judgment Summary
Aziz v MICMSMA [2019] FCA 1397	
Bae & Anor v MIBP [2017] FCCA 625	
Bala v MIBP [2019] FCA 600	

[142] Departmental guidelines state this amount is the gross amount (i.e. before tax), Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.5.2 Annual income (re-issued 21/09/2018).
[143] Policy – *Migration Regulations* – Schedules – [Sch2Visa500] Visa 500-Student – 4.6.5.2 Annual income (re-issued 21/09/2018).
[144] *MIBP v Kaur* [2014] FCA 1384.
[145] *Maharjan (No 2) v MHA* [2020] FCCA 731 at [17].
[146] *Maharjan (No 2) v MHA* [2020] FCCA 731 at [21] where the Court held that the applicant's own academic record was relevant to whether he intended genuinely to stay in Australia temporarily, and his poor academic performance was a rational basis for inferring that he had not genuinely intended to stay temporarily when he held a Student visa and for that reason would not hold a genuine intention to stay temporarily as a member of his wife's family unit.

Dait v MICMSMA [2022] FCAFC 25	
Ding v MHA [2019] FCA 1036	
EEG18 v MHA; EEI18 v MHA; EEJ18 v MHA [2019] FCCA 2132	Summary
Eros v MICMSMA [2020] FCA 1061	Summary
Inderjit v MICMSMA [2019] FCAFC 217	
Jan v MHA [2019] FCA 1837	
Ji Hyang Lee v MICMSMA [2021] FCCA 1084	Summary
Kabir v MIAC [2010] FMCA 132	Summary
Kaur v MHA [2019] FCA 2026	
Kaur v MICMSMA [2020] FCCA 2606	
MIAC v Khadgi [2010] FCAFC 145; (2010) 190 FCR 248	Summary
MIBP v Kumar [2017] HCA 11	Summary
Kumar v MIBP [2020] FCAFC 16	Summary
Liu v MIAC [2008] FMCA 750; 218 FLR 150	Summary
Maharjan (No 2) v MHA [2020] FCCA 731	Summary
Mia v MIAC [2010] FCA 1312	
Ou Yang v MIMIA [2003] FCAFC 258;132 FCR 571	Summary
Patel v MIAC [2013] FCA 97; 211 FCR 35	Summary
Patel v MIBP [2019] FCCA 2436	
Patel v MICMSMA [2020] FCA 346	
Ramanayake v MICMSMA [2022] FedCFamC2G 5	Summary
Randhawa v MIMAC [2013] FCCA 1207	Summary
Saini v MIBP [2015] FCCA 2379	Summary
Saini v MIBP [2016] FCA 858	Summary
Sharma v MIBP [2015] FCCA 575	Summary

Singh v MIAC [2009] FMCA 1149; 236 FLR 384	Summary
Singh v MIBP [2018] FCCA 3423	Summary
Singh v MHA [2019] FCCA 249	
Singh v MHA [2019] FCCA 3556	
Tariwal v MIBP [2017] FCCA 991	Summary
Tran v MIBP [2016] FCCA 1984	Summary
Zhang v MIAC [2010] FMCA 809	Summary
Zhu v MIBP [2017] FCCA 83	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523	No 01/2016
Migration Legislation Amendment (2017 Measures No 4) Regulations 2017 (Cth)(disallowed)	F2017L01425	No 05/2017
Migration Amendment (Protecting Australia's Critical Technology) Regulations 2022 (Cth)	F2022L00541	No 01/2022
Migration Amendment (Postgraduate Research in Critical Technology – Student Visa Conditions) Regulations 2022 (Cth)	F2022L00866	No 01/2022

Available decision templates / precedents

There is a template / precedent available for use in matters dealing with Subclass 500.

Last updated/reviewed: 7 October 2022

Attachment A – Direction No 69

DIRECTION NUMBER 69 – ASSESSING THE GENUINE TEMPORARY ENTRANT CRITERION FOR STUDENT VISA AND STUDENT GUARDIAN VISA APPLICATIONS

(Section 499)

I, *PETER DUTTON*, Minister for Immigration and Border Protection give this Direction under section 499 of the *Migration Act 1958* (the Act).

Dated: 18 April 2016

Peter Dutton

Minister for Immigration and Border Protection

Note: Section 499(1) of the Act empowers the Minister to give a written direction to a person or body having functions or powers under the Act if the directions are about the performance of those functions; or the exercise of those powers. Under section 499(2) of the Act, the direction must not be inconsistent with the Act or the *Migration Regulations 1994*. Under section 499(2A) of the Act, the person or body must comply with the Direction.

Part 1 of Direction No 69 - Preliminary

Name of Direction

This Direction is Direction No 69 - Assessing the genuine temporary entrant criterion for Student visa and Student Guardian visa applications.

It may be cited as Direction No 69.

Commencement

This Direction commences on 1 July 2016.

Interpretation

Act means the *Migration Act 1958.*

Genuine temporary entrant means a person who satisfies the genuine temporary entrant criterion for Student visa or Student Guardian visa applications.

Genuine temporary entrant criterion refers to clause 500.212(a), 500.312(a) and 590.215(a) at Schedule 2 to the Regulations.

Home country has the same meaning as the definition of that term in regulation 1.03 in Part 1 of the Regulations.

Regulations mean the *Migration Regulations 1994.*

Relative has the same meaning as the definition of that term in regulation 1.03 in Part 1 of the Regulations.

Spouse has the same meaning as the definition of the term in section 5F of the Act.

Student visa means a Subclass 500 (Student) visa

Student Guardian visa means a Subclass 590 (Student Guardian) visa.

Application

This Direction applies to delegates performing functions or exercising powers under section 65 of the Act in relation to assessing an applicant's temporary entrant criterion for Student visa applications in Schedule 2 to the Regulations.

This Direction also applies to members of the Administrative Appeals Tribunal who review the decisions of primary decision-makers in relation to a Student visa or a Student Guardian visa application.

The genuine temporary entrant criterion must be satisfied by all applicants who make an application for either a Student visa seeking to satisfy the primary criteria for a Student Guardian visa.

Preamble

The Australian Government operates a student visa programme that enables people who are not Australian citizens or Australian permanent residents to undertake study in Australia. A person who wants to undertake a course of study under the student visa programme must obtain a student visa before they can commence a course of study in Australia. A successful applicant must be both a genuine temporary entrant and a genuine student.

An applicant who is a genuine temporary entrant will have circumstances that support a genuine intention to temporarily enter and remain in Australia, notwithstanding the potential for this intention to change over time to an intention to utilise lawful means to remain in Australia for an extended period of time or permanently.

The genuine temporary entrant criterion for Student visa applications requires the Minister to be satisfied that the applicant intends genuinely to stay in Australia temporarily, having regard to:

a. the applicant's circumstances; and

b. the applicant's immigration history; and

c. if the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant; and

d. any other relevant matter.

This Direction provides guidance to decision makers on what factors require consideration when assessing the above paragraphs a to d, to determine whether the applicant genuinely intends to stay in Australia temporarily.

Decision makers must take a reasonable and balanced approach between the need to make a timely decision on a Student visa or Student Guardian visa application and the need to identify those applicants who, at time of decision, do not genuinely intend to stay in Australia temporarily.

Part 2 of Direction No 69 - Directions

Assessing the genuine temporary entrant criterion

1. Decision makers should not use the factors specified in this Direction as a checklist. The listed factors are intended only to guide decision makers when considering the applicant's circumstances as a whole, in reaching a finding about whether the applicant satisfies the genuine temporary entrant criterion.

2. Decision makers should assess whether, on balance, the genuine temporary entrant criterion is satisfied, by:

a. considering the applicant against all factors specified in this Direction; and

b. considering any other relevant information provided by the applicant (or information otherwise available to the decision maker).

3. Decision makers may request additional information and/or further evidence from the applicant to demonstrate that they are a genuine temporary entrant, where closer scrutiny of the applicant's circumstances is considered appropriate.

4. Circumstances where further scrutiny may be appropriate include but are not limited to:

a. information in statistical, intelligence and analysis reports on migration fraud and immigration compliance compiled by the department indicates the need for further scrutiny;

b. the applicant or a relative of the applicant has an immigration history of reasonable concern;

c. the applicant intends to study in a field unrelated to their previous studies or employment; and

d. apparent inconsistencies in information provided by the applicant in their Student visa application.

5. An application for a Student visa or a Student Guardian visa should be refused if, after weighing up the applicant's circumstances, immigration history and any other relevant matter, the decision maker is not satisfied that the applicant genuinely intends a temporary stay in Australia.

The applicant's circumstances

6. Decision makers should have regard to the applicant's circumstances in their home country and the applicant's potential circumstances in Australia.

7. For primary applicants of Subclass 500 Student visas, decision makers should have regard to the value of the course to the applicant's future.

8. Weight should be placed on an applicant's circumstances that indicate that the Student visa or Student Guardian visa is intended primarily for maintaining residence in Australia.

The applicant's circumstances in their home country

9. When considering the applicant's circumstances in their home country, decision makers should have regard to the following factors:

a. whether the applicant has reasonable reasons for not undertaking the study in their home country or region if a similar course is already available there. Decision makers should allow for any reasonable motives established by the applicant;

b. the extent of the applicant's personal ties to their home country (for example family, community and employment) and whether those circumstances would serve as a significant incentive to return to their home country;

c. economic circumstances of the applicant that would present as a significant incentive for the applicant not to return to their home country. These circumstances may include consideration of the applicant's circumstances relative to the home country and to Australia;

d. military service commitments that would present as a significant incentive for the applicant not to return to their home country; and

e. political and civil unrest in the applicant's home country. This includes situations of a nature that may induce the applicant to apply for a Student visa or Student Guardian visa as means of obtaining entry to Australia for the purpose of remaining indefinitely. Decision makers should be aware of the changing circumstances in the applicant's home country and the influence these may have on an applicant's motivations for applying for a Student visa or a Student Guardian visa.

10. Decision makers may have regard to the applicant's circumstances in their home country relative to the circumstances of others in that country.

The applicant's potential circumstances in Australia

11. In considering the applicant's potential circumstances in Australia, decision makers should have regard to the following factors:

a. The applicant's ties with Australia which would present as a strong incentive to remain in Australia. This may include family and community ties;

b. evidence that the student visa programme is being used to circumvent the intentions of the migration programme;

c. whether the Student visa or Student Guardian visa is being used to maintain ongoing residence;

d. whether the primary and secondary applicant(s) have entered into a relationship of concern for a successful Student visa outcome. Where a decision maker determines that an applicant and dependant have contrived their relationship for a successful Student visa outcomes, the decision maker may find that both applicants do not satisfy the genuine temporary entrant criterion; and

e. the applicant's knowledge of living in Australia and their intended course of study and the associated education provider; including previous study and qualifications, what is a realistic level of knowledge an applicant is expected to know and the level of research the applicant has undertaken into their proposed course of study and living arrangements.

Value of the course to the applicant's future

12. Decision makers should have regard to the following factors when considering the value of the course to the applicant's future:

a. whether the student is seeking to undertake a course that is consistent with their current level of education and whether the course will assist the applicant to obtain employment or improve employment prospects in their home country. Decision makers should allow for reasonable changes to career or study pathways; and

b. relevance of the course to the student's past or proposed future employment either in their home country or a third country; and

c. remuneration the applicant could expect to receive in the home country or a third country, compared with Australia, using the qualifications to be gained from the proposed course of study.

The applicant's immigration history

13. An applicant's immigration history refers both to their visa and travel history.

14. When considering the applicant's immigration history, decision makers should have regard to the following factors:

a. Previous visa applications for Australia or other countries, including:

   i. if the applicant previously applied for an Australian temporary or permanent visa, whether those visa applications are yet to be finally determined (within the meaning of subsection 5(9) of the Act), were granted, or grounds on which the application(s) were refused; and

   ii. if the applicant has previously applied for visa(s) to other countries, whether the applicant was refused a visa and the circumstances that led to visa refusal.

b. Previous travels to Australia or other countries, including:

   i. if the applicant previously travelled to Australia, whether they complied with the conditions of their visa and left before their visa ceased, and if not, were there circumstances beyond their control;

   ii. whether the applicant previously held a visa that was cancelled or considered for cancellation, and the associated circumstances;

   iii. the amount of time the applicant has spent in Australia and whether the Student visa or Student Guardian visa may be used primarily for maintaining ongoing residence, including whether the applicant has undertaken a series of short, inexpensive courses, or has been onshore for some time without successfully completing a qualification; and

   iv. if the applicant has travelled to countries other than Australia, whether they complied with the migration laws of that country and the circumstances around any non-compliance.

If the applicant is a minor — the intentions of a parent, legal guardian or spouse of the applicant

15. If the primary or secondary applicant for a Subclass 500 Student visa is a minor, decision makers should have regard to the intentions of a parent, legal guardian or spouse of the applicant.

Any other relevant matters

16. Decision makers should also have regard to any other relevant information provided by the applicant (or information otherwise available to the decision maker) when assessing the applicant's intention to temporarily stay in Australia. This includes information that may be either beneficial or unfavourable to the applicant.

SUBCLASSES 570–576 – VARIOUS ISSUES

Applicants without a substantive visa – 28 day rule and related requirements

Exceptional reasons for the grant of the visa

Health insurance – adequate arrangements

Subclass 576 – AusAID / Foreign Affairs or Defence Sector

Overview[1]

This commentary covers a range of miscellaneous issues commonly arising in reviews of student visa subclasses 570-576. It applies in relation only to visa applications made before 1 July 2016. It covers:

- 28 day rule – cl 57x.211(3)
- 'exceptional reasons' criterion – cl 57x.227
- health insurance requirement
- Subclass 576 (AusAID/Foreign Affairs or Defence Sector) visas.

From 1 July 2016, persons seeking a student visa must apply for the Subclass 500 visa. See the Subclass 500 commentary for more information.

Applicants without a substantive visa – 28 day rule and related requirements

Onshore applicants for a student visa must either hold a substantive visa at the time of application or meet additional requirements for the grant of the visa. One of these additional requirements is that the last substantive visa held was of a prescribed class, and the student visa application was made within 28 days (or a specified period) after the day that last substantive visa ceased (the '28 day requirement').[2]

Where the Tribunal sets aside and substitutes a decision to cancel a visa or a decision not to revoke a visa cancellation, later than 28 days after the substantive visa has naturally ceased, the visa holder can still make a valid student visa application, provided that the application is lodged within 28 days after the applicant is taken to have been notified of the Tribunal decision.[3]

In addition to the 28 day requirement, as part of the same criterion, onshore student visa applicants who do not hold a substantive visa must satisfy criterion 3005 in Schedule 3 to the *Migration Regulations 1994* (Cth) (the Regulations).[4]

The 28 day requirement

For all onshore student visa applicants who do not hold a substantive visa at the time of application, a criterion for the grant of the visa is that the applicant's last substantive visa was of a prescribed kind and the application is made within a specified period.[5] Issues may

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] cl 57x.211(3) of sch 2 to the Regulations. Before 22 March 2014 these criteria referred to a period specified by Gazette Notice. Each was amended to instead refer to a legislative instrument made by the Minister by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30).
[3] Amendments made by the *Migration Amendment Regulations 2004* (Cth) (No 8) (Cth) (SR 2004 No 390). References to 'Migration Review Tribunal' in cl 57x.211(3)(c)(ii) and cl 580.211(3)(c)(ii) were amended to 'Tribunal' by the *Migration Legislation Amendment (2015 Measures No 2) Regulation 2015* (Cth) (SLI 2015, No 103) from 1 July 2015.
[4] cl 57x.211(3)(d). Please note that the relevant sch 3 criterion for student visa applicants is 3005. There is no requirement in cl 57x.211(3)(d) for the applicant to satisfy criterion 3001, although this criterion is sometimes erroneously referred to in primary decisions.
[5] cl 57x.211(3).

arise about whether the last substantive visa held was of a prescribed class, and whether the applicant made the application within 28 days (or a specified period)[6] after the day that last substantive visa ceased to be in effect,[7] or the day when the applicant is taken to have been notified of a decision by the Tribunal to set aside the substantive visa's cancellation.[8] These issues require identification of:

- the last substantive visa
- when that visa ceased to be in effect (or, where relevant, when the visa cancellation decision was set aside by the Tribunal), and
- when the application was made.

Where an application is found not to have been made within the relevant 28 day period, the applicant will not be able to meet the requirement in cl 57x.211(3)(d). There is no discretion for a decision maker to consider the reasons why an applicant did not lodge the visa application within the relevant timeframe.[9]

The last substantive visa

A substantive visa means a visa other than a bridging visa, a criminal justice visa or an enforcement visa.[10] An applicant who did not hold a substantive visa at the time of application can only satisfy the time of application criteria if the last substantive visa held was one of the following kinds:[11]

- student
- special purpose
- Subclass 303 (Emergency (Temporary Visa Applicant))
- Diplomatic (Temporary)(Class TF) visa granted to the holder as the spouse, de facto partner or a dependent relative of a diplomatic or consular representative of a foreign country
- in relation to applications for some of the student visa subclasses, Subclass 497 (Graduate—Skilled).

[6] There has been no period specified in respect of this criterion.
[7] cl 57x.211(3)(c)(i).
[8] cl 57x.211(3)(c)(ii), applicable to visa applications made on or after 23 December 2004.
[9] In *Chen v MIAC* [2008] FMCA 1285, the applicant claimed that the Tribunal erred in failing to exercise a discretion based on her claims about being misled by the Department. In rejecting this ground of appeal, the Court confirmed that the Tribunal has no discretion in these matters and the applicant's claimed circumstances were not matters the Tribunal could take into account in determining whether the applicant satisfied the 28 day requirement in cl 573.211(3). See also *Kaur v MIAC* [2012] FMCA 1179.
[10] Defined in s 5(1) of the Act.
[11] cl 57x.211(3)(b). The subclass 497 (Graduate – Skilled) visa is currently specified in relation to applications for the Subclass 572 (Vocational Education and Training Sector), 573 (Higher Education Sector) and 574 (Postgraduate Research Sector) student visas (see cl 572.211(3)(b)(v), 573.211(3)(b)(v) and 574.211(3)(b)(v)). The reference to de facto partner in cl 57x.211(3)(b) was introduced on 1 July 2009 to apply to applications made on or after that date, and includes reference to same sex couples: see *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth) and *Migration Amendment Regulations 2009* (Cth) (No 7) (SLI 2009 No 144). Before 1 July 2009 'spouse' as defined in the Regulations included an opposite sex de facto partner.

When did the last substantive visa cease to be in effect?

This is a mixed question of fact and law[12]. Provisions about when visas are in effect are set out in cl xxx.511 of the relevant Part of Schedule 2 to the Regulations, or, for special purpose visas, s 33(5) of the *Migration Act 1958* (the Act).[13]

For example, if the last substantive visa held was a student visa, it would have ceased on a date specified by the Minister, or if the application was made on form 157P or 157P (Internet) (for students applying for permission to work), when the previous visa held would have ceased to be in effect.[14] The date specified by the Minister is a question of fact about which there may be evidence in the Department's Movement Records, any relevant ISCE records, and the letter notifying the applicant of the visa grant.[15]

What if the last substantive visa was cancelled?

The legislation expressly provides for the situation where a cancellation or non-revocation decision is set aside by the Tribunal more than 28 days after the last substantive visa held has naturally ceased. In that case, the application must be made within 28 days (or within a period specified by legislative instrument) after the later of the day when that last substantive visa ceased and the day when the applicant is taken to have been notified of the Tribunal's decision.[16]

There is no equivalent provision in circumstances where the Minister's delegate decides under s 137L(1) of the Act to revoke a visa cancellation, and notifies the applicant of the revocation after the day when the visa ceased; nor in cases where an applicant's visa is found not to have been automatically cancelled under s 137J, for example because of a defective notice purportedly issued under s 20 of *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act).[17]

[12] *Kaur v MIAC* [2010] FCA 1319 at [59].
[13] Special purpose visas are provided for in s 33(5) of the Act and reg 2.40 of the Regulations. The categories of persons to whom they apply include airline crew, guests of government, certain members of foreign armed forces, transit passengers from certain countries and members of the royal family.
[14] cl 57x.511.
[15] See *Kaur v MIAC* [2010] FCA 1319. In that case the applicant was granted a new student visa which expired earlier than the visa that it replaced; however the visa label was not replaced and the delegate's letter advising the applicant of the grant of the new visa was confusing as to the expiry date. The Tribunal relied on the Department's Movement Records to determine the relevant date. In upholding the Tribunal's decision, the Court held that the delegate's letter specified a single expiry date, and that the Tribunal asked itself the right question by considering the relevant items in sch 2 to the Regulations. It held that even if the Tribunal had misdirected itself by determining the relevant date by reference to the Department's Movement Records, that record was consistent with the date specified in the letter of grant.
[16] cl 57x.211(3)(c)(ii), introduced by SR 2004 No 390, with effect from 23 December 2004 and applicable to visa applications made on or after that date. In relation to decisions involving the Tribunal setting aside decisions to cancel or not to revoke a cancellation made prior to this amendment, in *Shreshta v MIMIA* [2005] FMCA 1626, Scarlett FM found that the Tribunal committed a jurisdictional error by breaching s 353 when it had failed to make a decision prior to the visa naturally ceasing. Federal Magistrate Scarlett held that the Tribunal had an obligation to hear the applicant's case whilst it was still possible to put the applicant back in the same position that he was in before the cancellation of his visa. In a similar case, *Wang v MIMIA* [2004] FMCA 454, Raphael FM did not consider whether the significant gap between the date of the Tribunal's cancellation decision and the visa cease date amounted to jurisdictional error. Dismissing an appeal, Whitlam J stated that it would be possible to characterise the workings of the Act and the Regulations as rendering the appellant 'a victim of the law which has flaws', but that that would not mean that there was any jurisdictional error on the part of the Tribunal: *Wang v MIMIA* [2004] FCA 1313.
[17] In each of those circumstances, it would appear that the applicant will not be able to satisfy the 28 day requirement if the cancellation is revoked by the delegate, or the error identified, more than 28 days after the last substantive visa held had naturally ceased. However, this should no longer be an issue following amendments to the *Education Services for Overseas Students Act 2000* (Cth) (ESOS Act) by the *Migration Legislation Amendment (Student Visas) Act 2012* (Cth) which effectively resulted in the cessation of the automatic cancellation scheme from 13 April 2013. Before 13 April 2013, s 20 of the ESOS Act required education providers to send an accepted student of the provider a written notice if the student had breached a prescribed condition of a student visa, which commenced the automatic cancellation process under s 137J. *Migration Legislation Amendment (Student Visas) Act 2012* (Cth) (No 192, 2012) sch 1, item 5 inserted s 20(4A) into the ESOS Act,

When is an application made?

The 28 day requirement is concerned with when the visa application is made. For these purposes, an application is made when it satisfies the requirements for a valid application.[18] Therefore, to be satisfied that the 28 day requirement is met, it is necessary to establish when the visa application was made in accordance with the statutory requirements.

Section 46 of the Act specifies the requirements for a valid visa application and the circumstances in which a visa application will be invalid. Further requirements are prescribed by the Regulations including general requirements in reg 2.07 (approved form, charges, and other),[19] and requirements as to where a visa application must be made in reg 2.10.[20] Further subclass specific requirements relating to visa application charges, forms and other requirements for each visa class are found in Schedule 1 to the Regulations.

Item 1222 of Schedule 1 prescribes the specific requirements for a valid application for a Student (Temporary) visa (Class TU). Under this item, an application must be made using the prescribed approved form[21] and an applicant must have paid the prescribed visa application charge.[22] Depending upon an applicant's particular circumstances, applications may be made by way of internet application,[23] by submitting the relevant hardcopy form 'at an office of Immigration in Australia'[24] or at certain approved educational institutions.[25] In addition, there are a number of 'Other' requirements that must also be met. For applicants who seek to satisfy the primary criteria and make the application on form 157A or 157E, one of these requirements is that the application must be accompanied by satisfactory evidence that the applicant is enrolled or has been offered a place in a registered full-time course of study of a type specified in a legislative instrument made under reg 1.40A(1) and the provider of which is not a suspended education provider.[26]

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which provides that a registered provider must not send a notice under s 20(1) of the ESOS Act on or after the day that subsection commenced, being 13 April 2013.

[18] See *MIAC v Mon Tat Chan* [2008] 172 FCR 193. Allowing the Minister's appeal from *Chan v MIAC* [2007] FMCA 1943, the majority held that an invalid application cannot become valid prior to the applicant complying with the provisions of the Act and Regulations which would make the application valid. While they do not say so, it is implicit in the majority judgments that for the purposes of the 28 day requirement, an application is made when it is validly made, i.e., when it satisfies all the statutory requirements for a valid application. In his dissenting judgment, Moore J held that 'the application' in cl 573.211(3)(c)(i) is intended to refer only to the application form. Consistently with the judgment of Turner FM at first instance, his Honour held that although the applicant did not make a valid application until after the expiry of the 28 days, that did not dictate a conclusion that he did not satisfy the 28 day requirement.

[19] Regulation 2.07 provides that the relevant item of sch 1 will set out the approved form (if any) to be completed by an applicant; any charges and/or components that may be applicable to a particular application for the visa (read in conjunction with reg 2.12C); and any other matters relating to the application. It also provides that an applicant must complete an approved form in accordance with any directions on it; and that an application for a visa that is made using an approved form is not a valid application if the applicant does not set out his or her residential address in the form or in a document accompanying the application.

[20] Regulation 2.10 governs where an application must be made, most notably it provides that if an application for a visa is made in Australia, the application must be made in accordance with any requirements in Division 2.2 of Part 2 of the Regulations or in sch 1 that relate to where the visa application is to be made, or where there are no such requirements of that kind, at an office of Immigration in Australia: reg 2.10(2A).

[21] item 1222(1).

[22] item 1222(2).

[23] item 1222(1).

[24] item 1222(3)(cf)(i). For student visa applications made in Australia, using form 157P, the application may be lodged at an office of Immigration in Australia. For all other onshore student visa applicants who do not fall within items 1222(3)(cf)(i)–(iii), no address or place for lodgement is specified. Where no requirements are specified in sch 1, reg 2.10(2A)(b) provides that an application must be made at an 'office of Immigration in Australia'.

[25] item 1222(3)(cf)(ii)–(iii). In order to lodge a student visa application at an educational institution, the applicant also needs to meet certain other requirements, including that institution is approved in writing and that the applicant is enrolled with that institution.

[26] item 1222(3)(c)(i)–(ii). Prior to 22 March 2014 item 1222(3)(c) referred to a course of study specified by a Gazette notice under reg 1.40A(1), however this was amended to refer to a legislative instrument by SLI 2014 No 30. Note that there are different evidentiary requirements for primary applicants who are applying for a Subclass 576 (Foreign Affairs or Defence

It is an applicant's responsibility to have filed an 'objectively valid application on time'[27] and an assessment of when a valid application was made will often require a consideration of those matters required by item 1222 of Schedule 1 mentioned above. Some of these matters are discussed in more detail below.

When is an application charge paid?

An application is only valid if any visa application charge required to be paid at the time of the visa application has been paid.[28] Where an applicant has elected to pay an application charge by credit card or a cheque, for example, this will be the time at which the Department was placed in a position from which payment of that charge could be taken. The amount of information required to be provided in a visa application form before payment is properly authorised is a question of fact to be determined having regard to all the circumstances of the particular case.[29] For example, in the separate cases of *Vumentala v MIMIA*[30] and *Butcher v MIMIA,*[31] the Department rejected the visa applications as invalid because the amount of the visa application charge and credit card particulars provided with the visa application were incomplete. In each of those cases however, the Court held that sufficient detail was provided, either within the application itself or in visa applications lodged at the same time by the same representative, such that the Department had all the necessary information before it and had therefore been placed in the position to require payment at the time the applications were made. The situation is different however, where an attempt is made to require payment by credit card or by a cheque, and that attempt is declined or dishonoured. In those circumstances, the Department would not have been placed in the necessary position to require payment and a valid application could not be taken to have been made.[32]

See Chapter 1 – Visa Applications for further discussion on visa application fees and charges, and when payment is taken to have been made.

When is an application made by internet?

It is not until an internet application is received by the Department, in the sense of it taking physical possession of the complete application, that it can be said to have been 'made'.[33] This does not mean that a completed application which was received, needs to have been processed or acted upon, but system errors, for example, which prevent an internet

Sector) visa with approval from the relevant Minister or who are secondary exchange students (sch 1, item 1222(3)(c)(iii)) and for certain applicants who are seeking to remain in Australia for the marking of their postgraduate thesis (sch 1, item 1222(3)(c)(iv)). Other provisions of item 1222(3) include direction as to where an application may be made depending on whether the applicant is inside or outside Australia and the form used, and provisions for combining applications.

[27] *Mann v MIAC* [2011] FMCA 667 at [24].

[28] s 46(1)(ba).

[29] *Vumentala v MIMIA* [2004] FCA 744 at [16].

[30] *Vumentala v MIMIA* [2004] FCA 744.

[31] *Butcher v MIMIA* [2005] FMCA 880.

[32] See *Jaswal v MIMIA* [2004] FCA 787.

[33] *Mohammed v MIBP* [2014] FCCA 139 at [29]. In that case, the applicant attempted to lodge his visa application online on the last day that he held a student visa, but was prevented from doing so due to a system error in the departmental online lodgement system. The Court held that the Tribunal was correct in deciding that his unsuccessful attempt to lodge the visa application online did not constitute a valid application, and that the requirements for a valid application were not met until he presented a paper copy of the application to the department the following day. See also *Mann v MIAC* [2011] FMCA 667 which rejected at [25] the applicants' argument that their visa application should be deemed to have been made whilst they held eligible visas because that was the situation when their attempt to make an internet application was prevented by the department's system error.

application from being received by the Department will not result in a valid application having been made.[34]

When is an application made at an office of Immigration?

The Regulations permit applications, other than internet applications, and those made by a prescribed class of persons, to be made 'at an office of Immigration in Australia'. The term 'office of Immigration in Australia' is not defined in either the Act or Regulations and should be read as encompassing any postal address specified by the Department for the purpose of receiving applications.[35] An application may therefore be considered as 'made' at the time when it is received at the relevant postal address (a GPO Box) and not, for example, a later date when the application is subsequently delivered to the Departmental premises or processing centre.[36]

When is an application accompanied by the relevant evidence?

A student visa application that is subject to the evidence of enrolment requirement is valid if and only if it is accompanied by the required evidence. In both *Khoja v MIMIA*[37] and *MIAC v Mon Tat Chan*[38] the visa applications were not accepted as valid when first lodged because they were not accompanied by satisfactory evidence of enrolment. In each case, the applicant returned with the required evidence more than 28 days after the substantive visa had expired. In *Khoja*, Nicholls FM found that pursuant to s 46, reg 2.07 and the relevant Schedule 1 requirements, the Tribunal was entitled to find that the first attempted application was not valid as the applicant had failed to provide satisfactory evidence of enrolment or offer as required by item 1222(3)(c) of Schedule 1, and as her valid application was made more than 28 days after her substantive visa had expired, this put her outside the cl 573.211(3)(c) time limit.[39] His Honour's reasons and conclusions are consistent with the later decision in *Chan*, where the majority of the Full Court upheld the Tribunal's decision that the applicant did not satisfy the 28 day requirement because his valid visa application was made more than 28 days after his substantive visa had expired.

While the authorities make it clear that an incomplete application may be perfected by the later provision of the material required, the applicant will not be able to satisfy the 28 day criterion if this is not done within 28 days after the substantive visa had expired, even if the application was first lodged within that time.

What if a visa application is not processed or incorrectly returned?

There is some support for the proposition that a visa application is made when it is first lodged complete with all the statutory requirements, even if it is not processed until a later

[34] See, for example, *Mohammed v MIBP* [2014] FCCA 139 and *Mann v MIAC* [2011] FMCA 667.
[35] *Chen v MIBP* (2013) 216 FCR 241.
[36] *Chen v MIBP* (2013) 216 FCR 241 at [41]–[62].
[37] *Khoja v MIMIA* [2005] FMCA 274.
[38] *MIAC v Mon Tat Chan* (2008) 172 FCR 193.
[39] Contrast *Chan v MIAC* [2007] FMCA 1943 where Turner FM took a different approach. That decision was overturned in *MIAC v Mon Tat Chan* (2008) 172 FCR 193.

date or is incorrectly rejected for some reason, for example it was incorrectly considered invalid, and returned to the applicant.[40]

Similarly, it would also appear that an application is made when it is first lodged complete with the statutory requirements, even if it is then incorrectly rejected or returned to the applicant because of a perceived deficiency or for some other reason. In *Vumentala v MIMIA*[41] and *Butcher v MIMIA,*[42] for example, the Department was ordered by the Court in each of those cases to consider the visa applications as they had first been made, notwithstanding that the Department had incorrectly rejected each of them at that time on the basis of insufficient credit card details being provided.

Therefore, while the question of when a visa application was made is a question of fact having regard to all of the circumstances, it would appear on the basis of the principles discussed above that 'made', for the purposes of the 28 day requirement in cl 57x.211(3)(c), means when an application is received by the Department complete with the statutory requirements. This may be irrespective of whether it was processed by the Department as a valid application or otherwise returned to an applicant (after having first been received) because of an incorrectly perceived deficiency or some other error on the part of a Departmental officer.

Where a review applicant claims that they attempted to lodge a visa application on a particular date which would have been within the 28 day period, or before their substantive visa ceased, but a Departmental officer advised them to do something else or incorrectly told them that they could not lodge the application, the Tribunal upon review should made clear findings of fact on such claims. It will be a finding of fact for the Tribunal as to whether the applicant was attempting to make an application on that date that would have met all the statutory requirements for a valid application. If the Tribunal accepts such claims and finds the applicant was making an application that would have met all statutory requirements, the actions of the Departmental officer could be treated as the Department incorrectly returning or rejecting an application that was 'made' on that date.

What if the 28th day falls on a weekend/holiday?

Section 36(2) of the *Acts Interpretation Act 1901* (Cth) provides that if an Act allows a thing to be done, and the last day for doing it is a weekend or public holiday, then it may be done on the next day that's not a weekend or public holiday. However, this does not affect the 28 day requirement – in *MIBP v Kumar*, the High Court rejected an argument that s 36(2) applies so that if the 28th day fell on one of these days, a visa application made on the next

[40] In *Angus Fire Armour Aust P/L v Collector of Customs* (1988) 19 FCR 477 the Court emphasised the distinction between 'filing' (which is an act of the court or tribunal) and 'lodging' (which is an act of the party). The majority held that an application to the Administrative Appeals Tribunal had been lodged when it was first received at the Registry notwithstanding that it had been returned to the applicant. According to Northrop J, 'a document deposited on a counter at the office of a Registry may not be lodged, but if taken by an officer, or in other words received by that officer, it is accepted for the purpose of lodging'. *Angus Fire Armour Aust PL* was subsequently considered by the Full Court in In *Hong Ye v MIMA* (1998) 82 FCR 468, with the Court in that case holding that, provided 'acceptance' is understood to mean that the Registry had obtained possession of the document, they agreed with his Northrop J's views. Importantly, they did not accept that an application for review is not 'lodged' unless there is conduct by the Registry staff that signifies that the document has been accepted as a document to be lodged with the Registry. *Hong Ye* and *Angus Fire Armour Aust PL* were followed by the Queensland Industrial Relations Court in *Baker v Stephen Island Community Council* QIRC No B1509 of 2000, where it was held that the applicant's complaint was lodged when it was received; and the subsequent act of deciding whether to accept or reject a complaint did not affect its lodgement.

[41] *Vumentala v MIMIA* [2004] FCA 744.

[42] *Butcher v MIMIA* [2005] FMCA 880.

working day would be deemed to have been made on the 28th day.[43] It confirmed that the extension of time provided for by s 36(2) does not apply in determining whether an applicant satisfies a visa criterion such as cl 572.211.[44]

Other requirements: Criterion 3005

Another requirement for onshore visa applicants who do not hold a substantive visa at time of application, set out in cl 57x.211(3)(d), is that the applicant satisfy Schedule 3 criterion 3005.[45] This must be satisfied even if the applicant meets the 28 day requirement.

Schedule 3 criterion 3005 relevantly requires that the applicant has not previously been granted a visa on the basis of having satisfied any Schedule 3 criteria. That includes criterion 3005 itself, with the result that a person can be granted a student visa where they applied for the visa within 28 days of the cessation of the last substantive visa on one occasion only.[46]

Exceptional reasons for the grant of the visa

Certain applicants for a Student (Temporary) (Class TU) visa who apply in Australia must establish 'exceptional reasons' for the grant of the visa: cl 57x.227.[47] Practically speaking, where this criterion applies, an applicant cannot enter Australia on another type of temporary visa (i.e. a temporary visa other than a student visa) and then obtain a Class TU visa on the basis of studying in Australia unless he or she establishes exceptional reasons for the grant of the visa.

The 'exceptional reasons' requirement does not apply to either Subclass 576 (Foreign Affairs or Defence Sector) visas or secondary applicants for any of the other Class TU visas.

The 'exceptional reasons' for grant criterion (cl 57x.227) only applies where:

- the visa application was made in Australia
- the applicant is subject to assessment levels 2, 3, 4, or 5, i.e. the applicant is not subject to streamlined visa processing arrangements[48] and

[43] *MIBP v Kumar* (2017) 260 CLR 367, overturning *Kumar v MIBP* (2016) 243 FCR 146.
[44] It held that s 36(2) states a rule with respect to the time for the doing of a thing which an Act requires or allows to be done, and does not otherwise alter the rights or obligations conferred or imposed by the Act: *MIBP v Kumar* (2017) 260 CLR 367 at [24]–[25]. The reasoning would apply equally to the equivalent provisions in the other student visa subclasses (cl 57X.211(3)(c)).
[45] Schedule 2, cl 57x.211(3)(d). Schedule 3 to the Regulations sets out additional criteria for visa applicants who are in Australia and do not hold a substantive visa at the time of application. Although criterion 3001 is sometimes erroneously referred to in primary decisions, the relevant sch 3 criterion for student visa applicants is 3005 and there is no requirement in cl 57X.211(3)(d) for the applicant to satisfy criterion 3001.
[46] PAM3: GenGuide G – Student visas – Visa application and related procedures – student visa assessment – If applying after last substantive visa has ceased (re-issue date 1/1/16). This construction of 3005 in cl 57X.211(3) was upheld in *Sapkota v MIBP* (2014) 226 FCR 455 at [27]–[28], [30].
[47] The criterion is nearly identical in the sch 2 criteria for all Class TU subclasses except for Subclass 576 (Foreign Affairs or Defence Sector) and Subclass 580 (Student Guardian). For Subclass 580, cl 580.227 is very similar to cl 57x.227 but the assessment level consideration relates to the nominating student rather than the applicant; it is not discussed further in this commentary.
[48] cl 57X.227A. Assessment level 2 is not relevant to this requirement where the visa application was made before 1 November 2002: the reference to assessment level 2 was inserted into the cl 57x.227 criterion by *Migration Amendment Regulations 2002* (No 5) (Cth) (SR 2002 No 213). For visa applications made on or after 22 March 2014 there is no assessment level 4 or 5, following amendments made by SLI 2014, No 30. For information on determining an applicant's assessment level, please see: Genuine Student: Relevant Assessment levels and Schedule 5A criteria. Applicants who meet the definition of 'eligible vocational education and training student' (cl 572.111), 'eligible higher degree student' (cl 573.111, 574.111) or 'eligible university exchange student' / 'eligible non-award student' (cl 575.111) are not subject to assessment levels and do not have to meet sch 5A evidentiary requirements. These definitions are generally referred to as streamlined visa processing arrangements. These arrangements were first introduced into Subclasses 573–575 for visa applications on or after 24 March

- at the time of application, the applicant was either
  - the holder of a specified temporary visa, or
  - if the applicant did not hold a substantive visa, immediately before ceasing to hold a substantive visa, the applicant held a specified visa.

Specified visas

The range of specified temporary visas varies depending on the date of the application for a student visa, and transitional provisions that apply.[49] See the Legislation – Point in Time database for different versions depending on the date of application. The following temporary visas are among those that have been specified:

- Electronic Travel Authority (Class UD)
- Temporary Business Entry (Class UC)
- Subclass 400 (Temporary Work (Short Stay Activity))[50]
- Tourist (Class TR)[51]
- Visitor (Class TV)[52]
- Working Holiday (Temporary) (Class TZ)
- Temporary Work (Long Stay Activity) (Class GB)[53]
- Training and Research (Class GC)[54]
- Subclass 600 (Visitor)[55]
- Subclass 485 (Temporary — Graduate)
- Subclass 497 (Graduate — Skilled).

As a Student (Temporary) (Class TU) visa is not a specified temporary visa, cl 57x.227 is not a requirement where an applicant holds such a visa when making a further application for a Student (Temporary) (Class TU) visa whilst in Australia.

Exceptional reasons

An applicant subject to cl 57X.227 must establish that there are exceptional reasons for the grant of the visa. This is a question of fact for the decision-maker.[56]

2012 and introduced for Subclass 572 for visa applications on or after 23 November 2014. For further detail about these definitions and streamlined processing arrangements see: Genuine Student: Relevant Assessment levels and Schedule 5A criteria.

[49] For visa applications made before, on or after 22 March 2014 in accordance with regs 2.08, 2.08A or 2.08B, where the original applicant applied for their visa before 22 March 2014, the specified visas include Business (Temporary) (Class TB), Expatriate (Temporary) (Class TJ), Family Relationship (Temporary) (Class TL), Interdependency (Temporary) (Class TM), and Supported Dependent (Temporary) (Class TW). References to these visa classes were removed from cl 57X.227 from 22 March 2014 by SLI 2014 No 30, but a transitional provision in pt 28 of sch 13 to the Regulations means that cl 57X.227 as in force immediately prior to repeal continues to apply to those applications.

[50] cls 57x.227(c)(i)(NA), 580.227(c)(i)(NA), inserted by *Migration Amendment Regulation 2013* (No 1) (Cth) (SLI 2013 No 32) for visa applications made on or after 23 March 2013.

[51] cl 57x.227(c)(i)(NB), as amended by SLI 2013 No 32.

[52] cl 57x.227(c)(i)(NC), as amended by SLI 2013 No 32.

[53] cl 57x.227(c)(i)(P) and cl 580.227(c)(i)(P), inserted by *Migration Legislation Amendment Regulation 2012* (No 4) (Cth) (SLI 2012, No 238) for visa applications made on or after 24 November 2012.

[54] cls 57x.227(c)(i)(Q), 580.227(c)(i)(Q), inserted by SLI 2012 No 238.

[55] cls 57x.227(c)(i)(T), 580.227(c)(i)(T), inserted by SLI 2013 No 32 for visa applications made on or after 23 March 2013.

When determining whether 'exceptional reasons' have been established, the decision-maker must assume that the visa applicant 'should not be granted the visa unless some reasons can be positively identified which justify, in the mind of the decision-maker, the grant of the visa'.[57] Beyond such reasons being capable of being described as 'exceptional' in 'ordinary parlance', there is no prescriptive definition of the term.[58] Similar to the phrase 'exceptional circumstances' in the context of visa cancellation, the emphasis of 'exceptional reasons' is on the term 'exceptional', and the term is one which may have a wide operation and no definition which limits its application should be adopted unless the limitation appears from the words of the relevant statutory provision.[59] The decision-maker has 'a nearly unconfined discretion to address the particular circumstances of the case, and to consider whether the applicant should be made an exception to a ban on the grant of the visa in Australia'.[60] Exceptional reasons may be demonstrated by personal circumstances.[61]

Under departmental guidelines (PAM3),[62] 'exceptional reasons' may include but are not limited to situations where:

- there is a 'benefit to Australia' (for example where the 'visa grant would improve bilateral relations or provide significant economic benefits to Australia')
- the applicant is a dependent of a departing temporary resident and has been studying in Australia for at least one year and wishes to complete her or his current course or undertake further studies
- the applicant held a student visa in Australia when they were granted a specified temporary visa and now wishes to undertake further study or continue their course of study
- the applicant held an Occupational Trainee, Visiting Academic or Training and Research visa in the Occupational Trainee or Research streams
- the applicant previously held a student visa and now holds a Subclass 600 (Visitor) or Subclass 676 (Tourist) visa granted under s 351 (Ministerial intervention).

[56] *Liu v MIBP* [2014] FCCA 936; *Maan v MIAC* (2009) 179 FCR 581.
[57] *Kim v MIAC* [2008] FMCA 1577 at [30], undisturbed on appeal – *Kim v MIAC* [2009] FCA 161. Smith FM also observed at [29] that 'Exceptional reasons' are not intended to be found by deciding whether the visa applicant has the 'normal' characteristics of an applicant who is not subject to the restriction in the criterion, nor by deciding whether he or she departs from the 'normal' characteristics of the group who is subject to the restriction
[58] *Kim v MIAC* [2008] FMCA 1577 at [30] undisturbed on appeal – *Kim v MIAC* [2009] FCA 161. See also *Ali v MIBP* [2014] FCCA 1630 at [8]–[9]. The Federal Court in *Shashidhar v MIBP* [2017] FCA 253 at [21] considered the expression 'exceptional reasons' in cl 572.227 must mean reasons that are unusual or out of the ordinary. His Honour observed at [22] that this construction was consistent with *Kim v MIAC* [2009] FCA 161, in which no issue was taken with the MRT's approach that 'exceptional reasons' means reasons that are unusual or out of the ordinary: at [5]. The Court also observed at [27] that the Regulations do not prescribe any limitation on what may constitute 'exceptional reasons' and it is open to the decision maker to take into account a broad array of circumstances, which will include a comparison with the common, usual or ordinary reasons for which a person might apply for a student visa. See also *Arora v MIBP* [2017] FCA 484 at [19]–[21].
[59] In *Ali v MIBP* [2014] FCCA 1630, the Court held at [8]–[9] that these remarks by Raphael J in *Gurung v MIBP* [2013] FCCA 2009 at [9] regarding the phrase 'exceptional circumstances' in the now repealed reg 2.43(2)(b) in the context of s 116 cancellation are apposite and relevant to the phrase 'exceptional reasons' in the context of cl 57x.227.
[60] *Kim v MIAC* [2008] FMCA 1577 at [30], undisturbed on appeal – *Kim v MIAC* [2009] FCA 161.
[61] In *Baig v MIBP* [2016] FCCA 570, the applicant argued that the Tribunal's finding that the circumstances raised by the applicant were 'not exceptional, they are personal to her' misconstrued the exceptional reasons test. The Court held at [24]–[26] that the Tribunal did not dismiss the applicant's reasons simply because they were personal to her. Read fairly and as a whole, the Tribunal was aware of, and considered, each of the reasons advanced by the applicant, leading to the conclusion that they could not properly be characterised as exceptional, in circumstances where she could have, but had not, sought to undertake any study in the period since she was notified of the visa refusal.
[62] PAM3 - Migration Regulations > GenGuide G - Student visas - Visa application and related procedures – Student Visa Assessment – Other student visa assessment requirements – If applying in Australia - additional criteria (1/1/2016 version).

These guidelines are not binding upon the Tribunal[63] but may be a relevant consideration when determining what constitutes 'exceptional reasons' in the individual circumstances. [64]

Health insurance – adequate arrangements

Under the Migration Act and the Regulations, overseas students (and members of their family unit) must maintain adequate arrangements for health insurance during their period of intended stay in Australia. This is reflected in the Schedule 2 criterion that requires all applicants to give 'evidence of adequate arrangements in Australia for health insurance during the period of the applicant's intended stay in Australia' (cls 57x.225, 57x.327, 576.224, 576.327, 580.223(4), 580.327), and in condition 8501 which is attached to all student visas and requires a holder to 'maintain adequate arrangements for health insurance while the holder is in Australia'.

The expression 'adequate arrangements' is not defined in the Act or Regulations. Under PAM3, the health insurance requirement can be satisfied if the student (or family member) is covered by:

- the Overseas Student Health Cover (OSHC)
- a national health scheme or arrangement approved by the Department of Health as being adequate health insurance
- a Defence or Department of Foreign Affairs and Trade sponsorship, or
- an Endeavour Award.[65]

Students from countries which have a specific agreement with Australia are exempt. PAM 3 states that the Government wants to be able to monitor and regulate insurers covering people staying temporarily in Australia.[66]

Overseas Student Health Cover

The OSHC is the result of arrangements between the Australian Government and certain registered health insurers for the provision of visits to the doctor, some public hospital insurance treatment, ambulance cover and limited pharmaceuticals for student visa holders and their dependants.[67]

Health insurers registered in Australia may provide OSHC to overseas students if they have been approved by the Department of Health to do so under a Deed of Agreement.[68] The

[63] See the Application of policy commentary for further information.
[64] In *Singh v MIBP* [2017] FCCA 765, the Court at [24] rejected the argument that the Tribunal erred by narrowing its consideration to only one of the situations specified in the PAM3 policy. The Court observed that only one of the situations, the one considered by the Tribunal, had any potential relevance and the Tribunal did not err by not considering the others. The judgment was upheld on appeal in *Singh v MIBP* [2017] FCA 975.
[65] See PAM3 – Migration Regulations - GenGuideG - Student visas - Visa application and related procedures – Student Visa Conditions – Condition 8501 – Health insurance – About condition 8501 (1/1/2016 version).
[66] See PAM3 – Migration Regulations - GenGuideG - Student visas - Visa application and related procedures – Student Visa Conditions – Condition 8501 – Health insurance – The Overseas Student Health Cover (OSHC) (1/1/2016 version).
[67] See PAM3 – Migration Regulations - GenGuideG - Student visas - Visa application and related procedures – Student Visa Conditions – Condition 8501 – Health insurance – The Overseas Student Health Cover (OSHC) (1/1/2016 version).
[68] See http://www.health.gov.au/internet/main/publishing.nsf/Content/health-privatehealth-consumers-deed.htm (accessed 20/12/2017).

current approved OSHC providers are ahm OSHC, BUPA Australia, Medibank Private, Allianz Care Australia (Peoplecare), CBHS International Health and NIB OSHC.[69]

Other approved health scheme or arrangement

The only students not required to be covered by OSHC are students from certain countries. Currently some Belgian, Norwegian and Swedish students are covered by a specific agreement with Australia, which covers their insurance requirements. Current information on these arrangements should be confirmed with the Department.[70]

Evidence of adequate arrangements

Evidence of OSHC will typically take the form of a receipt or written advice from an approved OSHC provider that the OSHC policy has been issued. The OSHC should cover the duration of the applicant's (and any family unit members) intended stay in Australia.

For students (other than certain Subclass 576 applicants or visa holders) and family unit members (other than family unit members applying outside Australia to join a student already in Australia), OSHC may be arranged by the education provider.[71] In that case, evidence of OSHC will appear on the student's Certificate of Enrolment (CoE). However providers are not required to organise OSHC for intending students. If the CoE indicates that OSHC has not been provider arranged, the student will need to give evidence that they have OSHC, as above.

Departmental guidelines specify different policy approaches to acceptable evidence for Endeavour Award holders, Subclass 576 students sponsored by the Department of Foreign Affairs and Trade (formerly AusAID) or Defence (Defence Cooperation Program and Fee for Service Program) and Norwegian, Swedish and Belgian students.[72]

Subclass 576 visas: AusAID/Foreign Affairs or Defence Sector

The Subclass 576 visa was repealed with effect from 1 July 2016.[73] From this date, prospective Foreign Affairs or Defence Students must apply for a Subclass 500 (Student) visa. See the Subclass 500 commentary.

The Subclass 576 Foreign Affairs or Defence Sector visa, formerly the 'AusAID or Defence Sector' visa,[74] is for overseas students sponsored by the Australian Department of Defence or by the Department of Foreign Affairs and Trade, who are undertaking any type of full-time course (CRICOS and non-CRICOS registered). Unlike other student visa subclasses, it is not restricted to specific types of courses.

[69] See the Private Health website, managed by the Private Health Insurance Ombudsman, at https://www.privatehealth.gov.au/health_insurance/overseas/overseas_student_health_cover.htm (accessed 17/05/2021).
[70] See Department's website at: https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/student-500#Eligibility (accessed 14/02/2020), under the 'details' drop down. Although applicable to Subclass 500 student visas, the information is still relevant here.
[71] See PAM3 – Migration Regulations - GenGuideG - Student visas - Visa application and related procedures – Student Visa Conditions – Condition 8501 – Health insurance (1/1/2016 version).
[72] See PAM3 – Migration Regulations - GenGuideG - Student visas - Visa application and related procedures – Student Visa Conditions – Condition 8501 – Health insurance (1/1/2016 version).
[73] item 32 of sch 4 of *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (F2016L00523), and item 5404 of sch 13 to the Regulations, inserted by item 2 of sch 5 to F2016L00523.
[74] reg 1.03 defines 'Subclass 576 (Foreign Affairs or Defence Sector) visa' as including a Subclass 576 (AusAID or Defence Sector) visa: inserted by item 6 of sch 5 to *Migration Legislation Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 82).

The requirements for making a valid application for a Class TU student visa, including a Subclass 576 visa, include requirements relating to application form, charges, location of the applicant, place for applying, evidence of enrolment (or intended enrolment) and combining applications.[75]

To satisfy the criteria for this subclass, students must have the support of the Foreign Minister or Defence Minister.[76]

'Foreign Affairs students' and 'Foreign Affairs recipients' (formerly 'AusAID students' or 'AusAID recipients') may apply for other student visa subclasses (570-575) to pursue non-AusAID / Foreign Affairs studies in Australia but must, at the time of decision, have the support of the Foreign Minister for the grant of the visa.[77]

Applicants (and any dependent family members) who are accepted under a Foreign Affairs program are expected to leave Australia and return to their home country to use their skills and knowledge gained in Australia for 2 years before they may apply for a further temporary or permanent visa for entry to Australia.[78]

On 1 November 2013, AusAID (the Australian Agency for International Development) ceased to exist as an executive agency and its functions were integrated into the Department of Foreign Affairs and Trade.[79] Initially, provision for the cessation of AusAID was made through the insertion of reg 1.04AA into the Regulations which stated how references to the former AusAID were to be read.[80] Subsequent amendments were made which repealed the interim measures in reg 1.04AA and made amendments to reflect the change in terminology.[81] These amendments and the change in terminology apply to visa applications made on or after 1 July 2014 and visa applications not finally determined before that date.[82] For ease of reference, both terms AusAID and Foreign Affairs are used in this commentary.

Key definitions

There are a number of definitions in the Regulations that are relevant to Subclass 576. As discussed above, most references to 'AusAID' or the 'AusAID Minister' have been amended to refer to Foreign Affairs and the Foreign Minister.[83]

[75] sch 1, item 1222.
[76] cl 576.229
[77] cls 570.230A, 571.229A, 572.229A, 573.229A, 574.229A, 575.229A (amended by item 17, sch 5, SLI 2014, No 82).
[78] See PAM3 – Migration Regulations - GenGuideG - Student visas - Visa application and related procedures – Student Visa Assessment – Foreign Affairs or Defence (576) (1/1/2016 version). Special Return Criterion 5010, which is a criterion for most visas, generally requires Foreign Affairs visa holders (and any dependent family members) seeking to return to Australia within 2 years of ceasing or completing their course to have the support of the Foreign Minister before the visa can be granted.
[79] Explanatory Statement to *Migration Amendment (AusAID) Regulation 2013* (Cth) (SLI 2013, No 268). On 18 September 2013, the Administrative Arrangements Order listed international development and aid, formally a function of AusAID, as being a function of the Department of Foreign Affairs and Trade. AusAID ceased operations as an executive agency on 1 November 2013.
[80] SLI 2013, No 268.
[81] SLI 2014, No 82.
[82] item 3103, sch 13, inserted by item 2, sch 8 to SLI 2014, No 82.
[83] Amendments by sch 5 to SLI 2014, No 82.

Foreign Affairs student

'Foreign Affairs student' is defined in reg 1.03 as having the meaning given by reg 1.04A(3) of the Regulations. Under that regulation, a person is a 'Foreign Affairs student' if the person:

- has been approved by the AusAID Minister or Foreign Minister to undertake a full-time course of study or training under a scholarship scheme or training program approved by the Foreign Minister or AusAID Minister; and
- is either the holder of an 'AusAID/Foreign Affairs student visa' granted in circumstances where the person intended to undertake the full-time course of study or training and that course or another approved in substitution by the Minister has not ceased;[84] or an applicant for a student visa whose application shows an intention to undertake such study or training.

The 'AusAID Minister' means a Minister who was responsible for administering AusAID.[85] Effective 1 November 2013, those functions are the responsibility of the Foreign Minister.[86]

Foreign Affairs student visa

A 'Foreign Affairs student visa' is defined in reg 1.04A(1) to mean a student visa granted to a primary applicant who was a student in a full-time course of study or training under a scholarship scheme or training program approved by the Foreign Minister or AusAID Minister.

Foreign Affairs recipient

'Foreign Affairs recipient' is defined in reg 1.03 as having the meaning given by reg 1.04A(2) of the Regulations. Under reg 1.04A(2), a person is a Foreign Affairs recipient if the person:

- is the holder or former holder of a Foreign Affairs student visa
- has 'ceased'[87] either the full-time course of study or training to which the visa relates or another course approved by the Foreign Minister or AusAID Minister in substitution, and
- has not spent at least 2 years outside Australia since ceasing the course.

[84] 'Cease' in this context is defined as including completing, withdrawing from, or being excluded from the relevant course – see reg 1.04A(1).
[85] reg 1.03 as amended by item 2, sch 5 to SLI 2014, No 82.
[86] Explanatory Statement to SLI 2013, No 268. On 18 September 2013, the Administrative Arrangements Order listed international development and aid, formally a function of AusAID, as being a function of the Department of Foreign Affairs and Trade. AusAID ceased operations as an executive agency on 1 November 2013.
[87] 'Cease' in this context is defined as including completing, withdrawing from, or being excluded from the relevant course – see reg 1.04A(1).

Defence student

'Defence student' is defined in reg 1.03 as having the meaning given by reg 1.04B of the Regulations. Under reg 1.04B, a person is a 'Defence student' if the person:

- has been approved by the Defence Minister to undertake a full-time course of study or training under a scholarship scheme or training program approved by the Defence Minister, and
- is either the holder of a Subclass 576 visa granted in circumstances where the person intended to undertake the full-time course of study or training and that course or another approved in substitution by the Minister has not ceased,[88] or an applicant for a student visa whose application shows an intention to undertake such study or training.

Key visa criteria

The criteria for a Subclass 576 visa are contained in Part 576 of Schedule 2 to the Regulations. A number of these criteria are the same or very similar to some of those for Subclasses 570-575. These include the requirement to:

- hold, or have previously held a specific visa at the time of application, if the application was made in Australia[89] – see 'The 28 day requirement' discussion above
- be a genuine applicant for entry and stay as a student and meet the Schedule 5A requirements[90] – see the: Genuine Student: Relevant Assessment Levels and Schedule 5A Criteria commentary
- satisfy public interest and special return criteria.[91] One of these (special return criterion 5010) is in part specifically directed to AusAID / Foreign Affairs students – see discussion below
- provide evidence of adequate arrangements for health insurance during the intended period of stay – see discussion above[92]
- *if visa application made before 21 November 2015* – have the recommendation of the Foreign Minister if the applicant is in Australia as the spouse, de facto partner or dependent relative of a diplomatic or consular representative who has completed or is about to complete his/her posting[93]

[88] 'Ceased' is not defined for the purpose of reg 1.04B; however, the definition of the same term in reg 1.04A in near identical context provides some guidance – 'cease' is defined in reg 1.04A(1) as including completing, withdrawing from, or being excluded from the relevant course.
[89] cl 576.211.
[90] cls 576.221, 576.222. Note cl 576.221 was amended for visa applications made on or after 15 October 2007: see *Migration Amendment Regulations 2007 (No 12) 2007* (Cth) (SLI 2007, No 314), item 223 and cl 4; cl 576.222 was amended for visa applications made on or after 1 January 2010 by inserting new cl 576.222(2)(c) which requires the Minister to be satisfied the applicant will have access to the funds relied upon to meet the Schedule 5A requirements: see *Migration Amendment Regulations 2009 (No 14) 2009* (Cth) (SLI 2009, No 331), sch 3, item 31 and cl 5.
[91] cls 576.223, 576.231. The health criteria requirements for AusAID Students were amended on 1 July 2013 to insert PIC 4007 (health criterion with waiver) instead of PIC 4005: cl 576.223(a) as amended by item 1, sch 9 to *Migration Legislation Amendment Regulations 2013* (Cth) (No 3) (SLI No 146, 2013). This amendment applies to visa applications not finally determined as at 1 July 2013 and applications made on or after that date: item 1909 of sch 13 to the Regulations.
[92] cl 576.224.
[93] cl 576.226. This criterion was repealed for visa applications made on or after 21 November 2015: *Migration Legislation Amendment (2015 Measures No 3) Regulation 2015* (Cth) (SLI 2015, No 184) item 1 of sch 1, and item 4801 of sch 13 to *Migration Regulations 1994* (Cth), inserted by item 2 of sch 10 to F2015L01810.

- *if the application was made in Australia and the applicant is the holder of a student visa subject to condition 8535 (limitation on grant of further substantive visa) or whose last substantive visa was a student visa that was subject to condition 8535, and is or was provided financial support by the Commonwealth or a foreign government* – the applicant gives written evidence that the relevant government (be that the Commonwealth or the government of the foreign country) does not oppose the applicant undertaking a course of study[94]
- hold a passport of a type specified by legislative instrument[95]
- *if the applicant is subject to assessment level 2* – the Minister is satisfied that the regular income of any individual (including the applicant) supplying funds to the applicant was sufficient to accumulate the level of funding being provided by that individual[96]
- *if the visa application is made before 22 March 2014 and the applicant is subject to assessment level 5* – the aggregate period of ELICOS that the applicant is seeking to undertake together with the period of any previous ELICOS undertaken as a Student visa holder or subsequent bridging visa holder is no more than 40 weeks (as the holder of a Subclass 570, 572, 573, 574, 575 or 576 visa) or 50 weeks (as the holder of Subclass 571 visa).[97] The restrictions on ELICOS only apply to students subject to AL5, whereas similar restrictions apply to students subject to AL3-5 under the other subclasses.[98]

Unlike Subclass 570–575 visas, there is no enrolment criterion for Subclass 576.

Support of the AusAID / Foreign Minister or the Defence Minister

At the time of decision, the applicant must have the support of the Foreign Minister or the Defence Minister for the grant of the visa.[99] There are no legislative requirements specifying the form such support must take. Under Departmental guidelines, support for the grant of the visa is to be evidenced by a written statement of support from the Department of Foreign Affairs and Trade or the Department of Defence, which must also list any dependents.[100]

Secondary applicants for Subclass 576 visas must also have the support of the Foreign Minister or the Defence Minister.[101]

Special Return Criterion 5010

Special Return Criterion (SRC) 5010 places a two year exclusion period on the ability of current and former holders of AusAID / Foreign Affairs student visas to obtain further

[94] cl 576.227.
[95] cl 576.228. The passport must be specified in an instrument made under reg 1.40. The relevant instrument can be accessed under the 'Passport' tab of the Register of Instruments – Student visas.
[96] cl 576.230.
[97] cl 576.232(1), (2). This criterion was repealed for visa applications made on or after 22 March 2014: SLI No 30 of 2014 item 115, sch 1 and item 2801(1) of sch 13 to the Regulations. Note: there are currently no passports specified for assessment Level 5 for Subclass 576. See the 'AssmtLvl' tab in the Register of Instruments – Student visas. Assessment levels 4 and 5 have been removed for visa applications made on or after 22 March 2014: see for example reg 1.41(4)(a) as amended by SLI No 30 of 2014, item 83, sch 1, and item 2801 of sch 13, inserted by item 314 of sch 1 to F2014L00272.
[98] See for example cl 574.234.
[99] cl 576.229.
[100] PAM3: GenGuideG - Student visas - Visa application and related procedures – Student visa assessment - Student visa subclasses and assessment levels – Student visa subclasses – Foreign Affairs or Defence (576) (re-issue date 1/1/16).
[101] cl 576.332.

visas.[102] At the time of decision, the applicant must have spent at least 2 years outside Australia since ceasing the course of study or training to which their current or former AusAID / Foreign Affairs student visa applied. The two year exclusion period does not apply if the applicant meets the requirements of SRC 5010(3) or 5010(5). That is:

- the course of study or training to which the current or former AusAID / Foreign Affairs student visa relates is one designed to be undertaken over a period of less than 12 months (SRC 5010(3)); or
- the applicant has the support of the AusAID / Foreign Minister for the grant of the visa (SRC 5010(5)(a)); or
- the decision maker is satisfied that in the particular case, the requirement to have the support of the AusAID / Foreign Minister for the grant of the further visa may be waived because there are compelling circumstances that affect the interests of Australia; or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen (SRC 5010(5)(b)).

For discussion on what constitutes compassionate or compelling circumstances please see the Compelling and/or Compassionate Circumstances/Reasons commentary.

Case law

Judgment	Judgment summary
Ali v MIBP [2014] FCCA 1630	
Angus Fire Armour Aust P/L v Collector of Customs (1988) 19 FCR 477	
Arora v MIBP [2017] FCA 484	
Baig v MIBP [2016] FCCA 570	
Baker v Stephen Island Community Council QIRC No B1509 of 2000	
Butcher v MIMIA [2005] FMCA 880	Summary
Chan v MIAC [2007] FMCA 1943	Summary
Chen v MIAC [2008] FMCA 1285	
Chen v MIBP [2013] FCAFC 133; (2013) 216 FCR 241	Summary
Hong Ye v MIMA (1998) 82 FCR 468	

[102] SRC 5010(4).

Jaswal v MIMIA [2004] FCA 787	Summary
MIAC v Kaur [2013] FCAFC 66	Summary
Kaur v MIAC [2010] FMCA 634	Summary
Kaur v MIAC [2012] FMCA 1179	
Kaur v MIAC [2010] FCA 1319	Summary
Khoja v MIMIA [2005] FMCA 274	
Kim v MIAC [2008] FMCA 1577	Summary
Kim v MIAC [2009] FCA 161	
Kumar v MIBP [2015] FCCA 2573	Summary
Kumar v MIBP [2016] FCA 177; (2016) 243 FCR 146	Summary
MIBP v Kumar [2017] HCA 11; (2017) 260 CLR 367	Summary
Liu v MIBP [2014] FCCA 936	Summary
Mann v MIAC [2011] FMCA 667	Summary
Maan v MIAC [2009] FCAFC 150; 179 FCR 581	Summary
Mohammed v MIBP [2014] FCCA 139	Summary
MIAC v Mon Tat Chan [2008] FCAFC 155; (2008) 172 FCR 193	Summary
Sapkota v MIBP [2014] FCAFC 160; (2014) 226 FCR 455	Summary
Shashidhar v MIBP [2017] FCA 253	
Shreshta v MIMIA [2005] FMCA 1626	Summary
Singh v MIBP [2017] FCCA 765	
Singh v MIBP [2017] FCA 975	
Tang v MIAC [2011] FMCA 631	
Tang v MIAC [2011] FCA 1273	
Vumentala v MIMIA [2004] FCA 744	Summary
Wang v MIMIA [2004] FMCA 454	

Wang v MIMIA [2004] FCA 1313	

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2001 (No 5) (Cth)	SR 2001, No 162
Migration Amendment Regulations 2002 (No 5) (Cth)	SR 2002, No 213
Migration Amendment Regulations 2003 (No 11) (Cth)	SR 2003, No 363
Migration Amendment Regulations 2004 (No 6)(Cth)	SR 2004, No 269
Migration Amendment Regulations 2004 (No 8) (Cth)	SR 2004, No 390
Migration Amendment Regulations 2005 (No 3) (Cth)	SLI 2005, No 133
Migration Amendment Regulations 2007 (No 6) (Cth)	SLI 2007, No 191
Migration Amendment Regulation 2007 (No 7) (Cth)	SLI 2007, No 257
Migration Amendment Regulations 2007 (No 12) (Cth)	SLI 2007, No 314
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth)	No 144, 2008
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144
Migration Amendment Regulations 2009 (No 14) (Cth)	SLI 2009, No 331
Migration Legislation Amendment (Student Visas) Act 2012 (Cth)	No 192, 2012
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32
Migration Legislation Amendment Regulations 2013 (No 3) (Cth)	SLI No 146, 2013
Migration Amendment (AusAID) Regulation 2013 (Cth)	SLI 2013, No 268
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82
Migration Legislation Amendment (2015 Measures No 2) Regulation	SLI 2015, No 103

2015 (Cth)	
Migration Legislation Amendment (2015 Measures No 3) Regulation 2015 (Cth)	SLI 2015, No 184
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523

Available decision templates

There is one decision template available for use in relation to the **28 day requirement**:

- **57X Student Visa Refusal – 28 days** – this template is designed for use in a review of a decision to refuse a Class TU (Subclass 570-580) Student visa where the issue before the Tribunal is whether the applicant satisfies cl 57x.211(3). The template is suitable for visa applications lodged on or after 23 December 2004. The template requires adjustments if the applicant is an 'eligible higher degree student', 'eligible university exchange student' or 'eligible non-award student' or if the relevant visa subclass is Subclass 580 (Student Guardian).

There are no decision templates that deal specifically with the **exceptional reasons** requirement or **health insurance** requirement. Members should use the 'generic' decision template for these matters.

While there are no templates that deal with issues that are unique to **Subclass 576**, there are a range of other student visa templates that deal with criteria relevant to **Subclass 576**. These are:

- **Subclass 57X Student Visa Refusal – Genuine Intention**. This template is intended for use in the review of a decision to refuse a Class TU (Subclass 570 – 576) Student visa where the issue in dispute is whether the applicant is a genuine student because they intend genuinely to stay in Australia temporarily (cl 570.223(1), 571.223(1), 572.223(1), 573.223(1), 574.223(1), 575.223(1), or 576.222(1)).
- **Subclass 57X Visa Refusal – Public Interest Criterion 4013** – This template is suitable for reviews of decisions to refuse a student visa where Public Interest Criterion 4013 is in issue.

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