Migration and Refugee Division Commentary

Business visas

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Business Review Applicants:
Frequently asked questions

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Business concepts

1. What is the difference between a business and an employer?

Businesses and employers are different concepts appearing throughout the *Migration Act 1958* (the Act) and Migration Regulations 1994 (the Regulations) and while they sometimes overlap, the concepts are distinct. For example, in the context of a r.5.19 employer nomination, a person (a nominator) may apply for approval of a nomination of a position in Australia where they are actively and lawfully operating a business in Australia.[1] While the person specified in s.347(2)(b) of the Act as having standing to apply for review may correspond with an employer or business, this is not always the case. What is necessary as a starting point in every case, however, is that the applicant for review is either a natural person, a partnership, an unincorporated association or a corporation with separate legal personality.

What is a business?

The term 'business' is not defined in the Act or the Regulations. Accordingly, the term should be given its natural meaning unless the legislation requires otherwise, either expressly or by implication. While the Macquarie dictionary defines business, inter alia, as 'a person, partnership, or corporation engaged in business; an established or going enterprise or concern',[2] at law a business is not a legal entity with its own separate personality as described in the first part of this definition, but more a term used in the wider sense to cover the affairs of commercial organisations, individuals and non-profit bodies.

In the context of Business visa applications, it is a term which takes its content from its context.[3] Accordingly, the associated definitions of 'main business' and 'qualifying business' inform the more general term 'business'. In this regard, the expression 'main business' is defined in r.1.11 of the Regulations as, amongst other things, a 'qualifying business' which in turn is defined in r.1.03 of the Regulations to mean an 'enterprise' of a particular kind. Accordingly, a 'business' should be seen not as a legal entity as such but rather, as an enterprise or undertaking.[4]

As a result, it is not a necessary characteristic for the business to be carried on only by a single entity.[5] Thus where it is claimed a single business is transacted through multiple entities, the decision-maker is entitled to consider the ownership structure of each entity at any relevant time in order to decide whether they constitute 'the business'.[6] In those circumstances, continuity and repetition of trading activity over a reasonable period is a relevant consideration in determining whether an entity is a 'business' in the sense of a going concern,[7] and it may be concluded that an entity is not a business

[1] See r.5.19(3)(b)(ii) and r.5.19(4)(b)(i).
[2] The Macquarie Dictionary Online Sixth Edition 2013, Macquarie Dictionary Publishers Pty Ltd (https://www.macquariedictionary.com.au/features/word/search/?word=business&search_word_type=Dictionary) accessed on 28 September 2018.
[3] *Lu v MIAC* [2009] FMCA 891 (Barnes FM, 22 September 2009) at [39], citing Mason CJ, Gaudron and McHugh JJ in *Re Australian Industrial Relations Commission and Others; Ex parte Australian Transport Officers Federation and Others* (1990) 171 CLR 216 at 226.
[4] *Ibrahim v MIAC* [2009] FCA 1328 (Jagot J, 18 November 2009) at [30].
[5] *Nassif v MIMIA* (2003) 129 FCR 448 at [35]. See also *Lu v MIAC* [2009] FMCA 891 (Barnes FM, 22 September 2009) at [40], considering the meaning of 'business' in the context of the definition of 'eligible business' in s.134(10) in relation to a decision to cancel a visa under s.134(1)(a).
[6] *Ibrahim v MIAC* [2009] FCA 1328 (Jagot J, 18 November 2009) at [32]. The Court on appeal upheld the Tribunal's reasoning. The Tribunal accepted that two businesses claimed by the first appellant were very similar, but did not accept they were the same business on the basis that there must have been a benefit to the first appellant from the winding up of one entity and setting up another entity as a 'new business' and that the different ownership arrangements between the two entities were inconsistent with the claim that they were the same business. The Court held these factors were not irrelevant considerations to determining whether multiple entities were the same 'business'.
[7] *Kushner v MIAC* [2009] FMCA 390 (Driver FM, 28 May 2009) at [48]. Although the Court was considering a cancellation under s.134(1), the reasoning appears equally applicable in relation to the meaning of 'business' in the context of 'main business' and 'qualifying business'.

if the evidence points to the business not being engaged in ongoing trading.[8] For these purposes regard may be had to the motivation for undertaking trading activities in order to determine whether those activities amount to a going concern.[9] This could be done, for example, by looking at the Company Constitution or other documentation relating to the establishment of the entity conducting the business.

Nor is a company or other entity limited to carrying on a single business.[10] In *MIBP v Snyman*, for example, the Court upheld the Tribunal's findings that Cutman Pty Ltd carried on four different business activities notwithstanding that they all used one ABN and a single set of consolidated accounts in reporting profit and loss and for its Business Activity Statements.

What is a business name?

Further information about particular businesses can be found by searching a business name. A business name is simply a name or title under which a person or entity conducts a business. Unless an exemption applies an entity commits an offence if it carries on a business under a particular name but does not register that business name on the Business Names Register.[11] The public information relating to business names (e.g. address for service and principal place of business) is available on the public register and accessible by searching the ASIC registers called 'ASIC Connect' at https://asic.gov.au. Importantly, registration or use of a business name does not create a legal entity (whereas registration of a company does) and does not allow the use of privileges to which a company is entitled, such as a corporate tax rate or limited liability. A business name has no legal status and cannot be regarded as an applicant for the purposes of a review of a refusal to approve a business sponsor. Only the person(s) who conducts the business can be regarded as an applicant.

What is a franchise?

A franchise is a business arrangement in which the owner (franchisor) of an enterprise grants the rights to another person or entity (franchisee) to operate under the franchisor's trade name. Under this arrangement, the franchisee is an entity that purchases the rights to use a franchisor's name and business model to do business while the franchisor owns the overall rights and trademarks (if any) of the business and allows its franchisees to use these rights and trademarks to carry on business within terms of the franchise. The *Corporations Act 2001* defines a franchise thus:

> '[A]n arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of the right, to use a trademark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.'[12]

A franchise is a contractual arrangement governed by the terms of a franchise agreement signed by the parties and which sets out the rights and obligations of the franchisor and franchisee.[13] Under a franchise agreement, the relationship between a franchisee and franchisor can take one of the following forms:

[8] *Kushner v MIAC* [2009] FMCA 390 (Driver FM, 28 May 2009) at [47]. The Court upheld a decision of the AAT to cancel a visa under s.134(1) on the basis that the relevant entity was not a 'business' in circumstances where its activities were *ad hoc* and for the purpose of a migration outcome, where there was evidence of goods being ordered and billed for, but scant evidence of payment or shipment of goods and evidence of trading activity was recent and relatively small scale. Further issues may arise in such contexts in relation to 'turnover'. See for example *Cheng v MIAC* [2012] FMCA 911 (Driver FM, 16 November 2012) at [53], upheld on appeal by the Federal Court in *Cheng v MIAC* [2013] FCA 405 (Cowdroy J, 6 May 2013).
[9] *Kushner v MIAC* [2009] FMCA 390 (Driver FM, 28 May 2009) at [48].
[10] *MIBP v Snyman* [2016] FCA 242 (Barker J, 11 March 2016).
[11] s.18 *Business Names Registration Act* 2011.
[12] s.9 *Corporations Act* 2001 (dictionary).
[13] See r.5 'Meaning of *franchise agreement*' Competition and Consumer (Industry Codes – Franchising) Regulation 2014.

- a product distribution franchise, which occurs where the franchisee is the outlet for the purchase of the products of the franchisor (e.g. petrol retail outlets or sale of motor vehicles);
- a system or business format franchise, which occurs where the franchisor develops a system for doing business and allows franchisees to use the system in the franchisee's own business (e.g. fast food chains); and
- a processing or manufacturing franchise, which occurs where the franchisor provides the franchisee with technical information to enable the processing or manufacture of particular goods (e.g. soft drink industry).[14]

The system or business format franchising, is the most commonly seen form before the Tribunal and frequently in the context of Business Skills applications where the applicant is seeking to establish a particular ownership interest in a main business. In this context, the business format franchise is a continuing relationship between the franchisor and the franchisee that covers the product, the service, the trademark and the entire business including marketing and advertising strategies, operating procedures and standards, accounting practices, legal liabilities, close communications, quality control and operational standards. Under this arrangement, the franchisor provides varying levels of management assistance and support during the term of the licence agreement in return for an up-front licensing fee and an annual royalty fee normally based on turnover. The level of management assistance under such an agreement can be relevant to the assessment of occupations within the business, such as in the Temporary Work context,[15] as well as in relation to the level of management control in the Business Skills context. In the context of Business Skills applications it may be necessary to determine if the franchisee, as the owner of the business, has a 'direct and continuous management role' to satisfy 'main business' visa requirements, in which case regard should be had to the franchise agreement to determine the level of management autonomy and involvement of the franchisee.

What is an employer?

Similarly, the term 'employer'[16] is not defined in the Act or Regulations and there has been no direct judicial consideration of the meaning of the term in this context. It is therefore necessary to consider the ordinary meaning of the term. According to the Macquarie Dictionary the term 'employer' means 'someone who employs people, especially for wages'.[17] An employment relationship is governed by the contract of employment, which is necessarily an individual one involving one employer and one employee. While it is the common law which determines whether an employment relationship exists, an employer may be regarded as a legal person (natural or corporate) who employs a natural person under a contract of service, whether on a full-time, part-time, casual or temporary basis.

There are other relationships at law which have similarities with employment relationships and these are distinguished by a number of tests that have been devised over time. In determining whether a worker is engaged in an employment relationship, courts adopt a multi-factor test that considers a number of factors and the totality of the relationship between the parties. An important and relevant factor is the control test which provides, in general terms, that where there is a contract to perform work and the work in issue is under the control of one party to the contract (in relation to the content of, manner of performing and time allocated to, the work) then the relationship is one of employment – the person in control is the employer and the person performing the work is the employee.

[14] See *Halsbury's Laws of Australia* at [420-4505] (accessed via LexisNexis 14 September 2017).
[15] See, for example, *Khan v MIBP* [2016] FCCA 333 (Judge Manousaridis, 19 February 2016) in which the Court held that it was open to the Tribunal to find that given the franchise agreement and degree of control of the franchisor, the employer's business did not require a full time customer service manager. Accordingly the finding that the position associated with the nominated occupation was not genuine did not amount to jurisdictional error.
[16] For example as contained in r.5.19.
[17] The Macquarie Dictionary Online Sixth Edition 2013, Macquarie Dictionary Publishers Pty Ltd (https://www.macquariedictionary.com.au/features/word/search/?word=employer&search_word_type=Dictionary) accessed on 28 September 2018.

The identification of an employer may be necessary in a variety of contexts when assessing review applications related to the temporary or permanent business schemes. For example, while there need be no employment relationship between a standard business sponsor and a secondary sponsored person, the employment relationship between a standard business sponsor and a primary sponsored person is a key feature of the sanctioning regime in relation to temporary work visas.[18] In the context of employer nominations it appears that r.5.19 distinguishes a business from an employer who operates the business.[19] In *Li Tian v MIAC*,[20] the Federal Magistrates Court rejected the submission that the requirements of cl.856.222 could be met in circumstances where the business of the employer who had a nomination approved under r.5.19 was taken over by another entity that acquired the goodwill, assets and liabilities and employees of the original employer (i.e. the substantive nature of the business did not change) and the applicant's job did not change. The Court upheld the Tribunal decision that, at time of decision, the applicant was not employed in the business of the employer referred to in the relevant employer nomination, as that entity had been deregistered by ASIC and was no longer in existence.[21]

Jurisdiction - who can apply for review under different business structures?

Only a 'person', not a 'business', can apply for review. The person who can apply for review depends upon the kind of decision to be reviewed under s.338, and must be the person described in s.347(2) (including in any applicable Regulations). For example, an application for review of a s.140GB refusal or a decision to take an action under s.140M can only be made by the relevant sponsor.[22]

2. Who is a person who can apply for review?

In any case, the review applicant must at a minimum be a person, legal or natural, or one created under the Act and Regulations in the case of partnerships and unincorporated associations, who has the capacity to apply for review.

While the term 'person' is not defined in the Act or Regulations,[23] it is affected by the operation of Division 3A, Subdivision G of the Act and s.2C(1) of the *Acts Interpretation Act 1901*. Specifically, ss.140ZB and 140ZE of the Act provide that regulations made under provisions of the Act that relate to Division 3A or the regulations apply to a partnership or an unincorporated association as if it were a

[18] The mandatory sponsorship obligations on standard business sponsors imposed by rr.2.78 – 2.87C to the Regulations include obligations that clearly contemplate an employment relationship, for example, in the obligations to ensure equivalent terms and conditions of employment in r.2.79; to ensure the primary sponsored person does not work in an occupation other than the occupation nominated by the person for the primary sponsored person and approved by the Minister: r.2.86(2); to ensure that the primary sponsored person is only engaged as an employee of the person or an employee of an associated entity of the person: r.2.86(2A); and to ensure that the primary sponsored person works or participates in the nominated occupation, program or activity in relation to which the primary sponsored person was identified in r.2.86(2C).

[19] r.5.19(4)(a) states that, in respect of Direct Entry nomination, the Minister must approve a nomination if the application for approval identifies a need for the nominator to employ an identified person as a paid employee to work in the position under the nominator's direct control.

[20] [2009] FMCA 930 (Emmett FM, 21 September 2009) upheld on appeal in *Li Tian v MIAC* [2009] FCA 1406 (Lander J, 2 December 2009).

[21] [2009] FMCA 930 (Emmett FM, 21 September 2009) at [30], upheld on appeal in *Li Tian v MIAC* [2009] FCA 1406 (Lander J, 2 December 2009) at [24]-[26]. See also *Kim v MIMIA* [2005] FMCA 1699 (Nicholls FM, 25 November 2005). In *Kim v MIMIA* the applicant sought to change employers during the course of the review application. The Court at [20]-[21] found no error in the Tribunal's reasoning that the effect of cl.856.222 (read in conjunction with cl.856.213) was that an approved nomination at the time of making of the decision must be the same nomination made by an employer in respect of an appointment in the business of that employer at the time of making the application for the visa.

[22] In the context of s.140GB nominations, it is the approved sponsor who made the nomination who has standing to apply for review: s.347(2)(d) and r.4.02(5)(c). An 'approved sponsor' is relevantly defined in s.5(1) of the Act as a person who has been approved as a sponsor and whose sponsorship approval has not been cancelled or ceased to have effect.

[23] The definition of 'person' in cl.457.111 for Part 1 Div.1.4A was omitted by SLI 2009 No. 202.

person, subject to certain changes made by the Act. In addition, s.2C(1) of the *Acts Interpretation Act 1901* provides that in any Act, unless the contrary intention appears, 'expressions used to denote persons generally (such as 'person', 'party', 'someone', 'anyone', 'no-one', 'one', 'another' and 'whoever'), include a body politic or corporate as well as an individual'. Accordingly, the categories of person who may apply for review can be taken to include not only natural persons, but also bodies politic, bodies corporate, partnerships and unincorporated associations.

As a 'business' is not a person with such capacity for the reasons outlined above, it is the person who acts on behalf and with the authority of that business who can apply for review. Such persons may include, for example, a sole trader in his or her own name, the director of a proprietary limited company trustee on behalf of a trust, or a partner of a partnership in his or her name on behalf of that partnership.[24]

3. Can a sole trader apply for review?

Yes, a natural person can apply for review as a sole trader.

What is a sole trader?

A sole trader is a person who conducts business by him or herself as an individual. In circumstances where the person is trading under a business name other than his or her own name, there is no difference between the person and the business. As such, the liabilities of the business are the liabilities of the individual – he or she is personally liable for any and all business-related obligations, such as debts resulting from the purchase of goods or services or from court judgments and for the performance of warranty obligations in respect of goods supplied.[25]

Who can act on behalf of a sole trader?

Where an application, such as a nomination or sponsorship application, is made in a sole trader's business name, it is the natural person who is the sole trader and proprietor of the business who has standing to apply for review under s.347(2)(d) of the Act and r.4.02(5)(a)of the Regulations.

What is the status of the review when a sole trader dies?

As with applications made by natural persons in other contexts, it is not entirely clear whether the statutory entitlement to merits review survives, lapses or devolves to another person on the death of the review applicant. This is because the principle that a review application ceases to be valid upon the review applicant's death is at odds with the provision of a fee refund upon withdrawal following the death of a visa or review applicant contained in r.4.14(2)(a).[26] Where an application is withdrawn, for example by the executor of a sole trader's will, the Tribunal should treat the application as withdrawn. If there is no withdrawal, a decision should be made that the Tribunal does not have jurisdiction as there is no valid review application.

4. Can a partnership apply for review?

Yes, a partner or other authorised person can apply for review on behalf of a partnership.

[24] Section 140ZB provides that the sponsorship provisions apply to a partnership as if it were a person, but with changes including that sponsorship obligations are imposed on each partner instead of the partnership.
[25] See *MIAC v Wainwright* [2010] FMCA 29 (Wilson FM, 22 January 2010) at [35] and [36]. See also *Moller v MIAC* [2007] FMCA 168 (Smith FM, 28 February 2007) at [22].
[26] *V120/00A v MIMA* (2002) 116 FCR 576 at [53].

What is a partnership?

A person, legal or natural, with capacity to carry on business may elect to pursue that enterprise with others and one of the structures they may do this is through a 'partnership'. The arrangement is usually contractual, either express or implied. Usually, persons intending to enter a partnership will execute a deed or other formal agreement establishing their rights and obligations when commercial activity commences. However, the terms of their arrangement may alternatively be implied from the way in which they conduct themselves during the course of the venture.

Partnerships are governed for the most part by State and Territory partnership legislation[27] and may take a variety of incarnations including general partnerships, limited partnerships and incorporated limited partnerships. While in some limited cases a partnership may be found to exist where the parties agree that one party will be paid a salary and will not contribute capital, share profits or be liable for the firm's debts,[28] in general, a partnership exists where the persons concerned:

- carry on a business;[29]
- share profits from that business;[30] and
- have mutual rights and obligations as principals arising from that business connection.[31]

A partnership is not a separate legal entity in the same way as a company has an existence separate from its shareholders. A partnership exists by contractual relationships among the partners. In relationships with parties outside the partnership, the contractual liability of the partners is joint, not several, unless individual partners make themselves severally liable. Due to the operation of the rules of joint liability, liability of all partners merges in a judgment given against one partner.[32]

Section 140ZB of the Act provides that provisions of the Act and Regulations that relate to Part 2 Division 3A of the Act (concerning sponsorship) apply to a partnership as if it were a person, but with the changes set out in s.140ZB, and in s.140ZC and s.140ZD (which deal with offences and civil penalties, and where a partnership ceases to exist). Accordingly, an application made under Division 3A and any associated sponsorship right that would otherwise be exercisable by the partnership may be exercisable by each partner instead.[33]

In *Moller*, Smith FM acknowledged that there may be circumstances in which a person has 'a power to contract in his representative capacity with himself as an individual'.[34] For example, a person may, in her capacity as a representative of another legal 'person', such as a company or unincorporated partnership, contract with herself as an employee of the company.

[27] See *Partnership Act 1963* (ACT); *Partnership Act 1892* (NSW); *Partnership Act 1997* (NT); *Partnership Act 1891* (Qld); *Partnership Act 1891* (SA); *Partnership Act 1891* (Tas); *Partnership Act 1958* (Vic); *Partnership Act 1895* (WA).
[28] *M Young Legal Assocs Ltd v Zahid* [2006] 1 WLR 2562; [2006] EWCA Civ 613.
[29] See *Sinclair v Rankin* (1907) 9 WALR 233 (FC); *Ferrie v Whitehead* (1879) 5 VLR (L) 132 (FC). In *Khan v Miah* [2001] 1 WLR 2123; [2001] 1 All ER 20; [2000] UKHL 55 the Court held that the business commences when the proposed partners take steps to implement their business plan.
[30] See the statutory definition of partnership in: *Partnership Act 1963* (ACT), s.6; *Partnership Act 1892* (NSW), s.1; *Partnership Act 1997* (NT), s 5; *Partnership Act 1891* (Qld), s.5; *Partnership Act 1891* (SA), s.1; *Partnership Act 1891* (Tas), s.6; *Partnership Act 1958* (Vic), s.5; *Partnership Act 1895* (WA), s.7.
[31] Partners in a partnership are 'joint venturers in a commercial enterprise'. While they do not have to be active in the day-to-day management of the business, all share responsibility for expenses and obligations and all must have the capacity to participate in management, unless by agreement or practice they have disclaimed this entitlement. Each partner carries on the business as agent for all the partners including himself or herself: *Lang v James Morrison & Co Ltd* (1911) 13 CLR 1.
[32] *Kendall v Hamilton* (1879) 4 App Cas 504.
[33] s.140ZB(2). These provisions have a similar effect to Court Rules in other jurisdictions. For example, see *Federal Court Rules 2011* (Cth), r.9.46; *Court Procedure Rules 2006* (ACT), r.286(5); *Supreme Court Rules 1987* (NT), r.17.01; *Supreme Court Civil Rules 2006* (SA), r.237; *Supreme Court Rules 2000* (Tas), r.312; *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r. 17.0.; *Rules of the Supreme Court 1971* (WA), O.71 r.9.
[34] *Moller v MIAC* [2007] FMCA 168 (Smith FM, 28 February 2007), at [19].

Who can act on behalf of a partnership?

As every partner is an agent of the firm for the purpose of the firm's business,[35] where a primary or review application is made for a partnership, it is the partners of the partnership insofar as they act as agent for the partnership as a whole, who have standing to apply for review under s.347(2)(d) and r.4.02(4)(e). In the case of sponsorship rights, this is codified in s.140ZB of the Act which provides that a sponsorship right that would otherwise be exercisable by the partnership is exercisable by each partner instead.

The person who can act then on behalf of the partnership may either be one of the partners in the partnership, or where the partnership has employed another person who is authorised to do certain things on behalf of the partnership, for example a Human Resources Manager, that other person. While the authority may be negated or qualified by contrary agreement of the partners,[36] a partnership is bound by the acts of a partner done in the usual way for carrying on business of the kind conducted by the firm unless the Tribunal either knows of the partner's lack of authority or does not know or believe that the person is a partner. In other words, where the Tribunal neither knows nor believes that the person with whom they are dealing is a partner, the partnership will not be bound by the acts of that person on the basis of ostensible authority.[37]

This is reflective of the codified procedures at the Courts, where, in jurisdictions other than New South Wales, a writ in a partnership firm's name may issue where two or more persons were carrying on business in the jurisdiction at the time the cause of action accrued.[38]

What is the status of the review when a partner dies, joins or leaves a partnership or the partnership as a whole is wound up?

While the Act imposes ongoing obligations on persons who were partners to continue to satisfy any applicable sponsorship obligation despite the cessation of a partnership,[39] it is silent as to the status of a review application in circumstances where the partnership ceases to exist. However, to the extent that a partnership may be considered a 'person' for the purposes of s.140ZB(1) who may make an application as far as it relates to Part 2 Division 3A of the Act or the regulations, once that 'person' ceases to exist, it would appear that any review application made in that person's name would be treated in a similar way to where it was made in the name of a natural person. In other words, if there is an express withdrawal, the Tribunal should treat the application as withdrawn. If there is no withdrawal, a decision should be made that the Tribunal does not have jurisdiction as there is no valid review application.

A partnership may be ended where the partners have agreed to fix the term of their association by reference to time, the completion of a particular operation or a formula.[40] Alternatively, the partnership may be terminated by:

- agreement between the partners;[41]

[35] *Partnership Act 1963* (ACT), s.9; *Partnership Act 1892* (NSW), s.5; *Partnership Act 1997* (NT), s.9; *Partnership Act 1891* (Qld), s.8; *Partnership Act 1891* (SA), s.5; *Partnership Act 1891* (Tas), s.10; *Partnership Act 1958* (Vic), s.9; *Partnership Act 1895* (WA), s.26.
[36] *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd* (1985) 155 CLR 541; 59 ALJR 393; 58 ALR 411, the Court at 547 (CLR).
[37] *Construction Engineering (Aust) Pty Ltd v Hexyl Pty Ltd* (1985) 155 CLR 541; 59 ALJR 393; 58 ALR 411.
[38] *Federal Court Rules 2011* (Cth), r.9.41; *Court Procedure Rules 2006* (ACT), r.286; *Supreme Court Rules 1987* (NT), r.17.01; *Uniform Civil Procedure Rules 1999* (Qld), r.83; *Supreme Court Civil Rules 2006* (SA), r.86; *Supreme Court Rules 2000* (Tas), r.308; *Supreme Court (General Civil Procedure) Rules 2015* (Vic), r.17.01; *Rules of the Supreme Court 1971* (WA), O.71 r.1.
[39] See s.140ZD of the Act.
[40] *Wilson v Kirkcaldie* (1894) 13 NZLR 286 (SC) (for as long as it is profitable); *Moss v Elphick* [1910] 1 KB 846 (CA) (by mutual consent).
[41] *Partnership Act 1963* (ACT), s.23; *Partnership Act 1892* (NSW), s.19; *Partnership Act 1997* (NT), s.23; *Partnership Act 1891* (Qld), s.22; *Partnership Act 1891* (SA), s.19; *Partnership Act 1891* (Tas), s.24; *Partnership Act 1958* (Vic), s.23; *Partnership Act 1895* (WA), s.29.

- performance or effluxion of time, in single ventures and partnerships for a term;[42]
- at any time by any partner giving notice to the others,[43] in the case of partnerships at will;[44]
- exercise of a statutory option;[45]
- operation of law[46] (including upon death or bankruptcy);[47] and
- court order.[48]

However, the relationship between surviving partners does not terminate until the final settlement of accounts at the conclusion of the winding-up process.[49]

Alternatively, where a partner decides to leave a partnership without having the partnership wound up, he or she may assign his or her share to another person. Indeed, many partnership agreements make express provision for the buying out of a former partner's interest, at a price, calculated according to an agreed formula. In those circumstances, an assignee of a partner's share, whether of the entirety or a part, does not become a partner in the firm, unless accepted by the other partners.[50] In any event, where such a change in partnership occurs not resulting in the winding up of the partnership, the review application will remain on foot.

5. Can a company apply for review?

Yes. A company can apply for review usually by authorising a natural person to make such an application on behalf of the company.

What is a company?

A company is a legal entity separate from its owners (the 'shareholders') and those who manage the affairs of the company (the 'directors'). Although one shareholder companies are now possible,[51] a company can be characterised as a type of voluntary association formed pursuant to the *Corporations Act 2001* (Corporations Act). It is a legal device by which legal rights, powers, privileges, immunities,

[42] *Partnership Act 1963* (ACT), s.37(1)(a), (b); *Partnership Act 1892* (NSW), s.32(a), (b); *Partnership Act 1997* (NT), s.36(1); *Partnership Act 1891* (Qld), s.35(1); *Partnership Act 1891* (SA), s.32(a), (b); *Partnership Act 1891* (Tas), s.37(a), (b); *Partnership Act 1958* (Vic), s.36(a), (b); *Partnership Act 1895* (WA), s.43(a), (b).
[43] *Partnership Act 1963* (ACT), s 31; *Partnership Act 1892* (NSW), s.26; *Partnership Act 1997* (NT), s.30; *Partnership Act 1891* (Qld), s.29; *Partnership Act 1891* (SA), s.26; *Partnership Act 1891* (Tas), s.31; *Partnership Act 1958* (Vic), s.30; *Partnership Act 1895* (WA), s.37.
[44] Notice of dissolution given by one partner to all other members of the firm is sufficient to dissolve both a partnership for a fixed term continued after the expiry of its original term without a new agreement and a partnership for an undefined term. See *Partnership Act 1963* (ACT), ss.31, 32 37(1)(c); *Partnership Act 1892* (NSW), ss.26, 27, 32(c); *Partnership Act 1997* (NT), ss.30, 31, 36(1)(c); *Partnership Act 1891* (Qld), ss.29, 30, 35(1)(c); *Partnership Act 1891* (SA), ss.26, 27, 32(c); *Partnership Act 1891* (Tas), ss.31, 32, 37(c); *Partnership Act 1958* (Vic), ss.30, 31, 36(c); *Partnership Act 1895* (WA), ss.37, 38, 43(c).
[45] An option to terminate a partnership arises where the interest of a partner in a firm's assets is charged with the repayment of a separate debt or where, in Western Australia, a partner assigns that interest. See *Partnership Act 1963* (ACT), s.38(2); *Partnership Act 1892* (NSW), s.33(2); *Partnership Act 1997* (NT), s.37(2); *Partnership Act 1891* (Qld), s.36(2); *Partnership Act 1891* (SA), s.33(2); *Partnership Act 1891* (Tas), s.38(2); *Partnership Act 1958* (Vic), s.37(2); *Partnership Act 1895* (WA), s.44(2).
[46] i.e. where the conduct of the business or the continuation of the business by the partners illegal: *Hudgell Yeates & Co v Watson* [1978] QB 451; [1978] 2 WLR 661; [1978] 2 All ER 363 (CA).
[47] The death or bankruptcy of a partner dissolves the association by operation of law unless all the partners have previously agreed expressly and explicitly that their association will continue notwithstanding these occurrences. It is possible that the dissolution, or an application for winding-up by a court, of a corporate partner, would take effect in the same manner as the death or bankruptcy of a human partner, but that depends on the language used in the relevant insolvency statutes. For example, in *Anderson Group Pty Ltd (in liq) v Davies* (2001) 53 NSWLR 401; 19 ACLC 1,112; [2001] NSWSC 356, Barrett J ruled that the liquidation of a corporate partner did not effect the dissolution of a partnership in New South Wales because the New South Wales legislation had distinguished between personal bankruptcy and corporate insolvency before the passage of the *Partnership Act 1892* (NSW). See: *Re F* [1941] VLR 6 regarding dissolution on death, *Mannigel v Aitken* (1985) 9 FCR 1; 72 ALR 16 (FC) regarding dissolution on bankruptcy.
[48] Note that the rules for dissolution of a limited partnership, unless varied by the partnership agreement, operate in the same way as those for an ordinary partnership in so far as general partners are concerned, although some rules operate differently with respect to limited partners. Contact MRD Legal Services for further guidance should this arise as an issue.
[49] *Everingham v Everingham* (1911) 12 SR (NSW) 5.
[50] *Davies v Barlow* (1881) 2 LR (NSW) 66 (FC).
[51] *Ford, Austin and Ramsay's Principles of Corporations Law* at [1.180] (accessed via LexisNexis 14 September 2017).

duties, liabilities and disabilities may be attributed to a fictional entity equated for many purposes to a natural person.[52] A company comes into existence on the day on which it is created with the legal capacity and powers specified in the Corporations Act.

Importantly, a company takes a legal identity separate from the members associated together in the company and acts through the persons behind it, including its directors and members. Companies, as legal persons, derive their ability to deal with other persons from s.124 of the Corporations Act, which provides for them to have the legal capacity and powers of an individual. Thus, a company has the same ability to enter into contractual relationships and deal with property as natural person who has such capacity.[53] A company may not exercise powers which are, by their very nature, reserved for natural persons, such as entering into a contract to *serve* as an employee.[54]

Who can act on behalf of a company?

However, not being natural persons, they must act through the medium of natural persons. Accordingly, a company can act through and be bound by the acts of others although the ability of others to bind the company depends on whether they have the appropriate authority. The authority to bind the company may be derived from the constitution, as in the case of the organs of the company, or from statute as with an external administrator appointed under the Corporations Act.[55] For example, when a contract is made by these persons, they enter into the agreement as the company itself. [56]

Decisions in a company are made in the first place by the members in general meeting or by the board of directors. They derive their power to make decisions from the Corporations Act and the company's constitution contained in its memorandum and articles of association.[57] Where the directors are charged with the management of the company's business, it will be the directors acting collectively as the board which has the authority to bind the company. Where the constitution provides that management powers are to be exercised by someone else, such as a governing director in the case of a small private company, then that other person will have the authority to subject the company to binding obligations.[58]

Express Authority

Officers or agents of the company may have the authority to make decisions and enter into binding arrangements on behalf of the company when the appropriate authority has been delegated to them. This is facilitated by s.126 of the Corporations Act which recognises that persons acting with the actual authority of the company may make contracts that bind the company. In those circumstances, the ordinary principles of agency law apply when a person acts on behalf of a company and the company will be the principal for the purposes of agency law.

Implied Authority

An agent may have implied actual authority arising by inference from the conduct of the parties and from the circumstances of the case, which includes an incidental authority to do all that is necessary for, or ordinarily incidental to, the effective execution of the agent's express authority in the usual

[52] *Ford, Austin and Ramsay's Principles of Corporations Law* at [1.050] (accessed via LexisNexis14 September 2017).
[53] For further discussion as to a natural person's capacity generally, see Chapter 14 Procedural Law Guide - Competency to give evidence.
[54] *Australian Mutual Provident Society v Allan* (1978) 52 ALJR 407; 18 ALR 385; 44 SAIR 354, Lord Fraser (for the Privy Council) at 410 (ALJR).
[55] See *The Laws of Australia,* Thompson Reuters at [4.1.560] (accessed via WestLaw 14 September 2017).
[56] *Black v Smallwood* (1966) 117 CLR 52; 39 ALJR 405, Barwick CJ, Kitto, Taylor and Owen JJ at 60 (CLR).
[57] Under s 198A of the *Corporations Act 2001*, the directors are charged with the management of 'the business of the company', which includes the authority to subject the company to binding obligations. Note, however, this is a replaceable rule and may not in fact be applicable to a particular company if it has been so replaced.
[58] See *The Laws of Australia,* Thompson Reuters at [4.1.570] (accessed via WestLaw 14 September 2017).

way.[59] Where a person is appointed to a position or office within the company, the company impliedly authorises that person to do all such things as fall within the usual scope of that office. For example, in *Re Qintex Ltd [No 2]*[60] where Underwood J held that 'actual authority may be implied where the act in question is one within the usual authority of a person appointed to a particular office'.[61]

Where a person is held out by a company as an officer or agent, then the Tribunal is entitled to assume that he or she has been duly appointed and is authorised to exercise all of the powers that are customarily exercised by a person in that position in a similar company. This is because agents or officers who act with the apparent or ostensible authority of the company are dealt with in s.128 and s.129 of the Corporations Act. These provisions enable persons dealing with a company in good faith to assume that acts within its constitution and powers have been duly performed and does not require third parties such as the tribunal to inquire whether acts of internal management have been regular.[62] For example, in *Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd*,[63] the Appeal Division of the Supreme Court of Victoria held that where someone with actual authority identified a person as the company secretary and stated that that person had the authority to execute security documents, the other party to the transaction was entitled to assume that the individual held out as the secretary was regularly appointed and to make the assumption permitted by a predecessor of s.129(6) that the relevant document was duly sealed.

What is the status of the review when a company is put into administration or wound up?

External administrators appointed under the Corporations Act to manage the affairs of a company may have authority to bind the company as the appointee takes on the power of management.[64] Administrators of companies under administration and administrators of deeds of company arrangement as well as provisional and official liquidators are empowered under the Corporations Act to manage the affairs of the company in place of the board and general meeting upon appointment.[65]

6. Can a trust apply for review?

No, a trust cannot apply for review. A natural person or company which is a trustee of a trust can apply for review, however, where such an application is not inconsistent with the trustee's fiduciary duties.

What is a trust?

A trust differs significantly from the legal entities described above insofar as it not an entity as such, but rather an obligation enforceable in equity. A trust rests on a person (the trustee) as the legal owner of specific property to deal with that property for the benefit of the beneficiary or beneficiaries, or for the advancement of certain purposes. The nature and style of trusts may vary and frequently applications are made to review decisions concerning family trusts. These particular trusts may be used as a means for minimising the progressive rates of tax payable on income from property by splitting that income using a discretionary trust.

[59] *Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549; [1967] 3 WLR 1408; [1967] 3 All ER 98 (CA), Lord Denning MR at 583 (QB).
[60] (1990) 2 ACSR 479.
[61] at [482].
[62] For further discussion on what has been called the 'indoor management rule' see: *Northside Developments Pty Ltd v Registrar-General (NSW)* (1990) 170 CLR 146; and *HL (Qld) Nominees Pty Ltd v Jobera Pty Ltd* [2009] SASC 165, Layton J at [156]–[386].
[63] [1992] 2 VR 279.
[64] See *The Laws of Australia,* Thompson Reuters at [4.1.580] (accessed via WestLaw 14 September 2017).
[65] See *Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365; 8 ACLC 319 (WASC), Kennedy J at 383–386 (ACSR).

Who can act on behalf of a trust?

A trust is simply a relationship and not a person. Therefore, a trust cannot be approved as a sponsor, nor can a trust do things such as make an application. A review application would need to be made by the trustee or trustees, acting on behalf of the trust and that trustee may be an individual, a partnership or a company.

The terms of a trust arrangement are usually set out in the trust deed and the trustee is compelled by law to deal with trust property in accordance with the terms of the trust. Where a trust is established, the trust deed will frequently specify the various powers of the trustees to be exercised at their discretion[66] and relevantly a trust deed may confer upon the trustee a power to carry on certain business activities. Whether a power to carry on business has been conferred in the trust instrument, and, if so, the extent of this power, is to be determined on the construction of the clause in question in the context of the trust document as a whole.[67]

However, the power to carry on business forming part of the assets of the trust will not vest in the trustee unless it is conferred by the trust instrument, by statute or by the court,[68] and any powers must be exercised within the trustees' scope and authority. Where a trust deed confers the power to carry on business, an enterprise conducted by a person in their capacity as trustee of a trust can, for example, provide people with employment, generate sales, produce a profit and sponsor a person for a visa.

Accordingly, where an application is made in the name of a trust, the Tribunal must be satisfied that a person with capacity has made an application. In such cases, if the business is operated under a trust structure, where the trustee is an individual, partnership or company, the business name and number would be registered to the trustee as trustee for the trust and the trust deed would show who the parties to the trust are.

7. Can an unincorporated association apply for review?

Yes, an unincorporated association can apply for review through an authorised member of that association making an application on its behalf.

What is an unincorporated association?

Unincorporated associations are formed when persons who share a common lawful purpose agree to further that interest by collective action. They are formed by the voluntary action of those people who agree to its formation and the terms of association. An unincorporated association is not a legal entity and is not usually accorded recognition by the legal system.[69]

However, the Act recognises the associations for particular sponsorship purposes. In this regard, s.140ZE of the Act provides that 'the regulations made under it and any other provision of this Act as far as it relates to this Division or the regulations, apply to an unincorporated association as if it were a person, but with the changes set out in this section and s140ZF and s140ZG' In addition, members

[66] Powers can also be conferred on the trustee by court order or statute. See, for example: *Trustee Act 1898* (Tas), s.64; *Trustee Act 1958* (Vic), s.2(3); *Trustees Act 1962* (WA), s.5(3). The Australian Capital Territory, New South Wales, Northern Territory and South Australia have numerous provisions which combine to this effect. In Queensland, most given powers are declared to be applicable whether or not a contrary intention is expressed in the instrument creating the trust: *Trusts Act 1973* (Qld), ss.7A, 10, 20(2), 31(1), 60, 65, 79, 107.
[67] See *The Laws of Australia,* Thompson Reuters at [15.14.2240] (accessed via WestLaw 14 September 2017).
[68] See *The Laws of Australia,* Thompson Reuters at [15.14.2270] (accessed via WestLaw 14 September 2017).
[69] See *The Laws of Australia*, Thompson Reuters at [4.8.1200] (accessed via WestLaw 14 September 2017).

of the unincorporated association are recognised as possessing limited liability for the debts of their association.[70]

Who can act on behalf of an unincorporated association?

Members of an unincorporated association are, subject to the powers of the association's constitution, capable of entering into contracts and doing things on behalf of other people in the association.[71] Accordingly, where a review application is signed by one member of an unincorporated association with the powers to do so, it may be treated as validly made to the extent that the other validity requirements are complied with.

Conduct of review

8. Who should the tribunal communicate with on behalf of the business?

Generally speaking, the Act and Regulations require communication, including tribunal notifications, to be with the review applicant, unless that person has appointed an authorised recipient, or, not relevant in the case of business review applicants, a minor who has a 'carer'. It is a factual question as to who the review applicant is in cases concerning business review applicants and who has authority to represent that business. In these cases, this would mean the tribunal should communicate with the sole trader, partnership firm, unincorporated association or person with authority to act on behalf of the company, applying the principles outlined above.

What is the role of representatives in the review?

However, as will often be the case, a business review applicant may, like any other review applicant, appoint an agent to represent it while the application for review is before the tribunal. If the applicant has in such situations given the Tribunal written notice of the name and address of another person in respect of a valid review application who has been authorised by the applicant to do things on behalf of the applicant that includes the receiving documents in connection with the review, the tribunal must give the invitation to that authorised recipient[72] unless and until the applicant withdraws or varies the notice given.[73] This would normally be the case, for example, in relation to the appointment of a migration agent or human resources manager.

In addition to the specific authorised recipient provisions in the Act, under general principles of agency, a person may be given authority to act on behalf of the business review applicant in relation to the Tribunal in a way that binds the principal. The authority to act in a particular way may be conferred expressly, either orally or by writing, or impliedly, from the conduct of the parties or relationship of the parties. At common law a person may authorise another person (an agent) to do anything on their behalf that the person could do him or herself. This includes signing a document, such as the review application form.[74]

Where the person authorised to act on behalf of the applicant is a migration agent, the tribunal is entitled to assume that the migration agent holding him or herself out as acting on behalf of an

[70] See *The Laws of Australia*, Thompson Reuters at [4.8.1200] (accessed via WestLaw 14 September 2017).
[71] They are also individually and personally responsible for any debts incurred in the name of the association.
[72] ss.379G [Part 5 - Migration] and 441G [Part 7 - Protection]. See *Lee v MIAC* (2007) 159 FCR 181 where Besanko J (Moore J agreeing) expressly disagreed with the reasoning in *Makhu v MIMIA* [2004] FCA 221 and rejected the Minister's argument that it was possible to just give the s.359A letter to the applicant by a method specified in s.379A at [38].
[73] This is so even if the authorised recipient themselves attempts to withdraw their nomination as authorised recipient: *Guan v MIAC* [2010] FMCA 802 (Nicholls FM, 22 October 2010).
[74] See *Trustees of the Franciscan Missionaries of Mary v Weir* (2000) 176 ALR 501 at [6] and the cases cited.

applicant has implied usual authority[75] to act in that way unless the tribunal is aware of something to the contrary. This is because of the professional obligations which apply to migration agents.[76]

Who can appear at the Tribunal hearing to give evidence and present arguments?

The Tribunal is required at a minimum to invite the review applicant to appear before it to give evidence and present arguments relating to the issues arising in relation to the decision under review.[77] This would clearly be the person identified as the business review applicant applying the principles outlined above for the relevant entity.

In the case of a review applicant who is not a natural person (e.g. a company), it would be impossible for the review applicant to personally attend the hearing. Accordingly, it would be the person who has the authority to act on behalf of the relevant business entity applying the principles outlined above who would be entitled to appear at the tribunal hearing to give evidence and present arguments on behalf of the company.

In addition, business review applicants before the Tribunal, like any other real persons who are applicants before the Tribunal, are entitled to be 'assisted' by another person although not represented as such.[78] Accordingly, it may be the case, for example, that an employee of the business who might not otherwise have authority to represent the business can assist at the business at hearing in a way contemplated by s.366A of the Act. In such situations, two matters would be relevant to the tribunal's considerations: first, whether the tribunal considers that exceptional circumstances exist such as to allow the assistant under s.366A to present arguments to or otherwise address the tribunal; and second, the weight and value of the evidence provided by that assistant. In other words, as long as the requirements in s.366A(2) are satisfied, there is nothing to prevent an employee from giving evidence to the Tribunal at hearing although that relationship may affect the Tribunal's assessment of the evidence given by the employee.

Last updated/reviewed: 28 September 2018

[75] Implied usual authority, also called "implied actual authority", is authority an agent has by virtue of being reasonably necessary to carry out his express authority. As such, it can be inferred by virtue of a position held by an agent. For example, in a corporation, a managing director with decision-making authority by virtue of his or her position has authority to bind the corporation.

[76] See clause 2.8 of the MARA Code of Conduct which includes the obligation to act in accordance with the client's instructions. Agents are also subject to common law duties including duties to act in their principal's best interests and to inform their principal.

[77] In *SZPZH v MIAC & Anor* [2011] FMCA 407 (Cameron FM, 2 June 2011) the Court confirmed s. 360 does not refer to a visa applicant and did not operate to require the Tribunal to invite the visa applicant to give evidence in the event that it was unable, on the papers, to reach a favourable decision on the review application. The Court held that the words "the applicant" in Division 5 of Part 5 of the Act refer to the person who has made the application to the Tribunal and to no one else: at [25]. Upheld on appeal in *SZPZH v MIAC* [2011] FCA 960 (Robertson J, 18 August 2011). This issue only arises where the visa applicant and review applicant are not the same person.

[78] s.366A.

Business Skills (Residence) Visas (Class DF)
(Subclasses 890 – 893)

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Overview

Class DF - Business Skills (Residence) is a permanent visa class and consists of four visa subclasses:[1]

- Subclass 890 Business Owner;
- Subclass 891 Investor;
- Subclass 892 State/Territory Sponsored Business Owner; and
- Subclass 893 State/Territory Sponsored Investor.

The visa class was introduced on 1 March 2003[2] as part of a two-stage visa processing scheme for the business skills visa scheme whereby the majority of applicants initially apply for a 4-year provisional business skills visa (Class UR) and, after providing satisfactory evidence of a specified level of business activity in Australia, may apply for an onshore permanent business skills visa (Class DF).[3] The Business Skills (Residence) (Class DF) visa is the second stage of this two-staged processing structure, and provides Australian permanent residence for eligible business persons.

In July 2012 new temporary and permanent visa classes, the Business Skills (Provisional) (Class EB) and Business Skills (Permanent) (Class EC) visas, were introduced to eventually replace Class UR and Class DF.[4] Class DF is still open to visa applications, however as the provisional visas which are a precondition to applying as a primary applicant were repealed on 1 July 2012, applications for Subclass 890-893 visas will diminish over time.

All four Subclasses of 890 – 893 visas are permanent visas which permit the holders to travel to, and enter Australia for a period of 5 years from the date of grant.[5] They have the same visa conditions, which provide that if the applicant is outside Australia when the visa is granted and the applicant satisfied the secondary criteria, first entry must be made before a date specified by the Minister for the purpose; and condition 8515 (which provides that visa holder must not marry before entering Australia) may be imposed.[6]

The visa application requirements for Business Skills (Residence) (Class DF) are found in item 1104B of Schedule 1 to the Migration Regulations 1994 (the Regulations).

Merits review

A decision to refuse to grant a Subclass 890, 891, 892 or 893 visa is a decision reviewable by the Tribunal under s.338(2) (for applicants seeking to satisfy primary criteria who were in Australia at time of visa application) or s.338(7A) of the Act (for applicants seeking to satisfy secondary criteria who made the visa application whilst outside Australia).

[1] item 1104B(4) of Schedule 1 to the Migration Regulations 1994.
[2] Migration Amendment Regulations 2002 (No.10) (SR 2002, No.348).
[3] Explanatory Statement to SR 2002, No.348.
[4] Explanatory Statement to Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82), p.55, 72.
[5] cl.890.511, cl.891.511, cl.892.511 and cl.893.511.
[6] cl.890.611, cl.891.611, cl.892.611 and cl.893.611.

In both instances it is the visa applicant who has standing to apply for review.[7]

If the decision is reviewable under s.338(2), the visa applicant must be physically present in the migration zone when the application for review is made.[8]

If the decision is reviewable under s.338(7A), the visa applicant must be physically present in the migration zone both at the time when the primary decision was made *and* when the application for review is made.[9]

Subclass 890 – Business Owner

Requirements for making a valid application

An application for a Class DF (Subclass 890) visa must be made on the approved form[10] and the prescribed fee must be paid.[11] With one exception, relevant only to applications made prior to 1 July 2012, the applicant seeking to satisfy the primary criteria must hold a Business Skills (Provisional) (Class UR) visa.[12]

The application must be made at the place and in the manner specified.[13] An applicant seeking to satisfy the primary criteria must be in Australia, while an applicant seeking to satisfy the secondary criteria may be in or outside Australia. However, neither the applicants seeking to satisfy the primary or the secondary criteria may be in immigration clearance.[14] An application by a person claiming to be a member of the family unit of the applicant may be made at the same time and place as, and combined with, the application by the applicant.[15]

Time of Application Criteria for Subclass 890

The primary criteria must be satisfied by at least one member of a family unit. The other members of the family unit who are applicants for a visa of this subclass need to satisfy only the secondary criteria. For a more detailed discussion on who may satisfy the primary criteria, see below.

The time of application primary criteria require that:

- the applicant has had, and continues to have, an ownership interest in one or more actively

[7] s.347(2)(a).
[8] s.347(3).
[9] s.347(3A).
[10] item 1104B(1). For applications made prior to 18 April 2015, the prescribed forms were 47BU and 1217. This provision was amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No.34) for applications made on or after 18 April 2015 to provide that the approved form is that specified by the Minister in a legislative instrument under r.2.07(5).
[11] item 1104B(2).
[12] item 1104B(3)(d) as amended by SLI 2012, No.82 for visa applications made on or after 1 July 2012. For applications made before 1 July 2012 this requirement is set out in item 1104B(3)(d)(i), and (ii) which provided an alternative requirement for persons designated under r.2.07AO: Regulation 2.07AO was inserted by Migration Amendment Regulations 2004 (No.6) (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 Subclasses 890-892. It was repealed from 23 March 2013: Migration Amendment Regulation 2013 (No.1) (SLI 2013, No.32).
[13] item 1104B(3)(a). For applications made on or after 18 April 2015, this provision was amended by SLI 2015, No.34 to provide that the place and manner in which the application must be made, if any, is specified by the Minister in a legislative instrument under r.2.07(5).
[14] items 1104B(3)(b) and 1104B(3)(c).
[15] item 1104B(3)(h).

operating main businesses in Australia for at least two years immediately before the application is made;[16]

- for each business to which cl.890.211(1) (above) applies, an Australian Business Number ('ABN') has been obtained; and all Business Activity Statements ('BAS') required by the Australian Taxation Office (the ATO) for the period mentioned in cl.890.211 have been submitted to the ATO and have been included in the application;[17]

- *for visa applications made before 9 August 2008* - the net value of the assets of the applicant and/or the applicant's spouse, in the main business(es) in Australia is, and has been throughout the 12 months immediately before the application is made, at least AUD100 000;[18]

- *for visa applications made on or after 9 August 2008* - the assets of the applicant and/or the applicant's spouse / de facto partner,[19] in the main business(es) in Australia have, and have had throughout the 12 months immediately before the application is made, a net value of at least AUD100 000, and have been lawfully acquired;[20]

- in the 12 months immediately before the application is made, the applicant's main business(es) in Australia, had an annual turnover of at least AUD300 000;[21]

- in the period 12 months immediately before the application is made, the main business(es) in Australia, of the applicant and/or the applicant's spouse / de facto partner, provided an employee, or employees, with a total number of hours of employment at least equivalent to the total number of hours that would have been worked by two full-time employees over that period of 12 months; and provided those hours of employment to employees who were not the applicant or a member of the family unit of the applicant, and who were Australian citizens or permanent residents or New Zealand passport holders;[22]

[16] cl.890.211(1). 'Ownership interest' is defined as having the meaning given to it in s.134(10) of the *Migration Act 1958*: r.1.03. Sub-section 134(10) in turn defines it as an interest in a business as a shareholder in a company that carries on the business; or a partner in a partnership that carries on the business; or the sole proprietor of the business; including any such interest held indirectly through one or more interposed companies, partnerships or trusts. 'Main business' has the meaning specified in r.1.11: r.1.03. (See MRD Legal Services Commentary: Main Business (r.1.11))

[17] cl.890.211(2).

[18] cl.890.212. See MRD Legal Services Commentary Net Assets for further discussion about different kinds of assets and calculation of asset values.

[19] The express inclusion of 'de facto partner' in this sub-clause only applies in relation to visa applications made on or after 1 July 2009: Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144). 'Spouse' and 'de facto partner' for these purposes are defined in s.5F and s.5CB of the Act respectively and both definitions include same and opposite sex partners. For applications made prior to this date, the reference to 'spouse' is a reference to the definition in r.1.15A as it stood prior to 1 July 2009 (i.e. married and opposite sex de facto partners).

[20] cl.890.212. The current version applies to visa applications made on or after 9 August 2008: Migration Amendment Regulations 2008 (No.3) (SLI 2008, No.166). The Explanatory Statement states: 'Paragraph 890.212(c) introduces an additional requirement that these assets must have been lawfully acquired by the applicant or the applicant and his or her spouse together. New paragraph (c) clarifies that applicants cannot satisfy clause 890.212 by using assets which have been unlawfully acquired.' While the assets must have been lawfully acquired, there is no requirement that the assets be genuinely or actively invested in the business. See *He v MIBP* [2015] FCCA 2915 (Judge Vasta, 29 October 2015). See MRD Legal Services Commentary Net Assets for further discussion about different kinds of assets and calculation of asset values.

[21] cl.890.213. In *Cheng v MIAC* [2012] FMCA 911 the Federal Magistrates' Court considered the meaning of 'turnover' in the context of cl.892.213 and found that in circumstances where the main business acted as an agent for another business (and not as a merchant in its own right), the substance of the business should be examined in determining its 'turnover'. In that case, the Court found the Tribunal was correct in concluding that as an intermediary, the main business' 'turnover' was limited to the value of the service provided in the business transactions, being in this case the commissions. This finding was upheld on appeal by the Federal Court in *Cheng v MIAC* [2013] FCA 405 (Cowdroy J, 6 May 2013).

[22] cl.890.214. This criterion was amended by Migration Amendment Regulations 2008 (No. 3) (SLI 2008, No.166). The current version applies to visa applications not finally determined on 9 August 2008, or made on or after that date. The Explanatory Statement states: 'The effect of [then] current clause 890.214 is that the applicant must have employed one full-time employee at all times throughout the 12 month period. Applicants who own businesses which for seasonal reasons have fluctuating labour requirements may not be able to satisfy this criterion. By requiring applicants to provide employment hours that is at least equivalent to the hours that would have been worked by two full-time employees, new clause 890.214 will ensure that applicants with fluctuating labour requirements are not disadvantaged in terms of their ability to satisfy this criterion. For

- the net value of the business and personal assets in Australia of the applicant and/or the applicant's spouse / de facto partner, is, and has been throughout the 12 months immediately before the application is made, at least AUD250,000;[23]

- neither the applicant nor the applicant's spouse / de facto partner (if any) has a history of involvement in business activities of a nature that is not generally acceptable in Australia;[24]

- the applicant has been in Australia as the holder of one of the visas mentioned in item 1104B(3)(d) of Schedule 1 for a total of at least one year in the two years immediately before the application is made.[25]

The secondary time of application criteria require the secondary applicant to be a member of the family unit of, and have made a combined application with, a person who satisfies the primary criteria in Subdivision 890.21 (time of application criteria for primary applicants).[26]

Time of Decision Criteria for Subclass 890

At the time of the decision, applicants must continue to satisfy the primary criteria in cl.890.211, 890.215 and 890.216.[27] Also, applicants and members of the family unit of the primary applicant need to satisfy certain public interest criteria.[28] For visa applications made on or after 1 July 2005, applicants must also meet certain passport requirements.[29]

The secondary time of decision criteria require the secondary applicant to be a member of the family unit of a person who is the person with whom a combined application was made, and having satisfied the primary criteria, is the holder of a Subclass 890 visa.[30] Various public interest criteria must also be met by secondary applicants at the time of decision.[31]

Circumstances for Grant

When the visa is granted, the applicant who satisfies the primary criteria must be in Australia (but not in immigration clearance). Applicants that satisfy the secondary criteria may be in or outside Australia (but not in immigration clearance).[32]

example, an applicant who employs four full-time staff for six months of the year and then no full-time staff for the remaining six months would be able to satisfy this new criterion but could not satisfy the current criterion'.

[23] cl.890.215. See MRD Legal Services Commentary Net Assets for further discussion about different kinds of assets and calculation of asset values.

[24] cl.890.216.

[25] cl.890.217. Note item 1104B(3)(d) was amended for visa applications made on or after 1 July 2012 by SLI 2012, No.82.

[26] cl.890.311.

[27] cl.890.221. Note that in respect of the requirement for cl.890.221 that the applicant 'continues to satisfy' cl,890.211, the applicant must have at the time of decision an ownership interest in at least one of the businesses nominated for and relied on to meet cl.890.211: *Yang v MIBP* [2014] FCCA 1576 (Judge Driver, 14 October 2014). For further general discussion of the requirement, used in relation to a number of visa subclasses, that an applicant 'continues to satisfy' a particular visa criterion, see the Legal Services commentary Continues to Satisfy Criterion.

[28] cl.890.222, 890.223(1), 890.223(2), 890.223(3), 890.223(4) and 890.224.

[29] For applications made on or after 1 July 2005 but before 24 November 2012: cl.890.225 inserted by Migration Amendment Regulations 2005 (No.4) (SLI 2005, No.134). For applications on or after 24 November 2012 the relevant passport requirements are contained in PIC 4021: cl.890.222(a).

[30] cl.890.321

[31] cl.890.322 and 890.323. For applications made on or after 1 July 2005 but before 24 November 2012, secondary applicants also must meet cl.890.324.

[32] cl.890.411.

Requirements for making a valid Subclass 891 application

An application for a Class DF (Subclass 891) visa must be made on the approved form[33] and the prescribed fee paid.[34] An applicant seeking to satisfy primary criteria must hold a Subclass 162 (Investor (Provisional)) visa granted on the basis that the applicant satisfied the primary criteria for the grant of the visa.[35]

The application must be made at the place and in the manner specified.[36] An applicant seeking to satisfy the primary criteria must be in Australia. An applicant seeking to satisfy the secondary criteria may be in or outside Australia. However, neither the applicants seeking to satisfy the primary or the secondary criteria may be in immigration clearance.[37] An application by a person claiming to be a member of the family unit of the applicant may be made at the same time and place as, and combined with, the application by the applicant.[38]

Time of Application Criteria for Subclass 891

The primary criteria must be satisfied by at least one member of a family unit. The other members of the family unit who are applicants for a visa of this subclass need to satisfy only the secondary criteria. For a more detailed discussion on who may satisfy the primary criteria, see below.

The time of application primary criteria require that:

- neither the applicant nor his or her spouse / de facto partner[39] (if any) has a history of involvement in business or investment activities of a nature that is not generally acceptable in Australia;[40]
- the applicant has been in Australia as the holder of a Subclass 162 (Investor (Provisional)) visa for a total of at least 2 years in the 4 years immediately before the application is made;[41] and
- the applicant genuinely has a realistic commitment, after the grant of a Subclass 891 visa, to continue to maintain business or investment activity in Australia.[42]

[33] item 1104B(1) of Schedule 1 to the Regulations. For applications made prior to 18 April 2015, the prescribed form was 47BU. This provision was amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No.34) for applications made on or after 18 April 2015 to provide that the approved form is that specified by the Minister in a legislative instrument under r.2.07(5).
[34] item 1104B(2).
[35] item 1104B(3)(e).
[36] item 1104B(3)(a). For applications made on or after 18 April 2015, this provision was amended by SLI 2015, No.34 to provide that the place and manner in which the application must be made, if any, is specified by the Minister in a legislative instrument under r.2.07(5).
[37] items 1104B(3)(b) and 1104B(3)(c).
[38] item 1104B(3)(h).
[39] The express inclusion of 'de facto partner' in this sub-clause only applies in relation to visa applications made on or after 1 July 2009: Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144). 'Spouse' and 'de facto partner' for these purposes are defined in s.5F and s.5CB of the Act respectively and both definitions include same and opposite sex partners. For applications made prior to this date, the reference to 'spouse' is a reference to the definition in r.1.15A as it stood prior to 1 July 2009 (i.e. married and opposite sex de facto partners).
[40] cl.891.211.
[41] cl.891.212.
[42] cl.891.213.

The secondary time of application criteria require the secondary applicant to be a member of the family unit of, and to have made a combined application with, a person who satisfies the primary criteria in Subdivision 891.21 (time of application criteria for primary applicants).[43]

Time of Decision Criteria for Subclass 891

At the time of the decision, an applicant must continue to satisfy the primary criteria in cl.891.211 and 891.213,[44] relating to their history of business/investment involvement and commitment to maintaining business or investment activity in Australia (see above). In addition, the designated investment made by the applicant for the purpose of satisfying a requirement for the grant of a Subclass 162 (Investor (Provisional)) visa must have been held continuously in the name of the applicant, or in the names of the applicant and his or her spouse / de facto partner together, for at least 4 years.[45]

For visa applications made on or after 1 July 2005, applicants must also meet certain passport requirements.[46] Also, primary applicants need to satisfy certain public interest criteria.[47]

The secondary time of decision criteria require the secondary applicant to be a member of the family unit of a person who is the person with whom a combined application was made, and having satisfied the primary criteria, is the holder of a Subclass 891 visa.[48] Various public interest criteria must also be met by secondary applicants at the time of decision.[49]

Circumstances for Grant

When the visa is granted, the applicant that satisfies the primary criteria must be in Australia, but not in immigration clearance. The applicants that satisfy the secondary criteria may be in or outside Australia (but not in immigration clearance).[50]

Subclass 892 – State/Territory Sponsored Business Owner

Requirements for making a valid Subclass 892 application

An application for a Class DF (Subclass 892) visa must be made on the approved form[51] and the prescribed fee paid.[52] The application must be made at the place and in the manner specified.[53]

[43] cl.891.311.
[44] cl.891.221. For further discussion of the requirement, used in relation to a number of visa subclasses, that an applicant 'continues to satisfy' a particular visa criterion, see the Legal Services commentary Continues to Satisfy Criterion.
[45] cl.891.222.
[46] For applications made on or after 1 July 2005 but before 24 November 2012: cl.891.226 inserted by SLI 2005, No.134, and for applications made on or after 24 November 2012 PIC 4021 contains the relevant passport requirements: cl.891.223(a).
[47] cl.891.223, 891.224(1), 890.224(2), 891.224(3), 891.224(4) and 891.225.
[48] cl.891.321
[49] cl.891.322 and 891.323. For applications made on or after 1 July 2005 but before 24 November 2012, secondary applicants also must meet cl.891.324.
[50] cl.891.411.
[51] item 1104B(1) of Schedule 1 to the Regulations. For applications made prior to 18 April 2015, the prescribed forms were 47BU, 1217 and 949. This provision was amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No.34) for applications made on or after 18 April 2015 to provide that the approved form is that specified by the Minister in a legislative instrument under r.2.07(5).
[52] item 1104B(2).

Applicants seeking to satisfy the primary criteria must be in Australia and applicants seeking to satisfy the secondary criteria may be in or outside Australia. However, neither the applicants seeking to satisfy the primary nor the secondary criteria may be in immigration clearance.[54] Applications by a person claiming to be a member of the family unit of the applicant may be made at the same time and place as, and combined with, the application by the applicant.[55]

From 1 July 2012, an applicant seeking to satisfy the primary criteria for the grant of a Subclass 892 visa must hold a Business Skills (Provisional) (Class UR) visa in order to make a valid application.[56] Applications made prior to 1 July 2012 are subject to a different requirement so that other visa holders seeking to satisfy the primary criteria, including certain Subclass 457 (Business (Long Stay)) visa holders and certain Skilled – Independent Regional (Provisional) (Class UX) visa holders, may make a valid application.[57] In either case, the primary applicant must be sponsored by an appropriate regional authority specified in a legislative instrument made by the Minister,[58] and Form 949 must be signed by an officer of the authority who is authorised to sign a sponsorship of that kind.[59]

Time of Application Criteria for Subclass 892

The primary criteria must be satisfied by at least one member of a family unit. The other members of the family unit who are applicants for a visa of this subclass need to satisfy only the secondary criteria. For a more detailed discussion on who may satisfy the primary criteria, see below.

The time of application primary criteria require that:

- the applicant has had, and continues to have, an ownership interest in one or more actively operating main businesses in Australia for at least two years immediately before the application is made;[60]
- for each business to which cl.892.211(1) (above) applies, an ABN has been obtained and all BAS required by the ATO for the period mentioned in subclause (1) have been submitted to the ATO and have been included in the application;[61]
- *for visa applications made before 9 August 2008* - unless the 'appropriate regional authority' has determined that there are exceptional circumstances, the applicant meets at least two of the following requirements:[62]

[53] item 1104B(3)(a). For applications made on or after 18 April 2015, this provision was amended by SLI 2015, No.34 to provide that the place and manner in which the application must be made, if any, is specified by the Minister in a legislative instrument under r.2.07(5).
[54] items 1104B(3)(b) and 1104B(3)(c).
[55] item 1104B(3)(h).
[56] item 1104B(3)(f) as amended by SLI 2012, No.82. The purpose of this is to retain the permanent visa pathway to the Subclass 892 visa for holders of a Class UR visa, and remove the pathway for other visa holders who may be eligible to apply for a permanent visa: Explanatory Statement to SLI2012, No.82 at 34.
[57] Items 1104B(3)(f)(i)(B) & (C), 1104B(3)(j). Applications made prior to 1 July 2012 by persons designated under r.2.07AO are subject to an alternative requirement: item 1104B(3)(f)(ii).
[58] The definition of 'appropriate regional authority' was amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30), omitting reference to 'by Gazette Notice, for the purposes of these Regulations' and substituting with 'in a legislative instrument made by the Minister' with effect from 22 March 2014. However, instruments in force immediately before the commencement of that provision have effect after that date as if made under the amended provision.
[59] item 1104B(3)(i).
[60] cl.892.211(1). Ownership interest' is defined as having the meaning given to it in s.134(10) of the *Migration Act 1958*: r.1.03. Sub-section 134(10) in turn defines it as an interest in a business as a shareholder in a company that carries on the business; or a partner in a partnership that carries on the business; or the sole proprietor of the business; including any such interest held indirectly through one or more interposed companies, partnerships or trusts. 'Main business' has the meaning specified in r.1.11: r.1.03. (See MRD Legal Services Commentary: Main Business (r.1.11)).
[61] cl.892.211(2).
[62] cl.892.212.

- in the 12 months ending immediately before the application is made, the main business(es) in Australia, of the applicant, or of his/her spouse, or of the applicant and his/her spouse together, employed at least one full time employee (or a number of part-time employees with a total number of hours of employment at least equivalent to those that would have been worked by one full-time employee), who is not the applicant or a family member and who is an Australian citizen or permanent resident or New Zealand passport holder;[63]
- the net value of the business and personal assets in Australia of the applicant, the applicant's spouse or the applicant and his/her spouse together, is, and has been throughout the 12 months immediately before the application is made, at least AUD250 000;[64]
- the total value of the net assets owned by the applicant, the applicant's spouse or the applicant and his/her spouse together, in the main business(es) in Australia, is, and has been throughout the 12 months immediately before the application is made, at least AUD75 000;[65]

- *for visa applications made on or after 9 August 2008* - unless the 'appropriate regional authority' has determined that there are exceptional circumstances, the applicant meets at least two of the following requirements:[66]
  - in the 12 months ending immediately before the application is made, the main business(es) in Australia, of the applicant, the applicant's spouse / de facto partner[67] or the applicant and his/her spouse / de facto partner together, employed at least one full time employee (or a number of part-time employees with a total number of hours of employment at least equivalent to those that would have been worked by one full-time employee), who is not the applicant or a family member and who is an Australian citizen or permanent resident or New Zealand passport holder;[68]
  - the business and personal assets in Australia of the applicant, the applicant's spouse / de facto partner or the applicant and his/her spouse / de facto partner together have, and have had throughout the 12 months ending immediately before the application is

[63] cl.892.212(a). This version applies to visa applications not finally determined on 9 August 2008, or made on or after that date: SLI 2008, No.166. The Explanatory Statement states: 'The effect of [then] current clause 892.212(a) is that the applicant must have employed one full-time employee at all times throughout the 12 month period. Applicants who own businesses which for seasonal reasons have fluctuating labour requirements may not be able to satisfy this criterion. By requiring applicants to provide employment hours that is at least equivalent to the hours that would have been worked by one full-time employee, new paragraph 892.212(a) will ensure that applicants with fluctuating labour requirements are not disadvantaged in terms of their ability to satisfy this criterion. For example, an applicant who employs two full-time staff for six months of the year but no full-time staff for the remaining six months would be able to satisfy this new criterion but could not satisfy the current criterion.'

[64] cl.892.212(b). See MRD Legal Services Commentary Net Assets for further discussion about different kinds of assets and calculation of asset values.

[65] cl.892.212(c). See MRD Legal Services Commentary Net Assets for further discussion about different kinds of assets and calculation of asset values.

[66] cl.892.212.

[67] The express inclusion of 'de facto partner' in this sub-clause only applies in relation to visa applications made on or after 1 July 2009: Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144). 'Spouse' and 'de facto partner' for these purposes are defined in s.5F and s.5CB of the Act respectively and both definitions include same and opposite sex partners. For applications made prior to this date, the reference to 'spouse' is a reference to the definition in r.1.15A as it stood prior to 1 July 2009 (i.e. married and opposite sex de facto partners).

[68] cl.892.212(a). This version applies to visa applications not finally determined on 9 August 2008, or made on or after that date: SLI 2008, No.166. The Explanatory Statement states: ''The effect of [then] current clause 892.212(a) is that the applicant must have employed one full-time employee at all times throughout the 12 month period. Applicants who own businesses which for seasonal reasons have fluctuating labour requirements may not be able to satisfy this criterion. By requiring applicants to provide employment hours that is at least equivalent to the hours that would have been worked by one full-time employee, new paragraph 892.212(a) will ensure that applicants with fluctuating labour requirements are not disadvantaged in terms of their ability to satisfy this criterion. For example, an applicant who employs two full-time staff for six months of the year but no full-time staff for the remaining six months would be able to satisfy this new criterion but could not satisfy the current criterion'.

made, a net value of at least AUD250 000, and have been lawfully acquired;[69]

- the total value of the net assets owned by the applicant, the applicant's spouse / de facto partner or the applicant and his/her spouse / de facto partner together, in the main business(es) in Australia, have, and have had throughout the 12 months ending immediately before the application is made, a net value of at least AUD75 000; and have been lawfully acquired;[70]

- the applicant meets either of the following:[71]

  - in the 12 months immediately before the application is made, the applicant's main business(es) in Australia together, had an annual turnover of at least AUD200 000;[72] or

  - the applicant meets at least two of the requirements set out in cl.892.212(a), (b) and (c); **and** the applicant resides in, and operates the applicant's main business(es) in Australia in, an area specified in an instrument in writing made by the Minister for this paragraph; **and** the appropriate regional authority has determined that there are exceptional circumstances for this subclause;[73]

- neither the applicant nor the applicant's spouse / de facto partner (if any) has a history of involvement in business activities of a nature that is not generally acceptable in Australia;[74]

- if the applicant is <u>not</u> a holder of a Skilled – Independent Regional (Provisional) (Class UX) visa, for a total of at least one year in the two years immediately before the application is made the applicant has been in Australia as the holder of

  - one of the visas mentioned in item 1104B(3)(f) of Schedule 1,[75] or

  - a Bridging visa A or Bridging visa B granted on the basis of a valid application for a Temporary Business Entry (Class UC) visa and a Subclass 457 visa was subsequently granted on the basis of the applicant, the applicant's spouse / de facto

[69] cl.892.212(b). This version applies to visa applications made on or after 9 August 2008: SLI 2008, No.166. The Explanatory Statement states: 'New subparagraph 892.212(b)(iii) introduces an additional requirement that these assets must have been lawfully acquired by the applicant or the applicant and his or her spouse together. This clarifies that applicants cannot satisfy paragraph 892.212(b) by using assets which have been unlawfully acquired.' While the assets must have been lawfully acquired, there is no requirement that the assets be genuinely or actively invested in the business. See *He v MIBP* [2015] FCCA 2915 (Judge Vasta, 29 October 2015). See MRD Legal Services Commentary Net Assets for further discussion about different kinds of assets and calculation of asset values.

[70] cl.892.212(c). This version applies to visa applications made on or after 9 August 2008: SLI 2008, No.166. The Explanatory Statement states: 'Subparagraph 892.212(c)(iii) introduces an additional requirement that these assets must have been lawfully acquired by the applicant or the applicant and his or her spouse together. New subparagraph 892.212(c)(iii) clarifies that applicants cannot satisfy paragraph 892.212(c) by using assets which have been unlawfully acquired.' See discussion above on *He v MIBP* [2015] FCCA 2915 (Judge Vasta, 29 October 2015). See MRD Legal Services Commentary Net Assets for further discussion about different kinds of assets and calculation of asset values.

[71] cl.892.213.

[72] cl.892.213(2). In *Cheng v MIAC* [2012] FMCA 911 the Federal Magistrates' Court considered the meaning of 'turnover' in the context of cl.892.213 and found that in circumstances where the main business acted as an agent for another business (and not as a merchant in its own right), the substance of the business should be examined in determining its 'turnover'. In that case, the Court found the Tribunal was correct in concluding that as an intermediary, the main business' 'turnover' was limited to the value of the service provided in the business transactions, being in this case the commissions. This finding was upheld on appeal by the Federal Court in *Cheng v MIAC* [2013] FCA 405 (Cowdroy J, 6 May 2013).

[73] cl.892.213(3).

[74] cl.892.214. Amended by SLI 2009, No.144, see footnote above.

[75] For visa applications made prior to 1 July 2012 the visas mentioned in item 1104B(3)(f) are a Business Skills (Provisional) (Class UR) visa, a Subclass 457 (Business (Long Stay)) visa or a Skilled Independent Regional (Provisional) (Class UX) visa. For visas made on or after 1 July 2012 item 1104B(3)(f) refers only to a Business Skills (Provisional) (Class UR) visa: SLI 2012, No.82.

partner, or the applicant's former spouse/de facto partner meeting cl.457.223(7A);[76]

- if the applicant is the holder of, or the last substantive visa held by the applicant since last entering Australia was a Skilled – Independent Regional (Provisional) (Class UX) visa; the applicant must have lived for at least 2 years in total as the holder of that visa and/or a Bridging A or B visa which was granted on the basis of making a valid application for a Class UX visa, in a part of Australia that at the time the Class UX or bridging visa was granted, was specified in an instrument in writing for item 6A1001 of Schedule 6A (see 'Reg. & low pop areas' tab of the Register of Instruments – Skilled Visas);[77]

- if the applicant is the holder of, or the last substantive visa held by the applicant since last entering Australia was a Skilled – Independent Regional (Provisional) (Class UX) visa; the applicant must have worked full time for at least 12 months in total, as the holder of a Class UX visa and/or Bridging A or B visa granted on the basis of a valid application for a Class UX visa, in a part of Australia that at the time the Class UX or bridging visa was granted, was specified in an instrument in writing for item 6A1001 of Schedule 6A (see 'Reg. & low pop areas' tab of the Register of Instruments – Skilled Visas);[78]

- if the applicant is the holder of, or the last substantive visa held by the applicant since last entering Australia was a Skilled – Independent Regional (Provisional) (Class UX) visa; the applicant has complied with the conditions of that visa.[79]

The secondary time of application criteria require the secondary applicant to be a member of the family unit of, and have made a combined application with, a person who satisfies the primary criteria in Subdivision 892.21 (time of application criteria for primary applicants).[80] If the secondary applicant is the holder of, or the last substantive visa held since last entering Australia was, a Skilled – Independent Regional (Provisional) (Class UX) visa, it is a requirement that the applicant has complied with the conditions of that visa.[81]

Time of Decision Criteria for Subclass 892

At the time of the decision, applicants must continue to satisfy the primary criteria in cl.892.211 and 892.214, relating to their ownership interest in one or more main businesses and business history (see above),[82] and, if the applicant met the requirements of cl.892.212(b), the requirements in cl.892.212(b).[83] In addition:

[76] cl.892.215. This criterion was amended by SLI 2008, No.166. The current version applies to visa applications not finally determined on 9 August 2008 or made on or after that date. The Explanatory Statement states: 'This amendment recognises that some applicants hold Bridging A or Bridging B visas for an extended period while their Subclass 457 visa is processed.'
[77] cl.892.216. Note that from 1 July 2012 an application for a Subclass 892 visa will not be valid unless the person seeking to satisfy the primary criteria holds a Business Skills (Provision) (Class UR) visa: item 1104B(3)(f) as amended by SLI 2012, No.82.
[78] cl.892.216A. Note that from 1 July 2012 an application for a Subclass 892 visa will not be valid unless the person seeking to satisfy the primary criteria holds a Business Skills (Provision) (Class UR) visa: item 1104B(3)(f) as amended by SLI 2012, No.82.
[79] cl.892.217. Note that from 1 July 2012 an application for a Subclass 892 visa will not be valid unless the person seeking to satisfy the primary criteria holds a Business Skills (Provision) (Class UR) visa: item 1104B(3)(f) as amended by SLI 2012, No.82.
[80] cl.892.311.
[81] cl.892.312.
[82] Note that in respect of the requirement for cl.892.221 that the applicant 'continues to satisfy' cl,892.211, the applicant must have at the time of decision an ownership interest in at least one of the businesses nominated for and relied on to meet cl.892.211: *Yang v MIBP* [2014] FCCA 1576 (Judge Driver, 14 October 2014). While this judgment concerned cl.890.221, its reasoning appears equally applicable to cl.892.221 (which is identically worded).
[83] cl.892.221. For further general discussion of the requirement, used in relation to a number of visa subclasses, that an applicant 'continues to satisfy' a particular visa criterion, see the Legal Services commentary Continues to Satisfy Criterion.

- the applicant and members of the family unit need to satisfy certain public interest criteria;[84]
- *for visa applications made before 9 August 2008* - the applicant's sponsor for paragraph 1104B(3)(i) of Schedule 1 must not have withdrawn the sponsorship;[85]
- *for visa applications made on or after 9 August 2008* - the applicant must be sponsored by an appropriate regional authority and form 949 must be signed by an officer of the authority authorised to do so;[86]
- *for visa applications made on or after 1 July 2005* - applicants must also meet certain passport requirements.[87]

The secondary time of decision criteria require the secondary applicant to be a member of the family unit of a person who is the person with whom a combined application was made, and having satisfied the primary criteria, is the holder of a Subclass 892 visa.[88] Various public interest criteria must also be met by secondary applicants at the time of decision.[89]

Circumstances for Grant

If at the time of application the applicant was the holder of, or is a member of the family unit of a person who satisfied the primary criteria for and who was the holder of a Skilled – Independent Regional (Provisional) (Class UX) visa, the applicant may be in or outside Australia when the visa is granted (but not in immigration clearance).[90] If cl.892.411 does not apply, the applicant that satisfies the primary criteria must be inside Australia (but not in immigration clearance) when the visa is granted and the applicants that satisfy the secondary criteria may be in or outside Australia (but not in immigration clearance) when the visa is granted.[91]

Subclass 893 – State/Territory Sponsored Investor

Requirements for making a valid Subclass 893 application

An application for a Class DF (Subclass 893) visa must be made on the approved form,[92] and the

[84] cl.892.223, 892.224 and 892.225.
[85] cl.892.222.
[86] cl.892.222. This version applies to visa applications made on or after 9 August 2008: SLI 2008, No.166. The Explanatory Statement states: 'New clause 892.222 clarifies that applicants seeking to satisfy primary criteria for a Subclass 892 visa must in fact be sponsored at the time of decision. In certain circumstances, it may be possible to argue that an application was valid even though no sponsorship was lodged with the application. This amendment ensures that, even in those circumstances, an applicant will still have to be sponsored as required by the time of decision, in order to satisfy the criteria for grant of a Subclass 892 visa. The amendment also moves away from the concept of a sponsor not having withdrawn their sponsorship to make it clear that applicants may change their sponsor between the time of application and time of decision.'
[87] For applications made on or after 1 July 2005 but before 24 November 2012: cl.892.226 inserted by SLI 2005, No.134. For applications on or after 24 November 2012 the relevant passport requirements are contained in PIC 4021: cl.892.223(a).
[88] cl.892.321
[89] cl.892.322 and 892.323. For applications made on or after 1 July 2005 but before 24 November 2012, secondary applicants also must meet cl.892.324.
[90] cl.892.411.
[91] cl.892.412.
[92] item 1104B(1) of Schedule 1 to the Regulations. For applications made prior to 18 April 2015, the prescribed forms were 47BU and 949. This provision was amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No.34) for applications made on or after 18 April 2015 to provide that the approved form is that specified by the Minister in a legislative instrument under r.2.07(5).

prescribed fee paid.[93] An applicant seeking to satisfy the primary criteria must hold a Subclass 165 (State/Territory Sponsored Investor (Provisional)) visa granted on the basis that the applicant satisfied the primary criteria for the grant of the visa.[94] Additionally, the applicant must be sponsored by an appropriate regional authority, and Form 949 must be signed by an officer of the authority who is authorised to sign a sponsorship of that kind.[95]

The application must be made at the place and in the manner specified.[96] An applicant seeking to satisfy the primary criteria must be in Australia and an applicant seeking to satisfy the secondary criteria may be in or outside Australia. However, neither the applicants seeking to satisfy the primary or the secondary criteria may be in immigration clearance.[97] An application by a person claiming to be a member of the family unit of the applicant may be made at the same time and place as, and combined with, the application by the applicant.[98]

Time of Application Criteria for Subclass 893

The primary criteria must be satisfied by at least one member of a family unit. The other members of the family unit who are applicants for a visa of this subclass need satisfy only the secondary criteria. For a more detailed discussion on who may satisfy the primary criteria, see below.

The primary time of application criteria require that:

- neither the applicant nor his or her spouse / de facto partner[99] (if any) has a history of involvement in business or investment activities of a nature that is not generally acceptable in Australia;[100] and

- the applicant has been resident, as the holder of a Subclass 165 (State/Territory Sponsored Investor (Provisional)) visa, in the State or Territory in which the appropriate regional authority that sponsors the applicant is located for a total of at least two years in the four years immediately before the application is made;[101] and

- the applicant genuinely has a realistic commitment, after the grant of a Subclass 893 visa, to continue to maintain business or investment activity in Australia.[102]

The secondary time of application criteria require the secondary applicant to be a member of the family unit of, and have made a combined application with, a person who satisfies the primary criteria in Subdivision 893.21 (time of application criteria for primary applicants).[103]

[93] item 1104B(2).
[94] item 1104B(3)(g).
[95] item 1104B(3)(i).
[96] item 1104B(3)(a). For applications made on or after 18 April 2015, this provision was amended by SLI 2015, No. 34 to provide that the place and manner in which the application must be made, if any, is specified by the Minister in a legislative instrument under r.2.07(5).
[97] items 1104B(3)(b) and 1104B(3)(c).
[98] item 1104B(3)(h).
[99] The express inclusion of 'de facto partner' in this sub-clause only applies in relation to visa applications made on or after 1 July 2009: Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144). 'Spouse' and 'de facto partner' for these purposes are defined in s.5F and s.5CB of the Act respectively and both definitions include same and opposite sex partners. For applications made prior to this date, the reference to 'spouse' is a reference to the definition in r.1.15A as it stood prior to 1 July 2009 (i.e. married and opposite sex de facto partners).
[100] cl.893.211.
[101] cl.893.212.
[102] cl.893.213.
[103] cl.893.311.

Time of Decision Criteria for Subclass 893

At the time of the decision, applicants must continue to satisfy the primary criteria in cl.893.211 and 893.213.[104] In addition:

- *for visa applications made before 9 August 2008* - the applicant's sponsor for item 1104B(3)(i) of Schedule 1 must not have withdrawn the sponsorship;[105]

- *for visa applications made on or after 9 August 2008* - the applicant must be sponsored by an appropriate regional authority and form 949 must be signed by an officer of the authority authorised to do so;[106]

- the designated investment made by the applicant for the purpose of satisfying a requirement for the grant of a Subclass 165 (State/Territory Sponsored Investor (Provisional)) visa has been held continuously in the name of the applicant, or in names of the applicant and the applicant's spouse / de facto partner together, for at least four years;[107]

- the applicant and members of the applicant's family unit need to satisfy certain public interest criteria;[108]

- *for visa applications made on or after 1 July 2005* - applicants must also meet certain passport requirements.[109]

The secondary time of decision criteria require the secondary applicant to be a member of the family unit of a person who is the person with whom a combined application was made, and having satisfied the primary criteria, is the holder of a Subclass 893 visa.[110] Various public interest criteria must also be met by secondary applicants at the time of decision.[111]

Circumstances for Grant

When the visa is granted, the applicant that satisfies the primary criteria must be in Australia, but not in immigration clearance, while applicants that satisfy the secondary criteria may be in or outside Australia (but not in immigration clearance).[112]

[104] cl.893.221.
[105] cl.893.222.
[106] cl.893.222. The current version applies to visa applications made on or after 9 August 2008: SLI2008, No.166. The Explanatory Statement states: 'New clause 893.222 clarifies that applicants seeking to satisfy the primary criteria for a Subclass 893 visa must in fact be sponsored at the time of decision. In certain circumstances, it may be possible to argue that an application was valid even though no sponsorship was lodged with the application. This amendment ensures that, even in those circumstances, an applicant will still have to be sponsored as required by the time of decision, in order to satisfy the criteria for grant of a Subclass 893 visa. The amendment also moves away from the concept of a sponsor not having withdrawn their sponsorship to make it clear that applicants may change their sponsor between the time of application and time of decision.'
[107] cl.893.223.
[108] cl.893.224, 893.225 and 893.226.
[109] For applications made on or after 1 July 2005 but before 24 November 2012: cl.893.227, inserted by SLI 2005, No.134. For applications on or after 24 November 2012 the relevant passport requirements are contained in PIC 4021: cl.893.224(a).
[110] cl.893.321
[111] cl.893.322 and 893.323. For applications made on or after 1 July 2005 but before 24 November 2012, secondary applicants also must meet cl.893.324.
[112] cl.893.411.

Legal Issues

Designated Investment

Subclasses 891 and 893 each contain a time of decision criterion which requires that the designated investment made by the applicant for the purpose of satisfying a requirement for the grant of a Subclass 165 (State/Territory Sponsored Investor (Provisional)) visa has been held continuously in the name of the applicant, or in the names of the applicant and his or her spouse or de facto partner together, for at least four years.[113] 'Designated investment' is defined as an investment in a security specified by legislative instrument by the Minister under r.5.19A.[114] The investments specified by such an instrument must meet certain requirements specified in r.5.19A(2). For the current instrument see the 'Securities' tab of the Register of Instruments - Business Visas.

Securities specified by the Minister for the purposes of r.5.19A are required to have the following features:[115]

- an investment in the security matures in not less than 4 years from its date of issue;
- repayment of principal is guaranteed by the issuing authority;
- an investment in the security cannot be transferred or redeemed before maturity except by operation of law or under other conditions acceptable to the Minister;
- investment in the security is open to the general public at commercially competitive rates of return; and
- the Minister is satisfied that the Commonwealth will not be exposed to any liability as a result of an investment in the security by a person.

Departmental policy states that to satisfy the requirements of cl.891.222 or cl.893.223 the applicant must provide evidence from the State/Territory treasury corporation confirming the date the original designated investment in the name of the applicant and/or their spouse / de facto partner was made and that it has not been withdrawn in the 4 years since. In most cases, the designated investment will have already matured and evidence will be in the form of evidence of pay out of the investment on maturity. Thus, evidence can be in the form of written or emailed confirmation from the treasury corporation or bank statements confirming repayment of the amount.[116]

It should be noted that there is no legislative power to cancel a Subclass 891 or Subclass 893 visa for not maintaining business or investment activity in Australia after the maturity of the designated

[113] cl.891.222 and cl.893.223.
[114] cl.891.111 and cl.893.111. Note that reference to specification of securities was amended by SLI 2014, No.30, omitting reference to 'Gazette Notice' and substituting with 'legislative instrument' with effect from 22 March 2014. However, instruments in force immediately before the commencement of that provision have effect after that date as if made under the amended provision.
[115] r.5.19A(2).
[116] Policy - Migration Regulations - Schedules > Sch2 Visa 891 - Investor > The visa 891 main applicant at [4.2]; Policy - Migration Regulations - Schedules > Sch2 Visa 893 - State/Territory Sponsored Investor > The visa 893 main applicant at [4.2] (re-issued 19 November 2016).

investment.[117]

Sponsorship

Schedule 1, item 1104B(3)(i) requires sponsorship by an 'appropriate regional authority' for making a valid application for both Subclasses 892 and 893 visas. For visa applications made on or after 9 August 2008, cl.892.222 and 893.222 also require that at time of decision, the applicant must be sponsored by an appropriate regional authority. An 'appropriate regional authority' in relation to a State or Territory and applications for visas of a particular class, means a Department or authority of that State or Territory that is specified in a legislative instrument made by the Minister,[118] in relation to the grant of visas of that class.[119] The types of authorities that have been specified include the NSW Department of State and Regional Development, and the Victorian Department of Innovation, Industry and Regional Development. These appropriate regional authorities are listed in a legislative instrument (or previously a Gazette Notice), and can be located on the 'ARA' tab of the MRD Legal Services' Register of Instruments – Business Visas.

In considering whether cl.892.222 or cl.893.222 is satisfied, the Tribunal should ensure that it is applying the instrument in force at the time it makes its decision. In considering whether the visa applicant was valid, the instrument in force at the time of application should be applied.

Note that the sponsor need not be the same authority which sponsored the applicant at time of visa application.

Ownership interest in main business(es)

Clauses 890.211 and 892.211 require an applicant for a Subclass 890 visa or a Subclass 892 visa to have an ownership interest in one or more actively operating main businesses in Australia for at least two years immediately before the application is made. Clauses 890.221 and 892.221 require that at the time of decision an applicant 'continues to satisfy' cl.890.211 or cl.892.211 (as well as certain other criteria). To satisfy these criteria an applicant must have, at the time of decision, an ownership interest in at least one of the businesses nominated for and relied on to meet the time of application requirement.[120]

In relation to a similarly worded criterion for the now closed Subclass 845 visa, it has been held that there is no room for substantial compliance in relation to the period of ownership interest (in the sense of allowing an ownership interest held for slightly less than two years)[121], and that neither should there be any gap in the holding of an ownership interest over the period of 2 years immediately preceding the application.[122]

For a discussion of the term 'ownership interest' as it applies throughout the Act and Regulations, see the Legal Services Commentary: Main business (r.1.11).

[117] Policy - Migration Regulations - Schedules > Sch2 Visa 891 - Investor > The visa 891 main applicant at [7.1] (re-issued 19 November 2016); Policy - Migration Regulations - Schedules > Sch2 Visa 893 - State/Territory Sponsored Investor > The visa 893 main applicant at [8.1] (re-issued 19 November 2016).
[118] The definition of 'appropriate regional authority' was amended by SLI 2014, No.30, substituting the reference to 'Gazette Notice' with 'legislative instrument' with effect from 22 March 2014. However, instruments in force immediately before the commencement of that provision have effect after that date as if made under the amended provision.
[119] r.1.03.
[120] *Yang v MIBP* [2014] FCCA 1576 (Judge Driver, 14 October 2014). While this judgement considered cl.890.221, its reasoning appears equally applicable to cl.892.221 (which is identically worded).

'Actively operating' main business

Clauses 890.211(1), 890.221, 892.211(1) and 892.221 require an ownership interest in one or more actively operating main businesses in Australia. The phrase 'actively operating' is not defined in the Regulations, however in *Shahpari v MIBP*[123] the Court held that it was open to the Tribunal to find that the expression involved a consideration of whether the business exhibited activity of a 'repetitive, continuous and permanent character' in which the business actively sought to generate business, in fact generated trade and custom, and derived some financial gain for its activities in the relevant period.[124] Further, in *Rahbarinejad v MIBP*,[125] the Court held that the absence of a BAS for a given period is not definitive of business activity. Ultimately, it is a finding of fact for the decision-maker as to whether a main business is 'actively operating'.

Main business

Schedule 2 criteria for Subclasses 890 (Business Owner) and 892 (State/Territory Sponsored Business Owner) require applicants to have an ownership interest in a 'main business'. 'Main business' is defined in r.1.11. Detailed guidance on the meaning of 'main business' is contained in the Legal Services Commentary: Main business (r.1.11).

The applicant's business history

For a Subclass 890-3 visa to be granted, the applicant and his/her spouse / de facto partner must not have a history of involvement in business or investment activities of a nature that is not generally acceptable in Australia.[126]

Departmental policy indicates that the purpose of this provision is to guard against the entry of persons who may otherwise satisfy Business Skills visa criteria, but whose business is in an industry, or whose business practices are of a nature that would generally be unacceptable to the Australian community, were the business to operate in Australia.[127]

In considering this criterion it is not appropriate to equate unlawfulness of activities with 'not generally acceptable in Australia'. It may well be that some conduct is unlawful, but is not of a nature that is not generally acceptable in Australia.[128] Examples of such conduct could include advertising by business signage which does not comply with by-laws or SP bookmaking, either as a bookmaker or as a better.[129]

The expression 'not generally acceptable in Australia' requires consideration of whether an applicant, or his or her spouse or de facto, has a history of involvement in business activities that are of a nature that the larger part, or most, of people in Australia would not or do not approve of.[130] The issue is not whether a 'history of involvement' was 'not generally acceptable in Australia', but rather whether the

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[121] *Zhou v MIAC* [2003] FMCA 169 (Harnett,FM, 8 May 2002) at [31].
[122] *Liang v MIAC* (2009) 175 FCR 184 at [54].
[123] *Shahpari v MIBP* [2016] FCCA 513 (Judge Wilson, 11 March 2016)
[124] *Shahpari v MIBP* [2016] FCCA 513 (Judge Wilson, 11 March 2016) at [71].
[125] *Rahbarinejad v MIBP* [2018] FCCA 2293 (Judge Wilson, 14 August 2018) at [31]. However, if BAS statements for the main business have not been included in a visa application, other criteria may not be satisfied, e.g. cl.892.211(2)(b).
[126] cl.890.216, 891.211, 892.214, 893.211.
[127] Policy - Migration Regulations - Other > GenGuideM - Business visas - Visa application and related procedures > Other Business-Related Requirements – The applicant's business history (re-issued 10 September 2016).
[128] *Lee v MIAC* (2009) 180 FCR 149 at [33]. The Court held the Tribunal did not misapply cl.892.214, in that it did not equate unlawfulness with non-satisfaction of cl.892.214. The Court's reasoning appears equally applicable to the identically worded criteria in cll.890.216, 891.211 and 893.211
[129] *Lee v MIAC* (2009) 180 FCR 149 at [34].
[130] *Lee v MIAC* (2009) 180 FCR 149 at [51].

nature of relevant business activities in which the applicant was involved had that character.[131]

'Business activities' can include the manner in which a business is conducted for profit, as well as the profit-making activities themselves. The criterion allows a decision-maker to consider a primary applicant's compliance with laws, standards, ethics, and community expectations in the course of conducting a legitimate business in Australia.[132] The standards governing unacceptable business activities would usually be identifiable by reference to Australia's laws and prevailing business ethics and practices. In doubtful situations, decision-makers would have access to expert or experienced sources of advice and information about relevant business standards.[133]

Who can satisfy the primary criteria?

While the regulations make clear that at least one member of the family unit who are applicants for the visa must meet the primary criteria, an application for a Class DF made by multiple applicants, it is necessary for a 'discriminating choice' to be made by such applicants as to who of them, will be put forward as the 'applicant seeking to satisfy the primary criteria'.[134]

In *Lee v MIMAC*,[135] Ms L applied for a Class DF (Subclass 892) visa and included her husband and children as family members. Relevantly, the Tribunal found she was unable to satisfy the requirements in cl.892.215 relating to period of residence, and that as she was the person who held the necessary sponsorship required by cl.1104B(4)(3)(i), only she could satisfy the primary criteria and not her husband. The Federal Magistrates Court held that the Tribunal's approach was correct. In particular, it noted that the 'the applicant' referred to in cl.892.215 was the person *seeking* to be assessed against the primary criteria.[136] It did not refer to any person other than the person who has sought in the relevant visa application to satisfy the primary criteria for that visa.[137] That interpretation was endorsed by the Federal Court on appeal, which noted that the approved form required identification of the 'main applicant', that is the person seeking to satisfy the primary criteria.[138]

This does not mean that more than one person cannot satisfy the primary criteria, rather as the note to cl.892.2 (for example) makes clear, they must choose one, but need not choose more than one.[139] Ultimately it will be a factual question having regard to the Schedule 1 requirements, and contents of the visa application.

Relevant Case Law

Cheng v MIAC [2012] FMCA 911	Summary

[131] *Lee v MIAC* [2008] FMCA 1523 (Smith FM, 25 November 2008) at [14], construing cl.892.214. This point was not specifically addressed on appeal in *Lee v MIAC* (2009) 180 FCR 149, however, the Court did not express any disagreement with the reasoning of Smith FM.
[132] *Lee v MIAC* [2008] FMCA 1523 (Smith FM, 25 November 2008) at [18]. This point was not specifically addressed on appeal in *Lee v MIAC* (2009) 180 FCR 149, however, the Court did not express any disagreement with the reasoning of Smith FM.
[133] *Lee v MIAC* [2008] FMCA 1523 (Smith FM, 25 November 2008) at [31]. This point was not specifically addressed on appeal in *Lee v MIAC* (2009) 180 FCR 149, however, the Court did not express any disagreement with the reasoning of Smith FM.
[134] *Lee v MIMAC* (2013) 215 FCR 109 at [14].
[135] *Lee v MIMAC* (2013) 215 FCR 109.
[136] *Lee v MIAC* [2013] FCCA 396 (Jarrett FM, 31 May 2013) at [48].
[137] *Lee v MIAC* [2013] FCCA 396 (Jarrett FM, 31 May 2013) at [48].
[138] *Lee v MIMAC* (2013) 215 FCR 109 at [16].
[139] *Lee v MIMAC* (2013) 215 FCR 109 at [14].

Cheng v MIAC [2013] FCA 405	Summary
He v MIBP [2015] FCCA 2915	Summary
Lee v MIMAC [2013] FCA 854; (2013) 215 FCR 109	
Lee v MIAC [2013] FMCA 396	Summary
Lee v MIAC [2009] FCA 977: (2009) 180 FCR 149	Summary
Lee v MIAC [2008] FMCA 1523	Summary
Liang v MIAC [2009] FCA 189; (2009) 175 FCR 184	Summary
Shahpari v MIBP [2016] FCCA 513	Summary
Rahbarinejad v MIBP [2018] FCCA 2293	Summary
Sun v MIBP [2015] FCCA 1266	Summary
Teng v MIBP [2015] FCCA 1197	Summary
Zhou v MIAC [2003] FMCA 169	

Relevant legislative amendments

Migration Amendment Regulations 2002 (No.10)	SR 2002, No.348
Migration Amendment Regulations 2004 (No.6)	SR 2004, No.269
Migration Amendment Regulations 2005 (No.4)	SLI 2005, No.134
Migration Amendment Regulations 2008 (No.3)	SLI 2008, No.166
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82
Migration Amendment Regulation 2013 (No.1)	SLI 201, No.32
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (2015 Measures No.1) Regulation 2015	SLI 2015, No.34

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Business Sponsorship Bars and Cancellation

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Criteria that must be taken into account

- Failure to satisfy sponsorship obligation
- Provision of false or misleading information
- Application or variation criteria no longer met
- Contravention of law
  - Contravention of Commonwealth, State or Territory law generally
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Overview

A person who is or was approved as a standard business sponsor,[1] a professional development sponsor,[2] a temporary work sponsor,[3] or a temporary activities sponsor,[4] may have that approval cancelled, or may be barred, for a specified period, from sponsoring more people or making further applications for approval as a sponsor.[5] Additional action can also be taken against sponsors such as the imposition of civil penalties and the issuing of infringement notices.

The process relating to barring and cancellation of sponsors was subject to significant legislative amendment with effect from 14 September 2009.[6] Currently, the actions which can be taken against sponsors are outlined in s.140K and 140M of the *Migration Act 1958* (the Act). Section 140L of the Act and r.2.88-2.94A of the Migration Regulations 1994 (the Regulations) set out the circumstances in which action can be taken and the criteria to be taken into account if considering taking such action. The process to bar a sponsor or cancel approval is outlined in s.140N and r.2.95-2.98.

This commentary focuses on the current legislative scheme. For information about bars and cancellations imposed prior to 14 September 2009, please contact MRD Legal Services.

Tribunal's jurisdiction and power

Tribunal's jurisdiction

Under Part 5 of the Act, the Tribunal has jurisdiction to review a decision made on or after 14 September 2009 under s.140M to take one or more actions to cancel a sponsor's approval or bar a sponsor from doing certain things.[7] The person whose approval has been cancelled or barred has standing to apply for review.[8]

However, it is not a reviewable decision if the decision relates to a standard business sponsor or former standard business sponsor, and:

[1] A 'standard business sponsor' is defined in r.1.03 of the Migration Regulations 1994 (the Regulations) as a person who is an approved sponsor and who is approved as a sponsor in relation to the standard business sponsor class under s.140E(1) of the *Migration Act 1958* (the Act). 'Approved sponsor' is relevantly defined in s.5(1) of the Act as a person who has been approved as a sponsor in relation to a prescribed class and whose sponsorship approval has not been cancelled or ceased to have effect. 'Standard business sponsors' are relevant only to Subclass 457 visas.
[2] A 'professional development sponsor' is defined in r.1.03 as a person who is an approved sponsor and is approved as a sponsor in relation to the professional development sponsor class by the Minister under s.140E(1) of the Act on the basis of an application made before 19 November 2016.
[3] A 'temporary work sponsor' is defined in r.1.03 as meaning any of the following: a special program sponsor, an entertainment sponsor, a superyacht crew sponsor, a long stay activity sponsor and a training and research sponsor. Each of these are further defined in r.1.03. Prior to the introduction of the Migration Amendment (Temporary Activity Visas) Regulations 2016 (F2016L01743) on 19 November 2016, a further seven classes of sponsor were included in this definition – for details see MRD Legal Services commentary: Approval as a Temporary Work Sponsor.
[4] A 'temporary activity sponsor' is defined in r.1.03 as a person who is an approved sponsor and is approved as a sponsor in relation to the temporary activities sponsor class by the Minister under s.140E(1) of the Act.
[5] s.140M of the Act as amended by the *Migration Legislation Amendment (Worker Protection) Act 2008* (No.159, 2008).
[6] The *Migration Legislation Amendment (Worker Protection) Act 2008* (No.159, 2008) (the Worker Protection Act) and the *Migration Amendment Regulations 2009* (No.5) (SLI 2009 No.115) overhauled the existing scheme. These changes apply to all actions to cancel or bar approval as a sponsor taken on or after 14 September 2009 and to review of decisions to take such action made before that date. Further changes to the Worker Protection Act were made with effect from 1 June 2013: Migration Amendment (Reform of Employer Sanction) Act 2013 (No.10, 2013).
[7] s.338(9) and r.4.02(4)(h) as amended by SLI 2009, No.115.
[8] s.347(2)(d), r.4.02(5)(g).

- in making the decision whether to approve the person as a standard business sponsor, the Minister did not consider the criteria in r.2.59(d) and (e) (if the decision was made *before* 18 March 2018),[9] or r.2.59(f) (if the decision was made *on or after* 18 March 2018);[10] or

- in making a decision whether to vary a sponsorship approval, the Minister did not consider r.2.68(e) and (f) (if the decision was made *before* 18 March 2018),[11] or r.2.68(g) (if the decision was made *on or after* 18 March 2018).[12]

These criteria relate to businesses lawfully operating a business in Australia. As the Minister is only required to consider them if the applicant is lawfully operating a business in Australia, the Tribunal has jurisdiction in relation to decisions to cancel or bar sponsor approval for businesses operating in Australia only.[13] It is a finding of fact for the Tribunal as to whether the Minister did not consider the relevant criteria in making the decision to approve the person as a standard business sponsor or to vary the approval.

The Tribunal does not have jurisdiction to review decisions to take other actions in relation to sponsorships, such as to waive a bar that has been imposed,[14] to impose civil penalties[15] and issue infringement notices.[16]

Tribunal's powers in undertaking a review

In reviewing decisions under Part 5 of the Act, the Tribunal has the powers provided in s.349(2) of the Act. In the context of reviewing a decision to cancel or bar approval as a sponsor the Tribunal has the power to:

- affirm the decision under review;
- set aside the decision under review and substitute a decision not to take any of the actions to cancel or bar approval as a sponsor;
- set aside the decision under review and substitute a decision to take different actions to cancel or bar approval as a sponsor; or
- vary the decision under review (e.g. varying the period of a bar).

One decision may involve the taking of more than one action. For example, a delegate's decision may be to cancel the existing sponsorship approval of a person as a sponsor for all classes to which they belong (s.140M(1)(b)) and to bar the sponsor for a specific period from making future applications for approval as a sponsor (s.140M(1)(d)). The decision under review encompasses both actions and the exercise of the Tribunal's powers under s.349(2) should reflect this. For example, if on review the Tribunal forms the view that both actions should be taken, then that decision may be affirmed. If the view is formed that no actions should be taken, then the decision can be set aside and substituted with a decision not to take any actions. If the view is formed that one action should be taken but not the other, then the delegate's decision can be varied to that extent or the whole decision set aside and a new decision substituted (that reflects the action to be taken).

[9] r.4.02(4B) as in force before 18 March 2018.
[10] r.4.02(4B) as repealed and substituted by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262), which commenced on 18 March 2018.
[11] r.4.02(4B) as in force before 18 March 2018.
[12] r.4.02(4B) as repealed and substituted by F2018L00262, which commenced on 18 March 2018.
[13] Explanatory Statement to SLI 2009, No.115 at p.67.
[14] s.140O.
[15] s.140Q.
[16] s.140R, which was repealed with effect from 1 June 2013: *Migration Amendment (Reform of Employer Sanctions) Act 2013* (No.10, 2013).

Process to bar sponsor or cancel approval

Section 140N specifies that the Regulations may prescribe a process for barring or cancelling approval as a sponsor. This process is prescribed in r.2.95 - 2.98. It applies to a person who is or was an approved sponsor (other than a party to a work agreement),[17]

The process to bar or cancel a sponsor involves the Minister:

- giving written notice to the sponsor, by a method specified in s.494B, which sets out the following:
  - the details of the circumstances prescribed under s.140L in relation to which the action is being considered, e.g. the sponsor's failure to comply with a particular sponsorship obligation;
  - the details of the actions that may be taken, e.g. cancelling the sponsorship approval;
  - the address for providing a response; and
  - the time in which a response must be given (not earlier than 7 days after the date a person is taken to have received the notice under s.494C);[18]
- considering any response given before the response due date specified in the Minister's written notice, or, after this date but before the Minister's decision is made;[19]
- giving written notice of the decision.[20] If the decision is to bar/cancel, the Minister must notify the person in writing of the following matters:[21]
  - the decision and its effect;
  - the grounds for making the decision;
  - details of any review rights;
  - if the action is to bar a person, details of how to apply for waiver of a bar and the address to which a request for a waiver must be sent.

While there is no judicial authority considering these provisions, s.140N does not appear to establish the process in r.2.95-2.98 as an essential precondition to the exercise of the power to cancel in s.140M.[22] Although the process is prescribed for making a decision to cancel or bar under s.140M, it appears similar to cancellation of a visa under s.116, in that, if there is an error or failure to follow the process at primary level, the Tribunal on review can cure a procedural defect through following its own procedural fairness procedures.[23]

[17] r.2.95(1). 'Approved sponsor' is defined in s.5(1) as a person who has been approved by the Minister under s.140E in relation to the classes prescribed under r.2.58 and whose sponsorship approval has not been cancelled or ceased to have effect, or a person (other than the Minister) who is a party to a work agreement. Regulation 2.58 was amended for applications made from 22 March 2014 by the Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30) and again by F2016L01743 for applications made on or after 19 November 2016, reflecting reforms of the temporary work visa scheme.
[18] r.2.96.
[19] r.2.97.
[20] r.2.98.
[21] r.2.98(1).
[22] This is unlike cancellation of a visa under s.109, where s.109 itself refers to considering any response to the notice given in a way required by paragraph 107(1)(b), establishing compliance with s.107(1)(b) as an essential precondition to cancellation.
[23] *Zubair v MIMIA* (2004) 139 FCR 344 at [28] and [32], *Krummrey v MIMIA* (2005) 147 FCR 557 at [3] and *Alam v MIMIA* (2004) 187 FLR 120 at [42] referring to *Zubair.*

Bars and cancellations

Division 3A of Part 2 of the Act establishes a scheme which permits sanctions to be imposed on sponsors and former sponsors for failing to satisfy sponsorship obligations and for other reasons. Where certain prescribed circumstances exist and certain criteria have been considered, action may be taken to cancel a sponsor's approval or to bar a sponsor from doing certain things in the future. The scheme involves up to three steps for the decision-maker:

- determining whether a circumstance exists in relation to which action to cancel/bar may be taken;
- having regard to applicable criteria, determining what, if any, action should be taken against the sponsor i.e. cancel or bar sponsorship approval, or no action; and
- if deciding to impose a bar, determine what the sponsor should be barred from doing and for how long.

Actions that may be taken

Section 140K of the Act sets out a range of actions that may be taken under the Act in relation to approved sponsors and former approved sponsors who *fail to satisfy an applicable sponsorship obligation*. They include:

- barring the sponsor from doing certain things under s.140M;[24]
- cancelling the person's approval as a sponsor under s.140M (not applicable in relation to a former approved sponsor);[25]
- applying for a civil penalty order;[26]
- accepting an undertaking under s.114 of the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act) from the sponsor;[27]
- apply for an order under s.115 of the Regulatory Powers Act if the Minister considers that the sponsor has breached such an undertaking;[28]
- issuing an infringement notice as an alternative to proceedings for a civil penalty order;[29] and
- requiring and taking a security under s.269 of the Act, or enforcing a security already taken.[30]

[24] if regulations are prescribed under s.140L: s.140K(1)(a)(i) for approved sponsors, s.140K(2)(a)(i) for former approved sponsors. The regulations that are prescribed under s.140L are those in r.2.88 – 2.94A.
[25] if regulations are prescribed under s.140L: s.140K(1)(a)(ii). The regulations that are prescribed under s.140L are those in r.2.88 – 2.94A.
[26] s.140K(1)(a)(iii) for approved sponsors, s.140K(2)(a)(ii) for former approved sponsors: as amended by *Migration Amendment (Reform of Employer Sanctions) Act 2013* (No.10, 2013) with effect from 1 June 2013. Civil penalties orders are defined in s.486R(4) and arise where an eligible court is satisfied that the person has contravened a civil penalty provision, and the court orders the person to pay to the Commonwealth such pecuniary penalty for the contravention as the court determines to be appropriate. They are imposed for failing to satisfy a sponsorship obligation and are set out in s.140Q and r.5.20A. See *MIAC v Sahan Enterprises Pty Ltd* (2012) 266 FLR 111.
[27] s.140K(1)(a)(iv) for approved sponsors, s.140K(2)(a)(iii) for former approved sponsors as inserted by the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013) and in relation to a sponsorship obligation whether it arose before, on or after 29 June 2013. An incorrect reference to s.119 of the Regulatory Powers Act was changed to s.114 by Part 4 of the *Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018* (No. 90 of 2018).
[28] s.140K(1)(a)(v) for approved sponsors, s.140K(2)(a)(iv) for former approved sponsors as inserted by the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013) and in relation to a sponsorship obligation whether it arose before, on or after 29 June 2013. An incorrect reference to s.120 of the Regulatory Powers Act was changed to s.115 by Part 4 of *No. 90 of 2018.*
[29] s.140K(1)(b) for approved sponsors, s.140K(2)(b) for former approved sponsors. Infringement notices were previously provided for in s.140R (repealed from 1 June 2013) and Division 5.4 and 5.5 of Part 5 of the Regulations.

Section 140K is not the source of power for imposing these sanctions. Rather, it merely specifies what sanctions may be imposed under other provisions of the Act.[31] The power to impose sanctions such as a bar or cancellation is found in s.140M (see below). The power to impose a civil penalty for failure to satisfy a sponsorship obligation is in s.140Q, and the power to issue an infringement notice as an alternative to proceedings for a civil penalty order is under regulations made for the purpose of s.506A.

Whilst s.140K only specifies sanctions that may be imposed *for breach of an obligation*, the Act does not limit the circumstances in which the Minister may bar a sponsor from doing certain things or cancel approval as a sponsor.[32] That is, the regulations may prescribe circumstances, other than failure to satisfy a sponsorship obligation, in which a person may have their approval as a sponsor cancelled or barred.

Section 140K also provides the Minister must, subject to certain exceptions, publish information (including personal information) prescribed by the Regulations if an action is taken under s.140K in relation to an approved or former sponsor who fails to satisfy an applicable sponsorship obligation.[33] When doing so, the Minister is not required to observe any requirements of the natural justice hearing rule. Clause 2.87D of the Regulations prescribes the following information:

- information that identifies the approved or former sponsor who failed to satisfy an applicable sponsorship obligation;
- the applicable sponsorship obligation that the approved or former sponsor failed to satisfy; and
- information relating to the action taken under section 140K in relation to the approved or former sponsor.[34]

Bar and cancellation action in relation to current approved sponsors

The power to *cancel* a sponsorship or *bar* an approved sponsor is provided for in s.140M of the Act. Whilst s.140M is limited to only the barring and cancelling sanction, its application is not restricted only to circumstances in which an obligation has been breached. The actions in s.140M are available in the circumstances prescribed in regulations under s.140L (see below). Unlike decisions to impose a civil penalty or issue an infringement notice, decisions to take the action under s.140M are reviewable by the Tribunal.[35] The actions that can be taken in s.140M in relation to current approved sponsors are:

- cancelling the approval of a person as a sponsor in relation to a class to which the sponsor belongs;
- cancelling the approval of a person as a sponsor for all classes to which the sponsor belongs;

[30] s.140K(1)(c) for approved sponsors, s.140K(2)(c) for former approved sponsors.
[31] Explanatory Statement to Migration Legislation Amendment (Worker Protection) Bill, p.23 at [129] – [130]. The purpose of the section is to make clear that one, several, or all sanctions may be imposed for failing to satisfy a sponsorship obligation.
[32] s.140K(3).
[33] s.140K(4), as inserted by Part 1 of Schedule 1 of No. 90 of 2018. These amendments apply in relation to actions taken under s.140K on or after 18 March 2015. The Explanatory Memorandum states the purpose of publishing information about actions taken under s.140K is to deter businesses from breaching their sponsorship obligations, and to allow Australians and overseas workers to inform themselves about a sponsor's breaches. It is also for the purpose of increasing public awareness of the Department's sponsor monitoring activities.
[34] Clause 2.87D was inserted by the Migration Amendment (Enhanced Integrity) Regulations2018.
[35] s.338(9) and r.4.02(4)(h).

- barring the sponsor, for a specified period, from sponsoring more people under the terms of one or more existing specified approvals for different kinds of visa (however described);
- barring the sponsor, for a specified period, from making future applications for approval as a sponsor in relation to one or more classes prescribed by the regulations for the purpose of s.140E(2).[36]

Note that whilst s.140M(1) allows for circumstances to be prescribed in which the Minister may *or must* take one or more of the actions specified, no circumstances have been prescribed where the action must be taken - that is, all actions are currently discretionary.

Bar and cancellation actions in relation to former approved sponsors

Section 140M also gives the Minister or the Tribunal on review, the power to take action in regards to *former* approved sponsors.[37]

There is only one barring action that may be taken - the action to bar the former sponsor, for a specified period, from making future applications for approval as a sponsor. The action may be taken if prescribed circumstances exist. Relevant circumstances in which the Minister *may* bar the person from making future applications for approval as a sponsor have been prescribed (see below). As is the case for current approved sponsors, s.140M(2) also allows for circumstances to be prescribed in which the Minister *must* take one or more of the actions specified. However, no circumstances have been prescribed in which the Minister *must* bar the person.

Can a party to a work agreement be barred or cancelled?

The Minister cannot take any of the actions mentioned above against a party to a work agreement as all the actions relate only to a 'class of approved sponsor' under s.140E(2). Whilst a party to a work agreement is an 'approved sponsor', it is not a 'class of approved sponsor'. Instead, the terms of the work agreement provide for whether the agreement can be cancelled or whether the person can be barred from doing certain things under the agreement.[38]

Circumstances in which sponsor may be barred or approval cancelled

Section 140L provides that the regulations may prescribe circumstances in which a sponsor (including a former sponsor) *may* or *must* be barred or a sponsor's approval cancelled. The circumstances in which the Minister or the Tribunal *may* take such action are prescribed in r.2.88-2.94A.[39] There are currently no circumstances prescribed in which the Minister *must* bar or cancel a sponsor's approval.

The circumstances in which a sponsor may be barred or a sponsor's approval cancelled are:

- failure to satisfy a sponsorship obligation;[40]
- provision of false or misleading information to Immigration or the Tribunal;[41]

[36] s.140M(1).
[37] s.140M(2).
[38] Note to r.2.88.
[39] Previously, r.2.94B also prescribed failure by a standard business sponsor to pay medical and hospital expenses of a sponsored person as a circumstance for sponsorship bar or cancellation. However, r.2.94B was repealed on 18 March 2018 by F2018L00262.
[40] r.2.89.

- the criteria for approval as sponsor or terms of approval as varied, are no longer met;[42]
- contravention of a Commonwealth, State or Territory law;[43]
- the sponsor made an unapproved change to certain programs, including professional development, special, and youth exchange programs;[44]
- failure by a professional development sponsor to pay an additional security;[45] and

failure by a special program sponsor, temporary activities sponsor[46] or professional development sponsor[47] to comply with a term or condition of a special program agreement or professional development agreement.[48] These circumstances are discussed in further detail below. Criteria that must be considered in relation to taking action on the basis of each of these circumstances are set out below under 'Criteria that must be taken into account'.

Failure to satisfy sponsorship obligation - r.2.89

Under s.140L(1)(a)(i) and r.2.89, a circumstance in which the Minister *may* take one or more of the cancelling / barring actions is that the Minister is satisfied that the sponsor has failed to satisfy a sponsorship obligation. All sponsors are, from 14 September 2009, subject to a series of sponsorship obligations, although not all obligations apply to all types of sponsors. The sponsorship obligations are listed in r.2.78 - 2.87C and cover such matters as the obligation to:

- co-operate with inspectors;[49]
- ensure equivalent terms and conditions of employment; [50]
- pay return travel costs; [51]
- pay certain costs incurred by the Commonwealth; [52]
- keep records, provide records to the Minister, and provide information to Immigration; [53]
- secure an offer of a reasonable standard of accommodation; [54]
- ensure work or participation in nominated occupation, program or activity;[55]
- not recover, transfer or take actions which could result in another person paying for certain costs (relating to approval of sponsorship and recruitment of sponsored person);[56]

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[41] r.2.90.
[42] r.2.91.
[43] r.2.92.
[44] r.2.93. Regulation 2.93 was amended by F2016L01743 for sponsorship and variation applications made on or after 19 November 2016 to refer to temporary activities programs conducting programs referred to in cl.408.228(2) (youth exchange program) or cl.408.228(5) (other program).
[45] r.2.94.
[46] Reference to 'temporary activities sponsor' was added to r.2.94A by F2016L01743, for sponsorship applications and applications for variation of a term of approval made on or after 19 November 2016.
[47] Reference to professional development sponsors and agreements was added to r.2.94A by Migration Legislation Amendment Regulation 2012 (No.4) (SLI 2012, No.238), for applications made on or after 24 November 2012.
[48] r.2.94A.
[49] r.2.78.
[50] r.2.79.
[51] r.2.80 and r.2.80A.
[52] r.2.81.
[53] r.2.82, r.2.83 and r.2.84. Regulation 2.82(3)(f) was inserted by Migration Amendment Regulations 2013 (No.5) (SLI 145, 2013) and applies in relation to a standard business sponsor on and after 1 July 2013. Regulation 2.82(3)(g) was inserted by Migration Legislation Amendment Regulation 2013 (No. 3) (SLI 2013, No. 146), in relation to a person who is or was a standard business sponsor on or after 1 July 2013.
[54] r.2.85.
[55] r.2.86.
[56] r.2.87.

- make the same or equivalent position available to Australian exchange participants; [57]
- provide training; [58] and
- not to engage in 'discriminatory recruitment practices'.[59]

These obligations are discussed in detail in the MRD Legal Services Commentary: Sponsorship Obligations.

Barring or cancelling a sponsorship on the basis of failure to satisfy a sponsorship obligation applies to all types of current and former temporary and work sponsors – that is:

- standard business sponsors in relation to a primary sponsored person or a secondary sponsored person; or
- professional development sponsors in relation to a primary sponsored person; or
- temporary work sponsors in relation to a primary sponsored person or a secondary sponsored person; or
- temporary activities sponsors in relation to a primary sponsored person or a secondary sponsored person.[60]

The terms 'primary sponsored person' and 'secondary sponsored person' are defined in r.2.57(1). Essentially, a 'primary sponsored person' is a person who was last identified in the *approved nomination* by the sponsor or who satisfied the primary visa criteria on the basis of that sponsorship. The person must either still hold that visa, or no longer holds a substantive visa, but the visa obtained on the sponsorship was the last substantive visa held and the person is still in the migration zone.

The 'secondary sponsored person' is a person who met the secondary visa criteria and was last identified in the approved nomination by the sponsor or was sponsored as a member of the family unit of a primary sponsored person. The secondary sponsored person must either still hold the relevant visa connected to the sponsorship, or it was the last substantive visa held and the person is still in the migration zone.

Making these actions referable to primary and secondary sponsored persons ensures that sponsors are still subject to sponsorship obligations, and sanctions, in relation to the people they sponsored even after the visa ceases, where the person is still in Australia and has not been granted another substantive visa.[61]

[57] r.2.87A.Note, r.2.87A was repealed from 19 November 2016 by F2016L01743.
[58] r.2.87B inserted by SLI 2013, No. 146, and in relation to a person who is or was a standard business sponsor on or after 1 July 2013.
[59] r.2.87C inserted by the Migration Legislation Amendment (2016 Measures No.1) Regulation 2016 (F2016L00523). This obligation applies in relation to 'discriminatory recruitment practices' engaged in on or after 19 April 2016 by a standard business sponsor or a former standard business sponsor: Item 5401(3) of Schedule 13 to F2016L00523. The term 'discriminatory recruitment practice' is defined as a recruitment practice that directly or indirectly discriminates against a person based on the immigration status or citizenship of the person, other than a practice engaged in to comply with a Commonwealth, State or Territory law: r.2.57(1). The obligation in r.2.87C is complemented by r.2.59(f)(ii) which requires an applicant seeking approval as a standard business sponsor to declare in writing that the applicant will not engage in discriminatory recruitment practices. An identical requirement exists in relation to an applicant seeking a variation of terms of approval as a sponsor: r.2.68(g)(ii). These declaration requirements are applicable to all applications for approval as a standard business sponsor and variation of terms of approval of sponsorship made on or after 19 April 2016 and all undetermined applications of those types as at 19 April 2016: Item 5401(2) of Schedule 13 to F2016L00523.
[60] r.2.89(1). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications made on or after 19 November 2016. The terms 'standard business sponsor', 'professional development sponsor', 'temporary work sponsor' and 'temporary activity sponsor' are defined in r.1.03 of the Regulations.
[61] Explanatory Statement to SLI 2009, No.115, p.13.

The objective of r.2.89 is to allow the Minister (or the Tribunal on review) to cancel approval as a sponsor or bar a sponsor from sponsoring more people or applying for further approval as a sponsor where the sponsor fails to satisfy a sponsorship obligation.[62] The issues and evidentiary requirements for determining whether this circumstance exists will depend upon the relevant sponsorship obligation in question. For example, where the matter relates to failure to meet the sponsorship obligation to ensure the terms and conditions of employment of the sponsored person are equivalent to those provided to an Australian citizen/permanent resident,[63] the Tribunal would need to determine whether there is evidence that a sponsored person's terms and conditions of employment are less favourable than those of an Australian citizen/permanent resident performing work in an equivalent position in the sponsored person's workplace. This will require consideration of the relevant instrument specified for the purposes of r.2.79(3) for determining when terms and conditions will be considered no less favourable.[64] Evidence relevant to this issue would also include materials such as the sponsor's pay records and records relating to the sponsor's terms and conditions of employment including any evidence obtained by an inspector appointed under the s.140V of the Act for the purpose of determining whether a sponsorship obligation is being, or has been complied with.[65]

Where a relevant failure to satisfy a sponsorship obligation is found, the decision-maker must then determine what, if any, action should be taken in relation to the sponsor. In doing so, he or she must have regard to the criteria specific to this circumstance (see below).

Provision of false or misleading information to Immigration or Tribunal – r.2.90

Under s.140L(1)(a)(ii) and r.2.90, a circumstance in which the Minister may cancel or bar the approval of a sponsor is that the sponsor has provided false or misleading information to Immigration[66] or to the Tribunal. Current or former standard business sponsors, professional development sponsors, temporary work sponsors, or temporary activities sponsors may be barred or have their sponsorship cancelled on this ground.[67]

There is no relevant definition of what constitutes false or misleading information for these purposes in the Act or the Regulations. It is a question of fact for the Tribunal to determine and the nature of the information will be indicated by the decision under review. Regulation 2.90 does not specify information in relation to particular processes such as in relation to sponsorship approval or in relation to assessing compliance with the Act and Regulations. Instead, it is expressed in terms of the recipients of the information. It is likely that being expressed in such broad terms, it would cover all the same information including information given to Immigration or the Tribunal in relation to those matters. Although it is not express in the terms of r.2.90, having regard to the underlying context of the provision, it may be inferred that the relevant information is that which has been provided by the sponsor in relation to the sponsorship approval or a related process.

In assessing whether a particular piece of information was false or misleading, the Tribunal may have regard to such matters as:

[62] Explanatory Statement to SLI 2009, No.115, p.50.
[63] r.2.79.
[64] r.2.79(3) provides that terms and conditions will be considered no less favourable if they are at or above the terms and conditions determine in accordance with the process set out in an instrument made for this purpose.
[65] The powers of an inspector include a power to require a person, by written notice, to produce a document or thing to the inspector and the powers may be exercised for the purpose of investigating compliance with a sponsorship obligation: s.140X.
[66] Immigration is defined in r.1.03 to mean 'the Department administered by the Minister administering the *Migration Act 1958*' in relation to visa applications made on or after 22 March 2014: SLI 2014, No.30. For visa applications made prior to 22 March 2014, the term was defined as 'the Department of Immigration and Multicultural and Indigenous Affairs'.
[67] r.2.90(1). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications made on or after 19 November 2016.

- information required in relation to the application for approval as a sponsor;
- information required in relation to any related nominations, e.g. nomination of an occupation for a Subclass 457 visa;
- information required in relation to monitoring of sponsorship obligations;
- information provided to the Tribunal in relation to review of decisions on the above matters.

This is not an exhaustive list and the decision-maker should have regard to evidence and all the circumstances of the case in determining whether the sponsor has provided false or misleading information to Immigration or the Tribunal.

Criteria to be considered in determining whether to take action to cancel or bar in this circumstance are set out below.

Application or variation criteria no longer met - r.2.91

Under s.140L(1)(a)(ii) and r.2.91, a circumstance in which the Minister may cancel or bar the approval of a sponsor (standard business sponsor, professional development sponsor, temporary work sponsor, or temporary activities sponsor)[68] is that the person no longer satisfies the criteria for approval as a sponsor or, if the terms of the approval of the person as a standard business sponsor, temporary work sponsor or temporary activities sponsor have been varied, the person no longer satisfies the criteria for approval of the variation.[69]

This circumstance requires the Minister (or Tribunal on review) to identify the basis on which the sponsorship approval or variation of terms of approval was granted and then determine whether the sponsor no longer meets that criterion. For example, in relation to a standard business sponsorship approved under r.2.59, if the applicant was approved on the basis of r.2.59(d),[70] as a person lawfully operating a business in Australia for 12 months or more who meets the benchmarks for training of Australian citizens/permanent residents as specified in a written instrument, and the business had ceased trading in Australia but was operating lawfully outside Australia, the Tribunal must consider whether the sponsor no longer satisfies r.2.59(d), not whether the sponsor could now satisfy the criterion in r.2.59(h) relating to a business operating outside Australia.

The criteria to be taken into account in determining what action (if any) to take under s.140M in relation to this circumstance are set out below.

Contravention of law - r.2.92

Under s.140L(1)(a)(ii) and r.2.92, the action to bar or cancel the approval as a sponsor on the basis of contravention of law applied to standard business sponsors and temporary work sponsors in relation to primary sponsored persons only, professional development sponsors, and temporary activities sponsors.[71] For applications for approval as a standard business sponsor or for a variation of a term

[68] r.2.91(1). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications lodged on or after 19 November 2016.
[69] Criteria for approval of variation of a term of approval are specified in r.2.68 (standard business sponsor) and r.2.68A (temporary activities sponsor). Prior to 19 November 2016, the criteria for variation of terms of approval for a temporary work sponsor were contained in r.2.68A, however these applications were closed from 19 November 2016 by F2016L01743.
[70] As in force before 18 March 2018.
[71] r.2.92(1). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications made on or after 19 November 2016.

of approval as a standard business sponsor made on or after 19 November 2016, the limitation in relation to 'primary sponsored persons' does not apply.[72]

Contravention of a Commonwealth State or Territory Law

Under s.140L(1)(a)(ii) and r.2.92, a circumstance in which the Minister may take action to bar or cancel approval as a sponsor is where the Minister is satisfied that the sponsor has been found by a court or a competent authority to have contravened a Commonwealth, State or Territory law.[73]

Current or former standard business sponsors, professional development sponsors, temporary work sponsors and temporary activities sponsors may be barred or their sponsorship cancelled on this ground.[74]

A 'competent authority' is defined in r.2.57 as a Department or regulatory authority that administers or enforces a law that is alleged to have been contravened. There is no definition in the Act or Regulations of the term 'contravened', nor is there any specific indication as to what laws are covered by this provision. However, some guidance may be obtained from the definition of 'adverse information' in r.1.13A as in force before 18 March 2018. That definition specified the following actions that could constitute being found by a court or competent authority to have contravened a law within r.2.92:

- being found guilty by a court of an offence under Commonwealth, State or Territory law;[75] and
- has, to the satisfaction of a competent authority, acted in contravention of a Commonwealth State or Territory law.[76]

The definition of 'adverse information' also specified in r.1.13A(2) that the Commonwealth, State or Territory laws referred to mean laws relating to discrimination, immigration, industrial relations, occupational health and safety, people smuggling and related offences, slavery, sexual servitude and deceptive recruiting, taxation, terrorism and trafficking in persons and debt bondage.

Although the definition of 'adverse information' relates to, inter alia, the criteria for approval of a sponsorship in r.2.59(g), its purpose is to enable the Minister to consider the kinds of information referred to in the definition in determining the applicant's suitability as a sponsor.[77] This purpose is also related to the circumstances in which action to bar or cancel sponsorship approval may be taken, i.e. whether the sponsor is still suitable to continue to be a sponsor or to be a sponsor in the future.

Contravention of a licensing, registration or membership related law

A standard business sponsor, temporary activities sponsor or temporary work sponsor, in relation to a primary sponsored person,[78] may also be barred, or have their sponsorship cancelled if the Minister,

[72] r.2.92(1)(a) and (c) as amended by F2016L01743. Although the amendment also purports to apply in respect of 'temporary work sponsors', applications for approval as a temporary work sponsor or for variation of terms of approval for a temporary work sponsor were closed from 19 November 2016 by F2016L01743.
[73] s.140L(1)(a)(ii) and r.2.92(2).
[74] r.2.92(2). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications made on or after 19 November 2016.
[75] r.1.13A(1)(d).
[76] r.1.13A(1)(e).
[77] Explanatory Statement to SLI 2009, No.115, p.15.
[78] The reference to 'temporary activities sponsor' and the words 'in relation to a primary sponsored person' were added by F2016L01743. These amendments apply in respect of applications for approval as a sponsor or for variation of a term of approval as a sponsor made on or after 19 November 2016. As the temporary work sponsor classes were closed to new applications from 19 November 2016, this amendment appear to only have relevance to new applications in respect of standard business sponsors and temporary activities sponsors made on or after 19 November 2016.

or the Tribunal on review, is satisfied that the primary sponsored person (i.e. the primary visa holder) has been found by a court or a competent authority to have contravened a Commonwealth, State or Territory law relating to the licensing, registration or membership in relation to the primary sponsored person's approved occupation, and, the primary sponsored person was required to comply with the law in order to work in the occupation nominated by the standard business sponsor or temporary work sponsor and approved by the Minister.[79]

This obligation essentially means the sponsor is also responsible for ensuring that visa holders employed in occupations that have such registration, licensing or membership requirements meet those requirements. It is not just a responsibility of the individual sponsored person. Ordinarily the issues to be considered in relation to this circumstance will be determined by the relevant finding of a Court or competent authority identified by the decision under review. The Tribunal will need to consider whether the finding relates to a law that relates to licensing, registration or membership requirements of persons employed in the sponsored person's nominated occupation.

The criteria to be taken into account in determining what action (if any) to take under s.140M in relation to either of these circumstances are set out below.

Unapproved change to professional development program or special program - r.2.93

Under s.140L(1)(a)(ii) and r.2.93, the Minister (or Tribunal on review) may bar or cancel a sponsorship approval if satisfied that a current or former professional development sponsor has made a change to the professional development program without approval in writing from the Secretary, or a person who is or was a special program sponsor has made a change to the special program without approval, or a temporary activities sponsor who is conducting or has conducted a youth exchange program or other program[80] has made a change to that program without approval.[81]

There is no guidance in the legislation as to what will constitute a relevant 'change' to the program. This will be a finding of fact for the Tribunal based on all the circumstances of the case. However, the Tribunal should have regard to the purpose of the requirement, which is to ensure that the professional development program or special program being provided is the one that has been approved.[82]

The criteria to be taken into account in determining what action (if any) to take under s.140M in relation to this circumstance are set out below.

Failure to pay additional security - r.2.94

Under s.140L(1)(a)(ii) and r.2.94, the Minister (or Tribunal on review) may bar or cancel a sponsor's approval if satisfied that the sponsor has failed to pay an additional security requested by an authorised officer under s.269. A person has failed to pay a security if it was not paid within 28 days of the day on which the person was requested to pay it, or within a longer period as allowed by an authorised officer.[83]

[79] s.140L(1)(a)(ii) and r.2.92(4), as amended by F2016L01743.
[80] Referred to in cl.408.228(2) or (5) of Schedule 2.
[81] s.140L(1)(a)(ii) and r.2.93(2), as amended by F2016L01743.
[82] Explanatory Statement to SLI 2009, No.203, p.78.
[83] r.2.94(3).

A professional development sponsor may be requested to pay an additional security where a security previously provided has been enforced.[84] The Tribunal itself is not an authorised officer for the purposes of requesting a security under s.269.[85] The task of the Tribunal upon review is not to consider whether such a security should have been requested, but rather to consider whether such a security has been requested by an authorised officer and, if so, whether it has paid within the relevant period.

Current or former professional development sponsors only may be barred or their sponsorship cancelled on this ground.[86]

The criteria to be taken into account in determining what action (if any) to take under s.140M in relation to this circumstance are set out below.

Failure to comply with certain terms of special agreement or professional development agreement - r.2.94A

Under s.140L(1)(a)(ii) and r.2.94A, the Minister (or Tribunal on review) may bar or cancel a sponsor's approval if satisfied that the sponsor has not complied with a term or condition of:

- the special program agreement in relation to which the special program sponsor was approved;
- the professional development agreement in relation to which the professional development sponsor was approved; or
- the special program agreement[87] in relation to the youth exchange or other program that a temporary activities sponsor is conducting, or has conducted.[88]

For sponsorship applications made prior to 24 November 2012, only a person who is or was a special program sponsor could be barred or have their sponsorship cancelled on this ground. For sponsorship applications made on or after 24 November 2012, current or former professional development sponsors can also be barred or have their sponsorship cancelled on this ground.[89] For sponsorship applications and applications for variation of a term of approval made on or after 19 November 2016, this provision was amended to include temporary activity sponsors that are conducting or have conducted a youth exchange program or other program for the purposes of a Subclass 408 (Temporary Activities) visa.[90]

In determining whether relevant non-compliance has occurred, the Tribunal will need to have regard to the terms or conditions of the relevant agreement at the time it was approved. The matters to be considered by the Tribunal on review will be determined by the relevant terms or conditions that are the subject of the decision under review.

[84] Explanatory Statement to SLI 2009, No.115, p.55.
[85] 'Authorised officer' defined in s.5(1) of the Act: 'when used in a provision of this Act, means an officer authorised in writing by the Minister, the Secretary or the Australian Border Force Commissioner for the purposes of that provision.' Tribunal Members are not so authorised in writing for the purposes of s.269.
[86] r.2.94(1).
[87] Referred to in cl.408.228(2)(c) or (5)(c) of Schedule 2.
[88] r.2.94A(2).
[89] r.2.94A(2) as amended by SLI 2012, No.238, and apply to applications for approval as a sponsor made on or after 24 November 2012. The Explanatory Statement to SLI 2012, No.238 for items [178] – [181] states that the purpose of the amendments was to ensure that a consistent approach is taken to program agreements within the temporary work visa framework.
[90] r.2.94A(2) as amended by F2016L01743.

The criteria to be taken into account in determining what action (if any) to take under s.140M in relation to this circumstance are set out below.

Criteria that must be taken into account

Regulations 2.88-2.94A set out not only the circumstances in which the Minister may bar an approved sponsor or cancel a sponsorship approval, but also the criteria that must be considered when determining whether to impose a bar or cancel a sponsorship.

Having considered the specific criteria in relation to each of the relevant circumstances, the decision maker must decide whether or not to impose the sanction, and if one or more of the sanctions (i.e. cancellation and bar, or impose a bar only) are imposed, the extent of sanction.

In exercising this discretionary power to impose one or more sanctions, regard should be had to the objective of the reforms to the temporary skilled migration programs, which includes ensuring they do not permit exploitation of workers from overseas, include equitable remuneration arrangements and that Australian workers are not disadvantaged.[91] The Tribunal may also have regard to Departmental policy, but should always ensure that it considers the individual circumstances of the case. Departmental guidelines (PAM3) state that in determining the appropriate penalty (or combination of penalties), the Department will take into account a number of factors including whether the failure is minor, significant or serious, whether the failure was intentional, reckless or inadvertent, the effect the sanction will have on the sponsor, sponsored persons and the relevant sponsored worker program and the effect the sanction will have on Australia's national interest.[92] Note that these guidelines reflect the range of sanctions which may be imposed under the Act and Regulations, whereas the Tribunal only has jurisdiction in relation to actions under s.140M. For further guidance in relation to determining the length of any bar see 'Period of bar' below.

Failure to satisfy sponsorship obligation

When considering whether to bar or cancel a sponsorship on the basis that the sponsor has failed to satisfy a sponsorship obligation,[93] the prescribed criteria that must be taken into account are:

- the past and present conduct of the sponsor in relation to Immigration;
- the number of occasions on which the sponsor has failed to satisfy the sponsorship obligation;
- the nature and severity of the circumstances relating to the failure to satisfy the sponsorship obligation, including the period of time over which the failure has occurred;
- the period of time over which the sponsor has been an approved sponsor;
- whether, and the extent to which, the failure to satisfy the sponsorship obligation has had a direct or indirect impact on another person;

[91] Explanatory Statement to SLI 2009, No.115, p.2
[92] PAM3: [Div2.11-Div2.23] Sponsorship compliance framework: Penalties, sanctions and enforcement – Procedural Instruction – Decision making(reissued 1/10/2017). Note that the guidelines go on to discuss these considerations in more detail, including the characterisation of failures as minor, significant or serious.
[93] r.2.89 and s.140L(1)(a)(i).

- whether, and the extent to which, the failure to satisfy the sponsorship obligation was intentional, reckless or inadvertent;
- whether, and the extent to which, the person has cooperated with Immigration, including whether the person informed Immigration of the failure;
- the steps (if any) the person has taken to rectify the failure to satisfy the sponsorship obligation, including whether the steps were taken at the request of Immigration or otherwise;
- the processes (if any) the person has implemented to ensure future compliance with the sponsorship obligation;
- the number of other sponsorship obligations that the person has failed to satisfy, and the number of occasions on which the person has failed to satisfy other sponsorship obligations; and
- any other relevant factors.[94]

Provision of false or misleading information

When considering whether to bar or cancel a sponsorship on the basis that the sponsor has provided false or misleading information to Immigration or the Tribunal,[95] the criteria that must be taken into account are:

- the purpose for which the information was provided;
- the past and present conduct of the sponsor in relation to Immigration;
- the nature of the information;
- whether, and the extent to which, the provision of false or misleading information has had a direct or indirect impact on another person;
- whether the information was provided in good faith;
- whether the sponsor notified Immigration immediately upon discovering that the information was false or misleading; and
- any other relevant factors.[96]

Application or variation criteria no longer met

When considering whether to bar or cancel a sponsorship on the basis that the sponsor no longer satisfies the criteria for approval as a sponsor[97] the criteria that must be taken into account are:

- the nature of the applicable sponsorship criteria that the sponsor no longer meets;
- whether, and the extent to which, the failure to continue to satisfy the criteria for approval as a sponsor, or to continue to satisfy the criteria for approval of a variation, has had a direct or indirect impact on another person;
- the reason why the sponsor no longer satisfies the applicable sponsorship criteria, including whether the failure to satisfy the criteria is within the person's control;

[94] r.2.89(3).
[95] s.140L(1)(a)(ii) and r.2.90.
[96] r.2.90(3).
[97] s.140L(1)(a)(ii) and r.2.91.

- the steps (if any) the sponsor has taken to ensure that the person will satisfy the applicable criteria in the future; and
- any other relevant factors.[98]

Contravention of law

Contravention of Commonwealth, State or Territory law generally

When considering whether to bar or cancel a sponsorship on the basis that the sponsor has been found by a court or a competent authority to have contravened a Commonwealth, State or Territory law,[99] the criteria that must be taken into account are:

- the past and present conduct of the sponsor;
- the nature of the law that the sponsor has contravened;
- the gravity of the unlawful activity; and
- any other relevant factors.[100]

Contravention of law relating to licensing, registration or membership

When considering whether to bar or cancel a sponsorship on the basis that the primary sponsored person (i.e. visa holder) has been found by a court or a competent authority to have contravened a Commonwealth, State or Territory law relating to the licensing, registration or membership,[101] the criteria that must be taken into account are:

- whether the sponsor took reasonable steps to prevent the primary sponsored person from contravening a law relating to a licensing, registration or membership requirement of the primary sponsored person's approved occupation;[102]
- whether any other primary sponsored person, while in the employ of the sponsor, has been found by a court or a competent authority to have contravened a law relating to a licensing, registration or membership requirement;[103]
- the processes (if any) the sponsor has implemented to ensure future compliance with the licensing, registration or membership requirements of a primary sponsored person's approved occupation;[104] and
- any other relevant factors.[105]

Unapproved change to professional development program or special program

When considering whether to bar or cancel a sponsorship on the basis that a professional development sponsor has made a change to the professional development or a special program sponsor has made a change to the special program or a temporary activities sponsor has made a

[98] r.2.91(3).
[99] s.140L(1)(a)(ii) and r.2.92(2).
[100] r.2.92(3).
[101] s.140L(1)(a)(ii) and r.2.92(4).
[102] r.2.92(5)(a).
[103] r.2.92(5)(b).
[104] r.2.92(5)(c).
[105] r.2.92(5)(d).

change to a youth exchange or other program, without written approval from the Secretary,[106] the criteria that must be taken into account are:

- the severity of the conduct;
- the past conduct of the sponsor in relation to Immigration;
- the impact, if any, that the taking of the action may have on the Australian community;
- the extent to which the barring of the person as a sponsor will be an adequate means of dealing with the matter, having regard to the seriousness of the inability, or of the failure, to comply; and the past conduct of the person; and
- any other relevant factors.[107]

Failure to pay additional security

When considering whether to bar or cancel a sponsorship on the basis that the sponsor has failed to pay an additional security requested by an authorised officer under s.269, the criteria that must be taken into account are:

- the severity of the conduct;
- the past conduct of the sponsor in relation to Immigration;
- the impact, if any, that the taking of the action may have on the Australian community;
- the extent to which the barring of the person as a sponsor will be an adequate means of dealing with the matter, having regard to the seriousness of the inability, or of the failure, to comply; and the past conduct of the person; and
- any other relevant factors.[108]

Failure to comply with certain terms of special agreement or professional development agreement

When considering whether to bar or cancel a sponsorship on the basis that the sponsor has not complied with a term or condition of the special program agreement or professional development agreement in relation to which the special program sponsor or temporary activities sponsor or professional development sponsor was approved,[109] the criteria that must be taken into account are:

- the past and current conduct of the sponsor in relation to Immigration;[110]
- the extent to which the sponsor has not complied with the special program agreement or professional development agreement;[111]

[106] s.140L(1)(a)(ii) and r.2.93(2). References to temporary activities sponsors who are conducting or have conducted a program referred to in cl.408.228(2) or (5) were added by F2016L01743 for applications made on or after 19 November 2016.
[107] r.2.93(3).
[108] r.2.94(4).
[109] s.140L(1)(a)(ii) and r.2.94A(2). Regulation 2.94A was amended by SLI 2012, No.238 to include professional development sponsors for applications made on or after 24 November 2012 and again by F2016L01743 to refer to temporary activities sponsors for applications made on or after 19 November 2012.
[110] r.2.94A(3)(a).
[111] r.2.94A(3)(b) as amended by SLI 2012, No.238, and applies to applications for approval as a sponsor made on or after 24 November 2012 and extends to professional development agreements. The previous consideration was restricted to 'the extent to which the person has not complied with the special program agreement'.

- the number of occasions on which the person has failed to comply with the special program agreement or professional development agreement;[112] and
- any other relevant factors.[113]

Period of bar

Where the relevant sanction being considered is barring the sponsor from doing certain things, the decision-maker must determine the period of the bar which is being imposed.

The types of bars that may be imposed are:

- barring the sponsor, for a specified period, from sponsoring more people under the terms of an existing approval/s;[114] and
- barring the sponsor, for a specified period, from making future applications for approval as a sponsor in relation to one or more classes of sponsor.[115]

The type of bar will be determined having regard to the criteria relating to the relevant circumstance and all the relevant circumstances of the case (see relevant sections above).

There are no provisions prescribing any relevant periods for the purposes of imposing a bar. In the absence of such provisions, the length of period of the bar should be determined having regard to the circumstances of the case - that is, considering such matters as the nature of circumstance giving rise to the breach, the severity of the breach, whether the sponsor has previously had action taken against them, what measures may need to be taken by the sponsor to comply with sponsorship requirements and any other matters that may be relevant in the circumstances. In the exercise of its discretion to impose a bar for a specified period, the Tribunal may have regard to Departmental policy. However, it should ensure that any decision is made having regard to all the circumstances of the individual case.

Departmental guidelines provide that where a bar is to be imposed on a sponsor from making future applications for approval as a sponsor in relation to one or more classes of sponsor pursuant to s.140M(1)(d), the relevant bar period to be imposed should generally be between 3 months and 5 years.[116]

The matters specified in the legislative criteria and any other relevant circumstances should be taken into account in determining the length of any period of bar.

Relevant case law

Alam v MIMIA [2004] FMCA 583; (2004) 187 FLR 120	Summary 1

[112] r.2.94A(3)(c) as amended by SLI 2012, No.238 to extend to professional development agreements. The amended version applies to applications for approval as a sponsor made on or after 24 November 2012.
[113] r.2.94A(3)(d).
[114] 140M(1)(c).
[115] 140M(1)(d). Classes of sponsor are prescribed in r.2.58 for the purposes of s.140E.
[116] PAM3: [Div2.11-Div2.23] Sponsorship compliance framework: Penalties, sanctions and enforcement – Procedural Instruction – Bar a sponsor or cancel the approval of a person as a sponsor – Decision to bar an approved sponsor (reissued 1/10/2017). .

	Summary 2
Krummrey v MIMIA [2005] FCAFC 258; (2005) 147 FCR 557	Summary
MIAC v Roberts [2011] FMCA 77; (2011) 249 FLR 188	Summary
MIAC v Sahan Enterprises Pty Ltd [2012] FMCA 619; (2012) 266 FLR 111	
Zubair v MIMIA [2004] FCAFC 248; (2004) 139 FCR 344	Summary

Relevant legislative amendments

Title	Reference number
Migration Legislation Amendment (Worker Protection) Act 2008	No.159, 2008
Migration Amendment (Temporary Sponsored Visas) Act 2013	No.122, 2013
Migration Amendment (Reform of Employer Sanctions) Act 2013	No.10, 2013
Migration Amendment Regulations 2009 (No. 5) (as amended)	SLI 2009 No.115
Migration Amendment Regulations 2009 (No.9)	SLI 2009, No.202
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment Regulation 2013 (No.5)	SLI 2013, No.145
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018	No.90, 2018
Migration Amendment (Enhanced Integrity) Regulations 2018	F201801707

Available decision templates/precedents

The following template is designed for reviews of decisions to cancel or bar sponsorship approval:

- **Sponsorship bars and cancellation (post 14 September 2009) -** This template is for use in a review of a decision made after 14 September 2009 to cancel/bar approval of a temporary business sponsorship under s.140M of the Act.

Last updated/reviewed: 22 January 2019

Overview – Business and Employer Related Visas

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Relevant legislative amendments

Appendix 1: Temporary business scheme and Employer nomination scheme

Appendix 2: Table of Business Skills Visas

Overview

This commentary gives an overview of three broad categories of business visas - temporary business, permanent employer related and business skills visas. These visas generally require some form of sponsorship and/or nomination by an employer. They can be contrasted to temporary work visas (such as Subclass 407 and 408), which are granted on the basis of a particular occupation, program, or activity nominated by an approved sponsor of a specified type.[1]

For the purposes of this commentary, **temporary business visas** comprise the Temporary Business Entry (Class UC) (Subclass 457) visa and the Temporary Skill Shortage (Class GK) (Subclass 482) visa introduced on 18 March 2018. While the Subclass 457 visa was moved from the temporary business framework to the temporary work framework from 24 November 2012,[2] it has a separate sponsorship and nomination scheme to other temporary work visas and has been included in this commentary for this reason as well as its historical association with business visas. On 18 March 2018, Subclass 457 was repealed and replaced by Subclass 482. The Subclass 482 visa maintains a similar framework to the Subclass 457 visa. The sponsorship and nomination framework for these visas under Division 3A of Part 2 of the *Migration Act 1994* was amended from 17 April 2019 to cater for the introduction of the sponsored family visa program. In particular, persons may now be approved for the temporary work program as a 'work sponsor' (including in relation to the Standard Business Sponsorship class) rather than as a 'sponsor'.[3]

Permanent employer sponsored visas allow Australian employers to recruit highly skilled people from overseas where the employer has been unable to fill the position from within the Australian labour market or through the training of Australian staff. These visas are part of a two stage process: firstly, the employer applies for approval of a nominated position (under r.5.19 of the Migration Regulations 1994 (the Regulations)) in which the nominee is to be employed; and secondly, the nominee applies for a visa of the relevant class. These visas include Subclass 186 and 187, and the former Subclass 119, 121, 856 and 857.

Business skills visas are designed to attract applicants who have skills to enhance the Australian economy and relate broadly to business owners/executives and investors. Visas within this group include the current Subclass 132 and 188 (which replaced Subclasses 160-165), and 888 (which replaced Subclasses 845, 846, and 890-893). Subclasses 890-893 continue to be available for holders of certain provisional business skills visas.

Temporary Business Visas

Temporary Business Scheme

The Temporary Business Scheme was established in 1995 to enable employers to sponsor overseas

[1] For further information in relation to temporary work visas, please see the Legal Services commentary: Overview - Temporary Work Visas.
[2] Migration Amendment Regulations 2012 (No.4) (SLI 2012, No.238). The effect of SLI 2012, No.238 is summarised in Legislation Bulletin No.9/2012, 29 October 2012.
[3] See the *Migration Amendment (Family Violence and Other Measures) Act 2018* (No.162, 2018) and the Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (F2019L00551). The effect of the amending Act and the amending Regulations are summarised in Legislation Bulletin No.1/2019, 7 January 2019 for No.162, 2018 and Legislation Bulletin No.3/2019, 15 April 2019 for F2019L00551. These amendments, while expanding the scope of relevant current sponsorship framework provisions to include family sponsors, do not make any substantive changes to the temporary work sponsorship scheme.

workers to work in Australia on a temporary basis, to fill shortages that cannot be met from the local labour market.[4] It currently requires the visa applicant to be the subject of an approved nomination by an 'approved work sponsor'[5] (a standard business sponsor or party to a work agreement). There are two relevant visa classes, the Temporary Business Entry (Class UC) visa and the Temporary Skill Shortage (Class GK) visa.

Temporary Business Entry (Class UC) (Subclass 457) visa

The Subclass 457 visa provides for long-term entry of up to four years for people with employment in Australia. It provides streamlined entry arrangements for businesses employing staff from overseas on a temporary basis. The Subclass 457 visa was closed to new applications on 18 March 2018, and replaced by the new Subclass 482 visa (discussed further below).

Under the Subclass 457 visa framework, applicants may be granted this visa under distinct 'streams'.[6] For visa applications made on or after 23 March 2013 and before 18 March 2018, the streams for Subclass 457 are:

- employment in Australia under a labour agreement;[7] and
- sponsorship for employment by a standard business sponsor.[8]

The most common stream in the Tribunal's caseload is sponsorship by a standard business sponsor.[9]

For further detailed commentary on Subclass 457 visas, see Subclass 457 visa commentary.

Temporary Skill Shortage (Class GK) (Subclass 482) visa

The Temporary Skill Shortage (Class GK) visa was introduced on 18 March 2018 and contains one subclass: Subclass 482.[10] The Subclass 482 visa replaces the Subclass 457 visa, and is designed to enable employers to access a temporary skilled overseas worker if an appropriately skilled Australian worker is unavailable.[11]

The Subclass 482 visa provides one set of common criteria, and three alternative streams with separate criteria. The three streams are:

- Short-term stream, allowing employers to source skilled overseas workers in occupations on the Short-term Skilled Occupation List (STSOL) for a maximum of two years (or up to four years if the two year limitation would be inconsistent with an international trade obligation);

[4] The business sponsorship scheme was first introduced in 1996 and underwent major changes in 2003 and 2009. Changes were also made in 2012 and were introduced by the Migration Amendment Regulations 2012 (No.4)(SLI 2012, No.238). The changes in 2009 were introduced by the *Migration Legislation Amendment (Worker Protection) Act 2008* (No.159, 2008) (Worker Protection Act) and the Migration Amendment Regulations 2009 (No.5) (SLI 2009 No.115) amended by Migration Amendment Regulations 2009 (No. 5) Amendment Regulations 2009 (No.1) (SLI 2009, No.203).
[5] As introduced by No.162 of 2018 and F2019L00551 as a distinct class of sponsor from the new 'family sponsor', with effect from 17 April 2019.
[6] cl.457.223.
[7] cl.457.223(2).
[8] cl.457.223(4).
[9] For applications made on or after 24 November 2012 but before 23 March 2013, applicants could also seek to satisfy the additional 'service sellers' stream (i.e. representing overseas companies) (cl.457.223(8) repealed by SLI 2013, No.32). For applications made prior to 24 November 2012, there were three further alternative streams, namely: Independent Executives proposing to maintain their ownership interest of a business in Australia (cl.457.223(7A)); persons who will be engaged in diplomatic-type work and entitled to certain privileges and immunities (cl.457.223(9)); and employment in Australia under an Invest Australia Supported Skills (IASS) agreement (cl.457.223(10)). These three streams were omitted by SLI 2012, No. 238.
[10] Introduced by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[11] Explanatory Statement to F2018L00262, p.1.

- Medium-term stream, allowing employers to source skilled overseas workers for occupations on the Medium and Long-term Strategic Skills List (MLTSSL); and

- Labour Agreement Stream, allowing employers to source skilled overseas workers in accordance with a labour agreement with the Commonwealth, where there is a demonstrated need that cannot be met in the Australian labour market and standard visa programs are not available.[12]

For detailed commentary on Subclass 482 visas, see Subclass 482 visa commentary.

Business sponsorship and nomination – regulations 2.59 and 2.72

The 'standard business sponsorship stream' of the Subclass 457 visa and the 'Short-term' and 'Medium-term' streams of the Subclass 482 visa involve 3 distinct stages. Firstly, a 'person' (the business) seeks approval as a Standard Business Sponsor (SBS) under r.2.59 and r.2.60S of the Regulations.[13] Secondly, the approved work sponsor (which includes an SBS) must nominate an occupation for approval under r.2.72 and a person (a Subclass 457 visa holder, a Subclass 482 visa holder, an applicant for a Subclass 457 or a Subclass 482 visa or a proposed applicant for a Subclass 482 visa) to perform the nominated occupation.[14] Lastly, the visa applicant must apply for a Subclass 457 or, from 18 March 2018, a Subclass 482 visa in respect of the nominated occupation.

To gain approval as an SBS, *all* requirements under r.2.59 and r.2.60S of the Regulations for approval as an SBS must be met. The requirements differ depending on whether the applicant operates a business in Australia and the length of time (if any) the business has traded in Australia. From 18 March 2018, several criteria, including the requirement to meet training benchmarks for training of Australian employees, have been removed from r.2.59 and these requirements are specified not to apply to live applications for approval as a SBS from that date.[15]

For further detailed commentary on r.2.59, standard business sponsorship and each of the requirements, see Standard Business Sponsor commentary.

Once a person has approval as an SBS under r.2.59, or has applied for approval as a SBS (or is established as a party to, or is a party to negotiations for a work agreement for the purposes of the alternative stream),[16] the second stage involves nominating an occupation to be undertaken in Australia by an identified visa applicant or holder under r.2.72.

The purposes of the nomination stage are:[17]

- to ensure that the approved sponsor agrees to be the sponsor for the particular visa applicant;

[12] Explanatory Statement to F2018L00262, p.1-2.
[13] Note that r.2.59 and r.2.60S have been subject to amendment over time, most recently from 18 March 2018 by F2018L00262. Please see MRD Legal Services Commentary Standard Business Sponsor for more detail.
[14] Note that the terms of r.2.72 were subject to significant amendment on 18 March 2018. Please see MRD Legal Services Bulletin No.1/2018 for more detail.
[15] Clause 6704(2) of Schedule 13 to the Regulations, as inserted by item 178, Schedule 1 of F2018L00262. Note that the training requirement has been replaced by a requirement to contribute to training funds as part of the nomination approval process for nomination applications made on or after 12 August 2018, as introduced by *Migration Amendment (Skilling Australians Fund) Act 2018* (No.38, 2018) and Migration Amendment (Skilling Australians Fund) Regulations 2018 (F2018L01093).
[16] Section 140GB(1) and r.2.72(1)(a) were amended by No.38 of 2018 and F2018L01093 respectively to enable not only an approved sponsor but also a person who has applied to be an approved sponsor or a person who is a party to negotiations for a work agreement, to nominate an applicant or a proposed applicant for a visa of a prescribed kind. Notwithstanding this, s.140GB(2)(ab)(inserted by item 3 of Schedule 2 to No.38 of 2018) preserves the requirement for the person to be an approved sponsor before the nomination can be approved. These changes apply to nominations made on or after 12 August 2018, or made before but not decided as at that date.
[17] Explanatory Statement to SLI 2009, No.115.

- to ensure that a person who is an SBS when making a nomination is still an approved sponsor when the decision on the nomination is made;

- to ensure that the nominated occupation corresponds with an eligible occupation. The eligible occupations will change from time to time depending on prevailing conditions in the Australian labour market;

- to ensure that the terms and conditions on which the proposed applicant will be employed are no less favourable than the terms and conditions that would be provided to an Australian citizen or permanent resident;

- to ensure that the obligation toward family members moves with the primary applicant; and

- to continue the exclusion of on-hire industry from the standard business sponsorship program.

Regulations 2.72 and 2.73 were repealed and substituted, effective from 18 March 2018.[18] The requirements of r.2.72 for nomination applications made on or after that date are broadly consistent with the previous version, although with some significant changes. Nominations lodged prior to 18 March 2018 cannot support the grant of a Subclass 482 visa, and nominations lodged after 18 March 2018 cannot support an outstanding application for a Subclass 457 visa (although they can support the continued holding of an existing 457 visa).

Further amendments under the *Migration Amendment (Skilling Australians Fund) Act 2018* and the Migration Amendment (Skilling Australian Fund) Regulations 2018, effective from 12 August 2018, introduced a 'nomination training contribution charge',[19] as well as changes to the labour market testing requirements.[20] These changes only apply to nominations made on or after 12 August 2018.

For further detailed commentary on nomination of an occupation for a Subclass 457 visa (pre-18 March 2018) and a Subclass 482 visa (post-18 March 2018), see Nomination of Occupation: r.2.72.

Variation of terms of approval of sponsorship – regulation 2.66

Section 140GA of the Act provides that a process may be established by the Regulations for the Minister to vary a term of a person's approval as a sponsor.[21] The process for approving a variation of a term of approval as a sponsor was introduced on 14 September 2009[22] and the process is available in relation to approvals of an SBS made on or after that date, up until 18 March 2018. For this time period, only the duration of the approval is prescribed as a term of approval that may be varied for standard business sponsors and temporary work sponsors.[23] From 18 March 2018 the duration of the term of an SBS approval is fixed by r.2.63A, and applications for variation of an approval as an SBS

[18] F2018L00262.
[19] Section 140GB(2)(aa) inserted by item 3 of Schedule 2 to No.38 of 2018; and r.2.73(5A) inserted by item 16 of Schedule 1 to F2018L01093. The nomination training contribution charge is intended to replace the Australian training requirements of employers sponsoring a foreign worker under a temporary work visa or nominating a foreign worker under the Direct Entry of the Subclass 186 visa. The new s.140ZM imposes a liability on a person to pay the nomination contribution charge in relation to certain prescribed nominations including a nomination of a proposed occupation under s.140GB(1)(b). The amount of the charge is prescribed in r.5 of the Migration (Skilling Australians Fund) Charges Regulations 2018 (F2018L01092).
[20] Section 140GBA as amended by No.38 of 2018. The new s.140GBA(5)-(6C) specify the way in which the labour market testing in relation to a nominated position for which an application is made on or after 12 August 2018 must be undertaken and the required evidence that must accompany the nomination.
[21] Variation of sponsorship relates to an SBS or temporary work sponsors. There is no provision for variation of terms of approval of a professional development sponsor.
[22] Worker Protection Act*;* SLI 2009, 115 as amended by SLI 2009, 203; and Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.2) (SLI 2009, 230).
[23] r.2.67.

can no longer be made.[24] Sponsors will be required to make a new application for approval and the Regulations have been amended to enable this 'renewal' process.

The process and criteria for variation of terms of approval for an SBS are set out in rr.2.66, 2.68 and 2.68J as in force up until 18 March 2018.[25] The requirements for notifying the decision in relation to an application for variation of terms of approval are contained in r.2.69. For further detailed commentary on varying the terms of approval of a sponsorship, see Variation of Terms of Approval of Sponsorship.

Merits Review

Subclass 457 and Subclass 482

The Tribunal has jurisdiction to review decisions to refuse the grant of a Subclass 457 or Subclass 482 visa under s.338(2) (onshore applications) or s.338(9) (offshore applications) in certain circumstances. These circumstances differ significantly for visas refused before and after 13 December 2018. For guidance on the Tribunal's jurisdiction, refer to Subclass 457 visa and Subclass 482 visa commentaries.

Decisions not to approve business sponsorship/nomination of occupation

A decision not to approve an application for approval as an SBS under r.2.59 is a reviewable decision,[26] except in limited circumstances. For guidance, see Approval as a Standard Business Sponsor commentary.

A decision to approve a nomination under r.2.72 is also a reviewable decision,[27] except in limited circumstances. See Nomination for Approval of an Occupation for Subclass 457 and Subclass 482 commentary for details.

Decisions not to approve variation of sponsorship

A decision not to vary a term specified in an approval is a reviewable decision,[28] except in certain circumstances where the approval sought to be varied relates to an SBS operating a business outside Australia. See Variation of Terms of Approval of Sponsorship commentary. As discussed above, variation of the terms of standard business sponsorship is no longer possible from 18 March 2018. Decisions that the Tribunal has jurisdiction to review will only be in relation to variations sought prior to 18 March 2018.

Permanent employer sponsored visas

The permanent employer sponsored visa schemes allow Australian employers to recruit highly skilled people from overseas where the employer has been unable to fill the position from within the Australian labour market or through training Australian staff.

These schemes involve two stages:

[24] F2018L00262.
[25] r.2.68J was inserted by Migration Amendment Regulation 2013 (No.5) (SLI 2013, No.147), and applies to all applications for approval as a sponsor not finally determined on 1 July 2013, and all such applications made on or after that date.
[26] s.338(9); and r.4.02(4)(a) of the Regulations as amended by SLI 2009, No.115.
[27] s.338(9); and r.4.02(4)(d) of the Regulations as amended by SLI 2009, No.115.
[28] s.338(9) and r.4.02(4)(n). Where the primary decision is to vary the duration of a term of approval as a sponsor, but the sponsor disagrees with the length of the term of approval as varied, this is not a reviewable decision.

- the employer seeks approval of a nominated position in which an individual is proposed to be employed in Australia under r.5.19 of the Regulations;

- the non-citizen applies for a permanent visa (currently Subclass 186 and 187) on the basis of the employer nomination.

Significant changes were made to the scheme on 1 July 2012, when r.5.19 was substituted in whole, and the existing visa subclasses (856, 857, 119 and 121) were replaced by two new subclasses – 186 and 187.[29] On 18 March 2018, r.5.19 was again repealed and substituted,[30] and a number of changes were made to the Subclass 186 and 187 visas.

For applications made on or after 1 July 2012 up to 18 March 2018, there are two different types of nominations of positions under r.5.19 – Temporary Residence Transition nomination and Direct Entry nomination. The relevant subclasses for these nominations are the Subclass 186 visa and Subclass 187 visa.[31]

For applications made on or after 18 March 2018, there are three different streams under r.5.19 – Temporary Residence Transition stream, Direct Entry stream, and Labour Agreement stream. Subclass 186 and 187 continue to be the relevant subclasses. The pre-18 March 2018 version of r.5.19 continues to apply to nominations made before 18 March 2018. Additionally, nominations made prior to 18 March 2018 can support Subclass 186 and 187 visa applications made after this date.

Employer Nominations – r.5.19

1 July 2012 to 18 March 2018 nominations

This scheme is divided into the Temporary Residence Transition nomination stream and the Direct Entry nomination stream, which have different requirements that must be satisfied:

- a Temporary Residence Transition nomination allows a standard business sponsor to nominate the holder of a Subclass 457 visa for employment in a specified occupation that has been carried out by the visa holder for a least two of the preceding three year period;

- a Direct Entry nomination stream may be satisfied by a nominator who is lawfully operating a business in Australia and who has identified a need to employ a paid employee in a position for at least two years.[32] The tasks to be performed in the position must correspond to those of a specified occupation and meet relevant training requirements unless the position is located in regional Australia, the business is operated locally and there is a genuine need for the employment which cannot be filled by an Australian living in the same local area.[33]

[29] Migration Amendment Regulation 2012 (No.2) (SLI 2012, No. 82). Before 1 July 2012, there were also two types of approved appointments: one made under the Employer Nomination Scheme and an appointment made under the Regional Sponsored Migration Scheme. Each of the old subclasses were closed to new primary applications from 1 July 2012 and removed from the Regulations entirely from 1 July 2013. The closing of primary applications does not affect applications deemed to have been made under r.2.08, 2.08A and 2.08B. This allows newborn children, spouses, de facto partners and dependent children of persons applying for Class BW or Class AN visas before 1 July 2012 to make a combined application with that person, even after the relevant Subclass has been repealed, provided a decision on the application has not been made: Schedule 13 to the Regulations, items 101(2) and 102(2) inserted by SLI 2012, No.82. For more information about the pre-1 July 2012 scheme, please contact MRD Legal.
[30] Item 129, Schedule 1, of the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[31] SLI 2012 No.82. See also the Explanatory Statement to which accompanied the amending regulations.
[32] See the Explanatory Statement to SLI 2012, No.82 at 30.
[33] See the Explanatory Statement to SLI2012, No.82 at 30.

The relevant criteria for the Temporary Residence Transition nomination is set out in r.5.19(3)[34] and the criteria for Direct Entry nomination is set out in r.5.19(4),[35] as in force prior to 18 March 2018.

Post 18 March 2018 nominations

New r.5.19 added an additional Labour Agreement stream to the already existing Temporary Residence Transition and Direct Entry streams.[36] Previously, a nomination was not required under r.5.19 for a visa in the Labour Agreement stream. These three streams are now mutually exclusive and a nominator is required to select the appropriate stream at the time of application. Applications will only be assessed against that stream.[37]

A number of changes were made to the Temporary Residence Transition stream, including to reflect the introduction of the Subclass 482 visa, and to increase the required period of employment while holding a Subclass 457 or 482 visa from two years to three years.

From 12 August 2018, a nomination application must also be accompanied by any nomination training contribution charge the nominator is liable for, and identify the annual turnover for the nomination.[38] These requirements were introduced in place of the training benchmark requirements for Temporary Residence Transition stream nominations and certain Direct Entry stream nominations, and therefore the requirements for the nominator to have met any applicable training obligations no longer apply to nomination applications made on or after 12 August 2018.[39]

For further detailed commentary on nominations under r.5.19, see Regulation 5.19 - Employer nominations commentary.

Employer Related Visas

Applications made on or after 1 July 2012 and before 18 March 2018

For visa applications made on or after 1 July 2012, there are two classes and two accompanying subclasses of visa reflecting the metropolitan and regional visa objectives:

- The **Employer Nomination (Permanent) (Class EN)** (Subclass 186) visa may be granted on the basis of meeting one of three alternative visa 'streams': the Temporary Residence Transition stream, the Direct Entry stream or the Agreement stream.[40]
- In respect of regional appointments, the **Regional Employer Nomination (Permanent) (Class RN)** (Subclass 187) visa may be granted on the basis of meeting one of three alternative visa 'streams' - the Temporary Residence Transition stream, the Direct Entry stream or the Agreement stream.[41]

Applications made on or after 18 March 2018

A number of changes were made to Subclass 186 and 187 visas from 18 March 2018.[42] The 'Agreement' stream of the Subclass 186 visa was renamed to the 'Labour Agreement stream', and was removed entirely from the Subclass 187 visa. The maximum age for visa applicants in the

[34] As inserted by SLI 2012, No.82.
[35] Inserted by SLI,2012 No.82.
[36] Inserted by F2018L00262
[37] Explanatory Statement to F2018L00262, Attachment C, Item 129.
[38] rr.5.19(2)(fa) and (fb) as inserted by F2018L01093.
[39] rr.5.19(5)(i) and (10)(c) were repealed by F2018L01093.
[40] Part 186 inserted by SLI 2012, No.82.
[41] New Part 187 inserted by SLI 2012, No.82.
[42] F2018L00262

Temporary Residence Transition streams for both visas was also lowered from 50 to 45 years. Additional integrity measures were also included. Changes only apply to visa applications where the associated nomination or the visa application was made on or after 18 March 2018.

Merits Review

Decisions relating to Employer Nominations under r.5.19

A decision to refuse to approve an employer nomination under r.5.19 is a reviewable decision under s.338(9) and r.4.02(4)(e). See Regulation 5.19 – approval of nominated positions commentary for further information.

Decisions relating to Employer Nomination visas

Decisions to refuse to grant both Subclass 186 and Subclass 187 visas to applicants are reviewable. See Subclass 186 and Subclass 187 commentaries for further information.

Business skills visas

Business skills visas are designed to attract applicants who have skills to enhance the Australian economy and relate broadly to business owners/executives[43] and investors.

The business skills program was introduced in 1992, after the original business migration program had been suspended around 18 months earlier, and is intended to attract business people to assist in the economic development of Australia.[44] The permanent business skills class originally allowed entry to non-citizens if they fell into particular categories: business owners; senior executives employed by major businesses; investors or business people who invest in 'designated investments' in Australia; and certain temporary visa holders in Australia who have established a business in Australia. Within these four groups, there were also State/Territory-sponsored options of the same visas, which incorporate lower threshold requirements for net assets, ownership, age and language requirements. The lower threshold for these sponsored categories was to assist to achieve the Federal Government's objective of increasing population growth in regional areas. These visas required that the State/Territory endorsed the application if the applicant brought business skills or benefit to the State/Territory employment figures or the economy.

The development of the program

For visa applications made between 1 March 2003 and 1 July 2012, a two-stage processing structure for most permanent business skills visas[45] applied and comprised of: Subclasses 160 - 165 (four year provisional residence visas) and Subclasses 890 – 893, and 845 and 846 (permanent residence visas).[46] These visas replaced Subclasses 127 – 131 and 840 – 844.[47] In addition, the permanent Subclass 132 (Business Talent) visa was also introduced.

[43] For applications made prior to 1 July 2012, the program also provides for business executives.
[44] New item 1104BA and new Part 888 inserted by SLI 2012, No.82.
[45] The Business Talent Subclass 132 visa was not subject to the two stage processing structure.
[46] Migration Amendment Regulations 2002 (No. 10) (SR 2002, No.348). These Regulations inserted the new visa Subclasses and omitted former Subclasses 127 to 131 and 840 to 844 visas.
[47] SR 2002, No.348.

On 1 July 2012, substantial changes to the business skills visa program were introduced to streamline and simplify the scheme. The Business Skills - Business Talent (Migrant) (Class EA) visa was renamed a Business Skills – Business Talent (Permanent) visa and the criteria for a Subclass 132 visas substituted for visa applications made on or after 1 July 2012. Additionally, a new temporary (Subclass 188) and permanent visa (Subclass 888) were introduced to attract business people to assist in the economic development of Australia.[48] On 1 July 2012, Subclasses 160-165, 845 and 846 were closed to new primary visa applications.[49] Subclasses 845 and 846 were removed entirely from the Migration Regulations from 1 July 2013, closing these subclasses to all applications from that date.[50]

The Subclass 188 Business Skills (Provisional) (Class EB) temporary visa is designed to replace Subclass 160, 161, 162, 163, 164 and 165 visa subclasses,[51] and currently contains seven separate streams, while the Subclass 888 (Business Innovation and Investment (Permanent)) is a permanent visa replacing the Subclasses 845, 846, 890, 891, 892, and 893 visa subclasses and currently contains five separate streams. As with the pre 1 July 2012 visa subclasses, these visas are designed as a two-stage process. That is, applicants may initially apply for the provisional Subclass 188 visa, and then the permanent Subclass 888 visa. The Subclass 890-893 visas remain available to certain holders of certain pre 1 July 2012 provisional business skills visas. For commentary on Subclass 890-893 see MRD Legal Services Commentary Subclass 890-893 - Business Skills (Residence) (Class DF).

For further information on any of the pre 1 July 2012 visa subclasses please contact MRD Legal Services.

Applications made on or after 1 July 2012

For visa applications made from 1 July 2012, applicants for business skills visas can apply for the two-stage visas, namely the Business Skills (Provisional) (Class EB) (Subclass 188) visa and the Business Skills (Permanent) (Class EC) (Subclass 888) visa, which are designed to attract business people to assist in the economic development of Australia.[52] Alternatively, particularly high calibre applicants can apply for the Business Skills – Business Talent (Permanent) (Class EA) (Subclass 132) visa.

Applications for Subclass 890-893 visas can continue to be made after 1 July 2012, but only in certain circumstances. For more detail see MRD Legal Services Commentary Subclass 890-893 - Business Skills (Residence) (Class DF).

Subclass 188 - Business Skills (Provisional) (Class EB)

The Business Skills (Provisional) (Class EB) is a temporary visa containing only one subclass – the Subclass 188 (Business Innovation and Investment (Provisional)) visa.[53] It replaces Subclasses 160, 161, 162, 163, 164 and 165[54] and is designed for persons intending to establish a new, or manage an existing, business in Australia or make a designated investment with a State / Territory government.

[48] Item 1104BA and new Part 888 inserted by SLI 2012, No.82.
[49] Items 1202A(3)(aa) and 1104A(3)(aa) of Schedule 1 to the Regulations specifying that an application by a person seeking to satisfy the primary criteria for a Class UR and Class BH visa respectively must be made before 1 July 2012: inserted SLI 2012 No.82.
[50] SLI 2012, No.82.
[51] Item 1202B and Part 888 inserted by SLI 2012, No.82. See Explanatory Statement to SLI 2012, No.82 at 55.
[52] Item 1104BA and new Part 888 inserted by SLI 2012, No.82.
[53] Item 1202B and Part 888 inserted by SLI 2012, No.82, with effect from 1 July 2012.
[54] Explanatory Statement to SLI 2012, No.82 at 55.

The Subclass 188 has seven 'streams':

- the Business Innovation stream;
- the Business Innovation Extension stream;[55]
- the Investor stream;
- the Significant Investor stream;
- the Significant Investor Extension stream;[56]
- the Premium Investor stream;[57]
- the Entrepreneur stream.[58]

The requirements for making a valid application differ depending upon which visa 'stream' the applicant is seeking to satisfy. For the Business Innovation, Business Innovation Extension, Investor and Entrepreneur streams, the applicant must be nominated by a State or Territory government agency.[59] For the Significant Investor and Significant Investor Extension streams, the applicant must be nominated by a State or Territory government agency, or the CEO of Austrade.[60] For the Premium Investor stream, the applicant must be nominated by the CEO of Austrade.[61] For the Business Innovation stream, the Investor stream and the Significant Investor stream, the applicant must make the application within a specified period of being invited to apply. A valid application for the Business Innovation Extension stream, requires the applicant to hold, and have held for at least three years, a single Subclass 188 visa, whereas a valid application for the Significant Investor Extension stream, requires the applicant to hold a Subclass 188 visa and either to have held that for at least three years or to have not held another one.

While all primary applicants must meet the 'common criteria',[62] the criteria for a Subclass 188 visa also differ for each of the seven visa streams. In particular, the Significant Investor stream requires the applicant to have made a complying significant investment of at least AUD5,000,000, the Premium Investor stream requires the applicant to have made a complying premium investment of at least AUD15,000,000, the Business Innovation and Investor streams require the applicant to meet a new Business visa Points Test contained in Schedule 7A to the Regulations, which is more extensive than the Schedule 7 Points Test,[63] and the Entrepreneur stream requires the applicant to undertake a complying entrepreneur activity relating to an innovative idea that is proposed to lead to the commercialisation of a product or service or the development of a business or enterprise in Australia.

[55] This stream was originally titled the 'Extension stream' but renamed the 'Business Innovation Extension stream' to distinguish it from the new Significant Investor Extension stream from 24 November 2012: Migration Amendment Regulation 2012 (No.7) (SLI 2012, No.255).
[56] The Significant Investor stream and Significant Investor Extension stream were inserted for new applications made on or after from 24 November 2012: SLI 2012, No.255.
[57] The Premium Investor stream was inserted for new applications made on or after 1 July 2015: Migration Amendment (Investor Visas) Regulation 2015 (SLI 2015, No.102).
[58] The Entrepreneur stream was open to visa applications from 10 September 2016, and was inserted by the Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016 (F2016L01391).
[59] Items 1202B(4), (5), (6) and (6D) of Schedule 1 to the Regulations.
[60] Items 1202B(6A) and (6B).
[61] Item 1202B(6C).
[62] The Common criteria are at cl.188.21 and require that the applicant / spouse / partner do not have a history of investment activities of a nature not generally acceptable in Australia; the State/territory or CEO of Austrade nomination has not been withdrawn, public interest criteria, special return criteria and passport requirements are met.
[63] Inserted by SLI 2012, No.82.

For further details, see MRD Legal Commentary Subclass 188: Business Innovation and Investment (Provisional) visa.

Subclass 888 - Business Innovation and Investment (Permanent) (Class EC)

The Business Skills (Permanent) (Class EC) visa is a permanent visa and also contains only one subclass – the Subclass 888 (Business Innovation and Investment (Permanent)) visa.[64] It replaces Subclasses 845, 846, 890, 891, 892, and 893.

Unlike the seven streams in the temporary subclass, from 10 September 2016 the Business Skills (Permanent) (Class EC) visa has only five streams:

- the Business Innovation stream;
- the Investor stream;
- the Significant Investor stream;
- the Premium Investor stream; and,
- the Entrepreneur stream.[65]

The requirements for making a valid application differ depending upon which visa 'stream' the applicant is seeking to satisfy. For the Business Innovation, Investor, or Entrepreneur stream the applicant must be nominated by a State/Territory government agency. For the Significant Investor stream, the applicant must be nominated by a State/Territory government agency or the CEO of Austrade. For the Premium Investor stream, the applicant must have been nominated by the CEO of Austrade. There is no requirement that the applicant be invited by the Minister to apply for the visa. Notably, for the Business Innovation and Investor streams, the primary applicant and secondary applicants may 'switch' who will meet the primary criteria from who was the primary and secondary applicant for the Subclass 188 visa in the respective stream. In effect, the primary applicant for the Subclass 888 visa becomes the secondary applicant for the Subclass 188 visa.[66]

The Schedule 2 requirements differ depending upon the visa 'stream' the applicant is seeking to satisfy, but broadly speaking require the primary applicant to hold one of the specified types of business visa. For the Business Innovation stream the criteria relate to the period of time in which the applicant has been in Australia as the holder of a qualifying visa, has actively operated a main business, held their ownership interest and obtained an Australian Business Number and submitted Business Activity Statements. The Investor stream criteria relate to the period of time in which the applicant has been in Australia as the holder of a qualifying visa and the period of time for which the applicant has held a *designated* investment. Similarly, the Significant Investor stream criteria relate to the period of time in which the applicant has been in Australia as the holder of a qualifying visa and the period of time for which the applicant has either held a *complying significant* investment or a *complying investment* with the submission of an approved form for each managed fund sought to be relied upon.[67] The Premium Investor stream criteria also relate to the period of time in which the

[64] Item 1104BA of Schedule 1 and Part 888 of Schedule 2 inserted by SLI 2012, No.82.
[65] For applications made before 24 November 2012, applicants could only be granted a visa for satisfaction of the criteria in the Business Innovation or Investor streams. The Significant Investor stream was inserted for new applications made on or after 24 November 2012: SLI 2012, No.255. The Premium Investor stream was inserted for new applications made on or after 1 July 2015: SLI 2015, No.102. The Entrepreneur stream was inserted for new applications from 10 September 2016: F2016L01391.
[66] Items 1104BA(4) and 1104BA(5) of Schedule 1 inserted by SLI 2015, No.102.
[67] Complying Investment is defined in r.5.19B in respect of applications made on or after 24 November 2012 but before 1 July 2015: SLI 2012, No.255. Complying Significant Investment is defined in r.5.19C in respect of applications made on or after 1 July 2015: SLI 2015, No.102.

applicant has been in Australia as the holder of a qualifying visa and the period of time for which the applicant has held a *premium investment*.[68] The Entrepreneur stream criteria relate to the periods of time in which the applicant has held the qualifying visa and resided in Australia, and whether the applicant has demonstrated a successful record of undertaking activities of an entrepreneurial nature in Australia while holding the qualifying visa.

Subclass 132 - Business Skills Business Talent (Permanent) (Class EA)

The Class EA visa is designed for high-calibre business migrants talented in business. While this was also a pre 1 July 2012 class of visa it was renamed from a Business Skills - Business Talent (Migrant) visa to a Business Skills – Business Talent (Permanent) visa and the criteria contained within it were substantially revised by post 1 July 2012.

The Subclass 132 visa is the only permanent visa under the business skills category that does not legally or practically require the visa applicant to first hold a provisional or temporary business skills visa or go through the two-stage process. Applicants may be inside or outside Australia to make the visa application, and the application must be made at the place and in the manner specified.[69]

The visa can be granted on the basis of the primary applicant meeting alternative 'streams':

- the Significant Business History stream; or
- the Venture Capital Entrepreneur stream.

There are separate criteria for each stream, as well as 'common' criteria that must be met by both.[70] A key difference between the streams is that the Venture Capital Entrepreneur stream requires a legally enforceable agreement with an Australian company to receive venture capital funding for at least AUD1,000,000, whilst the Significant Business History stream requires the applicant to have had an overall successful business career, and specified net assets.

Merits Review

Subclass 132

Decisions to refuse a Subclass 132 visa are reviewable decisions regardless of whether the applicant was in or outside the migration zone when the visa application was made.[71] However, if the applicant was offshore at the time the visa application was made, s/he *must* be in the migration zone at the time of the primary decision and making of review application.[72] Only the visa applicant has standing to apply for review.[73]

[68] Premium Investment is defined in r.5.19D inserted by SLI 2015, No.102.
[69] Item 1104AA(3).
[70] The common criteria (cl.132.21) relate to the applicant / spouse not having a history of involvement in business activities that are of a nature that are generally not acceptable in Australia; the State / Territory government agency not having withdrawn the nomination; public interest and special return criteria, and passport requirements. The criteria for the Significant Business History stream are contained in cl.132.22, and relate to the requirement to be invited to apply, applicant's age, overall success of their business career, ownership interest in a qualifying business, business turnover, value of personal and business assets, commitment to, and involvement in the business. The criteria for the Venture Capital Entrepreneur scheme are in cl.132.23 and relate to the requirement to be invited to apply, a venture capital funding agreement, personal and business assets, and commitment to, and involvement in the business.
[71] s.338(2) (if onshore) or s.338(7A) (if offshore).
[72] s.347(3A).
[73] s.347(2)(a).

Subclass 188

A decision to refuse an *onshore* Subclass 188 visa is reviewable.[74] Applications for review of these decisions must be made by the visa applicant while in the migration zone.[75]

Subclass 888

A decision to refuse a Subclass 888 visa is reviewable where the visa applicant made the visa application whilst in the migration zone or outside the migration zone.[76] In both instances, the visa applicant has standing to apply for review.[77] The visa applicant must be in the migration zone at the time of the application for review.[78] Where the visa application was made when the visa applicant was outside the migration zone, the visa applicant must also have been in the migration zone at the time of the primary decision.[79]

For information on merits review of Subclasses 890-893 see MRD Legal Services Commentary Subclass 890-893 - Business Skills (Residence) (Class DF). For information about Subclasses 160-165 and 845-846 please contact MRD Legal Services.

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2002 (No.10)	SR 2002 No.348
Migration Amendment Regulations 2005 (No.1)	SLI 2005 No.54
Migration Legislation Amendment (Worker Protection) Act 2008	No.159 2008
Migration Amendment Regulations 2009 (No.5)	SLI 2009 No.115
Migration Amendment Regulation 2009 (No.9)	SLI 2009 No.202
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)	SLI 2009 No.203
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.2)	SLI 2009 No.230
Migration Amendment Regulation 2012 (No.2)	SLI 2012 No.82
Migration Amendment Regulations 2012 (No.4)	SLI 2012 No.238
Migration Amendment Regulation 2012 (No.7)	SLI 2012 No.255
Migration Amendment Regulation 2013 (No.1)	SLI 2013 No.32
Migration Amendment Regulation 2013 (No.5)	SLI 2013 No.147
Migration Amendment (Investor Visas) Regulation 2015	SLI 2015 No.102
Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016	F2016L01391

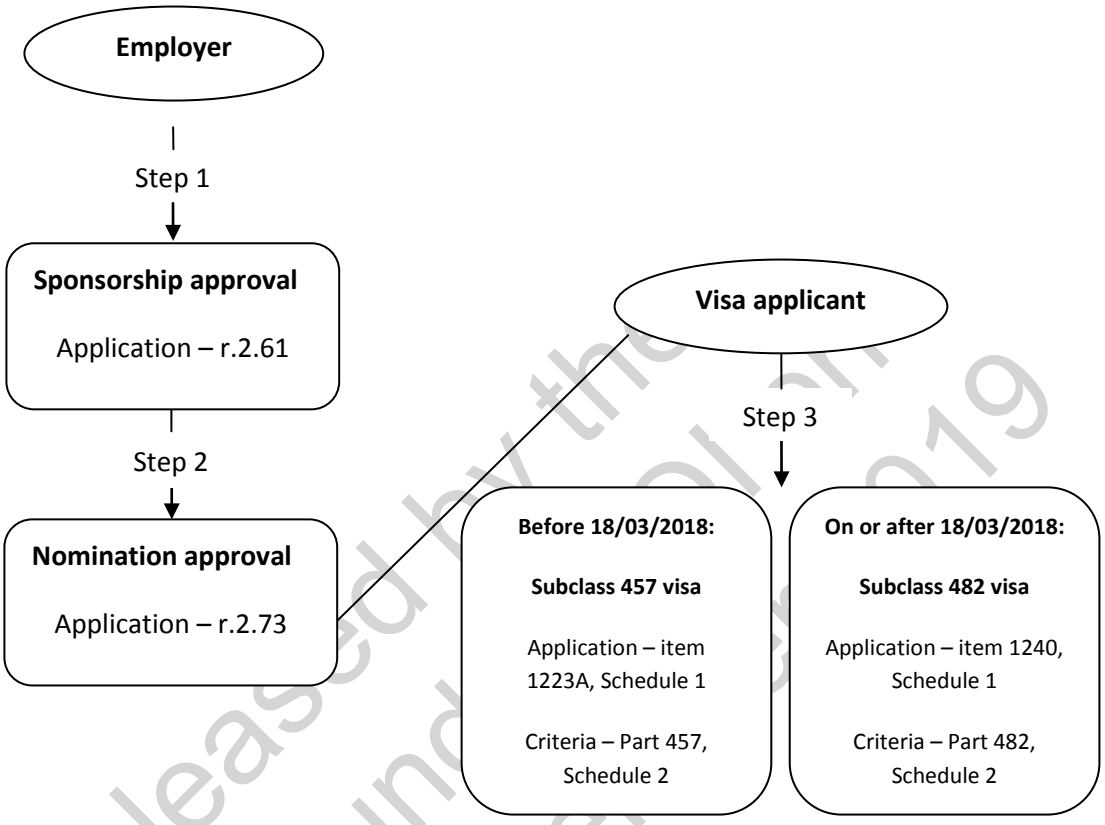
[74] Under s.338(2), if the application was made in the migration zone.
[75] ss. 347(2)(a) and 347(3).
[76] s.338(2) and (7A).
[77] s.347(2)(a).
[78] s.347(3) if visa application was made in the migration zone and s.347(3A) if visa application was made outside the migration zone.
[79] s347(3A)(a).

Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262
Migration Amendment (Skilling Australians Fund) Act 2018	No.38, 2018
Migration (Skilling Australians Fund) Charges Act 2018	No.39, 2018
Migration Amendment (Skilling Australians Fund) Regulations 2018	F2018L01093
Migration (Skilling Australian Fund) Charges Regulations 2018	F2018L01092
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018	No.90, 2018
Migration Amendment (Enhanced Integrity) Regulations 2018	F2018L01707
Migration Amendment (Family Violence and Other Measures) Act 2018	No.162, 2018
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019	F2019L00551

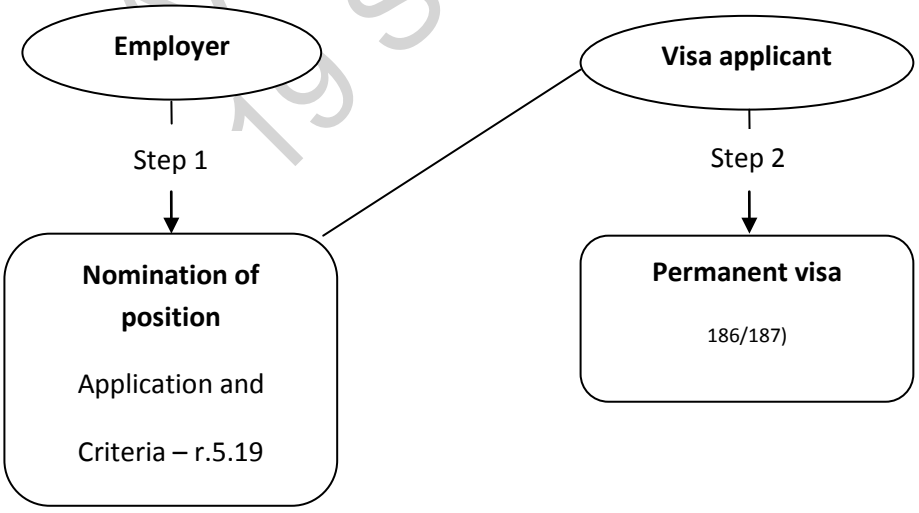
Last updated/reviewed: 16 September 2019

Appendix 1: Temporary business scheme and Employer nomination scheme

Temporary business scheme – three stage process (standard business sponsors)



Employer nomination scheme – two stage process



Appendix 2: Table of Business Skills Visas

<table>
<tr><th colspan="2">pre 1 March 2003</th></tr>
<tr><th colspan="2">Permanent</th></tr>
<tr><td colspan="2">127 Business Owner (offshore/onshore)
840</td></tr>
<tr><td colspan="2">128
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<tr><td colspan="2">129
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Overview

Employer nominations are intended to enable Australian employers to recruit, for permanent positions, skilled workers either from overseas or who are temporarily in Australia, where the employer has not been able to fill their needs from the Australian workforce or through their own training efforts.

The employer nomination scheme involves two stages:

- an employer seeking approval of a nominated position in which an individual is proposed to be employed in Australia; and
- a person applying for a permanent visa on the grounds that the visa applicant proposes to be employed in that position.

Regulation 5.19 sets out the procedure for an application for an approved nomination and the requirements that must be met for approval. A nomination is made in respect of a particular, single position, rather than an occupation or the person who will fill that position.[1] Accordingly, in considering applications for approval of a nominated position it is necessary to focus on the *position* and not the attributes of the visa applicant. Whether the visa applicant will be granted a visa under the employer nomination scheme requires consideration of the criteria contained in the relevant Part of Schedule 2 to the Migration Regulations 1994 (the Regulations).

The nomination scheme in r.5.19 was originally introduced in 1994. It was subject to significant reform in 2005,[2] 2012,[3] and on 18 March 2018.[4] The applicable version of r.5.19 will depend on the date of the application. This Commentary discusses nomination applications made between 1 July 2012 and 17 March 2018, and those made on or after 18 March 2018. Please contact MRD Legal Services for information about nomination applications made prior to 1 July 2012.

For applications made on or after 1 July 2012 and before 18 March 2018, the scheme included two streams: 'Temporary Residence' and 'Direct Entry' nominations. For applications made on or after 18 March 2018, the scheme also includes a Labour Agreement stream. A nominated position approved under r.5.19 will satisfy certain criteria for the grant of an Employer Nomination (Permanent) (Class EN), Subclass 186 visa or the Regional Employer Nomination (Permanent) (Class RN), Subclass 187 visa.[5]

[1] *Thuy Tien Hair Designs v MIBP* [2014] FCCA 2582 (Judge Emmett, 11 November 2014) at [41]–[43]. Although this judgment considered r.5.19 as in force prior to 1 July 2012, similar reasoning appears equally applicable to the post 1 July 2012 and 18 March 2018 versions of r.5.19.
[2] Migration Amendment Regulation 2005 (No.1) (SLI 2005, No.54).
[3] Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82).
[4] Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[5] For further information, see MRD Legal Services commentaries Subclass 186 – Employer Nomination (Permanent) (Class EN) and Subclass 187 – Regional Employer Nomination (Permanent) (Class RN).

Merits review

Tribunal's jurisdiction

A decision under r.5.19 to refuse approval of the nomination of a position is a reviewable decision under Part 5 of the Act.[6] It is the person to whose nomination the decision relates who has standing to apply for review.[7]

Applications for review of more than one nomination decision cannot be combined, even where the same employer is the nominator and applicant for review in each matter.[8]

For discussion of issues which commonly arise in relation to review applicants in this context, see the MRD Legal Services Commentary Business Review Applicants FAQs.

Tribunal's powers on review

The Tribunal's powers on review will be limited to affirming the decision under review (if any of the applicable requirements of r.5.19 are not met) or setting aside the decision under review and substituting a new decision to approve the nomination application (if all of the applicable requirements of r.5.19 are met). Note that all requirements must be met before the nomination can be approved. The Tribunal does not have the power to remit the application with a direction that certain requirements of r.5.19 are met, as this is not a direction permitted by the Regulations.[9]

In circumstances where a subsequent nomination of the same position has been approved, the Tribunal must still carry out a review of the nomination refusal decision and exercise its powers in one of these ways (assuming a valid application for review has been made). There is no express prohibition in the Regulations on multiple nominations of a particular position, and no specific criterion for approval relating to previous nomination approvals. However, if another nomination in respect of the same position has already been approved, this may be relevant to certain criteria, for example the requirement for Direct Entry nominations that the application identifies a need for a paid employee. The Tribunal is not bound by any findings made in respect of a different nomination.

Nomination requirements

Applications made on or after 18 March 2018

An application by a 'person' (including a partnership or unincorporated association) (the nominator) for approval of a nominated position made on or after 18 March 2018 must meet a set of common requirements, as well as requirements that are specific to one of three streams: the Temporary Residence Transition stream, the Direct Entry stream, or the Labour Agreement stream.

[6] s.338(9) and r.4.02(4)(e), as amended by SLI 2012, No.82.
[7] s.347(2)(d) and r.4.02(5)(d).
[8] r.4.12. See also *Thuy Tien Hair Designs v MIBP* [2014] FCCA 2582 (Judge Emmett, 11 November 2014).
[9] The power to remit under s.349(2)(c) is limited to remitting with such directions or recommendations are permitted by the Regulations. No direction covering satisfaction of certain requirements in r.5.19 is so permitted.

If the applicable requirements are met, then the nomination must be approved, and if not, it must be refused.[10]

Application requirements

The application requirements for a nomination application are set out in r.5.19(2). The application must identify the particular visa subclass and stream to which the nomination relates, which must be one of the following: a Subclass 186 (Employer Nomination Scheme) visa in the Temporary Residence Transition stream, Direct Entry stream or the Labour Agreement stream; or a Subclass 187 (Regional Sponsored Migration Scheme) visa in the Temporary Residence Transition stream or the Direct Entry stream.[11] The nomination is only assessed against the stream that has been selected.[12]

The application must also identify the position, the occupation in relation to the position and a person in relation to the position (the 'identified person'); be made in accordance with the approved form; be accompanied by a fee; and include a written certification stating whether the nominator has engaged in conduct in relation to the nomination that constitutes a contravention of s.245AR(1).[13]

Finally, for applications made on or after 12 August 2018 only, the application must be accompanied by any nomination training contribution charge the nominator is liable for, and identify the annual turnover (within the meaning of the Migration (Skilling Australians Fund) Charges Regulations 2018) for the nomination.[14] These requirements were introduced in place of the training benchmark requirements for Temporary Residence Transition stream nominations and certain Direct Entry stream nominations. Section 140ZM of the Migration Act imposes a liability on a person to pay a nomination contribution charge in relation to certain prescribed nominations including a nomination of a position under r.5.19.[15] 'Nomination training contribution charge' is defined in s.5(1) of the Migration Act as charge imposed by s.7 of the Migration (Skilling Australians Fund) Charges Act 2018 (No 39, 2018), which imposes the charge payable under s.140ZM. The Migration (Skilling Australians Fund) Charges Regulations 2018 prescribes the amount charge applicable as $3000 for annual turnovers of less than $10 million, or otherwise $5000. There is no charge if the nomination relates to a Subclass 186 in the Labour Agreement stream, and identifies the occupation of minister of religion or religious assistant.

General requirements

Regulation 5.19(4) sets out general requirements that must be met for approval of a nomination made in any of the three streams. These are:

- **application requirements** – the application must be made in accordance with r.5.19(2);[16]
- **no adverse information** – either there is no adverse information known to Immigration about the nominator or a person associated with them or it is reasonable to disregard it;[17]
- **licencing, registration or membership** – if it is mandatory in the State or Territory in which the position is located to hold a particular licence, registration or membership of a

[10] r.5.19(3).
[11] r.5.19(2)(e).
[12] Item 129, Attachment C of Explanatory Statement to F2018L00262.
[13] In general terms, s.245AR(1) places prohibitions on a person asking for or receiving a benefit in return for the occurrence of a sponsorship related event. The term 'sponsorship-related event' is defined in s.245AQ of the Act, but relevantly includes such events as a person applying for approval of the nomination of a position in relation to an applicant (or proposed applicant) for a sponsored visa or the grant of such a visa. Both the Subclass 186 and Subclass 187 visas are defined as 'sponsored visas' under s.245AQ of the Act and r.5.19M of the Regulations.
[14] r.5.19(2)(fa) and (fb).
[15] Section 140ZM was inserted by the *Migration Amendment (Skilling Australians Fund) Act 2018* for nominations made on or after 12 August 2018: see item 16(3) of Schedule 1.
[16] r.5.19(4)(a).
[17] r.5.19(4)(b).

professional body to perform the tasks in the occupation, the identified person holds (or is eligible to hold) the licence, registration or membership at the time of application;[18]

- **compliance with laws** – the nominator has a satisfactory record of compliance with the laws of the Commonwealth and of each State or Territory in which the nominator operates a business and employs employees in the business, in relation to employment;[19]
- **payment of debts** (post 12 August 2018 nominations only) – any debt due by the nominator mentioned in s.140ZO has been paid in full.[20] Section 140ZO provides for an amount of a nomination training contribution charge or a penalty in relation to the underpayment of such a charge to be debts due to the Commonwealth.
- **stream specific requirements** – the nomination must meet the additional requirements for approval specific to the stream to which the nomination relates, i.e. the requirements in r.5.19(5) for the Temporary Residence Transition stream, the requirements in r.5.19(9) for the Direct Entry stream, or the requirements in r.5.19(14) for the Labour Agreement stream.[21]

Temporary Residence Transition stream – additional requirements

The Temporary Residence Transition stream allows for nominations in respect of nominees who hold or have held a Subclass 457 visa in the standard business sponsorship stream or a Subclass 482 visa in the Medium-term stream and have worked in the position for at least three out of the four years before the time of application. The specific requirements applicable to this stream are set out in r.5.19(5).

These requirements are:

- **visa held by identified person –** at the time of application, the identified person must hold a Subclass 457 visa granted on the basis of satisfying the standard business sponsorship stream (cl.457.223(4)); or a Subclass 482 visa in the Medium-term stream (or the Short-term stream for persons identified in a legislative instrument made for r.5.19(5)(a)(iii));[22] or, if the last substantive visa held was one of those visas, a bridging visa granted on the basis that they are an applicant for one of those visas or a Subclass 186 or 187 visa;[23]
- **occupation –** the occupation must be:
  - listed in ANZSCO and have the same 4-digit occupation unit group code as the occupation for which the identified person's most recent Subclass 457 or Subclass 482 visa was granted;[24]
  - an occupation specified in an instrument made under r.5.19(8) and in force at time of application, and apply to the identified person in accordance with the instrument, unless an instrument made under r.5.19(8) exempts the identified person;[25]
- **information about performance of occupation tasks –** no information is known to Immigration indicating that the identified person is not genuinely performing the tasks of the occupation as specified in ANZSCO, or it is reasonable to disregard the information;[26]

[18] r.5.19(4)(c). This is a new requirement applying to nomination applications made on or after 18 March 2018.
[19] r.5.19(4)(d).
[20] r.5.19(2)(da), as inserted by the Migration Amendment (Skilling Australians Fund) Regulations 2018 (F2018L01093).
[21] r.5.19(4)(e) to (g).
[22] See the 'TransitionalTRT' tab of the Register of Instruments: Business Visas for the relevant instrument, IMMI 18/052. This instrument specifies persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 which was subsequently granted.
[23] See r.5.19(5)(a). However, the ability to rely on a bridging visa associated with a Subclass 482 visa in the Short-term stream is limited to persons specified in an instrument under r.5.19(5)(a)(iii), i.e. Subclass 457 holders or applicants as at 18 April 2017.
[24] r.5.19(5)(b).
[25] r.5.19(5)(c). See the 'Occ187' tab of the Register of Instruments: Business Visas for the relevant instrument.

- **employment of Subclass 457 or 482 visa holder and time period for which visa has been held (not including persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 that was subsequently granted)[27] -** in the 4 years immediately before the application was made:
    - the identified person held one or more of a Subclass 457 visa in the standard business sponsorship stream, a Subclass 482 visa in the medium-term stream, or for persons specified in a legislative instrument made under r.5.19(5)(a)(iii),[28] a Subclass 482 visa in the short-term stream, for at least 3 years;[29]
    - the identified person was employed in the position to which the above visa or visas were granted for at least 3 years (not including periods of unpaid leave) on a full-time basis in Australia, unless r.5.19(5)(g) applies (see below dot point);[30]
    - if r.5.19(5)(g) applies, i.e. the visas were granted in relation to an occupation specified in an instrument under r.2.72(13), the identified person was employed in the occupation for a total of at least 3 years (not including unpaid leave periods);[31]
- **employment of Subclass 457 or 482 visa holder and time period for which visa has been held for persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 that was subsequently granted[32] –** in the 3 years immediately before the application was made:
    - the identified person held one or more of a Subclass 457 visa in the standard business sponsorship stream, a Subclass 482 visa in the medium-term stream, or for persons specified in a legislative instrument made under r.5.19(5)(a)(iii),[33] a Subclass 482 visa in the short-term stream, for at least 2 years;[34]
    - the identified person was employed in the position to which the above visa or visas were granted for at least 2 years (not including periods of unpaid leave) on a full-time basis in Australia, unless r.5.19(5)(g) applies (see below dot point);[35]
    - if r.5.19(5)(g) applies, i.e. the visas were granted in relation to an occupation specified in an instrument under r.2.72(13), the identified person was employed in the occupation for a total of at least 2 years (not including unpaid leave periods);[36]
- **nominator's requirements –** the nominator:[37]
    - was the standard business sponsor who last identified the identified person in an approved nomination; and

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[26] r.5.19(5)(d).
[27] Under r.5.19(6), these persons are specified for r.5.19(5)(e), (f) and (g) as having different time period requirements by IMMI 18/052. See the 'TransitionalTRT' tab of the Register of Instruments: Business Visas for this instrument.
[28] That is, persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 which was subsequently granted. See the 'TransitionalTRT' tab of the Register of Instruments: Business Visas for the relevant instrument, IMMI 18/052.
[29] r.5.19(5)(e).
[30] r.5.19(5)(f).
[31] r.5.19(5)(g). See the 'ExemptOccs' tab of the Register of Instruments: Business Visas for the relevant instrument. The occupations include Chief Executives, Corporate General Managers, and various medical professionals. It is only necessary for these persons to have worked in the occupation rather than a particular position.
[32] See IMMI 18/052, made under r.5.19(6). The qualifying period for these persons (2 years out of the previous 3) reflects the Temporary Residence Transition stream arrangements before 18 March 2018.
[33] That is, persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 which was subsequently granted. See the 'TransitionalTRT' tab of the Register of Instruments: Business Visas for the relevant instrument, IMMI 18/052.
[34] r.5.19(5)(e).
[35] r.5.19(5)(f).
[36] 5)(g). See the 'ExemptOccs' tab of the Register of Instruments: Business Visas for the relevant instrument. The occupations include Chief Executives, Corporate General Managers, and various medical professionals. It is only necessary for these persons to have worked in the occupation rather than a particular position.
[37] r.5.19(5)(h).

- is actively and lawfully operating a business in Australia;

- **training requirements (pre 12 August 2018 nominations only) –** during the period of the nominator's most recent standard business sponsorship approval, the nominator fulfilled any commitments regarding its training requirements and complied with sponsorship obligations relating to training as a standard business sponsor, unless it is reasonable to disregard those requirements;[38]

- **genuine need –** unless the occupation is exempt,[39] the application identifies a need, and there is a genuine need, for the identified person to be employed in the position under the nominator's direct control;[40]

- **employment –** the following requirements must be met:

  - the identified person will be employed on a full-time basis in the position for at least 2 years (unless the occupation is exempt)[41] and the terms and conditions will not expressly exclude the possibility of extending the employment;[42]

  - the nominator's business has the capacity to employ the identified person for at least 2 years and to pay the person at least the annual market salary rate for the occupation each year, and this salary rate is not less than the temporary skilled migration income threshold;[43]

  - the nominator has provided information required by the Minister for the purposes of the requirements in r.5.19(5)(k) to (n) i.e. each of the above two requirements, as well as the genuine need for the position;[44]

  - there is no information known to Immigration that indicates the employment conditions (other than earnings) will be less favourable than those that apply, or would apply, to an Australian citizen or permanent resident performing equivalent work at the same location, or it is reasonable to disregard that information;[45] and

  - the requirements in r.2.72(15) are met.[46] This regulation contains several requirements which must be met where the nominee's annual earnings in relation to the nominated occupation will not be at least the amount specified in the legislative instrument (at the time of writing, IMMI 18/033 specified this as $250,000),[47] including that the annual market salary rate is not less than the temporary skilled migration income threshold.

[38] r.5.19(5)(i). This requirement was repealed for nominations made on or after 12 August 2018 by the Migration Amendment (Skilling Australians Fund) Regulations 2018 (F2018L01092). Clause 7602(6) as inserted by item 43 of Schedule 1 of these Regulations preserved the need to comply with them for nominations made before this date. Note however that for nominators whose most recent standard business sponsorship under r.2.59 was approved on or after 18 March 2018, there would not be any obligations nor commitments made by the nominator/sponsor in relation to meeting the training requirement for which r.5.19(5)(i) must be assessed against, due to the criteria under rr.2.59(d) and (e) being repealed from 18 March 2018 with the effect that the training requirement no longer applied to all live applications for standard business sponsorship approval from that date. In such circumstances, it would appear open to disregard the training requirement or find that it is met. See for example, *Ozzy Fortune Group Pty Ltd (Migration)* [2019] AATA 735 (Member Skaros, 10 April 2019).
[39] r.5.19(7) provides this does not apply if the occupation is specified in an instrument under r.2.72(13). See the 'ExemptOccs' tab of the Register of Instruments: Business Visas for the relevant instrument. The occupations include Chief Executives, Corporate General Managers, and various medical professionals.
[40] r.5.19(5)(j), (k).
[41] r.5.19(7) provides this does not apply if the occupation is specified in an instrument under r.2.72(13). See the 'ExemptOccs' tab of the Register of Instruments: Business Visas for the relevant instrument. The occupations include Chief Executives, Corporate General Managers, and various medical professionals.
[42] r.5.19(5)(l), (m).
[43] r.5.19(5)(n).
[44] r.5.19(5)(q).
[45] r.5.19(5)(p).
[46] r.5.19(5)(o).
[47] See the 'TSMIT' tab of the Register of Instruments: Business Visas for the relevant instrument.

Direct Entry stream – additional requirements

The Direct Entry stream is limited to applicants who are nominated in relation to an occupation specified in a legislative instrument in force at the time the application is made. On top of the general requirements in r.5.19(4), all nominations in this stream must meet a number of requirements in r.5.19(9). Those which are nominations for Subclass 186 visas must also meet r.5.19(10), while those which are occupations for Subclass 187 visas must also meet r.5.19(12).

The r.5.19(9) requirements are:

- **actively and lawfully operating –** the nominator's business must be both actively and lawfully operating in Australia;[48]
- **business activities relating to labour hire** – if the nominator's business activities relate to hiring of labour to other unrelated businesses, the position must be within the nominator's business and not for hire to unrelated businesses,[49]
- **genuine need –** the application identifies a need, and there is a genuine need, for the identified person to be employed in the position under the nominator's direct control,[50]
- **employment –** the following requirements must be met:
    - the identified person will be employed on a full-time basis in the position for at least 2 years and the terms and conditions will not expressly exclude the possibility of extending the employment;[51]
    - the nominator's business has the capacity to employ the identified person for at least 2 years and to pay the person at least the annual market salary rate for the occupation each year;[52]
    - there is no information known to Immigration that indicates the employment conditions (other than earnings) will be less favourable than those that apply, or would apply, to an Australian citizen or permanent resident performing equivalent work at the same location, or it is reasonable to disregard that information;[53]
    - the requirements in r.2.72(15) are met.[54] This regulation contains several requirements which must be met where the nominee's annual earnings in relation to the nominated occupation will not be at least the amount specified in the legislative instrument (at the time of writing, IMMI 18/033 specified this as $250,000),[55] including that the annual market salary rate is not less than the temporary skilled migration income threshold; and
    - the requirements relating to the occupation set out in r.5.19(10) or r.5.19(12) are met.[56]

Nominations which relate to a Subclass 186 visa must also meet r.5.19(10), which provides:

- **occupation** - the tasks to be performed in the position will be performed in Australia and correspond to the tasks of an occupation specified in an instrument under r.5.19(11) and in

[48] r.5.19(9)(a).
[49] r.5.19(9)(b).
[50] r.5.19(9)(c) and r.5.19(9)(d).
[51] r.5.19(e) and r.5.19(9)(f).
[52] r.5.19(9)g) and r.5.19(9)(h).
[53] r.5.19(9)(i).
[54] r.5.19(5)(o).
[55] See the 'TSMIT' tab of the Register of Instruments: Business Visas for the relevant instrument.
[56] r.5.19(9)(j)

force at the time the application is made, and the occupation applies to the identified person in accordance with the instrument;[57] and

- **training requirements (for pre August 2018 nominations only)** – for businesses in operation for at least 12 months, the nominator fulfilled the requirements for the training of Australian citizens and permanent residents specified in a legislative instrument, or for those in operation for less than 12 months, the nominator has an auditable plan for fulfilling the requirements specified in this legislative instrument.[58]

Nominations which relate to a Subclass 187 visa must meet 5.19(12), which requires:

- **regional Australia** – the position is located at a place in regional Australia, the business operated by the nominator is located at that place, and the position cannot be filled by an Australian citizen or permanent resident who is living in, or would move to, the local area concerned.[59] Regional Australia is a part of Australia specified in a legislative instrument;[60]
- **occupation** – the tasks to be performed in the position will be performed in Australia and correspond to the tasks of an occupation specified in an instrument under r.5.19(13) and in force at the time the application is made, and the occupation applies to the identified person in accordance with the instrument;[61]
- **certification by regional body** – a specified body located in the State or Territory of the position and responsible for the local area of the position has certified a number of matters.[62]

Labour Agreement stream – additional requirements

The Labour Agreement stream allows employers to source skilled overseas workers in accordance with labour agreements with the Commonwealth, where there is a demonstrated need that cannot be met by the Australian labour market and standard visa programs are not available.[63] Nominations in relation to a Subclass 186 visa in the Labour Agreement Stream must, in addition to meeting the requirements in r.5.19(4), meet a number of requirements in r.5.19(14).

For further advice in relation to this stream, please contact MRD Legal Services.

Applications made on or after 1 July 2012 but before 18 March 2018

An application by a 'person' for an approval of a nominated position lodged on or after 1 July 2012 must be made in accordance with the approved form[64] and must be accompanied by the relevant fee.[65] The nominator may be an individual, a corporate body, partnership or unincorporated association.

The employer nomination scheme applying to applications made on or after 1 July 2012 but before 18 March 2018 is divided into the Temporary Residence Transition nomination stream and the Direct

[57] r.5.19(10)(a) and (b). See the 'Occ186 442 457 & Noms' tab of the Register of Instruments: Business Visas for the relevant instrument.
[58] r.5.19(10)(c). See the 'Training' tab of the Register of Instruments: Business Visas for the relevant instrument. This requirement was repealed for nominations made on or after 12 August 2018 by F2018L01092. Clause 7602(6) as inserted by item 43 of Schedule 1 of these Regulations preserved the need to comply with them for nominations made before this time.
[59] r.5.19(12)(a)-(c).
[60] r.5.19(16). See the 'RegAustpost180318' tab of the Register of Instruments: Business Visas for the relevant instrument.
[61] r.5.19(12)(d) and (e). See the 'Occ187' tab of the Register of Instruments: Business Visas for the relevant instrument.
[62] r.5.19(f).
[63] Explanatory Statement to F2018L00262, p.1.
[64] The approved form is Form 1395, see r.5.19(2)(a) inserted by SLI 2012 No.82. This was amended to refer to Form 1395 (Internet) by SLI 2013, No.32 with effect from 23 March 2013.
[65] The fee is set out in r.5.37. See r.5.19(2)(b) inserted by SLI 2012 No.82.

Entry nomination stream, which have different requirements that must be satisfied. The Minister, or the Tribunal on review, must refuse a nomination if neither set of stream requirements are met.[66]

Temporary Residence Transition nomination stream – r.5.19(3)

A Temporary Residence Transition nomination allows a standard business sponsor to nominate the holder of a Subclass 457 visa for employment in a specified occupation that has been carried out by the visa holder for at least two years of the preceding three year period.[67] The employment must be within the nominator's own businesses unless the Subclass 457 visa was granted under special provisions which allowed the holder to work as an independent contractor.[68] The requirements for approval of a Temporary Residence Transition nomination, which vary slightly depending on whether the application was made before or on or after 1 July 2013, are set out in r.5.19(3).[69]

These requirements are:

- **form, fee and declaration** - the nomination is made using the approved form and accompanied by the prescribed fee,[70] and, *for nomination applications made on or after 14 December 2015*, includes a written certification by the nominator stating whether or not the nominator has engaged in conduct, in relation to the nomination, that constitutes a contravention of s.245AR(1) of the Act;[71]
- **Subclass 457 visa holder and occupation** - the nomination identifies:
  - a person who holds a Subclass 457 visa that was granted on the basis of satisfying the standard business sponsorship stream (cl.457.223(4)); and
  - an occupation which is listed in ANZSCO and has the same occupation unit group code as that carried out by the Subclass 457 visa holder (see discussion below);[72]
- **nominator's requirements** - the nominator:
  - is, or was, the standard business sponsor who last nominated the Subclass 457 visa holder in a nomination;[73]
  - is actively and lawfully operating a business in Australia (see discussion below);[74] and
  - *for nominations made on or after 1 July 2013*, did not satisfy standard business sponsorship criteria in the most recent sponsorship approval on the basis that they were lawfully operating a business outside Australia and did not lawfully operate a business in Australia;[75]
- **employment of Subclass 457 visa holder** - either:

[66] r.5.19(5) inserted by SLI 2012, No.82.
[67] See the Explanatory Statement to SLI 2012, No.82 at 30 and the Explanatory Statement to SLI 2013 No.146 at 20.
[68] See the Explanatory Statement to SLI 2012, No.82 at 30.
[69] As inserted by SLI 2012, No.82.
[70] r.5.19(3)(a)(i) and r.5.19(2)(a) and (b).
[71] r.5.19(3)(a)(i) and r.5.19(2)(aa), as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No. 242) and applying to an application for a nomination made after commencement (14 December 2015). In general terms, s.245AR(1) places prohibitions on a person asking for or receiving a benefit in return for the occurrence of a sponsorship related event. The term 'sponsorship-related event' is defined in s.245AQ of the Act, but relevantly includes such events as a person applying for approval of the nomination of a position in relation to an applicant (or proposed applicant) for a sponsored visa or the grant of such a visa. Both the Subclass 186 and Subclass 187 visas are defined as 'sponsored visas' under s.245AQ of the Act and r.5.19M of the Regulations.
[72] r.5.19(3)(a)(ii) and (iii).
[73] r.5.19(3)(b)(i). This must be in a nomination that was made under s.140GB of the Act, or rr.1.20G or 1.20GA as in force immediately before 14 September 2009, see r.5.19(3)(b)(i) as inserted by SLI 2012 No.82.
[74] r.5.19(3)(b)(ii).
[75] r.5.19(3)(b)(iii) as inserted by Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146). Regulation 5.19(b)(ii) does not exclude nominators who were an overseas business when granted approval as a standard business sponsor and have since been actively and lawfully operating a business in Australia before applying for approval under r.5.19. The 1 July 2013 introduction of 5.19(3)(b)(iii) reflects the policy intention that an overseas business should not be able to nominate foreign workers for permanent residence in Australia (see the Explanatory Statement to SLI 2013 No.146 at 68).

- in the 3 years immediately before the nominator made the application, the Subclass 457 visa holder:
    - has been employed in the position for a total of at least two years in the three years immediately before the nominator made the application, and the employment in that position was full-time and undertaken in Australia;[76] and
    - *if the associated visa application was made on or after 24 November 2012*, held one or more Subclass 457 visas for a total of at least two years;[77] and
- the holder will be employed on a full-time basis in the position for at least two years and the terms and conditions of employment will not expressly exclude the possibility of extending the employment;[78]

or

- the Subclass 457 visa holder holds the visa on the basis of being identified in a nomination of an occupation that is specified in the relevant instrument; the nominator nominated that occupation; and the Subclass 457 visa holder has been employed in that occupation for a total of at least two years in the three years immediately before the nominator made the application;[79]

- **terms and conditions** - the terms and conditions of the employment for the position will be no less favourable than those provided to an Australian citizen or permanent resident performing equivalent work in the same workplace in the same location;[80]
- **training commitments** - during the period of the nominator's most recent standard business sponsorship approval, the nominator fulfilled any commitments regarding its training requirements and, for nominations made on or after 1 July 2013, complied with sponsorship obligations relating to training as a standard business sponsor, unless it is reasonable to disregard such non-compliance;[81]
- **no adverse information** - either there is no adverse information known to Immigration about the nominator or an associated person or it is reasonable to disregard such information (see discussion below);[82]
- **compliance with laws** - the nominator has a satisfactory record of compliance with the laws of the Commonwealth, and of each State or Territory in which the applicant operates a business and employs employees in the business, relating to workplace relations (see discussion below);[83]

[76] r.5.19(3)(c)(i)(A) and (B). This does not include any period of unpaid leave,
[77] r.5.19(3)(c)(i)(A)(I) inserted by Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256).
[78] r.5.19(3)(d) applies if an applicant satisfies r.5.19(3)(c)(ii)(A), inserted by SLI 2012 No.82.
[79] r.5.19(3)(c)(ii)(A),(B), (C). See the 'Occ-Ex' tab of the Register of Instruments: Business Visas for the relevant instrument.
[80] r.5.19(3)(e). For a discussion on the requirements of the very similarly worded requirement in r.2.72 (temporary work nominations) see the MRD Legal Services Commentary Nomination and Approval of an Occupation for Subclass 457 – Regulation 2.72 and 2.73.
[81] r.5.19(3)(f). Note however that for nominators whose most recent standard business sponsorship under r.2.59 was approved on or after 18 March 2018, there would not be any obligations nor commitments made by the nominator/sponsor in relation to meeting the training requirement for which r.5.19(3)(f) must be assessed against, due to the criteria in rr.2.59(d) and (e) being repealed from 18 March 2018 with the effect that the training requirement no longer applied to all live applications for standard business sponsorship approval from that date. In such circumstances, it would appear open to either disregard the training requirement or find that it is met. See for example, *Ozzy Fortune Group Pty Ltd (Migration)* [2019] AATA 735 (Member Skaros, 10 April 2019).
[82] r.5.19(3)(g). For the purpose of this provision the terms 'adverse information' and 'associated with' are defined r.1.13 and r.1.13B (previously r.2.57(3) and r.2.57(2)). Please refer to the MRD Legal Services Commentary: Nomination and Approval of an Occupation for Subclass 457 – Regulation 2.72 and 2.73 for further discussion on this requirement.
[83] r.5.19(3)(h).

- **genuine need** – *for nomination applications made on or after 1 July 2017*, the nominator has a genuine need to employ the person, as a paid employee, to work in the position under the nominator's direct control, and identifies that need in the application for approval.[84]

Direct Entry nomination stream – r.5.19(4)

The Direct Entry nomination stream may be satisfied by a nominator who is lawfully operating a business in Australia and who has identified a need to employ a paid employee in a position for at least two years.[85] The tasks to be performed in the position must correspond to those of a specified occupation and the nominator must meet relevant training requirements, unless the position is located in regional Australia, and the business is operated locally and there is a genuine need for the employment which cannot be filled by an Australian living in the same local area.[86] The requirements for approval in the Direct Entry nomination stream are set out in r.5.19(4).[87] It requires:

- **form and fee** - the nomination is made using the approved form and accompanied by the prescribed fee;[88] and, *for nomination applications made on or after 14 December 2015*, includes a written certification by the nominator stating whether or not the nominator has engaged in conduct, in relation to the nomination, that constitutes a contravention of subsection 245AR(1) of the Act;[89]
- **identified need** - the nomination identifies a need for the nominator to employ a paid employee to work in the position under the nominator's direct control and, *for nomination applications made on or after 1 July 2017*, identifies a particular person in relation to this need (see discussion below);[90]
- **actively and lawfully operating** - the nominator is actively and lawfully operating a business in Australia and directly operates the business (see discussion below);[91]
- **labour hire restrictions** - if the nominator's business activities relate to the hiring of labour to other unrelated business, the position is within the business activities of the nominator and not for hire to other unrelated businesses;[92]
- **2 years minimum full time employment** - the employee will be employed on a full time basis in the position for at least two years and the terms and conditions of the employment will not expressly exclude the possibility of extending the period of employment;[93]

[84] r.5.19(3)(a)(iv) and r.5.19(3)(i), as inserted by Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017 (F2017L00816) and applying to an application for a nomination made after commencement (1 July 2017). The effect of this amendment is that an employer nomination for the purposes of a Direct Entry nomination stream must establish that there is a genuine need for the nominator to employ an identified person in the nominated position, rather than any paid employee.
[85] See the Explanatory Statement to SLI 2012, No.82 at 30.
[86] See the Explanatory Statement to SLI 2012, No.82 at 30.
[87] As inserted by SLI 2012, No.82.
[88] r.5.19(4)(a)(i) and r.5.19(2)(a) and (b).
[89] r.5.19(4)(a)(i) and r.5.19(2)(aa), as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No. 242) and applying to an application for a nomination made after commencement (14 December 2015). In general terms, s.245AR(1) places prohibitions on a person asking for or receiving a benefit in return for the occurrence of a sponsorship related event. The term 'sponsorship-related event' is defined in s.245AQ of the Act, but relevantly includes such events as a person applying for approval of the nomination of a position in relation to an applicant (or proposed applicant) for a sponsored visa or the grant of such a visa. Both the Subclass 186 and Subclass 187 visas are defined as 'sponsored visas' under s.245AQ of the Act and r.5.19M of the Regulations.
[90] r.5.19(4)(a)(ii). This subparagraph was amended by F2017L00816, for nominations made on or after 1 July 2017, to refer to a need to employ *an identified person* as a paid employee, not just a need for a paid employee. This change, and related changes to r.5.19(4)(h), cl.186.233 and cl.187.233, were intended to avoid the possibility of a nominator having a nomination approved without knowing or stating the intended employee, a situation which could result in migration fraud: see Explanatory Statement to F2017L00816, p.43.
[91] r.5.19(4)(b).
[92] r.5.19(4)(c).
[93] r.5.19(4)(d).

- **terms and conditions** - the terms and conditions of employment applicable to the position will be no less favourable than those provided to an Australian citizen or permanent resident performing equivalent work in the same workplace;[94]
- **no adverse information** - there is no adverse information known to Immigration about the nominator or associated person or it is reasonable to disregard such information (see discussion below);[95]
- **compliance with laws** - the nominator has a satisfactory record of compliance with the laws of the Commonwealth, and of each State or Territory in which the applicant operates a business and employs employees in the business, relating to workplace relations (see discussion below);[96]
- **tasks, training requirements, location and position** - either:
    - *for non-regional applicants*[97]:
        - the tasks to be performed will be performed in Australia, correspond to those of an occupation specified in the relevant instrument,[98] and the occupation is applicable to the nominee in accordance with the specification of the occupation;[99] and
        - certain training requirements are met, specifically either*:*
            - if the nominator's business has operated for **at least 12 months**, the requirements for the training that are specified by the Minister in an instrument are met;
            - or if the nominator's business has operated for **less than 12 months**, the nominator has an auditable plan for meeting the requirements specified in the same instrument;[100] and
        - *for nomination applications made on or after 1 July 2017* there is a genuine need for the nominator to employ the person identified in the application (per 5.19(4)(a)(ii)) as a paid employee, to work in the position under the nominator's direct control;[101]

or

[94] r.5.19(4)(e). For a discussion on the requirements of the very similarly worded requirement in r.2.72 (temporary work nominations) see the MRD Legal Services Commentary Nomination and Approval of an Occupation for Subclass 457 – Regulation 2.72 and 2.73.
[95] r.5.19(4)(f).
[96] r.5.19(4)(g).
[97] Although r.5.19(4)(h) (i) and (ii) are expressed in the alternative, in practice only an applicant who has paid the non-regional fee required by r.5.37(3) will be able to satisfy r.5.19(4)(h)(i); and only applications in respect of positions located in regional Australia will be able to satisfy r.5.19(4)(h)(ii). For further discussion, see below. Note that, as a result of an apparent drafting oversight, r.5.19(4)(h)(i) is worded as requiring nomination applications that were lodged before 1 July 2017 to satisfy 'both', rather than 'all', of the criteria in r.5.19(4)(h)(i)(A), (AAA) and (B). This was rectified for nominations made after 1 July 2017 by the substitution of 'all' instead of 'both' when (AA) was inserted by F2017L00816. However the preferable approach would appear to be that r.5.19(4)(h)(i) should be read as requiring nomination applications lodged before 1 July 2017 to satisfy 'all' of the criteria in r.5.19(4)(h)(i)(A), (AAA) and (B) in order to meet this first alternative, by operation of the common law 'slip rule'.
[98] r.5.19(4)(h)(i)(A). For the relevant instrument specified for the purpose of r.5.19(4)(h)(i)(A), see the 'Occ' tab in the Register of Instruments: Business Visas.
[99] r.5.19(4)(h)(i)(AAA) inserted by the Migration Amendment (Specification of Occupation) Regulations 2017 (F2017L00818) for all live nomination applications. This additional requirement is intended to allow for specification of requirements in addition to just classes of occupation, such as the circumstances in which the occupation will be undertaken or the circumstances in which the person is to be employed in the position, as reflected in r.5.19(4A), also inserted by F2017L00818.
[100] r.5.19(4)(h)(i)(B). For the relevant instrument specified for these purposes see the 'Training' tab in the Register of Instruments: Business Visas.
[101] r.5.19(4)(h)(i)(AA) inserted by F2017L00816 for applications for approval of nominations made on or after 1 July 2017.

- *for regional applicants*[102] all of the following are satisfied:
    - the position is located in 'regional Australia' and the business operated by the nominator is located at that place,[103]
    - there is a genuine need to employ a paid employee to work in the position or, *for nomination applications made on or after 1 July 2017*, a genuine need to employ the person identified in the nomination application as a paid employee in the position [104]
    - the position cannot be filled by an Australian citizen or permanent resident living in the same local area,[105]
    - either:
        - *for applications for approval made prior to 1 July 2015,* the tasks to be performed correspond with certain ANZSCO requirements (skill level 1, 2, or 3),[106] or
        - *for applications for approval made on or after 1 July 2015*, the tasks to be performed in the position correspond to the tasks of an occupation specified by the Minister in an instrument and the occupation is applicable to the person identified in accordance with the specification of the occupation;[107] and
    - a specified Regional Certifying Body located in the same State or Territory as the position has provided advice to the Minister (see discussion below) about whether:
        - the terms and condition of employment are no less favourable than those provided to Australian citizens or permanent residents performing equivalent work in the same workplace;
        - there is a genuine need for the nominator to employ the person identified as a paid employee to work in the position under the nominator's direct control; and

[102] Although r.5.19(4)(h) (i) and (ii) are expressed in the alternative, in practice only an applicant who has paid the non-regional fee required by r.5.37(3) will be able to satisfy r.5.19(4)(h)(i); and only applications in respect of positions located in regional Australia will be able to satisfy r.5.19(4)(h)(ii). For further discussion, see below.
[103] r.5.19(4)(h)(ii)(A) and (E). 'Regional Australia' is defined to mean a part of Australia specified in an instrument: r.5.19(7). For the relevant instrument, see the 'RegAustpost010712' tab in the Register of Instruments: Business Visas.
[104] r.5.19(4)(h)(ii)(B), amended by F2017L00818 for nomination applications made on or after 1 July 2017. This requirement, along with an amendment to 5.19(4)(a)(ii) is an integrity measure intended to link the nomination to a particular person, rather than allow a nomination to be approved without having to identify the person who is to be employed in the position: see Explanatory Statement to F2017L00816, p.44.
[105] r.5.19(4)(h)(ii)(C).
[106] r.5.19(4)(h)(ii)(D). Note that for occupations made prior to 1 July 2015, r.5.19(4)(h)(ii)(D) did not provide power for the Minister to specify occupations in an instrument and all that is required for these applications is that the occupation is of a certain skill level. The relevant instrument specifying occupations for the purposes of r.5.19(4)(h)(ii)(D) will have no effect in these cases.
[107] r.5.19(4)(h)(ii)(D) as amended by Migration Legislation Amendment (2015 Measures No.2) Regulation 2015 (SLI 2015, No.103) and applying to applications for approval made on or after 1 July 2015. For the instrument specifying relevant occupations see the 'ExmtSkillsAgeEng186&187' tab in the Register of Instruments: Business Visas. Reg 5.19(4)(h)(ii)(DA) was added by F2017L00816. It requires the occupation to be performed in the position to also meet any additional specifications made in the relevant instrument. These could be, for example, related to the circumstances in which the occupation is undertaken. There were no transitional arrangements included in the amendment regulations, indicating that the new (DA) applies to all live nomination applications. However, it will have no practical application for nominations made prior to 1 July 2015, as the applicable requirement then in 5.19(4)(h)(ii)(D) was for the occupation to be of a particular skill level, and did not provide for any specification of occupations.

- the position cannot be filled by an Australian citizen or permanent resident living in the same area.[108]

Key issues

Tribunal's powers – multiple nominations

In circumstances where the Tribunal is reviewing refusal of a nomination and a subsequent nomination of the same position has been approved, the tribunal must still carry out a review of the nomination refusal decision (assuming a valid application for review has been made) and exercise its powers to either affirm the refusal decision or set it aside and substitute a new decision that the nomination is approved. There is no express prohibition in the Regulations on multiple nominations of a particular position, and no specific criterion for approval relating to previous nomination approvals. However, if another nomination in respect of the same position has already been approved this may be relevant to certain criteria, for example the requirement for pre 18 March 2018 Direct Entry nominations that the application identifies a need for a paid employee, or the requirement for a genuine need for the position for post 18 March 2018 Direct Entry and Temporary Residence Transition nominations.[109] Note that the Tribunal is not bound by any findings made in respect of a different nomination.

Changing nomination stream

Nominations made before 18 March 2018

There doesn't appear, in the terms of r.5.19, to be any restriction on a nominator who has applied on the basis of satisfying the requirements of one stream claiming and being found to meet the requirements of the other stream.

However, there are different application fees payable for applications made in the Temporary Residence Transition stream depending on whether the position is located in regional Australia, and in the Direct Entry stream depending on whether the application seeks approval in accordance with r.5.19(4)(h)(i) or r.5.19(4)(h)(ii), again relating to whether the position is in regional Australia.[110] As a result, there may be in practice a restriction on changing the basis of the nomination where that would mean the application was not 'accompanied by the fee mentioned in r.5.37', as required by r.5.19(2). For example, where a nomination in the Direct Entry stream is made initially on the basis r.5.19(4)(h)(ii) is met, for which no fee is payable, if it is found instead that the terms of r.5.19(4)(h)(i) are met, it may not be open to a decision-maker to approve the nomination, as it's unlikely the applicable fee in r.5.37 would have accompanied the application.

Note also that the basis on which a nomination is approved is also relevant to associated visa applications, such that prescribed criteria for the grant of a visa may not be met if a nomination is approved on a different basis than initially made.[111]

[108] r.5.19(4)(h)(ii)(F). For the instrument specifying relevant bodies see the 'RegAustpost010712' tab in the Register of Instruments: Business Visas.
[109] r.5.19(4)(a)(ii) before 18 March 2018, and r.5.19(5)(k) and (9)(d) after 18 March 2018.
[110] r.5.37.
[111] Note that from 1 July 2017, Subclass 186 and 187 visa applicants may seek a refund of the first instalment of a visa application fee where a nomination sought to meet the requirements of r.5.19(3) when it was more likely that the requirements of r.5.19(4) would have been met, or vice versa: r.2.12F(3B) inserted by F2017L00816.

Whether a decision maker is required to consider an application against the requirements of both streams and/or against alternative requirements within a stream, will depend on the claims and evidence put forward by an applicant in the individual case. Importantly, the Minister, or the tribunal on review, must refuse a nomination if neither set of stream requirements are met.[112]

Nominations made on or after 18 March 2018

For these nominations, r.5.19 provides for three mutually exclusive streams. The nominator is required to select the appropriate stream and will only be assessed against that stream.[113] The Explanatory Statement states that the reason for this change was to reduce unnecessary processing work caused by requiring decision makers to assess both sets of criteria in order to refuse a nomination.[114]

Changing positions

For both the Temporary Residence Transition and Direct Entry streams in nominations made prior to 18 March 2018, an issue which may arise is whether the position, as this phrase appears in a number of requirements in r.5.19(3) and (4), is fixed to the position specified in the application made under r.5.19(2), or whether it can change without being fatal to the criteria under consideration. Position is not defined but the Courts have commented that it refers to a particular role, incorporating the duties and tasks involved in performing that role.[115]

At a broad level, r.5.19(1) provides that a nominator may apply for approval of the nomination of 'a' position. Each other relevant subregulation in r.5.19(2) and (3) refers to 'the' position. This suggests that the position is that specified in the application. The purpose of the Temporary Residence Transition stream to provide a visa pathway for Subclass 457 visa holders who have worked for an employer who then wants to offer them a permanent position also suggests continuity. In addition, for regional Direct Entry stream applicants, it is difficult to reconcile the presence of a criterion requiring a certifying body to advise the Ministers of a number of matters relevant to the position (r.5.19(4)(h)(ii)(F)) if this position could be changed. The Subclass 186 and 187 visa application requirements and criteria also suggest there is intended to be continuity in respect of the position. To validly apply for these visas, the applicant needs to make a declaration that the position to which their visa application relates is a position nominated under r.5.19 (items 1114B(3)(d) and 1114C(3)(d) of Sch 1). Various visa criteria link back to this declaration in that the position to which the visa application relates must be that which was declared (cls.186.223, 186.233, 187.223 and 187.233).

While there have been a number of structural changes to r.5.19 following the 18 March 2018 amendments, r.5.19(1) remains unchanged. Similarly, the application requirements in r.5.19(2)(b) that apply to each of the three streams in nominations made on or after 18 March 2018 continue to refer to 'the' position. Further, the occupation in relation to the position in both the Temporary Residence Transition and Direct Entry streams is fixed to occupations specified at the time of application, suggesting that the occupation and position is intended to be certain.

Therefore, considering the scheme as a whole, it appears that for both pre and post 18 March 2018 nominations the position is fixed to that nominated at the time of the nomination application. For pre 18 March 2018 nominations, the occupation, on the other hand, may have a degree of flexibility – see discussion in relation to the Temporary Residence Transition stream here, and the Direct Entry stream here and here.

[112] r.5.19(5) inserted by SLI 2012, No.82.
[113] r.5.19(2)(e).
[114] Item 129, Attachment C of Explanatory Statement to F2018L00262.
[115] *Singh v MIBP* [2017[FCAFC 105 at [7] (per Mortimer J).

Identification of need for an employee – Direct Entry stream (pre 18/3/18), Temporary Residence Transition stream (post 18/3/18) and Direct Entry stream (post 18/3/18)

For nominations in the Direct Entry Stream made on or after 1 July 2017 and before 18 March 2018, r.5.19(4)(a)(ii) requires that the application for approval 'identifies a need for the nominator to employ an identified person, as a paid employee, to work in the position under the nominator's direct control'.[116] This means, the employer nomination must identify a specific person to work in the nominated position rather than, as previously, any paid employee. The Minister must also be satisfied, in respect of different criteria, that there is a genuine need for the nominator to employ that person in the position under the nominator's direct control.[117] Similar requirements continue to apply to nominations made on or after 18 March 2018 in both the Temporary Residence Transition and Direct Entry steams,[118] subject to an exception for the former.[119]

For nominations made before 1 July 2017, r.5.19(4)(a)(ii) requires that the application for approval 'identifies a need for the nominator to employ a paid employee to work in the position under the nominator's direct control'. It is unclear whether this requirement is directed just at a statement to this effect or something of a more qualitative nature. The wording '*identifies* a need' arguably suggests more is required to meet this criterion than simply a statement or declaration that there is such a need. 'Identify' is defined as 'to recognise or establish as being a particular person or thing; attest or prove to be as claimed or asserted.'[120] On that view, which is consistent with that reflected in Departmental policy,[121] a decision maker would need be satisfied there is a genuine need on the part of the nominator to employ someone in the nominated position.[122] However, it could alternatively be argued that r.5.19(4)(a) as a whole is directed towards requirements for the application form / process of a more administrative nature, such that r.5.19(4)(a)(ii) could be met by a simple statement or certification of need. Support for this view can also be found in the contrast between the wording of r.5.19(4)(a)(ii) and, for example, r.5.19(4)(h)(ii)(B) (for applications relating to positions in regional Australia), which requires that there be a ***genuine need*** for the nominator to employ a paid employee to work in the position under the nominator's control – clearly requiring a qualitative assessment, and r.5.19(4)(d)(i), which requires satisfaction that the employee ***will be*** employed on a full-time basis in the position for at least two years. Given the uncertain scope of r.5.19(4)(a)(ii), if the existence of a need for the position is a critical issue on review, it may be more appropriately considered under r.5.19(4)(h)(ii)(B) (if applicable)[123] or r.5.19(4)(d)(i).

This criterion also requires a decision maker to be satisfied that the relationship between the nominator and the person filling the position will be one of employer and paid employee, and that this employee will work under the nominator's direct control. For example, depending on the facts of the

[116] As inserted by F2017L00816 and applying to an application for a nomination made after commencement (1 July 2017).
[117] r.5.19(4)(h)(i)(AA) (for non-regional positions) as inserted by and r.5.19(4)(h)(ii)(B) (for regional positions) as amended by F2017L00816 and applying to an application for a nomination made after commencement (1 July 2017).
[118] r.5.19(9)(c) and r.5.19(9)(d) as inserted by F2018L00262 and applying to an application for a nomination made after 18 March 2018.
[119] r.5.19(7) provides this does not apply if the occupation is specified in an instrument under r.2.72(13). See the 'ExemptOccs' tab of the Register of Instruments: Business Visas for the relevant instrument. The occupations include Chief Executives, Corporate General Managers, and various medical profession
[120] Macquarie Dictionary online (accessed 9 March 2017).
[121] Policy - Migration Regulations – Divisions – Div 5.3 – General > Approval of nominated positions (employer nomination) > Part C - Criteria applicable to Direct Entry stream nominations > Need for a paid employee > Applicability and overview (reissued 12/05/17 – last reissue prior to 1 July 2017).
[122] In *Bharaj Construction Pty Ltd v MIBP* [2016] FCCA 902 (Judge Barnes, 28 April 2016), the Court considered a similarly worded provision in respect of a pre-1 July 2012 RSMS nomination, i.e. "the employer nomination is made by an employer in respect of a need for a paid employee". Whilst on the one hand r.5.19(4)(a)(ii) does not appear to impose a different requirement beyond emphasising the requirement for an applicant to *identify* the need (unlike the pre-1 July 2012 version of r.5.19(2)(a) and (4)(a)), the wording of the criteria does differ slightly and the Tribunal should exercise caution in applying the reasoning of *Bharaj* to a post-1 July 2012 nomination.
[123] Note that for post 1 July 2017 nominations an equivalent requirement has also been inserted into the non-regional criteria, at r.5.19(4)(h)(i)(AA).

individual case, if the nominated position is to be filled by an independent contractor, then the requisite employer-employee relationship may not exist. A position in an entity associated with the nominating business but not within the nominating business itself, for example, may not be under the nominator's direct control.[124] However, the particular circumstances of the individual case must always be considered. See below for discussion of this requirement in the context of religious or other not-for-profit organisations.

Full-time employment for 2 years - Direct Entry Stream and Temporary Residence Transition Stream (pre and post 18 March 2018 nominations)

For nominations made before 18 March 2018, there is a requirement for applications under both the Direct Entry[125] and Temporary Residence Transition streams[126] that the person / visa holder 'will be employed on a full-time basis in the position for at least two years'. It would appear that, in deciding whether an employee will be employed on a full-time basis in the proposed position for at least 2 years, it is open to the Tribunal to consider whether the nominator's business has the financial resources to meet the wages costs for the proposed employment over the relevant period.[127]

This requirement continues to apply to nominations made on or after 18 March 2018 in the Direct Entry Stream[128] and Temporary Residence Transition Stream.[129] For these cases, there is an additional express requirement for the nominator's business to have the capacity to employ the identified person for at least 2 years.[130] This must be a capacity to pay them at least the annual market salary rate for the occupation each year. The annual market salary rate means the earnings an Australian citizen or Australian permanent resident earns or would earn for performing equivalent work on a full-time basis for a year in the same workplace at the same location: r.1.03.

Identification of visa holder and occupation – Temporary Residence Transition stream (pre and post 18 March 2018 nominations)

Nominations made before 18 March 2018

For nominations made before 18 March 2018 in the Temporary Residence Transition stream, r.5.19(3)(a)(ii) and (iii) require that the application for approval identifies both:

- a person who holds a Subclass 457 visa that was granted on the basis of satisfying the requirements of the standard business sponsorship stream (i.e. cl.457.223(4)); and

[124] Departmental policy states that, based on r.5.19(4)(a)(ii) and r.5.19(4)(b)(ii), a nominator *cannot* nominate a position that exists within the business activities of entities associated or related to them under the Direct Entry stream: Policy - Migration Regulations – Divisions – Div 5.3 – General > Approval of nominated positions (employer nomination) > 10. Part C - Criteria applicable to Direct Entry stream nominations > [10.2] The nominated position is under the direct control of the nominator > [10.2.2] Positions with associated and related entities (reissued 27/07/17). As r.5.19(4)(b) does not clearly indicate that the nominator must directly operate the business *in which the nominated position exists*, it would appear that this interpretation goes beyond the wording of the regulations cited, and that it appears at least *possible* (albeit unlikely) for an employee to work under the nominator's direct control despite the position existing within the business activities of an associated or related entity.
[125] r.5.19(4)(d)(i)
[126] r.5.19(3)(d)(i)
[127] See for example *Jayshree Enterprises Pty Ltd v MIBP and Gohil v MIBP* [2016] FCCA 2825 (Judge Vasta, 8 November 2016). Although at first instance the Court found the Tribunal had erred in its factual assessment of the financial situation of the applicant employer, this was overturned on appeal: *MIBP v Jayshree Enterprises Pty Ltd* [2017] FCA 264 (Judge Logan, 28 February 2017).
[128] r.5.19(9)(e).
[129] r.5.19(5)(l).
[130] r.5.19(5)(n) and (9)(g).

- an occupation, in relation to the position, that is listed in ANZSCO, and has the same 4 digit occupation unit group code as the occupation carried out by the holder of the Subclass 457 visa.[131]

Whether the application for approval identifies a relevant visa holder and identifies a relevant occupation are questions of fact. Although arguably the language of this provision may suggest that these requirements must be met at the time of application (particularly the requirement that the person identified 'holds' a Subclass 457 visa), there is no express requirement to this effect. The terms of the provision do not prevent these requirements being met at some point after the application date.

For nomination approval applications made on or after 1 July 2017, there is an additional requirement in r.5.19(3)(a)(iv) that the application identifies a need for the nominator to employ the person, as a paid employee, to work in the position under the nominator's direct control.[132] Although it is not clear whether 'identifies' requires a simple declaration to this effect or more (see discussion above), in practice more will be needed to establish this genuine need in order to satisfy new r.5.19(3)(i),[133] also applicable to nomination applications made on or after 1 July 2017.

Nominations made on or after 18 March 2018

For nominations made on or after 18 March 2018 in the Temporary Residence Transition stream, r.5.19(5)(a) requires that at the time of application the identified person holds:

- a Subclass 457 visa that was granted on the basis of satisfying the requirements of the standard business sponsorship stream (i.e. cl.457.223(4) as in force prior to 18 March 2018);[134]
- a Subclass 482 visa in either the Medium term stream;[135] or Short term stream where the person is specified in a legislative instrument;[136] or,
- in limited circumstances, a bridging visa.[137]

The occupation must be listed in ANZSCO[138] and have the same 4 digit occupation unit group code as the occupation carried out by the holder of the Subclass 457 or Subclass 482 visa.[139] The occupation must also be specified under an instrument made under r.5.19(8) and in force at the time the application is made, and also apply to the identified person in accordance with the instrument, unless the instrument exempts the identified person.[140]

[131] 'ANZSCO' means the Australian and New Zealand Standard Classification of Occupations, a document produced by the Australian Bureau of Statistics and accessible online. 'ANZSCO' is defined by the Regulations (see r.1.03) differently depending on the date of visa application. For visa applications made on or after 1 July 2013 'ANZSCO' has the meaning specified by the Minister in an instrument in writing. See the 'SOL-SSL' tab of the Register of Instruments: Skilled Visas for current instrument.
[132] Inserted by F2017L00816.
[133] Which requires a decision maker to be satisfied that there is a genuine need for the nominator to employ the person, as a paid employee, to work in the position under the nominator's direct control.
[134] r.5.19(5)(a)(i).
[135] r.5.19(5)(a)(ii).
[136] r.5.19(5)(a)(iii).
[137] r.5.19(5)(a)(iv)-(vi).
[138] r.5.19(5)(b)(i).
[139] r.5.19(5)(b)(ii).
[140] r.5.19(5)(c). See the 'Occ187' tab of the Register of Instruments: Business Visas for the relevant instrument containing the occupations. Also see the 'TransitionalTRT' tab of the Register of Instruments: Business Visas for the relevant instrument (IMMI 18/052) which effectively exempts a person who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 which was subsequently granted.

Can the visa holder or occupation identified change?

For nominations made on or after 18 March 2018, it is clear that the visa holder and occupation cannot change. This is because the application must 'identify a person'[141] and 'identify an occupation' in relation to the identified position.[142] The occupation identified in the nomination must also be specified in the instrument in force when the nomination is made.

For nominations made before 18 March 2018, the links between the requirements of r.5.19(3)(a) and the application requirements in 5.19(2),[143] and the corresponding visa application requirements and substantive visa criteria which limit visa grant to the position that was the subject of a declaration at time of application,[144] suggest that the intention of the scheme was for the identified visa holder and occupation to remain the same throughout the nomination approval process. However, for nomination applications before 1 July 2017, there is nothing in the terms of r.5.19(3)(a) which expressly prevents the visa holder or occupation being changed during the processing of the nomination application, providing the other requirements of r.5.19(3) are met.[145]

For nomination applications made on or after 1 July 2017 the position is less clear, as from that date onwards r.5.19(3)(a)(iv) requires an application to identify a need to employ *a specific* person in the position.[146]

Where an employer claims the wrong person or occupation was identified in the application as a result of factual error, it may be open to find as a question of fact, on the basis of evidence other than the form itself (e.g. applicant's explanation, other material submitted with form), that the occupation or person listed was not (and is not) the identified visa holder or occupation. There has been some limited judicial consideration of this possibility in the skilled visa context (discussed in the Skilled Occupation commentary page).

Does the occupation need to be the same as identified in the Subclass 457 or Subclass 482 nomination?

For nomination applications made before 18 March 2018, r.5.19(3)(a)(iii)(B) requires that the nomination must identify an occupation that has the same 4-digit occupation unit group code (ANZSCO) as the occupation carried out by the holder of the Subclass 457 visa. Similarly, for nomination applications made on or after 18 March 2018, r.5.19(5)(b)(ii) requires that a nomination must identify an occupation that has the same 4-digit ANZSCO unit group code identified in a person's most recently held Subclass 457 or 482 visa.

In *Nauru Air Corporation v MIBP*, the Court held that r.5.19(3)(a)(iii)(B) is not simply a process of matching the occupation unit group codes between the occupation identified in the r.5.19 nomination and that nominated as part of the Subclass 457 application, but instead is a qualitative assessment that requires the decision maker to consider the nominated occupation under r.5.19 against the occupation that was *actually* carried out by the Subclass 457 holder,[147] regardless of whether it was

[141] r.5.19(2)(c).
[142] r.5.19(2)(d).
[143] Reg 5.19(3)(a)(i) links the 'application for approval' in r.5.19(3)(a)(ii)&(iii) with the application referred to in r.5.19(2) which lists a specific form, suggesting that it is the person and occupation listed in that form which need to be considered for r.5.19(3)(a).
[144] Clause 186.223(1) and 187.223(1) require that the position to which the application relates is the position in relation to which the applicant is identified as the holder of a Subclass 457 visa *and* in relation to which the declaration mentioned in 1114B/C(3)(d) of Schedule 1 was made in the application for the grant of the visa.
[145] Departmental policy does not specifically address this issue: Policy - Migration Regulations – Schedules > Employer Nomination Scheme (subclass 186 visa) > [6.1] EN-186 Temporary Residence Transition (TRT) stream (reissued on 27/07/2017); and Policy - Migration Regulations – Divisions – Div 5.3 – General > Approval of nominated positions (employer nomination) > 8. Part B - Criteria applicable to Temporary Residence Transition stream nominations – [8.1.4] The nomination identifies an occupation (reissued 27/07/17).
[146] r.5.19(3)(a)(iv) inserted by F2017L00816.
[147] *Nauru Air Corporation v MIBP* [2016] FCCA 13 (Judge Jarrett, 11 January 2016) at [35].

the occupation identified in the nomination associated with the grant of the Subclass 457 visa. The question of what occupation was actually carried out by the Subclass 457 visa holder will be a question of fact for the decision maker having regard to the relevant circumstances. However, as there are strict restrictions on Subclass 457 visa holders working in occupations other than those nominated as part of the 457 application process,[148] in many cases there should be no difference between the occupation nominated through the Subclass 457 application and the occupation actually undertaken by the Subclass 457 holder. Given the similarity of the provisions, the case law is also likely to apply in the Subclass 482 visa context.

Identification of occupation – Direct Entry stream (non-regional) (pre and post 18 March 2018)

Nominations made before 18 March 2018

For nominations in the Direct Entry stream which do not relate to employment in regional Australia, r.5.19(4)(h)(i)(A) requires, among other things, that the tasks to be performed in the nominated position correspond to the tasks of an occupation specified by an instrument in writing.

Note that r.5.19(4)(h)(i)(A) was amended on 1 July 2017 to include an express requirement that any additional specifications as to the applicability of the occupation to the nominee are met.[149] When considering whether the requirements of r.5.19(4)(h)(i)(A) are satisfied, regard should be had to any exclusions of specific roles and/or additional requirements relating to the particular position in specifying some occupations. This change to r.5.19 takes effect from 1 July 2017, but the first instrument which includes additional requirements of this kind, IMMI 17/080, only applies to nomination applications which were made on or after 1 July 2017.

Can the identified occupation change?

The relevant occupation for this requirement is not linked to any previous visa or nomination, and there is no other requirement that in effect fixes a nomination in this stream to a particular identified occupation. This means that as long as the tasks to be performed in the *position* correspond to *one* of the occupations specified in the applicable legislative instrument, it doesn't necessarily have to be the occupation identified initially in the application or the occupation used in the position title. On an alternative view, it could be argued that there is difficulty in reconciling a change in occupation with the requirements in cl.186.233/187.233 for applicants in the Direct Entry stream. To find this criterion is met, the Tribunal would need to be satisfied that the change in occupation did not change the position nominated under r.5.19. In any event, a decision maker is not obliged to undertake a broad ranging inquiry as to whether the tasks to be carried out correspond to any of the specified occupations, but rather must respond to the case put by the applicant.

What is the relevant instrument?

Given this requirement falls to be considered at time of decision, and absent any indication to the contrary in the terms of the provision, it appears that the applicable instrument will be that in force at the time of decision,[150] subject to any applicability or transitional provisions within the terms of the instruments themselves. See the MRD Legal Services Register of Instruments: Business visas ('Occ186/442/457&Noms' tab) for the relevant instruments.

[148] The Court in *Nauru Air Corporation* did not consider the relationship between the r.5.19 provisions and the Subclass 457 scheme – in particular condition 8107 which relevantly requires that the primary Subclass 457 visa holder must work only in the occupation listed in the most recently approved nomination.
[149] r.5.19(h)(i)(AAA), inserted by F2017L00818. The same amending regulations inserted r.5.19(4A) to put beyond doubt the Minister's power to make such specifications.
[150] This is now the position adopted in Departmental policy: Policy - Migration Regulations – Divisions > Div 5.3 – General > Approval of nominated positions (employer nomination) – Regulation 5.19 > 10. Part C – Criteria applicable to Direct Entry stream nominations > [10.3.3] Approval occupations specified in the latest legislative instrument (reissued 27/07/17).

Nominations made on or after 18 March 2018

For Subclass 186 visas in the Direct Entry Stream, r.5.19(10) requires that the tasks to be performed in the position must correspond to the tasks of an occupation specified in a legislative instrument made under r.5.19(11) and in force at the time the nomination is made.[151] As such, the identified occupation cannot change. The relevant Explanatory Statement notes that this provides certainty for nominating employers and visa applicants in that if an occupation is removed from the legislative instrument before a decision is made the nomination will not be affected.[152] See the MRD Legal Services Register of Instruments: Business visas ('Occ186/442/457&Noms' tab) for the relevant instrument.

When considering this issue, decision-makers should also ensure they have regard to any exclusions of specific roles and/or additional requirements relating to the occupation included in the instrument, as required by r.5.19(10)(b).

Identification of occupation – Direct Entry stream (regional) (pre and post 18 March 2018)

Nominations made before 18 March 2018

For nominations made on or after 1 July 2015 in the Direct Entry stream in regional Australia, r.5.19(4)(h)(ii)(D) requires the tasks to be performed in the position to correspond to the tasks of an occupation specified in an instrument.[153] In addition, from 1 July 2017, any additional specifications as to the applicability of the occupation to the nominee must be met: r.5.19(4)(h)(ii)(DA).[154]

Can the identified occupation change?

As for non-regional nominations, it is arguable that as long as the tasks to be performed in the position correspond to one of the occupations specified in the applicable legislative instrument, it doesn't necessarily have to be the occupation identified initially in the application or the occupation used in the position title. On an alternative view, it could be argued that there is difficulty in reconciling a change in occupation with the requirements in 187.233 because to find this criterion is met, the Tribunal would need to be satisfied that the change in occupation did not change the position nominated under r.5.19. Further, for regional applications in particular, r.5.19(4)(h)(ii)(F) contemplates advice being given to the Minister by a certified body about certain aspects of the nomination criteria, specifically r.5.19(4)(e), and r.5.19(4)(h)(ii)(B) and (C). It would be open to interpret the 'position' and 'nomination' as the same fixed thing in this context, given that it is difficult to see how a certified body could advise of these matters (and the Tribunal then make its own determination as to them) if you could nominate a position without substance or change the occupation.

What is the relevant instrument?

Given this requirement falls to be considered at time of decision, and absent any indication to the contrary in the terms of the provision, it appears that the applicable instrument will be that in force at the time of decision, subject to any applicability or transitional provisions within the terms of the instruments themselves. See the MRD Legal Services Register of Instruments: Business visas ('ExmtSkillsAgeEng186&187' tab) for the relevant instruments.

[151] r.5.19(10)(a).
[152] Item 129, Attachment C of Explanatory Statement to F2018L00262.
[153] r.5.19(4)(h)(ii)(D) as amended by SLI 2015, No.103. For the instrument specifying relevant occupations see the 'ExmtSkillsAgeEng186&187' tab in the Register of Instruments: Business Visas.
[154] Inserted by F2017L00818. .

Nominations made on or after 18 March 2018

For nominations made on or after 18 March 2018, the requirement that the tasks performed must correspond to the tasks of an occupation specified in a legislative instrument has been maintained: r.5.19(12)(d). This criterion provides that the applicable instrument is the instrument that was in force at the time the application was made. As such, the identified occupation cannot change. See the 'Occ187' tab of the Register of Instruments: Business Visas for the relevant instrument.

When considering this issue, decision-makers should also ensure they have regard to any exclusions of specific roles and/or additional requirements relating to the occupation included in the instrument, as required by r.5.19(12)(e).

Actively and lawfully operating a business in Australia – Direct Entry stream and Temporary Residence Transition stream (pre and post 18 March 2018)

For nominations in both the Direct Entry and Temporary Residence Transition streams, it is a requirement that the nominator is actively and lawfully operating a business in Australia.[155] Following the 18 March 2018 amendments, these requirements remain unchanged.[156] However, the further requirement in the Direct Entry stream that the nominator directly operates the business was removed on the basis that this was unnecessary where there must be a business actively and lawfully operating in Australia and the nominee is required to work under the nominator's direct control.[157] The terms 'business' and 'actively and lawfully' are not further defined in the legislation. These are questions of fact for the decision maker.

Is the nominator operating a 'business'?

A question may arise in the context of not-for-profit enterprises whether the relevant organisation or entity is operating a 'business'. 'Business' is not relevantly defined in the Act or the Regulations for the purpose of r.5.19 and accordingly, should be given its ordinary meaning, considered in the context of the applicable legislation. The Macquarie Online Dictionary defines business, inter alia, as 'a person, partnership, or corporation engaged in business; an established or going enterprise or concern'.[158] Departmental policy does refer to not-for-profit organisations as one of the 'common' business structures for nominators under r.5.19.[159]

The question of whether someone is carrying on a business has been considered in the context of s.134 cancellations of certain business visas and the term 'eligible business', in turn drawing on judicial authority in other contexts, which may provide some guidance. For example, in *Hope v The Council of the City of Bathurst* (1980) 144 CLR 1 Mason J considered the term 'business' as used in the *Local Government Act (NT)* and held (at [14]) it denoted "activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis". A broader approach was taken by Hill and Carr JJ in *Puzey v Commissioner of Taxation* (2003) 131 FCR 244 (at [47] – [48]):

> *In deciding whether or not a business is carried on, courts have pointed to what have been called in the United Kingdom the "badges of trade", indicia which, while no one of them will be determinative of whether a business is carried on, collectively will demonstrate a business. These include the profit motive (although a non-profit company may still carry on a business),*

[155] r.5.19(3)(b)(ii), r.5.19(4)(b)(i).
[156] The requirement that a business is actively and lawfully operating in Australia is now contained in r.5.19(5)(h)(ii) in the Temporary Residence Transition stream, and in r.5.19(9)(a) for the Direct Entry stream.
[157] Item 34, Attachment C of Explanatory Statement to F2018L00262.
[158] The Macquarie Dictionary Online Sixth Edition 2013, Macquarie Dictionary Publishers Pty Ltd: accessed 7 February 2017.
[159] Policy – Migration Regulations – Divisions 2.58-2.69 – Standard Business Sponsorship > 4. Procedural Instruction > 4.11 Useful information on business structures and registration requirements (reissued 12 August 2018).

acting in a business-like way (although many businesses may be found which operate in a non business-like way), the keeping of books of account and records (although the fact that there are none will not necessitate the conclusion that a business is not carried on), and repetition (although a fixed term project may still be a business).

Ultimately it will be a factual decision, having regard to relevant evidence, circumstances and arrangements in the particular case, whether there is a 'business' for the purposes of r.5.19(3)(b)(ii) and r.5.19(4)(b)(i) for applications made before 18 March 2018, and r.5.19(5)(h)(ii) or r.5.19(9)(a) for applications made on or after 18 March 2018.

Is the business operating lawfully?

Departmental policy and operational guidelines suggest that in determining whether a business is operating lawfully, regard should be had to whether the business and its activities are registered with the relevant authorities as required. Registration may involve registration for tax purposes with an Australian Business Number (ABN), registration with the Australian Securities and Investment Commission (i.e. an Australian Company Number (ACN) or an Australian Registered Body Number (ARBN)) and registration of a business / trading name.[160] See http://www.ato.gov.au/Business/Registration/Work-out-which-registrations-you-need/ for further details on required business registrations.

Is the business operating actively?

It is not sufficient that a business is lawfully operating; it must also be *actively* operating. A shelf company for example, would meet the former but not the latter requirement. Departmental policy distinguishes between new businesses (less than 12 months operation) and established businesses (in operation for more than 12 months), although such distinction is largely a matter of the evidence that a nominator can be expected to provide to establish active operation. For an established business, Departmental policy and operational guidelines state that the business should be able to submit:

- a balance sheet (statement of position) for the most recently concluded fiscal year (with comparative figures for previous fiscal year), and a profit and loss statement (statement of performance) for the most recently concluded fiscal year, with comparative figures for the previous fiscal year; or
- business tax returns for the most recently concluded fiscal year; and
- if the fiscal period to which the financial statements or tax returns submitted relate ended more than three months before the nomination was lodged - a business activity statement (BAS) for each complete quarter between the end of the fiscal period and the date the nomination was lodged.

It further states that if the business is not able to provide these financial statements or tax returns for logistical reasons, quarterly business activity statements covering the period leading to the date the nomination was lodged may be accepted. Departmental policy recommends that, for both new and established businesses, other relevant types of evidence to demonstrate active operation that may be sought include:

- contracts of sale relating to the purchase of the business;

[160] Policy – Migration Regulations – Divisions 2.58-2.69 – Standard Business Sponsorship > 4. Procedural Instruction > 4.5 Requirements to be met by SBS applicants > 4.5.2 Lawfully operating a business > 4.5.2.1 Assessment of 'lawfulness' – Australian businesses (reissued 12 August 2018).

- lease agreements relating to business premises;
- evidence of lease or purchase of machinery, equipment and furniture;
- contracts to provide services;
- evidence of employment of staff;
- business bank statements covering the period of operation; and
- letters of support from the accountant to the business.[161]

Ultimately, whether a business is actively operating is a question of fact to be determined in light of the entirety of the evidence, rather than the existence or otherwise of certain documents.

Previous employment – Temporary Residence Transition stream (pre and post 18 March 2018)

Nominations made before 18 March 2018

It is an alternate requirement for nominations in the Temporary Residence transition stream made before 18 March 2018 that, in the three years before the nomination application is made, the visa applicant identified in the nomination has been employed in the position in respect of which the person holds the Subclass 457 visa for a total period of at least two years.[162]

It is unclear whether this requirement can be satisfied where an applicant has worked in the same role for the requisite period, but their employer has changed during that period, for example due to a business re-structure or sale. Departmental policy indicates that in some cases this requirement could still be met where there is a new employer (and so new standard business sponsor) for part of the period in question, and outlines some considerations for Departmental decision makers to decide whether the position has nevertheless remained the same.[163] However, that approach seems inconsistent with the sponsorship and nomination scheme for Subclass 457 visas, which involve a specific entity making a nomination. Further, use of the term 'employed'[164]suggests a relationship between a particular employer and employee, which will necessarily change in the case of a business restructure or sale.

Additionally, the alternative criterion in r.5.19(3)(c)(ii) which uses the term 'occupation' in contrast to 'position', specifically allow people in certain occupations (primarily medical practitioners) who work as independent contractors to satisfy this requirement even though they have worked for different employers.[165] The different choice in language arguably suggests the drafting intent was for r.5.19(3)(c)(i) to only be satisfied where there is one employer for the requisite period. Where a person has, throughout the relevant period, carried on the same duties, in the same role, in the same place, for the same people (albeit with a business sale/re-structure) it seems arguable that they have worked in the same 'position' at all relevant times, though this factual situation may not often arise as

[161]Policy – Migration Regulations – Divisions 2.58-2.69 – Standard Business Sponsorship > 4. Procedural Instruction > 4.5 Requirements to be met by SBS applicants > 4.5.2 Lawfully operating a business > 4.5.2.4 Assessment of 'operating a business' (reissued 12 August 2018).
[162] r.5.19(3)(c)(i)(A)(II).
[163] Policy – Migration Regulations – Division 5.3 – General > Approval of nominated positions (employer nomination) – Regulation 5.19 > 4. Procedural Instruction > 4.3 Criteria applicable to Temporary Residence Transition (TRT) stream nominations > 4.3.6 Employed for a total period of three years in the same position > 5.3.6.2 Employment with the same employer (reissued 12 August 2018).
[164] For applications made before 18 March 2018, r.5.19(3)(c)(i)(A)(II) requires that in the 3 year period immediately before the nomination the holder of the Subclass 457 visa was 'employed' in the same position for at least two years. For applications made on or after 18 March 2018, the requirement that a visa holder be 'employed' remains and is contained in r.5.19(5)(f). However, note, the changes to qualifying periods: r.5.19(5)(e)-(g).
[165] See Explanatory Statement to SLI 2012, No.82 at p.30 and Policy - Migration Regulations - Divisions > Div 5.3 - General > Approval of nominated positions (employer nomination) > [9.1.3] Independent contractors (reissued 27/07/17).

the sale of a business or restructure would generally involve changes to various aspects of the business. For further advice if this issue arises, please contact MRD Legal Services.

A question may also arise as to whether this requirement is satisfied when the applicant has and continues to carry out the same duties in the same role, but the occupation was incorrectly or inaccurately identified in the nomination for the Subclass 457 visa, and is now correctly identified for the r.5.19 nomination. For example, an applicant may have held a Subclass 457 visa in respect of the position of 'General Manager' but was actually and still is carrying out the duties of a 'Cattle Farmer'. Arguably in that scenario the applicant has never worked in the position of General Manager, and so was not employed in the position in respect of which the person holds the Subclass 457 visa, and r.5.19(c)(i)(A)(II) (as it then was) is not met.[166] That approach would reflect the nomination process for Subclass 457 visas, which requires the identification of a specific occupation[167] which an applicant is then required to work in for the duration of their visa,[168] thereby being the 'position in respect of which the person holds the Subclass 457…visa'.

Nominations made on or after 18 March 2018

Subject to a transitional cohort, for nominations made on or after 18 March 2018, the qualifying period has increased from two years out of the previous three years, to three years out of the previous four years immediately before the nomination application is made.[169] The Explanatory Statement states that the change aligns with the extended work experience requirement in the Subclass 482 visa and supports the intention that the nominee has the requisite skills to do the job.[170] The visas held for the past three years can include one or more of a Subclass 457 visa in the standard business sponsorship stream, a Subclass 482 visa in the medium-term stream, or for persons specified in a legislative instrument made under r.5.19(5)(a)(iii),[171] a Subclass 482 visa in the short-term stream.

The transitional cohort is persons who, on 18 April 2017, held a Subclass 457 visa or were an applicant for a Subclass 457 that was subsequently granted.[172] The qualifying period for this cohort is two years out of the previous three years, ensuring there is no disadvantage to these persons.[173]

In either case, where the Subclass 457 or 482 visa was granted in relation to an occupation specified under r.2.72(13), the identified person has to only have been employed in the occupation for the requisite time period, rather than a particular position: r.5.19(5)(g). See the 'ExemptOccs' tab of the Register of Instruments: Business Visas for the relevant instrument. At the time of writing, the occupations include Chief Executives, Corporate General Managers, and various medical professionals.

[166] See MRD decisions in 1310006 and 1418488 for alternate approaches. For applications made on or after 18 March 2018, the applicable equivalent provision is r.5.19(5)(f), however, note the changes to the qualifying periods in r.5.19(5)(e)-(g).
[167] r.2.72(8), (8A), (10)(a) & (aa).
[168] See condition 8107.
[169] r.5.19(5)(e).
[170] Item 129, Attachment C of Explanatory Statement to F2018L00262.
[171] That is, persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 which was subsequently granted. See the 'TransitionalTRT' tab of the Register of Instruments: Business Visas for the relevant instrument, IMMI 18/052.
[172] See r.5.19(6), which allows the Minister to vary the time period for specified persons. IMMI 18/052, made under r.5.19(6), specifies this transitional cohort.
[173] Item 129, Attachment C of Explanatory Statement to F2018L00262.

No adverse information known to Immigration (pre and post 18 March 2018)

Nominations made before 18 March 2018

There is a requirement for both the Direct Entry and Temporary Residence Transition streams that there is nothing adverse known to Immigration about the nominator or an associated person, and allows for the requirement to be disregarded in certain circumstances.

This requirement extends to any 'adverse information' known to Immigration about the nominator or a person associated with the nominator. For the purpose of this provision the terms 'adverse information' and 'associated with' are defined in r.1.13A and r.1.13B, respectively.[174] Please refer to the MRD Legal Services Commentary: Nomination and Approval of an Occupation for Subclass 457 – Regulation 2.72 and 2.73 for further discussion on the meaning of these terms.

The adverse information may be disregarded if it is reasonable to do so. The Explanatory Statement to the regulation introducing this requirement is silent on the intention behind this aspect of the criterion but guidance can be obtained from the identically worded requirement in r.2.72 for temporary work nominations. The Explanatory Statement to the regulations introducing the then r.2.72(1)(i) (now r.2.72(9)) states that it may be 'reasonable' to disregard information if, for example, the person had developed practices and procedures to ensure the relevant conduct was not repeated. To illustrate, if a person was found to have breached occupational health and safety legislation two years ago and had since appointed an occupational health and safety manager and had a clean occupational health and safety record, it may be reasonable to disregard the original breach.[175]

Nominations made on or after 18 March 2018

Similar to the pre 18 March 2018 scheme, there is a general requirement common across all streams that there is no adverse information known about the nominator or a person associated with the nominator,[176] or, that it is reasonable to disregard any adverse information known about the nominator or persons associated with the nominator.[177] However, there are new definitions of 'adverse information' and 'associated with' in r.1.13A and r.1.13B respectively. The Explanatory Statement notes that the previous definitions were rigid and inadequate to deal with a range of potential abuses.[178] The new definitions are more flexible and are aimed at addressing instances of phoenixing and businesses operating through multiple corporate entities.[179] Please refer to the MRD Legal Services Commentary: Nomination and Approval of an Occupation for Subclass 457 – Regulation 2.72 and 2.73 for further discussion on the meaning of these terms.

Policy guidance

Departmental policy and operational guidelines on assessing adverse information provisions state:

> *Under policy, decision-makers should take the following factors into account when deciding whether it is reasonable to disregard the adverse information:*
> - *the nature and seriousness of the adverse information*
> - *whether the adverse information arose recently or a long time ago*
> - *how the adverse information arose, including the credibility of the source of the adverse information*
> - *whether the allegations have been substantiated or not – e.g. whether the applicant has been convicted of an offence under Australian law or investigations are ongoing*

[174] These definitions were previously found in r.2.57(3) and r.2.57(2) and referred to in r.5.19(7). These definitions were repealed and replaced by new definitions in r.1.13A and r.1.13B through SLI 2015 No. 242.
[175] Explanatory Statement to SLI 2009 No.115, p.28.
[176] r.5.19(4)(b)(i).
[177] r.5.19(4)(b)(ii).
[178] Item 15, Attachment C of Explanatory Statement to F2018L00262.
[179] Item 15, Attachment C of Explanatory Statement to F2018L00262.

- *whether the applicant has acknowledged the issues with their previous behaviour*
- *whether the applicant has provided evidence to demonstrate that they have rectified any issues where relevant (such as repaying monies to an underpaid employee) and taken steps to ensure the circumstances that led to the adverse information do not reoccur*
- *whether the applicant has demonstrated subsequent compliance*
- *whether the conduct of concern is likely to recur*
- *information about relevant findings made by a competent authority*
- *whether there are any compelling circumstances affecting the interests of Australia.*[180]

These guidelines are not exhaustive and the determination of whether it is reasonable to disregard the information is a question for the relevant decision maker, having regard to all the relevant circumstances of the case. Note that the above is an extract of the applicable policy following the 18 March 2018 amendments but is broadly reflective of the previous policy guidelines.

Record of compliance with workplace relations/employment laws of the Commonwealth and States and Territories (pre and post 18 March 2018)

For nominations made before 18 March 2018, it is a requirement for both nomination streams that the Minister is satisfied that the employer has a satisfactory record of compliance with the workplace relations laws of the Commonwealth and each State or Territory in which the employer operates their business and has employees of that business. There is an equivalent requirement for nominations made on or after 18 March 2018 across all streams (r.5.19(4)(d)), however the criterion references laws relating to 'employment' rather than 'workplace relations'.

The term 'workplace relations laws' is not defined in the legislation, but appears to contemplate a wide range of laws relating to an employer's duties and obligations in the workplace. They would include an employer's compliance with State/Territory and Commonwealth laws relating to:

- National Employment Standards[181]
- pay (minimum wages, deductions, superannuation, penalty rates and allowances).
- leave (annual leave, sick leave, long service leave and maternity leave).
- employee entitlements (maximum hours, overtime, flexible arrangements and breaks).
- Workplace Health & Safety (safe workplaces, bullying and harassment).
- workplace discrimination.
- termination (redundancy, unfair dismissal).

Departmental policy and operational guidelines state that the requirement can be considered satisfied unless the decision maker has received information that suggests the employer has not complied with workplace relations laws.[182] These guidelines note that the Department of Jobs and Small Business (DJSB) and Fair Work Ombudsman regularly provides the Department with a list of employers who

[180] Policy – Migration Regulations – Division 1.2 Interpretation – Division 1.2/reg 1.13A Adverse information and skilled visas (regulation 1.13A AND 1.13B > 4. Procedural Instruction > 4.4 Assessing adverse information provisions> 4.4.2.1 Factors that should be considered (reissued 12 August 2018).

[181] The National Employment Standards (NES) are 10 minimum employment entitlements that have to be provided to all employees. The national minimum wage and the NES make up the minimum entitlements for employees in Australia. An award, employment contract, enterprise agreement or other registered agreement can't provide for conditions that are less than the national minimum wage or the NES, nor can they be excluded. See http://www.fairwork.gov.au/employee-entitlements/national-employment-standards (last accessed 08/02/2019).

[182] Policy – Migration Regulations – Division 5.3 General > Div 5.3/reg.5.19 > 4. Procedural Instruction > 4.2 Common nomination criteria > 4.2.13 Compliance with employment laws (reissued 12 August 2018).

have been prosecuted for a breach of workplace relations laws or who the DJSB believes to have breached workplace relations laws but prosecution was either unwarranted or not possible.[183] Current and former employees and members of the public can be alternative sources of information concerning the employer's failure to comply with workplace relations laws. The guidelines suggest that where information received from a third party is utilised to refuse a nomination, decision makers should be mindful of both procedural fairness and privacy obligations.[184]

Decision makers are not limited to considering advice from the DJSB or Fair Work Ombudsman in assessing an employer's record of compliance with workplace laws. In terms of Commonwealth laws, other types of relevant evidence could include decisions of the Fair Work Commission (formerly Fair Work Australia),[185] or investigations and legal proceedings commenced by the Fair Work Ombudsman.[186] In the State and Territory context, there are a number of bodies that investigate, arbitrate or prosecute employers for breaches of workplace relations laws.[187] Examples include decisions of the NSW Industrial Relations Commission relating to wages (including unpaid super) and unfair dismissal[188] and investigations and prosecutions undertaken by bodies such as Worksafe Victoria into breaches of Workplace Health and Safety laws.[189]

What constitutes a 'satisfactory record' of compliance with workplace relations laws?

The term 'satisfactory record' is not defined in the Regulations. On its face it appears to be a subjective test that does not contemplate or require a perfect record of compliance. Dictionary definitions of 'satisfactory' vary from 'fulfilling all demands or requirements' to 'acceptable, though not outstanding or perfect'.[190] In *Nice Shoes Aust Pty Ltd v MIMIA*, the Federal Court considered these competing definitions in the context of 'satisfactory record' as it arose in training requirement for standard business sponsors in the since repealed r.1.20D(2)(c)(ii).[191] In that case, the Court observed that the difficulty with such a definition is that it provides no measure or standard against to determine whether something is 'satisfactory'. Looking to the broader context of r.1.20D, the Court held that a 'satisfactory record' of training is a record that demonstrates that the applicant provides training to a degree reasonably commensurate with the nature and extent of its business operations in Australia.[192]

[183] Policy - Migration Regulations - Divisions > Div 5.3 - General > Approval of nominated positions (employer nomination) > 7.Part A - Common criteria > [7.7] Compliance with workplace relations laws > [7.7.2] Assessment (reissued 27/07/17); Policy – Migration Regulations – Division 5.3 General > Div 5.3/reg.5.19 > 4. Procedural Instruction > 4.2 Common nomination criteria > 4.2.13 Compliance with employment laws (reissued 12 August 2018).

[184] Policy – Migration Regulations – Division 5.3 General > Div 5.3/reg.5.19 > 4. Procedural Instruction > 4.2 Common nomination criteria > 4.2.13 Compliance with employment laws (reissued 12 August 2018).

[185] The Fair Work Commission (FWC) makes decisions on workplace disputes and unfair dismissal. It is the successor body to Fair Work Australia and the Australian Industrial Relations Commission. It also performs functions previously performed by the Workplace Authority and the Australian Fair Pay Commission. Decisions and orders of the FWC can be found here: https://www.fwc.gov.au/cases-decisions-and-orders/find-decisions-orders (last accessed 11/02/19).

[186] The Fair Work Ombudsman (FWO) investigates complaints relating to matters such as underpayment of wages (including superannuation), conditions (e.g. annual leave), workplace rights and discrimination in the workplace. In addition to resolving complaints, the FWO is also able to initiate legal proceedings against employers. Some examples of FWO litigation can be found here: https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2017-2018-litigation-outcomes (last accessed 11/02/19).

[187] Note, there are a range of equivalent agencies and bodies across the States and Territories that deal with workplace relations issues, but the scope of matters these bodies deal with depends on each state's particular industrial relations system – which are not uniform.

[188] The NSW Industrial Relations Commission regulates workplace affairs in NSW. It conciliates and arbitrates disputes relating to conditions of employment, awards and claims of unfair dismissal. Examples of decisions of the Commission can be found here: http://www.irc.justice.nsw.gov.au/Pages/IRC_judgments/IRC_judgments.aspx (last accessed 11/02/19).

[189] WorkSafe Victoria is responsible for prosecuting breaches of a range of workplace laws in Victoria, including the *Occupational Health and Safety Act 2004* (Vic). Prosecution outcomes and enforceable undertakings are published on the WorkSafe website: https://www.worksafe.vic.gov.au/prosecution-result-summaries-enforceable-undertakings (last accessed 11/02/19).

[190] The Macquarie Dictionary (6th ed., 2013) relevantly defines 'satisfactory' as meaning 'affording satisfaction; fulfilling all demands or requirements' while the Oxford Dictionary of English (3rd ed., 2010) provides a lower standard of 'satisfactory' as meaning 'fulfilling expectations or needs; acceptable, though not outstanding or perfect'.

[191] [2004] FCA 252 (Branson J, 18 March 2004).

[192] *Nice Shoes Pty Ltd v MIMIA* [2004] FCA 252 (Branson J, 18 March 2004) at [16]-[17].

Critically, the Court observed that the relevant issue for the Tribunal's consideration was whether it was satisfied that the applicant had such a satisfactory record.[193]

This suggests that in this context, the criterion would not necessarily require the employer to demonstrate a 'blemish-free' record of compliance with workplace relations laws. Instead, the level of compliance by the employer may instead be of such a level to satisfy the decision maker that the employer will be able to fulfil its workplace obligations to the employee such that the nomination should be approved.

There is also some support in Departmental policy and operational guidelines for such an approach. While the guidelines are brief on the interpretation of what constitutes a 'satisfactory record of compliance', related guidance can be found in the context of the Subclass 888 Business Innovation and Investment visa and the very similarly worded cl.888.214 which requires the visa applicant to have a 'satisfactory record' of compliance with certain Australian laws.[194] In assessing that criterion, policy suggests a fair and reasonable approach in assessment of this criterion should be applied in all cases. It states that the requirement is not intended to be applied in every instance of a breach of Australian law and that 'minor breaches' of the law, or a single more serious breach, may be disregarded, especially if the applicant can demonstrate that the breach has been rectified and there has been no recurrence of the breach for a reasonable period.[195] The Department's guidelines suggest some leniency may be appropriate in the first instance if it can be reasonably expected that the applicant may not have been fully aware of their Australian legal obligations, albeit subsequent breaches would not be considered with such leniency, in particular if the applicant had been made aware of the earlier breach by a relevant authority.[196] Again, while the policy arises in a different context, the balancing factors identified would seem equally applicable in the assessment of compliance in the workplace relations context.

Direct Entry nomination – which task, training, location and position requirements can be satisfied? (Pre 18 March 2018)

For nominations made before 18 March 2018, r.5.19(4)(h) contains certain requirements in the Direct entry stream relating to location, training, the need for the position and the nature of the tasks involved. There are two alternate limbs in r.5.19(4)(h), the key difference between them being that while the first does not limit the location of the position other than that it must be in Australia, the second requires that the position is located in regional Australia.

However, while r.5.19(4)(h)(i) and (ii) are on their face expressed in the alternative, as a matter of practical reality an applicant will only be eligible to satisfy one or the other, depending upon the fee paid. This is because, r.5.19(2) requires that an application for approval of a nomination must be accompanied by the fee mentioned in r.5.37. Regulation 5.37 prescribes different fees depending upon which limb of r.5.19(4)(h) an application is seeking to satisfy. For an application seeking to meet

[193] *Nice Shoes Pty Ltd v MIMIA* [2004] FCA 252 (Branson J, 18 March 2004) at [19]. See also *Total Eye Care Australia v MIMA* [2007] FMCA 281 (McInnis FM, 8 March 2007) and *Daiwa Food Co Pty Ltd v MIMIA* [2005] FMCA 1651 (McInnis FM, 16 November 2005).
[194] cl.888.214 requires the applicant to possess a 'satisfactory record of compliance with the laws of the Commonwealth, and of each State or Territory in which the applicant operates a business and employs employees in the business, relating to the applicant's business'.
[195] Policy - Migration Regulations – Schedules > Sch2 Visa 888 - Business Innovation and Investment (Permanent) > EC-888 primary applicant common criteria > Compliance with Australian laws > Assessment (reissued on 10/09/16).
[196] Policy - Migration Regulations – Schedules > Sch2 Visa 888 - Business Innovation and Investment (Permanent) > EC-888 primary applicant common criteria > Compliance with Australian laws > Assessment (reissued on 10/09/16).

r.5.19(4)(h)(i) (non-regional), the fee is $540[197] whereas there is no fee payable for an application seeking approval in accordance with r.5.19(4)(h)(i) (regional).[198]

Further, although an applicant who had paid the $540 fee applicable to non-regional applications would theoretically be eligible to satisfy either limb, it is unlikely, given their election to pay the non-regional fee, that they would satisfy the requirement in r.5.19(4)(h)(ii)(A) that the position be located in regional Australia.

Therefore, a nomination can only be approved if the employer satisfies the limb of r.5.19(4)(h) for which they have paid the corresponding fee under r.5.37.

Training requirements – Direct Entry stream and Temporary Residence Transition stream (pre and post 18 March 2018)

Nominations made before 18 March 2018

Different training requirements apply depending on the date on which the application for approval of a nomination was made as well as the date the application as a standard business sponsor was made where the applicant is seeking to satisfy the Temporary Residence Transition nomination criteria.

Nominations made between 1 July 2013 and 18 March 2018

For nomination applications lodged on or after 1 July 2013 and before 18 March 2018, the training requirements differ depending on whether or not the nominator is seeking to satisfy the Direct Entry or Temporary Residence Transition stream criteria.

Temporary Residence Transition nominations

Regulation 5.19(3)(f) requires during the period of the nominator's most recent approval as a standard business sponsor the nominator to have both:

- fulfilled any commitments made regarding meeting the nominator's training requirements during the period of the most recent standard business sponsorship approval; and
- complied with its training obligations.

Where the nominator does not meet one of these requirements, it may nonetheless meet r.5.19(3)(f) if it is reasonable in the circumstances to disregard that or those requirements.

The Explanatory Statement introducing this requirement does not provide any guidance as to the nature of these commitments. However, Departmental policy indicates that this refers to commitments made at the time of the application for standard business sponsorship approval.[199] As a starting point, decision makers should have regard to the training requirements and benchmarks that were satisfied for the most recent approval as a standard business sponsor. These differ depending upon when the standard business sponsorship was approved.

Where the most recent approval covers only a short time period, such as a few months, a question may arise as to how compliance may be assessed. This will turn on the nature of any commitments made, and the interpretation of any applicable obligation. For example, the training obligations in r.2.87B provide that certain standard business sponsors must comply with training obligations for a

[197] r.5.37(3). The existing fee structure has been maintained following the commencement of the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).The new Labour Agreement stream follows the same fee structure as the Temporary Residence Transition stream.
[198] r.5.37(4).
[199] Policy - Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) > [9.2] The nominator has met the training requirement > [9.2.2.2] The training benchmarks (reissued 27/07/17).

period of 12 months commencing on the day they are approved as a sponsor. The Department's policy is to assess compliance on an annual, rather than pro-rata, basis.[200] While the obligation commences on the day of approval,[201] which may suggest a pro-rata assessment is possible, the better interpretation appears to be that the obligation cannot be assessed until at least 12 months have elapsed, given the requirement anticipates a need for it to be met for the entire period, it does not arise unless and until a primary person is sponsored, and as the instruments specifying training requirements refer to expenditure equal to a specified proportion of payroll in the last financial or calendar year.[202]

Where the most recent standard business sponsorship was approved on or after 18 March 2018, there would not have been any training obligations nor commitments made for the purpose of satisfying the sponsorship approval criteria. This is because, for applications for approval of standard business sponsorship which were undetermined as at 18 March 2018 or made after that date, the criteria in r.2.59(d) and (e) (which required businesses operating in Australia to either meet the training benchmarks for training Australia citizens and permanent residents as specified by a legislative instrument if the business had traded in Australia for 12 months or more, or have an auditable plan for meeting those benchmarks if the business traded for less than 12 months) no longer applied.[203] While this circumstance does not appear to have been contemplated by the legislative changes, it may be open to either disregard the training requirement as there were no relevant obligations, or to find the requirement to be satisfied.[204]

Commitments in relation to pre 14 September 2009 sponsorships

Where the standard business sponsorship or variation application was approved before 14 September 2009, the applicant would have satisfied the training requirement in r.1.20D(2)(c) which required them to demonstrate that they either:

- would introduce to, or utilise or create in, Australia new or improved technology or business skills; or
- had a satisfactory record of, or a demonstrated commitment towards, training Australian citizens and permanent residents in their business operations in Australia.

The requirements in r.1.20D(2)(c) do not appear to necessarily involve a future commitment to training, although an ongoing commitment may be arguably implicit in the requirement to have 'commitment towards training'. Ultimately however, whether such a commitment exists and what is required for it to be demonstrated will be a question of fact for the decision maker.

Commitments in relation to post 14 September 2009 sponsorship approvals

Where the standard business sponsorship or variation application was approved on or after 14 September 2009, the sponsor would have satisfied one of the two training benchmarks identified in the instrument[205] for the purposes of r.2.59(d)-(e) or r.2.68(e)-(f) or to have provided an auditable plan

[200] Policy > Migration Regulations – Divisions > Div 2,11-2,13 Sponsorship compliance framework: Sponsorship obligations > Assessment of regulation 2.87B (reissued 13 April 2018).
[201] r.2.87B(4).
[202] See the 'Training' tab of the Register of Instruments: Business Visas for the relevant instruments.
[203] These requirements for training were repealed by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262) with the effect that the repealed criteria no longer applied to live applications for approval as a standard business sponsor from 18 March 2018.
[204] See, e.g., the decision in *Ozzy Fortune Group Pty Ltd (Migration)* [2019] AATA 735 (Member Skaros, 10 April 2019) where the Tribunal found that the applicant's most recent standard business sponsorship approved on 6 September 2018 did not include any training commitment to be fulfilled for the purposes of satisfying r.5.19(3)(f) and given that the sponsorship obligation to provide training no longer applied, the training requirement was considered to have been met (at [32]).
[205] See the 'Training' tab of the Register of Instruments: Business Visas for the relevant instrument.

to meet one of the those training benchmarks, depending on the period for which the business had traded.

For businesses operating for more than 12 months that are required to satisfy the training benchmarks, Departmental policy notes that if a nominator cannot demonstrate that they maintained the relevant level of training expenditure throughout the validity of their standard business sponsorship they cannot satisfy the requirements of the Temporary Residence Transition stream and it will be necessary to consider whether it is reasonable to disregard this requirement.[206]

For businesses operating for less than 12 months that are required to have an auditable plan, Departmental policy provides that if 'the sponsorship was approved on the basis of an auditable plan, the commitment identified in the plan must have been fulfilled and the sponsor must have met the training benchmark they committed to, throughout the validity of the sponsorship.'[207] Whether or not commitments are made in the plan will be a question of fact and accordingly, it will be necessary in such cases to have close regard to the contents of such a plan to determine if those commitments have been fulfilled. The auditable plan requirement was intended to ensure that prospective sponsors operating a business in Australia have a measurable commitment to training Australian citizens and permanent residents before being granted access to the pool of overseas labour.[208]

Compliance with obligations

In addition, the nominator must have complied with the applicable obligations relating to the nominator's training requirements during the period of the nominator's most recent approval as a standard business sponsor. The most relevant training obligations are contained in r.2.87B(2) and (3), which provide that if, during the 12 months from the day the person is approved as a standard business sponsor or within 12 months commencing on an anniversary of that day and the nominator sponsored at least one primary person, it must comply with requirements relating to training specified in an instrument for that 12 month period. For the relevant instrument see the 'Training' tab in the Register of Instruments: Business Visas.

It appears that IMMI 18/017 is relevant for specifying what the obligations are after 18 March 2018 for all existing nominations made after 1 July 2017.[209] Given that these obligations extend for several years, it also appears arguable to still give effect to IMMI 17/045 despite its repeal, in that it specifies the content of the obligation for these nominations at the point in time before 18 March 2018. For nominations before 1 July 2017, while not clear, it appears that IMMI 13/030 is the relevant instrument. This instrument was repealed by IMMI 17/075 on 1 July 2017, but it is arguable to infer a partial repeal of this instrument in the sense that it doesn't apply for post 1 July 2017 cases on the basis that the same day, another instrument (17/045) was made which only applied to post 1 July 2017 matters.

In addition to the obligations imposed by r.2.87B(2) and (3), if the nominator was lawfully operating a business in Australia at the time of the standard business sponsorship or variation approval, all records showing that the person has complied with requirements relating to the training obligation in 2.87B(2) must be kept in accordance with a separate record keeping obligation.[210]

[206] Policy - Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) > [9.2] The nominator has met the training requirement > [9.2.2.2] The training benchmarks (reissued 27/07/17).
[207] Policy - Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) > [9.2] The nominator has met the training requirement > [9.2.2.2] The training benchmarks (reissued 27/07/17).
[208] Explanatory Statement to SLI 2009, No.115, p17.
[209] The Explanatory Statement to IMMI 18/017 indicates that it applies 'to a standard business sponsor on and after 18 March 2018' and that the purpose of the instrument is to 'carry over requirements in subregulations 2.87B(2) and 2.87B(3) of the Regulations, such that the training benchmark obligations will continue to apply to standard business sponsors'.
[210] r.2.82.

The Explanatory Statement introducing this obligation states that:

> *…this amendment imposes an obligation on the sponsor to provide training to Australian workers for each 12 months, either from the day that they are approved as a standard business sponsor or the day that their terms of approval as a sponsor is varied, where they have sponsored an overseas worker for all or part of that 12 months period. For example, if the person became a sponsor on 1 January 2012, and at any time between 1 January 2012 and 31 December 2012 they have at least one primary sponsored person, then they must comply with the relevant training requirements. If the person varies his/her sponsorship approval on 1 June 2012, then it is the policy intention for the 12 months period to be reset so that, if at any time between 1 June 2012 and 31 May 2013 they have at least one primary sponsored person, then they would be required to meet the relevant training requirements.*[211]

For further information on compliance with this obligation see the MRD Legal Services Commentary: Sponsorship Obligations.

Direct Entry nominations

The training requirements for the Direct Entry nomination stream also apply differently depending on the period for which the business has operated:

- if the nominator's business has operated for **at least 12 months**, the nominator must meet the requirements for the training of Australian citizens and Australian permanent residents that are specified by the Minister in an instrument;[212] or
- if the nominator's business has operated for **less than 12 months**, the nominator must have an auditable plan for meeting the requirements specified in the same instrument.[213]

For the relevant instrument see the 'Training' tab in the Register of Instruments: Business Visas.

Departmental policy in relation to this criterion directs decision makers to consider the period the business has been 'actively operating' noting that a 'business would be considered to have commenced active operation once the entire infrastructure necessary for the activities of the business is in place and the business has commenced providing services to customers'.[214]

An applicant may have provided evidence in their application on the basis that the business has been operating for less than 12 months, but by the time of decision the business has been operating for more than 12 months. In these circumstances, the application must be considered against the criterion which is applicable at the time of decision, namely r.5.19(4)(h)(i)(B)(I).

Applications made between 1 July 2012 and 1 July 2013

Whilst the training requirements for the Direct Entry nomination stream are the same for applications made in this period as for those made or on after 1 July 2013, those relating to the Temporary Residence Transition nomination stream differ. In particular, there is no requirement to comply with training obligations (i.e. those in r.2.87B).

Temporary Residence Transition nominations

For applications made between 1 July 2012 and 1 July 2013, the nominator must have met the 'training requirements' that the nominator was required to meet under r.2.59(d) or (e) or under

[211] Explanatory Statement to SLI 2013, No.146, p.36.
[212] r.5.19(4)(h)(i)(B)(I).
[213] r.5.19(4)(h)(i)(B)(II).
[214] Policy - Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) > 10. Part C - Criteria applicable to Direct Entry stream nominations > [10.4] Training > [10.4.2] Assessing period of operation and applicable training benchmark (reissued on 27/07/17).

r.1.20D(2)(c) for the purpose of approval as a standard business sponsor.[215] Unlike post 1 July 2013 applications, there is no express reference to fulfilling 'commitments' made under the training requirements, although in substance there may be little difference between fulfilling commitments and meeting training requirements which involve commitments. For details on the different training requirements, see discussion above.

Direct Entry nominations

The training requirements for the Direct Entry nomination stream for applications made before 1 July 2013, are the same as those for applications made on or after that date, discussed above.

Nominations made on or after 18 March 2018 and before 12 August 2018

The training requirements for applications lodged during this period are substantively the same as those which applied immediately prior to 18 March 2018 and discussed above. The requirements that apply to the Temporary Residence Transition stream are set out in r.5.19(5)(i) and for the Direct Entry stream (in relation to Subclass 186 visas), at r.5.19(10)(c). There are no training requirements attached to Direct Entry nominations relating to Subclass 187 visas.

From 12 August 2018, the training requirements in both streams were repealed by the Migration Amendment (Skilling Australians Fund) Regulations 2018 (F2018L01092). Clause 7602(6) as inserted by item 43 of Schedule 1 of these Regulations expressly preserves the need to comply with them for relevant nominations made before this date.

In place of the repealed training requirements, all types of nominations made on or after 12 August 2018 must instead be accompanied by any nomination training contribution charge the nominator is liable for. See discussion above under Application requirements.

If considering a Temporary Residence Transition stream nomination made before 12 August 2018, and the question of whether the nominator has complied with their obligations during the most recent sponsorship approval, note that there is a transitional provision exempting a sponsor from complying with training obligations under r.2.87B in relation to a period of 12 months ending on or after 12 August 2018.[216] In other words, the obligation only applies in relation to full periods of 12 months that end before that date. As r.2.87B (which was also repealed on this date) operated by imposing an obligation for periods of 12 months starting on the anniversary of the sponsor's approval, without this transitional provision, this obligation could have overlapped with the introduction of the nomination training contribution charge, and have been unfair to employers.[217]

Also, in circumstances where the nominator obtained a new standard business sponsorship approval on or after 18 March 2018, there would not have been any training obligations nor commitments made by the nominator for the purposes of satisfying the sponsorship approval criteria under r.2.59.[218] While unclear, in such cases, it may be open to find that the nominator satisfies r.5.19(5)(i) without any evidence of meeting the training requirements because there are no such requirements.[219] Alternatively, the requirements could be disregarded.

[215] r.5.19(3)(f).
[216] Clause 7602(5) as inserted by item 43 of Schedule 1 to the amending regulations.
[217] Explanatory Statement to F2018L01093 at p 23.
[218] This is because from 18 March 2018, the requirements for training under r.2.59(d) and (e) were repealed by F2018L00262 with the effect that these criteria no longer applied to live application for approval as a standard business sponsor from that date.
[219] See, e.g., *Ozzy Fortune Group Pty Ltd (Migration)* [2019] AATA 735 (Member Skaros, 10 April 2019) where the Tribunal found that the applicant's most recent standard business sponsorship approved on 6 September 2018 did not include any training commitment to be fulfilled for the purposes of satisfying r.5.19(3)(f) (pre-18/3/2018 version of r.5.19(5)(i)) and given that

Regional Australia and Regional certifying body – Direct Entry stream (pre and post 18 March 2018)

Direct Entry nominations which are intended to support a Subclass 187 visa must satisfy a number of specified criteria. For nominations made before 18 March 2018, r.5.19(4)(h)(ii) includes the requirements that the position is located in 'regional Australia',[220] that there is a genuine need for the position, that the position cannot be filled by an Australian citizen or permanent resident living in the same local area. Additionally, a specified body located in the same State or Territory must have provided the Minister with advice about certain criteria, including the genuine need for the position and inability to fill it with an Australian citizen or permanent resident.[221]

For Direct Entry nominations relating to Subclass 187 visas made on or after 18 March 2018, r.5.19(12) contains similar requirements, except that position must also not be able to be filled by an Australian citizen or resident who would move to the local area.[222]

Both the areas that constitute 'regional Australia'[223] and the 'regional certifying bodies' who can provide the required advice are specified by legislative instrument.

What is the relevant instrument?

Nominations before 18 March 2018

See the 'RegAustPost010712' tab of the Register of Instruments: Business Visas for the instruments. Given the requirements relating to 'regional Australia'[224] and the regional certifying body[225] fall to be considered at the time of decision, and given the absence of any transitional or application provisions in the instruments themselves, it appears that the instrument in force at the time of decision on the nomination is the applicable instrument.

The Department made a public statement to the contrary in respect of the most recent instrument in place before 18 March 2018, IMMI 17/059, indicating that it only applies to nomination applications made on or after its commencement on 17 November 2017,[226] however this interpretation is difficult to reconcile with the terms of the instrument itself and the unqualified revocation of the instrument previously in force. IMMI 17/059 was repealed on 18 March 2018,[227] and no further instrument under r.5.19(7) has been made,[228] meaning it's unclear which instrument, if any, applies to outstanding nomination applications.

Having regard to the two instruments most recently made under these provisions for this cohort, key changes are:

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the sponsorship obligation to provide training no longer applied, the training requirement was considered to have been met (at [32]).

[220] For applications made before 18 March 2018, this requirement is contained in r.5.19(4)(h)(ii)(A).

[221] For applications made before 18 March 2018, this requirement is contained in r.5.19(4)(h)(ii)(F). For applications made on or after 18 March 2018, this requirement is contained in r.5.19(12)(f).

[222] r.5.19(12)(f)(iii)

[223] For applications made before 18 Mach 2018 the definition of 'regional Australia' is contained in r.5.19(7). For applications made on or after 18 March 2018, the definition is contained in r.5.19(16).

[224] For applications made before 18 March 2018, r.5.19(4)(h)(ii)(A) requires that a position is located in 'regional Australia' which is defined in r.5.19(7) to part of Australia specified by the Minister in an instrument. For applications made on or after 18 March 2018, these same provisions are contained in r.5.19(12)(a) and r.5.19(16) respectively.

[225] For applications made before 18 March 2018, r.5.19(h)(F)(i)states that a 'body' is specified by the Minister in an instrument in writing. For applications made on or after 18 March 2018, this provision is contained in r.5.19(12)(g)(i).

[226] See the 'Skilled Visa E news November 2017' publication at https://www.homeaffairs.gov.au/trav/work/newsletters/november-2017 (accessed 12 February 2018).

[227] IMMI 18/037.

[228] The specification of regional Australia made by IMMI 18/037 is expressly made under r.5.19(12)(g)(i), and r.5.19(16), reflecting significant amendments made to r.5.19 by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262). Further, IMMI 18/037 is itself expressed to apply only to nominations made on or after 18 March 2018.

- IMMI 16/045, which commenced on 1 July 2016 and was repealed on 17 November 2017, added Norfolk Island to the list of areas which constitute 'Regional Australia'.

- IMMI 17/059, which commenced on 17 November 2017 and was repealed on 18 March 2018, removed the Perth metropolitan area from the definition of 'regional Australia'. It also removed a number of regional certifying bodies from the specification for r.5.19(4)(h)(ii)(F) (particularly Queensland and Western Australian bodies) and updated the names of several bodies (particularly Victorian bodies, as well as the bodies specified for NT, SA and Tasmania).

Despite this, it is arguable to interpret the recent legislative instruments in a way which supports a view that the instrument that was in force at the time the nomination application was made is the instrument that applies to determining 'regional Australia' for the purposes of r.5.19, consistent with the Department's view on this issue. For further advice on this issue, please contact MRD Legal Services.

Nominations made on or after 18 March 2018

See the 'RegAustpost180318' tab of the Register of Instruments: Business Visas for the relevant instrument. The most recent (and only at the time of writing) instrument, IMMI 18/037, is expressed to apply to nominations relating to Subclass 187 visas made on or after 18 March 2018 and applications for Subclass 187 visas made on or after 18 March 2018 where the related nomination is made on or after that date.

Is the advice of a regional certifying body conclusive?

While, for nominations made before 18 March 2018, r.5.19(4)(h)(ii)(F) requires that a specified body provide advice on the matters mentioned in r.5.19(4)(e) (relating to terms and conditions of employment) and r.5.19(4)(h)(ii)(B) and (C) (relating to a genuine need for the position and the filling of the position by an Australian employee), and r.5.19(12)(f) for nominations made after 18 March 2018 similarly requires advice on a number of matters, that advice is not conclusive or determinative of the question whether those other criteria are satisfied. That is, although the advice itself will be enough to satisfy r.5.19(4)(h)(ii)(F) or r.5.19(12)(f) as applicable, the Tribunal must consider and be satisfied of the matters about which the advice is provided and make separate findings on those other criteria. The advice given by the regional certifying body will, however, be relevant to that separate consideration.

In *Bharaj 2016*, the Court considered a similar requirement in the pre-July 2012 version of r.5.19(4), and commented in *obiter* that the use of the word 'advice' undoubtedly puts beyond doubt the construction of r.5.19(4), i.e. the advice is to be considered by the Minister (or Tribunal) in determining whether those requirements are satisfied but it is not determinative.[229] In *Bharaj (No.3)*. the Court confirmed that the judgment in *Bharaj 2016* was correct in holding that there was nothing in the language, text or structure of r.5.19(4) to support the view that the advice given by a regional certifying body is conclusive evidence that the requirements in subparagraphs (a) to (c) have been met.[230] This is also the position reflected in Departmental policy.[231]

[229] *Bharaj Construction Pty Ltd v MIBP* [2016] FCCA 902 (Judge Barnes, 28 April 2016) at [81].
[230] *Bharaj Construction Pty Ltd v MIBP (No.3)* [2019] FCCA 31 (Judge Nicholls 9 January 2019) at [63] – [72]. The court in *Bharaj 2016* remitted the matter to the Tribunal for reconsideration. The applicant then sought judicial review of that decision in *Bharaj (No.3)*.
[231] Policy - Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) > 10. Part C - Criteria applicable to Direct Entry stream nominations > [10.7] Consideration of the advice provided by the RCB (reissued on 18/11/17).

Religious institutions as nominators

Where the nominating employer is a religious institution (or other not-for-profit organisation), difficulties may arise in the application of certain r.5.19 requirements. In these cases, the nominator may not propose to pay the nominee any monetary remuneration as part of their employment and may not have a payroll system at all. This is often the case for positions involving religious occupations where in lieu of monetary payment, an employee is provided with housing, food and other basic needs.

For example, in such circumstances there may be a question as to whether the application identifies a need for the nominator to employ someone as a paid employee as required for Direct Entry nominations made before 18 March 2018 (r.5.19(4)(a)(ii)). On a strict approach, where wages are not to be paid there is arguably no need for *paid* employee or even an employer / employee relationship. That approach is supported by the use of the word 'paid' in addition to 'employee' in this requirement, suggesting an intention that the relevant employee be renumerated by the employer for the work performed. However, there are other indicia of an employee / employer relationship, such as control of activities or the provision of workers compensation coverage and, on a broader view, providing a package of non-monetary remuneration in exchange for performing certain duties could be equated with being paid for services.[232] Given the lack of commercial enterprise, there may also be a question as to whether the relevant organisation is in fact operating a 'business', as required by r.5.19(3)(b)(ii) and r.5.19(4)(b)(ii) (which applies to applications made before 18 March 2018) or 5.19(5)(h)(ii) and r.5.19(9)(a) (which applies to applications made on or after 18 March 2018) (see discussion above).

Depending on the nomination date, there are also training requirements in both streams which require a decision maker to consider expenditure on training measured as a percentage of the total payroll of the business.[233] For employers whose total payroll is $0, as may be the case for some religious and charitable institutions, it appears open to find as a matter of calculation that such requirements are met by $0 expenditure (2% of 0 = 0).[234]

From 1 July 2015 there has been in place an Industry Labour Agreement for Ministers of Religion, designed to provide a pathway for religious organisations who wish to bring in overseas workers,[235] so that these issues will arise with diminishing frequency.

Annual earnings (post 18 March 2018)

For nominations made on or after 18 March 2018 in both the Temporary Residence Transition and Direct Entry streams, the requirements in r.2.72(15) relating to the identified person's annual earnings must be met.[236] Regulation 2.72(15) applies to nominations for Subclass 482 visas and apply in the r.5.19 context as though references to 'nominee' were references to the 'identified person' and references to the 'person' were references to the 'nominator': r.5.19(5)(o) and r.5.19(9)(h).

[232] This view is consistent with Departmental policy in place prior to 1 July 2015, see Policy - Migration Regulations – Division 5.3 - General > Reg 5.19 - Approval of nominated positions (employer nomination) at [116] (18 April 2015 compilation).
[233] For applications made before 18 March 2018, see r.5.19(3)(f) and r.5.19(4)(h)(i)(B) and instruments made under r.2.59(d) and r.5.19(4)(h)(i)(B). For applications made on or after 18 March 2018, see r.5.19(5)(i) and r.5.19(10)(c) and instrument made under r.5.19(10)(c)(i) (see the 'Training' tab on the Register of Instruments: Business Visas).
[234] Departmental policy in place prior to 1 July 2015 indicates that if the nominated occupation is that of Minister of Religion, the nominator is not required to meet the training requirements specified in regulation 5.19(4)(h)(i)(B) (the policy does not refer to r.5.19(3)(f)). Policy - Migration Regulations – Division 5.3 - General > Reg 5.19 - Approval of nominated positions (employer nomination) at [117] (18 April 2015 compilation). However, that policy is not reflected in the terms of the Regulations themselves.
[235] Policy - Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) – 11.Part D occupation specific policy – [11.10] Ministers of Religion > [11.10.02] Industry Labour Agreement Pathway (reissued 27/07/17).
[236] r.5.19(5)(o) and r.5.19(9)(h) respectively.

In brief, r.2.72(15) contains several requirements which must be met where the nominee's annual earnings in relation to the nominated occupation will not be at least the amount specified in the legislative instrument (at the time of writing, IMMI 18/033 specified this as $250,000),[237] including that the annual market salary rate is not less than the temporary skilled migration income threshold. See MRD Legal Services Commentary Nomination and Approval of an Occupation for Subclass 457 – Regulation 2.72 and 2.73 (Additional requirements in relation to short-term stream and Medium-term stream (post 18/3/18 only) > Annual earnings) for discussion about this criterion.

Relevant case law

An v MIMIA [2006] FMCA 1537	
An v MIAC [2007] FCAFC 97; (2007) 160 FCR 480	Summary
Bharaj Construction Pty Ltd v MIBP [2016] FCCA 902	Summary
Bharaj Construction Pty Ltd v MIBP (No.3) [2019] FCCA 31	Summary
Hope v The Council of the City of Bathurst (1980) 144 CLR 1; [1980] HCA 16	
Jayshree Enterprises Pty Ltd v MIBP and Gohil v MIBP [2016] FCCA 2825	Summary
MIBP v Jayshree Enterprises Pty Ltd [2017] FCA 264	Summary
Li Tian v MIAC [2008] FMCA 500	Summary
Masuoka v IRT (1996) 67 FCR 492	
Mulwala Golden Inn Restaurant Pty Ltd and Zhu v MIAC [2010] FMCA 228	Summary
Nauru Air Corporation v MIBP [2016] FCCA 13	Summary
Nice Shoes Pty Ltd v MIMIA [2014] FCA 252	Summary
Puzey v Commissioner of Taxation (2003) 131 FCR 244; [2003] FCAFC 197	
Radeshar Pty Ltd v MIAC [2011] FMCA 561	Summary
Thuy Tien Hair Designs v MIBP [2014] FCCA 2582	Summary
Tian v MIAC [2008] FCA 1334	Summary
Tvarkovski v MIMA [2001] FCA 375	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 1999 (No.6)	SR 1999 No.81
Migration Amendment Regulations 2005 (No.1)	SLI 2005 No.54
Migration Amendment Regulations 2009 (No.5)	SLI 2009 No.115
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)	SLI 2009 No.203

[237] See the 'TSMIT' tab of the Register of Instruments: Business Visas for the relevant instrument.

Migration Amendment Regulations 2010 (No.1)	SLI 2010 No.38
Migration Amendment Regulation 2012 (No.2)	SLI 2012 No.82
Migration Amendment Regulation 2012 (No.3)	SLI 2012 No.105
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012 No.256
Migration Amendment Regulation 2013 (No.1)	SLI 2013 No.32
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013 No.146
Migration Legislation Amendment (2015 Measures No.2) Regulation 2015	SLI 2015 No.103
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No.242
Migration Legislation Amendment (2017 Measures No.3) Regulations 2017	F2017L00816
Migration Amendment (Specification of Occupations) Regulations 2017	F2017L00818
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262
Migration Amendment (Skilling Australians Fund) Act 2018	No 38, 2018
Migration (Skilling Australians Fund) Charges Act 2018	No 39, 2018
Migration Amendment (Skilling Australians Fund) Regulations 2018	F2018L01093
Migration (Skilling Australians Fund) Charges Regulations 2018	F2018L01092

Available decision templates/precedents

The following decision template/precedent is designed specifically for review of decisions on approval of nominated positions under r.5.19:

- **Business Nominated Position – r.5.19 (post 1 July 2012)** – This template is designed for use in review of a decision to reject an application for approval of a nominated position under r.5.19 of the Migration Regulations 1994 made on or after 1 July 2012. The template requires users to identify whether r.5.19(3) (Temporary Residence Nomination Stream) or r.5.19(4) (Direct Entry Nomination Stream) is relevant. It is not suitable for nominations made after 18 March 2018.

Last updated/reviewed: 2 August 2019

Financial Reports

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Overview

Reviews of certain decisions - including business visa refusals and business sponsorship refusals – require valuation of assets, identification of an ownership interest and assessment of a business entity's financial position and ability to comply with its sponsorship obligations. Such enquiries generally require consideration of financial reports.

A financial report (also known as a financial statement) shows the financial position of a business over time or at a point in time. In practical terms, it is a historical record, in monetary terms, of all resources owned, liabilities owed, profits or losses incurred and cash flows of the business at a defined time or over a defined period. Financial statements based on properly maintained records (e.g. taxation documentation, bank statements, accounts ledgers, invoices, receipt books, petty cash receipts) should correctly record and explain a business entity's transactions and explain its financial position and performance.[1] All companies registered under the *Corporations Act 2001* (the Corporations Act) must keep written financial records.[2] Other legal entities (e.g. sole proprietors and partnerships which are more common structures in business cases before the tribunal) may be required by various State and Federal Acts to record certain types of financial information (e.g. all businesses that are registered or required to be registered for Goods and Services Tax (GST) must lodge GST returns,[3] certain NSW businesses must provide financial information in payroll tax returns[4]).

The three major types of financial statement that give the clearest picture of an entity's business activities and financial success are:

1. the **balance sheet**, which measures a company's financial position at a point in time,
2. the **income statement** (otherwise known as the profit and loss statement), which measures a company's financial performance over a defined period (usually 12 months), and
3. the **statement of cash flow**, which details the company's cash flows from operating, financing and investing activities over a period of time.[5]

With these three statements it is possible to identify the assets, liabilities, and hence, the net worth of a business entity. They could also assist in identifying whether the business is in good health and being well-managed. Verifiable evidence of financial information would usually take the form of official documentation (e.g. tax records – Business Activity Statements (BAS), PAYG summaries lodged for reporting purposes that comply with statutory or regulatory requirements) or audited financial statements. Departmental guidelines state that where there are serious and specific concerns about the information provided in financial statements, officers may consider requesting statements

[1] Accounting Standard AASB 101, *Presentation of Financial Statements* (compiled version, 31 December 2017) ('AASB 101'), paragraph 9 describes financial statements as, 'a structured representation of the financial position and financial performance of an entity.' The objective of financial statements is 'to provide information about the financial position, financial performance and cash flows of an entity that is useful to a wide range of users in making economic decisions. Financial statements also show the results of the management's stewardship of the resources entrusted to it. To meet this objective, financial statements provide information about an entity's: (a) assets; (b) liabilities; (c) equity; (d) income and expenses, including gains and losses; (e) contributions by and distributions to owners in their capacity as owners; and (f) cash flows.' (https://www.aasb.gov.au/admin/file/content105/c9/AASB101_07-15_FP_COMPdec17_01-18.pdf, accessed 3 September 2018).

[2] s.286. In addition, some companies must prepare annual financial reports and directors' reports: s.292.

[3] *A New Tax System (Goods and Services Tax) Act 1999,* ss.31-5, 31-15.

[4] *Payroll Tax Act 2007* (NSW), s.87.

[5] A complete set of financial statements comprises: statement of financial position at the end of the period; statement of profit or loss for the period; statement of changes in equity for the period; statement of cash flows for the period; notes comprising a summary of significant accounting policies and other explanatory information; comparative information in respect of the preceding period and statement of financial position as at the beginning of the preceding period, if applicable (see AASB 101, paragraph 10).

addressing the specific concerns with a greater level of assurance such as review or audited statements.[6] Other financial records may be useful to assist in corroborating information contained in the financial reports, e.g. taxation documentation such as income tax returns, bank statements, company or business registrations such as extracts from registration authorities, business licenses, and special purpose reports that are supported by taxation documents.[7] Although not required, applicants may be requested to provide financial reports prepared by reputable accountants, limited review or audited financial statements with auditor's opinion in order to obtain a reasonable level of assurance if there are doubts regarding the reliability of the financial reports provided.[8]

Accounting Standards

Given the differences in individual business entities' sizes, corporate structures, nature of financial information and the purposes for which financial statements are used, accounting standards have been developed to standardise and guide the ways in which companies prepare financial statements so as to provide a basis for comparison and limit the options to make arbitrary accounting assumptions.

The Australian Accounting Standards Board (AASB) is responsible for developing and issuing Accounting Standards applicable to Australian entities and the care and maintenance of the body of Standards. The Board's functions and powers are set out in the *Australian Securities and Investments Commission Act 2001.* Since 1 January 2005, Australia has adopted International Financial Reporting Standards developed by the International Accounting Standards Board.[9]

The areas covered by accounting standards include changes in accounting estimates and errors, leases, intangible assets and presentation of financial statements. Some of the standards (e.g. the valuation of goodwill) are discussed briefly below. The complete set of standards can be found on the AASB website.

[6] Policy – Migration Regulations – Other - GenGuide M – Business visas – Visa application & related procedures – Business visa applications – Assessing applications – Requesting financial statements - If documentation is insufficient (re-issued 10/9/2016).

[7] Policy – Migration Regulations – Other - GenGuide M – Business visas – Visa application & related procedures – Business visa applications – Assessing applications – Requesting financial statements - Other financial documentation (re-issued 10/9/2016).

[8] Factors indicating that it may be appropriate to request for review or audited financial statements are:

- if the applicant relies on loans to the business to wholly or substantially meet the net assets in business requirements and these have not been evidenced through bank statements or independently certified loan documents;
- if the applicant relies on net business assets to meet the net value of assets in business, or net value of assets requirements, and the financial statements of the business concerned have not been prepared in accordance with international financial reporting standards or Australian accounting standards;
- if there are inconsistencies or discrepancies in the financial documentation and/or other documentation provided by the applicant; or
- other specific concerns such as whether the reported turnover is corroborated by tax documents or where there are concerns as to the source of funds, justifying a review or limited audit of the financial statements.

Financial audits are performed to form an independent opinion on the integrity of the financial information being presented and to establish reliability on the means by which it is reported. Most financial audits are performed within the context of international or Australian accounting and auditing standards and are covered by legislation such as financial management and corporations law. (Policy – Migration Regulations - Other - GenGuide M – Business visas – Visa application & related procedures – Business visa applications – Assessing applications – Requesting financial statements - Review or limited audit, and Audited statements (re-issued 10/9/2016)).

[9] See AASB website http://www.aasb.gov.au/Pronouncements.aspx (accessed 3 September 2018).

Who is bound by the Australian Accounting Standards?

Accounting standards regarding 'Presentation of Financial Statements' (AASB 101) applies to:[10]

(a) each entity that is required to prepare financial reports in accordance with Part 2M.3 of the Corporations Act;
(b) general purpose financial statements of each reporting entity; and
(c) financial statements that are, or are held out to be, general purpose financial statements.

Companies that are required to prepare financial reports in accordance with Part 2M.3 of the Corporations Act include all disclosing entities; all public companies; all large proprietary companies; and all registered schemes.[11] The term 'reporting entity' is defined as, 'an entity in respect of which it is reasonable to expect the existence of users who rely on the entity's general purpose financial statement for information that will be useful to them for making and evaluating decisions about the allocation of resources. A reporting entity can be a single entity or a group comprising a parent and all of its subsidiaries.'[12]

Many (perhaps most) businesses which the tribunal is required to assess will be non-reporting entities (e.g. sole proprietors, partnerships and small proprietary companies). Such entities are (in general terms, although exceptions may apply)[13] not required by the Corporations Act to apply accounting standards in their financial statements. If, however, their accounts are prepared by a member of the Chartered Accountants Australia and New Zealand, the Institute of Public Accountants, or CPA Australia, such a person is required to prepare certain elements of the accounts of non-reporting entities in accordance with the standards.[14] Note, however, that people who are not members of those professional bodies are not bound to prepare accounts in accordance with the standards.

It should be noted that compliance with accounting standards still leaves business entities with a degree of flexibility. Thus, there are a large number of choices available to accountants regarding characterisation, measurement and presentation of particular financial items when preparing financial reports.[15] Different accounting methods and assumptions may result in different asset values or profit or turnover levels. When not satisfied that financial records give an accurate picture, the tribunal may consider the following courses:

- matching statements (for example, matching the value of owners' equity as stated on the balance sheet for one year with the profit figure on the profit and loss statement for the relevant period and the figure on the previous year's balance sheet; comparing statements

[10] AASB 1057, paragraph 7 (https://www.aasb.gov.au/admin/file/content105/c9/AASB1057_07-15_COMPnov15_01-16.pdf, accessed 3 September 2018).
[11] s.292 and s.296 of the Corporations Act.
[12] 'Reporting entity' as defined AASB 101 in paragraph Aus7.2. Refer also to AASB 'Glossary of Defined Terms': http://www.aasb.gov.au/Pronouncements/Glossary-of-defined-terms.aspx (accessed 4 August 2017).
[13] E.g. s.293 of the Corporations Act provides that a small proprietary company may be required to prepare a financial report if so directed by shareholders with at least 5% of the votes.
[14] Members of these bodies are bound by Accounting Professional and Ethical Standards developed by the Accounting Professional and Ethical Standards Board (APESB): http://www.apesb.org.au/page.php?id=12 (accessed 3 September 2018). See also https://www.charteredaccountantsanz.com/member-services/member-obligations/codes-and-standards , https://www.publicaccountants.org.au/about-us/ipa-rules-and-standards and http://www.cpaaustralia.com.au/about-us/member-conduct-and-discipline (accessed 3 September 2018). See also APES 205 Revised 2015, *Conformity with Accounting Standards* (effective 1 January 2016) and APES 110, *Code of Ethics for Professional Accountants* (effective 1 July 2011 with early adoption permitted), available at: http://www.apesb.org.au/page.php?id=12 (accessed 3 September 2018).
[15] For example, there are four available ways in determining the cost of goods sold depending on the nature of a business: individual or specific identification method; First in first out method (FIFO); Weighted average method and Last in first out method (LIFO) (see Haber, J.R. *Accounting Demystified* (AMACOM, 2004), pp.52-63 for further information on these methods). There is also more than one way to depreciate an asset e.g. straight line depreciation method; declining balance depreciation (see Haber, J.R. *Accounting Demystified* (AMACOM, 2004), pp.76-81). Moreover, certain financial items could be characterised as an asset in one company but not in another due to the difference in industry sectors. See also Australian Accounting Standards Board's website for applicable accounting standards for different reporting periods. (http://www.aasb.gov.au/Pronouncements/Current-standards.aspx (accessed 3 September 2018).

given to the tribunal to statements given to the tax office or a lender),

- seeking advice from reputable accountants or auditors, or
- where it appears that a more accurate picture of a business may be gained by applying a particular accounting standard or method, the tribunal may request an applicant to provide statements prepared in accordance with the standard.

Note that the weight to be given to financial statements, like other evidence, is a matter for the Tribunal. For example, an applicant may claim that statements prepared do not present a true picture because they have been prepared for tax purposes. In such circumstances, the Tribunal must weigh those claims along with the other evidence in making its findings of fact. Where an applicant provides statements that do not conform with reliable accounting standards or policies, the Tribunal should take care to avoid any appearance of rejecting them on that basis alone, but should assess the weight to be given to them based on the difficulties the accounting method used poses in trying to discover the relevant facts.

Balance Sheet / Statement of Financial Position

A balance sheet (also known as statement of financial position) shows the financial position by listing what an enterprise owns, owes, and its owners' interest at a particular point in time under the basic accounting equation: **Assets = Liability + Owner's equity**.[16] The financial position of the business is essentially how much the business is worth on a given date (usually the end of the fiscal year), in other words, its net assets (also known as owner's equity or shareholder's equity). It can also be set out in the format of 'current/non-current form' or the 'liquidity form' where the former subdivides assets and liabilities into current and non-current[17] and the latter does not.[18] In some statements, liabilities are represented with either a negative sign or in parentheses.

Understanding how to read the statement of financial position is particularly important in asset calculations, as required in determining business skills visa decisions (see also MRD Legal Services Commentary: Net Personal and Business Assets Calculation for further details). Understanding the components and what they are meant to represent is an effective way of identifying if an applicant has misrepresented the business' financial position or whether there are irregularities that may need further scrutiny. Also, notes to the financial statements at the back of the reports are very useful in determining the nature of a particular financial item given the number of accounts within the balance sheet. These notes should be read in conjunction with the financial statements in order to understand the true nature of the components.

[16] See Hey-Cunningham, D. *Financial Statements Demystified,* 4th ed. (Allen & Unwin, Crows Nest, 2006), p.18-19 for further discussion.

[17] See AASB 101, paragraph 66:

'An entity shall classify an asset as current when:

(a) it expects to realise the asset, or intends to sell or consume it, in its normal operating cycle;
(b) it holds the asset primarily for the purpose of trading;
(c) it expects to realise the asset within twelve months after the reporting period; or
(d) the asset is cash or a cash equivalent (as defined in AASB 107) unless the asset is restricted from being exchanged or used to settle a liability for at least twelve months after the reporting period.

An entity shall classify all other assets as non-current.'

[18] AASB 101 indicates that presentation of assets and liabilities in order of liquidity may provide information that is reliable and more relevant than a current/non-current presentation for some entities, because the entity does not supply goods or services within a clearly identifiable operating cycle. A mixed presentation using current/non-current classification and in order of liquidity is also permitted under AASB 101 if that provides information that is reliable and more relevant (paragraphs 63, 64).

Assets Listed in the Balance sheet

An asset has been defined as:

> *A resource:*
> *(a) controlled by an entity as a result of past events; and*
> *(b) from which future economic benefits are expected to flow to the entity.*[19]

Most economic resources of an enterprise that are generally used to help produce, either directly or indirectly, future cash flows for the business and measurable in monetary terms are included in the Asset section of the statement. Assets can be classified as tangible or intangible. Assets may also be subdivided into current or fixed (non-current) assets.

Current Assets

Current assets are generally those which mature in less than one year.[20] They are the sum of the following categories:

- Cash,
- Accounts Receivable (A/R),
- Inventory (Inv),
- Notes Receivable (N/R), and
- Prepaid Expenses and other Current Assets.

Cash

The Cash account includes cash on hand, short-term savings deposits at banks and cheques on hand that have not been deposited. If cash is inadequate to pay debts or is improperly managed the business may become insolvent and be forced to wind up or the proprietor may be declared bankrupt. Problems with cash can be more accurately identified from the Statement of Cash Flow (see below). The amount reported in the balance sheet under 'cash' may be verifiable by bank account statements and other financial records for the relevant period. These financial records may also provide some useful information regarding the source of funds. The cash account in the balance sheet of cash businesses (e.g. small cafes where customers purchase by cash instead of by credit) would generally represent a large proportion of total assets and this is a sign that the business is actively trading on a cash basis.

Accounts Receivable (A/R)

Accounts receivable are monies due from customers who have purchased goods or services from the business entity on credit rather than paying cash. They arise from the sale of inventory or services sold on credit. Inventory is sold and shipped, an invoice is sent to the customer, and later cash is collected. The A/R exists from the time the inventory is sold until the receipt of cash. Although the majority of businesses have an A/R account on their balance sheet, it is still possible for an entity to have no A/R if it operates as a cash business. Where businesses operate mainly on a credit basis, receivables are proportional to sales. As sales rise, the investment made in receivables also rises. If a business entity has a high A/R figure as a percentage of its total assets on its balance sheet, it indicates that the majority of its income is derived as a result of trading activities on credit. Similar to the cash account, this is also one of the signs that the business is 'operated for the purpose of making profit through the provision of goods, services…to the public' and is therefore a 'qualifying business' as defined in r.1.03 of the Migration Regulations 1994 (the Regulations).

[19] See AASB 'Glossary of Defined Terms': http://www.aasb.gov.au/Pronouncements/Glossary-of-defined-terms.aspx (accessed 3 September 2018).
[20] See AASB, 'Glossary of Defined Terms': http://www.aasb.gov.au/Pronouncements/Glossary-of-defined-terms.aspx (accessed 3 September 2018).

Inventory

Inventory or trading stock consists of the goods and materials a business purchases or manufactures to on-sell at a profit. In the process, sales and receivables are generated.[21]

Notes Receivable (N/R)

Notes receivable are receivables due to the business, usually in the form of a promissory note, arising because the business made a loan to another party. In most cases the note will be due from one of three sources:

- customers,
- employees, or
- officers of the company (if incorporated).

A customer N/R is when a customer borrowed from the company, probably because they could not meet the A/R terms. The customer's obligation may have been converted to a promissory note. An employee N/R may be part of the employee salary package.

Prepaid Expenses and Other Current Assets

Other Current Assets consist of prepaid expenses and other miscellaneous and current assets. Prepaid expenses are prepayments of expenses that will be incurred in future periods, e.g. rent or insurance prepaid for the next period. They are classified as assets because they could provide future economic benefits to the business entity. Prepaid expenses greater than the period of one year would generally be classified as non-current assets.

Fixed or Non-Current Assets

Fixed or non-current assets represent assets used in the operation of the business and whose life exceeds one year. They include assets such as:

- land,
- building,
- property, plant, machinery and equipment,
- vehicles,
- furniture and fixtures,
- leasehold Improvements,
- intangible assets.

Intangibles

An intangible asset is an identifiable non-monetary asset without physical substance,[22] for example patents, copyrights, licences, brand names, goodwill, franchises, distributorships, and research and development costs. It has been said that the 'very definition of intangible (i.e. neither capable of being perceived especially by sense of touch, substantially real, capable of being realised precisely by the mind, nor capable of being appraised by an actual or approximate value) should make any prudent user of financial statements sceptical of any intangible assets included in a balance sheet.'[23]

[21] See also the definition of 'inventories' in the AASB 'Glossary of Defined Terms': http://www.aasb.gov.au/Pronouncements/Glossary-of-defined-terms.aspx (accessed 3 September 2018).
[22] Accounting Standard AASB 138, 'Intangible Assets' (compiled version, October 2015) (AASB 138), para 8 (and AASB 3, 'Business Combinations' (compiled version, August 2015), Appendix A. However, note Accounting Standard AASB 138, para 4: 'Some intangible assets may be contained in or on a physical substance such as a compact disc (in the case of computer software), legal documentation (in the case of a licence or patent) or film.' (http://www.aasb.gov.au/Pronouncements/Current-standards.aspx, accessed 3 September 2018).
[23] Hey-Cunningham, D., *Financial Statements Demystified,* 4th ed. (Allen & Unwin, Crows Nest, 2006), p.114.

Accounting Standard AASB 138, 'Intangible Assets' (AASB 138) states:

> *Entities frequently expend resources, or incur liabilities, on the acquisition, development, maintenance or enhancement of intangible resources such as scientific or technical knowledge, design and implementation of new processes or systems, licences, intellectual property, market knowledge and trademarks (including brand names and publishing titles)…*
>
> *Not all [these] items … meet the definition of an intangible asset, ie* ***identifiability, control over a resource and existence of future economic benefits.***[24] *If an item within the scope of this Standard does not meet the definition of an intangible asset, expenditure to acquire it or generate it internally is recognised as an expense when it is incurred. However, if the item is acquired in a business combination, it forms part of the goodwill recognised at the acquisition date.*[25] [Emphasis added]

The bolded words in the above paragraph are key to understanding whether an intangible is classed as an 'intangible asset' as defined by AASB 138. For example:

- Internally generated goodwill cannot be recognised as an asset, because it is not an identifiable resource (i.e. it is not separable nor does it arise from contractual or other legal rights) controlled by the entity that can be measured reliably at cost.[26]
- Internally generated brands, mastheads, publishing titles, customer lists and items similar in substance cannot be distinguished from the cost of developing the business as a whole. Therefore, such items are not recognised as intangible assets.[27]
- No intangible asset arising from research (or from the research phase of an internal project) shall be recognised. In the research phase of an internal project, an entity cannot demonstrate that an intangible asset exists that will generate probable future economic benefits. Therefore, this expenditure is recognised as an expense when it is incurred.[28] In its development phase, however, an intangible asset may be recognised, one of the criteria for recognition being a demonstrated ability to use or sell the asset.[29]
- An entity usually has insufficient control over the expected future economic benefits arising from a team of skilled staff and from training for these items to meet the definition of an intangible asset. For a similar reason, specific management or technical talent is unlikely to meet the definition of an intangible asset, unless it is protected by legal rights to use it and to obtain the future economic benefits expected from it. Similarly, in the absence of legal rights to protect, or other ways to control, an entity's relationship with customers, the entity usually has insufficient control over the expected economic benefits from customer relationships and loyalty for such items to meet the definition.[30]

Goodwill

By accounting convention/definition, 'goodwill' is calculated as the difference between the purchase price of an entity/business and the fair value of the assets and liabilities acquired.[31] That is, when an

[24] These characteristics are derived from the definitions of 'intangible asset' ('identifiable non-monetary asset without physical substance') and 'asset' ('a resource (a) controlled by an entity as a result of past events; and (b) from which future economic benefits are expected to flow to the entity') in AASB 138 'Intangible Assets', para 8.
[25] Accounting Standard AASB 138, 'Intangible Assets' (compiled version, October 2015), paras 9-10.
[26] AASB 138, paras 48-49. Para 12 states that an 'asset is identifiable if it either:
(a) is separable, ie is capable of being separated or divided from the entity and sold, transferred, licensed, rented or exchanged, either individually or together with a related contract, identifiable asset or liability, regardless of whether the entity intends to do so; or
(b) arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations.'
[27] AASB 138, para 63-64.
[28] AASB 138, paras 54-55.
[29] AASB 138, para 57.
[30] AASB 138,paras 15-16.
[31] Hey-Cunningham, D. *Financial Statements Demystified,* 4th ed. (Allen & Unwin, Crows Nest, 2006), p.115.

entity is purchased, and its purchase price exceeds the value of the assets as shown on its balance sheet, that part of the purchase price which cannot be attributed to other assets is attributed to goodwill.[32] This definition means that goodwill can only be entered on a balance sheet on the acquisition of an entity or business. Goodwill may remain on the balance sheet, but its value is usually reduced over time by amortisation.[33] It cannot be revalued upward.[34]

Other Assets

Other assets consist of miscellaneous accounts such as deposits and long-term notes receivable from third parties. They are turned into cash when the asset is sold or when the note is repaid.

Total Assets

Total assets represent the sum of all the assets owned by or due to the business. Total Assets should equal total liabilities + owners' equity on the balance sheet to reflect the accounting rule that resources of the business entity should equal the claims on the resources.

Liabilities Listed in the Statement

Liabilities are amounts that the business owes. Like assets, liabilities may be classified as current (payable within 12 months) and non-current (over 12 months).

It has been stated that the 'challenge for preparers of financial statements is to ensure all liabilities are included. The challenge for users is to discover the liabilities that have been taken 'off balance sheet.'[35]

Current and Non-current Liabilities

Current liabilities are those obligations that will mature and must be paid within 12 months (or the entity's 'normal operating cycle').[36] These are liabilities that can cause an entity's insolvency if cash is inadequate. All other liabilities are non-current.

[32] AASB 138, para 11 characterises this value as 'Goodwill recognised in a business combination is an asset representing the future economic benefits arising from other assets acquired in a business combination that are not individually identified and separately recognised. The future economic benefits may result from synergy between the identifiable assets acquired or from assets that, individually, do not qualify for recognition in the financial statements.' There is both a subjective element (the purchaser's assessment of the value of the entity) and an objective element (the market price for which the entity is sold, assuming the exchange is between knowledgeable, willing parties in an arm's length transaction). Of course, both the purchaser's assessment and the market value may later change. AASB 138, para 33 states: 'The fair value of an intangible asset will reflect expectations about the probability that the expected future economic benefits embodied in the asset will flow to the entity. In other words, the entity expects there to be an inflow of economic benefits, even if there is uncertainty about the timing or the amount of the inflow.' In other words, the effect of probability is reflected in the fair value measurement of the intangible assessment.

[33] Amortisation measures the decline in an intangible asset's value spread over the asset's economic life. It reflects the intangible asset's expiration, or obsolescence or other decline in value as a result of its use or the passage of time. It is to intangible assets what depreciation is to tangible assets. AASB 138, para 8 defines it as 'the systematic allocation of the depreciable amount of an intangible asset over its useful life.'

[34] Hey-Cunningham, D., *Financial Statements Demystified,* 4th ed. (Allen & Unwin, Crows Nest, 2006), p.117.

[35] Hey-Cunningham, D., *Financial Statements Demystified,* 4th ed. (Allen & Unwin, Crows Nest, 2006), p.127.

[36] AASB 101, paras 69 – 70, states:

69 An entity shall classify a liability as current when:
- (a) it expects to settle the liability in its normal operating cycle;
- (b) it holds the liability primarily for the purpose of trading;
- (c) the liability is due to be settled within twelve months after the reporting period; or
- (d) it does not have an unconditional right to defer settlement of the liability for at least twelve months after the reporting period. Terms of a liability that could, at the option of the counterparty, result in its settlement by the issue of equity instruments do not affect its classification.

An entity shall classify all other liabilities as non-current.

70 Some current liabilities, such as trade payables and some accruals for employee and other operating costs, are part of the working capital used in the entity's normal operating cycle. An entity classifies such operating items as current liabilities even if they are due to be settled more than twelve months after the reporting period. The same normal operating cycle applies to the classification of an entity's assets and liabilities. When the entity's normal operating cycle is not clearly identifiable, it is assumed to be twelve months.

Liabilities may consist of the following:

- Accounts Payable - Trade (A/P),
- Accrued Expenses,
- Notes Payable (N/P),
- Salaries payable,
- Income tax payable,
- Interest payable,
- Bank loan payable,
- Provisions, and
- Deferred income.

Accounts Payable

Accounts Payable are obligations due to trade suppliers who have provided inventory or goods and services used in operating the business. If the company is paying its suppliers in a timely fashion, days payable will not exceed the terms of payment.

Accrued Expenses

Accrued Expenses are obligations owed but not billed at the balance sheet date such as wages, superannuation contributions and payroll taxes, or obligations accruing, but not yet due, such as interest on a loan.

Borrowings

Borrowings include bank overdrafts and bank loans. If a borrowing is due within a year (or the 'normal operating cycle' of the entity) of the balance sheet, it is shown as a current liability. A bank loan may be split between non-current and current borrowings, the former being the balance of the principal not paid within the first year. A bank overdraft is included as a current liability because of the legal obligation of repayment on demand.[37]

The notes to the financial statements provide further detail about loans, including where loans are from and the terms and repayment date. They can be useful in determining whether the particular loan is a loan from a third party or from the owners.

Provisions

Provisions are a means of recognising an event or transaction that has occurred before the balance sheet date, but are not necessarily legally due, not necessarily as readily measured, and not payable until some time in the future. Provisions relating to specific assets are shown as deductions from those assets (e.g. provision for doubtful debts). All other provisions are shown as liabilities. Typical provisions are for dividends, income tax, employee entitlements, deferred tax, warranty rationalisation, maintenance, restoration and general insurance claims.[38]

Deferred Income

Deferred income arises when income is received in advance of the period in which it is earned i.e. before the supply of the goods or services. It is usually included in liabilities and sometimes in equity on the balance sheet. Deferred income is usually included as a liability when the amount is refundable if the goods or services are not eventually supplied, but is often treated as equity when refunding

[37] Hey-Cunningham, D., *Financial Statements Demystified,* 4th ed.(Allen & Unwin, Crows Nest, 2006), p.133.
[38] Hey-Cunningham, D., *Financial Statements Demystified* 4th ed. (Allen & Unwin, Crows Nest, 2006), p.151.

does not exist.[39]

Total Liabilities

The total liabilities figure is the sum of all the liabilities and obligations owed by the business to third parties. Continuous or large amounts of loans from third parties to finance the business together with a lack of asset backing is one of the signs which indicates that the business may not be financially sound.

Owners' equity / shareholders' equity (Net Assets)

Owners' equity or shareholders' equity is the book value (i.e. value according to the balance sheet) of owners' net investment in a company. Equity is defined by the AASB as the 'residual interest in the assets of the entity after deducting all its liabilities'.[40]

Owners' equity is equal to the net assets of the business since net assets (by convention) refer to an entity's total assets less total liabilities.[41] Owners' equity also equals assets minus liabilities from the accounting equation (see above). See MRD Legal Services Commentary Net Personal and Business Assets Calculation for further details in relation to net assets.

It is usually divided into three accounts: share capital (contributed equity), reserves and retained profits.

Retained profits

The retained profits account represents the total cumulative amount of profits that the business has retained and reinvested in the business rather than paid out as dividends. The account has a direct link with the income statements, the current year's retained profits being equal to opening retained profits (reported on the previous year's balance sheet as the closing retained profit figure) plus profits (reported in the current year's income statement) minus dividends.

Reserves

Reserves are amounts transferred from retained profits or created as a result of certain events or decisions and can take many different forms. Examples include asset revaluation reserve, general reserve, foreign currency translation reserve and capital profits reserve.

Contributed equity/share capital

The term 'contributed equity' is often used interchangeably with 'owners' equity'. When differentiated from retained profits and reserves, it generally refers to that part of owners' equity not attributable to retained profits and reserves. That is, it is that portion of owners' equity attributable directly to the contribution from owners, as distinct to changes in the value of the equity brought about by profits or movements in reserves.

Income Statement / Profit and Loss Statement

An Income Statement (or Profit and Loss Statement) identifies how the company is performing. It shows revenues and expenses for a particular accounting period (usually a fiscal year) and the

[39] Hey-Cunningham, D., *Financial Statements Demystified* 4th ed. (Allen & Unwin, Crows Nest, 2006), pp.147 - 148.
[40] AASB, *Framework for the Preparation and Presentation of Financial Statements* (compiled version, June 2014), para 49 (http://www.aasb.gov.au/Pronouncements/Conceptual-framework.aspx, accessed 3 September 2018).
[41] See Hey-Cunningham, D., *Financial Statements Demystified* 4th ed. (Allen & Unwin, Crows Nest, 2006), p.153.

resulting operating profit or loss before and after income tax. The income statement indicates how much the business earned for a year and whether it was profitable. Businesses may report reduced profit figures or losses for tax purposes which may not represent the true financial performance of the company. Therefore, although declining profits or negative profits are signals that a company is in financial difficulties, even if the company reported a low or negative profit figure, other financial evidence and records should be considered before concluding that the business is not financially sound.

Information that indicates that the company is not financially sound may constitute 'adverse information' about an employer for the purposes of certain sponsorship or nomination approvals.[42]

An income statement is also useful in providing the business entity's annual turnover figure as required in Subclasses 132, 890, 892 permanent business visas. Annual turnover may also appear as 'total sales' or 'revenue' and it refers to the revenue generated as a result of the ordinary activities of a business.[43] However, in certain circumstances it may be necessary to look behind the stated turnover/revenue of a business to examine whether that turnover/revenue is real in substance. In *Cheng v MIAC*[44] the Court upheld the Tribunal's finding that a business acting as an intermediary between two other businesses, and not as a merchant in its own right, could only claim the commissions it was paid as constituting its 'turnover'.

If there is a salary/wage expense figure on the income statement, it could be used to match against the number of employees claimed to have worked in the company in order to work out whether these employees were paid at the relevant wage level, which may be relevant if compliance with the sponsorship obligation to ensure equivalent terms and conditions of employment is in issue.

Although the necessary information to calculate net assets is found in the balance sheet, an income statement will identify whether the net assets are reflective of the business' success or merely book assets.

Statement of Cash Flow

The statement of cash flows details the inflows and outflows of cash from its various activities, specifically its:

- **operating activities**, such as receipts from customers, payments to suppliers, and taxes paid,
- **investing activities**, such as payments for plant and equipment and proceeds from sale of equipment, and
- **financing activities**, such as drawings, proceeds from borrowings, repayment of borrowings, proceeds from issue of shares, and dividends.[45]

[42] See for example r.2.59(g) for standard business sponsors, and r.5.19(3)(g) and r.5.19(4)(f) for employer nominations (made before 18 March 2018), as defined in r.1.13A. Adverse information as defined in r.1.13A includes information that a person has become insolvent within the meaning of s.95A of the *Corporations Act 2001*.
[43] Policy – Migration Regulations Other - GenGuideM – Business Visas – Visa application and related procedures – Business ownership and assets – Turnover – About 'turnover' (re-issued on 10 September 2016).
[44] [2012] FMCA 911 (Driver FM, 16 November 2012). This finding was upheld on appeal by the Federal Court in *Cheng v MIAC* [2013] FCA 405 (Cowdroy J, 6 May 2013).
[45] For further discussion see Haber, J.R. *Accounting Demystified* (AMACOM, 2004), pp.136-138, and Hey-Cunningham, D., *Financial Statements Demystified* 4th ed. (Allen & Unwin, Crows Nest, 2006), pp. 214-229.

While it is important to consider the profitability of a business, it is equally important to be satisfied that it has sufficient liquid funds to pay its bills when they fall due. Without sufficient cash available, even an asset rich business with apparently good profit margins can become insolvent. By tracking cash flow it is possible to determine if a business is properly capitalised. Solvency is also one of the indicators as to whether the business is being managed effectively. Cash flow problems are the primary cause of failed businesses and a developing pattern of cash shortage is a strong indicator that something is wrong.

Other Business Records

Other records held by a business that will shed light on its financial situation include:

- General ledger, recording all of a company's transactions and balances (revenues, expenses, assets, liabilities, etc.),
- Cash records (bank statements, deposit books, cheque butts, petty cash records),
- Debtor and sales records (a list of debtors and their balances, delivery dockets, invoices and statements issued, a list of all sales transactions),
- Creditor and purchases records (purchase orders, invoices and statements received and paid, unpaid invoices, a list of all purchases, a list of all creditors and their balances),
- Wages and superannuation records,
- A register of property, plant and equipment showing transactions and balances in relation to individual items,
- Inventory records,
- Investment records (contract notes, dividend or interest notices, certificates),
- Tax returns and calculations (income tax PAYG summaries, group tax, fringe benefit tax, GST returns/BAS statements and other statements), and
- Deeds, contracts and agreements.

Asset Value Forecasts

On occasion, the past and present assets of a business will not be a full or correct picture of its future value. In these cases a company may produce profit forecasts and projections. These should identify the assumptions used, extent of enquiries and research, specific period it relates to, and an explanation for choosing that period. They should also include the degrees of uncertainty. If there is a concern that a forecast may be misleading, an expert report, possibly in accordance with AASB standards, should be considered.

Common Signs of Financial Trouble

The financial statements can indicate financial trouble. Some of the warning signs that can be discovered from statements are:

- Low operating profits or cash flow,
- Low, declining or negative net assets.

- Large amounts of borrowing and/or persistent debt financing with low asset backing, and
- Legal action taken or threatened by trade suppliers or other creditors over money owed to them.

If the income statement is regularly at breakeven or in deficit this is an indication the business is not viable. Likewise if the statement of cash flow shows continual shortages or is often in the red this either indicates that A/R are not maturing before A/P or N/P are falling due or purchase of stock is out of step with sales and may mean that the business lacks solvency. If a business is not solvent, this may be relevant to whether the business is 'lawfully operating', which is a requirement for approval as a sponsor or nominator in certain circumstances.[46] Information of serious financial difficulties may also constitute adverse information about the business for the purposes of certain sponsorship or nomination approvals.[47] Examination of all other financial records and individual components of the financial statements may be necessary to build a complete picture of the business financial health before making conclusions regarding the viability or solvency of the business.

Further Reading

Haber, Jeffry R. *Accounting Demystified*, AMACOM 2004
Available in Library - 657.405 HAB

Hey-Cunningham, David. *Financial statements demystified,* 4th ed. (Allen & Unwin, Crows Nest, 2006). Available in Library – 657.3 HEY

Relevant Case Law

Cheng v MIAC [2012] FMCA 911	Summary
Cheng v MIAC [2013] FCA 405	Summary

Last updated/reviewed: 4 September 2018

[46] See for example r.2.59(c) for standard business sponsors; r.5.19(3)(b)(ii) and r.5.19(4)(b) for employer nominations made before 18 March 2018.
[47] See for example r.2.59(g) for standard business sponsors; r.5.19(3)(g) and r.5.19(4)(f) for employer nominations made before 18 March 2018.

Main Business (Regulation 1.11)

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Overview

Applicants for particular classes of visas must satisfy the Minister (and the Tribunal on review) that their 'main business' satisfies relevant criteria in respect of certain business activities. The relevant class of visa depends on the date on which the visa application was made.

For visa applications made prior to 1 July 2012, the following visas classes contain 'main business' criteria:

- Business Skills (Provisional) (Class UR) visas, subclass 160 (Business Owner) (Professional) and Subclass 163 (State/Territory Sponsored Business Owner) (Provisional);
- Business Skills (Residence) (Class DF) visas, Subclass 890 (Business Owner) and Subclass 892 (State/Territory Sponsored Business Owner); and
- Business Skills – Established Business (Residence) (Class BH) visas, Subclass 845 (Established Business in Australia) and Subclass 846 (State/Territory Sponsored Regional Established Business in Australia); and
- Business Skills - Business Talent (Migrant) Visa Class (Class EA) visa, Subclass 132.

For applications made on or after 1 July 2012, the following visas classes contain 'main business' criteria:

- Business Skills (Provisional) (Class EB) visa, Subclass 188 visa;[1]
- Business Skills (Permanent) (Class EC), Subclass 888 visa;[2] and
- Business Skills - Business Talent (Permanent) (Class EA), Subclass 132 visa.[3]

This follows amendments introduced by the Migration Amendment Regulations 2012 (No.2), whereby visa applications for Business Skills (Provisional) (Class UR) visas and Business Skills – Established Business (Residence) (Class BH) visas were closed to primary applications from 1 July 2012.[4] The visa subclasses in Class BH were removed from the Migration Regulations 1994 (the Regulations) entirely from 1 July 2013.[5] Further, from 1 July 2012, applications for Subclass 890 (Business Owner) and Subclass 892 (State/Territory Sponsored Business Owner) visas, can only be made in certain circumstances.[6]

[1] The Business Skills (Provisional) (Class EB), Subclass 188 visa was inserted in the Migration Regulations 1994 (the Regulations) by Migration Amendment Regulations 2012 (No.2) (SLI 2012, No.82). The relevant visa streams are the 'Business Innovation' stream and the 'Business Innovation Extension' stream. For more information regarding this visa subclass, see MRD Legal Services commentary: Subclass 188 - Business Innovation and Investment (Provisional) (Class EB).
[2] Subclass 888 was inserted into the Regulations by SLI 2012, No.82. The relevant stream is the 'Business Innovation' stream.
[3] As amended by SLI 2012, No.82. The relevant stream is the 'Significant Business History' stream.
[4] SLI 2012, No.82.
[5] SLI 2012, No 82.
[6] Specifically, applicants seeking to satisfy the primary criteria for these subclasses must hold a visa of a subclass included in the Business Skills (Provisional) (Class UR) class that was granted on the basis that the applicant, or the current or former spouse or de facto partner of the applicant (if any), satisfied the primary criteria for the grant of that visa. See items 1104B(3)(d) and (f) as substituted by SLI 2012, No.82.

The applicable criteria in relation to a 'main business' vary according to the subclass of visa. In general terms, the criteria relate to:

- annual turnover;[7]
- being established in Australia, with the applicant having an ownership interest;[8]
- actively operating[9] in Australia, with the applicant having an ownership interest;[10]
- the applicant's and the applicant's spouse or de facto partner's[11] ownership of net assets in the business;[12]
- the applicant, as an owner, having a direct and continuous role in the management and decision making of the business;[13]
- value of goods and services exported;[14]
- being in a designated area;[15]
- submission of Australian Business Number and Business Activity Statements to the Australian Taxation Office;[16]
- employment of Australian citizens or permanent residents or New Zealand passport holders;[17]
- operation in an area specified in a written instrument[18].

In addition, applicants for a Business Skills – Established Business (Residence) (Class BH) made prior to 1 July 2012, have their 'main business' assessed against a business skills points test[19] which takes into account employment of Australians and New Zealanders, turnover, and exports.

[7] Subclass 132 as it stood prior to 1 July 2012, Subclasses 160, 163, 846, 890, 892, the Significant Business History Stream of the Business Skills - Business Talent (Class EA), Subclass 132 visa, and the Business Innovation Streams for both the Subclass 188 and 888 visas.
[8] Subclasses 845, 846 and the Business Innovation Stream of the Subclass 188 visa.
[9] For discussion as to the meaning of 'actively operating', see MRD Legal Services commentaries: Subclass 188 - Business Innovation and Investment (Provisional) (Class EB) and Subclass 890-893 – Business Skills (Residence) (Class DF).
[10] Subclasses 890 and 892, the Extension Stream of the Subclass 188 visa and the Business Innovation Stream of the Subclass 888 visa.
[11] The inclusion of de facto partners as defined in s.5CB of the *Migration Act 1958* and r.2.03A and r.1.09A, applies to visa applications made on or after 1 July 2009: Migration Amendment Regulations 2009 (No. 7)(SLI 2009, No.144), r.3.
[12] Subclasses 845, 846, 890, 892, and the Business Innovation Stream for Subclass 888.
[13] Subclasses 845, 846, and the Business Innovation and Business Innovation Extension Streams of the Subclass 188 visa.
[14] Subclass 846.
[15] Subclass 846.
[16] Subclasses 890, 892, and the Business Innovation Stream of the Subclass 888 visa.
[17] Subclasses 890, 892, and the Business Innovation Stream of the Subclass 888 visa.
[18] Subclass 892 and the Business Innovation Stream of the Subclass 888 visa.
[19] Schedule 7 to the Regulations.

Key Issues

What is a 'main business'?

'Main Business' is defined in r.1.11 of the Regulations. The current definition of 'main business' applies to visa applications made on or after 19 April 2010 (except in certain limited circumstances).[20] Regulation 1.11 provides that a business is a 'main business' in relation to a visa applicant if:

- the applicant has, or has had, an ownership interest in the business;[21] and
- the applicant maintains, or has maintained, direct and continuous involvement in management of the business from day to day and in making decisions affecting the overall direction and performance of the business;[22] and
- the value of the applicant's ownership interest, or the total value of the ownership interests of the applicant and the applicant's spouse or de facto partner, in the business is or was:
    - if the business is operated by a publicly listed company - at least 10% of the total value of the business;[23] or
    - if the business is not operated by a publicly listed company and the annual turnover of the business is at least AUD400,000 – at least 30% of the total value of the business;[24] or
    - if the business is not operated by a publicly listed company and the annual turnover of the business is less than AUD400,000 – at least 51% of the total value of the business;[25] and
- the business is a qualifying business.[26]

The Tribunal should undertake a broad factual enquiry into what may constitute a main business, and should not limit its consideration to the business listed on the relevant Departmental form.[27]

'Qualifying business' - r.1.11(1)(d)

To be a 'main business', the business must be a 'qualifying business'. 'Qualifying business' is defined in r.1.03 of the Regulations to mean 'an enterprise that is operated for the purpose of making profit through the provision of goods and/or services (other than the provision of rental property) to the public and is not operated primarily or substantially for the purpose of speculative or passive investment.'

[20] See item [1] of Schedule 1 and r.2 – 3 to the Migration Amendment Regulations 2010 (No. 3) (SLI 2010, No. 70).
[21] r.1.11(1)(a).
[22] r.1.11(1)(b).
[23] r.1.11(1)(c)(i).
[24] r.1.11(1)(c)(ii).
[25] r.1.11(1)(c)(iii).
[26] r.1.11(1)(d).
[27] *Rahbarinejad v MIBP* [2018] FCCA 2293 (Wilson J, 14 August 2018). The Court held, in the context of cl. 892.211(1) (which requires that the applicant had, and continued to have had, an ownership interest in one or more actively operating 'main businesses' in Australia for at least two years immediately before the visa application was made), that the Tribunal had erred by confining its consideration of the potential main businesses to the business identified on form 1217: at [27]. It should have had regard to the totality of the factual scenario before it, including financial statements that indicated a related trust had been generating income in the two years prior to application: at [31].

The word 'business' is not defined in the *Migration Act* 1958 (the Act) or Regulations. It is a word which takes its content from its context.[28] In *Nassif v MIMIA,* Branson J considered it significant that a 'qualifying business' is defined to mean an enterprise of a particular kind.[29] Her Honour concluded that it is not a necessary characteristic of a 'main business' that the business be carried on by a single entity.[30] While the fact that there may be more than one legal entity is not determinative, where an applicant claims a single 'business' is transacted through multiple entities, the decision-maker is entitled to consider the ownership structure of each entity at any relevant time in order to decide whether they constitute 'the business'.[31]

Continuity and repetition of trading activity over a reasonable period is a relevant consideration in determining whether an entity is a 'business' in the sense of a going concern.[32] It is open to the decision-maker to conclude that an entity is not a 'business' if the evidence points to the business being a sham and not engaged in ongoing trading.[33] In this regard the decision-maker may have regard to the motivation for undertaking trading activities in order to determine whether those activities amount to a going concern.[34] However, any assessment of the elements of a 'qualifying business' should always be brought back to the definition contained in r.1.03.

'operated … making profit through the provision of goods and services to the public'

An enterprise must be operated for the purposes of making profit through the provision of goods and services to the public to meet the definition of qualifying business. It is not sufficient that there merely is an intention or future purpose of the company doing so. A company which has never commenced trading cannot be described as a business which operates through the provision of goods and services to the public.[35] The filing of annual returns alone, does not bring it within this description.[36]

There is no definition of the term 'the public', and it would have its ordinary meaning. However, this should not be treated in a restrictive way and should take account of the particular circumstances of the business. Departmental policy gives the following examples of exclusive business arrangements which may not come within the description of providing goods and services to the public:[37]

- customer base of the business is limited to family members

[28] *Lu v MIAC* (2009) 112 ALD 125 at [39], citing Mason CJ, Gaudron and McHugh JJ in *Re Australian Industrial Relations Commission and Others; Ex parte Australian Transport Officers Federation and Others* (1990) 171 CLR 216 at 226.
[29] *Nassif v MIMIA* (2003) 129 FCR 448 at [33].
[30] *Nassif v MIMIA* (2003) 129 FCR 448, at [35]. See also *Lu v MIAC* (2009) 112 ALD 125 at [40], considering the meaning of "business" in the context of the definition of "eligible business" in s.134(10) in relation to a decision to cancel a visa under s.134(1)(a).
[31] *Ibrahim v MIAC* [2009] FCA 1328 (Jagot J, 18 November 2009) at [32]. The Court on appeal upheld the Tribunal's reasoning. The Tribunal accepted that two businesses claimed by the first appellant were very similar, but did not accept they were the same business on the basis that there must have been a benefit to the first appellant from the winding up of one entity and setting up another entity as a "new business" and that the different ownership arrangements between the two entities were inconsistent with the claim that they were the same business. The Court held these factors were not irrelevant considerations to determining whether multiple entities were the same 'business'.
[32] *Kushner v MIAC* [2009] FMCA 390 (Driver FM, 28 May 2009) at [48]. Although the Court was considering a cancellation under s.134(1), the reasoning appears equally applicable in relation to the meaning of "business" in the context of "main business" and "qualifying business".
[33] *Kushner v MIAC* [2009] FMCA 390 (Driver FM, 28 May 2009) at [47]. The Court upheld a decision of the AAT to cancel a visa under s.134(1) on the basis that the relevant entity was not a "business" in circumstances where its activities were *ad hoc* and for the purpose of a migration outcome, where there was evidence of goods being ordered and billed for, but scant evidence of payment or shipment of goods and evidence of trading activity was recent and relatively small scale. Further issues may arise in such contexts in relation to 'turnover'. See for example *Cheng v MIAC* (2012) 134 ALD 119 at [53], upheld on appeal by the Federal Court in *Cheng v MIAC* (2013) 213 FCR 362.
[34] *Kushner v MIAC* [2009] FMCA 390 (Driver FM, 28 May 2009) at [48].
[35] *Zhou v MIMI*A [2003] FMCA 169 (Harnett FM, 8 May 2003) at [34]. The Court, considering "ownership interest" in a main business for the purposes of cl.846.212(a), rejected the contention that the Tribunal erred in construing the definition of 'qualifying business' as requiring that an enterprise physically trade rather than merely be operated for the purpose of making profit.
[36] *Zhou v MIMI*A [2003] FMCA 169 (Harnett FM, 8 May 2003) at [34].
[37] Policy - Migration Regulations - GenGuide M – Business Skills Visas – Visa application and related procedures – Business ownership and assets – Qualifying Business – Goods and services to the public (reissued 10 September 2016).

- goods and/or services have historically been provided to a single person

- goods and/or services are provided exclusively to a single entity, unless there is an arms-length commercial arrangement (i.e. the buyer and seller are not related, independent of each other, are on an equal footing and are dealing with each other on a commercial basis) that does not restrict or limit the business operations.[38]

Ownership interest - r.1.11(1)(a)

Once the Tribunal has identified the business, the next question in determining whether the applicant meets the definition of 'main business' is whether the applicant has, or has had, an ownership interest in the business as required by r.1.11(1)(a).[39] Regulation 1.03 provides that ownership interest has the meaning given to it in s.134(10) of the Act. The definition of ownership interest in relation to a business as defined in s.134(10) of the Act means an interest in the business as:

- a shareholder in a company that carries on the business; or

- a partner in a partnership that carries on the business; or

- the sole proprietor of the business;

including such an interest held indirectly through one or more interposed companies, partnerships or trusts.

The definition of ownership interest was introduced by the *Migration Amendment Act 1992 (No. 2)* (No.84, 1992), along with the power to cancel a business visa if its holder had not obtained a substantial ownership interest in an eligible business in Australia. The purpose of the new amendments was to ensure that people comply with requirements and were not transferring money and setting up businesses and not then going through with them.[40]

The definition of ownership interest in s.134(10) reflects a deliberate modification of the meaning of ownership interest which exists under general law.[41] Under general law a shareholder in a company has no legal or equitable interest in the assets of the company and a shareholder would not be described as having an 'ownership interest' in the company.[42] On the basis of the definition in s.134(10), being a shareholder in a company that carries on the relevant business satisfies the requirement in r.1.11(1)(a), but being an employee of the entity that carries on the business, for instance, as a director, would not be sufficient.[43]

[38] This was the case in *Teng v MIBP* [2015] FCCA 1197 (Judge Simpson, 18 May 2015) which involved the an Australian company trading solely with a Taiwanese company. The Court confirmed in order to be a 'qualifying business' it was necessary to demonstrate that the Australian company derived profit through the provision of goods to the public. The Court found no error in the Tribunal's finding that the provision of goods exclusively to the Taiwanese company was not 'the provision of goods to the public'.
[39] *Ibrahim v MIAC* [2009] FCA 1328 (Jagot J, 18 November 2009) at [32].
[40] Australia, House of Representatives, *Debates,* No. 183, 1992, Thursday 7 May 1992, pp.2679-2680. In the then Minister's Second Reading Speech, he stated that the Bill:

> *… provides a legal framework to implement two aspects of the Government's new business skills migration category… The first is a system of mandatory participation by business skills migrants in the monitoring of their business activities after their arrival in Australia. The second is the creation of a power for the Minister to cancel permanent entry permits and entry visas of business skills migrants after their arrival in Australia if they do not enter into business activities which meet the objectives of the category or make a genuine effort to do so.*

The Explanatory Memorandum and the Parliament's reading speeches did not otherwise specifically address the issue of ownership interest.
[41] *MIAC v Hart* (2009) 179 FCR 212 per Spender J at [30], per Greenwood J at [66], per Logan J at [104]-[105].
[42] *MIAC v Hart* (2009) 179 FCR 212 at [28], [65] and [104].
[43] *MIAC v Hart* (2009) 179 FCR 212 per Spender J at [15].

Equitable interests in general may be capable of constituting an ownership interest. Beneficial ownership, which can be considered an equitable interest, is expressly recognised in r.1.11A, although specific evidentiary requirements apply, as discussed below. However, the type of equitable interest must still be capable of constituting an ownership interest as either a shareholder, partner or sole proprietor. For example, in *Zhou v MIMIA,* the Court rejected arguments that the Tribunal erred in failing to consider contingent interests, based on the applicant's decision to enter into a particular business or the signing of a pre-contract agreement, as meeting the requirements of an ownership interest as a sole proprietor of a business.[44] Any economic interest and/or legal interest and/or equitable and/or contingent interest based on the signing of a pre-contract agreement did not constitute an ownership interest as a sole proprietor of the business.[45]

The applicant's ownership interest does not need to be continuous for the business to be a main business.[46] Regulation 1.11(1)(a) only requires that the applicant has, or has had, an ownership interest in the business. It would be an error to require an ownership interest at a particular time, such as time of decision, when deciding if a business is a main business.[47] This suggests that a main business in which an applicant ceases to have an ownership interest at the time of decision may still be a "main business" subject to the other requirements in r.1.11 being met. However, ownership arrangements may be relevant to determining what is the relevant business in relation to which the definition of main business is being considered (see Qualifying Business above). In any event, the visa criteria may still require that an applicant's ownership interest in the main business be continuous and that an applicant has an ownership interest in a main business at the time of decision.[48]

Evidence of an 'ownership interest'

In establishing whether the applicant has an ownership interest in the business as a shareholder in a company, as a sole proprietor or as a partner in a partnership, the Tribunal may have regard to documents such as contract of sale, title deeds, documents relating to the transfer or sale of business, transfer of shares, financial statements, partnership agreements, company's annual returns, company's share registers, business name registration certificates, company registration certificates and current or historical records of the Australian Securities and Investment Commission (ASIC), whichever might be relevant.

Evidence of legal title to a business will generally be sufficient to establish an ownership interest as defined by s.134(10). What constitutes evidence of legal ownership or title varies according to the relevant (national/state) jurisdiction and to whether the business operator is a company, a partnership, a sole proprietor, or some other entity.

Relevant legislation, such as State and Territory Partnership Acts,[49] may be helpful in determining whether a person has an ownership interest. The following section sets out some of the legislative provisions concerning legal title in an Australian company.

[44] *Zhou v MIMIA* [2003] FMCA 169 (Harnett FM, 8 May 2003) at [31] and [33].
[45] *Zhou v MIMIA* [2003] FMCA 169 (Harnett FM, 8 May 2003) at [33].
[46] *Ibrahim v MIAC* (2009) 111 ALD 148 at [28]. See also *Ibrahim v MIAC* [2009] FCA 1328 (Jagot J, 18 November 2009) at [32], although Jagot J did not agree that ownership structure was irrelevant to the definition of 'main business' merely because that term requires an 'ownership interest' at any time.
[47] *Ibrahim v MIAC* [2009] FCA 1328 (Jagot J, 18 November 2009) at [32]. However Jagot J did not consider that ownership structure was irrelevant to the definition of 'main business' merely because that term requires an 'ownership interest' at any time.
[48] For example, cl.845.213 and cl.845.221 as considered by the Court in *Ibrahim v MIAC* [2009] FCA 1328 (Jagot J, 18 November 2009). The Court held at [15] that the Tribunal correctly found on the evidence before it that the applicant did not satisfy cl.845.221 as the applicant did not continue to have an "ownership interest" in the nominated "main business" at the time of decision.
[49] For example, the *Partnership Act 1892 (NSW)*, s.20 and the *Partnership Act 1958 (Vic),* s.5, s.24.

Satisfactory evidence of a shareholding in an Australian company

The term shareholder is not defined in the Act or Regulations. Company is defined in s.337 of the Act, but only for the purpose of Part 5 – Review of Decisions, as including any body or association (whether or not it is incorporated), but does not include a partnership.

The term company has no strict legal meaning.[50] Section 9 of the *Corporations Act 2001* (the Corporations Act) defines 'company' to mean a company registered under the Corporations Act and includes certain winding up bodies (in Part 5.7) and unincorporated registrable bodies (in Part 5B.1). Most Australian companies are registered under the Corporations Act. For companies registered under the Corporations Act, whether a person is, and under what circumstances one becomes, a shareholder, may be ascertained with reference to that Act. Provisions relevant to holding and transfer of shares include ss.9, 169, 231, 761A,[51] 1070A, and 1072F.

Shareholder is not defined in the Corporations Act or the Corporations Regulations 2001. Section 111J, Part 1.5.6 of the Corporations Act set out some of the ways in which a person may become a shareholder of a company, this includes:

- the person being listed as a shareholder of the company in the application for registration of the company,
- the company issuing shares to the person,
- the person buying shares in the company from an existing shareholder and the company registering the transfer.

Section 111J, Part 1.5.6 of the Corporations Act also set out some of the ways in which a person ceases to be a shareholder. These include: the person sells all of their shares in the company and the company registers the transfer of the shares, the company buys back all the person's shares, and ASIC cancels the company's registration.

Provisions in the Corporations Act dealing with the issue and holding of shares, and ASIC company records, suggest that the words member and shareholder may be used interchangeably for a company with share capital.

Section 9 of the Corporations Act defines member in relation to a company as a person who is a member under s.231. Section 231 of the Corporations Act provides that a person is a member of a company if they are a member of the company on its registration, or agree to become a member of the company after its registration and their name is entered on the register of members, or become a member under s.167 (membership arising from conversion of a company from one limited by guarantee to one limited by shares). Section 169(3) of the Corporations Act provides that if the company has a share capital, the register must show the shares held by each member (including fully paid, partly paid and unpaid shares). A member may hold shares beneficially or non-beneficially (see, e.g., s.169(5A),(6)). Section 1072F(1) of the Corporations Act provides that a person is the holder of shares until the transfer of shares is registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.[52] Section 1072H sets out requirements for certain notices relating to beneficial or non-beneficial ownership of shares.

[50] See, e.g., *Re Stanley* [1906] 1 Ch 131.
[51] Definition of 'security' in s.761A means a share in a body.
[52] Note, s.135 replaceable rules may apply such that a company may include in its constitution a replaceable rule that does not otherwise apply to it. This means that the provision in s.1072F(1) regarding share transmission may be modified by the company's constitution.

It follows that if the applicant is registered as a member of a company with ASIC, the applicant is a shareholder and accordingly has an ownership interest in the company for the purpose of the definition in s.134(10), i.e. legal ownership of shares alone is sufficient to establish an ownership interest as a shareholder in the company.[53] If shares in a company are held in trust on behalf of a person, then the relevant ownership interest as a shareholder in a company may be established by beneficial ownership of shares, provided relevant evidence of the beneficial ownership of the shares is provided in accordance with r.1.11A, see below.

Beneficial ownership

Beneficial ownership subsists in a person who can enjoy the fruits of the property or dispose of it for her or his own benefit.[54] Often legal ownership and beneficial ownership are vested with the same person. For example, a shareholder of an Australian company who is registered in the company share register and evidenced by ASIC registration is both the legal and beneficial owner of the relevant shares, unless he/she/it holds the shares non-beneficially. A registered real property holder is the legal and beneficial owner of the relevant property. However, there are situations where a person can have beneficial ownership interest in a property or shares without having any legal ownership interest.

Examples of a beneficial ownership interest without legal ownership include:

- A transferee of shares who has paid the consideration for the transfer, but before registration of the transfer and the entry of the transferee's name on the register. (In Australia, the legal ownership of shares is normally evidenced by registration with ASIC);

- A purchaser of real property who has paid for the purchase price and obtained a duly executed transfer from the vendor but prior to the registration of title with the relevant land authorities (for example, the Department of Lands in NSW);

- A beneficiary of a fixed trust, as the legal ownership is vested with the trustee.

An ownership interest as defined in s.134(10) can be a beneficial ownership interest. However, in this event there are specific evidentiary requirements to be met.

<u>Evidence of beneficial ownership – r.1.11A</u>

Regulation 1.11A provides that, for certain specified visa subclasses, specific evidentiary requirements must be met for an ownership interest of the applicant or of the applicant's spouse or de facto partner[55] to include beneficial ownership, except in certain cases where a dependent child of the applicant has legal ownership.[56]

[53] *MIAC v Hart* (2009) 179 FCR 212, per Spender J at [15], per Greenwood J at [66]. This judgment focused on the meaning of "ownership interest" as defined in s.134(10). Where the Act and Regulations use the term "ownership" or "owns", rather than "ownership interest", general law concepts may still be relevant and an applicant may still need to establish beneficial ownership. See, e.g. *Zhang v MIMA* [2006] FMCA 1345 (Emmett FM, 13 September 2006). The court considered whether ownership of an asset requires beneficial interest in the assets for the purpose of cl.845.215 (which requires that the total value of net assets owned in a business be beyond a certain minimum) and held that the Tribunal correctly found that ownership of an asset requires more than legal title.

[54] *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167, cited in G E Dal Pont and D R C Chalmers, *Equity and Trust in Australia*, 4th ed, Lawbook Co 2007, at [34].

[55] The inclusion of de facto partners in this provision applies to visa applications made on or after 1 July 2009: SLI 2009, No.144. For visa applications made prior to 1 July 2009, the regulation only refers to "spouse" as defined in r.1.15A as it stood prior to 1 July 2009 (ie as including married and opposite sex de facto partners). For visa applications made on or after 1 July 2009, the clause refers to "spouse or de facto partner" as defined in ss.5F and 5CB of the Migration Act and r.2.03A and r.1.09A of the Regulations.

[56] r.1.11A(4).

The words beneficial ownership have a specialised legal meaning as a right that is derived from something, such as a contract or an expectancy, other than legal title.[57] In the context of a company the concept of a beneficial owner applies to the person whom equity recognises as the owner of the shares and the person able to deal with them, but who does not hold the legal title because the shares are registered in the name of another.[58] Regulation 1.11A refers to beneficial ownership in these senses.[59] Claims to beneficial ownership can be easily made. The effect of r.1.11A is to exclude claims to ownership which cannot be substantially proven by reference to authenticated documents.[60] The kinds of documents which are specified in r.1.11A(2) are:

- a trust document;
- a contract; or
- any other document capable of use to enforce the rights of the person to the ownership interest;

where the document has been stamped or registered by the appropriate authority under the law of the jurisdiction where the ownership interest is located.

For example, in *Yu v MIMIA*[61] the applicants claimed an ownership interest in a Chinese company. They claimed that the relevant shares were registered in someone else's name but were legally owned by them under Chinese law pursuant to a verbal agreement. The applicants had given the Tribunal legal opinions on the efficacy of oral agreements generally under Chinese law and on the validity of the particular verbal transaction, and minutes of a general meeting of shareholders they claimed reflected this arrangement. As the legal title of the shares was registered in someone else's name, the claimed circumstances fell within the concept of beneficial ownership.[62] The Court held there is no exception to r.1.11A where it is proved that applicants are the legal owners of an asset under foreign law even though they have no legal title.[63] The Tribunal made no error by applying r.1.11A and finding that the materials submitted did not meet the evidentiary requirements for beneficial ownership.[64]

A relevant document for the purposes of r.1.11A(2) does not evidence beneficial ownership for any period earlier than the date of registration or stamping by the appropriate authority.[65] This requirement may be relevant in determining whether the person held a relevant ownership interest in a main business at a particular point in time or for a relevant period.

Ownership interests and trusts

Where business assets are held in trust, the person with legal title to those assets (the trustee) does not necessarily have beneficial ownership of the assets. Another person (the beneficiary) may have beneficial ownership. However, it has been held that the definition of ownership interest in s.134(10)

[57] *Yu v MIMIA* (2004) FCR 126, per Kiefel J at [32], citing BA Garner, A Dictionary of Modern Legal Usage, 2nd edn, Oxford University Press, New York, 1995.
[58] *Yu v MIMIA* (2004) FCR 126, per Kiefel J at [32], citing Black's Law Dictionary, 8th edn, ed BA Garner, West Group, St Paul, MN, 2004 and Butterworths Australian Legal Dictionary, gen eds PE Nygh & P Butt, Butterworths, Sydney, 1997.
[59] *Yu v MIMIA* (2004) FCR 126, per Kiefel J at [32].
[60] *Yu v MIMIA* (2004) FCR 126, per Kiefel J at [35].
[61] (2004) FCR 126.
[62] *Yu v MIMIA* (2004) FCR 126 at [33].
[63] *Yu v MIMIA* (2004) FCR 126 at [36]
[64] *Yu v MIMIA* (2004) FCR 126 at [38].
[65] r.1.11A(3).

displaces general law concepts of ownership in relation to shareholders of a company,[66] therefore, it is important to focus on the meaning of ownership interest as defined. While there is not usually a disconnect between an ownership interest and control of assets in relation to sole proprietors and partners, other aspects of the nature of the legal status of joint trustees need to be considered in relation to these types of ownership interests.

While general law concepts of ownership of assets do not apply in relation to the s.134(10) definition of ownership interest, these concepts and the associated issues arising from trusts may arise for consideration in relation to other visa criteria requiring ownership of assets of the business of a certain value.[67]

Shareholder in a company – s.134(10)(a)

The relevant question for the purposes of establishing an ownership interest as a shareholder in a company for s.134(10)(a) is whether the company in which there is the necessary shareholding carries on the relevant business, rather than whether it carries on the business in a particular capacity.[68] Focusing on who has ownership (legal or beneficial) of *assets* of a business will distract from the relevant question. To the extent that earlier versions of departmental policy stated that a shareholding in a company acting as trustee of a trust confers no ownership interest in that company where the company carries on the business, because the company is a trustee of a discretionary trust, the policy was inconsistent with the Act and Regulations.[69]

Accordingly, a shareholding in a trustee company, which has legal title to business assets held in trust for others, will meet the requirements for an ownership interest as defined in s.134(10)(a) if the trustee company is carrying on the relevant business. However, the definition in s.134(10)(a) does not extend to an interest in a company that owns units in a unit trust that carries on the business. Whilst the interest can be held indirectly, for example via a trust, the actual carrying on of the business must be by a company.[70]

Partner in a partnership – s.134(10)(b)

A co-trustee in a trust which is carrying on the business does not, of itself, constitute an ownership interest as a partner in a partnership carrying on the business within s.134(10)(b).[71] Co-trustees carrying on the business jointly occupy one, inseparable office. As the relationship between partners is contractual and co-trustees occupying the one office cannot contract with one another, they are not discharging their duties as co-trustees in partnership.[72]

Sole proprietor of the business – s.134(10)(c)

[66] *MIAC v Hart* (2009) 179 FCR 212 per Spender J at [30], per Greenwood J at [66], per Logan J at [104]-[105]. (Logan J dissenting on the issue of relevance of ownership of assets). The Court in *MIAC v Hart* was specifically considering s.134(10)(a).
[67] See for example cl.845.215 which refers to "The assets owned by the applicant …in the main business…" having a net value of $100,000, and similarly worded provision in cl.846.214.
[68] *MIAC v Hart* (2009) 179 FCR 212, per Spender J at [22]-[23], agreeing with Jarratt FM at first instance: *MIAC v Hart* [2008] (Jarrett FM, FMCA 1067), at [20]; per Greenwood J at [72], Logan J dissenting.
[69] *MIAC v Hart* (2009) 179 FCR 212 per Greenwood J at [78]. The reasoning of Spender J is consistent with this point. Logan J dissenting, but note comments at [118]: policy statements that "complete and effective control over the trust income and assets" of a discretionary trust can be sufficient to confer an "ownership interest" were a "considerable and unwarranted extension of the language employed in the definition."
[70] *Muhammad v MIBP* [2016] FCCA 414 (Judge Lucev, 3 March 2016) at [33]. The Court contrasted this with the judgment in *MIAC v Hart* (2009) 179 FCR 212, which held that a person who holds shares in a trustee company that conducts a business is a person who holds an 'ownership interest' for the purposes of s.134(10)(a) (at [27]).
[71] *Campbell v MIAC* [2011] FMCA 61 (Jarrett FM, 9 February 2011) at [43]-[46]. Undisturbed on appeal: *Campbell v MIAC* (2011) 122 ALD 560.
[72] *Campbell v MIAC* [2011] FMCA 61 (Jarrett FM, 9 February 2011) at [44]. Undisturbed on appeal: *Campbell v MIAC* (2011) 122 ALD 560.

The terms of s.134(10)(c) refer to "*the* sole proprietor" of the relevant business. On its ordinary meaning there cannot be more than one sole proprietor. While this would seem to preclude a co-trustee from being capable of satisfying s.134(1)(c) on the basis of being 'the sole proprietor', this is not the end of the enquiry. This issue was first considered in *Campbell v MIAC* in which the Court found that although trustees are bound to act jointly in the exercise of their powers and duties pursuant to the trust, the fact that trustees must act together and unanimously in running a business does not mean that each co-trustee can be considered to be the sole proprietor.[73] However, the Court in *Sefat v MIBP* sought to distinguish *Campbell,* holding that it might be at least arguable that a co-trustee applicant might fall within the definition in s.134(10) as the 'sole proprietor' depending upon the nature of the trust arrangements as contained in the applicable trust deed. The Court held that in ascertaining whether a co-trustee can be characterised as 'the sole proprietor', the words in s.134(10) 'including such an interest…' require the Tribunal to look at the trust deed and the interests and roles created by that instrument in establishing whether such an ownership interest exists.[74] In that case, the Court held that the fact that the co-trustee was also made the appointor under the trustee, carrying with it the ability for the applicant to run the affairs of the company, meant that in the context of the relationships established by this trust deed, it was at least arguable that the first applicant was within the definition in s.134(10) as the 'sole proprietor'.[75]

Direct and continuous involvement in management - r. 1.11(1)(b)

To meet the definition of 'main business', the applicant must maintain, or have maintained, direct and continuous involvement in management of the business from day to day and in making decisions affecting the overall direction and performance of the business. A mere passive shareholder in a company that carries on the business would not satisfy r.1.11(1)(b), nor would a silent partner in a partnership that carries on the business.[76] Similarly, an applicant's presence in another country may impact on his or her ability to satisfy a decision maker that this requirement is satisfied.

Departmental policy states that, to meet the requirement for direct and continuous involvement in management the applicant must demonstrate that they have been actively managing and operating the business, which requires that the business be ongoing and for the applicant to consistently spend a significant portion of their time managing the business on an ongoing basis. Management involves planning, organising, directing and controlling the resources of the business. Departmental policy provides further details as to what is meant by the terms "planning", "organising", "directing" and "controlling" and also provides various examples of the types of decisions that may affect the overall direction and performance of the business.[77]

[73] *Campbell v MIAC* [2011] FMCA 61 (Jarrett FM, 9 February 2011) at [39]-[40]. The Court came to this view even taking account of the fact that the definition in s.134(10) is in disconformity with the ordinary meaning of ownership interest under the general law and held that construing s.134(10)(c) as allowing more than one sole proprietor for a business would "mangle the language of the section beyond permissible limits". Undisturbed on appeal: *Campbell v MIAC* (2011) 122 ALD 560.
[74] In *Sefat v MIBP* [2016] FCCA 2501 at [36]. In this case when the Tribunal applied *Campbell v MIAC* (2011) 122 ALD 560 (Campbell's case) it found that the husband visa applicant who was co-trustee with his wife in a family business *could not* be said to have an ownership interest as 'the sole proprietor'. However, Judge Heffernan (at [33]-[37]) found the Tribunal had erred in failing to look at the trust deed. While *Campbell's* case stood for the proposition that where there are two or more trustees who have an interest in a business then neither could be said to be the sole proprietor by virtue of their status as trustee *alone*, the definition of ownership interest had been expanded beyond that of the general law in s.134(10) and the words 'including such an interest' meant that the Tribunal should have had regard to the trust deed. In this case the deed gave the power to appoint and remove trustees to the husband only and so it was at least arguable that the husband met the definition of 'the sole proprietor'. Such analysis of the interests created by and the relationships governed by the trust deed was consistent with the court's approach in *Campbell's* case.
[75] *Sefat v MIBP* [2016] FCCA 2501 at [36].
[76] *MIAC v Hart* (2009) 179 FCR 212, per Spender J at [17].
[77] Policy - GenGuide M – Business Skills visas – Visa application and related procedures – Other business-related requirements – Direct and continuous management involvement (reissued 10 September 2016).

Care should be taken when having regard to policy. It should not be raised to the level of legislative requirement and findings should always be brought back to the terms of r.1.11(1)(b). There are a variety of ways in which a person might maintain direct and continuous involvement in the management of a business and in making decisions affecting its overall direction and performance.[78] It would not be appropriate to impose a narrower set of requirements, for example, by saying that this requirement can only be met if the applicant demonstrates the exercise of responsibility within the business in terms of decision-making authority, responsibility for employees and/or responsibility for expenditure.[79]

The question of whether an applicant has demonstrated an involvement in the management of that business from day to day and in making decisions that affected the overall direction and performance of that business, is a matter of fact for the Tribunal.[80] The factors which the decision maker is bound to consider are not expressly stated and must be determined by implication from the subject matter.[81] The wording of the test in cl.845.216 and the similarly worded requirement in r.1.11(1)(b) for the purposes of determining a main business is in ordinary words of the English language used in a non-technical sense and the Tribunal's finding of fact as to the applicant's involvement in the business is not reviewable by courts.[82]

Value of the ownership interest – r.1.11(1)(c)

The required value of the ownership interest for the business to be a main business within r.1.11 depends on the date of visa application, the Class and Subclass of visa applied for, and the circumstances of the relevant business.

If the *visa application is made before 19 April 2010* the value of the applicant's ownership interest, or the total value of the ownership interests of the applicant and his or her spouse or de facto partner,[83] in the business must be, or have been at least 10% of the total value of the business.

Except in certain circumstances, if the visa application is made *on or after 19 April 2010*, r.1.11(1)(c) requires that the value of the applicant's ownership interest, or the total value of the applicant and applicant's spouse or de facto partner's ownership interests is or was:

[78] *Lobo v MIMA* (2003) 132 FCR 93 at [63]. In stating this, the Court did not provide any examples.
[79] *Lobo v MIMA* (2003) 132 FCR 93 at [63]. The Full Court held that the Tribunal erred in assessing cl.845.216, which also uses the words "maintained direct and continuous involvement in the management of [the business] from day to day and in making decisions [affecting] the overall direction and performance of [the business]". The Tribunal had applied departmental policy which referred to guidelines for cl.127.213, which at that time required the applicant to demonstrate "they have exercised responsibility within the main business(es) in terms of decision-making authority, responsibility for employees and/or responsibility for expenditure; such responsibility has been exercised on a continuous (as opposed to on an occasional basis); and their skills have been fundamental to, or have exerted direct influence on, the operation of the main business(es)." See also *Tran v MIMA* [2006] FCA 1229 (Rares J, 12 September 2006), where the Court held the Tribunal applied the same departmental policy and made the same error as in *Lobo*. Current policy in relation to main business now only refers to various examples of decisions that may affect the overall direction and performance of the business, e.g. the recruitment and appointment of senior staff, the division of responsibilities between staff, and approval of remuneration and reward schemes; and directing funding and other resources including assessment of opportunities to make an acquisition, expand business, invest and launch a new product or conversely divest part of the business or discontinue a product: Policy - GenGuide M – Business Skills visas – Visa application and related procedures – Other business-related requirements – Direct and continuous management involvement (reissued 10 September 2016).
[80] *Lobo v MIMIA* [2005] FMCA 1024 (Lloyd-Jones, 29 July 2005) at [25]-[26]. For example, in *Sun v MIBP* [2015] FCCA 1266 (Judge Simpson, 18 May 2015) the Court held that on a plain reading of r.1.11(1)(b) it could not be said that the applicant, whilst she was overseas, maintained a direct and continuous involvement in the management of the business from day-to-day including making decisions affecting the overall direction and performance of the business.
[81] *Lobo v MIMIA* [2005] FMCA 1024 (Lloyd-Jones, 29 July 2005) at [24].
[82] *Lobo v MIMIA* [2005] FMCA 1024 (Lloyd-Jones, 29 July 2005) at [25]-[27].
[83] The inclusion of de facto partners in this provision applies to visa applications made on or after 1 July 2009: SLI 2009, No. 144,. For visa applications made prior to 1 July 2009, the regulation only refers to "spouse" as defined in r.1.15A as it stood prior to 1 July 2009 (ie as including married and opposite sex de facto partners). For visa applications made on or after 1 July 2009, the clause refers to "spouse or de facto partner" as defined in ss.5F and 5CB of the Migration Act and rr.1.09A and 2.03A of the Regulations.

Business operated by a publicly listed company

- at least 10% of the total value of the business;[84]

Business not operated by a publicly listed company

- if annual turnover of the business is equal to or greater than AUD400,000 – at least 30% of the total value of the business;[85] or

- if annual turnover of the business is less than AUD400,000 – at least 51% of total value of the business.[86]

The increase in ownership percentages for non publicly listed companies is intended to limit applicants from passively investing in businesses or swapping ownership with other business migrants for visa purposes.[87]

Turnover is not defined in the Act or Regulations. However, departmental policy refers to turnover as being the revenue generated by an entity as a result of the ordinary activities of a business, and states that only an amount that has been received and is lawfully receivable by an enterprise on its own account is considered to be revenue.[88] In certain circumstances it may be necessary for the tribunal to look behind the stated turnover of a business to examine whether that turnover is real in substance. Where a business is acting merely as an intermediary between two other businesses and not as a merchant in its own right, turnover may be limited to the value of the service provided by that business, i.e. the commissions it has been paid.[89] This approach was endorsed in *Cheng v MIAC*, where the court's reasons indicate that where an expression is open to different interpretations that could result in different outcomes, it is appropriate to have regard to departmental policy in the interests of consistency.[90]

The above values do not apply to a visa application made on or after 19 April 2010 if:

- the application is for a Business Skills – Established Business (Residence) (Class BH) visa [Subclasses 845 and 846]; or the application is for a Business Skills (Residence) (Class DF) visa and the applicant is seeking to meet the primary criteria for grant of a Subclass 890 or Subclass 892 visa;[91] and

- the applicant held a temporary visa immediately before 19 April 2010; and

[84] r.1.11(1)(c)(i) as amended by SLI 2010, No.70, commencing 19 April 2010: r.2. The amendment does not apply to an application for a visa in the circumstances specified in r.3(3).
[85] r.1.11(1)(c)(ii) as amended by SLI 2010, No.70, commencing 19 April 2010: r.2. The amendment does not apply to an application for a visa in the circumstances specified in r.3(3).
[86] r.1.11(1)(c)(iii) as amended by SLI 2010, No.70, commencing 19 April 2010: r.2. The amendment does not apply to an application for a visa in the circumstances specified in r.3(3).
[87] Explanatory Statement to SLI 2010, 70, p.2.
[88] Departmental policy goes on to provide further details as to what 'revenue' does and does not consist of: see Policy - GenGuide M – Business Skills visas – Visa application and related procedures – Business Ownership and Assets (reissued 10 September 2016).
[89] See *Cheng v MIAC* (2012) 134 ALD 119 at [53]. Driver FM's reasoning was upheld on appeal by the Federal Court in *Cheng v MIAC* (2013) 213 FCR 362.
[90] *Cheng v MIAC* (2012) 134 ALD 119, upheld on appeal by the Federal Court in *Cheng v MIAC* (2013) 213 FCR 362.
[91] Note that from 1 July 2012, Subclasses 845 and 846 were closed to new primary applications and removed entirely from 1 July 2013: SLI 2012 No.82. Further from 1 July 2012, applications for Subclass 890 and 892 visas were only open to certain applicants: SLI 2012 No. 82.

- while holding the temporary visa, the applicant purchased an ownership interest in a business in Australia before 19 April 2010.[92]

For applications which fall within the exceptions the previous version of r.1.11(1)(c) applies and the relevant value of the ownership interest is just 10% of the total value of the business.

The finding as to the value of the business is one of fact for the Tribunal, to be made after considering all the information available, including an applicant's submissions. It will also turn on the nature of the relevant ownership interest being claimed, i.e. shareholder in a company carrying on the business, partner in a partnership carrying on the business or sole proprietor of the business.

Where the ownership interest is as a shareholder in a company that is carrying on the business, the value of the shareholding equates to the value of the ownership interest for the purposes of r.1.11(1)(c).[93] For example if a shareholder in a company that carries on the business holds more than 10% of the shares in the company, the value of the ownership interest held by that shareholder is more than 10% of the value of the business for the purposes of r.1.11(1)(c).[94]

Where the ownership interest is as a partner in a partnership carrying on the business, the number of partners and the nature of the partnership would determine whether the ownership interest is at least 10% of the total value of the business. For example, one out of 500 equal joint venture partners of a partnership formed for the production of a film would not have a qualifying value of ownership interest for r.1.11(1)(c).[95]

Ownership interest in more than one business – r.1.11(2)

Regulation 1.11(2) provides that an applicant must not nominate more than 2 qualifying businesses as main businesses.

The term 'nominate' is not defined in the Act, the Regulations or departmental policy. The current online *Macquarie Dictionary* defines the verb 'to nominate' to mean to propose, to appoint or to enter. Thus the applicant by proposing or entering the name of two main businesses that are considered as qualifying businesses complies with the requirement of r.1.11(2) and the instructions as provided in the application form for some visa subclasses.[96]

An issue may arise as to whether the main business nominated at the time of application need be the same main business assessed in relation to Schedule 2 criteria and the points test at the time of decision. For example, in relation to the now closed Subclass 845 visa, it has been held that time of application and time of decision criteria concerning having an ownership interest in a main business can only be satisfied by the same interest in the same business, and that business must have been

[92] r.3(3), SLI 2010, 70.
[93] *MIAC v Hart* (2009) 179 FCR 212, per Spender J at [31] and Greenwood J at [73], Logan J dissenting in relation to shareholding in company operating as trustee of a discretionary trust.
[94] *MIAC v Hart* (2009) 179 FCR 212, per Spender J at [31] and Greenwood J at [73].
[95] *MIAC v Hart* (2009) 179 FCR 212, per Spender J at [16].
[96] The limitation in r.1.11(2) seldom arises an issue. Nontheless, it is a question of fact as to whether a particular activity or enterprise constitutes a business for the purposes of the definition of 'main business' and consequently whether no more than two qualifying businesses have been nominated as main businesses. In *MIBP v Snyman* [2016] FCA 242 (Barker J, 11 March 2016), the applicant had relied upon his ownership interest in a company for the purpose of meeting the definition of 'main business' and cl.892.212(c). That company carried on four different business activities which all used one ABN, being that assigned to the company. The Tribunal found that r.1.11(2) indicated that an applicant could rely on no more than two main businesses, that the company was not one main business, and the four business enterprises were each themselves separate main businesses. At first instance the Federal Circuit Court found that the Tribunal had erred in reaching this finding (see *Snyman v MIBP* [2015] FCCA 2791 (Judge Street, 19 October 2015)), however on appeal the Federal Court held that the Tribunal's finding as a matter of fact was one open for it to make. The Court confirmed that r.1.11(2) should be read so that a visa applicant can only nominate two businesses as main businesses, regardless of whether the businesses are operated by different entities or the same entity (at [110]).

nominated in (or with) the Subclass 845 visa application.[97] Accordingly, an applicant could not rely on a main business additional to the two nominated in their visa application to meet these criteria.[98]

Relevant Case Law

Boshoff v MIAC [2006] FMCA 1919	
Campbell v MIAC [2011] FCA 940; (2011) 122 ALD 560	Summary
Campbell v MIAC [2011] FMCA 61	Summary
Cheng v MIAC [2012] FMCA 911; (2012) 134 ALD 119	Summary
Cheng v MIAC [2013] FCA 405; (2013) 213 FCR 362	Summary
He v MIBP [2015] FCCA 2915	Summary
Ibrahim v MIAC [2009] FCA 1328	Summary
Ibrahim v MIAC [2009] FMCA 593; (2009) 111 ALD 148	Summary
Kushner v MIAC [2009] FMCA 390	
Liang v MIAC [2009] FCA 189; (2009) 175 FCR 184	Summary
Lobo v MIMA [2003] FCAFC 168; (2003) 132 FCR 93	Summary
Lobo v MIMIA [2005] FMCA 1024	Summary
Lu v MIAC [2009] FMCA 891; (2009) 112 ALD 125	
MIAC v Hart [2009] FCAFC 112; (2009) 179 FCR 212	Summary
MIAC v Hart [2008] FMCA 1067	Summary
Muhammad v MIBP [2016] FCCA 414	Summary
Nassif v MIMIA [2003] FCA 481; (2003) 129 FCR 448	Summary
Ng v MIMIA [2002] FCA 1146	Summary
Rahbarinejad v MIBP [2018] FCCA 2293	Summary
Sefat v MIBP [2016] FCCA 2501	Summary
Snyman v MIBP [2015] FCCA 2791	Summary
MIBP v Snyman [2016] FCA 242	Summary
Su v MIMIA [2005] FMCA 616	
Sun v MIBP [2015] FCCA 1266	Summary
Teng v MIBP [2015] FCCA 1197	Summary
Tran v MIMA (2006) 154 FCR 536	Summary
Yu v MIMIA (2004) FCR 126	
Zhang v MIMA [2006] FMCA 1345	
Zhou v MIMA [2003] FMCA 169	

[97] *Liang v MIAC* (2009) FCA 184 at [55].
[98] *Liang v MIAC* (2009) FCA 184 at [55].

Relevant legislative amendments

Title	Reference number
Migration Amendment Act 1992 (No. 2)	No.84, 1992
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No. 144
Migration Amendment Regulations 2010 (No.3)	SLI 2010, No.70
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82

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Net Personal and Business Assets Calculation

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Overview

For a number of visa subclasses, a calculation of the value of certain assets is required. The required calculation is specified in the relevant criterion. Examples include:

- the net value of the assets in Australia of the applicant, or the applicant and the applicant's spouse or de facto partner[1] together;[2]
- the net value of the assets owned by the applicant, or by the applicant and the applicant's spouse or de facto partner together, in the main business or main businesses in Australia;[3]
- the net value of the assets of the applicant, or the applicant's spouse or de facto partner, or the applicant and the applicant's spouse or de facto partner together, in a qualifying business;[4]
- the net value of business and personal assets;[5]
- the net assets of the applicant and the applicant's spouse or de facto partner together;[6] and
- the net value of the applicant's assets, or the combined net value of the assets of the applicant and the applicant's spouse or de facto partner, that are available and capable of being transferred, to Australia.[7]

Departmental guidelines (PAM3) state that the policy intention of the various 'net value of assets in business' criteria is to establish that the applicant has, by investing a substantial amount of money sourced from their own funds, a record of financial commitment to business through personal financial involvement and exposure to risk.[8] In relation to some Subclasses, calculation of 'net assets' serves to ensure an applicant has enough money to settle in Australia.[9] Calculation of the value of assets may also be required when establishing the value of an applicant's ownership interest in a business to decide whether it is a 'main business'.[10]

This MRD Legal Services Commentary primarily covers issues arising in reviews of decisions to refuse the grant of a Business Skills (Provisional) (Class EB) Subclass 188 visa, Business Skills (Permanent) (Class EC) Subclass 888 visa and Business Skills – Established Business (Residence) (Class BH) Subclass 845 – Established Business in Australia visa. Such decisions are reviewable by the Tribunal

[1] The inclusion of 'de facto partners' (as referred to here, and at the various places in this Commentary), applies to visa applications made on or after 1 July 2009: Migration Amendment Regulations 2009 (No. 7) (SLI 2009, No.144). For visa applications made prior to 1 July 2009, 'spouse' is defined in r.1.15A as it stood prior to 1 July 2009 (ie as including persons in a married or opposite sex de facto relationship). For visa applications made on or after 1 July 2009, 'spouse' is defined in s.5F of the *Migration Act 1958* (the Act) and refers to persons in a married relationship only (including, from 9 December 2017, same-sex couples); and 'de facto partner' is defined in s.5CB of the Act, and rr.1.09A and 2.03A of the Migration Regulations 1994 (the Regulations) and includes both opposite and same sex de facto relationships.
[2] cl.845.214 and cl.846.213 of Schedule 2 to the Regulations. The wording of this requirement was changed for visa applications made on or after 9 August 2008: Migration Amendment Regulations 2008 (No. 3) (SLI 2008, No.166). Prior to those amendments, the wording had been 'value of the net assets'.
[3] cl.845.215 and cl.846.214 of Schedule 2 to the Regulations. The wording of this requirement was changed for visa applications made on or after 9 August 2008: SLI 2008, No.166. Prior to those amendments, the wording had been 'value of the net assets'. See also cl.188.226, cl. 188.227, cl.188.245, cl.890.212, cl.892.212(c) and cl.888.225.
[4] cl.132.224 and cl.160.212 of Schedule 2 to the Regulations.
[5] cl.132.226, cl.160.214, cl.161.213, cl.162.212, cl.163.213, cl.164.213, cl.165.212, cl.890.215, cl.892.212(b) of Schedule 2 to the Regulations.
[6] cl.845.222(2)(c) of Schedule 2 to the Regulations, Part 4 of Schedule 7 to the Regulations.
[7] cl.405.227.
[8] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets - Net business assets – Net business assets – overview - Policy intention (reissued 10/09/2016).
[9] See, e.g. cl.161.213(2) and cl.188.227 of Schedule 2 to the Regulations.
[10] r.1.11(1)(c) of the Regulations.

under Part 5 (s.338(2)) of the *Migration Act 1958*) but make up a only a small portion of the Tribunal's business visa caseload.

The calculation of asset values requires consideration of two questions. One is whether assets are owned by the individual, spouse or de facto partner and/or business, and can be included in the calculation. The second is the calculation of the value of the assets to determine whether the amount meets the relevant statutory threshold.

Definitions

A person's (or business entity's) net assets is generally understood to be their assets minus their liabilities (that is, assets net of liabilities). The identification and valuation of net assets therefore requires assessment of assets and liabilities, and those items which comprise assets and liabilities. The accounting profession has developed definitions of these terms, which have become standardised in recent years.[11] The accounting terms discussed below are not defined in the Act or Regulations, and there is only limited judicial interpretation of them in the context of the Act and Regulations.[12] Therefore, in determining their meaning, regard should be had to the ordinary meaning of those words and, to some extent, policy guidance found in PAM3.

Net assets

The net assets of a business can be defined as the amount attributable to the owners/shareholders after deducting financial liabilities owed to third parties (i.e. total assets – total liabilities = net assets).[13] This is also known as shareholder's equity,[14] and is usually displayed on the business' Statement of Financial position (previously known as a balance sheet). See Calculating the net value of personal and business net assets for discussion of how this amount is related to the value of a person's assets in a business.

[11] See 'Accounting Standards' on Australian Accounting Standards Board (AASB) website: http://www.aasb.gov.au/Pronouncements/Current-standards.aspx (accessed 30 January 2019).

[12] For example, the meaning of 'turnover' was considered in *Cheng v MIAC* [2012] FMCA 911 (Driver FM, 16 November 2012) where the Court found it had a different meaning from the strict accounting sense. These comments were endorsed on appeal by the Federal Court in *Cheng v MIAC* [2013] FCA 405 (Cowdroy J, 6 May 2013), in which the Court held (at [26]) that the Tribunal was correct to have regard to the policy contained in PAM3 in finding that the meaning of 'turnover' in the context of that case only included service revenue for a business that operates as an agent in the provision of services.

[13] See, e.g., PAM3: GenGuide M – Business visas – Visa application and related procedures – Business Ownership and Assets - Net business assets - Net business assets (reissued 10/09/2016).

[14] See, e.g., AASB, Compiled framework: *Framework for the Preparation and Presentation of Financial Statements* (AASB CF), para.49(c), which defines equity as the 'residual interest of the assets of the entity after deducting all its liabilities'. http://www.aasb.gov.au/admin/file/content105/c9/Framework_07-04_COMPjun14_07-14.pdf (accessed 30 January 2019). See also Glossary of Defined Terms, AASB website, http://www.aasb.gov.au/admin/file/content102/c3/AASB_Glossary_30_September_2015.pdf (accessed 30 January 2019).

Business Assets and Liabilities

An asset is defined by the Australian Accounting Standards Board (AASB) as a resource controlled by an entity as a result of past events and from which future economic benefits are expected to flow to the entity.[15]

Liabilities are the opposite of assets. A liability is defined by the AASB as a present obligation of the entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits.[16]

The AASB definitions are not binding, but the Tribunal may have regard to them in determining the meaning of those words. Note that the AASB definitions of assets and liabilities are both in terms of resources *expected to* flow.[17] Choses in action,[18] e.g. to recover a debt, may be considered an asset depending on the probability of an applicant's claim succeeding and being paid.[19] Similarly, whether debts are liabilities may depend on whether it is expected that the debt will be paid.[20]

Business assets include land and buildings, plant and machinery, trading stock, cash and investments.[21] Assets need not be those held directly by the business. In accordance with the definition of 'ownership interest' in s.134(10) of the *Migration Act 1958* (the Act) in relation to assets of a 'main business', assets held by a business to which the main business has indirect access will also be assets in the main business.

Business liabilities will include debts to suppliers or other creditors, outstanding loans, or general business expenses and tax liabilities. As with assets, liabilities in a subsidiary business for which the main business is responsible are liabilities for the purpose of net asset calculation.

[15] Australian Accounting Standards Board, compiled Standard 138: *Intangible Assets* (AASB 138), para.8. http://www.aasb.gov.au/admin/file/content105/c9/AASB138_08-15_COMPoct15_01-18.pdf (accessed 30 January 2019). See MRD Legal Services commentary Financial Reports for a discussion of the Accounting Standards and their application. Similar definitions can be found in PAM3: GenGuide M - Business visas – Visa application and related procedures – Business visa legislated and policy terms (reissued 10/09/2016).

[16] Australian Accounting Standards Board, compiled Standard 137: *Provisions, Contingent Liabilities and Contingent Assets* (AASB 137), para.10. http://www.aasb.gov.au/admin/file/content105/c9/AASB137_08-15.pdf (accessed 30 January 2019). Similar definitions can be found at PAM3: GenGuide M - Business visas – Visa application and related procedures – Business visa legislated and policy terms (reissued 10/09/2016).

[17] The AASB distinguishes between provisions (liabilities of uncertain timing or amount) and contingent assets and liabilities (possible assets/obligations arising from past events and whose existence will be confirmed only by the occurrence or non-occurrence of an uncertain future event not wholly within the entity's control, or, for contingent liabilities, present obligations not recognised because it is not probable that an outflow of resources will be required to settle the obligation or the amount cannot be reliably measured). Provisions are to be recognised as liabilities, contingent assets or liabilities are not. Where the possibility of any inflow or outflow in settlement is remote, that possibility is not to be recognised as an asset or liability: AASB 137, paras. 10-14, 27, 31, 86, 89, Appendix A. Appendix C provides examples of relevant factors to be considered in recognising problematic items, such as warranties, legal requirements to fit smoke filters, and a court case.

[18] A chose in action is a right of proceeding in a court of law to procure the payment of a sum of money or to recover pecuniary damages for the infliction of a wrong or the non-performance of a contract: Rutherford, L. and Bone, S. (eds.), *Osborn's Concise Law Dictionary* (Sweet & Maxwell, London, 1993), p.69.

[19] In *Bodenstein v MIAC* [2009] FCA 50 (Perram J, 6 February 2009), the Court suggested that a chose in action could be an asset, although it wasn't required to decide on the matter. However, a claim pursued through legal processes where the outcome is uncertain is described in AASB 137 as a contingent asset, which is not recognised in financial statements to avoid recognition of income that may never be realised. When realisation of income is probable, then it should be disclosed and where it is virtually certain, it is no longer a contingent asset and the income should be recognised: AASB 137, paras. 33 and 89.

[20] See for example *Su v MIMIA* [2005] FMCA 616 (Scarlett FM, 29 April 2005). The Court held that the Tribunal should have considered that the liquidated debtor company had ceased to exist for almost six years by the time of the Tribunal decision and that no demand had been then made for repayment, so there was almost no possibility that any proceedings could have been commenced within any relevant limitation period.

[21] Note a business involved in primarily or substantially speculative or passive investment such as share-holding portfolios, interest-bearing deposits, currency speculation or rental properties will not be a 'qualifying business' under the Regulations (r.1.03), but such assets may be included in calculations as business assets when held by a qualifying or main business.

Personal Assets and Liabilities

Personal assets may include a broader definition of 'assets' than that which Accounting Standards apply to businesses. The Macquarie Dictionary Online defines 'asset' as 'a useful thing or quality' or 'an item of property'; and 'an economic resource'.[22] That is, something of value owned by someone for personal use as opposed to owned for use in business may be a personal asset, even though it is not expected to result in a flow of economic benefits. In general terms, this broader concept is consistent with that used in some other jurisdictions, for example, in taxation, CGT (Capital Gains Tax) assets are defined as any kind of property; or a legal or equitable right that is not property.[23] Examples of CGT assets include options; units in a unit trust; a right to enforce a contractual obligation; collectables, and other assets that are used or kept mainly for personal use or enjoyment ('personal use assets').[24] Another example is in the *Corporations Act 2001*, where 'asset' is defined to mean property, or a right, of any kind, and includes any legal or equitable estate or interest (whether present or future, vested or contingent, tangible or intangible, in real or personal property) of any kind; and any chose in action; and any right, interest or claim of any kind including rights, interests or claims in or in relation to property (whether arising under an instrument or otherwise, and whether liquidated or unliquidated, certain or contingent, accrued or accruing).[25]

PAM 3 states:

> *An item that is the result of a past expense and is of future economic benefit is an asset. Personal asset items that can be included are expected to be tangible objects:*
> - *for which ownership can be proven*
> - *that are capable of generating a monetary value that can be realised and can be readily converted to cash for business use and settlement in Australia.*
>
> *If ownership, recognition and valuation of an asset cannot be reasonably established, that asset would not normally be considered for inclusion (this might include personal items such as clothing and personal jewellery or household items such as china, furniture, blankets or cutlery unless the officer is reasonably satisfied).*[26]

These guidelines appear to impose a requirement beyond that required by criteria such as cl.888.225(2), cl.888.225(4) and cl.890.215,[27] which on their face call simply for a factual assessment of the value of personal assets, without reference to the use for which those assets are available. This can be contrasted with criteria such as cl.845.222,[28] which limits consideration to assets 'capable of being

[22] https://www.macquariedictionary.com.au accessed 30 January 2019.
[23] s.108–5 of the *Income Tax Assessment Act 1997*.
[24] ss.108-5, 108-10 and 108-20 of the *Income Tax Assessment Act 1997*.
[25] 'Asset' is defined in s.601WAA of the *Corporations Act* 2001, for the purposes of Part 5D.6 – ASIC – approved transfers of estate assets and liabilities.
[26] PAM3: GenGuide M - Business visas – Visa application and related procedures – Business ownership and assets – Net business and personal assets - Personal items (reissued 10/09/2016).
[27] cl.890.215 requires that 'The net value of the business and personal assets in Australia of the applicant, the applicant's spouse or de facto partner, or the applicant and his or her spouse or de facto partner together, is, and has been throughout the 12 months immediately before the application is made, at least AUD250 000'. The inclusion of de facto partners applies to visa applications made on or after 1 July 2009: SLI 2009, No.144. For visa applications made prior to 1 July 2009, 'spouse' is defined in r.1.15A as it stood prior to 1 July 2009 (i.e. as including persons in a married or opposite sex de facto relationship). For visa applications made on or after 1 July 2009, 'spouse' is defined in s.5F of the Act and refers to persons in a married relationship only; and 'de facto partner' is defined in s.5CB of the Act, and rr.1.09A and 2.03A of the Regulations and includes both opposite and same sex de facto relationships.
[28] cl.845.222(2)(c) provides that 'in determining the score of an applicant under Part 4 of Schedule 7, only:
(i) assets in Australia that have been lawfully acquired; or
(ii) assets, lawfully acquired, that are available for transfer, and capable of being transferred, to Australia within 2 years of the grant of a business skills visa to the applicant;

transferred to Australia'; cl.188.228 which requires the assets be 'available for transfer to Australia within 2 years after the grant of a Subclass 188 visa'; cl.160.214,[29] which requires that assets are 'of a sufficient net value to settle in Australia'; and cl.163.213,[30] which requires that assets be of a specified value that is 'available for the conduct or establishment of a business in Australia.' The extract from PAM3 above appears to be consistent with these criteria. However, the Tribunal should take care to avoid any appearance of applying them as legal requirements.

Personal liabilities will include things like credit card debts, amounts borrowed from banks or other lending institutions to fund the acquisition of an asset or outstanding tax assessments.

Intangible Assets

Intangible assets are identifiable non-monetary assets without physical substance.[31] These may be derived from the positive attributes of a business, e.g. its market reputation/goodwill, or from the intangible resources of a business e.g. licences, market knowledge, scientific/technical knowledge or intellectual property such as patents, copyrights and trademarks. Australian Accounting Standards require that intangible assets should only be recognised (i.e. included in a business' assets) if it is probable that the expected future economic benefits that are attributable to the asset will flow to the (business) entity, and the cost of the asset can be measured reliably.[32]

Personal assets do not usually include intangible assets, but may if an individual owns an intangible asset not being used by him/her in a business (e.g. royalties from the licensing of an invention or copyrighted material).

The goodwill of a business may be recognised as an intangible asset. Goodwill is generally defined as a portion of the market value of a business beyond its net assets. It represents a premium for the future earning capacity of the business based on its reputation, customer base, brand recognition etc. Australian Accounting Standards characterise this asset as 'representing the future economic benefits arising from other assets acquired in a business combination that are not individually identified and separately recognised. The future economic benefits may result from synergy between the identifiable assets acquired or from assets that, individually, do not qualify for recognition in the financial statements.'[33]

There is both a subjective element (the purchaser's assessment of the value of the entity) and an objective element (the market price for which the entity is sold, assuming the exchange is between knowledgeable, willing parties in an arm's length transaction) in the valuation of goodwill. Evidence that

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are to be taken into account.'

[29] cl.160.214(2) requires 'The applicant, the applicant's spouse or de facto partner, or the applicant and his or her spouse or de facto partner together, have business and personal assets, in addition to the assets mentioned in subclause (1), that the Minister is satisfied are of a sufficient net value to settle in Australia.' The inclusion of de facto partners applies to visa applications made on or after 1 July 2009: SLI 2009, No.144. For visa applications made prior to 1 July 2009, 'spouse' is defined in r.1.15A as it stood prior to 1 July 2009 (i.e. as including persons in a married or opposite sex de facto relationship). For visa applications made on or after 1 July 2009, 'spouse' is defined in s.5F of the Act and refers to persons in a married relationship only; and 'de facto partner' is defined in s.5CB of the Act, and rr.1.09A and 2.03A of the Regulations and includes both opposite and same sex de facto relationships.

[30] cl.163.213(1)(a). For visa applications before 19 April 2010 the net value of the personal and business assets of the relevant persons must be at least AUD250 000, and for visa applications made on or after 19 April 2010, 'at least AUD500 000': Migration Amendment Regulations 2010 (No. 3) (SLI 2010, No.70).

[31] AASB 138, para. 8. For a fuller discussion of intangible assets, see Legal Services Commentary Financial Reports.

[32] AASB 138, para. 21.

[33] AASB 138, para. 11.

an exchange is an arm's length transaction could include a written attestation by a competent authority such as a chartered accountant or lawyer to the genuineness of the sale and goodwill value.

Goodwill cannot be valued at more than the original value paid. See MRD Legal Services Commentary Financial Reports for further information.

Establishing Ownership of Assets

Determining ownership of an asset is a necessary first step before the asset can be included in the calculation of the assets of a person or business. Establishing ownership of the different types of assets is usually a question of evidence.

Ownership

Ownership of an asset ordinarily requires more than legal title.[34] In this respect, the concept of ownership embedded in expressions such as 'assets of the applicant' and 'have business and personal assets' corresponds to a non-technical understanding of ownership which pervades the law generally. It should not be confused with the technical term 'ownership interest' which is defined in s.134(10) of the Act, which is relevant to the definition of 'main business' and which may not correspond in all respects to general law notions of ownership.

Ownership of an asset in this sense cannot be equated with possession of legal title to the asset. It includes 'beneficial ownership', which has been defined as 'the right to the enjoyment of a thing as contrasted with the legal or nominal ownership.'[35] Thus, a person may have legal title to an asset, but the asset may be owned by someone else, who is the beneficial owner.[36]

Regulation 1.11A of the Regulations (*'Ownership for the purposes of certain Parts of Schedule 2'*) provides that ownership by an applicant, or the applicant's spouse or de facto partner, of an asset includes beneficial ownership only if the beneficial ownership is evidenced in accordance with r.1.11A(2)[37]. Regulation 1.11A(2) provides:

[34] See *Zhang v MIMA* [2006] FMCA 1345 (Emmett FM, 13 September 2006) at [33]. The Court found that the Tribunal was correct in considering that, for the purposes of cl.845.215, ownership of an asset requires a beneficial or equitable interest in the asset.
[35] Rutherford, L. and Bone, S. (eds.), *Osborn's Concise Law Dictionary* (Sweet & Maxwell, London, 1993), p.239, 'Ownership'. At p.45, 'beneficial owner' is described as 'The person who enjoys or who is entitled to the benefit of property being entitled both at law and in equity'.
[36] 'Beneficial ownership', for the purposes of business skills visa applications is defined as where assets (e.g. shares, property, ownership interests in a business) are held in the name of a third party 'on behalf' of the applicant: PAM3: GenGuide M - Business visas – Visa application and related procedures - Business skills legislated and policy terms (reissued 10/09/2016).
[37] Regulation 1.11A(1). Note that r.1.11A only applies to those Parts of Schedule 2 it mentions, and that it does not expressly require 'beneficial ownership'. It sets out the circumstances in which beneficial ownership is to be recognised, where beneficial ownership is required. As discussed above, the requirement of beneficial ownership in asset requirements comes from general law concepts of ownership embedded in terms like 'assets of the applicant'. For 'ownership interest' in s.134(10), these concepts appear to be embedded in terms like 'sole proprietor', although there may be circumstances in which an interest of the type described in s.134(10) may be conferred by legislation without beneficial ownership (e.g. interest as a shareholder conferred by the *Corporations Act 2001* (Cth)).

(2) To evidence beneficial ownership of an asset, eligible investment or ownership interest, the applicant must show to the Minister:

(a) a trust instrument; or

(b) a contract; or

(c) any other document capable of being used to enforce the rights of the applicant or the applicant's spouse or de facto partner, as the case requires, in relation to the asset, eligible investment or ownership interest;

stamped or registered by an appropriate authority under the law of the jurisdiction where the asset, eligible investment or ownership interest is located.

Beneficial ownership and the purpose of r.1.11A have been described as follows:

> *The words 'beneficial ownership' have a specialised legal meaning consisting in a right that is derived from something, such as a contract or an expectancy, other than legal title: BA Garner, A Dictionary of Modern Legal Usage, 2nd edn, Oxford University Press, New York, 1995. In the context of a company the notion of a beneficial owner is applied to the person whom equity recognises as the owner of the shares and the person able to deal with them, but who does not hold the legal title because the shares are registered in the name of another: Black's Law Dictionary, 8th edn, ed BA Garner, West Group, St Paul, MN, 2004; Butterworths Australian Legal Dictionary, gen eds PE Nygh & P Butt, Butterworths, Sydney, 1997. Regulation 1.11A should be understood to refer to beneficial ownership in these senses.*
>
> *…*
>
> *Regulation 1.11A has the effect of excluding from an applicant's assets claims to ownership which cannot be substantially proven by reference to authenticated documents. Claims to beneficial ownership are easily made. There may often be little or no documentation of the contract or other arrangement which is said to create the ownership interest, leaving the decision-maker to determine the veracity of a claim based upon an oral arrangement with no objective evidence to assist that determination. And when documentation is provided it may be difficult to assess its authenticity. In the context of migration and visa applications there are added difficulties for the decision-maker in verifying documents put forward, since they may be in a foreign language or reflect aspects of a foreign legal system. It is these difficulties which the regulation addresses.*[38]

Subregulation (3) provides that a document does not evidence beneficial ownership for any period earlier than the date of registration or stamping by the appropriate authority.

The source of the funds used to acquire an asset may be relevant to whether those assets are owned by an applicant (e.g. whether a person acquired beneficial ownership of an asset by purchasing it with another's funds),[39] or to the value of the person's net assets (e.g. whether the funds advanced for purchase of an asset are really a loan from another person, and should be deducted from the value of the assets to calculate net assets).[40] When considering such questions, however, the Tribunal should make clear that it is addressing the question of the ownership or value of assets, and not being distracted by an enquiry into the source of the funds as a separate issue.[41]

[38] *Yu v MIMIA* (2004) 140 FCR 126 (Kiefel J, 16 November 2004) at [32], [35].

[39] See, e.g., *MIAC v Yong Zhao* [2008] FMCA 1683 (Scarlett FM, 22 December 2008), at [26]: 'The crucial matter to be established was whether those funds did in fact belong to the first and second applicant, rather than some other person. Clearly, to be the net assets of the first and second respondents, the funds needed to be owned by them'. See also *Cheung v MRT* (2004) 141 FCR 243, at [23]: 'Where a purchaser directs that a property be held in the name of a third person and there is nothing to indicate that that person is to have the beneficial interest in the property, a trust in the purchaser's favour may be implied: *Napier v Public Trustee (WA)* (1980) 55 ALJR 1 at 3 and *Calverley v Green* (1984) 155 CLR 242 at 266'.

[40] See *Ibrahim v MIAC* [2008] FCA 503 (Lander J, 21 April 2008).

[41] See *Ibrahim v MIAC* [2008] FCA 503 (Lander J, 21 April 2008), at [48]: '… there was no suggestion in any of the evidence that anyone else apart from the appellant was the owner of the business or later the sole shareholder in the company. The evidence in relation to the injection of funds was contradictory but the first question to be addressed was whether the appellant was the owner of

The source of funds used to acquire an asset is also relevant where there is a requirement that assets have been lawfully acquired.[42]

General Business Assets

Financial Statements

The three basic financial statements are usually sufficient to evidence general business assets (e.g. trading stock, revenue[43]). These are:

- a statement of financial position (previously known as a balance sheet);
- a statement of financial performance (previously known as a profit and loss report); and
- a statement of cash flow.

PAM3 does not set out binding evidentiary requirements, but they do provide guidance on the types of evidence which may be useful in satisfying a Tribunal of an applicant's financial position.

The guidelines relevantly provide that the purpose of financial statements is to show the financial position and performance of an entity.[44] They provide a minimum level of information to the public given that the information contained in the statements is influenced by accounting principles and policies adopted by the entity. The statement of financial position (also known as balance sheet) provides the position of the company at a fixed point in time and the income statement presents a summary of revenues and expenses of the entity for a period of time.

Note that the statement of financial position provides only a snapshot of the financial position of the business at that particular day, and it may be necessary in some circumstances to request additional statements (balance sheets). For more information regarding financial statements, please see MRD Legal Services Commentary on Financial Reports.

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the business and later the sole shareholder in the company. That evidence was all to the same effect. Once that question was addressed the inquiry which needed to be made was as to whether the net assets of the business, and later the company, was throughout the period of 12 months in excess of AUD$100,000'. In contrast, see *Wen v MIMA* [2000] FCA 320 (Mansfield J, 23 March 2000). In *Wen*, the delegate's reasons stated: 'There is scope for decision-makers to inquire into the source of an applicant's claimed assets, in order to reach a proper degree of satisfaction that an applicant is indeed the legal and beneficial owner of a business interest'. The court held that the reasons did not demonstrate that the delegate took the view that, as a matter of law to satisfy cl.127.212(2) in every case there is an obligation to make such an inquiry (at [40]). 'The delegate has simply taken the step of requiring evidence of the source of the funds available to the applicant to acquire his interests in [the company] because, on the material initially supplied, and having regard to the location of the company's business and its interests in Chinese based corporations, the delegate was concerned that the applicant might not be the true owner of the assets he claimed. That was a matter for the delegate to decide. It cannot be the case that a delegate must accept at face value the accuracy of material supplied in support of an application such as the present' (at [43]).

[42] This requirement was introduced for Subclass 845, 846, 890 and 892 applications made on or after 9 August 2008: SLI 2008, No.166.

[43] The terms 'revenue' and 'turnover' are often used interchangeably. However in some countries they can have different meanings and it may be necessary to seek clarification where the meaning is not clear. Further, in certain circumstances it may be necessary to look behind the stated turnover/revenue of a business to examine whether that turnover/revenue is real in substance. In *Cheng v MIAC* [2012] FMCA 911 (Driver FM, 16 November 2012) the Court upheld the Tribunal's finding that a business acting as an intermediary between two other businesses, and not as a merchant in its own right, could only claim the commissions it was paid as constituting its 'turnover'. This finding was upheld on appeal by the Federal Court in *Cheng v MIAC* [2013] FCA 405 (Cowdroy J, 6 May 2013).

[44] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business visa applications - Assessing applications – Requesting financial statements (reissued 10/09/2016).

If there is insufficient information presented in the financial statements and/or other documentation provided by applicants, a statement clarifying the issue should be sought from the accountant who prepared the accounts. However, if decision makers can satisfy themselves as to the issue in question on the basis of other information already provided there is no need to request further documentation (see Other financial documentation below).[45]

Applicants may be required to submit financial statements covering specified criteria under assessment e.g. ownership interest or sources of funds to establish that assets have been lawfully acquired. Where there are serious and specific concerns about the information provided in financial statements, statements addressing the specific concerns with a greater level of assurance such as review or audited statements may be requested from the applicant.

Other financial documentation

In addition to financial statements, other financial documentation may also be used to evidence general business assets. For example, ownership of trading stock can be shown through receipts, order forms, invoices or bills of lading; royalties for intangible assets (eg patents) can be shown by the patent, trademark or copyright registration, permissions agreement and receipts.

PAM3 provides that the following kinds of financial documentation may be useful to assist in corroborating information reported in financial statements and other requirements of business skills visas:[46]

- taxation documentation such as income tax returns;
- bank statements;
- company or business registrations such as extracts from registration authorities;
- business licenses;
- special purposes reports that are supported by taxation documents; and
- BAS (Business Activity Statements).

Business Activity Statements (BAS)

For Australian businesses, PAM3 provides that alternate financial statements such as BAS may be sufficient evidence. For example, to demonstrate an ongoing level of business activity during a period not covered by the business' financial statements, BAS would be sufficient.[47]

A BAS is the form Australian Business Number (ABN) holders provide to the Australian Taxation Office (ATO) to report the business obligations and entitlements relating to various kinds of tax including goods and services tax (GST) as well as PAYG amounts withheld, PAYG instalments and fringe benefits tax.[48] Some companies will receive a quarterly GST and/or PAYG instalment notice instead of an activity statement if they report and pay GST and/or PAYG instalments quarterly, use the instalment amounts

[45] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business visa applications - Assessing applications – Requesting Financial Statements – If documentation is insufficient (reissued 10/09/2016).
[46] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business visa applications - Assessing applications – Requesting Financial Statements – Other Financial Documentation (reissued 10/09/2016).
[47] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business visa applications - Assessing applications – Requesting Financial Statements – Other Financial Documentation (reissued 10/09/2016).
[48] See Australian Taxation Office (ATO) website, 'Business Activity Statements (BAS)', https://www.ato.gov.au/Business/Business-activity-statements-(BAS)/ (accessed 30 January 2019).

advised by the ATO, and have no other reporting requirements.[49] Hence, quarterly GST and PAYG notices may also be useful financial evidence.

PAM3 provides that in examining printed copies of BAS, the 'Activity Statement Status' line enables the officer to check the status of the BAS with the ATO. If the status is 'New', the BAS has been printed prior to the lodgement with the ATO and is not sufficient evidence of lodgement.[50]

BAS may also be cross checked against turnover and wages figures in the applicant's income statement for verification purposes. As any references to total sales will include GST, the total sale figure should be recorded, less export sales and other GST-free sales. To calculate GST, the total figure must be divided by 11, with this figure then deducted from the total.[51]

Special Purpose Reports

In assessing offshore businesses, if acceptable financial statements are not available, a Special Purpose Report on business turnover or investments may be requested. The report should be prepared in accordance with the International Standard on Related Services (ISRS 4400), by a person certified by a recognised accounting body acting to international financial reporting standards or Australian accounting standards. Decision makers may request comments from the accountant on a number of issues including whether the information reported is corroborated by tax documents.[52]

The objective of a special purpose report is for an accountant to report on factual findings on agreed financial information, as opposed to a limited audit of financial statements, without providing an assurance. Therefore, the cost for a special purpose report is expected to be substantially less than a limited audit. The special purpose report should outline the agreed-upon procedures performed by the accountant for the issue of the report, and where the findings differ from the information shown in the other financial documentation such as income tax returns, details of the discrepancy are required to be set out.

Capital Assets

The capital assets of a business (e.g. plant, equipment, fixtures) may be evidenced by relevant ownership document (e.g. car registration, receipts, certificates of ownership), or by secondary records like insurance policies, lease agreements, loan agreements showing the asset as security or other documentation that has a satisfactory level of assurance.

Real Property

Ownership of real estate may be evidenced through legally recognised title deeds. The value of real estate can be determined through property valuations prepared by a licensed or registered valuer.

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[49] See Australian Taxation Office (ATO) website, 'Instalment notices for GST and PAYG instalments' https://www.ato.gov.au/Business/Business-activity-statements-(BAS)/Instalment-notices-for-GST-and-PAYG-instalments/ (accessed 30 January 2019).
[50] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business visa applications - Assessing applications – Requesting financial statements – Other financial documentation (reissued 10/09/2016).
[51] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business visa applications - Assessing applications – Requesting financial statements – Other financial documentation (reissued 10/09/2016).
[52] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business visa applications - Assessing applications – Requesting financial statements – Other financial documentation (reissued 10/09/2016).

Overseas Property

Whether the applicant owns overseas property is a question of fact for the Tribunal. Relevant considerations include:

- what documentation would evidence the asset in the relevant country;
- whether any documents produced are originals or genuine copies;
- whether the property is only encumbered to the extent claimed by the applicant.

How this is achieved will depend on the circumstances of the case. A property's value may be established by, for example, valuation by a licensed assessor or shown by some other reliable document like an insurance policy or loan agreement.

Investments

Ownership of shares, stocks and bonds may be evidenced by share scripts, bond certificates, debentures or transfer documentation. The market value may be evidenced by the applicant using published financial information for the end of the fiscal year. In some cases where the asset is in managed fund products it may be necessary to produce the prospectus or other investment information to show the asset value.

Loans

A loan by a person to a business may be an asset of that person in the business, though it is not an asset of the business. PAM3 provides that loans made to incorporated businesses by independent parties, including financial institutions, are liabilities of the business and can not be included in the value of an applicant's net assets in the business. Loans made to the business from the applicant's personal asset base (e.g. from funds transferred from overseas) are fully attributable to the net value of the assets of an applicant in a business.[53] In this sense, the applicant's asset is not the money (which belongs to the company) but is the right to enforce the company's promise to repay that money.[54] Furthermore, a loan made by an applicant to a business can still constitute an asset of that applicant in that business[55] despite the applicant not having access to and control over the money alone, and/or the money not being used for the day-to-day operation of that business.[56]

According to PAM, the value of personal loans made to a business by the applicant which are based on an applicant's (and/or their spouse or de facto partner's) personal assets as collateral should be added to the net value of an applicant's business assets. However, the value of the personal loans made to the business by the applicant which are not based on personal assets as collateral or that exceed the value of the secured assets used as collateral should be deducted from the net value of the applicant's business assets.[57]

[53] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business assets - Loans – Source of funds and collateral - Loans to the business (compilation 1/7/14).
[54] *Yao v MIBP* [2016] FCCA 3164 (Judge Smith, 16 December 2016) at [47].
[55] E.g. for the purposes of satisfying cl.890.212 of Schedule 2 to the Regulations
[56] *Yao v MIBP* [2016] FCCA 3164 (Judge Smith, 16 December 2016) at [44] and [47]-[48]. See also *He v MIBP* [2015] FCCA 2915 (Judge Vasta, 29 October 2015) in which the Court found Departmental policy guidelines, which stated that a loan by an applicant to the business had to be used to fund the activities of the business, overreached the terms of cl.890.212.
[57] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business assets - Loans – Source of funds and collateral – Encumbered loans based on collateral (compilation 1/7/14).

For example:
If a financial institution lends money to the applicant using the applicant's personal assets such as the applicant's house as security and the applicant loans the money to a company or trust (that is, a separate legal entity) provided the funds do not exceed the value of the secured asset, the loan advanced by the applicant should be included in the computation of the applicant's net value of assets in the business. This is based on the premise that the applicant's asset (money) is directly used by the business and is a personal liability which is exposed to risk.[58]

In making a finding as to whether a loan is in fact a liability, the Tribunal may be required to consider whether the loan is likely to be repaid.[59] As stated above (see Business Assets and Liabilities) Australian Accounting Standards define a liability as a present obligation of the entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits.[60] Though the Standards do not provide binding definitions for the Act and Regulations, the Tribunal may have regard to them in determining the meaning of words.

Cash

Cash on deposit is cash held in banks and other financial institutions. It may be evidenced by bank (or other financial institution) account statements.

Calculating the value of personal and business net assets

Having established ownership of personal and business assets, the next step is for the decision maker to calculate the value of net assets held by an applicant.

[58] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business assets - Loans – Source of funds and collateral – Encumbered loans based on collateral (reissued 10/09/2016).
[59] See *Su v MIMIA* [2005] FMCA 616 (Scarlett FM, 29 April 2005). In *Su*, the applicant argued that there was no longer any obligation to repay a particular loan, because the company which lent the money had been wound up. It was submitted that the Tribunal erred in restricting its considerations to the past, that is where the loan came from, and failed to consider the present, which was the status of the loan during the relevant period. It was submitted that if the Tribunal had considered the status of the loan during the relevant period, the Tribunal would have found that liability for repayment of the loan had been discharged by termination of the company. Under Chinese law, a liquidation organisation would have been established and the assets would have been realised and the liabilities discharged. If there had been an outstanding debt, it would have been pursued by the liquidator. It was argued that the fact that this had not occurred raised a strong presumption that there was no outstanding debt due from the applicant's business to the liquidated business. Further, it was argued that any debt due was probably unenforceable. The Court (at [36]) considered that the likelihood of the debt being unenforceable was not an issue of great point. What was at point, was that the Tribunal should have considered that the liquidated company had ceased to exist for almost six years by the time of the Tribunal decision and that no demand had been then made for repayment, so there was almost no possibility that any proceedings could have been commenced within any relevant limitation period. Scarlett FM held (at [64]-[65]) that the Tribunal asked the wrong question, as there was sufficient evidence before the Tribunal for it to examine the current status of the money and that there was evidence capable of supporting the finding that the company had been wound up six years before its decision.
[60] The Standard distinguishes between provisions (liabilities of uncertain timing or amount) and contingent liabilities (possible obligations whose existence will be confirmed only by the occurrence or non-occurrence of an uncertain future event, or present obligations not recognised because it is not probable that an outflow of resources will be required to settle the obligation or the amount cannot be reliably measured). Provisions are to be recognised as liabilities, contingent liabilities are not. Where the possibility of any outflow in settlement is remote, that possibility is not to be recognised as a liability: AASB 137, paras. 10-14, 27, 86, Appendix A.

Assets in a business

In calculating the value of a person's assets in a business, the Tribunal should not restrict itself to considering assets *owned* by the business.[61] For example, where property of an applicant's spouse is used to secure an overdraft for a business, letters of credit and other banking facilities for the applicant's trading activities, it is arguable that the property is used in the business.[62] Similarly, a loan advanced by an applicant to a business is arguably an asset of the applicant in the business, although it is not an asset of the business.

PAM3 states:

> *The net value of the assets of a business is the amount attributable to the business after deducting financial claims upon the business by third parties (i.e. total assets – total liabilities = net assets/liability).*
>
> *The method of establishing the net value of assets in a business can vary depending on whether the business is a sole proprietorship…a partnership…a company… a franchise…[or] operated in conjunction with a trust fund.*
> *…*
> *As a general rule, to calculate the net value of an applicant's assets in a business in any given year, it is necessary to:*
> - *establish the* net value of the assets *of the business (or owners'/shareholders' equity or funds) then*
> - *calculate the share/portion of those assets attributable to the applicant based on ownership interest and personal investment in the business.*
>
> *To determine the net value of the assets held by an applicant, and/or the applicant's spouse or de facto partner in a business:*
> - *calculate the proportionate share of the assets held by the applicant and/or spouse or de facto partner, then:*
>
> *add*
> - *the balance of any loans advanced to the business by the applicant (if the directors or major shareholders have made any loans to the company, these should be itemised in the financial statements or in the notes to the accounts) and*

deduct
- *the balance of any loans the business may have advanced to the applicant and*
- *the value of any other loans the applicant may have taken out to finance their investment in the business not based on personal assets pledged as collateral…* [63]

[61] *Cheung v MIMIA* (2005) 143 FCR 117.
[62] *Cheung v MIMIA* (2005) 143 FCR 117 at [34]. Compare *Yen v MIMIA* [2003] FCA 705 (Dowsett J, 3 June 2003). In *Yen*, the applicant commenced proceedings to recover a debt of $100,000 in 1997 and applied for a Subclass 845 visa in respect of her main business in April 2000. She recovered the debt later in 2000, and applied it in discharge of the debts of her main business. The Court found that the Tribunal did not err in finding that the applicant did not meet cl.845.215, which required her to have had net assets of $100,000 in the business *throughout the period of 12 months immediately preceding the making of the application*. Dowsett J further commented that it would have been open to the applicant to assign her claim to the main business but that she never did so. The main business at no time became entitled, in law or in equity, to make any claim with respect to the amount or the chose in action representing it. It was never any part of the property of the company or in any sense a measure of the applicant's interest in the company (at [5]-[7]). To the extent that Dowsett J suggests that cl.845.215 requires an applicant's assets to be owned by the business rather than to be used in the business, the comments are *obiter*, going beyond the words of the provision and conflicting with the Full Federal Court's judgment in *Cheung*.
[63] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business assets - Net business assets (reissued 10/09/2016).

While the guidelines reflect a definition of 'assets in a business' which is consistent with the approach taken in *Cheung v MIMIA,*[64] the Tribunal should be careful not to treat the guidelines as a legislative requirement.

PAM3 suggests two methods of valuing a person's equity in an incorporated business:

- For both unlisted and listed companies, the applicant's share of the shareholders' equity (i.e. the applicant's net value of the assets in that company) may be ascertained by the applicant's shareholding as a percentage of the total share issue, and then applying that percentage to the total shareholders' equity.[65]

- For listed companies, equity may also be ascertained using the current market value of the applicant's shareholding. This is calculated by taking the number of shares held and multiplying this number by the shares' market price current at the end of a fiscal year for offshore visas or the beginning and end of the assessment period for onshore visas.[66]

Net assets in partnerships

In general terms, a partnership is a relationship which exists between persons carrying on a business. Some jurisdictions have defined the term 'partnership' legislatively, and have made provisions with respect to the assets and liabilities of parties in a partnership.[67] A person's share of assets and liabilities held in a partnership agreement will also be determined by the terms of that agreement.[68]

A person's share of assets held under a partnership agreement may be set out in the partnership accounts. PAM3 states:

> *In a partnership, the applicant, as one of a number of partners, can only claim a share of the assets of the business. However, if the business partner is also the applicant's spouse or de facto partner, 100% of the net value of assets of the business can be attributed to the applicant.*
>
> *This share is normally measured by the balance of their individual capital account. A partnership agreement provides evidence of the share of ownership interest in a business.*
>
> *The balance of a partner's capital account normally comprises:*
> - *the value of the partner's individual contributions/investments* plus
> - *the individual partner's share of income* minus
> - *drawings / borrowings on the account.*[69]

[64] *Cheung v MIMIA* (2005) 143 FCR 117.
[65] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business assets – Incorporated businesses (public and private companies) - Owner's equity – Incorporated businesses (reissued 10/09/2016).
[66] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business assets – Incorporated businesses (public and private companies) -Owner's equity – Listed companies (reissued 10/09/2016).
[67] E.g., *Partnership Act 1892* (NSW), ss.1, 9, 20A, *Partnership Act 1958* (Vic.), ss.5, 13, 24.
[68] See for example *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation* [1955] HCA 66 (Dixon CJ, McTiernan J, Fullagar J, Kitto J, Taylor J, 29 November 1955), Kitto J, at [13].
[69] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business assets – Unincorporated businesses (sole proprietors and partnerships) - Partnerships (reissued 10/09/2016).

Net assets in sole proprietorships

All of the net assets of a business owned by a sole proprietor are the assets of the proprietor. However, the proprietor may have personal assets which are not assets in the business.

PAM3 states:

> *An applicant who is the sole proprietor can claim all of the owner's equity of the business. However, because there is no legal distinction between the business and its owner, the assets of the business may not be readily distinguishable from the applicant's personal assets, particularly if separate business accounts are not maintained.*
>
> *If separate business accounts are maintained, the net value of the applicant's assets in the business are the same as the net assets of the business itself. However, if separate business accounts are not maintained, the business assets need to be identified and separated from the applicant's personal assets, and the liabilities associated with those business assets must be deducted.*
> *…*
>
> *Normally the calculation of net value of assets in a sole proprietorship would be the net value of* business assets less borrowings against those assets.[70]

The Tribunal may have regard to the guidelines, but is not bound by them. In particular, uncritical adherence to this guideline could result in the Tribunal incorrectly asking itself about the value of assets *of* a business, instead of the value of an applicant's assets *in* a business. For example, a loan from an applicant to the business, or a personal asset used to secure credit for the business, may not be an asset of the business, but may be an asset of the proprietor in the business.

Evidentiary and procedural issues

Valuations

The weight to be given to asset valuations is a matter for the Tribunal.[71] It may reject an expert opinion if not satisfied as to how or why the conclusions expressed in that opinion were reached.[72]

[70] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business assets – Unincorporated businesses (sole proprietors and partnerships) - Sole proprietorships (reissued 10/09/2016).

[71] *Tran v MIAC* [2008] FCA 1826 (Collier J, 2 December 2008). In *Tran*, the Court found no error with the Tribunal's approach in putting no weight on the applicant's estimations of real estate valuations as they were not supported by translated valuations or an explanation of how the values were arrived at and where the most recent valuations provided were inconsistent with earlier valuations. As for financial statements, see *Sharma v MIAC* [2007] FMCA 2027 (Scarlett FM, 17 December 2007). In *Sharma*, the Tribunal accepted statements current as at 30 September 2003, but was not satisfied that net assets increased to the required level by December 2003 as it did not accept the statements covering the financial position from 1 January to 31 December 2003 as reliable given that they contradicted the company's position declared with the Tax Office. The Tribunal was of the view that they minimised the company's expenses in order to boost the profits and therefore the net assets. The Court found that that conclusion was a finding of fact, and that it was open to the Tribunal to find that it was not satisfied that the applicant met the requirements of cl.845.215 for the reasons given (see [27]). See also *Xin v MIAC* [2007] FCA 703 (Middleton J, 8 May 2007) at [17] and [19]: 'The Tribunal's function was to assess the evidence, and although it was of an accounting nature, there is nothing in the Tribunal's reasoning to indicate error. … The Tribunal need not be comprised of members who are qualified accountants or auditors, as seems to be suggested by the appellants. The Tribunal is entitled to act upon the evidence before it to reach a conclusion according to law. In any event, in the way the Tribunal approached its task, I do not consider the conclusions reached depended upon any specific accounting expertise it needed to have itself'.

In general, the Tribunal is not obliged to substitute its own valuation where it is not satisfied that an applicant's is correct.[73]

Double counting

To ensure a correct picture of the net assets of an applicant is determined, decision makers should satisfy themselves that each of the assets used to meet the relevant criteria are not 'double counted' in so far as they may appear in multiple places (e.g. when funds are transferred from one bank account to another) or in multiple forms (e.g. when assets are sold).

To avoid this possibility, PAM3 instructs officers to ask initial applicants to demonstrate the net value of their personal and business assets on one date (under policy, within the 3 months preceding the lodgement of the visa application). By asking that the same date be used, the possibility of double counting of assets is eliminated.[74]

Again, the Tribunal may have regard to PAM3 in this regard, but should not consider itself bound by it as this may result in the Tribunal imposing an impermissible gloss on the regulations and consequently asking the wrong question.

Adequate / available assets

Some provisions require that assets be available and/or adequate for a purpose, e.g. to settle or be used in a business.

In instances where the applicant has to show sufficient net assets 'to conduct the business', it is not necessary that the asset be committed or set aside for the purposes of conducting the business. It is enough that the applicant has possession of assets at the level described which are capable of being applied to support the business.[75] It is, however, necessary that the assets be available.[76] Further, in circumstances where the Tribunal is required to consider the adequacy of assets to conduct the business, rather than assessing whether the assets meet a particular monetary threshold, decisions should not be solely based on the value of the financial resources, without addressing the real question of whether or

[72] *Phua v MIAC* [2008] FMCA 1737 (Riley FM, 8 October 2008). In *Phua*, the Tribunal had rejected the evidence of an accounting professor on the basis that the professor did not explain how or why he reached his conclusion. The Court held that the Tribunal's conclusions were reasonably open to it. In *Loessi v MIMIA* [2007] FCA 1891 (Greenwood J, 30 November 2007), the Tribunal considered a forensic accountant's report and concluded that having regard to the limitations of the scope of the report and the limited sources of information recited in it, it could not accept the valuation. The Court held that it was open to reach that conclusion.

[73] See for example *Phua v MIAC* [2008] FMCA 1737 (Riley FM, 8 October 2008) at [7]: 'Having held that the equity in the company was not as asserted in the balance sheet it was unnecessary, in my view, for the Tribunal to specify in what respect the figure for net assets was inaccurate. It may have been that the figures for cash, or cash equivalents, or intangibles were inflated, or the figure for liabilities may have been understated. However, it was not for the Tribunal to prove which of these possibilities was the truth. It was enough for the Tribunal to conclude on a reasonable basis that the applicant's equity in the company was less than $100,000.'

[74] PAM3: GenGuide M – Business visas – Visa application and related procedures – Business ownership and assets – Net business and personal assets - Net value – Avoiding double counting (reissued 10/09/2016).

[75] *Wyse v MIAC* [2006] FMCA 1362 (Smith FM, 28 September 2006).

[76] *Bodenstein v MIAC* [2009] FCA 50 (Perram J, 6 February 2009).

not those resources were adequate to conduct the particular business having regard to the nature of the particular business.[77]

Relevant Case Law

Bodenstein v MIAC [2009] FCA 50	Summary
Cheng v MIAC [2012] FMCA 911	Summary
Cheng v MIAC [2013] FCA 405	Summary
Cheung v MRT [2004] FCA 1725	
Cheung v MIMIA [2005] FCAFC 122	Summary
He v MIBP [2015] FCCA 2915	Summary
Ibrahim v MIAC [2008] FCA 503	Summary
Loessi v MIMIA [2007] FCA 1891	
Lukac v MIMIA [2004] FCA 1641	Summary
Nassif v MIMA [2003] FCA 481	Summary
Parisi v MIMA [2005] FMCA 218	Summary
Phua v MIAC [2008] FMCA 1737	
Sharma v MIAC [2007] FMCA 2027	
Su v MIMIA [2005] FMCA 616	
Tran v MIAC [2008] FCA 1826	
Wyse v MIAC [2006] FMCA 1362	Summary
Xin v MIAC [2007] FCA 703	
Yao v MIBP [2016] FCCA 3164	Summary
Yen v MIMIA [2003] FCA 705	
MIAC v Yong Zhao [2008] FMCA 1683	Summary
Yu v MIMIA [2004] FCA 1477	
Zhang v MIMA [2006] FMCA 1345	

[77] *Parisi v MIAC* [2005] FMCA 218 (Reithmuller FM, 3 March 2005), *Lukac v MIMIA* [2004] FCA 1641 (Spender J, 13 December 2004).

Relevant amending legislation

Migration Amendment Regulations 2008 (No. 3)	SLI 2008, No.166
Migration Amendment Regulations 2009 (No. 7)	SLI 2009, No.144
Migration Amendment Regulations 2010 (No. 3)	SLI 2010, No.70
Migration Amendment Regulations 2012 (No. 2)	SLI 2012, No.82

Last updated/reviewed: 30 January 2019

Nomination and Approval of an Occupation for Subclass 457 and Subclass 482 – Regulations 2.72 and 2.73

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Overview

Nomination is the process through which a person who is, or has applied to be, an approved standard business sponsor,[1] or who is a non-Ministerial party to negotiations for a work agreement,[2] nominates for approval an occupation which a visa holder, visa applicant, or proposed visa applicant will undertake.[3] This ensures that the standard business sponsor, or party to the work agreement agrees to be the sponsor for that particular visa holder, visa applicant, or proposed visa applicant.[4]

In the standard business sponsor context, the nomination is the second stage of a three-stage business sponsorship scheme under the *Migration Act 1958* (the Act) and the Migration Regulations 1994 (the Regulations). The first stage involves a person (the employer) seeking approval as a standard business sponsor, and the third stage involves the person to be employed in a proposed occupation by the approved business sponsor, applying for a temporary visa (i.e. applying for a Subclass 457 or Subclass 482 visa). In the context of a nomination by a party to a labour agreement, there is no separate sponsorship approval process. Rather, the party to the labour agreement will make the nomination prior to the person to be employed applying for a temporary visa.

The requirements relating to nomination in respect of a Subclass 457 visa[5] underwent major revision as a result of the *Migration Legislation Amendment (Worker Protection) Act 2008* and the Migration Amendment Regulations 2009 (No.5),[6] effective 14 September 2009.[7] All nominations whether made prior to, or after 14 September 2009 and before 18 March 2018 are assessed under this revised scheme. Further amendments introducing additional integrity measures were made on 28 June 2013 variously affecting all applications from 1 July 2013 as a result of the Migration Legislation Amendment Regulation 2013 (No.3).[8] Amendments introducing labour market testing requirements applied to certain nominations made by standard business sponsors on or after 23 November 2013.[9]

Major reforms again occurred on 18 March 2018, introduced by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (TSS Regulations). The TSS Regulations repealed the Class UC Subclass 457 (Temporary Work (Skilled)) visa and

[1] From 17 April 2019, a 'standard business sponsor' is defined in r.1.03 of the Regulations as a person who is an approved work sponsor and who is approved as a work sponsor in relation to the standard business sponsor class under s.140E of the *Migration Act 1958* (the Act). 'Approved work sponsor' is relevantly defined in s.5(1) of the Act as a person who has been approved as a work sponsor and whose sponsorship approval has not been cancelled or ceased to have effect. The introduction of 'work sponsor' from 17 April 2019 in place of the former 'approved sponsor' scheme was a technical amendment consequential to the introduction of an 'approved family sponsor' for the purposes of certain family visas: see the *Migration Amendment (Family Violence and Other Measures) Act 2018* (No.162, 2018) and Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (F2019L00551).

[2] A 'work agreement' for the purposes of a Subclass 457 or Subclass 482 visa is defined in s.5 of the Act r.2.76(2) of the Regulations as an agreement in effect between the Commonwealth, as represented by the Minister, and a person, an unincorporated association or a partnership in Australia, which is a labour agreement that authorises the recruitment, employment, or engagement of services of a prospective Subclass 457 (or Subclass 482) visa holder.

[3] The *Migration Amendment (Skilling Australians Fund) Act 2018* (No.38, 2018) amended s.140GB(1) from 12 August 2018 (for all live nominations) to allow a person who has applied for approval as a sponsor or is a party to negotiations to nominate under s.140GB.

[4] Explanatory Statement to SLI 2009, No.115, p.25.

[5] Note the Subclass 457 visa was moved to the temporary work framework from 24 November 2012: Migration Amendment Regulation 2012 (No. 4) (SLI 2012, No.238). The Explanatory Statement to SLI 2012 No.238 states that the amendment is intended to better reflect the purpose of the visa to provide for temporary entry of skilled workers, not to cater for temporary business visitors who have more appropriate visa options under the visitor program. As a result of these rebadging, the Subclass 457 (Business (Long Stay)) visa was renamed the Subclass 457 (Temporary Work (Skilled)) visa on 24 November 2012. However, the new name is defined to include the old, and vice versa: r.1.03

[6] SLI 2009 No.115 as amended by Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1) (SLI 2009, No.203).

[7] See Legislation Bulletin 11/2009 for further details.

[8] Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146). For further details on the effect of SLI 2013, No. 146 see: Legislation Bulletin No.10/2013,

[9] *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013) and Migration Amendment (Temporary Sponsored Visas) Commencement Proclamation 2013.

replaced it with a Class GK Subclass 482 (Temporary Skill Shortage) visa. The TSS Regulations also introduced a new set of substantive criteria and procedural requirements for the nomination of occupations in relation to holders of or applicants for the Subclass 482 visa at r.2.72 and r.2.73. Nomination applications made on or after 18 March 2018 are subject to the new scheme, while those made before this time are subject to the previous scheme, with the exception of one small cohort.[10] This commentary addresses nominations made both before and after 18 March 2018. The criteria for approval under both schemes are, in substance, largely consistent, with some exceptions including:

- specifying occupations by reference to an instrument in force at the time of nomination application rather than time of decision;
- introduction of the term 'annual market salary rate' in relation to salary requirements;
- a new criterion requiring the nominator to not have engaged in discriminatory recruitment practices; and
- the division of criteria into short-term and medium-term occupation streams and a corresponding division of specification of occupations, with some stream specific variation in criteria.

Nominations lodged before 18 March 2018 cannot support the grant of a Subclass 482 visa, and nominations lodged after 18 March 2018 can only support Subclass 482 visa holders, applicants and proposed applicants, as well as existing Subclass 457 visa holders.

Further amendments introduced by the *Migration Amendment (Skilling Australians Fund) Act 2018* and the Migration Amendment (Skilling Australians Fund) Regulations 2018, effective from 12 August 2018, introduced a 'nomination training contribution charge', as well as changes to the labour market testing requirements.

Under both the pre- and post- 18 March 2018 schemes, s.140GB of the Act provides that the Minister must approve a person's nomination if they are an approved work sponsor and prescribed criteria are satisfied. The prescribed criteria for approval of a nomination are set out in r.2.72. For nominations made on or after 23 November 2013, there is an additional requirement for approval that if the nomination is one subject to a labour market testing condition, unless certain exemptions apply, that condition is satisfied.[11] The labour market testing condition and exemptions are set out in ss.140GBA-GBC of the Act. For nominations made on or after 12 August 2018 there is an additional requirement for approval that if the applicant is liable to pay the nomination training contributions charge, it has been paid.[12] The process for nomination is outlined in r.2.73.

Other MRD Legal Services commentary relating to the temporary business scheme includes Standard Business Sponsorship, Subclass 457 visas and Subclass 482 visas.

[10] For pre-18 March 2018 nominations where the nominee identified in the nomination had not applied for a Subclass 457 visa on the basis of the nomination before 18 March 2018, neither the old nor the view version of r.2.72 applies: see *B & G Green Trading (Migration)* [2018] AATA 3190, where the Tribunal considered the operation of the transitional provision in cl.6704(6) of Schedule 11 to the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262). The Tribunal further held that as there were no prescribed criteria, such a nomination could not be approved. This is a 'guidance decision' under s.353B of the *Migration Act 1958* and must be complied with by the Tribunal in cases where the nomination was for a proposed occupation, made before 18 March 2018, in relation to a proposed Subclass 457 applicant, and the proposed applicant did not apply for a Subclass 457 before 18 March 2018.
[11] s.140GB(2) as amended by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013).
[12] s.140GB(2) as amended by No.38, 2018.

Tribunal's jurisdiction and powers

A decision to refuse to approve a nomination under s.140GB(2) and r.2.72 is a reviewable decision under Part 5 of the Act.[13]

However, a decision will not be reviewable if the decision relates to a current or former standard business sponsor, and in making the decision whether to approve the person as a standard business sponsor or whether to vary the terms of approval, the Minister did not consider the criteria under r.2.59 and r.2.68 that apply only to businesses lawfully operating in Australia.[14] It is a question of fact as to whether the relevant criteria were considered in making the decision. The person who made the nomination has standing to apply for review.[15]

On review, the Tribunal has the power either to affirm a decision to refuse an application for nomination, if one or more of the prescribed criteria are not met or if labour market testing requirements are applicable and not met (and no exemption applies), or to set aside a refusal decision and substitute a new decision to approve the nomination, if satisfied that *all* prescribed criteria *and* the labour market testing requirements (subject to application or an exemption applying) are met, and the applicant is an approved work sponsor.[16]

Process for Nomination of an occupation

A person who is, or who has applied to be, an approved work sponsor, or who is a non-Ministerial party to negotiations for a work agreement, may nominate a visa applicant or proposed visa applicant, or a proposed occupation, program or activity.[17] The definition of 'approved work sponsor' in this context means either an approved standard business sponsor whose approval has not ceased or been cancelled, or a party to a work agreement (other than a Minister).[18]

The nomination may be of a visa holder, visa applicant, or a proposed visa applicant. The person who is the subject of the nomination does not have to make a visa application at the time of nomination. In the case of a nomination for a Subclass 457 or Subclass 482 visa, it is only an occupation, or proposed occupation that may be nominated.[19]

Regulation 2.73 sets out the requirements for the process of nomination of an occupation.

[13] s.338(9), r.4.02(4)(d).
[14] For decisions made on standard business sponsorship approval or variation of standard business sponsorship approval made before 18 March 2018, these are r.2.59(d) and (e) and r.2.68(e) and (f) respectively; see r.4.02(4B) as inserted by SLI 2009 No.115 (as amended by SLI 2009, No.203). For decisions made on either of these approvals made *after* 18 March 2018, the relevant provisions will be r.2.59(f) and r.2.68(g): see r.4.02(4B) and clause 6704(16) of Schedule 13 as amended by F2018L00262.
[15] s.347(2)(d) and r.4.02(5)(c) as amended by the Migration Amendment (Skilling Australians Fund) Regulations 2018 (F2018L01093) from 12 August 2018. Standing was previously limited to the 'approved sponsor', but it is no longer necessary for an approved sponsor to make a nomination application.
[16] s.140GB(2) and s.349(2) of the Act.
[17] s.140GB(1) of the Act as amended byNo.38, 2018) for nominations made on or after commencement (12 August 2018), or made before but not decided at commencement of the Act. See Legislation Bulletin 02/2018 for further details.
[18] s.5(1) of the Act as amended by No.162, 2018.
[19] s.140GB(1)(b) and r.2.73(1A) (before 18 March 2018)/r.2.73(1) (after 18 March 2018).

Regulation 2.73 for nomination applications made before 18 March 2018

Regulation 2.73 requires that, for a person who is nominating an occupation and identifies in the nomination a Subclass 457 visa holder, or an applicant or proposed applicant for a Subclass 457 visa:

- the approved sponsor must:
  - *for nominations made before 1 July 2013:* make the nomination in accordance with the approved form; [20]
  - *for nominations made on or after 1 July 2013*: make the nomination using the internet and an approved form specified in the relevant written instrument;[21]
- the approved sponsor must provide, as part of the nomination:[22]
  - the identity of the visa holder, or proposed visa holder who will work in the nominated occupation;[23]
  - specified details of the occupation - that is:
    - *for nominations made before 1 July 2010* – the 6-digit ASCO code for the nominated occupation, or if there is no code, the name of the occupation as it appears in the relevant written instrument (if the approved sponsor is a standard business sponsor) or in the work agreement (if the approved sponsor is a party to a work agreement); [24]
    - *for nominations made on or after 1 July 2010* – the name of the occupation and corresponding 6-digit ANZSCO code, or if there is no code, the name of the occupation and the corresponding 6-digit code as specified in the relevant written instrument (if the approved sponsor is a standard business sponsor) or in the work agreement (if the approved sponsor is a party to a work agreement);[25]
    - the location(s) of the nominated occupation;[26] and
  - if the approved sponsor is a standard business sponsor - written certification that:
    - the tasks of the position include a significant majority of the tasks of the nominated occupation listed in the ASCO [pre 1/7/10 nominations] or ANZSCO [post 1/7/10 nominations], or the nominated occupation listed in the relevant instrument (standard business sponsor);[27] and

[20] r.2.73(2). Immediately prior to 1 July 2013 this was form 1196N or approved form 1196 (Internet). For nominations made before 1 July 2013, if the approved sponsor does not operate a business in Australia, the application must be made in accordance with Form 1196N: r.2.73(3).
[21] r.2.73(2) and (3) as amended by SLI 2013, No.146. Regulation 2.73(9), also inserted by SLI 2013 No.146, allows the Minister to specify a different manner, form and fee for making a nomination. See the 'Form&Fee' tab of the Register of Instruments: Business visas for the relevant instrument specifying alternative forms, methods and fees for making nominations.
[22] r.2.73(4) for nominations made before 1/7/10 and r.2.73(4A) for nominations made on or after 1/7/10.
[23] By reference to r.2.72(5).
[24] r.2.72(8) as amended by Migration Amendment Regulations 2010 (No.6) (SLI 2010, No.133) . 'ASCO' means the Australian Standard Classification of Occupations, Second Edition, published by the Australian Bureau of Statistics on 31 July 1997: r.1.03. See the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas for relevant instrument.
[25] r.2.72(8A) as inserted by SLI 2010, No.133. 'ANZSCO', for nominations and visa applications made before 1 July 2013, means the Australian and New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics as current on 1 July 2010: r.1.03. For applications made on or after 1 July 2013 'ANZSCO' has the meaning specified by the Minister in an instrument in writing: r.1.03. See the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas for relevant instrument for 2.72(8A) and the definition of ANZSCO.
[26] By reference to r.2.72(8)(d) and 2.72(8A)(d);
[27] r.2.73(4)(b) for standard business sponsor, r.2.73(4)(c) for work agreement. See the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas for the relevant instrument.

        - if the person is lawfully operating a business in Australia, the nominated occupation is a position in the business of the standard business sponsor or an associated entity, or is an occupation listed in the relevant instrument;[28]
        - if the person is lawfully operating a business outside Australia but does not lawfully operate a business in Australia, the nominated occupation is a position in the business of the standard business sponsor or is an occupation listed in the relevant instrument;[29] and
        - the qualifications and experience of the applicant are commensurate with those specified in ASCO or ANZSCO, as applicable, or if there is no code, those specified in the relevant instrument.[30]
    - if the approved sponsor is a party to a work agreement - written certification that:
        - the nominated occupation is specified in the work agreement as an occupation that the person may nominate;
        - the tasks of the position include a significant majority of the tasks of the nominated occupation listed in ASCO [pre 1/7/10 nominations] or ANZSCO [post 1/7/10 nominations], or the nominated occupation specified in the work agreement, and
        - the qualifications and experience of the visa holder are commensurate with those specified for the occupation in the work agreement.[31]

- *for applications made on or after 14 December 2015* – the approved sponsor must provide the written certification in r.2.72(8B) as to whether or not the person has engaged in 'payment for visa' conduct that constitutes a contravention of s.245AR(1) of the Act: r.2.73(4B).[32]
- the application is accompanied by the prescribed or specified fee.[33] The fee may be refunded in certain circumstances.[34]

Regulation 2.73 for nomination applications made on or after 18 March 2018

Nominations made on or after 18 March 2018 may be in relation to a Subclass 457 visa holder, a Subclass 482 visa holder, or an applicant or proposed applicant for a subclass 482 visa.[35] This allows for the nomination of an occupation in relation to an existing 457 visa holder, to enable existing visa holders who change employers to have their new employer make a new nomination and so facilitate continued compliance with visa condition 8107.

Regulation 2.73 requires that:

[28] By reference to r.2.72(10)(d)(iii). See the 'Occ-Ex' tab of the Register of Instruments: Business visas for the relevant instrument.
[29] By reference to r.2.72(10)(d)(ii). See the 'Occ-Ex' tab of the Register of Instruments: Business visas for the relevant instrument.
[30] By reference to r.2.72(10)(d)(iv) and r. r.2.72(10)(e)(iv). See the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas for the relevant instrument.
[31] By reference to r.2.72(11)(b) and r. r.2.72(11)(c).
[32] r.2.73(4B) as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242) and applying to applications for approval of a nomination made after 14 December 2015.
[33] r.2.73(5). For visa applications made before 1 July 2013 the fee was prescribed in the Regulations. For visa applications made on or after 1 July 2013, the fee is specified in an instrument made by the Minister: SLI 2013 No.146. Regulation 2.73(9), also inserted by SLI 2013 No.146, allows the Minister to specify a different fee. See the 'Form&Fee' tab of the Register of Instruments: Business visas for relevant instruments.
[34] See r.2.73(6).
[35] r.2.73(1) of the Regulations, as amended by F201800262.

- the applicant make the nomination using the internet and an approved form specified in the relevant written instrument;[36] and
- the application is accompanied by the prescribed or specified fee and any applicable nomination training contribution charge the applicant is liable to pay;[37] and
- unless the nomination is for the Labour Agreement Stream, the occupation is nominated in either the Short-term stream (where the occupation is a short term skilled occupation specified in an instrument under r.2.72(9) at the time of the nomination) or Medium-term stream (where the occupation is a medium and long term strategic skills occupation specified in an instrument under r.2.72(9) at the time of the nomination);[38] and
- the following information is provided in the nomination application:
    - the identity of the nominee in the nomination;[39]
    - the name of the occupation and the corresponding 6-digit code (if any);[40]
    - the location(s) at which the nominated occupation will be carried out;[41]
    - the proposed period of stay for a visa granted on the basis of the nomination;[42]
    - the annual turnover of the nominating business;[43]
    - any other information specified in an instrument for r.2.73(9)(e);[44]
    - written certification as to whether or not the person has engaged in conduct that contravenes s.245AR(1) of the Act;[45]
    - written certification that the employment contract with the nominee complies or will comply with Commonwealth, State or Territory employment laws (unless exempt).[46];
- if the nomination is in relation to the Short-term stream or Medium-term stream, written certification that:[47]
    - the tasks of the nominated position include a significant majority of the tasks specified for the occupation in ANZSCO or if there is no ANZSCO code, in the relevant instrument;[48]
    - the qualifications and experience of the nominee are commensurate with those specified for the occupation in ANZSCO or if there is no ANZSCO code, in the relevant instrument;[49]

[36] r.2.73(3) and (4), as amended by F201800262. See the 'Form&Fees' tab of the Register of instruments: Business Visas.
[37] r.2.73(5) and (5A) as amended by F2018L01093.
[38] r.2.73(6) as amended by F201800262. The selected occupation will automatically determine the relevant stream depending on whether it is an occupation in the short term skilled occupation list or the medium and long term strategic skills occupation list in the specified instrument. See the 'Occ482noms' tab of the Register of Instruments: Business Visas.
[39] r.2.73(8) as amended by F2018L01093.
[40] r.2.73(9)(a) and (b) as amended by F201800262.
[41] r.2.73(9)(c) as amended by F201800262.
[42] r.2.73(9) as amended by F201800262. Regulations 2.73(10) and (11) provides that for this purpose, the proposed period may be either 1, 2, 3 or 4 years s, 1 or 2 years for certain short term skilled occupations, or not longer than the period specified in a work agreement if the nomination is in the Labour Agreement stream.
[43] r.2.73(9)(da) as amended by F2018L01093 as it is required to calculate the nomination training contribution charge the nominator is liable to pay.
[44] r.2.73(9)(e) as amended by F201800262. There were no specifications at the time of writing.
[45] r.2.73(12) as amended by F201800262. A person contravenes s.245AR(1) of the Act if they ask for (or receive) a benefit from another person in return for the occurrence of a sponsorship-related event.
[46] r.2.73(13) as amended by F201800262. See the 'ExemptOccs' tab of the Register of Instruments: Business Visas.
[47] r.2.73(14) as substituted by F201800262.
[48] See the 'Occ482noms' tab of the Register of Instruments: Business Visas.
[49] See the 'Occ482noms' tab of the Register of Instruments: Business Visas.

- the occupation is a position in the person's business if they are or would be an overseas business sponsor, or, in any other case, is in the person's or an associated entity's business (unless the occupation is exempt);[50]

- if the nomination is in relation to the Labour Agreement stream, written certification that:[51]
  - the tasks of the nominated position include a significant majority of the tasks specified for the occupation in ANZSCO or if there is no ANZSCO code, in the work agreement or proposed work agreement; and
  - the qualifications and experience of the nominee are commensurate with those specified for the nominated occupation in the work agreement or proposed work agreement.

Criteria for approval of a nomination – r.2.72

Section 140GB(2) provides that the Minister must approve a person's nomination if the person is an approved work sponsor and prescribed criteria are satisfied. These criteria are set out in r.2.72 of the Regulations. In addition, for nominations made on or after 23 November 2013, there is an additional requirement that must be met for some nominations. That is, where the 'labour market testing condition' set out in s.140GBA applies, that condition must be satisfied, unless one of the statutory exemptions applies.[52] Further, the person must have paid any nomination training contribution charge in relation to the nomination for which they are liable (and such liability may arise for nominations made after 12 August 2018).[53]

Nomination applications made before 18 March 2018

The criteria in r.2.72 require that the Minister (or Tribunal on review) is satisfied that:

- the approved sponsor has made the nomination in accordance with the prescribed process in r.2.73;[54]
- the approved sponsor is a standard business sponsor or party to a work agreement;[55]
- the approved sponsor has identified in the nomination the visa holder, or applicant or proposed applicant, who will work in the nominated occupation;[56]
- if the approved sponsor identifies a Subclass 457 visa *holder* to work in the nominated occupation, the approved sponsor has listed on the nomination each secondary visa holder included in the visa unless the decision maker considers it reasonable to disregard this requirement,[57] and if required to do so by the decision maker, the visa holder demonstrates, in the manner specified by the decision maker, that they had the skills necessary to perform the occupation;
- if the approved sponsor identifies a Subclass 457 visa holder for whom public interest criterion (PIC) 4006A was waived, the approved sponsor has provided an equivalent

[50] See the 'ExemptOccs' tab of the Register of Instruments: Business Visas.
[51] r.2.73(15) as substituted by F201800262.
[52] s.140GB(2) as amended by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013).
[53] Item 16(2) and (3) of Schedule 1 to No.38, 2018.
[54] r.2.72(3).
[55] r.2.72(4).
[56] r.2.72(5).
[57] r.2.72(6), (7).

undertaking to that provided in relation to the Subclass 457 visa holder by their current sponsor under PIC 4006A(2) (health criterion);[58]

- the approved sponsor has included the requisite information in the nomination regarding the description and location of occupation;[59]
- unless it is reasonable to disregard it, there is no adverse information known to Immigration about the person or a person associated with the person;[60]
- *if the approved sponsor is a standard business sponsor*:[61]
    - the nominated occupation corresponds to an occupation specified the relevant written instrument, and the occupation is applicable to the person identified in the nomination in accordance with any specifications (or 'caveats') made in that instrument (See 'Occ186/442/457&Noms' tab of Register of instruments: Business visas)[62];
    - if required by the written instrument, the nomination of the occupation is supported, in writing to the Minister, by an organisation specified in the written instrument;
    - the terms and conditions of employment will be no 'less favourable'[63] than those that are provided, or would be provided, to an Australian citizen or permanent resident for performing work in an equivalent position at the same location;
    - the base rate of pay under the terms and conditions of employment that are or would be provided to an Australian citizen or permanent resident would be greater than the temporary skilled migration income threshold in the relevant instrument;[64]
    - the approved sponsor has provided the requisite written certification in the nomination;
    - the position associated with the nominated occupation is genuine;[65]
    - if the approved sponsor has identified in the nomination the holder of a Subclass 457 visa who met the requirements in cl.457.223(6), either the visa holder continues to meet the requirements in cl.457.223(6), is an exempt applicant for cl.457.223(4), or has a specified level of English (see below);[66] and
    - either the approved sponsor will engage the visa holder, applicant or proposed applicant for a Subclass 457 visa only as an employee under a written contract of

[58] r.2.72(7A).
[59] r.2.72(8) for nominations made before 1/7/10, r.2.72(8A) for nominations made on or after 1/7/10.
[60] r.2.72(9).
[61] r.2.72(10).
[62] r.2.72(10)(aa) as amended by the Migration Amendment (Specification of Occupations) Regulations 2017 (F2017L00818) on 1 July 2017. This amendment added the additional requirement that the occupation is applicable to the nominee in accordance with any specifications made in the instrument, reflecting the addition of detailed requirements (referred to in policy documents as 'caveats') to instruments made under this paragraph. The amendment applies to all applications not yet finalised as at 1 July 2017, and nomination applications made on or after that date.
[63] This term is defined in r.2.57(3A).
[64] For the relevant instrument, see the 'TSMIT' tab of the Register of Instruments: Business visas.
[65] r.2.72(10)(f). Inserted by SLI 2013 No.146 and applying to all nominations not finally determined on 1 July 2013, and nominations made on or after 1 July 2013.
[66] Regulation 2.72(10)(g) was inserted by SLI 2013 No.146 and applying to all nominations not finally determined on 1 July 2013, and nominations made on or after 1 July 2013. Subsequent amendments made by Migration Amendment (Visa application Charge and Related Matters No.2) Regulation 2013 (SLI 2013, No.253) were replaced by Migration Amendment (2014 Measures No. 1) Regulation 2014 (SLI 2014, No.32) for all nominations made but not finally determined as at 22 March 2014 or made on or after that date.

employment and give a copy of that contract to the Minister, or the nomination is an occupation specified in the relevant instrument.[67]

- *If the application for approval is made on or after 14 December 2015* – the approved sponsor has certified whether or not they have engaged in conduct, in relation to the nomination, that constitutes a contravention of s.245AR(1) of the Act;[68]

- *if the approved sponsor is a party to a work agreement* - the nominated occupation is specified in the work agreement as an occupation that the person may nominate and the approved sponsor has provided the requisite written certification;[69]

- *if the person is a party to a work agreement* and the work agreement specifies requirements that must be met by the party to the work agreement, the requirements of the work agreement have been met.[70]

Nominations applications on or after 18 March 2018

The criteria in r.2.72 require that the Minister (or Tribunal on review) is satisfied that:

- the applicant is an approved work sponsor at the time of decision and has paid any nomination training contribution charge in relation to the nomination if liable;[71]
- the nomination was made in accordance with the prescribed process in r.2.73;[72]
- there is no adverse information known to Immigration about the applicant or a person associated with the applicant, or it is reasonable to disregard such information;[73]
- the applicant is a standard business sponsor or a party to a work agreement;[74]
- the applicant has paid in full any debt mentioned in s.140ZO of the Act;[75]
- if the nominee holds a Subclass 457 or 482 visa, the applicant has listed on the nomination each person granted a Subclass 457 or 482 visa as a family member of the nominee, unless it is reasonable in the circumstances not to do so;[76]
- the nominated occupation and its 6-digit code correspond to an occupation specified in the relevant instrument at the time of the nomination application (or the work agreement in the case of the Labour Agreement stream), and the occupation applies to the nominee in accordance with instrument or work agreement;[77]

[67] Inserted by Migration Amendment Regulation 2013 (No.5) (SLI 2013, No.145) and applying to all nominations not finally determined on 1 July 2013 and nominations made on or after that date. For the relevant instrument see the 'Occ-ex' tab of the Register of Instruments: Business visas.
[68] r.2.72(8B), as inserted by SLI 2015 No.242 and applying to applications for approval of a nomination made after 14 December 2015.
[69] r.2.72(11).
[70] r.2.72(12).
[71] Note inserted after r..2.72(2) by F2018L01093. The nomination training contribution charge liability only applies to for nomination applications made on or after 12 August 2018.
[72] r.2.72(3) as substituted by F2018L00262.
[73] r.2.72(4) as substituted by F2018L00262.
[74] r.2.72(5) as substituted by F2018L00262.
[75] r.2.72(5A) as inserted by F2018L01093. Section 140ZO provides for an amount of a nomination training contribution charge or a penalty in relation to the underpayment of such a charge to be debts due to the Commonwealth.
[76] r.2.72(6) and (7) as substituted by F2018L00262.
[77] r.2.72(8) as substituted by F2018L00262. See the 'Occ482noms' tab of the Register of Instruments: Business Visas, If the occupation is nominated in the Short-term stream or Medium-term stream, the instrument made under r.2.72(9) in force at the time the nomination is made or in the work agreement (if the approved sponsor is a party to a work agreement. This is different to the previous position which was at the time of decision.

- the position associated with the nominated occupation is genuine and a full-time position (unless it is reasonable to disregard this full-time requirement);[78]
- *if the nomination is for the Short-term stream or Medium-term stream:*
    - the nominee will be engaged only as an employee under a written contract of employment and the applicant will give a copy of the contract, signed by the employer and nominee, to the Minister, unless the nominated occupation is specified in the instrument.[79] If the applicant is an overseas business sponsor, the nominee must be employed by them, and if the applicant is not an overseas business sponsor, the nominee must be employed by the applicant or an associated entity; if the nominee holds a Subclass 457 or Subclass 482 visa, and the Minister requested evidence that the nominee satisfies the language test requirements, the applicant has provided evidence that the nominee satisfies the language test requirements specified for cl.482.223 (if the nomination is in the Short-term stream) or cl.482.232 (if the nomination is in the Medium-term stream);[80]
    - if the nominee's annual earnings in relation to the nominated occupation will *not* be at least the amount specified in an instrument,[81] certain requirements relating to the 'annual market salary rate' and 'temporary skilled migration income threshold' are met;
    - there is no known information that indicates that the employment conditions that will apply to the nominee are less favourable than those that apply, or would apply, to an Australian citizen or permanent resident performing equivalent work at the same location, and if the applicant is lawfully operating a business in Australia, they have not engaged in discriminatory recruitment practices;[82]
- *if the nomination is for the Labour Agreement stream:*[83]
    - the nominated occupation is specified in the work agreement as an occupation that the person may nominate;
    - if the work agreement specifies requirements that must be met by the party to the work agreement, the requirements of the work agreement have been met; and,
    - the number of nominations made and approved under s.140GB of the Act is less than the number of approved nominations permitted under the work agreement for the year.

Nomination in accordance with prescribed process - r.2.72(3)

Under r.2.72(3), a mandatory criterion for approval of nomination is that the approved sponsor has made the nomination in accordance with the process set out in r.2.73. For further information on this process see above Process for Nomination of an occupation.

[78] r.2.72(10) as substituted by F2018L00262. r.2.72(10A) as inserted by F2018L01093 for all not finally determined applications allows for the requirement in r.2.72(10)(b) for the nominated position to be full time to be disregarded if it is reasonable in the circumstances.
[79] r.2.72(11), (12) and (13) as substituted by F2018L00262. See the 'ExemptOccs' tab of the Register of Instruments: Business Visas.
[80] r.2.72(14) as inserted by F2018L00262. See the '482English' tab of the Register of Instruments: Business Visas.
[81] r.2.72(15), (16) and (17) as inserted by F2018L00262. See the 'TSMIT' tab of the Register of Instruments: Business Visas.
[82] r.2.72(18) as inserted by F2018L00262.
[83] r.2.72(19) as inserted by F2018L00262.

Standard business sponsor or party to a work agreement – r.2.72(4) (pre 18/03/18) or r.2.72(5) (post 18/03/18)

Regulation 2.72(4) for nominations made before 18 March 2018 or r.2.72(5) for applications made on or after 18 March 2018, provides that the decision maker must be satisfied that the applicant is a standard business sponsor or a non-Ministerial party to a work agreement. The purpose of this criterion is to ensure that a person who is a standard business sponsor or a party to a work agreement when they make the nomination is still a standard business sponsor or a party to a work agreement when the decision on the nomination is made.[84] While nominations made after 18 March 2018 can be lodged by applicants for standard business sponsorship or persons in negotiations for a work agreement, the applicant needs to have been approved as a standard business sponsor or party to a work agreement by the time of decision.

A 'standard business sponsor' is defined in r.1.03 of the Regulations as a person who is an approved work sponsor in relation to the standard business sponsor class by the Minister under s.140E(1) of the Act. 'Approved work sponsor' is relevantly defined in s.5(1) of the Act as a person who has been approved as a work sponsor and whose sponsorship approval has not been cancelled or ceased to have effect. A standard business sponsor will continue to be an 'approved work sponsor' despite being the subject of a barring action under s.140M. Before 17 April 2019, the Act and Regulations referred to an 'approved sponsor' rather than a 'work sponsor'. This was a technical amendment consequential to the introduction of an 'approved family sponsor' for the purposes of certain family visas.[85]

A 'work agreement' for the purposes of a Subclass 457 or Subclass 482 visa is defined in s.5 of the Act and r.2.76(2) of the Regulations as an agreement in effect between the Commonwealth, as represented by the Minister, and a person, an unincorporated association or a partnership in Australia, which is a labour agreement[86] that authorises the recruitment, employment, or engagement of services of a prospective Subclass 457 or Subclass 482 visa holder.

Identification of visa holder who will work in the nominated occupation – r.2.72(5) (pre 18/03/18) or r.2.73(8) (post 18/03/18)

For nominations made before 18 March 2018, r.2.72(5) requires that the decision maker must be satisfied that the approved sponsor has *identified in the nomination* the visa holder, or visa applicant, or proposed visa applicant who will work in the nominated occupation. This criterion is intended to reflect the policy intention that the standard business sponsor must identify the person who will work in the nominated occupation.[87] This means that while the nomination is of an occupation, pursuant to s.140GB(1)(b) of the Act, the nomination relates to a particular individual. If the approved sponsor has not identified such a person as part of the nomination,[88] or a decision maker is not satisfied that the identified person will work in the nominated occupation, this criterion will not be met.

While there is no equivalent criterion for nominations made after 18 March 2018, a nomination application must, under r.2.73(8), identify the nominee.

[84] Explanatory Statement to SLI 2009 No. 115, p. 26.
[85] No.162, 2018 and F2019L00551. See Legislation Bulletin No.3/2018 and Legislation Bulletin No.1/2019 for more information.
[86] A 'labour agreement' is defined in r.1.03 of the Regulations as a formal agreement entered into between the Minister, or the Employment Minister; and a person or organisation in Australia, under which an employer is authorised to recruit persons to be employed by that employer in Australia.
[87] Explanatory Statement to SLI 2009 No. 203, pp.33-34.
[88] This is in practice unlikely given the use of an internet form to seek approval of a nomination, which require this information to be provided.

Can the identified person change?

It is unclear whether the identified individual can change prior to a final decision being made on the nomination application, for example if the initial nominee decides not to pursue the visa after the nomination application is lodged but before it is finally determined, but another visa holder, applicant or proposed applicant who will work in the nominated occupation has been put forward by the nominating entity. In practice, this scenario does not commonly arise. However, it appears the question turns on whether the terms of r.2.72(5) restrict the identification of the nominee who will, by the time of decision, work in the nominated occupation, to the nominee who was named when the application for approval of the nomination was lodged. On one view, the use of the words 'identified in *the nomination*', read with some of the requirements of r.2.73,[89] suggests r.2.72(5) requires the decision maker to be satisfied that the person identified when the nomination application was initially lodged will work in the nominated occupation. This is the view reflected in Departmental policy,[90] and in the absence of judicial authority may be the preferable one. However, nominations under r.2.73 and r.2.72 are, strictly speaking, of a proposed occupation, not a person (an option that is available under s.140GB(1)(a)), and there may be some merit in taking a more permissive interpretation which would allow an employer otherwise in genuine need of an employee to work in that occupation to identify a different visa holder, applicant or proposed applicant prior to the nomination application being decided. The criterion in r.2.72(5), which falls to be considered at the time of decision (along with r.2.72(3) which requires satisfaction the nomination is made in accordance with the process in r.2.73), is not expressly limited to the information provided at that earlier point in time, and it is at least arguable that the nominating entity can 'identify in the nomination' a different visa holder, applicant or proposed applicant by providing those identification details at some point after the initial application is lodged.[91]

For nominations under r.2.73(8), it appears the identified individual cannot change. This is because of the need to nominate 'the nominee' in the nomination application, the repetition of 'the nominee' in the visa criteria, and the requirement in r.2.72(8) for the nominated occupation and any specifications for the nominations to apply to the nominee in accordance with the instrument in force at the time of nomination.

Family Members and skills requirement - r.2.72(6), (7)

Inclusion of family members

Regulation 2.72(6)(a) (for nominations made before 18 March 2018) and r.2.72(6) (for nominations made on or after 18 March 2018) requires that the decision maker must be satisfied that, if the approved sponsor identifies a Subclass 457 or Subclass 482 visa holder as the person who will work in the proposed occupation (the primary visa holder), the approved sponsor has listed on the nomination each secondary visa holder granted their visa as members of the same family unit of the primary visa holder. The decision maker can however disregard the fact that family members have not been included in the nomination if it is 'reasonable in the circumstances' to do so.[92] An example of a circumstance in which it may be reasonable to approve the nomination where all family members are

[89] For example, the requirement in r.2.73(2) that 'the nomination' must be made using the internet, suggests that the words 'the nomination' are intended to be restricted to the application for approval of the nomination. Further, there is also a requirement to identify the nominee in r.2.73(4A)(a) which refers to 'the information mentioned in subregulations r.2.72(5)', suggesting that the information (i.e. identify of visa holder, applicant or prosed applicant) must be the same at the time the application for approval is lodged and at the time a decision is made on the criteria in r.2.72.

[90] It is Department policy that if there is a need to change the nominated person, the applicant must withdraw the original nomination application and lodge a new one: PAM3 – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.5.3] Nominee must be identified (reissued 1 October 2017).

[91] This would rely on the argument that a nomination is something that exists from the time that it is made and continues in existence through to the time of approval or refusal (and beyond, in the case of an approved nomination),

[92] r.2.72(7).

not included, is where the relevant family member has left Australia and does not intend to return, but their visa is still in effect.[93]

This criterion ensures that the person making the nomination is aware of all the secondary sponsored persons who are connected to the prospective primary sponsored person that is being nominated, and that the person who owes obligations in relation to a person granted a visa on the basis of satisfying the secondary criteria is the same as the person who owes obligations in relation to the person granted a visa on the basis of satisfying the primary criteria, i.e. it ensures that the liability for the family unit moves with the primary person.[94]

Demonstration of skills – r.2.72(6)(b) (pre 18/03/18)

For nominations made before 18 March 2018 which identify the holder of a Subclass 457 visa holder only, r.2.72(6)(b) requires that if the decision maker requires the visa holder to demonstrate that they have the skills necessary to perform the occupation, the visa holder demonstrates this in the manner specified by the Minister.

Generally this will arise for consideration where the delegate at primary level has required the visa holder to demonstrate that he or she has the required skills by undertaking a skills assessment and the visa holder has not done so.[95] In terms of specifying the manner in which the skills may be demonstrated, the legislation does not prescribe any particular requirement or method for the demonstration of the relevant skills. Departmental guidelines (PAM3) refer to requiring the visa holder to undergo a skills assessment, providing evidence of qualifications, a CV or employment references.[96] However, other methods may be specified by the decision-maker, for example, providing evidence of membership of a professional association.

On review, the Tribunal can also consider whether it requires the visa holder to demonstrate that he or she has the necessary skills and to specify the manner in which it would require this to be demonstrated. However, in doing so it should have regard to the fact that the delegate did require it and any reasons that the delegate gave for this.

Equivalent undertaking to that provided by current sponsor for PIC 4006A – r.2.72(7A) (pre 18/03/18)

If r.2.72(7A) applies, the Minister (or Tribunal on review) must be satisfied that the person making the current nomination has provided an equivalent undertaking to that provided in relation to the relevant Subclass 457 visa holder by their current sponsor under public interest criterion (PIC) 4006A(2) (health criterion). Under cl.4006A(2) the requirements of cl.4006A(1)(c)[97] may be waived if the

[93] Explanatory Statement to SLI 2009 No. 115, p.28.
[94] Explanatory Statement to SLI 2009 No. 115, p.26-7.
[95] Departmental policy specifies circumstances in which officers would and would not require a skills assessment for the nomination. Circumstances in which it would require a skills assessment may include (but are not limited to): the new nominated occupation is not in the same as the current occupation, particularly if it is in a different ANZSCO unit group, or the Subclass 457 visa holder's qualifications and experience do not appear to correspond with the qualifications and experience required for the new nomination. See PAM3 – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.5.4.2] Skills necessary to perform the occupation (reissued 1 October 2017).
[96] See PAM3 – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.5.4.2] Skills necessary to perform the occupation (reissued 1 October 2017).
[97] PIC 4006A(1)(c) requires that the applicant is not a person who has a disease or condition which would be likely to require health care or community services, or meet criteria for community services during the period of proposed stay in Australia where provision of health care or community services relating to the disease or condition would be likely to result in a significant cost to the Australian community; or prejudice access of Australian citizens or permanent residents to health care or community services.

relevant nominator[98] gives an undertaking that the nominator will meet all costs related to the disease or condition that causes the applicant to fail to meet the requirements of cl.4006A(1)(c).

The requirement in r.2.72(7A) applies if the nomination was made before 18 March 2018 and identifies a current Subclass 457 visa holder who was granted the visa on the basis of the waiver under cl.4006A(2). The relevant Subclass 457 visa holder may be the person nominated for the occupation and have been granted the visa as the primary visa holder,[99] or they may be listed on the current nomination as a person granted the Subclass 457 visa as a member of the family unit of the primary Subclass 457 visa holder.[100]

This criterion is to ensure that a subsequent approved sponsor of an existing Subclass 457 visa holder makes the same undertaking in relation to the visa holder's health costs as the current sponsor.[101] For further information on PIC 4006A see MRD Legal Services commentary: Health Criteria.

Identification of occupation and proposed employee – r.2.72(8A) (post 1/7/10 and pre 18/03/18) - or 2.72(8) (post 18/03/18)

For nominations made before 18 March 2018, r.2.72(8A) requires that the decision maker is satisfied that the approved sponsor has provided the following information as part of the nomination:

- the name of the occupation and the corresponding 6-digit ANZSCO code;
- if there is no ANZSCO code and the person is a standard business sponsor - the name of the occupation and the corresponding 6-digit code as specified in the relevant instrument;[102]
- if there is no 6-digit ANZSCO code for the occupation and the person is a party to a work agreement - the name of the occupation and the corresponding 6 digit code (if any) as specified in the work agreement; and
- the location or locations at which the nominated occupation is to be carried out.

Regulation 2.72(8) applies if the nomination is made on or after 18 March 2018.[103] It requires that the nominated occupation and its 6-digit code correspond to an occupation and 6-digit code specified in the instrument in force at the time the nomination is made (where the occupation is in the Short-term of Medium-term streams) or in the work agreement (where the occupation is in the Labour Agreement Stream).[104] The occupation must also apply to the nominee in accordance with the instrument including any applicability conditions specified in the instrument.

Can the nominated occupation change?

For nominations made after 18 March 2018, the requirement to nominate occupations by reference to the time of nomination instrument means the occupation cannot change.

[98] 'Relevant nominator' is defined in 4006A(3) as an approved sponsor who has lodged a nomination in relation to a primary applicant; or included a member of the family unit of a primary applicant in a nomination for the primary applicant; or has agreed in writing for an applicant/ member of the family unit of a primary applicant to be a secondary sponsored person in relation to the approved sponsor.
[99] r.2.72(7A)(a).
[100] r.2.72(7A)(b).
[101] Explanatory Statement to SLI 2009 No.289, p.7.
[102] See 'Occ186/442/457&Noms' tab of Register of Instruments: Business visas for the relevant instrument.
[103] r.2.72(8) as substituted by F2018L00262.
[104] r.2.72(9) as substituted by F2018L00262.

This also appears to be the case for nominations made before this time. This criterion (and others in r.2.72) requires the provision of information, such as the ANSZCO code, in relation to 'the nominated occupation'. Based on the legislative context, it appears that 'the nominated occupation' means the occupation nominated in the approved application form when initially making the nomination. While not free from doubt, it does not appear that the applicant can change the nominated occupation from that specified in the application for the purposes of meeting this criterion, or other criteria in r.2.72.[105] Regulation 2.72(1) specifically states that this provision applies to a person who has nominated *an occupation* under s.140GB(1)(b). Regulation 2.73(1) provides that, for s.140GB(3) of the Act, the person may 'nominate *a* proposed occupation in accordance with the process set out in this regulation' (emphasis added). The approved form for making the nomination requires a single occupation and its ANZSCO code be identified,[106] and r.2.72(8A) refers to '*the* nominated occupation' (emphasis added). This language suggests that what must be considered in relation to r.2.72 is the occupation that was nominated as part of the process in r.2.73, i.e. at the time the nomination application was initially made. This reasoning appears equally applicable to other criteria in r.2.72 which refer to 'the nominated occupation' (see r.2.72(5),(8),(10) and (11)).

In addition, the provision in r.2.73 for withdrawal of the nomination and refund of the nomination fee in circumstances where the tasks of the nominated occupation no longer correspond to the tasks of an occupation specified in the relevant instrument supports this interpretation. That is, if this situation arises, the appropriate course is to withdraw the nomination and apply again nominating another skilled occupation, rather than changing the nominated occupation in the course of the nomination.

What is the relevant instrument?

While the position is clear for nominations made after 18 March 2018,[107] for those made before this time, r.2.72(8A)(b) requires that if there is no ANZSCO code for the nominated occupation in the nomination, that the name of the occupation appears in the list of occupations in the relevant instrument. The relevant instrument for these purposes is that made for the purposes of r.2.72(10)(aa) (see the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas).

An applicant for approval of a nominated occupation would usually be making the nomination and specifying the nominated occupation in relation to the legislative instrument in effect when the nomination is initially made. Where the instrument that was in effect at the time of application has been revoked and replaced, or has been amended before the nomination application has been finally determined, questions arise as to which is the relevant instrument – the one in force at the time of application, or as in force at the time of decision.

Although not entirely clear, for the following reasons, the better view is the occupation must be contained in the instrument in force at the time of decision. The Explanatory Statement that introduced r.2.72(8) refers to r.2.72(10)(a) as allowing the Minister to specify eligible occupations for the Subclass 457 visa program from time to time in the same way as under the pre-14 September 2009 nomination provisions, depending upon prevailing conditions in the Australian labour market,[108] suggesting that approvals of nominations should have regard to the most recent instrument. This interpretation is also supported by provisions that provides for refund of the application fee in circumstances where the nominated occupation is no longer listed in the relevant instrument and the

[105] That is the position adopted in Departmental Policy, see PAM3 – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.5.5] Specification of occupation code or name and location (reissued 1 October 2017).
[106] Form 1196 (Internet) as generated 3 April 2017.
[107] See the instrument in force at the time of the nomination application in the 'Occ482noms' tab of the Register of Instruments: Business Visas.
[108] Explanatory Statement to SLI 2009 No.115 at p.26.

nomination is withdrawn.[109] This alleviates to some extent the potential unfairness involved in specifying requirements for the nomination in terms of the nominated occupation (and certification in relation to the nominated occupation) by reference to a legislative instrument that can change in the course of the nomination. Therefore, while not free from doubt, the relevant instrument for the purposes of r.2.72(8A) appears to be the one in effect at time of decision.

Certification relating to 'payment for visa' conduct – r.2.72(8B) (post 14/12/15 and pre 18/3/18), or r.2.73(12) (post 18/03/18)

Regulation 2.72(8B) applies if the nomination is made after 14 December 2015 and before 18 March 2018.[110] It requires that the applicant has, as part of the nomination, certified in writing whether or not they have engaged in conduct, in relation to the nomination, that constitutes a contravention of s.245AR(1) of the Act. For nominations made after 18 March 2018, there is an equivalent requirement attached to the process of lodging a nomination in r.2.73(12) (and the decision-maker must be satisfied that the nomination was made in accordance with r.2.73: r.2.72(3)).

A person contravenes s.245AR(1) of the Act if they ask for (or receive) a benefit from another person in return for the occurrence of a sponsorship-related event. The meaning of 'sponsorship-related event' is detailed in s.245AQ of the Act, but relevantly includes a person making a nomination under s.140GB of the Act in relation to an applicant for a Subclass 457 or Subclass 482 visa.

According to the Explanatory Statement to these amendments, the purpose of this requirement is to ensure that any person making a nomination provides the certification before the nomination is approved and, depending on the information provided, the Department may take further action to investigate the nominator and/or the nominee.[111]

The provisions in r.2.73(4B) require that the certification in r.2.72(8B) must be provided 'as part of the nomination'. While the wording of this provision would suggest that the certification must have been provided at the time the application for the nomination was made, it is also arguable that a certification provided to the decision-maker, including the Tribunal upon review, would form 'part of the nomination'.

Ultimately, in the context of a review before the Tribunal, it will be a question of fact as to whether the certification has been provided.

No adverse information known about the person or an associated person - r.2.72(9) (pre 18/3/18), or r.2.72(4) (post 18/03/18)

Regulation 2.72(9) (for nominations before 18 March 2018) or r.2.72(4) (for nominations made on or after 18 March 2018), require that the Minister must be satisfied that there is no 'adverse information' known to Immigration about the person or a 'person associated' with the person, unless it is reasonable to disregard it.

'Adverse information' for these purposes means any adverse information relevant to a sponsor's suitability as an approved sponsor or a nominator and includes information about the sponsor or a person associated with the sponsor.[112] The objective of r.2.72(9) or r.2.72(4) is to allow the Minister to consider information about the applicant's suitability as a nominator in deciding whether to approve an

[109] r.2.73(6)(a).
[110] As inserted by SLI 2015, No.242 and as amended by F201800262.
[111] Explanatory Statement to SLI 2015, No.242.
[112] r.1.13A and r.1.13B as amended SLI 2015 No.242. This definition was previously found in r.2.57(3), prior to its repeal.

application.[113] There were changes to the definitions of 'adverse information' and 'associated with' on 18 March 2018.

Pre 18 March 2018 definitions

Adverse information as defined in r.1.13A (previously r.2.57(3)) includes information that the person:

- has been found guilty by a court, of an offence under a Commonwealth, State or Territory law; or
- has, to the satisfaction of a 'competent authority',[114] acted in contravention of a Commonwealth, State or Territory law; or
- has been the subject of administrative action (including the issue of a warning) by a competent authority for the possible contravention of a Commonwealth, State or Territory law; or
- is under investigation, subject to disciplinary action or subject to legal proceedings in relation to an alleged contravention of a Commonwealth, State or Territory law; or
- has become insolvent within the meaning of s.5(2) and (3) of the *Bankruptcy Act 1966* and s.95A of the *Corporations Act 2001*.[115]

The law which has been contravened, or has possibly been contravened as referred to in the first four dot points above, must relate to one or more of the following: discrimination, immigration, industrial relations, occupational health and safety, people smuggling and related offences, slavery, sexual servitude and deceptive recruiting, taxation, terrorism and trafficking in persons and debt bondage.[116] In addition, the conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[117]

Note that the word 'includes' as used in r.1.13A(1) indicates the above list is not exhaustive. Other information which is in some way adverse and relevant to the sponsor's suitability as an approved sponsor or as a nominator could be considered 'adverse information' for the purposes of r.2.72(9).

A person is 'associated with' an applicant:

- *if the applicant is a corporation* - if the associated person is an officer of the corporation, a related body corporate or an associated entity;
- *if the applicant is a partnership* - if the associated person is a partner of the partnership;
- *if the applicant is an unincorporated association* - is a member of the association's committee of management;
- if the applicant is an entity other than a corporation, partnership or an unincorporated association - if the associated person is an officer of the entity.[118]

[113] Explanatory Statement to SLI 2009 No. 115, p.28 (but in relation to r.2.72(1)(i) prior to amendment).
[114] 'Competent Authority' is defined as a Department or regulatory authority that administers or enforces a law that is alleged to have been contravened: r.2.57(1) as inserted by SLI 2009 No.115.
[115] r.1.13A(1).
[116] r.1.13A(2).
[117] r.1.13A(3).
[118] r.1.13B(5). The terms 'officer', 'related body corporate' and 'entity' are defined in r.1.13B(5) (previously r.2.57(3). The term 'officer', for a corporation or entity (that is not a corporation or individual) has the same meaning in s.9 of the *Corporations Act 2001*. The term 'related body corporate' has the same meaning as in s.50 of the *Corporations Act 2001*. The term 'associated entity' is further defined in r.1.03 as having the same meaning in s.50AAA of *Corporations Act 2001*.

As drafted, r.2.72(9) or r.2.72(4) refers to adverse information 'known to Immigration'. Where the information in question comes to the Tribunal's attention but is not known to Immigration, it is unclear whether it would fall within the operation of this provision. However, in practice, this issue could be overcome by notifying Immigration of the information in question.

Even if such adverse information is known to Immigration, it may be disregarded if reasonable to do so. The regulations do not further define 'reasonable' in this context, but the Explanatory Statement to the regulations introducing this requirement states that it may be 'reasonable' to disregard information if, for example, the person had developed practices and procedures to ensure the relevant conduct was not repeated. To illustrate, if a person was found to have breached occupational health and safety legislation two years ago and had since appointed an occupational health and safety manager and had a clean occupational health and safety record, it may be reasonable to disregard the original breach.[119]

Post 18 March 2018 definitions

The amendments in 18 March 2018 inserted new definitions of 'adverse information' (r.1.13A) and 'associated with' (r.1.13B) to replace the previous definitions which were considered to be inadequate to deal with some abuses.[120]

The meaning of 'adverse information' in r.1.13A has been expanded to include specific reference to information that a person has given, or caused to be given to the Minister, an officer, the Tribunal or an assessing authority a bogus document or information that is false or misleading in a material particular.[121] The definition makes it clear that the examples of adverse information in r.1.13A(2) are a non-exhaustive list.

The meaning of 'associated with' in r.1.13B has been significantly expanded to include a range of personal relationships and associates which can be used to continue unacceptable or unlawful business practices via different corporate entities. [122] The amended definition states that it is not an exhaustive definition.

The new definitions only apply to applications made on or after 18 March 2018.[123]

Occupational, certification, English, contractual and terms & conditions requirements for standard business sponsors – r.2.72(10) (pre 18/03/18 only)

For nominations made before 18 March 2018 by standard business sponsors, r.2.72(10) includes various requirements to ensure that the nominated position meets a particular standard. It requires that the decision maker must be satisfied that:

- the nominated occupation corresponds to an occupation specified by the Minister in a written instrument, and (for nominations made on or after 1 July 2010) the occupation is applicable to the person identified in the nomination in accordance with any specifications (or 'caveats') made in that instrument (see 'Occ186/442/457&Noms' tab of Register of Instruments: Business visas);[124] and

[119] Explanatory Statement to SLI 2009 No. 115, p.28 (but in relation to r.2.72(1)(i) and (ii) prior to amendment).
[120] Explanatory Statement to F201800262, item 15.
[121] r.1.13A as substituted by F201800262, The amendments make clear to applicants that nominations will be refused where documents are bogus or information provided is false and misleading.
[122] r.1.13B as substituted by F201800262,
[123] Part 6703 application provisions of F201800262.
[124] r.2.72(10)(a),(aa). Note that 2.72(10)(aa) was amended by F2017L00818 on 1 July 2017 to incorporate an additional requirement that the occupation is applicable to the nominee in accordance with any specifications made in the instrument, reflecting the addition of detailed requirements (referred to in policy documents as 'caveats') to instruments made under this

- if required by that written instrument, the nomination of the occupation is supported, in writing to the Minister, by an organisation specified in the written instrument;[125] and
- except in certain circumstances:
    - the terms and conditions of proposed employment will be 'no less favourable'[126] than those that are provided, or would be provided, to an Australian citizen or an Australian permanent resident for performing equivalent work at the same location;[127] and
    - the 'base rate of pay'[128] under the terms and conditions of employment will be greater than the income threshold specified by the Minister in an instrument (may be waived in limited circumstances);[129] and
- the standard business sponsor has provided the requisite written certification as part of the nomination. For nominations made before 1 July 2010, the relevant provisions refer to the ASCO,[130] while for nominations made on or after 1 July 2010, the relevant provisions refer to ANZSCO.[131] The standard business sponsor must certify that:
    - the tasks of the position include a significant majority of the tasks of the nominated occupation listed in the ANZSCO, or the nominated occupation listed in a written instrument;[132]
    - if the person is lawfully operating a business outside, but not in Australia, the nominated occupation is a position in the business of the standard business sponsor, or is an occupation listed in a written instrument;[133]
    - if the person is lawfully operating a business in Australia, the nominated occupation is a position with the business or an associated entity of the applicant or is an occupation listed in a written instrument;[134]
    - the qualifications and experience of the visa applicant or holder are commensurate with those specified in ANZSCO, or if there is no ANZSCO code, those specified in a written instrument; [135] and
- the position associated with the nominated occupation is genuine;[136]

paragraph. The amendment applies to all applications not yet finalised as at 1 July 2017, and nomination applications made on or after that date.

[125] r.2.72(10)(a),(aa),(b).

[126] As defined in r.2.57(3A).

[127] r.2.72(10)(c) as amended by SLI 2013 No.146 for all nominations not finally determined by 1 July 2013 and nominations made on or after 1 July 2013.

[128] As defined in r.2.57(1).

[129] r.2.72(10)(cc).

[130] r.2.72(10)(d). 'ASCO' means the Australian Standard Classification of Occupations, Second Edition, published by the Australian Bureau of Statistics on 31 July 1997: r.1.03 as inserted by SLI 2010 No.133.

[131] r.2.72(10)(e). 'ANZSCO', for nominations and visa applications made before 1 July 2013, means the Australian and New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics, as current on 1 July 2010. For nominations and visa applications made on or after 1 July 2013, 'ANZSCO' is defined as having the meaning specified by the Minister in an instrument in writing. See 'Occ186/442/457&Noms' tab of Register of Instruments: Business visas for the relevant instrument.

[132] r.2.72(10)(d)(i) and (10)(e)(i). See the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas for the relevant instrument.

[133] r.2.72(10)(d)(ii) and (10)(e)(ii). See the 'Occ-Ex' tab of the Register of Instruments: Business visas for the relevant instrument.

[134] r.2.72(10)(d)(iii) and (10)(e)(iii). See the 'Occ-Ex' tab of the Register of Instruments: Business visas for the relevant instrument.

[135] r.2.72(10)(d)(iv) and (10)(e)(iv). See the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas for the relevant instrument.

[136] r.2.72(10)(f) inserted by SLI 2013 No.146 for all nominations not finally determined on 1 July 2013, and nominations made on or after 1 July 2013.

- if the approved sponsor has identified in the nomination the holder of a Subclass 457 visa who met the requirements in cl.457.223(6) (i.e. certain highly paid applicants), either:
    - the visa holder continues to meet the requirements in cl,457.223(6), or
    - is an exempt applicant for cl.457.223(4), or
    - if there is mandatory licence/registration/membership to perform the occupation and in order to obtain such licences/membership or registration, the person would have to demonstrate that s/he achieved a better score than that specified in the relevant instrument, then he or she has English language proficiency of at least the standard required for the grant of the licence, or
    - undertakes a specified test and achieves a specified score in a single attempt and within a specified period;[137] and
- either the approved sponsor will engage the nominee only as an employee under a written contract of employment and will give a copy of that contract to the Minister or the nominated occupation is specified in an instrument in writing.[138]

The discussion in this part of the commentary relates to nominations made before 18 March 2018 only unless otherwise indicated.

Occupation in written instrument

Regulation 2.72(10)(a) and (aa) require that the Minister is satisfied that the nominated occupation corresponds to an occupation specified in the relevant instrument. In the case of a nomination made on or after 1 July 2010 the 6 digit code of the nominated occupation must correspond to the 6 digit code for the occupation listed in the instrument. Additionally, r.2.72(10)(aa) requires that the occupation is applicable to the person identified in the nomination in accordance with the specification of the occupation.[139] This requires consideration of whether any additional specifications or conditions made in the applicable instrument in relation to the occupation are satisfied.[140] These may, for example, relate to the circumstances in which the occupation is undertaken or the circumstances in which the person is to be employed in the position.[141]

This criterion would appear to require no more than confirmation that the occupation listed in the nomination (and its corresponding 6 digit code, where relevant) match that of an occupation listed in the relevant instrument, and (for r.2.72(10)(aa)) that any additional specifications are met. However, the judgment of the Federal Circuit Court in *Nguyen v MIBP* appears to go further in requiring the decision maker to determine whether the *position* nominated effectively aligns with the ANZSCO classification – that is, to assess what the visa applicant is going to do against the tasks of the nominated ANZSCO code.[142] The judgment appears to have been informed by the particular approach adopted by the Tribunal in that case, but nevertheless seems to extend the reach of the criterion beyond its plain terms. While the Departmental guidelines (PAM3) indicate delegates can

[137] Regulation 2.72(10)(g) was inserted by SLI 2013 No.146 for all nominations not finally determined on 1 July 2013, and nominations made on or after 1 July 2013. It was subsequently amended by SLI 2014 No.32 for nominations made but not finally determined as at 22 March 2014 and made on or after that date. See the '457Eng' tab of the Register of Instruments: Business visas for the relevant instrument specifying tests, scores, and relevant periods.
[138] r.2.72(10)(h) inserted by SLI 2013 No.145 for all nominations not finally determined on 1 July 2013, and nominations made on or after 1 July 2013.
[139] r.2.72(10)(aa) as amended on 1 July 2017 by F2017L00818, with effect from 1 July 2017.
[140] See r.2.72(10AAA) as inserted by F2017L00818, with effect from 1 July 2017.
[141] Reg 2.72(10AAA) allows the Minister to specify *any* matters, but includes a non-exhaustive list of the type of matters which might be specified for r.2.72(10)(aa). Note that PAM3 does include some guidance on these additional requirements (referred to as 'inapplicability conditions' in the latest instrument, but as 'caveats' in the PAM3 Procedural Instruction). See PAM3 – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.8] Advice on occupations with a caveat (reissued 1 October 2017).
[142] *Nguyen v MIBP* [2013] FCCA 1697 (Judge Burchardt, 30 October 2013) at [37]-[40]. In that case, the Tribunal found that the tasks of nominated position (Project/program Administrator) aligned more closely to another occupation (Accounts Clerk).

simply rely on the certification made under r.2.72(10)(e) in making their assessment, they do state that delegates must be satisfied that the nominated position effectively aligns with the ANZSCO classification.[143] Given the uncertainty, should there be concern as to the nature and content of the position, the issue may be better considered under r.2.72(10)(f), as discussed below.

The relevant instrument

The instrument under r.2.72(10)(a) applies to nominations made before 1 July 2010 and specifies occupations by reference to ASCO. The instrument under r.2.72(10)(aa) applies to nominations made on or after 1 July 2010 and specifies occupations by reference to ANZSCO. The relevant instruments for both types of nominations can be located on the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas.

The written instrument specifying the nominated occupation allows the Minister to specify eligible occupations for the Subclass 457 visa program from time to time depending on prevailing conditions in the Australian labour market.[144]

Given the clear intention in the Explanatory Statement that the occupations will change from time to time, and the general legislative context, it appears that the relevant instrument for the purposes of assessing whether r.2.72(10)(a) or r.2.72(10)(aa) is met is the instrument in effect for the relevant subclause at the time of decision (see 'Occ186/442/457&Noms' tab of Register of Instruments: Business visas). This view is reflected in the Departmental guidelines (PAM3),[145] and is consistent with provisions which allow for a refund of the nomination application fee in circumstances where the tasks of the nominated occupation no longer correspond to the tasks of a specified occupation.[146] For instruments made on or after 1 July 2017, there is express provision in the Regulations for instruments made under r.2.72(10)(aa) to be expressed to apply in relation to nominations made on or after the instrument commences, or made and not finally determined before the day the instrument commences, regardless of when any associated visa application was made, and are to have effect accordingly.[147]

The instrument in effect at time of writing is IMMI 18/004. It came into effect on 17 January 2018, and is expressed to apply to nominations made on or after 17 January 2018. However, note that for nomination applications made between 1 July 2010 and 30 June 2012, it appears that two instruments apply. IMMI 12/022 (still in force) specifies that it applies to nomination applications made in that period while, as mentioned above, IMMI 17/060 appears to apply to all live applications. Accordingly, for nominations made during this period, if a nominated occupation is not specified by one instrument, it should be considered whether it is specified by the other. As long as the nominated occupation is specified in one relevant instrument in force at time of decision, it appears r.2.72(10)(aa) will be met.

Support of a specified organisation

Regulation 2.72(10)(b) requires in certain circumstances that the nomination is supported in writing by an organisation specified in the relevant instrument. No organisations are currently specified for this purpose.

[143] PAM3: Migration Regulations - Schedules - Temporary Work (Skilled) visa (subclass 457) - nominations - 4.6.1. Occupation specified in the latest legislative instrument (reissued 1 October 2017), which refers to decision makers consulting additional evidence such as a duty statement or job description and further assessment being undertaken where there are doubts as to the veracity of certification.
[144] Explanatory Statement to SLI 2009 No. 115, p. 26 (but in relation to r.2.72(1)(c)(i)).
[145] PAM3: Migration Regulations - Schedules - Temporary Work (Skilled) visa (subclass 457) - nominations - 4.6.1. Occupation specified in the latest legislative instrument (reissued 1 October 2017).
[146] r.2.73(6)(a).
[147] Part 66, clause 6601 inserted by F2017L00818.

Terms and conditions of employment and base rate of pay

The requirements in r.2.72(10)(c) and (cc) specify standards for terms and conditions of employment and the rate of pay of the person nominated for the occupation. For applications lodged after 18 March 2018 similar requirements are found in r.2.72(15), (16) and (17) for the nominee's annual earnings: see below.[148] However, r.2.72(10)(c) and (cc) do not apply if the annual earnings of the Subclass 457 visa holder or proposed visa holder are equal to or greater than the amount specified by legislative instrument.[149] The relevant instrument appears to be the one in effect at the time of decision, as the requirements of r.2.72 must be met at the time the decision on the nomination application is made. See the 'TSMIT' tab of Register of instruments: Business visas for the relevant instrument.

Regulation 2.72(10)(c) requires that the terms and conditions of proposed employment be 'no less favourable'[150] than those provided, to an Australian citizen or an Australian permanent resident for performing equivalent work at the same location. For nomination applications made on or after 1 December 2015, r.2.72(10)(c) expressly provides that the reference to terms and conditions include those terms and conditions provided by an applicable enterprise agreement under the *Fair Work Act 2009*.[151]

Previously, r.2.72(10)(c) required that the terms and conditions be no less favourable than those provided to an Australian citizen or Australian permanent resident for performing equivalent work *in the person's workplace* at the same location. The words 'in the person's workplace' were removed (for all applications not finally determined on 1 July 2013 and applications made on or after that date),[152] with the intention that this would allow consideration of a broader range of information.[153] Regulation 2.72(10AA) provides that, for r.2.72(10)(c) (and (cc)), if no Australian citizen or Australian permanent resident performs equivalent work *in the person's workplace* at the same location, the procedure for determining a point of comparison set out in that provision must be followed (see below). While this may suggest the r.2.72(10AA) method should be used where there is no one performing equivalent work in the same workplace at the same location, this is difficult to reconcile with the wording of r.2.72(10)(c) and (cc), which provide for a direct comparison where the location is the same. Further, given the intention of the removal of the words 'in the person's workplace' in r.2.72(10)(c),[154] and because r.2.72(10AA) operates to qualify that provision, it appears that the retention of the words 'in the person's workplace' in r.2.72(10AA) may have been a drafting oversight. Therefore, the preferable interpretation is that r.2.72(10AA) would only apply if no Australian citizen or Australian permanent resident performs equivalent work at the same location.

Regulation 2.72(10)(cc) requires that the 'base rate of pay'[155] in those terms and conditions be greater than a specified temporary skilled migration income threshold. This requirement may be waived in certain circumstances (see r.2.72(10A)). Together, r.2.72(10)(c) and (cc) mean that a nomination may not be approved if the base rate of pay of the equivalent Australian employee is below the temporary skilled migration income threshold, despite the fact that the terms and conditions are no less

[148] As inserted by F201800262.
[149] r.2.72(10AB). For example, the current specification for the purposes of r.2.72(10AB) is annual earnings of AUD 250,000. See IMMI 13/028.
[150] As defined in r.2.57(3A).
[151] r.2.72(10)(c) as amended by Migration Amendment (Clarifying Subclass 457 Requirements) Regulation 2015 (SLI 2015, No. 185).
[152] SLI 2013, No.146.
[153] Explanatory Statement to SLI 2013 No.146, p.49.
[154] According to the Explanatory Statement to SLI 2013 No.146, the amendment was to ensure that the Minister is not limited to only considering the terms and conditions of employment of an Australian worker performing equivalent work in the workplace of the person identified in the nomination, but could consider a broader range of information and ensure the terms and conditions are no less favourable than those given to Australian workers performing the same work at the same location (p.49).
[155] As defined in r.2.57(1).

favourable than terms and conditions that are/would be provided to an Australian citizen or permanent resident.[156] The purpose of this is to maximise the likelihood that Subclass 457 visa holders can independently provide for themselves in Australia and limit the extent to which visa holders may impose a burden on the broader community or come under pressure to breach visa conditions.[157] The two requirements are mirrored by equivalent sponsorship obligations in r.2.79.

The various steps in assessing this criteria are set out in the table at Attachment A.

Determining whether the criterion applies

As noted above, the requirements in r.2.72(10)(c) and (cc) do not apply if the annual earnings of the person identified in the nomination are equal to, or greater than, the amount specified by legislative instrument. See the 'TSMIT' tab of Register of Instruments: Business visas for the relevant instrument. The first step in this assessment is to identify the annual earnings of the person identified in the nomination. The term 'earnings' is defined in r.2.57A as including:

- the person's wages;
- amounts applied or dealt with in any way on the person's behalf or as the person directs; and
- the agreed money value of 'non-monetary benefits'.[158]

However the concept of earnings does not include any payments the amount of which cannot be determined in advance, such as commissions, bonuses, incentive based payments and overtime (unless the overtime is guaranteed).[159] It also does not include reimbursements or certain employer superannuation contributions specified in r.2.57A(4). This definition of 'earnings' is based on the definition in s.332 of the *Fair Work Act 2009* and it is intended that interpretations of this section will apply to this definition.[160]

If the annual earnings of the person identified in the nomination are less than the amount specified by the Minister in writing, the next step is to ascertain the terms and conditions of employment of the person in the nomination and the terms and conditions of employment that are, or would be, provided to an Australian citizen or permanent resident performing equivalent work in the person's workplace at the same location.

Assessing whether terms and conditions are less favourable

To determine whether the terms and conditions under which the Subclass 457 or Subclass 482 visa holder will be employed are no less favourable than those of an equivalent Australian citizen / permanent resident performing equivalent work in the same location, regard must be had to the meaning of 'less favourable'.

According to r.2.57(3A), terms and conditions are less favourable if the 'earnings' provided for are less than the earnings provided for in those terms and conditions against which they are being compared; and there is no substantial contrary evidence that the earnings are less favourable than those against which they are being compared.

The term 'earnings' is defined in r.2.57A as including:

[156] Explanatory Statement to Migration Amendment Regulations 2009 (No. 5) Amendment Regulations 2009 (No. 2) (SLI 2009, No.230), p.7.
[157] Explanatory Statement to SLI 2009 No.230, p.7.
[158] For definition of 'non-monetary benefits' see r.2.57A(3).
[159] r.2.57A(2)(a) and Note to r.2.57A(2).
[160] Explanatory Statement to SLI 2009 No.230, p.7 and Note to r.2.57A.

- the person's wages;
- amounts applied or dealt with in any way on the person's behalf or as the person directs; and
- the agreed money value of 'non-monetary benefits'.[161]

However the concept of earnings does not include any payments the amount of which cannot be determined in advance, such as commissions, bonuses, incentive based payments and overtime (unless the overtime is guaranteed).[162] It also does not include reimbursements or certain employer superannuation contributions specified in r.2.57A(4). This definition of 'earnings' is based on the definition in s.332 of the *Fair Work Act 2009* and it is intended that interpretations of this section will apply to this definition.[163]

Once the two sets of terms and conditions have been identified, they must be compared to determine whether the terms of the person being nominated are 'less favourable' than those in the other set. Regulation 2.57(3A) provides that a set of terms and conditions of employment for a person (the first set) is less favourable than another set if the 'earnings' in the first set are less than the 'earnings' in the other set and there is no substantial contrary evidence that the first set is not 'less favourable'. This latter requirement allows for 'substantial' evidence to be provided to illustrate that aspects of terms and conditions other than earnings should be considered in comparing the two sets of terms and conditions. For example, if earnings under one set of terms and conditions for ordinary hours of work of 50 hours per week are greater than another set of terms and conditions for ordinary hours of work for 38 hours per week, depending upon the evidence, it may be appropriate to regard the latter set of terms and conditions as no less favourable that the former.[164]

Regulation 2.72(10AA) provides that if there is no Australian citizen or permanent resident performing equivalent work in the person's workplace at the same location, the person making the nomination must determine the terms and conditions of employment and the base rate of pay using the method specified by the Minister in an instrument in writing for this purpose.[165] Formerly, r.2.72(10)(c) required comparison of the terms and conditions of employment of the person identified in the nomination with the terms of condition of an Australian citizen or permanent resident *in the person's workplace* at the same location.[166] The removal of the words 'in the person's workplace' was intended to allow a decision maker to consider terms and conditions of employment for Australian citizens or permanent residents in the same workplace or more generally in that location (for persons performing equivalent work).[167] The terms of r.2.72(10AA) still appear to require that the procedure it specifies must be followed if no Australian citizen or Australian permanent resident performs equivalent work *in the person's workplace* at the same location. However, given the purpose of the amendment to r.2.72(10)(c), and because r.2.72(10AA) qualifies r.2.72(10)(c), it appears that the retention of words 'in the person's workplace' in r.2.72(10AA) was a drafting oversight. Therefore, the preferable interpretation is that r.2.72(10AA) would only apply if no Australian citizen or Australian permanent resident performs equivalent work at the same location. Where there is an Australian citizen or Australian permanent resident performing equivalent work at the same location, a direct comparison can be made under r.2.72(10)(c).

[161] For definition of 'non-monetary benefits' see r.2.57A(3).
[162] r.2.57A(2)(a) and Note to r.2.57A(2).
[163] Explanatory Statement to SLI 2009 No.230, p.7 and Note to r.2.57A.
[164] Explanatory Statement to SLI 2009 No.230, pp.6 and 9.
[165] r.2.72(10AA). See the 'T&C' tab of the Register of Instruments: Business visas for the relevant instrument.
[166] Amended by SLI 2013 No.146, applying to all nomination applications not finally determined on 1 July 2013, and nominations made on or after that date.
[167] Explanatory Statement to SLI 2013 No.146, p.49.

Base rate of pay

If the terms and conditions for the person identified in the nomination are no 'less favourable' than for the relevant Australian citizen or permanent resident, the decision-maker must then determine whether the base rate of pay under the terms and conditions of employment that are or would be provided to the equivalent Australian citizen or permanent resident will be greater than the temporary skilled migration income threshold specified by the Minister in writing.[168] This requirement may be disregarded in certain circumstances (see below).

'Base rate of pay' is defined in r.2.57(1) as meaning the rate of pay payable to an employee for his or her ordinary hours of work, but not including incentive-based payments/bonuses, loadings, monetary allowances, overtime/penalty rates or any other separately identifiable amounts. This definition is based on the definition in s.16 of the *Fair Work Act* 2009 and it is intended that interpretations of this section will apply to this definition.[169]

Disregarding the base rate of pay requirement

The base rate of pay may be disregarded if:

- the base rate of pay will not be greater than the temporary skilled migration income threshold; and
- the annual *earnings* (as defined in r.2.57A) are equal to or greater than the temporary skilled migration income threshold; and
- it is reasonable to do so.[170]

Consideration of when it will be reasonable to disregard this requirement may be guided by the purpose of the provisions in r.2.72(10)(c) and (cc) to maximise the likelihood that Subclass 457 visa holders can independently provide for themselves in Australia and limit the extent to which visa holders may impose a burden on the broader community or come under pressure to breach visa conditions.[171] The Explanatory Statement to the regulations inserting the provisions states, by way of example, that it may not be reasonable to consider additional earnings to the extent to which those earnings are not directed toward cost of living expenses; conversely, it may be reasonable to consider the annual earnings where the disposable income is greater than it would otherwise be if their remuneration was structured in such a way that the base rate of pay would be greater than the temporary skilled migration income threshold.[172]

Requisite certification

Regulation 2.72(10)(e) requires that the approved sponsor must have provided a written certification as part of the nomination in relation to a number of different matters, namely that:

- the duties of the position include a significant majority of the duties of the nominated occupation listed in the ANZSCO, or the nominated occupation listed in the relevant legislative instrument;[173]
- if the person is lawfully operating a business outside, but not in Australia, the nominated occupation is a position in the business of the standard business sponsor, or is an occupation listed in the relevant legislative instrument;[174]

[168] r.2.72(10)(cc).
[169] Explanatory Statement to SLI 2009 No.230, p.5 and Note to definition of 'base rate of pay' in r.2.57(1).
[170] r.2.72(10A).
[171] Explanatory Statement to SLI 2009 No.230, p.7.
[172] Explanatory Statement to SLI 2009 No.230, p.9
[173] r.2.72(10)(d)(i), r.2.72(10)(e)(i).See the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas for the relevant instrument.

- if the person is lawfully operating a business in Australia, the nominated occupation is a position with the business or an associated entity of the applicant or is an occupation listed in relevant legislative instrument;[175]
- the qualifications and experience of the visa applicant or holder are commensurate with those specified in ANZSCO, or if there is no ANZSCO code, those specified in relevant legislative instrument.[176]

Such a certification represents a formal self-assessment and informs the sponsor of the Minister's expectations about what the proposed visa applicant will be doing when the Department conducts monitoring and compliance activities.[177]

The purpose of the written certification that applies to a standard business sponsor who is lawfully operating a business outside Australia, but not inside Australia, is to prevent a standard business sponsor who is operating a business outside Australia and not in Australia from placing the Subclass 457 visa holder with an associated entity which is operating in Australia, and thereby circumventing the criteria which apply to a standard business sponsor who is operating a business in Australia.[178] The intention of the exception to the requirement that the nominated occupation be in the business or associated entity of the applicant for certain specified occupations is to allow certain highly-skilled visa holders to work in specific occupations which require a degree of mobility between employers (for example, general managers sitting on the board of directors of several unrelated businesses, medical professionals working as locums at various hospital clinics).[179]

Position associated with nominated occupation is genuine – r.2.72(10)(f) (pre 18/3/18) or r.2.72(10)(a) (post 18/3/18)

Regulation r.2.72(10)(f) (for nominations before 18 March 2018) and r.2.72(10)(a) (for nominations made on or after 18 March 2018), require a decision maker to be satisfied that the position associated with the nominated occupation is genuine. The intention of this provision is to ensure that positions nominated under this provision are in skilled occupations and are genuinely needed by the nominating employer.[180]

Regulation 2.72(10)(f) or r.2.72(10)(a) is a determination of not only whether or not the position in question is genuine in the sense that the position exists, but also whether that position really is what it purports to be. In terms of the latter, the Courts have confirmed that the determination necessarily requires a qualitative analysis of the position and a comparison of that with the occupation which has been nominated by the proposed sponsor.[181]

In *Cargo First Pty Ltd v MIBP*, it was settled that r.2.72(10)(f) requires a qualitative analysis of the position that is the subject of the nomination to determine whether it is 'genuine'. The Court confirmed that in considering whether the position associated with the occupation was genuine the decision maker was entitled to go behind the certification of matters required in r.2.72(10)(e) and reach a state of satisfaction as to whether or not there was a 'position' of the kind identified in the nomination, the person occupying that position was in fact required to undertake 'tasks' of the kind set forth in

[174] See the 'Occ-Ex' tab of the Register of Instruments: Business visas for the relevant instrument.
[175] See the 'Occ-Ex' tab of the Register of Instruments: Business visas for the relevant instrument.
[176] See the 'Occ186/442/457&Noms' tab of the Register of Instruments: Business visas for the relevant instrument.
[177] Explanatory Statement to SLI 2009 No. 115, p.27 (but in relation to r.2.72(1)(g) prior to amendment).
[178] Explanatory Statement to SLI 2009 No. 203, p.35.
[179] See PAM3 – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.6.9] Occupations exempt from the direct employer requirement (reissued 1 October 2017).
[180] Explanatory Statement to SLI 2013 No.146, Attachment B, p.34.
[181] *Cargo First Pty Ltd v MIBP* [2016] FCA 30 (Justice Flick, 3 February 2016) at [34].

ANZSCO, and the 'tasks' required to be undertaken included a significant majority of the tasks set forth in ANZSCO.[182]

Thus, to the extent that Departmental guidelines (PAM3) suggest that in most cases, officers may consider this requirement met on the basis of the certifications at r.2.72(10)(d) or (e), or r.2.73(14), that guidance should be treated with caution. However, PAM3 also suggests that if there is any doubt as to the veracity of the certifications, further assessment should be undertaken.[183]

In that regard, PAM3 includes detailed policy guidance as to decision makers' consideration of the criterion in relation to particular fact scenarios, and in particular provides instruction and examples for further assessment where:

- there is information that suggests that the nominated position may have been created to secure a migration outcome for the nominee and/or any of their family members (e.g. nominee is a relative of an officer of the sponsoring business, business has been in existence for a very short period of time, proposed salary is significantly higher or lower than industry standards);

- the information provided in the nomination application suggests that the tasks of the position do not align with the tasks of the occupation as described in ANZSCO (having regard to position in terms of organisational structure of the business, proposed tasks nominee will be performing, tasks performed by current employees and location where nominee will be working); or

- the position does not appear to be consistent with the nature of the business (e.g. where scope of the activities of the business do not encompass the duties of the nominated occupation or the size or turn-over of the business would not appear to support such a position).[184]

English language proficiency of certain visa holders identified in nomination

Regulation 2.72(10)(g) imposes additional requirements if the sponsor has identified in the nomination the holder of a Subclass 457 visa in relation to whom the requirements in cl.457.223(6) were met.[185]

Clause 457.223(6) in conjunction with cl.457.223(4)(eb) provides an exception from a requirement to demonstrate a basic level of English language proficiency where a decision maker is satisfied a visa applicant will be paid at a certain (higher level) salary level in connection with the nominated occupation, and the decision maker considers that granting the visa would be in the interests of Australia.

If r.2.72(10)(g) applies, it requires that <u>one of the following</u> must be met:

- the visa holder continues to meet the requirements in cl.457.223(6),

[182] *Cargo First Pty Ltd v MIBP* [2016] FCA 30 (Justice Flick, 3 February 2016) at [34]. The Court upheld the decision of the Federal Circuit Court in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091 (Judge Smith, 7 August 2015) in which Judge Smith, at [30], emphasised that the task of the Minister (and the Tribunal on review) is not simply to determine whether the duties relevant to the position include the majority of those referred to in the ANZSCO in respect of the nominated occupation. If it were otherwise, the scheme envisaged for the protection of the Australian workforce could be readily undermined simply by describing one thing as being another.

[183] PAM3: Migration Regulations - Schedules - Temporary Work (Skilled) visa (subclass 457) - nominations - 4.6.11 Genuine Position (reissued 1 October 2017).

[184] PAM3: Migration Regulations - Schedules - Temporary Work (Skilled) visa (subclass 457) - nominations - 4.6.11 Genuine Position (reissued 1 October 2017).

[185] r.2.72(10)(g) was inserted by SLI 2013 No.146 for all nominations not finally determined on 1 July 2013 and nominations made on or after that date.

- the visa holder is an exempt applicant within the meaning of cl.457.223(4),[186]
- if required to demonstrate a certain English level to hold a mandatory licence/registration/membership for the nominated occupation and, in order to do so, is required to have undertaken a language test specified for cl.457.223(4)(eb)(iv) and to have achieved a 'better score' than the test score specified for cl.457.223(4)(eb)(v), the visa holder achieves that score, or
- in all other cases, the visa holder has undertaken a test specified for cl.457.223(4)(eb)(iv) and achieved a score specified for cl.457.223(4)(eb)(v) in a single attempt and within a specified period.[187]

This mirrors the Schedule 2 English language requirements for Subclass 457 visa applicants in the Standard Business Sponsor stream. The purpose of this provision when first introduced was stated as being to require, as a nomination criterion, a visa holder who was exempt from the English language requirement on the basis of being paid a high salary, to be continue to be paid a salary that would exempt them from the English language requirement, or to meet the requirement, or to otherwise be exempt within the meaning of cl.457.223(4).[188]

Employee engaged under contract

Regulation r.2.72(10)(h) requires that either the sponsor will engage the visa holder, the applicant for a visa or the proposed applicant for a Subclass 457 visa only as an employee under a written contract of employment and give a copy of that contract to the Minister. Alternatively, an applicant may satisfy r.2.72(10)(h) where the nominated occupation is an occupation specified by the Minister in relevant legislative instrument.[189] This provision is intended to reflect the intention of the standard business sponsorship program for the sponsored person, or prospective sponsored person to be engaged as an employee of the sponsor.[190]

Full-time position – r.2.72(10)(b) (post 18/3/18 only)

For nominations made on or after 18 March 2018, r.2.72(10)(b) requires that the nominated occupation is for a full-time position. Regulation 2.72(10A) allows the Minister to disregard the requirement for a full time position if it is reasonable in the circumstances.[191] The relevant Explanatory Statement suggests this discretion is intended to cater for special and limited circumstances, providing the examples of fractional appointments for highly specialised or renowned academic staff and other situations where part-time work arrangements may be reasonable and consistent with the Australian workplace relations framework.[192]

[186] A person is an exempt applicant for these purposes if s/he is in a class of applicant specified in the applicable instrument: cl.457.223(11). For the applicable instrument, see the 'EngLangExempt457' tab of Register of Instruments: Business visas
[187] Regulation 2.72(10)(g) inserted by SLI 2013 No.146, for all nominations not finally determined on 1 July 2013, and nominations made on or after 1 July 2013. Regulation 2.72(10)(g)(ii) and (iv) were subsequently amended by SLI 2014 No.32 for nominations made but not finally determined as at 22 March 2014 and made on or after that date. See the '457Eng' tab of the Register of Instruments: Business visas for the relevant instrument specifying tests, scores and the relevant period.
[188] Explanatory Statement to SLI 2013 No.146, p.50.
[189] r.2.72(10)(g) was inserted by Migration Amendment Regulation 2013 (No.5) (SLI 2013, No.145) and applies to all nominations not finally determined in 1 July 2013, and all nominations made on or after that date: items [3] and [11] of Schedule 1. See 'Occ-Ex' tab of Register of Instruments: Business visas for the relevant instrument.
[190] Explanatory Statement to SLI 2013 No.145, p.7.
[191] r.2.72(10A) was inserted by F2018L01093. The exception in r.2.72(10A) applied to any applications made on or after 18 March 2018 which were not finally determined
[192] Explanatory Statement to F2018L01093, p.12.

Additional requirements in relation to Short-term stream and Medium-term stream (post 18/3/18 only)

There are additional requirements for nominations made after 18 March 2018 in the Short-term stream and Medium-term stream, some of which are similar to those which apply to standard business sponsors in the former scheme discussed above. They include requirements relating to:

- English language proficiency for nominees who hold a Subclass 457 or 482 visa;
- engagement under a written contract of employment and employment by certain entities;
- the nominee's annual earnings; and
- employment conditions being no less favourable than those of an equivalent Australian citizen or permanent resident, and not engaging in discriminatory recruitment practices.

English language proficiency

Under r.2.72(14), if the nominee holds a Subclass 457 or 482 visa and the Minister requested evidence that the nominee satisfies the language test requirements, the applicant is to provide evidence to the Minister, or the Tribunal, that satisfies:

- if the nomination is in the Short-term stream, any language test requirements specified for cl.482.223; or
- if the nomination is in the Medium-term stream, any language test requirements specified for cl.482.232.

The instrument specifying the English language test requirements for cl 482.223 and cl.482.232 can be found at the '482English' tab of the Register of Instruments – Business visas.

Annual earnings

Regulation 2.72(15) contains several requirements which must be met for nominations in the Short-term or Medium-term stream where the nominee's annual earnings in relation to the nominated occupation will not be at least the amount specified in the legislative instrument.[193] If the nominee's annual earnings will be more than the amount specified in the legislative instrument (at the time of writing, IMMI 18/033 specified this as $250,000) there is no requirement for an assessment of the nominee's salary. Regulation 2.57A provides a definition of 'earnings' (see discussion about this above).

If the annual earnings are less than this amount, the decision-maker must be satisfied that the 'annual market salary rate' has been determined by the applicant in accordance with the legislative instrument.[194] 'Annual market salary rate' is defined in r.1.03 and requires the nominee to be provided with remuneration and employment conditions that are at least equivalent to the conditions provided to an Australian worker performing the same work at the same location on a full-time basis for a year. The annual market salary rate is the benchmark for assessing the nomination. The instrument specifies the evidence to be considered in determining the annual market salary rate where there is or is not an Australian worker performing equivalent work.

[193] See the 'TSMIT' tab of the Register of Instruments: Business Visas for the relevant instrument.
[194] See the 'TSMIT' tab of the Register of Instruments: Business Visas for the relevant instrument.

Next, the annual market salary rate, excluding non-monetary benefits (as defined in r.2.57A(3) such as accommodation), must be equal to or greater than the temporary skilled migration income threshold (TSMIT) as specified in the legislative instrument.[195] If this is not satisfied, the nomination cannot be approved, unless the rate of the occupation is not less than the TSMIT, and it is reasonable in the circumstances to disregard this criterion.[196]

In addition:

- the decision-maker must be satisfied that the nominee's annual earnings in relation to the occupation will not be less than the annual market salary rate.[197] This requirement may be disregarded if it is reasonable to do so and where the requirement for a full time position in r.2.72(10)(b) is disregarded under r.2.72(10A).[198] The term 'earnings' is defined in r.2.57A (see discussion about this above).

- the decision-maker must be satisfied that the nominee's annual earnings, excluding any non-monetary benefits, in relation to the occupation will not be less than the TSMIT, unless it is reasonable in the circumstances to disregard this criterion;[199] and

- the decision-maker needs to be satisfied that either there is no information known to Immigration that indicates the annual market salary rate for the occupation is inconsistent with Australian labour market conditions relevant to the occupation, or it is reasonable to disregard any such information.[200]

No less favourable terms and conditions and discriminatory recruitment practices

Regulation 2.72(18)(a) requires the decision-maker to be satisfied that there is no evidence that the employment conditions (other than in relation to earnings) that will apply to the nominee will be less favourable than those that apply, or would apply, to an Australian citizen or permanent resident performing equivalent work at the same location.

Further, under r.2.72(18)(b), if the applicant is lawfully operating a business in Australia, they must also not have engaged in discriminatory recruitment practices, as defined in r.2.57(1).[201] For example, a business which relies heavily on overseas workers from a particular country may be asked to demonstrate that the business is genuinely seeking local workers and has open, competitive and merit-based recruitment practices.

Contract of employment

Regulations 2.72(11) and (12) set out requirements relating to engagement of the nominee under a written contract of employment and the persons who can employee the nominee. Unless the occupation is exempt,[202] the nominee must be engaged only as an employee under a written contract of employment, and must give a copy of the contract, signed by the employer and the nominee, to the Minister.

[195] r.2.72(15)(d) as inserted by F201800262. See the 'TSMIT' tab of the Register of Instruments: Business Visas for the relevant instrument.
[196] r.2.72(15)(d) and r.2.72(16)(a) as inserted by F201800262.
[197] r.2.72(15)(e) as inserted by F201800262.
[198] r.2.72(16)(aa) as inserted by F201800262.
[199] r.2.72(15)(f) and r.2.72(16)(b) as inserted by F201800262.
[200] r.2.72(15)(g) as inserted by F201800262.
[201] r.2.72(18)(b) as inserted by F201800262.
[202] See the 'ExemptOccs' tab of the Register of Instruments: Business Visas.

The employer can only be the sponsor where the applicant is an overseas business sponsor,[203] and can be either the sponsor or an associated entity where the applicant is not an overseas business sponsor.[204] An 'overseas business sponsor' is a standard business sponsor who was lawfully operating a business outside Australia and was not lawfully operating a business in Australia at the time the approval as a standard business sponsor was granted, or at the time of the most recent variation: r.1.03.

Requirements specified in work agreement - r.2.72(11) (pre 18/03/18) or r.2.73(15) (post 18/03/18)

Regulation 2.72(11) for applications before 18 March 2018 or r.2.73(15) for applications made on or after 18 March 2018, applies only to approved sponsors who are non-Ministerial parties to a work agreement.[205] It requires that if the work agreement specifies requirements that must be met by the party to the work agreement, the decision maker must be satisfied that the requirements of the work agreement have been met. This criterion ensures that if a work agreement sets out specific requirements for the nomination stage, for example the maximum number of nominations which may be approved in a particular year, then those requirements must also be met before the nomination can be approved.[206]

Nomination Training Contribution Charge

On 12 August 2018, the *Migration Amendment (Skilling Australians Fund) Act 2018 (No 38, 2018)* introduced a nomination training contribution charge in relation to nominations made under s.140GB. The new requirement in s.140GB(2)(aa) states that in a case in which the person is liable to pay nomination training contribution charge in relation to the nomination—the person has paid the charge. This requirement is in addition to the existing requirements to satisfy the prescribed criteria and any applicable LMT condition. While the amendment to s.140GB applied to nominations made on or after commencement and not yet decided at commencement, the liability under new s.140ZM relevantly only arose for nominations made on or after 12 August 2018.[207]

In particular, s.140ZM imposes a liability on a person to pay the nomination contribution charge in relation to certain prescribed nominations including a nomination of a proposed occupation under s.140GB(1)(b) in relation to a holder of a Subclass 457 or 482 visa, or an applicant or proposed applicant for a Subclass 482 visa.[208]

'Nomination training contribution charge' is defined in s.5(1) of the Act as the nomination training contribution charge imposed by s.7 of the *Migration (Skilling Australians Fund) Charges Act 2018 (No 39, 2018)*, which imposes the charge payable under s.140ZM, sets a charge limit for the charge and provides for the indexation of the charge limit.[209] It also provides that the amount of the nomination training contribution charge is to be prescribed the Regulations, and that the Regulations may prescribe different charges for different kinds of visas or persons.[210]

[203] r.2.72(11) as inserted by F201800262.
[204] r.2.72(12).
[205] Work agreement is defined in r.2.76(2).
[206] Explanatory Statement to SLI 2009 No. 203, p.35.
[207] Item 37 of Schedule 2 and Item 16(3) of Schedule 1 to No 38, 2018.
[208] r.5.42(1) as inserted by F2018L01093.
[209] s.7 and s.9 of the *Migration (Skilling Australians Fund) Charges Act 2018 (No 39, 2018)*.
[210] Section 8 of No 39, 2018.

The Migration (Skilling Australians Fund) Charges Regulations 2018 prescribes the amount of charges applicable for Subclass 457 and 482 visas, and is currently as follows:[211]

- if the annual turnover for the nomination is less than $10 million - $1,200 per year;
- if the annual turnover for the nomination is equal to or more than $10 million - $1,800 per year;
- if the nomination is in the Labour Agreement stream – nil charge; and
- if the nominated occupation is a minister of religion or religious assistant – nil charge.

The Regulations allow for the Minister to refund the nomination training contribution charge, and the nomination fee, in certain cases[212] but there are no provisions for the Tribunal to review decisions regarding refunds or refusals of refunds.

The Labour Market Testing Condition

In addition to satisfying the criteria for approval, nominations made by standard business sponsors on or after 23 November 2013, must also meet the labour market testing condition, *where applicable,* unless an exemption applies.[213] Accordingly, for nominations made on or after that date, before approving a nomination by an approved sponsor decision makers will also need to consider whether:

- the nomination is one to which the labour market testing condition applies;
- if the condition does apply, whether the applicant is subject to an exemption; and
- if not subject to an exemption, whether the requirements of the labour market testing condition are met.

There is no equivalent requirement for a nomination made by a party to a work agreement to meet the labour market testing condition. While there are similar requirements for labour market testing for work agreements entered into on or after 1 December 2015, these are considerations that arise outside of the nomination process.[214]

Changes to the labour market testing requirements to specify how the testing should be conducted were introduced on 12 August 2018.[215] The amended labour market testing requirements only apply to nomination applications made or after 12 August 2018.

[211] r.5 of Migration (Skilling Australians Fund) Charges Regulations 2018. Annual turnover means, if the person is liable to pay a charge in relation to the nomination operates a business in Australia – the total ordinary income (within the mean of the *Income Tax Assessment Act 1997*) the person derived in the most recent income year ending before the nomination day; or in any other case – the total income the person liable to pay the charge in relation the nomination derived in the ordinary course of the business in the most recent financial year (s.4 Migration (Skilling Australians Fund) Charges Regulations 2018).
[212] r.2.73AA as substituted by F2018L01093.
[213] s.140GB(2) as amended by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013), and the Migration Amendment (Temporary Sponsored Visas) Commencement Proclamation 2013.
[214] r.2.76A. This requirement was inserted by Migration Amendment (Clarifying Subclass 457 Requirements) Regulation 2015 (SLI 2015, No. 185) and provides that, with limited exceptions, the Commonwealth must not enter a work agreement in relation to the recruitment, employment or engagement of persons in occupations and locations required by the other party to the agreement unless the Minister is satisfied that the other party has made recent and genuine efforts to recruit, employ or engage Australian citizens or Australian permanent residents to meet those requirements.
[215] No.38, 2018 and F2018L01093.

Does the labour market testing condition apply? – s.140GBA(1)

The labour market testing condition is set out in s.140GBA of the Act. It applies to a nomination by a person if:

- the person is in a prescribed class of sponsors;[216]
- the person nominates a proposed occupation and a particular position, associated with the nominated occupation, that is to be filled by a visa holder, or applicant or proposed applicant for a visa, identified in the nomination;[217] and
- it would not be inconsistent with any international trade obligation of Australia to require the sponsor to satisfy the labour market testing condition in relation to the nominated position.[218]

The only prescribed class of sponsors prescribed are standard business sponsors.[219]

The qualification that the condition must not be inconsistent with any of Australia's international trade obligations requires consideration of those obligations set out in the relevant legislative instrument. A range of obligations arising under specific agreements (essentially free trade agreements with a number of countries) and in respect of persons in certain senior and specialist positions have been identified for this provision. Having regard to the terms of s.140GB(2), 140GBA(1)(c) and 140GBA(2), which are in the present tense and indicate that the labour market testing requirement falls to be considered at the time of decision on a nomination, it appears the relevant instrument to be considered is the one in effect at the time of decision. Such an approach would also be consistent with the purpose of this qualification, which is to ensure that labour market testing cannot be required of a person if doing so would be inconsistent with Australia's international trade obligations.[220] See the Register of Instruments – Business visas (LMT&ObligExmpt tab) for the relevant instruments.[221]

In summary, the labour market testing condition applies to standard business sponsors, or applicants who have applied to be sponsors, who are making a nomination, unless the condition would be contrary to the international obligations identified by legislative instrument. Note however, that even if the condition applies because it meets the three requirements listed above, there a number of exemptions which mean the labour market condition may not need to be satisfied in respect of a particular nomination.

Does an exemption apply? – s.140GBC and s.140GBB

If the labour market testing condition applies to a sponsor, the sponsor may nonetheless be exempt from having to satisfy the requirements of the condition in order for the nomination to be approved.[222] There are two exemptions:

[216] s.140GBA(1)(a) as amended by No.38, 2018
[217] s.140GBA(1)(b) as amended by No.38, 2018. This reflects that while nominations under the business sponsorship scheme may be made in relation to an occupation, program or activity, in the case of nominations for Subclass 457 or Subclass 482 visas made by standard business sponsors, it is only a proposed occupation that may be nominated.
[218] s.140GBA(1)(c).
[219] r.2.72AA inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013).
[220] Explanatory Statement to *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013), p.10
[221] Further information about Free Trade Agreements and the World Trade Organisation, including copies of relevant agreements, can be found at http://www.dfat.gov.au/trade/. While not authoritative, some practical guidance on the content of these obligations, as relevant to this provision, is available at http://www.immi.gov.au/Visas/Pages/457.aspx?tab=4. See PAM3 – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.6.13.7] International trade obligations and LMT (reissued 1 January 2018).
[222] s.140GB(2) as amended by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013.

- **skill and occupational exemptions** – that is, if a person has nominated an occupation and position requiring a particular level of qualification / relevant experience and the occupation is specified an instrument;[223] and
- **major disaster exemption –** that is, where a major disaster has occurred in Australia with such a significant impact on individuals that a government response is required and the exemption is necessary or desirable to assist disaster relief or recovery, having regard to the number of individuals affected and the nature and extent to which the event is unusual.[224]

Skill and occupational exemptions

Section 140GBC provides for exemption from the labour market testing condition requirements where, in a nomination made by a person:

- the person nominates a proposed occupation;[225]
- the person nominates a particular position, associated with the nominated occupation, that is to be filled by a visa holder, or applicant or proposed applicant for a visa, identified in the nomination;[226] and
- either of the two skill and occupation exemptions described below are met.[227]

The skill and occupation exemptions are set out in s.140GBC(2) and (3). Either may be met. They differ in the degree of qualifications and experience and require:

- **s.140GBC(2) – higher qualification / experience exemption -** met if:
  - either or both of the following are requirements for the nominated position, in relation to the nominated occupation:[228]
    - a relevant bachelor degree or higher qualification, other than a protected qualification;
    - 5 years or more of relevant experience, other than protected experience; and
  - the nominated occupation is specified in the relevant legislative instrument;
- **s.140GBC(2) – lesser qualification/ experience exemption** - met if:
  - either or both of the following are required for the nominated position, in relation to the nominated occupation:[229]
    - a relevant associate degree, advanced diploma or diploma covered by the AQF,[230] other than a protected qualification;
    - 3 years or more of relevant experience, other than protected experience; and
  - the nominated occupation is specified in the relevant legislative instrument.

The experience and skill descriptions match those required for occupations classified in the ANZSCO as Skill Level 1 and Skill Level 2 respectively. The intention of these provisions is to allow the Minister

[223] s.140GBC.
[224] s.140GBB.
[225] s.140GBC(1)(a) as amended by the *Migration Amendment (Skilling Australians Fund) Act 2018* (No.38, 2018).
[226] s.140GBC(1)(b) as amended by the *Migration Amendment (Skilling Australians Fund) Act 2018* (No.38, 2018).
[227] s.140GBC(2) and (3).
[228] s.140GBC(2)(a).
[229] s.140GBC(3)(a).
[230] 'AQF' means the Australian Qualifications Framework within the meaning of the *Higher Education Support Act 2003*: s.140GBC(6) as inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013).

to exempt occupations at that higher skill level from the labour market testing requirement.[231] See the Register of Instruments – Business visas ('LMTExemptOcc' tab) for the relevant instrument specifying occupations.

Note that for nomination applications made on or after 18 March 2018,[232] no occupations are specified for these purposes and so no skill / qualification based exemptions can apply. For nominations made prior that date, the range of exempt occupations was quite broad and included all occupations that are classified in the ANZSCO as Skill Level 1 and 2. An outline of the structure of ANZSCO including all Skill Levels and specific occupations thereunder can be found at the ABS website: ANZSCO, First Edition - Structure. In addition, a list of occupations that require labour market testing (i.e. those who do not fall within the exemption) is available on the Department's website here.

Note that the term 'protected qualification' is defined as a qualification (however described) in engineering (including shipping engineering) or nursing, and 'protected experience' is defined as experience in the field of engineering (including shipping engineering) or nursing.[233] The effect of these definitions is that nominations which relate to engineering and nursing occupations cannot be exempted from the labour market testing requirements under s.140GBC.

Major disaster exemption

Under s.140GBB the Minister may, in writing, exempt a sponsor from the requirement to satisfy the labour market testing condition in instances of major disasters in Australia where the exemption is necessary or desirable in order to assist disaster relief or recovery.

This exemption is intended to provide the Minister with flexibility to respond to situations of national or state emergency and to facilitate the speedy entry of overseas skilled workers without the delay caused by requiring an approved sponsor to undertake labour market testing.[234]

Requirements of the labour market testing condition – s.140GBA(3)

If a sponsor does not fall within one of the exemptions discussed above, the requirements of the labour market testing condition set out in s.140GBA(3) must be met. In broad terms, the condition is satisfied if:

- labour market testing has been undertaken in relation to the nominated position within a specified period;[235]
- the nomination is accompanied by specific evidence in relation to that testing;[236]
- if applicable, information is provided about recent redundancies and retrenchments from positions in the nomination occupation;[237]

[231] Explanatory Memorandum, Migration Amendment (Temporary Sponsored Visas) Bill 2013, p.11-13.
[232] Note that only one instrument was ever made under s.140GBC(2) specifying occupations for these purposes, IMMI 13/137. This instrument was repealed on 18 March 2018 by IMMI 18/058 without qualification (see also 18/062 for commencement date). It's somewhat unclear whether this repeal raises a question for all nominations undecided on 18 March 2018 – i.e. it could arguably suggest there are now no specifications even for live applications. However, given the Department's clear intention to the contrary (see Explanatory Statement to 18/058 and PAM3 commentary), the clear distinction between pre and post 18 March 2018 nominations, the practical difficulty in 'removing' the exemption for live applications where the condition requires action during the period prior to application and the arguable ambiguity, it seems preferable that a beneficial approach is adopted, continuing to apply these specifications to all pre-18 March 2018 nomination applications.
[233] s.140GBC(6) as inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013*.
[234] Explanatory Memorandum, Migration Amendment (Temporary Sponsored Visas) Bill 2013, p.10.
[235] s.140GBA(3)(a), (4) & (4A).
[236] s.140GBA(3)(b)(i), (5) & (6).
[237] s.140GBA(3)(b)(ii).

- having regard to that evidence and information (if any), the Minister is satisfied a suitable qualified and experienced Australian citizen, permanent resident or eligible temporary visa holder is not readily available to fill the nominated position;[238] and
- *for applications made on or after 12 August 2018* - the labour market testing in relation to the nominated position was undertaken in the specified manner.[239]

Labour market testing has been conducted over prescribed period

Section 140GBA(3)(a) requires the decision maker to be satisfied that the approved sponsor has undertaken labour market testing in relation to the nominated position within a period specified by legislative instrument in relation to the nominated occupation.

'Labour market testing' is relevantly defined as the testing of the Australian labour market to demonstrate whether a suitably qualified and experienced Australian citizen or permanent resident is readily available to fill the position.[240] For the period in which the testing must be undertaken see the 'LMTperiod' tab of the Register of Instruments – Business visas for the relevant instrument. The period specified at the time of writing is 12 months.[241]

This provision requires a decision maker to be satisfied that labour market testing has been undertaken in relation to the nomination position at some point within the specified period; it does not require continuous testing throughout that period.

While it is not clear from the terms of s.140GBA(3)(a) itself whether this provision requires testing to have taken place within the prescribed period *prior to the time the nomination is made* or within the prescribed period *prior to the time a decision on the nomination is made*, given evidence of this labour market testing must accompany the nomination (s.140GBA(3)(b)), it appears that the relevant period should be determined by reference to the date the nomination is made.

However, if any Australian citizens or Australian permanent residents were, in the previous 4 months, made redundant or retrenched from positions in the nomination occupation in a business of, or an associated entity of,[242] the approved sponsor, the labour market testing must have been undertaken after those redundancies and retrenchments.[243] Again, having regard to the requirement that evidence of this labour market testing be provided with the nomination, it appears the relevant period for this provision will be the 4 months prior to the date the nomination is made.

Evidentiary requirements and, for post 12/8/2018 nominations, the manner of LMT

Section s.140GBA(3)(b)(i) requires that a nomination is accompanied by evidence in relation to the labour market testing. For nominations made before 12 August 2018, the evidentiary requirements are set out in s.140GBA(5) and (6), while for those after this date, they are set out in a legislative instrument made under s.140GBA(6A).

[238] s.140GBA(3)(d).
[239] The manner in which the labour market testing is determined under s.140GBA(5). s.140GBA(5) and s.140GBA(3)(aa) as inserted No.38, 2018.
[240] s.140GBA(7) as inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013).
[241] IMMI 13/136. Note that the *Migration Amendment (Temporary Sponsored Visas) Act 2013* provides that s.140GBA(3)(a) applies in relation to a period determined for the purposes of that paragraph, whether the period, as applied in relation to the nomination, starts before or on the day the Act is given Royal Assent.
[242] 'Associated entity' has the same meaning as in Part 2A of the Regulations: s.140GBA(7) as inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013). Regulation 1.03 provides that associated entity has the same meaning as in section 50AAA of the *Corporations Act 2001.*
[243] s.140GBA(4A).

Nomination applications before 12 August 2018

To meet this requirement, the evidence in relation to labour market testing:

- *must* include information about the approved sponsor's attempts to recruit suitably qualified and experienced Australian citizens or Australian permanent residents to the position and any other similar positions;[244]
    - this *must* include details of any advertising (paid or unpaid) of the position, and any similar positions, commissioned or authorised by the approved sponsor and details of fees and other expenses paid (or payable) for that advertising;[245]
    - this *may* also include other information such as information about the approved sponsor's participation in relevant job and career expos, or details of any other fees and expenses paid (for payable) for any recruitment attempts, or details of the results of such recruitment attempts, including the details of any positions filled as a result;[246] and
- *may* also include other evidence, such as copies of or references to any research released in the previous four months relating to labour market trends generally and in relation to the nominated occupation, or expressions of support from Commonwealth, State and Territory government authorities with responsibility for employment matters, or any other type of evidence determined by legislative instrument.[247]

The optional types of information and evidence outlined above are intended to provide guidance on the kinds of evidence an approved sponsor may provide, but are not intended to preclude sponsors from providing other kinds of evidence in this regard.[248] In this regard, s.140GBA(6A) provides that if a sponsor elects to provide evidence and information that is not mandatory (i.e. evidence mentioned in s.140GBA(5)(b) and 6(b)), a decision maker may take that evidence into account, but is not to treat a nomination less favourably merely because a sponsor has elected not to do so.

For the evidentiary requirements to be met, the nomination must be accompanied at least by the mandatory information outlined in ss.140GBA(5)(a) and (6)(a). While not free from doubt, it appears that only evidence provided at the same time, or at most around the same time, the nomination is made can satisfy this requirement.[249] Current authority on a similarly worded provision (a criterion for the grant of a skilled visa) suggests that where an application must be 'accompanied by evidence' that evidence can be provided other than at the same time the application is lodged, but that there must be a close temporal connection with the application.[250]

However, while s.140GBA(3)(b)(i) requires certain evidence of labour market testing to accompany the nomination, this would not preclude a decision maker considering other material provided by an

[244] s.140GBA(5)(a).
[245] s.140GBA(6)(a)(i) and (ii).
[246] s.140GBA(6)(b)(i) and (ii).
[247] s.140GBA(5)(b)(i)-(iii). At the date of writing, no instruments have been made under s.140GBA(5)(b)(iii).
[248] Explanatory Memorandum, Migration Amendment (Temporary Sponsored Visas) Bill 2013, p.9.
[249] An argument could be made that a nomination is something that exists from the time that it is made and continues in existence through to the time of approval or refusal (and beyond, in the case of an approved nomination), such that a requirement that the nomination be accompanied by evidence could be met by providing that evidence at any time prior to final determination of the nomination. However, that interpretation would make the terms of the LMT requirement unworkable, as it requires on the provision of evidence about labour market testing within a period of 12 months (s.140GBA(3)(a)) and in some cases 'in the previous 4 months' (s.140GBA(3)(b)(ii)), pointing to the need for a fixed point in time, i.e. the point at which the nomination application is made. A broader interpretation would also be inconsistent with the otherwise stated legislative intention (see p.1 Explanatory Memorandum to the Migration Amendment (Temporary Sponsored Visas) Bill 2013).
[250] *Anand v MIAC* [2013] FCA 1050 (Katzmann J, 16 October 2013), considering cl.487.216, in relation to visa applications made before 23 March 2013.

applicant subsequent to the date of application for the purposes of the applicant satisfying s.140GBA(3)(a) (testing undertaken in prescribed period) or s.140GBA(3)(d) (no suitably qualified Australian / eligible temporary visa holder).

Note also that while these provisions require certain information to be provided, they do not require that any particular forms of labour market testing be undertaken. For example, while details of any paid advertising must be provided, there is no requirement that paid advertising be undertaken (though the absence of such advertising may be relevant to the substantive requirements of s.140GBA(3)(d)).

Nomination applications made on or after 12 August 2018

Section 140GBA(5) provides that the Minister may determine, by legislative instrument, the manner in which labour market testing in relation to the nominated position must be undertaken.[251] The labour market testing condition will only be met where the labour market testing is undertaken in the manner determined under s.140GBA(5).[252]

This may include:[253]

- the language to be used for any advertising of the position or similar position;
- the method of advertising; and
- the period during which the advertisement must occur, with the duration of any such advertising being for a minimum of 4 weeks.[254]

A determination can only be made if the Minister is reasonably satisfied that the advertising will be targeted so that a significant proportion of suitably qualified and experienced Australian citizens or permanent residents would be likely to be informed about the position, and will set out any skills or experience requirements that are appropriate to the position.[255]

The kinds of evidence of labour market testing that must accompany a nomination are specified in an instrument under s.140GB(6A), which may include a copy of the advertisement, and different requirements for different nominated positions or classes of nominated positions.[256] The relevant instrument is in the 'LMTPeriodMannerEvidence' tab of the Register of Instruments: Business Visas.

Additional requirement if recent redundancies / retrenchments

If any Australian citizens or Australian permanent residents[257] were, in the previous 4 months, made redundant or retrenched from positions in the nomination occupation in a business of, or an

[251] s.140GBA(5) as amended by No.38, 2018. See the 'LMT&Evid' tab of the Register of Instruments: Business Visas for the relevant instrument.
[252] s.140GBA(3)(aa) as inserted by No.38, 2018.
[253] s.140GBA(6) as amended by No.38, 2018.
[254] s.140GBA(6AB) as inserted by No.38, 2018.
[255] s.140GBA(6AA) as inserted by No.38, 2018.
[256] s.140GBA(6B) and s.140GBA(6C) as inserted by No.38, 2018.
[257] 'Australian permanent resident' means an Australian permanent resident within the meaning of the Regulations: s.140GBA(7) as inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013). Australian permanent resident is relevantly defined by r.1.03 as a non-citizen who, being usually resident in Australia, is the holder of a permanent visa.

associated entity of,[258] the approved sponsor, there is an additional requirement that information about those redundancies and/or retrenchments is provided with the nomination.[259] There are no particular requirements as to the form or content of that information.

No suitably qualified and experienced Australian / temporary visa holder available

Section 140GBA(3)(d) provides that, having regard to the evidence and information (if any) referred to in s.140GBA(3)(b), the Minister is satisfied that:

- a suitably qualified and experienced Australian citizen or Australian permanent resident[260] is not readily available to fill the nomination position;[261] and
- a suitably qualified and experienced eligible temporary visa holder is not readily available to fill the nominated position.[262]

An 'eligible temporary visa holder' is defined, in relation to a nomination by an approved sponsor, as a person who, at the time when the nomination is made:

- is the holder a of temporary visa referred to in the regulations as a Subclass 417 (Working Holiday) visa or a Subclass 462 (Work and Holiday) visa; and
- the person is employed in the agricultural sector by the approved sponsor (or an associated entity of the approved sponsor); and
- the temporary visa does not prohibit the person from performing that employment.

While s.140GBA(3)(d) provides that a decision maker must have regard to 'that' evidence, being the evidence accompanying the nomination outlined in s.140GBA(3)(b), it does not expressly preclude consideration of other relevant evidence including, for example, evidence which did not accompany the nomination but was provided at a later date.

Notice of primary decision

The Minister must notify an approved sponsor, in writing, of a decision to approve or refuse a nomination, within a reasonable period after making the decision, and by attaching a written copy of the approval or refusal (as well as a statement of reasons, if the decision is to refuse the nomination).[263] A 'reasonable period' is not defined in the Regulations. However, a notification may be considered to have been provided within a reasonable period if it is provided without undue delay after a decision has been made.[264]

[258] 'Associated entity' has the same meaning as in Part 2A of the Regulations: s.140GBA(7) as inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013). Regulation 2.57 (in Part 2A of the Regulations) provides that associated entity has the same meaning as in s.50AAA of the *Corporations Act 2001.*
[259] s.140GBA(3)(b)(ii).
[260] 'Australian permanent resident' means an Australian permanent resident within the meaning of the Regulations: s.140GBA(7) as inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013). Australian permanent resident is relevantly defined by r.1.03 as a non-citizen who, being usually resident in Australia, is the holder of a permanent visa.
[261] s.140GBA(3)(d)(i).
[262] s.140GBA(3)(d)(ii).
[263] r.2.74.
[264] Explanatory Statement to SLI 2009 No. 115, p.29.

If the application was made using approved form 1196 (Internet), the Minister may provide the notification to the applicant in an electronic form.[265]

Period of approval of nomination

Nominations made before 18 March 2018

An approval of a nomination in relation to a Subclass 457 visa ceases on the *earliest* of:

- the day on which Immigration receives written notice of the withdrawal of the nomination by the approved sponsor;[266]
- 12 months after the nomination is approved (subject to one exception, discussed below);[267]
- the day on which the related Subclass 457 visa is granted;[268]
- 3 months after the approved sponsor's approval as a standard business sponsor ceases;[269]
- the day on which the approved sponsor's approval as a standard business sponsor is cancelled;[270]
- if the nomination approval is given to a party to a work agreement (other than a Minister), the day on which the work agreement ceases.[271]

As the regulations set the term of approval, it is not necessary to specify the term in the nomination approval.

Note that r.2.75(2)(b), which provides for cessation 12 months after nomination approval, does not apply to a nomination made before 18 March 2018 if the person identified in the nomination applied for a 457 visa before 18 March 2018 *and* they applied to the Tribunal for a review of a decision to refuse to grant that visa within 12 months after the day on which the nomination was approved.[272] This is a 'savings' provision introduced as part of reforms to the temporary sponsored work visa program, intended to avoid situations where an application is successful in their review but the related nomination has ceased to be in effect, noting it would now not be possible to make a new nomination to support the 457 visa.[273] However, it appears this savings provision only has effect for nominations which had not yet ceased by operation of r.2.75(b) as at 18 March 2018. This is because the savings provision is not drafted in a way to imply it would have effect before this date. The effect of r.2.75 is to end the approval of a nomination, the legal effect of which is a concrete, definite end point (a changing of the status of approval). If it was intended that the amendment was to a retrospective effect of 'un-doing' the work of r.2.75(2)(b), it would be expected that this be expressed in clear and unambiguous language and that some sort of limitation would likely be imposed. Moreover, if the broader view is accepted that the saving provisions apply to 'any' nomination, this would have the effect of reviving nominations which ceased long ago.

[265] r.2.74(2).
[266] r.2.75(2)(a).
[267] r.2.75(2)(b).
[268] r.2.75(2)(c).
[269] r.2.75(2)(d).
[270] r.2.75(2)(e).
[271] r.2.75(2)(f).
[272] Clause 6704(15) of Schedule 13 to the Regulations, as inserted by F2018L00262.
[273] Explanatory Statement to F2018L00262, Attached C item 178.

Nominations made on or after 18 March 2018

An approval of a nomination made after 18 March 2018 ceases on the earliest of:[274]

- the day on which Immigration receives written notice of the withdrawal of the nomination by the approved sponsor;
- 12 months after the day on which the nomination is approved unless, at that time, there is a visa application made by the nominee on the basis of the nomination that has not been finally determined;
- if a visa application made by the nominee on the basis of the nomination is finally determined or withdrawn after 12 months after the day on which the nomination is approved—the day on which the visa application is finally determined or withdrawn;
- the day on which the related Subclass 482 visa is granted;
- if the nomination is of an occupation for a Subclass 482 (Temporary Skill Shortage) visa in the Short-term stream or the Medium-term stream—the nomination end day,[275] unless, on the nomination end day, the person is a standard business sponsor or there is an application for approval as a standard business sponsor made by the person before the sponsorship end day in relation to which a decision has not been made under subsection 140E(1) of the Act (or the day that application is refused); and
- if the nomination is of an occupation for a Subclass 482 (Temporary Skill Shortage) visa in the Short-term stream or the Medium-term stream and the person's approval as a standard business sponsor is cancelled - the day of cancellation; and
- if the approval of the nomination is given to a party to a work agreement (other than a Minister) and the nomination is of an occupation for a Subclass 482 (Temporary Skill Shortage) visa in the Labour Agreement stream—the day on which the work agreement ceases.

As the post 18 March 2018 scheme only enables one nomination per Subclass 482 visa application, r.2.75(b) and (ba) prevents the 12-month cessation rule from operating where there is an unfinalised Subclass 482 application.

Relevant case law

Anand v MIAC [2013] FCA 1050	Summary
Cargo First Pty Ltd v MIBP [2015] FCCA 2091	Summary
Cargo First Pty Ltd v MIBP [2016] FCA 30	Summary
Hu v MIMIA [2001] FCA 66	Summary
Nguyen v MIBP [2013] 1697	Summary

[274] r.2.75 as amended by F2018L00262.
[275] A nomination end day is the day 3 months after the sponsorship end day, which is the day on which the standard business sponsorship ceases: r.2.75(3) as inserted by F2018L00262.

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2009 (No.5)	SLI 2009, No.115
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)	SLI 2009, No.203
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.2)	SLI 2009, No.230
Migration Amendment Regulations 2009 (No.13)	SLI 2009, No.289
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment Regulation 2013 (No.5)	SLI 2013, No.145
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146
Migration Amendment (Temporary Sponsored Visas) Act 2013	No.122, 2013
Migration Amendment (Visa Application Charge and Related Matters No.2) Regulation 2013	SLI 2013, No.253
Migration Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No.32
Migration Amendment (Clarifying Subclass 457 Requirements) Regulation 2015	SLI 2015 No.185
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Amendment (Specification of Occupations) Regulations 2017	F2017L00818
Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018	F201800262
Migration Amendment (Skilling Australians Fund) Regulations 2018	F2018L01093
Migration Amendment (Skilling Australians Fund) Act 2018	C2018A00038

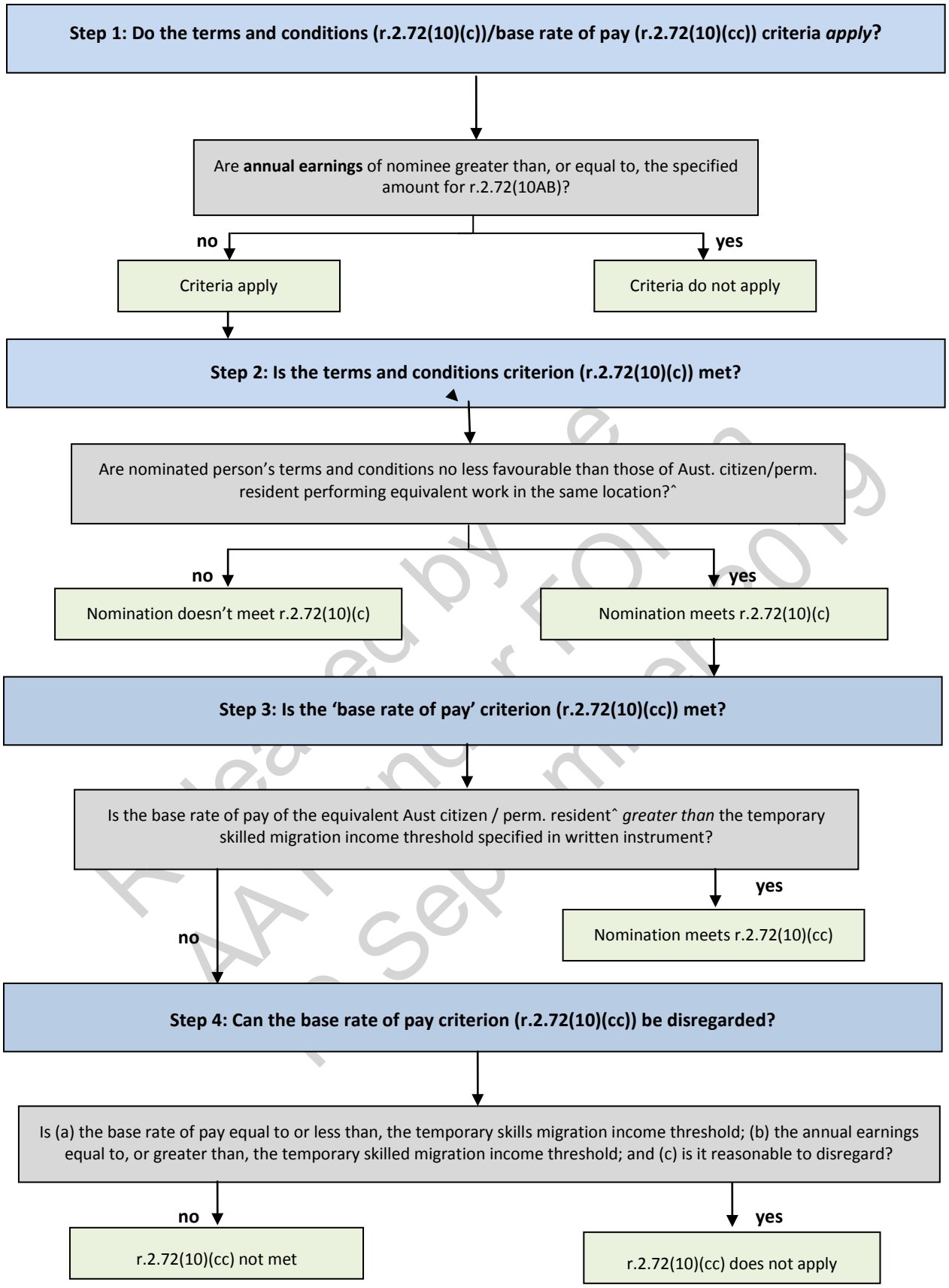
Available Decision Templates

The following decision templates are available for use:

- **Nomination of an Occupation (r.2.72) (before 18 March 2018)** – this template is designed for use in review of decisions to refuse approval of nomination of an occupation (in relation to a Subclass 457 visa) made on or after 14 September 2009, or those applications made prior to, but not finally determined at that date,

Last updated/revised: 12 June 2019

Attachment A: Assessing the terms and conditions of employment & base rate of pay for nominations pre 18 March 2018



ˆIf no Australian citizen/perm resident performs equivalent work at the same location, comparison terms and conditions and base rate of pay must be determined by a method specified in written instrument: r.2.72(10AA).

Overview – Temporary Work Visas

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- Class GE – Subclass 420 (Temporary Work (Entertainment)) visa
- Class UW – Subclass 488 (Superyacht Crew) visa
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Appendix 1: Table of temporary work visas pre and post 19 November 2016

Overview

This commentary provides an overview of a range of current and recently repealed temporary work visas.[1] Temporary work visas allow people to participate in highly specialised work, specific professional, cultural, social or research activities in Australia on a temporary basis. This is in contrast to the business skills visas[2] and employer related visas[3] which are granted for skilled workers or business people to participate in or establish new business in Australia; or for employers to sponsor and employ skilled workers with the required skills or experience in particular occupations required in Australia.

The temporary work visa scheme was subject to significant reform with effect from 19 November 2016. Five of the existing temporary work visa subclasses were repealed,[4] and replaced by two new temporary work visa subclasses: Subclasses 407 and 408.[5] In addition, a new class of sponsor was created, the 'temporary activities sponsor', which replaced six previous classes of sponsor,[6] and the requirement for sponsors to complete an additional nomination process was removed in respect of Subclass 408 visas but retained in respect of Subclass 407 visa applications.[7] A table at Appendix A provides a comparison of the visa subclasses in place before and after 19 November 2016.

Separate detailed MRD Legal Services commentaries are available in respect of Subclass 401 Temporary Work (Long Stay Activity) visas, Subclass 402 Training and Research visas and Subclass 417 Working Holiday visas. In relation to Subclass 457 visas, which were from 24 November 2012 rebranded as a temporary work visa,[8] the following commentaries are available: Standard Business Sponsor; Nomination of Occupation: r.2.72 and Subclass 457. For guidance on visa subclasses not covered by detailed commentary, please contact MRD Legal Services.

Application process – sponsorship and nominations

For Subclass 407 (Training) visas (where the approved sponsor is not a Commonwealth agency), and most of the recently repealed temporary work visas, there is a three-stage application process which requires:

- a person seeking approval to be a sponsor of the relevant kind;

[1] The term 'temporary work visa' referred to in this commentary is not defined in the legislation and used as a generic term for visa subclasses that allow a visa holder to participate in specific professional, cultural or social activities in Australia temporarily.
[2] For example, subclasses 890-893.
[3] For example, subclass 186, 187.
[4] Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743) repealed subclasses 401, 402, 416, 420 and 488. The changes were intended to progress the Government's visa simplification and deregulation and digital transformation agenda: see Explanatory Statement, p.1.
[5] F2016L01743.
[6] Professional development sponsor, special program sponsor, superyacht crew sponsor, long stay activity sponsor, training and research sponsor, and entertainment sponsor.
[7] F2016L01743.
[8] Migration Legislation Amendment Regulation 2012 (No.4) (SLI 2012, No.238).

- an 'approved sponsor'[9] nominating an occupation, program or activity in relation to a visa holder, visa applicant or proposed visa applicant; and

- a person applying for the relevant class of visa.

Other visa types, namely the Subclass 408 (Temporary Activity), the repealed Subclass 488 (Superyacht Crew) and 402 (Training and Research) in the Research and Professional development streams have sponsorship but no nomination requirements. Subclass 417, 462, 400 and 403 visas have no sponsorship or nomination requirements.

For more information regarding sponsorships and nominations, see MRD Legal Services Commentaries: Temporary Work Sponsor and Temporary Work Nominations.

Current visa classes

There are currently six visa classes and subclasses (excluding Subclass 457 visas) in the temporary work visa program. As part of significant reforms to this program, two new visa classes and subclasses were introduced from 19 November 2016 (Classes GF and GG). Although several visa classes were repealed as part of those reforms, several others remain open (Classes GA, GD, TZ and US).

Class GF – Subclass 407 (Training) visa

The Class GF (Training) visa was introduced on 19 November 2016 and replaced the now repealed Subclass 402 (Training and Research) (Class GF visa).[10] It is a temporary visa allowing for stays of up to two years,[11] and contains only one visa subclass: Subclass 407 (Training).[12]

Applicants seeking to satisfy the primary criteria for the grant of a Subclass 407 visa are required to meet criteria relating to age,[13] functional English,[14] no adverse consequences for employment or training of Australians,[15] health insurance,[16] genuine intention to stay temporarily,[17] eligible visas,[18] adequate means of support,[19] public interest and special return criteria,[20] and conduct relating to charging for migration outcomes.[21]

Unless the approved sponsor is a Commonwealth agency, the grant of a Subclass 407 visa involves the three-stage application process of sponsorship, nomination and application for a visa. The sponsor must be a temporary activities sponsor or, for visa applications lodged until 18 May 2017, a

[9] 'Approved sponsor' is defined in s.5(1) of the *Migration Act 1958* as either a person approved as a sponsor under s.140E of the Act in relation to a class of sponsor prescribed by the Migration Regulations 1994 (r.2.58), or a person (other than the Minister) who is party to a work agreement.
[10] Item 1238 of Schedule 1 to the Regulations and Part 407 of Schedule 2 to the Regulations as inserted by F2016L01743.
[11] cl.407.511.
[12] Item 1238(5) of Schedule 1 to the Regulations.
[13] cl.407.211.
[14] cl.407.212.
[15] cl.407.215.
[16] cl.407.216.
[17] cl.407.217.
[18] cl.407.218.
[19] cl.407.219.
[20] cl.407.219A & cl.407.219B.
[21] cl.407.219C.

training and research sponsor or a professional development sponsor.[22] Unless the approved sponsor is a Commonwealth agency, the applicant must be identified in a nomination approved under s.140GB.[23] For information relating to the sponsorship and nomination requirements, see MRD Legal Services commentaries: Temporary Work Sponsor and Temporary Work Nominations.

A decision to refuse a Subclass 407 visa is a decision reviewable under Part 5 of the Act in circumstances where:

For decisions made before 13 December 2018

- if the visa applicant made the application while in the migration zone, the applicant is sponsored by an approved sponsor at the time the application for review is made *or* an application for review of a decision not to approve the sponsor has been made and that decision is pending;[24] or

- if the visa applicant made the application while outside the migration zone, the visa applicant was sponsored or nominated as required by a criterion for the grant of the visa by an Australian citizen / permanent resident, company or partnership that operates in the migration zone or a New Zealand citizen who holds a special category visa.[25]

Applications for review in the former circumstances must be made by the visa applicant,[26] and in the latter the sponsor or nominator.[27]

For decisions made on or after 13 December 2018

- if the visa applicant made the application while in the migration zone, one of these circumstances must exist at the time of the decision;
    - the applicant is identified in an approved nomination that has not ceased; *or*
    - a review of a decision not to approve the sponsor is pending; *or*
    - a review of a decision not to approve the nomination is pending; *or*
    - except if it is a criterion for the grant of the visa that the applicant is identified in an approved nomination that has not ceased (i.e. where the sponsor is a Commonwealth agency) the applicant is sponsored by an approved sponsor;[28] *or*
    - the applicant is a secondary applicant.[29]

[22] cl.407.213.
[23] cl.407.214.
[24] s.338(2)(d) and r.4.02(1A)(b) as substituted by F2016L07143. Although there has been no judicial consideration of s.338(2) as it applies to subclass 407 visa refusal decisions, there has been considerable recent consideration of this provision as it applies to subclass 457 visa refusal decisions including, for example, what factual circumstances will satisfy the requirement that a visa applicant is 'sponsored by an approved sponsor'. This body of case law appears applicable in this context, because of the similarity of the visa schemes . For further discussion, see the MRD Legal Services commentary page Subclass 457 visa.
[25] s.338(9) and r.4.02(4)(o) as inserted by F2016L07143. See the MRD Legal Services commentary page Subclass 457 visa for discussion of the (relevantly) identically worded r.4.02(4)(l).
[26] s.347(2)(a).
[27] s.347(2)(d) and r.4.02(5)(n) as inserted by F2016L01743.
[28] s.338(2)(d) as inserted by *Migration and Other Legislation Amendment (Enhanced integrity) Act 2018* (No.90 of 2018). For prescribed visas which do not need a nomination such as Subclass 407 (Training) where the sponsor is a Commonwealth agency, one of s.338(2)(d)(ii) or (iv) must be met at the time of the refusal decision (cl.407.213). Where a nomination is required, one of s.338(2)(d)(i),(ii) or (iii) must be met (cl.407.214).
[29] s.338(9) and r.4.02(4)(q) as inserted by F2018L01707 provide that there is a reviewable decision where the grant of a visa to a secondary applicant was refused because they did not meet the secondary criteria, and s.338(2)(a)-(c) are met.

- if the visa applicant made the application while outside the migration zone, one of these circumstances existed at the time of the decision;

    - the applicant is identified in an approved nomination that has not ceased, and the nominator was at the time the nomination was approved, a person, company or partnership referred to in r.4.02(4AA); *or*

    - a review of a decision not to approve the proposed sponsor is pending and the proposed sponsor was a person, company or partnership referred to in r.4.02(4AA); *or*

    - a review of the decision not the approve the nomination is pending and the nominator was a person, company or partnership referred to in r.4.02(4AA); or

    - the applicant is a secondary applicant; or

    - except if it is a criterion for the grant of the visa that the applicant is identified in an approved nomination that has not ceased, the applicant is sponsored by an approved sponsor who is a Commonwealth agency.[30]

Applications for review in the former circumstances must be made by the visa applicant[31] and in the latter the person who applied to become the sponsor or who nominated the applicant.[32] For applications made in the migration zone by secondary applicants, the person with standing is 'a person to whose application the decision relates'.[33]

Class GG – Subclass 408 (Temporary Activity) visa

The Class GG (Temporary Activity) visa was introduced on 19 November 2016,[34] and replaced the following visas and streams:

- Invited Participant stream in the Subclass 400 (Temporary Work (Short stay activity)) visa;
- Subclass 401 (Temporary Work (Long Stay Activity)) visa;
- Research stream in the Subclass 402 (Training and Research) visa;
- Subclass 416 (Special Program) visa;
- Subclass 420 (Temporary Work (Entertainment)) visa; and
- Subclass 488 (Superyacht Crew) visa.

It is a temporary visa allowing for a stay of up to two years, except those granted under the 'invited participant to an event criterion' (three months) or the 'Australian government endorsed event'

[30] s.338(9) and r.4.02(4)(o) as inserted by Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707). Regulation 4.02(4AA) requires the nominator or sponsor to be an Australian citizen, company or partnership that operates in the migration zone, holder of a permanent visa, or New Zealand citizen who holds a special category visa or a Commonwealth agency.
[31] s.347(2)(a).
[32] s.347(2)(d) and r.4.02(5)(n) as amended by F2018L01707.
[33] s.338(9) and r.4.02(5)(p) inserted by F2018L01707.
[34] Item 1237 of Schedule 1 to the Regulations and Part 408 of Schedule 2 to the Regulations as inserted by F2016L01743.

criterion (four years),[35] and contains only one visa subclass: Subclass 408 (Temporary Activity).[36] It has nine alternate criteria under which the visa may be granted:

- *Invited participant in an event* – for non-citizens seeking to enter or remain in Australia to participate in one or more events. This replaces the Invited Participant stream of the Subclass 400 visa;[37]

- *Sports trainee and elite player, coach, instructor or adjudicator* – caters for elite sport and criteria substantively the same as the nomination criteria for 'sporting activity' for the repealed Subclass 401 visa;[38]

- *Religious worker* – for non-citizens seeking to enter or remain in Australia as religious workers. These criteria are substantively the same as the criteria in the Religious Worker stream of the repealed Subclass 401 visa;[39]

- *Domestic Worker* – for non-citizens seeking to enter or remain in Australia as domestic workers for a defined cohort of senior executives. These criteria are substantively the same as the Domestic Worker (Executive) stream of the repealed Subclass 401 visa and the related sponsorship and nomination criteria;[40]

- *Superyacht crew* – for non-citizens seeking to enter or remain in Australia to work as superyacht crew. These criteria are substantively the same as the criteria for the repealed Subclass 488 visa;[41]

- *Research and Research (student)* – for non-citizens seeking to enter or remain in Australia to engage in research at an Australian tertiary or research institution. The criteria for academics are substantively the same as the criteria for the Research stream of the repealed Subclass 402 visa, whereas the criteria for recent graduates are substantively the same as the criteria for the Occupational Trainee stream of the repealed Subclass 402 visa and the related nomination criteria;[42]

- *Staff exchange* – for non-citizens seeking to enter or remain in Australia to participate in a staff exchange program. These criteria are substantively the same as criteria for the repealed Exchange stream of the Subclass 401 visa and related nomination criteria;[43]

- *Special programs* – for non-citizens seeking to enter or remain in Australia to participate in youth exchange programs, school to school student interchange, school language assistant programs and other programs which have the objective of cultural enrichment or community benefit. The criteria are substantively the same as the criteria for part of the repealed Subclass 416 visa;[44]

[35] cl.408.511.
[36] Item 1237(7) of Schedule 1 to the Regulations.
[37] cl.408.221.
[38] cl.408.222.
[39] cl.408.223.
[40] cl.408.224.
[41] cl.408.225.
[42] cl.408.226.
[43] cl.408.227.
[44] cl.408.228.

- *Australian Government endorsed event* - this is a new visa pathway for applicants seeking to undertake work directly associated with an Australian Government endorsed event;[45]

- *Entertainment-related activities* – for non-citizens seeking to enter or remain in Australia for entertainment-related activity, such as film or television productions. These criteria are substantively the same as the criteria in the repealed Subclass 420 visa and related sponsorship and nomination criteria.[46]

Applicants seeking to satisfy the primary criteria for the grant of a Subclass 408 visa are required to meet one of the specific criteria above, as well as common criteria relating to no adverse consequences for employment or training of Australians,[47] health insurance;[48] genuine intention to stay temporarily;[49] eligible visas;[50] adequate means of support;[51] public interest and special return criteria;[52] conduct relating to charging for migration outcomes;[53] and not seeking to work in the entertainment industry unless they satisfy the Australian Government endorsed events or Entertainment-related activities alternative criteria (see above).[54]

For applicants inside Australia or those outside seeking a stay of 3 months or more, it is a requirement that either a temporary activities sponsor, or a relevant class of legacy sponsor for applications made up until 18 May 2017, 'passes the sponsorship test'[55] in relation to the visa applicant.[56] For applicants outside Australia seeking a stay of up to three months, sponsorship is not required, however it is a requirement that the relevant person or body 'passes the support test'[57] in relation to the applicant.[58] For information relating to the sponsorship requirements, see MRD Legal Services commentary: Temporary Work Sponsor.

A decision to refuse a Subclass 408 visa is a decision reviewable under Part of 5 of the Act:

- if the visa applicant made the applicant whilst in the migration zone;[59] or

- if the visa applicant made the application while outside the migration zone, the visa applicant was sponsored, as referred to in paragraph (a) of the definition of *passes the sponsorship test*

[45] cl.408.229. It is envisaged that this visa pathway will be limited to major events such as the Commonwealth games, see Explanatory Statement to F2016L01743 at p.23.
[46] cl.408.229A.
[47] cl.480.211.
[48] cl.408.212.
[49] cl.408.213.
[50] cl.408.214.
[51] cl.408.215.
[52] cl.408.216 & cl.408.217.
[53] cl.408.218.
[54] cl.408.219.
[55] Defined in cl.408.111. It requires a person to be an approved sponsor, who has agreed in writing to be the sponsor of the applicant, who has not withdrawn that agreement and has not ceased to be the sponsor of the applicant, for there to be no adverse information known to Immigration about the person or a person associated with them, and to either be a temporary activities sponsor or the visa application
[56] cls.408.221(f)(i), 408.222(2)(e)(i), 408.222(3)(e)(i), 408.223(e)(i), 408.224(j)(i), 408.225(c)(i), 408.226(2)(c)(i), 408.226(3)(d)(i), 408.227(e)(i), 408.228(2)(d)(i), 408.228(3)(c)(i), 408.228(4)(c)(i), 408.228(5)(d)(i), 408.229A(2)(c)(i), 408.229A(3)(c)(i), 408.229A(4)(c)(i), 408.229A(5)(c)(i), 408.229A(6)(c)(i), 408.229A(7)(b)(i) and 408.229A(8)(b)(i).
[57] Defined in cl.408.111.
[58] cls.408.221(f)(ii), 408.222(2)(e)(ii), 408.222(3)(e)(ii), 408.223(e)(ii), 408.224(j)(ii), 408.225(c)(ii), 408.226(2)(c)(ii), 408.226(3)(d)(ii), 408.227(e)(ii), 408.228(2)(d)(ii), 408.228(3)(c)(ii), 408.228(4)(c)(ii), 408.228(5)(d)(ii), 408.229A(2)(c)(ii), 408.229A(3)(c)(ii), 408.229A(4)(c)(ii), 408.229A(5)(c)(ii), 408.229A(6)(c)(ii), 408.229A(7)(b)(ii) and 408.229A(8)(b)(ii).
[59] s.338(2)(d). Subclass 408 is not prescribed for the purposes of s.338(2)(d) soonly s.338(2)(a), (b) and (c) need to be satisfied.

in cl.408.111,[60] by an Australian citizen / permanent resident, company or partnership that operates in the migration zone or a New Zealand citizen who holds a special category visa.[61]

Applications for review in the former circumstances must be made by the visa applicant,[62] and in the latter the sponsor.[63]

Although not free from doubt, it appears that for offshore visa refusals, the requirement that the visa applicant be sponsored 'as referred to in paragraph (a) of the definition of *passes the sponsorship test* in clause 408.111' appears to require that there be a current written agreement in place (per the terms of the definition), made by a relevant entity who is an approved sponsor at the time the application for review is made. It is unclear whether the terms of r.4.02(4)(p) will be met where the relevant entity is not an approved sponsor at that time because, for example, their application for approval is still pending with the Department, or has been refused but is the subject of a pending Tribunal review application. For further assistance please contact MRD Legal Services.

Class GD – Subclass 403 (Temporary Work (International Relations)) visa

The Class GD (Temporary Work (International Relations)) visa was introduced on 24 November 2012 and replaced the pre-existing Subclass 406, 415, 46 visas and the Privileges and Immunities streams in the Subclass 456 and 457 visas.[64] It contains one visa subclass: Subclass 403 (Temporary Work (International Relations). It has six streams under which the visa may be granted:

- *the Government Agreement stream* – for persons entering under a bilateral agreement between Australian and another country;[65]
- *the Foreign Government Agency stream* – for representatives of foreign government agencies without official status in Australia and foreign language teachers who are to be employed in Australia by their government;[66]
- *the Domestic Worker (Diplomatic or Consular) stream* - for domestic workers to be employed in a private capacity in Australia by diplomatic or consular representative and certain representatives of international organisations;[67]
- *the Privileges and Immunities stream* – for persons accorded privileges and immunities under either the *International Organisations (Privileges and Immunities) Act 1963* or the *Overseas Missions (Privileges and Immunities) Act 1995*;[68] and
- *the Seasonal Worker Program stream* – for persons seeking to enter Australia to participate in a program of seasonal work conducted by the sponsor. The criteria for this stream are

[60] Note that because offshore Subclass 408 visa applications seeking a stay of less than 3 months do not require sponsorship, the Tribunal will not have jurisdiction to review such decisions.
[61] s.338(9); and r.4.02(4)(p) as inserted by F2016L01743. For decisions made on or after 13 December 2018, r.4.02(4)(p) requires that it must be made by a person, company or partnership as referred to in r.4.02(4AA) (as inserted by F2018L01707), which, in addition to an Australian citizen etc., includes a Commonwealth agency.
[62] s.347(2)(a).
[63] s.347(2)(d); and r.4.02(5)(p) as inserted by F2016L01743.
[64] Item 1234 of Schedule 1 to the Regulations and Part 403 of Schedule 2 to the Regulations as inserted by SLI 2012, No.238.
[65] cl.403.22.
[66] cl.403.23.
[67] cl.403.24.
[68] cl.403.25.

substantively the same as the criteria for seasonal workers in the repealed Subclass 416 visa and it is only open for applications from 19 November 2016;[69] and

- *the Pacific Labour Scheme stream* – for low and semi-skilled workers from certain Pacific Island Countries (PICs) seeking to enter Australia to undertake non-seasonal work in rural and regional Australia for up to three years.[70] This stream is open to applications from 1 July 2018.[71]

Applicants seeking to satisfy the primary criteria for the grant of a Subclass 403 visa are required to meet certain criteria specific to the stream of visa they are seeking, as well as common criteria relating to health insurance,[72] genuine intention to stay temporarily in Australia for the purpose for which the visa is granted,[73] adequate means of support,[74] public interest and special return criteria.[75] There are no sponsorship or nomination requirements in relation to an application for a Subclass 403 visa except under the Seasonal Worker Program stream which requires sponsorship by a temporary activities sponsor or, for applications made up until and including 18 May 2017, a special program sponsor;[76] and the Pacific Labour Scheme stream which requires sponsorship by a temporary activities sponsor who is endorsed by the Department of Foreign Affairs and Trade (DFAT).[77] A decision to refuse a Subclass 403 is a decision reviewable under Part 5 of the Act:

- if the visa applicant made the application while in the migration zone;[78] or

- *for applicants under the Seasonal Worker Program stream*: if the visa applicant made the application while outside the migration zone, the visa applicant was sponsored as required by a criterion for the grant of the visa by an Australian citizen / permanent resident, company or partnership that operates in the migration zone or a New Zealand citizen who holds a special category visa;[79] or

- *for applicants under the Pacific Labour Scheme stream:* if the visa applicant made the application while outside the migration zone, the visa applicant was sponsored as required by a criterion for the grant of the visa by an Australian citizen / permanent resident, company or partnership that operates in the migration zone or a New Zealand citizen who holds a special category visa;[80] or if the visa applicant made the visa application in the migration zone and holds, or the last substantive visa held by the applicant was, a Subclass 403 visa in the Pacific Labour Scheme stream.[81]

If the visa applicant made the visa application while onshore the review application must be made by the visa applicant,[82] and if the visa applicant was offshore when the visa application was made then the review application must be made by the sponsor.[83]

[69] cl.403.26 inserted for applications made on or after 19 November 2016 by F2016L07143.
[70] Explanatory Statement to the Migration Amendment (Pacific Labour Scheme) Regulations 2018 (F2018L00829), p.4.
[71] cl.403.271 inserted for applications made on or after 1 July 2018 by F2018L00829.
[72] cl.403.211.
[73] cl.403.212.
[74] cl.403.213.
[75] cl.403.214 & cl.403.215.
[76] cl.403.261(b). Sponsorship by a special program sponsor was permissible under cl.403.261(b)(ii) as in place before amendments made by F2018L00829 commencing 1 July 2018.
[77] cl, 403.271(b)
[78] s.338(2). Please note that Subclass 403 is not prescribed for the purposes of s.338(2)(d) so that only s.338(2)(a), (b) and (c) need to be satisfied.
[79] s.338(5).
[80] s.338(5).
[81] ss.338(2) and cl.403.411(2A).
[82] s.347(2)(a).
[83] s.347(2)(b).

Class GA – Subclass 400 (Temporary Work (Short Stay Specialist)) visa

The Class GA Temporary Work (Short Stay Specialist)[84] visa was introduced from 23 March 2013 and contains one visa subclass: Subclass 400.[85] It has two streams under which a visa may be granted:

- *the Highly Specialised Work stream* – for persons seeking short-term entry to undertake non-ongoing highly specialised work;[86] and
- *the Australia's Interest stream* – for circumstances where there are compelling circumstances that affect Australia's interests and require the applicant's entry and stay in Australia.[87]

Prior to 19 November 2016 a third stream, the Invited Participant stream, existed for persons participating in non-ongoing cultural or social activities at the invitation of an organisation lawfully operating in Australia.[88] This stream was repealed from 19 November 2016 and moved into the 'invited participant in an event' criterion in the Class GG (Temporary Activity) visa.

Decisions to refuse Subclass 400 visa applications are not decisions reviewable under Part 5 of the Act.

Class TZ – Subclass 417 (Working Holiday) visa

The Class TZ Working Holiday (Temporary) visa was introduced on 1 September 1994, and contains one visa subclass: Subclass 417 (Working Holiday).[89]

The Subclass 417 visa program aims to encourage cultural exchange and closer ties between arrangement countries by allowing young persons between 18 and 31 years of age[90] from specific countries[91] to have an extended holiday supplemented by short term employment, with special focus on regional Australia. A person can enter Australia on no more than two Working Holiday visas in their lifetime.[92] It is not subject to sponsorship or nomination requirements.

For more information on Subclass 417 visas, see MRD Legal Services Commentary: Subclass 417 – Working Holiday visa.

Class US – Subclass 462 (Work and Holiday) visa

The Class US Work and Holiday (Temporary) visa was introduced on 1 November 2002, and contains one visa subclass: Subclass 462 (Work and Holiday).[93]

[84] Prior to 19 November 2016 this visa was named the Temporary Work (Short Stay Activity): amended by F2016L07143.
[85] Item 1231 of Schedule to the Regulations and Part 400 of Schedule 2 to the Regulations.
[86] cl.400.22.
[87] cl.400.24.
[88] cl.400.23.
[89] Item 1225 of Schedule 1 to the Regulations and Part 417 of Schedule 2 to the Regulations.
[90] cl.417.211(2)(b).
[91] cl.417.211(2)(c) requires an applicant to hold a 'working holiday eligible passport' defined by cl.417.111 as a valid passport held by a person who is a member of a class of persons mentioned in item 1225(3). Item 1225(3) provides for the specific of a number of matters, including the applicable class of persons for cl.417.211. For the applicable instrument see the Register of Instruments – Miscellaneous and other visa classes.
[92] See item 1225(3B)(d) and cl.417.222(b).
[93] Item 1224A of Schedule 1 to the Regulations and Part 462 of Schedule 2 to the Regulations, inserted by SR 2002, No.230.

Subclass 462 is only available to citizens of countries with which Australia has a work and holiday arrangement.[94] It enables young people aged 18 to 31 to holiday and work in Australia for up to 12 months.[95] It is not subject to sponsorship or nomination requirements.

A decision to refuse a Subclass 462 visa is a decision reviewable under Part 5 of the Act if the visa application was made in the migration zone.[96] Applications for review must be made by the visa applicant while in the migration zone.[97]

Repealed visa classes

Class GB – Subclass 401 (Temporary Work (Long Stay Activity)) visa

The Class GB Temporary Work (Long Stay Activity) visa was introduced on 24 November 2012 and replaced the repealed Subclass 411, 421, 427 and 428 visas.[98] Class GB was repealed on 19 November 2016 and replaced by the Class GG (Temporary Activity) visa.[99] Any visa applications for this visa made before 19 November 2016 must be considered against the relevant criteria as previously in force.

The Class GB is a temporary visa allowing for a stay of up to two years,[100] and contains only one visa subclass: Subclass 401 (Temporary Work (Long Stay Activity)). It has four streams under which the visa may be granted, the last being open to applications only from 23 March 2013:

- *the Exchange stream* - for the entry of skilled persons under exchange arrangements giving Australian residents reciprocal opportunities to work with overseas organisations;[101]
- *the Sport stream* – for the entry of sportspersons to participate in sporting activities and/or to engage in competition with Australian residents;[102]
- *the Religious Worker stream* – for the entry of persons who will be full-time religious workers in Australia;[103] and
- *the Domestic Worker (Executive) stream* - for the entry of persons to be employed as domestic workers for certain executives who hold temporary visas.[104]

Applicants seeking to satisfy the primary criteria for the grant of a Subclass 401 visa are required to meet certain criteria specific to the stream of visa they are seeking, as well as common criteria relating to eligible visas,[105] nominations,[106] adverse information,[107] conduct relating to charging for

[94] See cl.462.211 and cl.462.216, and instrument in writing made under item 1224A(3)(a) of Schedule 1. For applicable instrument see the Register of Instruments – Miscellaneous and other visa classes.
[95] cl.462.212 & cl.462.511.
[96] s.338(2).
[97] s.347(2)(a) and s.347(3).
[98] Item 1232 of Schedule 1 to the Regulations and Part 401 of Schedule 2 of the Regulations, as inserted by SLI 2012, No.238.
[99] F2016L01743.
[100] cl.401.511.
[101] cl.401.22.
[102] cl.401.23.
[103] cl.401.24.
[104] cl.401.25.
[105] cl.401.211.
[106] cl.401.212(1)-(3).
[107] cl.401.212(4).

migration outcomes,[108] health insurance,[109] genuine intention to carry out the occupation or activity,[110] adequate means of support,[111] public interest and special return criteria.[112]

The grant of a Subclass 401 visa involves the three-stage application process involving sponsorship, nomination and an application for a visa.[113] For information relating to the sponsorship and nomination requirements, see MRD Legal Services commentaries: Temporary Work Sponsor and Temporary Work Nominations.

A decision to refuse a Subclass 401 visa in any of the four streams is a decision reviewable under Part 5 of the Act in circumstances where:

Onshore visa applications

- for decisions made before 13 December 2018, if the applicant is sponsored by an approved sponsor at the time the application for review is made *or* an application for review of a decision not to approve the sponsor has been made and that decision is pending;[114] *or*

- for decisions made on or after 13 December 2018, if at the time of the decision the visa applicant is identified in an approved nomination that has not ceased *or* a review of a decision not to approve the sponsor is pending *or* a review of a decision not to approve the nomination is pending.[115] or the applicant is a secondary applicant;[116]

Offshore visa applications

- if the visa applicant made the application while outside the migration zone, the visa application is sponsored or nominated in accordance with s.338(5)(b).

Applications for review in the former circumstances must be made by the visa applicant,[117] and in the latter the sponsor.[118] For applications made in the migration zone by secondary applicants, the person with standing is 'a person to whose application the decision relates'.[119]

For more information on Subclass 401 visas, see MRD Legal Services Commentary: Subclass 401 – Temporary Work (Long Stay Activity) (Class GB).

Class GC – Subclass 402 (Training and Research) visa

The Class GC (Training and Research) visa was introduced on 24 November 2012 replacing the repealed Subclass 419, 442 and 470 visas. Class GC was repealed from 19 November 2016 and

[108] cl.401.212A.
[109] cl.401.213.
[110] cl.401.214.
[111] cl.401.215.
[112] cl.401.216 & cl.401.217.
[113] cl.401.221, cl.403.231, cl.401.241, cl.401.251(1) & (2).
[114] s.338(2)(d); and r.4.02(1A)(a) as substituted by SLI2012, No.238.
[115] s.338(2)(d) as inserted by No. 90 of 2018. For prescribed visas which require approval of a nomination, including Subclass 401 (Temporary Work (Long Stay Activity)), one of s.338(2)(d)(i), (ii) or (iii) must be met at the time of the refusal decision (cl.401.212). [116] s.338(9) and r.4.02(4)(q) as inserted by F2018L01707 provide that there is reviewable decision where the grant of a visa to a secondary applicant was refused because they did not meet the secondary criteria, and s.338(2)(a)-(c) are met.
[116] s.338(9) and r.4.02(4)(q) as inserted by F2018L01707 provide that there is reviewable decision where the grant of a visa to a secondary applicant was refused because they did not meet the secondary criteria, and s.338(2)(a)-(c) are met.
[117] s.347(2)(a).
[118] s.347(2)(b).
[119] s.338(9) and r.4.02(5)(p) inserted by F2018L01707.

replaced by the Class GF (Training visa) and the Class GG (Temporary Activities) visa.[120] Any visa applications made for this visa subclass made before 19 November 2016 must be considered against the relevant criteria as previously in force.

Class GC contains one visa subclass: Subclass 402 (Training and Research).[121]. It has three streams under which the visa may be granted:

- *the Occupational Trainee stream* – for persons who want to improve their occupational skills through participation in workplace-based training in Australia with an Australian organisation, government agency or foreign government agency;[122]

- *the Research stream* – for academics invited to participate in collaborative research in Australia by an Australian tertiary or research institution;[123] or

- *the Professional Development stream* – for Australian organisations and government agencies, to bring to Australia groups of professionals, managers or government officials from overseas to enhance their professional or managerial skills.[124]

Applicants seeking to satisfy the primary criteria for the grant of a Subclass 402 visa are required to meet certain criteria specific to the stream of visa they are seeking, as well as common criteria relating to eligible visas,[125] age of the visa applicant,[126] health insurance,[127] genuine intention to carry out the occupation or activity,[128] adequate means of support,[129] conduct relating to charging for migration outcomes,[130] public interest and special return criteria.[131]

The grant of a Subclass 402 involves sponsorship[132] and, in the case of the Occupational Trainee stream where the occupational training will not be provided to the applicant by the Commonwealth, nomination by a training and research or occupational trainee sponsor.[133] For information relating to the sponsorship and nomination requirements, see MRD Legal Services Commentaries: Temporary Work Sponsor and Temporary Work Nominations.

A decision to refuse a Subclass 402 visa application is a decision reviewable under Part 5 of the Act in circumstances where:

For decisions made before 13 December 2018

- the visa applicant made the application in relation to the Occupational stream or the Research stream while in the migration zone,[134] and at the time the review application is made the

[120] F2016L01743.
[121] Item 1233 of Schedule 1 to the Regulations and Part 402
[122] cl.402.22.
[123] cl.402.23.
[124] cl.402.24.
[125] cl.402.211.
[126] cl.402.212.
[127] cl.402.213.
[128] cl.402.214.
[129] cl.402.215.
[130] cl.402.231A
[131] cl.402.216 and cl. 402.217.
[132] cl.402.221, cl.402.231, cl.402.241.
[133] cl.402.221. Note that these classes of sponsor were closed to new applications from 19 November 2016, reflecting the repeal of this class of visa: F2016L01743.
[134] s.338(2).

application is sponsored by an approved sponsor *or* an application for review of a decision not to approve the sponsor has been made and that decision is pending;[135] *or*

- the visa applicant made an application in relation to the Professional Development stream and the visa applicant is sponsored in accordance with s.338(5)(b).[136]

For decisions made on or after 13 December 2018

- the visa applicant made the application in relation to the Occupational stream or the Research stream while in the migration zone and at the time of the decision the visa applicant is identified in an approved nomination that has not ceased *or* a review of a decision not to approve the sponsor is pending *or* a review of a decision not to approve the nomination is pending; *or* except if it is a criterion for the grant of the visa that the applicant is identified in an approved nomination that has not ceased, the applicant is sponsored by an approved sponsor;[137] *or*

- the applicant is a secondary applicant;[138]

- the visa applicant made an application in relation to the Professional Development stream and the visa applicant is sponsored in accordance with s. 338(5)(b).

Applications for review in the s.338(2) related circumstances must be made by the visa applicant,[139]and in the case of s.338(5) matters, the sponsor.[140]

For decisions made on or after 13 December 2018 in relation to applications made in the migration zone by secondary applicants, the person with standing is 'a person to whose application the decision relates'.[141]

For more information on Subclass 402 visas, see MRD Legal Services Commentary: Subclass 402 – Training and Research (Class GC).

Class GE – Subclass 420 (Temporary Work (Entertainment)) visa

The Class GE (Temporary Work (Entertainment)) visa was introduced on 24 November 2012 and replaced the then Class TW Cultural/Social (Temporary) visa and Subclass 420 (Entertainment) visa. Class GE was repealed from 19 November 2016 and replaced by the Class GG (Temporary Activity) visa.[142] Any visa applications for this visa made before 19 November 2016 must be considered against the relevant criteria as previously in force.

[135] s.338(2)(d); and r.4.02(1A)(a) as substituted by SLI 2012, No.238.
[136] s.338(5) and cl.402.411.
[137] s.338(2)(d) as inserted by No. 90 of 2018. This final option only applies where there is no approved nomination criterion. For prescribed visas which require approval of a nomination, including Subclass 402 (Training and Research), one of s.338(2)(d)(i), (ii) or (iii) must generally be met at the time of the refusal decision (cl.401.212). For prescribed visas which do not need a nomination, one of s.338(2)(d)(ii) or (iv) must be met at the time of the refusal decision. This includes Subclass 402 (Training and Research) in the Occupational Trainee stream where training is provided by the Commonwealth, as well as the Research and Professional Development streams (cl.402.221(b), 402.231 and 402.241).
[138] s.338(9) and r.4.02(4)(q) as inserted by F2018L01707 provide that there is reviewable decision where the grant of a visa to a secondary applicant was refused because they did not meet the secondary criteria, and s.338(2)(a)-(c) are met.
[139] s.347(2)(a).
[140] s.347(2)(b).
[141]s.338(9) and r.4.02(5)(p) inserted by F2018L01707.
[142] F2016L01743.

Class GE contains one visa subclass: Subclass 420 (Temporary Work (Entertainment).[143] From 24 November 2012, the term 'Subclass 420 (Entertainment) visa' is defined in r.1.03 to include 'Subclass 420 (Temporary Work (Entertainment)) visa' and vice versa. This is intended to ensure that the reference to the renamed Subclass 420 (Temporary Work (Entertainment)) visa can also be taken to be a reference to the Subclass 420 (Entertainment) visa.[144]

This visa is for those intending to work in Australia in the entertainment industry. Unlike many other temporary work visas, it does not have common criteria and streams, rather one set of criteria which primary applicants must satisfy.[145] The main criteria primary applicants must meet relate to holding a qualifying visa,[146] nomination,[147] genuineness,[148] adequate means of support,[149] conduct relating to charging for migration outcomes,[150] health insurance,[151] public interest and special return criteria.[152]

The grant of a Subclass 420 visa involves the three stage application process.[153] For information relating to the sponsorship and nomination requirements, see MRD Legal Services Commentaries: Temporary Work Sponsor and Temporary Work Nominations.

A decision to refuse a Class GE Subclass 420 visa is a decision reviewable under Part 5 of the Act in circumstances where:

Onshore visa applications

- for decisions made before 13 December 2018, if at the time the review application is made the application is sponsored by an approved sponsor *or* an application for review of a decision not to approve the sponsor has been made and that decision is pending;[154] *or*

- for decisions made on or after 13 December 2018, if at the time of the decision the visa applicant is identified in an approved nomination that has not ceased *or* a review of a decision not to approve the sponsor is pending *or* a review of a decision not to approve the nomination is pending;[155] or the applicant is a secondary applicant.[156]

Offshore visa applications

- the visa applicant made the application while outside the migration zone and the visa applicant is sponsored in accordance with s.338(5)(b).[157]

Applications for review in the former circumstances must be made by the visa applicant,[158] and in the latter, the sponsor.[159] For decisions made on or after 13 December 2018 in relation to applications

[143] Item 1235 of Schedule 1 to the Regulations and Part 420 of Schedule 2 to the Regulations as inserted and substituted respectively by SLI 2012, No.238.
[144] See Explanatory Statement to SLI 2012, No.238 for item [13].
[145] cl.420.21.
[146] cl.420.211.
[147] cl.420.212.
[148] cl.420.214.
[149] cl.420.215.
[150] cl.420.212A.
[151] cl.420.213.
[152] cl.420.216 & cl.420.217.
[153] cl.420.212.
[154] s.338(2)(d) and r.4.02(1A)(e).
[155] s.338(2)(d) as inserted by No. 90 of 2018. For prescribed visas, including Subclass 420 (Entertainment), which require approval of a nomination, one of s.338(2)(d)(i), (ii) or (iii) must generally be met at the time of the refusal decision (cl.420.212).
[156] s.338(9) and r.4.02(4)(q) as inserted by F2018L01707 provide that there is reviewable decision where the grant of a visa to a secondary applicant was refused because they did not meet the secondary criteria, and s.338(2)(a)-(c) are
[157] s.338(5).
[158] s.347(2)(a).
[159] s.347(2)(b).

made in the migration zone by secondary applicants, the person with standing is 'a person to whose application the decision relates'.[160]

Class UW – Subclass 488 (Superyacht Crew) visa

The Class UW Superyacht Crew (Temporary) visa was introduced on 27 October 2008.[161] It was repealed from 19 November 2016 and replaced by the Class GG (Temporary Activity) visa.[162] Any visa applications for this visa subclass made before 19 November 2016 must be considered against the relevant criteria as previously in force.

Class UW contains one visa subclass: Subclass 488 (Superyacht Crew).[163] The Subclass 488 visa is a temporary visa which allows crew members to work on board a Superyacht in Australia. 'Superyachts' are sailing ships or motor vessels of a particular kind specified by the Minister in writing.[164]

The grant of a Subclass 488 visa does not involve the three stage process. However, there is an associated sponsorship approval requirement for the grant of the visa. For information relating to the sponsorship requirements, see MRD Legal Services Commentary: Temporary Work Sponsor.

A decision to refuse a Subclass 488 visa, where the visa application was made between 14 September 2009[165] and 18 November 2016, is a decision reviewable under Part 5 of the Act in circumstances where the visa applicant made the application while in the migration zone, and the applicant is sponsored by an approved sponsor at the time the application for review is made *or* an application for review of a decision not to approve the sponsor has been made and that decision is pending.[166] The application for review must be made by the visa applicant while in the migration zone.[167]

For decisions made on or after 13 December 2018 a decision is reviewable if the visa applicant made the application while in the migration zone, and a review of a decision not to approve the sponsor is pending; *or* the applicant is sponsored by an approved sponsor.[168] The application for review must be made by the visa applicant while in the migration zone.[169] Decisions made after 13 December 2018 relating to secondary onshore applicants are also reviewable,[170] and the person with standing is 'a person to whose application the decision relates'.[171]

[160] s.338(9) and r.4.02(5)(p) inserted by F2018L01707.
[161] SLI 2008, No.189.
[162] F2016L01743.
[163] Item 1227A of Schedule 1 to the Regulations and Part 488 of Schedule 2 to the Regulations inserted by Migration Amendment Regulations 2008 (No.6) (SLI 2008, No.189).
[164] r.1.03. For the relevant instrument see 'Superyacht' tab of the Register of Instruments – Business visas.
[165] For visa applications made prior to 14 September 2009, a Subclass 488 visa refusal decision will be a decision reviewable under Part 5 of the Act if the visa applicant made the application while in the migration zone (s.338(2)). Applications for review of these decisions must be made by the visa applicant (s.347(2)(a)).
[166] s.338(2)(d) r.4.02(1A)(l).
[167] s.347(2)(a) and s.347(3).
[168] s.338(2)(d) as amended by No. 90 of 2018. For prescribed visas, including Subclass 488 (Superyacht Crew), which do not require a nomination, one of s.338(2)(d)(ii) or (iv) must be met at the time of the refusal decision.
[169] s.347(2)(a) and s.347(3).
[170] s.338(9) and r.4.02(4)(q) as inserted by F2018L01707 provide that there is reviewable decision where the grant of a visa to a secondary applicant was refused because they did not meet the secondary criteria, and s.338(2)(a)-(c) are met.
[171] s.338(9) and r.4.02(5)(p) inserted by F2018L01707.

Pre-November 2012 visa classes – TH, TE, TG, UE, UV

A number of temporary work visa classes were repealed (or largely repealed in the case of Class TE) on 24 November 2012,[172] as summarised briefly below. Please contact MRD Legal Services for further information on any of these visa classes.

The **Class TH Education (Temporary)** visa contained a number of subclasses at various points in time, as follows:

- *Subclass 406 (Government Agreement*) – open to applications from 14 September 2009 until 23 November 2012.[173] A visa for non-citizens to enter Australia in accordance with the terms of an agreement between a government in Australia and the government of a foreign country, or to direct the national operations of prescribed organisations in Australia;

- *Subclass 415 (Foreign Government Agency)* – a visa to provide entry for representatives of foreign government agencies who do not have official status in Australia, and certain foreign language teachers to be employed in Australia by their government or government agency;

- *Subclass 418 (Education)* – open to applications from 1 September 1994 until 13 September 2009. For persons teaching or undertaking research at Australian universities or tertiary institutions;

- *Subclass 419 (Visiting Academic)* – for academics in tertiary or research institutions overseas to visit Australia to observe or participate in established research projects; and

- *Subclass 442 (Occupational Trainee)* – for people to complete occupational training that is either training in the workplace that is required to obtain registration to be employed in the occupation of the identified visa applicant, a structured workplace training program tailored to enhance the skills of the identified visa applicant in an eligible occupation or a structured workplace-based training program that promotes capacity building overseas.

From 24 November 2012 these visa types were replaced, variously by the Subclass 402 (Training and Research) (Class GC) visa and the Subclass 403 (Temporary Work (International Relations)) (Class GC) visa.

The **Class TE Cultural / Social (Temporary)** visa contained a number of subclasses at various points in time, as follows:

- *Subclass 411 (Exchange)* – open to applications from 1 August 1996 until 23 November 2012. A visa which allowed entry of skilled persons under exchange arrangements to broaden their work experience and skills, and gave Australian residents reciprocal opportunities to work with overseas organisations;

[172] SLI 2012, No.238.
[173] Migration Amendment Regulations 2009 (No.9) (SLI 2009, No.212) and SLI 2012, No.238.

- *Subclass 416 (Special Program)* – the only subclass in Class TE from 24 November 2012 until 18 November 2016.[174] A visa for people who have been invited to participate in an approval special program such as a community benefit, cultural benefit, cultural enrichment or youth exchange program, and for people to participate in the Pacific Seasonal Worker Pilot scheme;

- *Subclass 420 (Entertainment)* – moved to Class GE from 24 November 2012 and renamed, as discussed above. A visa for people to work in the Australia entertainment industry, in film, television or live productions in either a performance or behind the scenes role;

- *Subclass 421 (Sport)* – for professional sports people to engage in competition and training with Australian residents;

- *Subclass 423 (Media and Film Staff)* – intended for persons seeking temporary entry as professional media staff members of foreign news organisations assigned to Australia or for involvement in the production of documentary programs exclusively for overseas use;

- *Subclass 428 (Religious Worker)* – intended for persons seeking to engage in full-time work or an activity that was predominantly non-profit in nature and directly serving the religious objectives of a religious institution in Australia. For visa applications made between 9 August 2008 and 13 September 2009 there was a sponsorship requirement,[175] and from 14 September 2009 until 23 November 2012 there was both a sponsorship and nomination requirement.

The Subclass 416 (Special Program) visa was replaced from 19 November 2016 by the Class GG Subclass 408 (Temporary Activity) visa. From 24 November 2012 the Subclass 420 (Entertainment) visa was replaced by the Subclass 420 (Temporary Work (Entertainment) visa, the Subclass 423 (Media and Film staff) visa was replaced by the Subclass 457 and Subclass 420 (Temporary Work (Entertainment) visas, and the other visa types replaced by the Subclass 401 (Long stay Activity) visa and the Subclass 402 (Training and Research) (Class GC) visa.

The **Class TG Domestic Work (Temporary)** visa had two visa subclasses as follows:

- *Subclass 426 (Domestic Worker (Temporary) – Diplomatic or Consular)* – for a domestic worker to be employed in the household of a diplomatic visa holder in Australia;

- *Subclass 427 (Domestic Worker (Temporary) – Executive)* – for a domestic worker to be employed in the household of certain senior executives in charge of an Australia office of an overseas organisation.

[174] Class TE of Schedule 1 was substituted to include only Subclass 416 by SLI 2012, No.238.
[175] See version of cl.428.222 as in force during this period.

Both were repealed from 24 November 2012. Subclass 426 was replaced from that date by the Subclass 403 (Temporary Work (International Relations)) visa and Subclass 427 from March 2013 by the Subclass 401 (Temporary Work (Long Stay Activity)) visa.

The **Class UE Medical Practitioner (Temporary)** visa was introduced on 1 August 1996 and contained only one visa subclass: Subclass 422 (Medical Practitioner) visa. It was intended to provide for the entry of temporary resident doctors to help overcome difficulties experienced in attracting and retaining doctors to maintain the standard of health care in Australia. Subclass 422 was closed to new primary applications on 1 July 2010[176] and repealed on 24 November 2012.[177]

The **Class UV Sponsored Training (Temporary)** visa was introduced on 1 July 2003. On introduction it contained only Subclass 470 (Professional Development). Subclass 471 (Trade Skills Training) was introduced on 1 November 2005[178] and subsequently removed from 10 September 2007.[179] Class UV was repealed from 24 November 2012 and Subclass 470 replaced by the Subclass 402 (Training and Research) visa in the Professional Development stream.[180]

Available Decision Templates/Precedents

The following decision templates for temporary work visas are available:

- **Subclass 457 Visa Refusal General -** this template is suitable for Subclass 457 cases where the visa application was made on or after 2 April 2005 and intended for use in cases *other than* where the issue is whether the visa applicant's sponsor is an approved business sponsor (cl.457.223(4)) (see below).
- **Subclass 457 Visa Refusal Standard Business Sponsor** - this template is for use in review of a decision to refuse a Subclass 457 visa where the application is made on the basis of employment by an approved Standard Business Sponsor (cl.457.223(4)). It is suitable for all issues in relation to cl.457.223(4), including Skills and English language. The template is only suitable for visa applications made on or after 1 March 2003.
- **Subclass 401 Visa Refusal General** - this template is for use in review of a decision to refuse a Class GB (Subclass 401) visa and covers common visa criteria and stream specific criteria. The template is only suitable for visa applications made between 24 November 2012 and 18 November 2016.
- **Subclass 402 Visa Refusal General** – this template is for use in review of a decision to refuse a Class GC (Subclass 402) visa and covers common visa criteria and stream specific criteria. The template is only suitable for visa applications made between 24 November 2012 and 18 November 2016.

[176] Migration Legislation Amendment Regulations 2010 (No.1) (SLI 2010, No.117).
[177] SLI 2012, No.238.
[178] Migration Amendment Regulations 2005 (No.9) (SLI 2005, No.240).
[179] Migration Amendment Regulations 2007 (No.8) (SLI 2007, No.272).
[180] SLI 2012, No.238.

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2005 (No.9)	SLI 2005, No.240
Migration Amendment Regulations 2007 (No.8)	SLI 2007, No.272
Migration Amendment Regulations 2008 (No.6)	SLI 2008, No.189
Migration Amendment Regulations 2009 (No.9)	SLI 2009. No.212
Migration Legislation Amendment Regulations 2010 (No.1)	SLI 2010, No.117
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Amendment (Pacific Labour Scheme) Regulations 2018	F2018L00829
Migration Amendment (Enhanced Integrity) Regulations 2018	F2018L01707
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018	No. 90 of 2018

Appendix 1: Table of temporary work visas pre and post 19 November 2016

Post 19 November 2016	Pre 19 November 2016
Subclass 400 (Temporary Work (Short Stay Specialist)) – Highly Specialised Work stream and Australia's interest stream only	Subclass 400 (Temporary Work (Short Stay Specialist))
Subclass 407 (Training and Research)	Subclass 402 (Training and Research) – Occupational Trainee stream and Professional Development stream
Subclass 408 (Temporary Activity)	Subclass 400 (Temporary Work (Short Stay Activity)) – Invited Participant Stream Subclass 401 (Temporary Work (Long Stay Activity)) visa Subclass 402 (Training and Research) – Research stream Subclass 416 (Special Program) Subclass 420 (Temporary Work (Entertainment)) Subclass 488 (Superyacht crew)
Subclass 403 (Temporary Work (International Relations))	Subclass 403 (Temporary Work (International Relations)
Subclass 417 (Working Holiday)	Subclass 417 (Working Holiday)
Subclass 457 (Temporary Work (Skilled))	Subclass 457 (Temporary Work (Skilled))
Subclass 462 (Work and Holiday)	Subclass 462 (Work and Holiday)

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Sponsorship Obligations – Division 2.19

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Overview

As of 14 September 2009, standard business sponsors and other temporary business and work sponsors approved under s.140E of the *Migration Act 1958* (the Act) are subject to the obligations set out in Division 2.19 of Part 2A of the Migration Regulations 1994 (Regulations). These obligations replaced the previous system of sponsorship undertakings, and apply to specified sponsors regardless of whether a sponsor undertakes to fulfil the obligations.

The imposition of obligations on sponsors is designed to ensure that non-citizens sponsored to work in Australia under the program are protected and that the program is not used inappropriately.[1] The obligations were inserted as part of a range of measures designed to preserve the integrity of the Australian labour market and ensure that the working conditions of sponsored visa holders meet Australian standards.[2] In the second reading speech to the Bill that introduced the obligations, the Minister said:

> *… any sponsor obligations that are prescribed in the Migration Regulations will:*
>
> - *lead to effective and efficient identification of non-compliance – this could be done for example by obliging sponsors to cooperate with monitoring by the Department of Immigration and Citizenship;*
> - *discourage inappropriate use of temporary skilled visa programs – this could be done for example by obliging sponsors to reimburse the Commonwealth for location, detention and removal expenses should the visa holder abscond*
> - *provide an effective price signal to encourage the hiring and training of Australian citizens and permanent residents; and, most importantly*
> - *protect overseas workers from exploitation.*
>
> *…The better defined sponsorship obligations that will be found in the Migration Regulations will deliver greater clarity to both sponsors and overseas workers.*[3]

The obligations may be, and are, varied from time to time. The Minister has a statutory obligation to take all reasonable steps to ensure that sponsorship obligations that are prescribed include obligations in relation to a range of matters (including salary payments, costs, notification of change in circumstances, inspectors, information management and visa holder participation in nominated positions).[4]

The obligations currently prescribed fall within three broad (and not mutually exclusive) categories:

- those facilitating compliance with and monitoring of the temporary business scheme (e.g. the obligation to cooperate with inspectors[5]);
- those ensuring sponsors bear certain costs (e.g. the obligation to pay travel costs to enable sponsored persons to leave Australia[6]);

[1] s.140AA(d) inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013) with effect from 30 June 2013.
[2] Explanatory Memorandum to *Migration Legislation Amendment (Worker Protection) Act 2008* (No.159, 2008).
[3] Senator Chris Evans, Minister for Immigration and Citizenship, Second Reading Speech, *Migration Legislation Amendment (Worker Protection) Bill*, 24 September 2008.
[4] s.140HA(1) inserted by the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013) with effect from 30 June 2013.
[5] r.2.78.

- those aimed at protecting sponsored visa holders and protecting the integrity of the labour market (e.g. the obligation to ensure equivalent terms and conditions of employment[7]).

Some obligations apply to all types of approved sponsor (e.g. the obligation to inform Immigration when certain events occur[8]) and some apply only to specified types of sponsor (e.g. the obligation to secure an offer of a reasonable standard of accommodation[9]). A sponsor may be required to fulfil the prescribed obligation generally (e.g. the obligation to keep records[10]) or in respect of each primary (and secondary) sponsored person[11] (e.g. the obligation to ensure a sponsored person works or participates in the nominated occupation, program or activity[12]).[13]

A range of sanction and enforcement tools may be applied to current and former sponsors who fail to fulfil an obligation. They include:

- barring the sponsor from doing certain things;[14]
- cancelling the person's approval as a sponsor;[15]
- applying for a civil penalty order;[16]
- accepting an undertaking from the sponsor;[17]
- apply for an order to enforce undertakings;[18]
- issuing an infringement notice as an alternative to proceedings for a civil penalty order;[19] and
- requiring and taking a security, or enforcing a security already taken.[20]

For more information about sanctions see the MRD Legal Services Commentary: Business Sponsorship Bars.

In addition to the above sanctions being able to be imposed for breach of sponsorship obligations, prior to 18 March 2018, applicants for variation of standard business sponsorship approval under r.2.68 were required to have complied with the applicable obligations relating to the applicant's training requirements during the period of the applicant's most recent approval as a standard

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[6] r.2.80.
[7] r.2.79.
[8] r.2.84.
[9] r.2.85.
[10] r.2.82.
[11] 'Primary sponsored person' is defined in r.2.57(1). See 'Application and period of effect of sponsorship obligations' below for discussion of this definition.
[12] r.2.86 and, from 19 November 2016, r.2.86A.
[13] s.140H(4).
[14] s.140K(1)(a)(i), (2)(a)(i), s.140M.
[15] s.140K(1)(a)(ii), s.140M.
[16] s.140K(1)(a)(iii) and (2)(a)(ii) as amended by *Migration Amendment (Reform of Employer Sanctions) Act 2013* (No.10, 2013) with effect from 1 June 2013. Civil penalties orders are defined in s.486R(4) and arise where an eligible court is satisfied that the person has contravened a civil penalty provision, and the court orders the person to pay to the Commonwealth such pecuniary penalty for the contravention as the court determines to be appropriate. They are imposed for failing to satisfy a sponsorship obligation and are set out in s.140Q and r.5.20A. See *MIAC v Sahan Enterprises Pty Ltd* (2012) 266 FLR 111.
[17] s.140K(1)(a)(iv),(2)(a)(iii) as inserted by the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013) and applying to a sponsorship obligation regardless of when it arose.
[18] s.140K(1)(a)(v), (2)(a)(iv) as inserted by the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013) and applying to a sponsorship obligation regardless of when it arose.
[19] s.140K(1)(b), (2)(b). Infringement notices were previously provided for in s.140R (repealed from 1 June 2013) and Division 5.4 and 5.5 of Part 5 of the Regulations.
[20] s.140K(1)(c), (2)(c).

business sponsor in order to have their application for variation of the terms of their sponsorship approved.[21]

Application and period of effect of sponsorship obligations

Application to sponsors

Section 140H of the Act provides that a person who is or was an 'approved sponsor' must satisfy the sponsorship obligations prescribed by the regulations. An approved sponsor is a person approved as a sponsor under s.140E of the Act and whose approval has not been cancelled under s.140M or otherwise ceased to have effect under s.140G, or a person (other than a Minister) who is a party to a work agreement.[22] They include people who were standard business sponsors or former standard business sponsors who remained bound by undertakings immediately before 14 September 2009.[23]

The sponsorship obligations are prescribed in the regulations, rather than being set out in the Act, to provide flexibility to remove or add sponsorship obligations.[24]

A party (or former party) to a work agreement (other than a Minister) may vary an obligation by a term of the agreement, so that the agreed obligation applies instead of that prescribed in the Regulations.[25] When determining the obligations of a party to a work agreement, it is therefore necessary to examine the agreement and determine which, if any, of the obligations it purports to vary, including whether the terms are effective in varying the obligation. All of the prescribed sponsorship obligations (as set out in the next section), should be read with this qualification in mind when considering an obligation owed by a work agreement party.

Each obligation is prescribed in a different regulation. For people who were standard business sponsors immediately before 14 September 2009, the obligations commence on the later of:

- 14 September 2009; or
- the date on which an event prescribed as the commencement point for an obligation occurs.[26]

[21] r.2.68(k)(i)(B) as in force before 18 March 2018. The process for applying for variation of the terms of approval of a standard business sponsor was removed from 18 March 2018 by the Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[22] s.5(1).
[23] *Migration Legislation Amendment (Worker Protection) Act 2008,* Schedule 1, items [45] and [46]; Migration Amendment Regulations 2009 (No. 5) (SLI 2009, No. 115) as amended by Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No. 1) (SLI 2009, No.203) and Migration Amendment Regulations 2009 (No. 5) Amendment Regulations 2009 (No.2) (SLI 2009, No.230), Schedule 1, Item [1].
[24] Explanatory Memorandum to *Migration Legislation Amendment (Worker Protection) Bill 2008*, p.21, [114].
[25] s.140H(2).
[26] *Migration Legislation Amendment (Worker Protection) Act 2008,* Schedule 1, items [45] and [46]; SLI 2009, No. 115, r.3(3). The Explanatory Memorandum to the Bill states at p.70, [470]: 'Subitem 45(5) provides that if an existing subclass 457 visa sponsor has made an undertaking under existing section 140H, then the undertaking ceases to have effect when Schedule 1 of the Bill commences, and they must satisfy any applicable sponsorship obligation prescribed by the regulations under new section 140H (inserted by item 19). An applicable sponsorship obligation is only required to be satisfied on and from commencement of the new sponsorship framework, a person cannot fail to satisfy a sponsorship obligation through an action that occurred prior to commencement of the new sponsorship framework.' The Explanatory Statement to SLI 2009 No.115 states at p.2 of Attachment B: 'Subregulation 3(3) clarifies that if an event prescribed in Division 2.19 (as to when a sponsorship obligation starts to apply to a person) happens prior to 14 September 2009, then the prescribed obligation starts to apply on 14 September 2009, rather than on the happening of the event. This confirms that the sponsorship obligations cannot commence retrospectively.' An example of a prescribed event is in r.2.81 (obligation to pay costs incurred by the Commonwealth to locate and remove unlawful non-citizen). The obligation starts on the day on which the primary sponsored person becomes an unlawful non-citizen.

Each regulation sets out to whom the particular obligation applies, and the period during which the obligation applies.

A sponsor may be required to fulfil the prescribed obligation generally (e.g. the obligation to cooperate with inspectors) or in respect of each sponsored visa holder.[27] Sponsored visa holders would include the 'primary sponsored person' and any 'secondary sponsored person', in relation to a current or former approved sponsor or party to a work agreement, as defined in the Regulations.[28]

Application to sponsored persons

In general terms, a person who holds a specified visa and who was *last* identified in an approved nomination by the approved sponsor or party to a work agreement **or** who satisfied the primary visa criteria on the basis of the approved sponsor's agreement to sponsor the person is a 'primary sponsored person' in relation to that sponsor or work agreement party.[29]

In addition, a person who does not hold a substantive visa, but whose last substantive visa was a specified visa, and who was last identified in an approved nomination by the approved sponsor or work agreement party, **or** who satisfied the primary visa criteria on the basis of the approved sponsor's agreement to sponsor the person, is a 'primary sponsored person' in relation to the sponsor or party.[30]

An important feature of this definition is that once a person is granted a new visa (of a specified kind)[31] based on a nomination or sponsorship by a new sponsor or work agreement party, that person ceases to be a sponsored person in relation to the former sponsor or work agreement party. As some of the obligations only apply in relation to a primary (or secondary) sponsored person, a visa grant based on a new sponsorship will mean that the former sponsor ceases to have obligations in relation to that person. The former sponsor may, however, continue to be liable for obligations in effect when the person was a sponsored person in relation to the former sponsor. A person who remains in Australia and is not granted a new visa of a prescribed kind will continue to be a sponsored person in relation to the former sponsor, until the term of the sponsorship approval expires or the approval is cancelled.[32] Where a person has been sponsored by one or more persons, then, the definitions of 'primary sponsored person' and 'approved sponsor', read in conjunction with the terms of the obligations themselves, determine who owes an obligation to the sponsored person.

The Explanatory Statement to the amendment which inserted the definition states:

> *This part of the definition of "primary sponsored person" is intended to ensure that sponsors continue to be subject to the sponsorship obligations after the Subclass 457 (Business (Long Stay)) visa ceases, but the primary sponsored person is still in Australia and has not been granted another substantive visa, thereby ensuring that there is someone who is responsible for the visa holder.*[33]

In general terms, a person is a 'secondary sponsored person' in relation to a former sponsor or work agreement party, if the person holds a specified visa granted on the basis of the sponsor or party having agreed to sponsor them on the basis of satisfying secondary criteria, or they were last

[27] s.140H(4).
[28] r.2.57(1).
[29] r.2.57(1).
[30] r.2.57(1).
[31] See r.2.56 for the prescribed kinds of visa.
[32] See definition of 'approved sponsor' in s.5(1) and definition of 'primary sponsored person' in r.2.57(1).
[33] Explanatory Statement to SLI 2009, No.115, p.13.

identified in an approved nomination by the sponsor.[34] The definition also includes certain sponsored children of a primary sponsored person born in Australia after the visa application.

Details for each obligation are discussed below.

The prescribed sponsorship obligations

The sponsorship obligations prescribed for the purposes of temporary work and business visas are contained in Division 2.19 of Part 2A of the Regulations.

Obligation to cooperate with inspectors - r.2.78

Nature of obligation

Under r.2.78 of the Regulations, current and former approved sponsors have an obligation to co-operate with inspectors appointed under the Act who are exercising powers under the Act.[35]

Inspectors may be appointed, with powers to:

- determine whether there is, or has been, compliance with an obligation;
- determine whether there is, or has been, compliance with a term or a condition of a work agreement;
- determine whether a circumstance exists, or has existed, in which a sponsor may be barred or have their approval cancelled;
- investigate if a circumstance exists or existed to assist in determining what action to take.[36]

Regulation 2.78 does not specify what cooperating with an inspector entails. Rather, it sets out circumstances in which a person is taken not to have cooperated with an inspector.[37] Broadly speaking, and without limiting the obligation to cooperate, a person is taken not to have cooperated with inspectors if the person:

- hinders or obstructs the inspectors;
- conceals, or attempts to conceal, certain information, people or things from the inspectors;
- assaults, threatens or intimidates the inspectors or persons assisting the inspectors (or attempts to do so).[38]

To whom does the obligation apply?

The obligation to cooperate with inspectors applies to a person who is or was an 'approved sponsor'.[39] That is, current and former, standard business sponsors, temporary activities sponsors, professional development sponsors, temporary work sponsors and non-Ministerial parties to a work agreement. The obligation applies generally rather than in respect of each sponsored person.[40]

[34] r.2.57(1).
[35] r.2.78(2). Specifically powers under Subdivision F of Division 3A of Part 2 of the Act.
[36] s.140V, s.140X, r.2.102C.
[37] r.2.78(3).
[38] r.2.78(3).
[39] r.2.78(1). An 'approved sponsor' includes a party to a work agreement (other than a Minister): s.5.
[40] r.2.78(1).

When does the obligation apply?

The obligation commences on the day on which the person is approved as a sponsor (or the work agreement commences) and ends 5 years after the day on which the person ceases to be a sponsor (or on which the work agreement ceases).[41]

Obligation to ensure equivalent terms and conditions of employment - r.2.79

Nature of obligation

Under r.2.79, certain current and former approved sponsors have an obligation to ensure that the terms and conditions of employment that are provided to sponsored persons are no less favourable than those provided to an Australian citizen or permanent resident performing equivalent work in the same workplace and location. The precise terms of the obligation vary depending upon the characteristics of the relevant primary sponsored person.

At present, there are different types of obligations, each corresponding to a different group of primary sponsored persons.[42] As discussed below, a single standard business sponsor may have different 'terms and conditions' obligations in respect of different sponsored persons. The types of primary sponsored persons to whom the obligations in r.2.79 apply are:

- persons sponsored by standard business sponsors who hold (or whose last substantive visa was) a Subclass 457 or Subclass 482 visa where the nomination identifying them was made before 18 March 2018;[43]
- persons sponsored by standard business sponsors who hold (or whose last substantive visa was) a Subclass 457 or Subclass 482 visa where the nomination identifying them was made on or after 18 March 2018;[44]
- persons sponsored by a non-Ministerial party to a work agreement.[45]

However, the obligations in r.2.79 do not apply in respect of the following type of primary sponsored person:

- persons sponsored by standard business sponsors who hold or last held a Subclass 457 or Subclass 482 visa and whose annual earnings are at least a specified amount.[46]

<u>Standard business sponsors: Sponsored persons who hold or last held a Subclass 457 or Subclass 482 visa and identified in a nomination made before 18 March 2018</u>

For a current or former standard business sponsor of a primary sponsored person who holds or last held a Subclass 457 or Subclass 482 visa identified in a nomination made before 18 March 2018, the obligation is to ensure that:

- the terms and conditions of employment provided to the primary sponsored person are no less favourable than those based on which the nomination was approved;[47] and

[41] r.2.78(4), r.2.78(5).
[42] r.2.79 was amended by F2018L00262 to remove redundant material relating to the pre-14 September 2009 scheme and to include reference to the new Subclass 482 (Temporary Skill Shortage) visa. Obligations applying in respect of primary sponsored persons who hold or held a Subclass 457 visa and persons sponsored by a non-Ministerial party to a work agreement remained unchanged by these amendments.
[43] See r.2.79(1)(a) and r.2.79(3)(a).
[44] See r.2.79(1)(a) and r.2.79(3)(b).
[45] See r.2.79(3)(e).
[46] See r.2.79(1A). See the 'TSMIT' tab of the Register of Instruments – Business Visas for the relevant instrument.

- the terms and conditions of employment provided to the primary sponsored person are no less favourable than the terms and conditions of employment that the sponsor provides, or would provide, to an Australian citizen or an Australian permanent resident to perform equivalent work in the person's workplace at the same location.[48]

For the purpose of these obligations, a set of terms and conditions of employment for a person (the first set) is defined as being 'less favourable' than another set if:

- the 'earnings' provided for in the first set are less than the earnings provided for in the other set; **and**
- there is no substantial contrary evidence that the first set is not 'less favourable' than the other set.[49]

According to the Explanatory Statement that accompanied the introduction of the definition of 'less favourable':

> *The effect of this amendment is to allow earnings to be compared when comparing two sets of terms and conditions in the first instance to determine whether one set of terms and conditions of employment are less favourable than another set. The amendment also allows for substantial evidence to be provided to illustrate that aspects of terms and conditions of employment other than earnings should be considered in comparing two sets of terms and conditions of employment.*
>
> *For example, if the earnings under one set of terms and conditions of employment for ordinary hours of work of 50 hours per week, are greater than another set of terms and conditions of employment for ordinary hours of work for 38 hours per week, it may be entirely appropriate to regard the latter set of terms and condition as no less favourable than the former.*[50]

'Earnings' is defined as including wages, amounts applied or dealt with in any way on the person's behalf or as they direct, and the agreed money value of non-monetary benefits.[51] It does not include payments the amount of which cannot be determined in advance, reimbursements or certain contributions to a superannuation fund.[52] According to the Explanatory Statement which accompanied the introduction of this definition:

> *This definition is based on the definition of 'earning' in section 332 of the* Fair Work Act 2009*. The definition is based on section 332 of the* Fair Work Act 2009 *as it is intended that interpretations of section 332 of the* Fair Work Act 2009 *will apply to this definition.*[53]

[47] r.2.79(3)(a)(iii). According to the Explanatory Statement accompanying SLI 2009, No.230 which initially introduced this obligation, its purpose is 'to ensure that the terms and conditions of employment of a primary sponsored person do not fall below what was approved at the nomination stage' (p.11).
[48] r.2.79(3)(a)(iv). Note that while the criterion for approval of a nomination in r.2.72(10)(c) (as in force before 18 March 2018) was amended from 1 July 2013 to remove reference to an Australian equivalent performing equivalent work '*in the person's workplace'* at the same location (see SLI 2013 No.146), the corresponding obligation was not amended to remove the parallel reference. Accordingly, when considering this obligation, the retention of the words 'in the same workplace' arguably limits the consideration of terms and conditions of Australian equivalents in the same workplace and not outside it. .
[49] r.2.57(3A).
[50] Explanatory Statement to SLI 2009 No.230, p.6.
[51] r.2.57A(1). 'Non-monetary benefits' are identified in r.2.57A(3) as benefits other than an entitlement to a payment of money to which the employee is entitled in return for the performance of work; and for which a reasonable money value has been agreed by the employee and the employer.
[52] r.2.57A(2). Sub-regulation 2.57A(4) applies to employer superannuation fund contributions in specified circumstances.
[53] Explanatory Statement to SLI 2009, No. 230, p.7.

Standard business sponsors: Sponsored persons who hold or last held a Subclass 457 or Subclass 482 visa and identified in a nomination made on or after 18 March 2018

For a current or former standard business sponsor of a primary sponsored person who holds, or last held a Subclass 457 visa or Subclass 482 visa and who is identified in a nomination made on or after 18 March 2018, the obligation is to ensure that:

- the primary sponsored person's annual earnings in relation to the occupation are not less than the annual earnings which the sponsor indicated would be provided to them when the nomination was approved;[54]
- the primary sponsored person's earnings in relation to the occupation are not less than the earnings an Australian citizen or an Australian permanent resident earns, or would earn, for performing equivalent work in the same workplace at the same location;[55] and
- the employment conditions (other than in relation to earnings) that apply to the primary sponsored person are no less favourable than those that apply, or would apply, to an Australian citizen or an Australian permanent resident performing equivalent work at the same location.[56]

Parties to work agreement: Persons sponsored by a party to a work agreement

For a sponsor (other than a Minister) who is or was a party to a work agreement, the obligation is to ensure that:

- the terms and conditions of employment provided to the primary sponsored person are no less favourable than the terms and conditions of employment set out in the work agreement.[57]

To whom does the obligation apply?

The obligation applies to former or current standard business sponsors of primary sponsored persons who hold or have held a Subclass 457 or a Subclass 482 visa.[58] It also applies to non-Ministerial parties to a work agreement who are former or current approved sponsors of primary sponsored persons if they hold or have held a Subclass 457 or Subclass 482 visa.[59] However, the obligation does not apply in relation to standard business sponsors of current or former subclass 457 visa holders whose annual earnings are at least a specified amount .[60]

When does the obligation apply?

The obligation commences on the day of approval of the nomination of the primary sponsored person, or the day of visa grant if the primary sponsored person does not hold a Subclass 457 or Subclass 482 visa on the day the nomination is approved.[61] It ends on the earlier of the day when the

[54] r.2.79(3)(b)(i).
[55] r,2.79(3)(b)(ii). According to the Explanatory Statement to F2018L00262 which introduced this obligation, 'this means that the earnings of the visa holder or former visa holder must keep pace with any increases in the earnings that are provided, or would be provided, to Australian workers performing equivalent work'.
[56] r.2.79(3)(b)(iii). Note that the definition of 'less favourable' in r.2.57(3A) does not apply to this obligation (According to the Explanatory Statement to F2018L00262 which amended r.2.57(3A), this is to clarify that the requirement to focus on earnings when considering terms and conditions of employment does not apply to r.2.79(3)(b)(iii) which relates to terms and conditions of employment other than earnings).
[57] r.2.79(3)(e).
[58] r.2.79(1)(a) as amended by F2018L00262 (which commenced on 18 March 2018) to include reference to subclass 482 visa holders.
[59] r.2.79(1)(b) as amended by F2018L00262 (which commenced on 18 March 2018) to include reference to subclass 482 visa holders.
[60] r.2.79(1A). The instrument which specifies the income threshold can be found in the MRD Legal Services Register of Instruments – Business Visas under the 'TSMIT' tab.
[61] r.2.79(4)(a).

sponsored person is granted a further visa (other than a Subclass 457 or Subclass 482 visa) or when he or she ceases employment with the sponsor.[62]

Standard business sponsors: Sponsored persons earning above a specified amount

The 'terms and conditions' obligation in r.2.79 does *not* apply to a standard business sponsor of a primary sponsored person who holds or last held a subclass 457 visa if the annual earnings of the primary sponsored person are equal to or greater than the amount specified by the Minister in a written instrument.[63] The instrument which specifies the income threshold can be found in the MRD Legal Services Register of Instruments – Business Visas under the 'TSMIT' tab.

The policy behind this exception to the general obligation was set out in Departmental guidelines (PAM3) as in force in 2011:

> *The purpose of this exemption is to mirror a similar exemption in the criteria for approval of a nomination (see regulation 2.72(10AB)), and to reduce the administrative burden for the sponsor and the department where the annual earnings are relatively high and the risks in terms of compliance and the integrity of the overall skilled temporary entry visa program are relatively low.*[64]

Obligation to pay travel costs to enable sponsored persons to leave Australia - r.2.80

Nature of obligation

Under r.2.80 certain sponsors have an obligation to pay 'reasonable and necessary' travel costs to enable a sponsored person to leave Australia if:

- the costs have been requested in writing by the Minister or the sponsored person; and
- the costs have not already been paid by the sponsor in accordance with the obligation.[65]

A person is taken to have paid reasonable and necessary costs if:

- the costs include the cost of travel from the primary sponsored person's usual place of residence in Australia to the place of departure from Australia; and
- the costs include the travel from Australia to the country the person specifies in their travel request (see next paragraph): and
- the costs are paid within 30 days of receiving the request for costs; and
- the costs are for economy air class travel or the equivalent of economy air class travel.[66]

For the obligation to arise, the request to pay the travel cost must also conform with specified requirements. That is, the request must:

- specify whose travel will be funded by the costs; and
- specify which country the person will travel to (they must hold a passport for that country); and

[62] r.2.79(4)(b).
[63] r.2.79(1A).
[64] PAM3: Sponsorship applicable to Division 3A of Part 2 of the Act – Sponsorship Obligations – The Sponsorship Obligations – 116. Equivalent Terms and Conditions of Employment – Reg 2.79 – 116.1 Who this obligation relates to (compilation before 15 May 2011).
[103] r.2.80(2).
[66] r.2.80(4).

- be made while the person held a Subclass 416,[67] 428,[68] 457 or 482[69] visa or, from 24 November 2012, a Subclass 401 or 402 visa,[70] or, from 19 November 2016 a Subclass 408 visa.[71] If the request does not meet these requirements, the obligation will not arise.

According to the Explanatory Statement that introduced the obligation:

> *The obligation to pay travel costs is contingent on a request from either a sponsored person or the Department (who will have contacted the sponsored person) in order to provide an appropriate trigger for the obligation. Unless a request is made, it will not be clear whether the sponsored person(s) intends to return home well in advance of their visa expiring or whether they intend to extend their stay by applying for a further visa.*[72]

Departmental policy (PAM3) explains the obligation as follows:

> *Under policy, the sponsor should pay for return travel costs for sponsored persons prior to the purchase of an airline ticket and any mandatory costs associated with return travel, for example, transit visa costs and airport taxes.*
>
> *The sponsor must be able to demonstrate that the travel costs paid equate to economy class air travel from Australia to the country specified in the written request.*
>
> *Under policy, the sponsor is not required to:*
>
> - *book airline tickets for the sponsored person*
> - *pay costs associated with relocation of personal effects (beyond any included airline baggage allowance)*
> - *pay costs for excess luggage*
> - *pay for rental property expenses (that is, costs of breaking a lease)*
> - *provide for personal choices to include, for example, stopovers on international flights*
> - *provide access to stopover hotels during international flights (if that stop over flight was solely due to the expressed personal preference of the sponsored person)*
> - *pay for the cost of obtaining a travel document (passport).*[73]

The Tribunal should be careful not to elevate these guidelines to the level of legislative requirements. In particular, the Tribunal should make its own findings of fact as to whether the costs listed as not being required to be paid by the sponsor are reasonable and necessary, having regard to all the

[67] But, from 1 July 2012, this obligation only applies to special program sponsors if the sponsored person holds a Subclass 416 (Special Program) visa *granted on the basis that the person satisfied the criterion in paragraph 416.222(a) of Schedule 2* or whose last substantive visa was granted on that basis: Migration Amendment Regulations 2012 (No.3) (SLI 2012 No.106).
[68] Note that Subclass 428 was closed to new applications from 24 November 2012, and references to this visa type were removed from r.2.80 for applications made from 19 November 2016 (see F2016L01743).
[69] r.2.80(3) as amended by F2018L00262, which commenced on 18 March 2018.
[70] r.2.80(3) as amended by Migration Legislation Amendment Regulation 2012 (No.4) (SLI 2012, No.238) to include reference to the Subclass 401 and 402 visas introduced on that date. While the transitional provisions introducing these amendments are unclear, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). The transitional provisions introducing this amendment provide that the amendments apply in relation to an application made on or after 24 November 2012 for a visa, approval as a sponsor, approval of a nomination or the variation of the terms of an approval as a sponsor, but do not indicate which of these applications is relevant for the purpose of determining the application of this amendment: item [1] of Schedule 4. Nevertheless, the context of the amendment, being in relation to sponsorship obligations, appears to suggest that the transitional arrangements must refer to the sponsorship application date, as opposed to say the visa application date, to be effective.
[71] r.2.80(3)(d) as amended by F2016L01743, in respect of sponsorship applications made on or after 19 November 2016.
[72] Explanatory Statement to SLI 2009 No. 115, p.34.
[73] PAM3: Migration Regulations – Divisions – [Div.2.11-2.23] Sponsorship compliance framework: Sponsorship obligations - Obligation to pay travel costs to enable sponsored persons to leave Australia – Reasonable and necessary costs (reissued 13//04/2018).

circumstances of the particular case. Note that r.2.80(4), which sets out when a person is taken to have paid reasonable and necessary costs is prefaced 'Without limiting paragraph 2(c),' which specifies that travel costs payable under this obligation must be reasonable and necessary.

To whom does the obligation apply?

The obligation to pay reasonable and necessary travel costs applies to certain sponsors of Subclass 457 visa holders,[74] Subclass 482 visa holders,[75] Subclass 416 (Special Program) visa holders,[76] and Subclass 428 (Religious Worker Sponsors).[77] From 24 November 2012, the obligation also applies to certain sponsors of Subclass 401 visa holders in the Religious Worker stream (including any secondary sponsored person and former visa holders)[78] and Subclass 402 visa holders in the Professional Development stream (including any former visa holders).[79] For sponsorship applications made on or after 19 November 2016, the obligation also applies to sponsors of Subclass 408 visa holders in the religious worker stream or special program stream (including any secondary sponsored persons and former visa holders).[80]

When does the obligation apply?

For visa / sponsorship applications made before 9 November 2009, the obligation commences on the day of approval of the nomination of the primary sponsored person, or visa grant if no nomination specifying that person had been approved at that time.[81]

For visa / sponsorship applications made on or after 9 November 2009, it commences:

- in relation to primary or secondary Subclass 416 visa holders,[82] on the date of visa grant;[83]

[74] r.2.80(1)(d) and (e).
[75] r.2.80(1)(d) and (e), as amended by F2018L00262, which commenced on 18 March 2018.
[76] Note that for applications made 1 July 2012 to 24 November 2012, the obligation does not apply to all Special Program sponsored persons. Instead, the obligation only applies to special program sponsors if the sponsored person holdsa Subclass 416 (Special Program) visa granted on the basis that the person satisfied the criterion in cl.416.222(a) of Schedule 2 or whose last substantive visa was granted on that basis: SLI 2012 No.106, Schedule 1 item [6]. A technical amendment was made to r.2.80(1)(c) for applications made on or after 24 November 2012, to clarify that the obligation also applies in relation to a secondary sponsored person, if the primary sponsored person holds, or last held, a Subclass 416 visa granted on the basis that the person satisfied the criterion in paragraph 416.222(a) of Schedule 2 - see item [147] of Schedule 1 to SLI 2012, No.238 and the Explanatory Statement to SLI 2012, No. 238. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108 .
[77] Note that the obligation in respect of long stay activity and religious worker sponsors of Subclass 428 visa holders and former holders was removed from r.2.80(1) for applications made from 19 November 2016 (F2016L01743), reflecting the closure of that visa subclass and those sponsorship classes.
[78] r.2.80(1)(a)(i)(A) & (ii)(A) prior to amendment by F2016L01743; r.2.80(1)(aa) for sponsorship applications made on or after 19 November 2016.
[79] r.2.80(1)(b) as amended by SLI 2012, No.238. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108. Note that the obligation in r.2.80 applies only in respect of primary sponsored persons who are the holders or former holders of a Subclass 402 visa in the Professional Development as this stream does not provide for secondary applicants - r.2.80(1)(b) as amended by SLI 2012, No.238, commencing 24 November 2012.
[80] r.2.80(1)(a) as substituted by, and r.2.80(1)(ca) as inserted by, F2016L01743 for sponsorship applications made on or after 19 November 2016.
[81] r.2.80(5)(a).
[82] However, for application made 1 July 2012 to 24 November 2012, this obligation only applies to special program sponsors if the sponsored persons holds a Subclass 416 (Special Program) visa granted on the basis that the person satisfied the criterion in cl.416.222(a) of Schedule 2 or whose last substantive visa was granted on that basis: SLI 2012 No.106, Schedule 1 item [6]. A technical amendment was made to r.2.80(1) for applications made on or after 24 November 2012 to clarify that the obligation also applies in relation to a secondary sponsored person, if the primary sponsored person holds, or last held, a Subclass 416 visa granted on the basis that the person satisfied the criterion in cl.416.222(a) of Schedule 2 - see item [147] of Schedule 1 to SLI 2012, No.238 and the Explanatory Statement to SLI 2012, No. 238 While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote108.
[83] r.2.80(5)(a)(ia).

- in relation to Subclass 428 or Subclass 457 visa holders, on the day of approval of the nomination of the primary sponsored person, or visa grant if the visa is not held on the day the nomination is approved.[84]

Additionally, from 24 November 2012, the obligation commences:

- in relation to primary Subclass 402 visa holders, on the date of the visa grant;[85]
- in relation to Subclass 401 visa holders, on the day of approval of the nomination of the primary sponsored person, or visa grant if no nomination specifying that person had been approved at that time.[86]

From 19 November 2016, the obligation commences in relation to Subclass 408 visa holders from the date of visa grant.[87]

In relation to Subclass 482 visa holders, the obligation commences on the day of approval of the nomination of the primary sponsored person, or visa grant if the visa is not held on the day the nomination is approved.[88]

The obligation relating to a primary sponsored person ceases on the earliest of:

- the day that their nomination for a position by another employer is approved;
- the day they are granted a further visa of a different subclass (or for Subclass 457 visa holders, a further visa that is not a Subclass 457 or 482 visa);[89] or
- they have left Australia and their relevant visa has ceased.[90]

The obligation relating to a secondary sponsored person ceases on the earliest of:

- the day that the primary sponsored person's nomination by another sponsor is approved;
- the day the secondary sponsored person is granted a further visa of a different subclass (or for Subclass 457 visa holders, a further visa that is not a Subclass 457 or 482 visa);[91] or
- they have left Australia and their relevant visa has ceased.[92]

[84] r.2.80(5)(a), as amended by Migration Amendment Regulations 2009 (No.12) (SLI 2009, No.273), which commenced 9 November 2009: r.2, 8 to SLI 2009, No.273. Regulation 2.80(5)(a) was again amended on 24 November 2012 by SLI 2012, No.238 to include reference to the new visa subclasses that were introduced on that date. The arrangements for the Subclass 416, 428 and 457 visas were unchanged by those amendments. The provision was further amended by F2016L01743 to remove reference to Subclass 428 visa holders, for sponsorship applications made on or after 19 November 2016.
[85] r.2.80(5)(a)(i).
[86] r.2.80(5)(a)(ii) as amended by SLI 2012, No.238. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108.
[87] r.2.80(5)(ia) as amended by F2016L01743.
[88] r.2.80(5)(a)(ii) as amended by F2018L00262, which commenced on 18 March 2018.
[89] r.2.80(5)(b)(ii) as amended by F2018L00262 from 18 March 2018, in relation to subclass 457 visa holders.
[90] r.2.80(5)(b). This provision was amended by SLI 2012, No.238 to insert references to the new Subclass 401 and 402 visas. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 105. References to the Subclass 428 visa were removed from r.2.80(5)(b) by F2016L01743 for applications made from 19 November 2016.
[91] r.2.80(5)(c)(ii) as amended by F2018L00262 from 18 March 2018, in relation to subclass 457 visa holders.
[92] r.2.80(5)(c). This provision was amended by SLI 2012, No.238 to insert reference to the new Subclass 401 visa. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108. Note that the provision does not refer to the Subclass 402 visa as secondary applicants are not eligible to be granted a visa in association with the Professional

Obligation to pay travel costs – domestic workers - r.2.80A

Nature of obligation

Sponsors of Subclass 408 holders in the Domestic Worker stream,[93] Subclass 401 visa holders in the Domestic Worker (Executive) stream[94] or Subclass 427 visa holders,[95] are obliged to pay the travel costs of such visa holders, including any secondary sponsored persons.[96] The sponsor must pay the 'reasonable and necessary' travel costs of the sponsored person that have not already been paid by the sponsor that will enable them to travel to and leave Australia.[97]

A person is taken to have paid reasonable and necessary costs if the costs:

- include the cost of travel to Australia, and from the place of arrival in Australia to the sponsored person's usual place of residence in Australia; and
- include the cost of travel from the sponsored person's usual place of residence in Australia to the place of departure from Australia; and
- include the cost of travel from Australia to the country from which the sponsored person came to Australia; and
- are for economy class air travel or its equivalent.[98]

This obligation differs from the obligation in r.2.80 to pay travel costs in respect of other types of sponsored persons in that it includes an obligation to enable the person to travel to Australia and it does not require a written request to be engaged. Rather, the obligation is enlivened regardless of whether the person requests the travel or not.[99]

To whom does the obligation apply?

The obligation applies to:

- a domestic worker sponsor where the sponsored person holds or held a Subclass 427 visa;[100]
- a long stay activity sponsor where the primary sponsored person holds or last held a Subclass 401 visa in the Domestic Worker (Executive) stream;[101] and
- a temporary activities sponsor or long stay activity sponsor where the sponsored person holds or last held a Subclass 408 visa in the Domestic Worker stream.[102]

Development stream of this new visa. References to the Subclass 428 visa were removed from r.2.80(5)(c) by F2016L01743 for applications made from 19 November 2016.

[93] r.2.80(1) as substituted by F2016L01743 for sponsorship applications made on or after 19 November 2016.

[94] r.2.80A(1A) was inserted by the Migration Legislation Amendment Regulation 2013 (No.1) (SLI 2013, No.32) to reflect the introduction of the Domestic Worker (Executive) stream of Subclass 401 and is consequential to other amendments in those regulations to allow for the nomination by a long stay activity sponsor of the domestic workers of certain executives for the grant of a Subclass 401 visa: see Explanatory Statement to SLI 2013 No.32 p.61. The amendment applies to visa applications made on or after 23 March 2013.

[95] r.2.80A(1) prior to repeal and substitution by F2016L01743. References to the Subclass 427 visa were removed from this provision by F2016L01743 for applications from 19 November 2016, reflecting the closure of this visa subclass in 2012.

[96] r.2.80A(1) & (1A).

[97] r.2.80A(2).

[98] r.2.80A(3).

[99] PAM3: Migration Regulations – Divisions – [Div.2.11-2.23] Sponsorship compliance framework: Sponsorship obligations – Obligation to pay travel costs to enable sponsored persons to leave Australia – r.2.80A Obligation to pay travel costs – Domestic Worker (Executive) (reissued 13/04/18).

[100] r.2.80A(1). Note that references to visa Subclass 427 were removed from r.2.80A by F2016L01743 for applications made from 19 November 2016, reflecting the closure of this visa class and sponsorship class in 2012.

[101] r.2.80A(1A), inserted by SLI 2013, No.32 for visa application made on or after 23 March 2013.

When does the obligation apply?

In relation to a primary sponsored person, for sponsors of Subclass 408 visa holders, the obligation commences on the day of visa grant.[103] For sponsors of Subclass 401 and 427 visa holders the obligation commences on the day of approval of the nomination of that person, or visa grant if no nomination specifying that person had been approved at that time.[104]

The obligation relating to a primary sponsored person ceases on the earliest of the day on which their nomination by another sponsor is approved, or they are granted a further visa of a different subclass, or they have left Australia and their relevant visa has ceased.[105] The obligation relating to a secondary sponsored person ceases on the earliest of the day the primary sponsored person's nomination by another sponsor is approved, or the day the secondary sponsored person is granted a further visa of a different subclass, or they have left Australia and their relevant visa has ceased.[106]

Obligation to pay costs incurred to locate / remove unlawful non-citizens – r.2.81

Nature of obligation

Under r.2.81, current and former approved sponsors have an obligation to pay costs incurred by the Commonwealth in locating and/or removing the primary or secondary sponsored person as an unlawful non-citizen from Australia, if the Minister has requested the payment by written notice.[107]

The obligation is not enlivened unless the notice requirements are met.[108] These requirements are:

- that the notice be given using a method mentioned in s.494B of the Act; and
- that it specify a date for compliance not earlier than 7 days after a person is taken, by s.494C of the Act, to have received the notice.

The obligation only applies in relation to costs incurred by the Commonwealth from the day the sponsored person becomes an unlawful non-citizen to the moment the person leaves Australia.[109]

The sponsor is liable to pay the Commonwealth the difference between the lesser of the actual costs incurred by the Commonwealth or an amount up to a maximum of $10,000, and any amount already paid under the obligation to pay travel costs to enable sponsored persons to leave Australia.[110]

'Costs', in relation to a non-citizen's detention and removal, are defined in s.207 the Act. They are the fares and other costs to the Commonwealth of transporting a non-citizen and a custodian of the non-citizen, from Australia to the place outside Australia to which the non-citizen is removed or deported.[111]

[102] r.2.80A(1) as substituted by F2016L01743 for sponsorship applications made on or after 19 November 2016.
[103] r.2.80A(4)(aa) as inserted by F2016L01743 for sponsorship applications made on or after 19 November 2016.
[104] r.2.80A(4)(a). Note that references to the Subclass 427 were removed from this provision by F2016L01743 from 19 November 2016.
[105] r.2.80A(4)(b). Note that this provision was amended to include a reference to Subclass 408 and omit a reference to Subclass 427 visas by F2016L01743 for sponsorship applications made on or after 19 November 2016.
[106] r.2.80A(4)(c). Note that this provision was amended to include a reference to Subclass 408 and omit a reference to Subclass 427 visas by F2016L01743 for sponsorship applications made on or after 19 November 2016.
[107] r.2.81(1), (2).
[108] r.2.81(2)(b), (5).
[109] r.2.81(2)(c), r.2.81(6).
[110] r.2.81(3), (4).
[111] r.2.81(8), s.207.

To whom does the obligation apply?

The obligation applies to a person who is or was an approved sponsor. That is, current and former standard business sponsors, temporary activities sponsors, professional development sponsors, temporary work sponsors and non-Ministerial parties to work agreements.

When does the obligation apply?

The obligation commences on the day a primary or secondary sponsored person becomes an unlawful non-citizen, and ends 5 years after they leave Australia.[112]

The period within which the Commonwealth must incur the costs starts on the day on which the sponsored person becomes an unlawful non-citizen, and ends at the moment when the sponsored person leaves Australia.[113]

Obligation to keep records – r.2.82

Nature of obligation

Under r.2.82, current and former approved sponsors have an obligation to keep records of their compliance with their other obligations. Sponsors are required to keep records that are specified for the particular class of sponsor in r.2.82 as well as records of a kind specified by instrument.[114]

The obligation requires that:

- the records must be in a reproducible format;[115]
- the records are kept for a particular period (see below for the particular period being no more than 5 years);[116] and
- either, the records must be kept in a manner specified by written instrument,[117] or in a manner that is capable of being verified by an independent person for records relating to:
    - payment of return travel costs to sponsored persons (see below);[118]
    - other money paid to, applied or dealt with on a primary sponsored person's behalf or as directed by them (see below);[119] and
    - compliance with requirements relating to training specified by instrument (see below).[120]

<u>Standard business sponsor</u>

A current or former standard business sponsor has an obligation under r.2.82 to keep the following records from the day of sponsorship approval until two years after the first day on which the employer ceases to be an approved sponsor and there is no sponsored person in relation to the employer:[121]

[112] r.2.81(7).
[113] r.2.81(6).
[114] r.2.82(2)(aa).
[115] r.2.82(2)(b).
[116] r.2.82(2)(d) when read with r.2.82(4), (5) and (6).
[117] r.2.82(2)(c)(i). There is currently no instrument for r.2.82(2)(c)(i).
[118] r.2.82(2)(c)(ii) and r.2.82(3)(a)(iii). Regulation 2.82(2)(c)(ii) was amended by SLI 2013, No.146 in relation to a person who is or was a standard business sponsor on or after 1 July 2013.
[119] r.2.82(2)(c)(ii) and r.2.82(3)(e)(i) and (ii). Regulation 2.82(2)(c)(ii) was amended by SLI 2013, No.146 in relation to a person who is or was a standard business sponsor on or after 1 July 2013.
[120] r.2.82(2)(c)(ii) and r.2.82(3)(g), amended by SLI 2013, No.146 in relation to a person who is or was a standard business sponsor on or after 1 July 2013.
[121] r.2.82(2)(d) when read with r.2.82(4) and (6).

- a record of a written request by a sponsored person for the payment of return travel costs;[122]
- a record of when that request was received by the sponsor;[123]
- a record of compliance with the request, including costs paid, who costs were paid for, and the date paid;[124]
- if a notifiable event of the kind specified in r.2.84[125] occurs, a record of the particulars of the notification of event, including date, method and where it was provided;[126]
- a record of the tasks performed by each primary sponsored person in relation to work undertaken in relation to the nominated occupation (if the primary sponsored person holds or last held a subclass 457 visa or a Subclass 482 visa);[127]
- a record of the location(s) at which these tasks were performed;[128]
- in relation to primary sponsored persons earning below a specified income threshold:[129]
    - a record of the money paid to them, and money applied or dealt with in any way on their behalf or as directed by them;[130]
    - a record of non-monetary benefits provided to them, including their agreed value and the time at which, or period over which, they were provided;[131]
    - if there is an equivalent worker in the person's workplace, a record of the terms and conditions applicable to that worker, including the period they applied;[132]
- a copy of the written contract of employment under which the primary sponsored person is employed;[133] and
- all records showing that the sponsor has complied with training requirements relating to training specified in an instrument (see below).[134] However, the obligation to keep these records only applies where the sponsor was lawfully operating a business in Australia at the time of the approval of the sponsorship or variation application.

Party to a work agreement

A current or former non-Ministerial party to a work agreement has an obligation under r.2.82 to keep records of a kind set out above for a standard business sponsor as well as any records specified in the work agreement as records that must be kept.[135]

[122] r.2.82(3)(a)(i).
[123] r.2.82(3)(a)(ii).
[124] r.2.82(3)(a)(iii).
[125] r.2.84 sets out the obligation to provide information to Immigration when certain events (e.g. cessation of a sponsored person's employment) occur. See Obligation to provide information to Immigration when certain events occur – r.2.84 below for further details.
[126] r.2.82(3)(b).
[127] r.2.82(3)(c) as amended by F2018L00262, which commenced on 18 March 2018.
[128] r.2.82(3)(d).
[129] r.2.82(3)(e). The threshold is specified under r.2.79(1) and (1A). See Obligation to ensure equivalent terms and conditions of employment – r.2.79 above for further detail. The instrument which specifies the income threshold for the purposes of r.2.79(1A) can be found in the MRD Legal Services Register of Instruments – Business Visas under the 'TSMIT' tab.
[130] r.2.82(3)(e)(i)-(ii).
[131] r.2.82(3)(e)(iii).
[132] r.2.82(3)(e)(iv).
[133] r.2.82(3)(f) inserted by Migration Amendment Regulation 2013 (No.5) (SLI 2013 No.145) in relation to a standard business sponsor on and after 1 July 2013.
[134] r.2.82(3)(g) inserted by SLI 2013 No.146, in relation to a person who is or was a standard business sponsor on or after 1 July 2013.
[135] r.2.82(1), (2), (3) and (3A).

The records must be kept from the day on which the work agreement commences until two years after the first day on which the employer ceases to be a party to a work agreement and there is no primary or secondary sponsored person in relation to the employer, for a period of up to 5 years.[136]

Temporary activities sponsor, temporary work sponsor or professional development sponsor

A current or former temporary activities sponsor,[137] temporary work sponsor or professional development sponsor has an obligation under r.2.82 to keep the following records, if the sponsor also has an obligation under r.2.80 (payment of travel costs),[138] from the day of sponsorship approval until two years after the first day on which the employer ceases to be an approved sponsor and there is no sponsored person in relation to the employer:[139]

- a record of a written request by a sponsored person for the payment of return travel costs;[140]
- a record of when the written request for the payment of return travel costs was received by the sponsor;[141] and
- a record of compliance with the request to pay return travel costs, including costs paid, who costs were paid for, and the date paid.[142]

In addition, if a notifiable event of the kind specified in r.2.84[143] occurs, a record of the particulars of the notification of event, including date, method and where it was provided must be kept.[144]

To whom does the obligation apply?

The obligation to keep specified records applies to a person who is or was an approved sponsor, namely current and former standard business sponsors, temporary activities sponsors, professional development sponsors, temporary work sponsors and non-Ministerial parties to work agreements.[145]

When does the obligation apply?

The obligation commences on the day a person is approved as a sponsor or on which the relevant work agreement commences, and ends 2 years after the day on which the person ceases to become an approved sponsor or party to a work agreement and on which there ceases to be any sponsored person in relation to the person.[146]

However, no record need be kept for more than five years under this obligation.[147]

[136] r.2.82(5) and (6).
[137] The obligations in relation to temporary activities sponsors were added by F2016L01743 for sponsorship applications made on or after 19 November 2016.
[138] r.2.80 sets out the obligation to pay travel costs to enable sponsored persons to leave Australia and to which sponsors the obligation applies. See Obligation to pay travel costs to enable sponsored persons to leave Australia – r.2.80 above for further details.
[139] r.2.82(2)(a)(iii),(d) and r.2.82(3), (4) and (6).
[140] r.2.82(3)(a)(i).
[141] r.2.82(3)(a)(ii).
[142] r.2.82(3)(a)(iii).
[143] r.2.84 sets out the obligation to provide information to Immigration when certain events (e.g. cessation of a sponsored person's employment) occur. See Obligation to provide information to Immigration when certain events occur – r.2.84 below for further details.
[144] r.2.82(3)(b).
[145] r.2.82(1).
[146] r.2.82(4) and (5).
[147] r.2.82(6).

Obligation to provide records and information to the Minister – r.2.83

Nature of obligation

Under this obligation, a sponsor must, on request and in the manner and timeframe requested by the Minister, provide records required to be kept by law or by the obligation to keep records in r.2.82, and which relate to the administration of the sponsorship provisions of the Act, or the administration of a work agreement.[148]

A notice from the Minister requesting records or information must be given using a method mentioned in s.494B and specify a date for compliance no earlier than 7 days after the person is deemed to have received the document.[149] The obligation will not arise if the request has not been made in this manner.

The Explanatory Statement which accompanied the introduction of the obligation does not set out the purpose of this obligation in particular. However, the amendments in general are stated to be 'for the purposes of enforceable sponsorship framework.'[150]

To whom does the obligation apply?

The obligation applies to a person who is or was an approved sponsor.[151] That is, current and former standard business sponsors, temporary activities sponsors, professional development sponsors, temporary work sponsors and non-Ministerial parties to work agreements.

When does the obligation apply?

The obligation commences on the day of sponsorship approval or commencement of the relevant work agreement, and ends 2 years after the day on which the person ceases to become an approved sponsor or party to a work agreement and on which there ceases to be any sponsored person in relation to the person.[152]

Obligation to provide information to Immigration when certain events occur – r.2.84

Nature of obligation

Under r.2.84, current and former approved sponsors have an obligation to provide details of a prescribed event to the Department when it occurs.[153] The prescribed events are many and varied and include:

- cessation of a sponsored person's employment
- change in the work duties of a sponsored person, or participation in a nominated activity
- change to training information, capacity to deliver an approved professional development program in a professional development agreement
- changes to certain sponsors' contact details

[148] r.2.83(1), (2).
[149] r.2.83(3).
[150] Explanatory Statement to SLI 2009, No. 115, p.1.
[151] r.2.83(1).
[152] r.2.83(4) and (5).
[153] r.2.84(1) and (2). Note that r.2.84 was subject to significant amendment by F2016L01743 to incorporate obligations for temporary activities sponsors and to remove redundant provisions, including obligations relating to visiting academic sponsors (r.2.84(4D)), sport sponsors (r.2.84(4F)), domestic worker sponsors (r.2.84(4G)), religious worker sponsors (r.2.84(4H)) and occupational trainee sponsors (r.2.84(4I)). These changes apply to sponsorship applications made on or after 19 November 2016 (so that existing sponsorship obligations are not affected).

- changes to information provided in a variation of term of approval relating to training
- changes to a sponsor's legal entity
- insolvency
- changes to a sponsor's directors, partners or managing committee
- whether return travel costs of a sponsored person have been paid
- changes relating to capacity of a sponsored person to participate in, or meet the requirements of a special program
- cessation of an entertainment sponsor's licence
- changes to formal arrangements between a sponsored person and a sport sponsor or a long stay activity sponsor.[154]

Different kinds of events are prescribed for different kinds of sponsors, and some types of obligations are common to a number of different kinds. For example a standard business sponsor or non-Ministerial party to a work agreement must notify Immigration about any change to the work duties carried out by the primary sponsored person.[155] No other types of sponsor have this obligation, although most have an obligation to notify changes to information provided in applications for sponsorship approval.

The information must be provided electronically, in the manner specified in a legislative instrument, and within certain timeframes of the event occurring.[156] The timeframe for notification is 10 days where the relevant event occurred prior to 18 April 2015, and 28 days where the relevant event occurred on or after 18 April 2015.[157]

The Explanatory Statement which accompanied the introduction of the obligation does not refer to the purpose of the obligation generally, but does explain the purpose in relation to a professional development sponsor:

> *The purpose of requiring a professional development sponsor to notify Immigration if the primary sponsored person is unable to participate in the professional development program, has ceased participation in a professional development program prior to the ending of the professional development program, or failed to attend a professional development program where the absence was not authorised by the professional development sponsor, is that the occurrence of these events may be an indication that a primary sponsored person is not complying with their visa conditions. Not every occurrence of such an event will mean a primary sponsored person is not complying with their visa conditions, but Immigration will investigate the events on receiving notification to determine if the primary sponsored person is complying with their visa conditions.*[158]

[154] r.2.84(3), (4), (4A), (4B), (4C), (4D), (4E), (4F), (4G), (4H), (4I), (4J) and, from 24 November 2012, (4K) and (4L). Regulation 2.84(4K) and (4L) were inserted by SLI 2012, No.238 to insert reference to the new long stay activity and training and research sponsor classes. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108. Note that r.2.84(4D) and (4F)-(4I) were repealed by F2016L01743, for sponsorship applications made on or after 19 November 2016.
[155] r.2.84(3)(aa).
[156] r.2.84(2) as amended by F2018L00262 which commenced on 18 March 2018. The instrument specifying the manner for providing the details of an event for r.2.84(2)(b)(i) may be found in the MRD Legal Services Register of Instruments - Business visas on the 'Sponsor-add' tab. The instrument in force at time of writing (IMMI 18/040, which commenced on 18 March 2018) specifies that the details are to be provided by email to a specified email address or by completing a 'Notification of sponsorship changes' form and submitting it using ImmiAccount.
[157] r.2.84(6). The timeframes in r.2.84(6) were increased to 28 days from 10 days by Migration Amendment (2015 Measures No.1) Regulation 2015 (SLI 2015, No. 34). The amendments apply in relation to an event mentioned in r. 2.84 that occurs on or after 18 April 2015. According to the Explanatory Statement to SLI 2015, No.34, the amendment extended the timeframe from 10 working days to 28 calendar days to ensure there was sufficient time to comply with the requirement. It was intended to reduce confusion for businesses and align with other comparable reporting periods that must be met businesses.
[158] Explanatory Statement to SLI 2009, No. 115, p.44.

To whom does the obligation apply?

The obligation applies to a person who is or was an approved sponsor.[159] That is, current and former standard business sponsors, temporary activities sponsors, professional development sponsors, temporary work sponsors and non-Ministerial parties to work agreements.

When does the obligation apply?

The obligation commences on the day of sponsorship approval or commencement of the relevant work agreement, and ends after the day on which the person ceases to become an approved sponsor or party to a work agreement and on which there ceases to be any sponsored person in relation to the person.[160]

Obligation to secure an offer of a reasonable standard of accommodation – r.2.85

Nature of obligation

Under r.2.85, certain sponsors have an obligation to secure one or more offers of accommodation for sponsored persons that will provide for a 'reasonable standard' of accommodation and to ensure that they have accommodation while they are in Australia.[161]

In a situation where accommodation has been secured and becomes unavailable, the sponsor is obligated and must secure another offer of accommodation for the primary or secondary sponsored person.[162]

Accommodation is of a 'reasonable standard' if it:

- meets all relevant State or Territory and local government regulations regarding fire, health and safety; and
- offers 24-hour access; and
- provides meals or a self-catering kitchen; and
- is clean and well-maintained; and
- has a lounge area; and
- has adequate laundry facilities or a laundry service; and
- provides power for lighting, cooking and refrigeration; and
- has an adequate ratio of guests to bathroom facilities; and
- has uncrowded sleeping areas; and
- provides appropriate gender segregated areas and bathroom facilities; and
- allows adequate privacy and secure storage for personal items.[163]

The Explanatory Statement which accompanied the introduction of the obligation does not expressly refer to the purpose of the obligation in relation to all of the sponsorship programs to which it applies, but does explain the purpose in relation to a professional development program:

[159] r.2.84(1).
[160] r.2.84(7) and (8).
[161] r.2.85(2).
[162] See example, r.2.85(2).
[163] r.2.85(3).

The purpose of this obligation is to ensure that a primary sponsored person has accommodation in Australia for the duration of the professional development program. The holder of a Subclass 470 (Professional Development) visa is not permitted to work in Australia. To ensure that the primary sponsored person is not destitute and is not forced to work in Australia, it is an obligation for the professional development sponsor to secure an offer of a reasonable standard of accommodation. The professional development agreement will then set out who is to pay for the accommodation in Australia.[164]

To whom does the obligation apply?

The obligation applies to current or former:[165]

- approved sponsors of current or former Subclass 470 visa holders;[166]
- special program sponsors of current or former volunteer Subclass 416 visa holders;
- entertainment sponsors of current or former volunteer Subclass 420 visa holders;
- approved sponsors, or non-Ministerial work agreement parties (for sponsorship applications made prior to 24 November 2012), who sponsor current or former volunteer Subclass 421 visa holders; [167]
- approved sponsors or, for sponsorship applications made prior to 24 November 2012, non-Ministerial work agreement parties, who sponsor current or former volunteer Subclass 428 visa holders;[168]
- approved sponsors of current or former volunteer Subclass 442 visa holders.[169]

Additionally, for sponsorship applications made on or after 24 November 2012, the obligation applies to current or former:

- approved sponsors of current or former Subclass 402 visa holders in the Research stream (where those visas were applied for on or after 24 November 2012 and before 23 March 2013)[170] or the Professional Development stream;
- approved sponsors of current or former Subclass 401 visa holders in the Sport stream, or the Religious Worker stream, in relation to a volunteer role; and
- approved sponsors of current or former Subclass 402 visa holders in the Occupational Trainee stream in relation to a volunteer role.[171]

[164] Explanatory Statement to SLI 2009, No. 115, p.46.
[165] r.2.85(1).
[166] Note that references to sponsors Subclass 470 visa holders were removed from r.2.85 by F2016L01743, for sponsorship and variation applications made on or after 19 November 2016. This reflects closure of this visa type and related sponsorship types from November 2012.
[167] The provisions relating to work agreements for sporting activities were repealed by SLI 2012, No.238. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108. Note that references to sponsors of Subclass 421 visa holders were removed from r.2.85 by F2016L01743, for sponsorship and variation applications made on or after 19 November 2016. This reflects closure of this visa type from November 2012.
[168] The provisions relating to work agreements for religious worker activities were repealed by SLI 2012, No.238. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108. Note that references to sponsors of Subclass 428 visa holders were removed from r.2.85 by F2016L01743, for sponsorship and variation applications made on or after 19 November 2016. This reflects closure of this visa type from November 2012.
[169] Note that references to sponsors of Subclass 442 visa holders were removed from r.2.85 by F2016L01743, for sponsorship and variation applications made on or after 19 November 2016. This reflects closure of this visa type from November 2012.
[170] Note that the references to the Research stream of a Subclass 402 (Training and Research) visa were omitted bySLI 2013, No.32 for visa applications made on or after 23 March 2013. The effect of the amendments is that r.2.85 only applies in respect of holders of Subclass 402 visas in the Research stream where those visas were applied for on or after 24 November 2012 and before 23 March 2013.

For sponsorship applications made on or after 19 November 2016, the obligation also applies to:

- temporary activities or special program sponsors of current or former Subclass 408 visa holders if the primary or secondary sponsored person was granted the visa in the special program stream for a volunteer role;[172] and
- approved sponsors of current or former Subclass 408 visa holders if the primary sponsored person was granted the visa in the sport, religious worker, or entertainment stream for a volunteer role.[173]

When does the obligation apply?

In relation to primary or secondary sponsored persons who hold a Subclass 408,[174] Subclass 416, Subclass 470 visa,[175] the obligation commences on the day of visa grant.[176] In relation to a primary sponsored person who holds a Subclass 402 visa in the Research stream (where that visa was granted on or after 24 November 2012 and before 23 March 2013)[177] or the Professional Development stream, the obligation commences on the day of visa grant.[178] In relation to a primary or secondary sponsored person who holds a Subclass 401 visa, a Subclass 407 visa,[179] a Subclass 420 visa, a Subclass 421 visa,[180] a Subclass 428 visa,[181] a Subclass 442 visa[182] or a Subclass 402 visa in the Occupational Trainee stream, the obligation commences on the day of approval of the nomination of the primary sponsored person, or visa grant if they do not hold the visa on the day the nomination is approved.[183]

The obligation relating to a primary sponsored person ceases on the earliest of the day that their nomination by another sponsor is approved, or they are granted a further visa of a different subclass, or they have left Australia and their relevant visa has ceased.[184] The obligation relating to a secondary sponsored person ceases on the earliest of the day the primary sponsored person's nomination by another sponsor is approved, or the day the secondary sponsored person is granted a visa of a different subclass, or they have left Australia and their relevant visa has ceased.[185]

[171] r.2.85(1)(a), (d) and (e) as amended by SLI 2012, No.238. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item 1 of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108.
[172] r.2.85(1)(ba) as inserted by F2016L01743 for applications made on or after 19 November 2016.
[173] r.2.85(1)(d)(iii) & (iv) as inserted by F2016L01743 for applications made on or after 19 November 2016.
[174] r.2.85(4)(a)(i) as amended by F2016L01743 for applications made on or after 19 November 2016.
[175] Note that references to the Subclass 470 visa were removed from r.2.85 for applications made on or after 19 November 2016.
[176] r.2.85(4)(a)(i).
[177] Note that the reference to the Research stream of a Subclass 402 (Training and Research) visa was omitted by SLI 2013, No.32 for visa applications made on or after 23 March 2013. The effect of the amendment is that r.2.85 only applies in respect of holders of Subclass 402 visas in the Research stream where those visas were applied for on or after 24 November 2012 and before 23 March 2013.
[178] r.2.85(4)(a)(iii).
[179] References to the Subclass 407 visa were added by F2016L01743 for applications made on or after 19 November 2016.
[180] Note that references to the Subclass 421 visa were removed from r.2.85 by F2016L01743, for applications made on or after 19 November 2016.
[181] Note that references to the Subclass 428 visa were removed from r.2.85 by F2016L01743, for applications made on or after 19 November 2016.
[182] Note that references to the Subclass 442 visa were removed from r.2.85 by F2016L01743, for applications made on or after 19 November 2016.
[183] r.2.85(4)(a)(ii). Note that this provision was amended by SLI 2012, No.238 to include reference to the Subclass 401 and 402 visas introduced on 24 November 2012. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108.
[184] r.2.85(4)(b).
[185] r.2.85(4)(c).

Obligation to ensure primary sponsored person participates in nominated occupation – r.2.86

Nature of obligation

Under r.2.86, certain sponsors have an obligation to ensure that the primary sponsored person works or participates in the nominated occupation, program or activity, is engaged only as an employee of the sponsor, is employed under a written contract of employment and that the sponsor itself meets additional obligations to prevent 'on-hire' of the primary sponsored person to any other business.[186] The precise nature of the obligation depends on the class of sponsor to whom it applies and when they were approved as a sponsor.

Nominated position obligations

For an approved sponsor, in relation to a person who holds, or whose last substantive visa was, a Subclass 457 visa or a Subclass 482 visa, the obligation is to ensure that the sponsored person:

- works in the nominated occupation; and
- does not work in an occupation unless the occupation was nominated by the sponsor for the primary sponsored person under s.140GB(1) and the nomination was approved under s.140GB(2).[187]

For specified kinds of temporary work sponsors the obligation is to ensure that the primary sponsored person works or participates in the nominated occupation, program or activity in relation to which the sponsored person was nominated.[188] Departmental guidelines explain:

> *A new nomination must be approved where a primary sponsored person intends to work in a different occupation from that approved at nomination.*[189]

The Explanatory Statement which accompanied the introduction of the obligation does not refer to the purpose of the obligation. It does, however, state in explaining the purpose of new Division 2.17 – Nominations:

> *Nomination is the process through which a standard business sponsor or party to a work agreement nominates for approval of an occupation as well as the visa holder, visa applicant, or proposed visa applicant who will undertake that occupation. This ensures that the standard business sponsor, or party to the work agreement agrees to be the sponsor for that particular visa holder, visa applicant, or proposed visa applicant.*[190]

As discussed above, agreement to sponsor a person for prescribed visas means taking on the relevant sponsorship obligations.

Direct employment obligations

If the person is *approved as a sponsor before 14 September 2009* and the sponsored person holds a Subclass 457 visa or whose last substantive visa was a Subclass 457 visa, the sponsor must ensure

[186] r.2.86(1), (2), (2A), (2AA), (2AB) and (2C).
[187] r.2.86(2)(a) as amended by F2018L00262, which commenced on 18 March 2018.
[188] r.2.86(1), r.2.86(2C). Note that these provisions were amended by items [165] and [169] of Schedule 1 to SLI 2012, No.238. While not free from doubt, it would appear the amendment applies to sponsorship applications made on or after 24 November 2012 (item 1 of Schedule 4 to SLI 2012, No.238). For further discussion see footnote 108. Regulation 2.86(2C) was amended to reflect the renaming of the Subclass 457 (Business (Long Stay)) visa to the Subclass 457 (Temporary Work (Skilled)) visa: Explanatory Statement to SLI 2012, No.238. It was also amended by F2018L00262 to include reference to the subclass 482 (Temporary Skill Shortage) visa.
[189] PAM3: Migration Regulations – Divisions – [Div.2.11-2.23] Sponsorship compliance framework: Sponsorship obligations – Obligation to ensure primary sponsored person works or participates in nominated occupation, program or activity (reissued 13/04/2018).
[190] Explanatory Statement to SLI 2009, No. 115, p.25.

the sponsored person is only engaged as an employee of the sponsor or an associated entity,[191] unless engaged as an independent contractor in an occupation specified by written instrument.[192]

If the person is *approved as a sponsor on or after 14 September 2009,* the obligation arises where the primary sponsored person holds a Subclass 457 or Subclass 482 visa or the last substantive visa held was a Subclass 457 or Subclass 482 visa. In these situations, the sponsor must ensure that:[193]

- if the person is or was a standard business sponsor lawfully operating a business in Australia at the time of the last sponsorship or variation approval, the sponsored person is only engaged as an employee of the sponsor or an associated entity of the sponsor;[194]
- if the person is or was a standard business sponsor who was not lawfully operating a business in Australia and was lawfully operating a business outside Australia at the time of the last sponsorship or variation approval, the sponsored person is engaged only as an employee of the sponsor;[195] and
- if the sponsor is or was a party to a work agreement the sponsored person is only engaged as an employee of the sponsor.[196]

However, this obligation will not apply where the nominated occupation is specified by the Minister in an instrument made under r.2.72(13).[197]

In addition, for most nominated occupations,[198] if a person is or was a standard business sponsor, a further sponsorship obligation is contained in r.2.86(2AA) to:

- require the sponsor to ensure that the primary sponsored person is employed under a written contract of employment; [199] and
- depending on whether the sponsor was approved as a standard business sponsor who lawfully operated a business in Australia at the time of sponsorship or variation approval, prohibit the sponsor from engaging in certain on-hire activities.[200]

In particular, this second limb of the obligation in r.2.86(2AA) requires the sponsor to ensure:

[191] Note that 'entity', in relation to an associated entity includes an entity within the meaning of s.9 of the *Corporations Act 2001* and a body of the Commonwealth, a State or a Territory: r.1.13B(4). The term 'associated entity' is further defined in r.1.03 as having the same meaning in s.50AAA of Corporations Act 2001.
[192] r.2.86(2A), r.2.86(2B). The instrument for r.2.86(2B) may be found in the MRD Legal Services Register of Instruments - Business Visas on the 'Occ-Ex' tab.
[193] See r.2.86(2A) as amended by SLI 2010, No.38, which applies to a person who, on or after 14 September 2009, is approved as a sponsor of a kind mentioned in r.2.86(1). It was further amended by F2018L00262 to include reference to a subclass 482 visa.
[194] r.2.86(2A)(c) as amended by SLI 2013 No.145, in relation to a standard business sponsor or a former standard business sponsor on and after 1 July 2013. Further amendments by SLI 2014, No.30 rectified minor punctuation errors in the amendment of r.2.86(2A)(c) by SLI 2013, No.145. Note that 'entity', in relation to an associated entity includes an entity within the meaning of s.9 of the *Corporations Act 2001* and a body of the Commonwealth, a State or a Territory: r.1.13B(4). The term 'associated entity' is further defined in r.1.03 as having the same meaning in s.50AAA of Corporations Act 2001.
[195] r.2.86(2A)(d) as amended by SLI 2013 No.145 in relation to a standard business sponsor or a former standard business sponsor on and after 1 July 2013.
[196] r.2.86(2A)(e).
[197] r.2.86(2A)(b). The instrument for r.2.72(13) may be found in the MRD Legal Services Register of Instruments - Business Visas on the 'ExemptOccs' tab. The instrument in force at time of writing (IMMI 18/035) specifies occupations including General Manager, Chief Executive or Managing Director, and a range of medical occupations.
[198] Occupations not subject to this requirement are those specified by the Minister in an instrument in writing for r.2.72(13): r.2.86(2AA). The instrument specifying occupations for nominations for the purpose of r.2.72(13) which can be found in the Register of Instruments - Business Visas, under the 'ExemptOccs' tab.
[199] r.2.86(2AA)(a) inserted by SLI 2013, No.145 in relation to current and former standard business sponsors from 1 July 2013.
[200] r.2.86(2AA)(b) and (c) inserted by SLI 2013, No.145 in relation to current and former standard business sponsors from 1 July 2013.

- the sponsor does not engage in activities that relate to the recruitment of a visa holder, an applicant or proposed applicant for a visa for the purpose of supplying the visa holder, applicant or proposed applicant to:
    - any other business - where the sponsor *was not* lawfully operating a business in Australia at the time of the last sponsorship or variation approval;[201] or
    - a business that is not associated with the sponsor - where the sponsor *was* lawfully operating a business in Australia at the time of the person's approval as a standard business sponsor or last approval of a variation;[202] and

- the sponsor does not engage in activities that relate to the hire of a visa holder to:
    - any other business – where the sponsor *was not* lawfully operating a business in Australia at the time of the last sponsorship or variation approval;[203] or
    - a business that is not associated with the sponsor - where the sponsor *was* lawfully operating a business in Australia at the time of the person's approval as a standard business sponsor or last approval of a variation.[204]

This additional obligation in r.2.86(2AA) applies only to a primary sponsored person who is sponsored by a standard business sponsor, rather than a party to a work agreement. The Explanatory Statement to the amendment which introduced r.2.86(2AA) provides that it was not intended for the obligation in r.2.86(2AA) to apply to a party to a work agreement because work agreements are intended to operate under more flexible arrangements.[205] The Explanatory Statement also states that the amendment was intended to continue the existing exclusion of the on-hire industry from the standard business sponsorship program, unless the nominated occupation is specified by instrument. This is because on-hire arrangements are problematic in the context of Subclass 457 visas, as it may not be clear if the primary sponsored person is working as a contractor or an employee, which affects what rights and entitlements that the primary sponsored person has access to, and it may be unclear who is responsible for the control and supervision of the primary sponsored person.[206]

To whom does the obligation apply?

The obligations generally apply to certain sponsors of Subclass 457,[207] Subclass 411, Subclass 419, Subclass 420, Subclass 421, Subclass 423, Subclass 427, Subclass 428 or Subclass 442 or Subclass 482[208] visa holders. In addition, for visa / sponsorship applications made on or after 24 November 2012, the obligation applies to long stay activity and training and research sponsors.[209] From 19 November 2016, the obligation also applies to sponsors of Subclass 407 visa holders

[201] r.2.86(2AA)(c)(i) inserted by SLI 2013, No.145 in relation to current and former standard business sponsors from 1 July 2013.
[202] r.2.86(2AA)(b)(i) inserted by SLI 2013, No.145 in relation to current and former standard business sponsors from 1 July 2013.
[203] r.2.86(2AA)(c)(ii) inserted by SLI 2013, No.145 in relation to current and former standard business sponsors from 1 July 2013.
[204] r.2.86(2AA)(b)(ii) inserted by SLI 2013, No.145 in relation to current and former standard business sponsors from 1 July 2013.
[205] Explanatory Statement to SLI 2013, No.145, p.11.
[206] Explanatory Statement to SLI 2013 No.145, p.10.
[207] The reference to a party to a work agreement was omitted from r.2.86(1) by SLI 2012, No.238, which applies to sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4).
[208] The reference to subclass 482 was inserted by F2018L00262.
[209] r.2.86(1). Note that this provision was amended by item [165] of Schedule 1 to SLI 2012, No.238 and the amendment applies to visa / sponsorship applications made on or after 24 November 2012 (item [1] of Schedule 4 to SLI 2012, No.238). Regulation 2.86(1) as amended has the same effect as the previous version of the provision, except that it is expressed in terms which remove the need to separately list the individual classes of sponsor and visa. In addition, it applies to the new long stay activity and training and research sponsors, created by item [57] of Schedule 1 to SLI 2012, No.238.

(except Commonwealth agencies).[210] The obligation only applies in respect of primary (not secondary) sponsored persons,[211] except in relation to sponsorship applications made prior to 24 November 2012 in respect of occupational trainee sponsors.[212]

The obligations relating to the employment under a written contract of employment and prohibiting the sponsor from engaging in certain on-hire activities in r.2.86(2AA) apply only in relation to primary sponsored persons currently or formerly[213] holding Subclass 457 visas granted in the standard business sponsorship stream;[214] or Subclass 482 visas in the Short-term or Medium-term stream.[215]

When does the obligation apply?

The obligation commences on the day of approval of the nomination of the primary sponsored person, or visa grant if the primary sponsored person did not hold a visa on the day the nomination is approved.[216] The obligation ceases on the earliest day of their nomination by another sponsor is approved, or they are granted a further visa of a different subclass (or for Subclass 457 visa holders, a further visa that is not a Subclass 457 or 482 visa),[217] or they have left Australia and their relevant visa has ceased.[218]

Obligation to ensure primary sponsored person works or participates in activity in relation to which the visa is granted – r.2.86A

Nature of obligation

Under r.2.68A approved sponsors of current and former Subclass 408 visa holders are obliged to ensure that the primary sponsored person undertakes the activity in relation to which the visa was granted.[219] This obligation is intended to mirror r.2.86, which imposes an equivalent obligation on sponsors in relation to visa holders who are nominated by a sponsor (whereas nominations are not required in respect of Subclass 408 visas).[220]

To whom does the obligation apply?

The obligation applies to persons who are or were an approved sponsor of a primary sponsored person who holds a Subclass 408 visa, or whose last substantive visa was a Subclass 408 visa.[221]

When does the obligation apply?

The obligation starts on the day the visa is granted, and ceases on the earliest day of the primary sponsored person being granted a visa of a different subclass, or being granted a further Subclass 408 visa but with a different sponsor, or leaving Australia and relevant visas ceasing.[222]

[210] Subclass 407 visas were introduced by F2016L01743 from 19 November 2016 and require an approved sponsor to nominate a program of occupational training (except where the approved sponsor is a Commonwealth agency), so falling within the terms of r.2.86(1).
[211] r.2.86(1)
[212] r.2.86(1)(h) as in force prior to 24 November 2012.
[213] Formerly being persons whose last substantive visa held was a Subclass 457 (Temporary Work (Skilled)) visa.
[214] r.2.86(2AB) inserted by item [7] of Schedule 1 to SLI 2013 No.145. This regulation applies in relation to a standard business sponsor or a former standard business sponsor on and after 1 July 2013.
[215] r.2.86(2AB) as amended by F2018L00262 to include reference to subclass 482 visas, which commenced on 18 March 2018.
[216] r.2.86(3)(a).
[217] r.2.86(3)(b)(ii) as amended by F2018L00262 which commenced on 18 March 2018.
[218] r.2.86(3)(b).
[219] Regulation 2.68A was inserted by F2016L01743 for applications made on or after 19 November 2016.
[220] Explanatory Statement to F2016L01743, p.46.
[221] r.2.68A(1).
[222] r.2.68A(4).

Obligation not to recover, transfer or take actions that would result in another person paying for certain costs – r.2.87

Nature of obligation

Under r.2.87 an approved sponsor (former and current) must not seek to transfer, recover, or cause another person to pay its costs (including migration agent costs) associated with: becoming or being a sponsor; being a former approved sponsor; a nomination under s.140GB(1) including a fee mentioned in rr.2.73(5) or (7) or r.2.73A(3);[223] or the recruitment of the visa applicant/holder, including for the purposes of a nomination under s.140GB(1) of the Act. In addition, certain sponsors must not seek to recover expenditure in relation to financial support of the sponsored person in Australia.

Recruitment costs

Under r.2.87, current and former approved sponsors have obligations for certain costs, including migration agent costs, associated with becoming an approved sponsor or being an approved sponsor or former approved sponsor, or a nomination under s.140GB, or that relate specifically to the recruitment of a non-citizen.[224] The obligations require that a person must not:

- take any action, or seek to take any action, that would result in the transfer to another person of some or all of the above costs; and
- take any action, or seek to take any action, that would result in another person paying some or all of the above costs; and
- recover, or seek to recover, from another person some or all of the above costs.[225]

The purpose is to ensure that the sponsor is solely responsible for certain costs.[226] Departmental guidelines (PAM3) state that the costs covered include:

- cost of sponsorship and nomination charges;
- migration agent costs associated with the lodgement of sponsorship and nomination applications;
- migration agent fees or legal fees associated with sponsorship monitoring;
- pre-agreed costs related to attracting a potential sponsored person e.g. paying airfares to Australia, visa application costs and moving assistance;
- administrative costs and any sundry costs an employer incurs when they conduct recruitment exercises, including:
    - recruitment agent fees;
    - the cost of job advertising;
    - screening of candidates, short listing, interviews and reference checks;
    - salaries of recruitment or human resource staff;
    - the cost of outsourcing background checks, police checks and psychological testing where they relate to an employer determining an applicant's suitability for the position;

[223] rr.2.87(1A)(a)(iiia), (b)(iiia) and (1B)(a)(iiia) inserted by F2018L00262 on 18 March 2018.
[224] r.2.87(1), (1A) and (1B).
[225] r.2.87(1A) as substituted by SLI 2013, No.145.
[226] see Explanatory Statement to SLI 2013, No.145 at p.14.

- training of new staff;
- responding to queries for prospective candidates, and advising unsuccessful applicants; and
- travel costs for the sponsor to interview and/or meet the applicant either overseas or in Australia.[227]

Given the strict wording of the provision, it would seem the obligation under r.2.87 is not removed if a non-citizen for the purposes of a nomination, a visa applicant, proposed visa applicant or visa holder initiates or consents to the transfer, payment or recovery of such costs by the sponsor. Departmental policy (PAM) specifically states that under the terms and conditions of the work contract or by agreed salary deduction the obligation would not be removed and that a sponsor will have failed to satisfy r.2.87 in these circumstances.[228]

The obligation was more limited before 1 July 2013. The principal obligation before 1 July 2013 was not to recover, or seek to recover, from the sponsored person, all or part of particular costs associated with approval as a sponsor or recruitment of the primary sponsored person.[229] In addition, prior to 24 November 2012, the obligation did not apply to professional development sponsors.[230] However from 24 November 2012, professional development sponsors are subject to this obligation.[231]

Financial support costs

In addition, certain sponsors must not recover or seek to recover from the sponsored person any expenditure in relation to financial support of the sponsored person in Australia.[232] The affected sponsors include sponsors of:

- sponsored current visa holders and persons whose last substantive visa was Subclass 408 visa in the Religious Worker or Domestic Worker streams;[233]
- sponsored current visa holders and persons whose last substantive visa was a Subclass 427 or 428;[234]
- primary sponsored Subclass 401 visa holders in the Religious Worker stream where the application was lodged on or after 24 November 2012;[235] and
- primary sponsored Subclass 401 visa holders in the Domestic Worker stream for applications made on or after 23 March 2013;[236] and
- certain non-Ministerial parties to a work agreements.[237]

[227] PAM3: Migration Regulations – Divisions – [Div.2.11-2.23] Sponsorship compliance framework: Sponsorship obligations – Obligation not to recover, transfer or take actions that would result in another person paying for certain costs (reissued 13/04/2018).
[228] PAM3: Sponsorship applicable to Division 3A of Part 2 of the Act - Sponsorship obligations – Obligation not to recover, transfer or take actions that would result in another person paying for certain costs at [85] (reissued 19/11/16).
[229] see r.2.87(2) as in force prior to 1 July 2013.
[230] see r.2.87(1) as in force prior to 24 November 2012.
[231] r.2.87(1) as amended by SLI 2012, No.238.
[232] r.2.87(2A).
[233] R.2.87(2A)(a) & (b)(iii)-(iv) as amended by F2016L01743 for applications made on or after 19 November 2016.
[234] r.2.87(2A)(b)(iii) and (iv). Note that these provisions were repealed and substituted by F2016L01743 to remove references to these visa subclasses for applications made on or after 19 November 2016. This reflects the closure of these subclasses of visa in November 2012.
[235] r.2.87(2A)(b)(i) and (ii). This includes sponsors where the last substantive visa held by the primary sponsored person was a Subclass 401 (Temporary Work (Long Stay Activity)) visa in the Religious Worker stream or the Domestic Worker stream: r.2.87(2A) as substituted by SLI 2013 No. 32 for visa applications made on or after 23 March 2013.
[236] r.2.87(2A)(b)(i) and (ii) as substituted by SLI 2013, No.32 to reflect the introduction of the Domestic Worker (Executive) stream of Subclass 401 and is consequential to other amendments in those regulations to allow for the nomination by a long stay activity sponsor of the domestic workers of certain executives for the grant of a Subclass 401 visa: see Explanatory Statement to SLI 2013 No.32 p.62. The amendment applies to visa applications made on or after 23 March 2013.

Additional obligations for persons agreeing to sponsor Subclass 402, 403, 407, 408 416 and 488 visa applicants

In addition to the above obligations, if an approved sponsor has agreed to be the sponsor of an applicant for, proposed applicant for or holder of a Subclass 402 (Training and Research), 403 (Temporary Work (International Relations)) visa,[238] Subclass 407 (Training) visa,[239] Subclass 408 (Temporary Activity visa),[240] 416 (Special Program) or 488 (Superyacht Crew) visa, they must not:

- take, or seek to take any action, that would result in the transfer to another person of some or all of the costs, including migration agents costs, that relate specifically to the recruitment of that applicant, proposed applicant or visa holder;
- take, or seek to take any action, that would result in another person paying to the person some or all of the costs, including migration agent costs, that relate specifically to the recruitment of that applicant, proposed applicant or visa holder; or
- must not recover, or seek to recover, some or all of the costs, including migration agent costs, that relate specifically to the recruitment of that applicant, proposed applicant or visa holder.[241]

To whom does the obligation apply?

The obligation applies to a person who is or was an approved sponsor (other than a professional development sponsor prior to 24 November 2012).[242]

When does the obligation apply?

The obligation commences on the day of sponsorship approval or commencement of the relevant work agreement, and ends after the day on which the person ceases to become an approved sponsor or party to a work agreement and on which there ceases to be any sponsored person in relation to the person.[243]

Obligation to make same or equivalent position available to Australian participants – r.2.87A

Nature of obligation

Under r.2.87A, the relevant current and former sponsors have an obligation to, immediately after the completion of the exchange, make available to the Australian citizen or permanent resident named in the exchange agreement the same position as, or a position equivalent to, the position held by the Australian participant in Australia at the time into which the exchange agreement was entered.[244]

Regulation 2.87A was repealed from 19 November 2016.[245]

[237] The reference to a party to a work agreement was omitted from r.2.87(2A) by SLI 2012, No.238 for sponsorship applications made on or after 24 November 2012.
[238] Note that these obligations were imposed in respect of sponsors of Subclass 403 holders only for sponsorship applications or variation applications made on or after 19 November 2016: F2016L01743.
[239] The references to Subclass 407 were inserted by F2016L01743 for applications made on or after 19 November 2016.
[240] The reference to Subclass 408 were inserted by F2016L01743 for applications made on or after 19 November 2016.
[241] r.2.87(1A)(c) and (d) and r.2.87(1B)(c) and (d).
[242] r.2.87(1).
[243] r.2.87(3) and (4).
[244] r.2.87A(1) and (2).
[245] F2016L01743. The amendment purportedly applies to sponsorship applications and applications to vary the terms of sponsorship made on or after 19 November 2016, however note that applications for relevant classes of sponsor cannot be made on or after that date. Accordingly, the obligation will apply to all relevant sponsors.

To whom does the obligation apply?

For sponsorship applications made before 24 November 2012, the obligation only applies to a person who is or was an exchange sponsor.[246] That is a sponsor in respect of a Subclass 411 visa. For sponsorship applications made on or after 24 November 2012, r.2.87A applies to a person who is or was an approved sponsor, who has made a nomination in relation to a new Subclass 401 visa in the Exchange Stream or a Subclass 411 visa.[247]

When does the obligation apply?

The obligation commences on the day of the relevant nomination approval and ends 30 days after completion of the exchange.[248]

Obligation to provide training – r.2.87B

Nature of obligation

Under r.2.87B, a person who is a standard business sponsor of at least one primary sponsored person must comply with requirements relating to training of Australian workers, in each year the person engages a Subclass 457 visa holder.[249]

The requirements relating to training are specified by the Minister in an instrument in writing,[250] and are the same requirements as the benchmarks for the training of Australian citizens and Australian permanent residents specified for the criteria for approval as a standard business sponsor in r.2.59(d) and for variation of terms of approval as a standard business sponsor in r.2.68(e).

To whom does the obligation apply?

This obligation only applies to standard business sponsors who were lawfully operating a business in Australia at time of their approval as a standard business sponsor, or at time of the last approval of a variation where the sponsorship or variation was approved after 1 July 2013;[251] and if during the period of 12 months commencing on the day of the sponsorship or variation approval or the anniversary of that day, the person is a sponsor of at least one primary sponsored person.[252]

[246] r.2.87A(1) as in force prior to 24 November 2012.
[247] r.2.87A(1) as amended by SLI2012, No.238. The Explanatory Statement to SLI 2012, No.238 relevantly states that the amendment to r.2.87A(1) ensures that the obligation applies to a person who is or was a new long stay activity sponsor, as well as to an exchange sponsor. It also ensures that the obligation applies in relation to a new Subclass 401 visa holder in the Exchange stream, as well as in relation to a Subclass 411 visa holder. The Subclass 401 visa was created by SLI 2012, No.238 and replaces (among other visa subclasses) the Subclass 411 visa subclass. The amendment therefore maintains the existing policy setting that an approved sponsor of a participant in a staff exchange is subject to the obligation to make the same or equivalent position available to the Australian participant upon completion of the exchange.
[248] r.2.87A(3).
[249] r.2.87B as inserted by SLI 2013 No.146. In addition to sanctions being able to be imposed for breach of this sponsorship obligation, applicants for variation of sponsorship approval under r.2.68 are required to have complied with this obligation during the period of the applicant's most recent approval as a standard business sponsor in order to have their application for variation of the terms of their sponsorship approved. See r.2.68(k)(i)(B) as inserted by SLI 2013 No.146 for applications for the variation of the terms of approval as a sponsor made, but not finally determined, before 1 July 2013 or made on or after 1 July 2013.
[250] r.2.87B(2) and (3). The current instrument can be found in the Register of Instruments – Business Visas, under the 'Training' tab.
[251] r.2.87B(1).
[252] r.2.87B(2), (3).

When does the obligation apply?

The obligation commences on the day the person is approved as a standard business sponsor.[253] The obligation continues for any 12 month period from the start of that obligation where the person is a standard business sponsor of at least one primary sponsored person.[254]

The obligation ends either 3 or 6 years after the person is approved as a standard business sponsor depending on the period of the person's approval.[255]

Obligation not to engage in discriminatory recruitment practices – r.2.87C

Nature of obligation

Under r.2.87C, a standard business sponsor must not engage in, or have engaged in, discriminatory recruitment practices during the period of their approval as a sponsor.[256] The term 'discriminatory recruitment practice' is defined as a recruitment practice that directly or indirectly discriminates against a person based on the immigration status or citizenship of the person, other than a practice engaged in to comply with a Commonwealth, State or Territory law.[257]

According to the Explanatory Statement to the amendment which inserted this obligation, the intention is to provide a basis for enforcement action in relation to inappropriate use of the Subclass 457 programme by sponsors who rely excessively or exclusively on Subclass 457 visa holders despite the availability of qualified Australian citizens or permanent residents.[258] The obligation is also intended to prohibit discrimination against overseas, non-citizen and non-permanent resident workers.

Labour market testing, under s.140GBA (where applicable), may work in a way to give preference to suitably qualified and available Australian citizen and permanent resident workers over other workers. However, the Explanatory Statement suggests that compliance with the labour market testing requirement under s.140GBA (where applicable) would amount to a practice engaged in to comply with a Commonwealth law and therefore would not amount to a breach of the new obligation.[259]

To whom does the obligation apply?

This regulation applies to a person who is or was a standard business sponsor and is lawfully operating a business in Australia.[260]

When does this obligation apply?

This obligation starts to apply on the day the person is, or was, approved as a standard business sponsor and ends when the person ceases, or ceased, to be a standard business sponsor.[261] The

[253] r.2.87B(4).
[254] r.2.87B(2) and (3).
[255] r.2.87B(5) and (6).
[256] r.2.87C(2).
[257] r.2.57(1).
[258] Explanatory Statement to F2016L00523, p.20.
[259] Explanatory Statement to F2016L00523, p.21..
[260] This obligation is complemented by r.2.59(f)(ii) which requires an applicant seeking approval as a standard business sponsor to declare in writing that the applicant will not engage in discriminatory recruitment practices. An identical requirement exists in relation to an applicant seeking a variation of terms of approval as a sponsor: r.2.68(g)(ii). These requirements are applicable to all applications for approval as a standard business sponsor and variation of terms of approval of sponsorship made on or after 19 April 2016 and all undetermined applications of those types as at 19 April 2016: Item 5401(2) of Schedule 13 to F2016L00523.
[261] r.2.87C(3).

obligation applies in relation to discriminatory recruitment practices engaged in on or after 19 April 2016 by a standard business sponsor or a former standard business sponsor.[262]

Relevant case law

MIAC v Sahan Enterprises Pty Ltd [2012] FMCA 619; (2012) 266 FLR 111	

Relevant legislative amendments

Title	Reference number
Migration Legislation Amendment (Worker Protection) Act 2008	No.159, 2008
Migration Amendment (Temporary Sponsored Visas) Act 2013	No.122, 2013
Migration Amendment (Reform of Employer Sanctions) Act 2013	No.10, 2013
Migration Amendment Regulations 2009 (No. 5) (as amended)	SLI 2009 No.115
Migration Amendment Regulations 2009 (No.12)	SLI 2009, No. 273
Migration Amendment Regulations 2009 (No. 14)	SLI 2009, No.331
Migration Amendment Regulations 2010 (No.1)	SLI 2010, No.38
Migration Legislation Amendment Regulation 2012 (No.3)	SLI 2012, No.106
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32
Migration Amendment Regulation 2013 (No.5)	SLI 2013, No.145
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (2015 Measures No.1) Regulation 2015	SLI 2015 No.34
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Available decision templates

The following decision templates are designed for reviews of a decision to take action against a sponsor for breach of an obligation or on the occurrence of a prescribed circumstance:

[262] Item 5401(3) of Schedule 13 to F2016L00523.

- **Sponsorship Bars and cancellation (post 14 September 2009)** - This template is designed for use in a review of a decision made on or after 14 September 2009 to bar a sponsor or cancel approval of a sponsorship pursuant to s.140M of the *Migration Act 1958.*

Last updated/reviewed: 18 July 2018

Approval as Standard Business Sponsor: Regulation 2.59

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Overview

The Australian temporary business sponsorship scheme under the *Migration Act 1958* (the Act) and the Migration Regulations 1994 (the Regulations) involves 3 distinct stages. First, a person (the employer) must seek approval as a standard business sponsor; secondly, the approved business sponsor must seek approval of nomination of a proposed occupation in which an individual is proposed to be employed in Australia; and thirdly, the person to be employed in the proposed occupation by the approved sponsor must apply for a Subclass 457 or 482 visa.[1]

The business sponsorship scheme was first introduced in 1996 and underwent major changes in 2003 and 2009.[2] From 24 November 2012, further amendments were made to the scheme to move the Subclass 457 visa within the temporary work framework and to remove several 'streams' of applicant who may be granted this visa.[3] The scheme was subject to a number of further amendments in 2013,[4] and again in 2018 as part of major reforms which replaced the Subclass 457 visa with the Subclass 482 (Temporary Skills Shortage) Visa.[5] This commentary considers the scheme as in force from 14 September 2009 onwards. For information about the scheme prior to this date, please contact MRD Legal Services.

Under the current scheme, a person may apply to the Minister for approval as a sponsor.[6] Section 140E of the Act provides that the Minister must approve a person as a sponsor in relation to one or more classes of sponsor if prescribed criteria are satisfied. Under r.2.58 of the Regulations, the current prescribed classes of sponsors are a standard business sponsor and a temporary activities sponsor.[7]

Since 30 June 2013 the Act has included a provision outlining the purposes of Division 3A,[8] which are stated to include the provision of a framework for a temporary sponsored work visa program in order to address genuine skill shortages, and addressing genuine skills shortages in the Australian labour market without displacing employment and training opportunities for Australian citizens and permanent residents, and without the temporary sponsored work visa program serving as a mainstay of the skilled migration program.[9]

This MRD Legal Services commentary focuses on standard business sponsorship. A 'standard business sponsor' is defined in r.1.03 of the Regulations as a person who is an approved sponsor and

[1] The Subclass 457 (Business (Long Stay)) visa was renamed the Subclass 457 (Temporary Work (Skilled)) visa in respect of visa applications made on or after 24 November 2012: Item [224] of Schedule 1 to the Migration Amendment Regulations 2012 (No.4) (SLI 2012, No.238).

[2] The changes introduced by the *Migration Legislation Amendment (Worker Protection) Act 2008* (No.159, 2008) (Worker Protection Act) and the Migration Amendment Regulations 2009 (No.5) (SLI 2009 No.115), as amended by Migration Amendment Regulations 2009 (No. 5) Amendment Regulations 2009 (No. 1) (SLI 2009, No.203), involved the repeal of the existing scheme and the introduction of a new scheme that applies to *all* sponsorship applications from 14 September 2009, regardless of when the application was made. The changes were introduced to streamline, simplify and provide flexibility to the requirements for approval as a sponsor, and remove existing criteria that were considered complex and unable to be assessed objectively and consistently - Explanatory Statement to SLI 2009, No.115, p2.

[3] Migration Amendment Regulations 2012 (No.4) (SLI 2012, No.238). The effect of SLI 2012, No.238 is summarised in Legislation Bulletin No.9/2012, 29 October 2012.

[4] See Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146), Migration Amendment Regulation 2013 (No.5) (SLI 2013, No.145) and the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (No.122, 2013).

[5] See Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).

[6] s.140F, r.2.61.

[7] Each of these classes of sponsors is defined in r.1.03 of the Regulations. The categories of professional development sponsor, special program sponsor, entertainment sponsor, superyacht crew sponsor, long stay activity sponsor and training and research sponsor were removed from r.2.58 for sponsorship applications made on or after 19 November 2016: Migration Amendment (Temporary Activity Visas) Regulation 2016 . Other categories of sponsor have been added and removed from this definition over time, in accordance with changes to the temporary work visa framework.

[8] s.140AA inserted by SLI 2013, No.122.

[9] s.140AA(a) and (b).

who is approved as a sponsor in relation to the standard business sponsor class under s.140E(1) of the Act. 'Approved sponsor' is relevantly defined in s.5(1) of the Act as a person who has been approved as a sponsor in relation to a prescribed class and whose sponsorship approval has not been cancelled or ceased to have effect. 'Standard business sponsors' are relevant only to Subclass 457 and Subclass 482 visas, and are the only sponsors who are required to meet the Labour Market Testing condition for the approval of nominations in relation to 457 and 482 visas under s.140GBA.[10]

Tribunal's jurisdiction and powers

A decision made on or after 14 September 2009 not to approve an application for approval as a standard business sponsor under s.140E(1) is reviewable by the Tribunal,[11] except in limited circumstances. These are where in making the decision, the delegate did not consider certain criteria which apply only to applicants operating a business in Australia:

- if the primary decision was made *before* 18 March 2018, the relevant criteria are r.2.59(d) and (e),[12] relating to training benchmarks;
- if the primary decision was made *on or after* 18 March 2018, the relevant criterion is r.2.59(f),[13] relating to written attestations/declarations.

As the Minister is only required to consider these criteria if the applicant is lawfully operating a business in Australia, the Tribunal only has jurisdiction in relation to decisions affecting a business operating in Australia.[14] It is a finding of fact for the Tribunal as to whether the delegate did, or did not, consider the relevant criteria. The standard business sponsor has standing to apply for review.[15]

Standard business sponsorship application process

Section 140F of the Act specifies that the Regulations may prescribe a process for the Minister to approve a person as a sponsor. The process prescribed for approval as a standard business sponsor is set out in r.2.61 of the Regulations. This essentially requires that the application be made on the prescribed form, and the prescribed fee be paid.[16] For applications made on or after 1 July 2013, the applicant must be made using the internet, using a form specified by an instrument in writing, and accompanied by the fee specified by an instrument in writing.[17] Note that from 18 March 2018, the Minister has the power to specify different forms for different types of applicants.[18]

[10] See r.2.72AA inserted by SLI 2013, No.122 . The criteria for the grant of a Subclass 457 visa includes cl.457.223(4) which requires, as relevant, that the applicant and or the activity/occupation to have been the subject of an approved nomination made by a standard business sponsor.
[11] s.338(9) of the Act and r.4.02(4)(a) of the Regulations as amended by SLI 2009, No.115.
[12] r.4.02(4A).
[13] r.4.02(4A) as repealed and substituted by F2018L00262, commencing 18 March 2018.
[14] See notes to r.4.02(4A) and the Explanatory Statement to SLI 2009, No.115, p.67.
[15] s.347(2)(d) and r.4.02(5)(a).
[16] r.2.61. Note that different requirements apply depending on whether the application was made before or on or after 1 July 2013: see SLI 2013, No.146 items [1] and [2] of Schedule 2, and item [2] of Schedule 10. For applications made on or after 18 March 2018, note that the Minister has the power to specify different forms for different types of applicants: see r.2.61(b) and (ba) as inserted by F2018L00262.
[17] See r.2.61(3A), as amended by SLI 2013, No.146. See the 'Form&Fee' tab of Register of Instruments - Business Visas for relevant instrument specifying alternative forms, methods and fees for making sponsorship applications.
[18] r.2.61(3A)(b), as inserted by F2018L00262.

Who can apply for approval as a sponsor?

A 'person' for these purposes, is not defined in the Act, or the Regulations. Section 2C of the *Acts Interpretation Act 1901* provides that in any Act, unless the contrary intention appears, 'expressions used to denote persons generally (such as 'person', 'party', 'someone', 'anyone', 'no-one', 'one', 'another' and 'whoever'), include a body politic or corporate as well as an individual…'. It appears that an applicant that an applicant can be a corporation, a partnership, an unincorporated association or an entity other than a corporation, a partnership or an unincorporated association, and that an individual or a sole trader is not precluded from applying for approval as a standard business sponsor.[19]

Note that a corporate body is a separate legal identity to the applicant, even when the applicant is the sole shareholder and sole employee of the company.[20] Note that a trust is simply a relationship and not a person, therefore a trust cannot be approved as a sponsor. However a trustee acting on behalf of a trust could be approved as a sponsor, and that trustee may be an individual, a partnership or a company. For further discussion of different kinds of business structures, see the Business Review Applicants FAQ commentary page.

Often a person may operate a business under a registered business name. It may be necessary to ascertain the proprietor of the business name. The applicant for approval as a standard business sponsor in such cases should be taken to be the person or body who has registered the business name and is trading under it.

In *Moller v MIAC*[21] the Court, in considering the scheme and apparent intention of the sponsorship requirements and provisions in cl.457.223(4)(b)(i)(B) of Schedule 2 to the Regulations and r.1.20D of the Regulations, held that the employer and visa applicant must have separate legal personalities, so as to be legally capable of incurring the separate obligations, benefits and responsibilities of a sponsoring employer on one side, and of an employee visa holder on the other. That is, it is not possible for the applicant to set up an unincorporated business in Australia and then use that business as a vehicle to essentially sponsor themselves. *Moller v MIAC* concerned the pre 14 September 2009 sponsorship requirements, and to some extent the reasoning turned upon the nature of the required employment relationship between the visa applicant and sponsor. The new sponsorship framework recognises that the relationship between sponsor and visa applicant may not always be an employment relationship and some visa criteria no longer refer to being 'employed' by a sponsor.[22] However, the sponsorship scheme includes prescribed sponsorship obligations which apply to an approved sponsor in relation to a visa holder which clearly envisage an employment relationship.[23] On this basis the reasoning in *Moller* is still relevant, as the sponsor and visa applicant/visa holder must have separate legal personalities so as to be legally capable of incurring the separate obligations, benefits and responsibilities of employer and employee.

Criteria for approval as a Standard Business Sponsor: r.2.59

Section 140E(3) of the Act provides that different criteria may be prescribed for different classes in relation to which a person may be approved as a sponsor. Regulations 2.59 and 2.60S set out the

[19] Having regard, for example, to the definition of 'associated with' in r.1.13B, as in force prior to 18 March 2018.
[20] See *Lee v Lee's Air Farming Ltd* [1961] AC 12.
[21] *Moller v MIAC* [2007] FMCA 168 (Smith FM, 28 February 2007) at [22].
[22] Explanatory Statement to SLI 2009, No.202, p.13.
[23] s.140H of the Act enables obligations to be prescribed. See for example r.2.79, obligation on standard business sponsors to ensure terms and conditions of employment are equivalent to those that would be provided to an Australian citizen or permanent resident.

criteria that must be satisfied for the Minister to approve an application by a person (the applicant) for approval as a standard business sponsor. These are that the Minister, or the Tribunal on review is satisfied that:

- the applicant has applied for approval as a standard business sponsor in accordance with the prescribed process (see discussion above);[24]
- *for applications made before 18 March 2018,* the applicant is not a standard business sponsor;[25]
- the applicant is lawfully operating a business in or outside Australia;[26]
- *if the applicant is lawfully operating a business in Australia,* the applicant has attested, in writing, that the applicant has a strong record of, or a demonstrated commitment to, employing local labour; and has declared, in writing, that the applicant will not engage in discriminatory recruitment practices;[27]
- either there is no adverse information known to Immigration about the applicant or an associated person; or it is reasonable to disregard any such adverse information;[28] and
- *if the applicant is lawfully operating a business outside Australia only* - the applicant is seeking to be approved as a standard business sponsor in relation to (for applications made before 18 March 2018) a Subclass 457 visa holder, applicant or prospective applicant for a Subclass 457 visa OR (for applications made on or after 18 March 2018) a Subclass 457 or 482 holder, or applicant or prospective applicant for a Subclass 482 visa,[29] and the sponsorship applicant intends for such person to establish or assist in establishing on behalf of the sponsorship applicant, a business operation in Australia with overseas connections, or to fulfil or assist in fulfilling a contractual obligation;[30]
- the applicant has not taken, or sought to take any action, that would result in the transfer to another person payment of or another person paying some or all of the costs associated with becoming an approved sponsor, or the costs relating to the recruitment of a non-citizen for nomination under s.140GB(1) of the Act, or, for applications made on or after 18 March 2018, costs associated with the nomination itself (including the nomination fee),[31] and that the sponsor has not recovered any such costs from another person.[32]

There are differing criteria depending on whether the applicant is operating a business in Australia or outside Australia only, as noted in the above list. From 18 March 2018 this is reflected by the introduction of the term 'overseas business sponsor', defined in r.1.03 by reference to the location of the operation of the business at the time approval as a standard business sponsor was last granted (or time of most recent variation).[33]

[24] r.2.59(a).
[25] r.2.59(b). A minor technical amendment was made to r.2.59(b)(ii) to replace 'subclause' with 'subitem', effective from 27 March 2010 (Migration Amendment Regulations 2010 (No.1) (SLI 2010, No.38), which did not affect the substantive requirements of the criterion. An alternative way to meet this requirement, that an applicant is a standard business sponsor because of the application of item 45(2) of Part 2 of Schedule 1 to the *Migration Legislation Amendment (Work Protection) Act 2008*, was removed by SLI 2013, No.146, applying to all applications not finally determined on 1 July 2013, or made on or after that date.
[26] r.2.59(c).
[27] r.2.59(f).
[28] r.2.59(g). The terms 'adverse information' and 'associated with' are defined in r.1.13A and r.1.13B.
[29] These technical amendments were made to r.2.59(h) to reflect the replacement of the 457 visa with the 482 visa from 18 March 2018: F2018L00262.
[30] r.2.59(h).
[31] r.2.60S(2)(ba), (2)(bb), (3)(a)(ia) and (3)(b)(ia) as inserted by F2018L00262, for applications made on or after 18 March 2018.
[32] r.2.60S applies to all classes of sponsor, including standard business sponsor. It was inserted by Migration Amendment Regulation 2013 (No.5) (SLI 2013, No.147), for applications for approval as a sponsor not finally determined on 1 July 2013, and all such applications made on or after that date.
[33] Definition inserted into r.1.03 by F2018L00262.

Criteria not applicable from 18 March 2018

Note that immediately prior to 18 March 2018, four more criteria applied and these may have been the determinative issue before the Departmental delegate in matters subject to review by the Tribunal. However, they are no longer applicable as of 18 March 2018, even in relation to applications for approval made prior to that date. These were:[34]

- *if the applicant is lawfully operating a business in Australia*, *and has traded in Australia for 12 months or more* - the applicant meets the benchmarks for the training of Australian citizens and Australian permanent residents specified in an instrument in writing (r.2.59(d));
- *if the applicant is lawfully operating a business in Australia, and has traded in Australia for less than 12 months* - the applicant has an auditable plan to meet the benchmarks specified in the written instrument (r.2.59(e));
- the applicant has provided the number of persons who they propose to nominate during the period of approval as a standard business sponsor and, either, the proposed number is reasonable, or the applicant has agreed to another number proposed by the Minister (r.2.59(i)); and
- if the applicant has previously been a standard business sponsor, either the applicant fulfilled any commitments and complied with applicable obligations relating to training requirements, or it is reasonable to disregard that requirement (r.2.59(j)).

The criteria relating to training requirements were omitted in anticipation of the creation of a new nomination training contribution charge intended to replace these requirements, while the requirement to provide numbers of proposed nominees was omitted as being of no value to the approval process.[35]

Even if failure to satisfy one of these criteria was the reason for a Departmental delegate (before 18 March 2018) refusing to approve an applicant as a standard business sponsor, this will no longer be relevant to reviews conducted by the Tribunal. The remaining applicable criteria, as discussed below, should be considered and a decision made on the basis of their satisfaction (or otherwise) only.

The applicant has applied for approval as a standard business sponsor – r.2.59(a)

Under r.2.59(a), a mandatory criterion for approval as a standard business sponsor is that the applicant has applied for approval as a standard business sponsor in accordance with the process set out in r.2.61. In essence, the requirement is that the application must be made on the prescribed form, and accompanied by the prescribed fee. For details on the process, see above Standard business sponsorship application process.

Standard business sponsor – r.2.59(b)

Regulation 2.59(b) requires that the applicant is not a standard business sponsor.[36] It only applies to applications for approval as a sponsor made before 18 March 2018.[37] The purpose of this criterion was to ensure that a person cannot have two concurrent approvals as a standard business sponsor.

[34] r.2.59(d), (e), (i) and (j) were repealed by F2018L00262, and specified to no longer apply to applications for approval as a standard business sponsor made, but not finally determined before 18 March 2018 (see clause 6704(2) of Schedule 13 of the Regulations).
[35] See Explanatory Statement to F2018L00262, item 53, item 56.
[36] An alternative way to meet this requirement, that an applicant is a standard business sponsor because of the application of item 45(2) of Part 2 of Schedule 1 to the *Migration Legislation Amendment (Work Protection) Act 2008*, was removed by SLI 2013, No.146, applying to all applications not finally determined on 1 July 2013, or made on or after that date.
[37] F2018L00262.

Thus, a person approved as a standard business sponsor whose sponsorship is still current would not be able to meet r.2.59(b). However, prior to 18 March 2018, such a person could have applied for a variation of the terms of approval as a sponsor to extend the duration of the sponsorship approval under rr.2.65-2.69.

From 18 March 2018, the term of an approval of sponsorship is fixed by r.2.63A (discussed further below), and the operation of that provision prevents any concurrent period of approval.[38] Accordingly, from that date this criterion was not needed and omitted from the Regulations.

Lawfully operating a business in or outside Australia – r.2.59(c)

Regulation 2.59(c) requires that the applicant for approval is lawfully operating a business either in or outside Australia. There is no definition of 'lawfully operating' in the Act or Regulations and no judicial consideration of the term in relation to this criterion, nor in relation to other similarly worded criteria.[39] It is appropriate therefore to apply the ordinary meaning of the term having regard to the legislative context.

Departmental guidelines (PAM3) explain the concept of 'lawfully operating' in terms of being 'legally established'.[40] The concept of being 'legally established' is described in terms of satisfying all registration requirements under the law of the relevant country. Depending on the structure of the business, registration of a business operating in Australia may include registration as a company with the Australian Securities and Investment Commission (ASIC), registration of a business (or trading) name under relevant State or Territory legislation and/or registration of an Australian Business Number (ABN) with the Australian Taxation Office for taxation purposes.[41] For a business operating outside Australia, the requirements would be governed by local law in the relevant country.[42] While registration requirements may be a relevant consideration in considering whether a business is lawfully operating, equating 'lawfully operating' with 'legally established and operating' may be an unnecessarily restrictive interpretation of the requirement in r.2.59(c). In this respect, the departmental guidelines should be approach with some caution.

The term 'lawfully operating' could also encompass matters other than the establishment of the business. For example, a registered company in Australia which is insolvent but which has not yet been deregistered by ASIC, might not be considered to be 'lawfully operating a business' within the ordinary meaning of that term in Australia. It is worth noting that the concept of 'lawfully established' is identified as a separate requirement to 'lawfully operating' elsewhere in the regulations, indicating that meaning of 'lawfully operating' is not restricted only to the establishment of a business.[43] However, this issue of interpretation is unlikely to be significant in practice.

Information before the Tribunal which raises the possibility that the applicant has breached a law in the course of operating the business would also fall for consideration in relation the criterion in r.2.59(g) that no adverse information is known to Immigration about the applicant or a person associated with the applicant, or if there is, it is reasonable to disregard it (see below).

[38] See r.2.63A(2) & (4), as inserted by F2018L00262.
[39] A requirement that the business be 'lawfully operating' also applies in relation to Employer Nomination under r.5.19(3)(b)(ii); a requirement that the organisation is 'lawfully operating in Australia or overseas' is contained in the definition of 'acceptable non-profit organisation' in cl.580.111 of Schedule 2 (Student Guardian visa) and Schedules 5A and 5B (evidentiary requirements for Student visas) to the Regulations.
[40] PAM3: Migration Regulations – Divisions – [Div2.58-2.69] Standard business sponsorship applications – [4.5.2] Lawfully operating a business (issued 18 March 2018).
[41] PAM3: Migration Regulations – Divisions – [Div2.58-2.69] Standard business sponsorship applications – [4.5.2.1] Assessment of 'lawfulness' – Australian business (issued 18 March 2018).
[42] PAM3: Migration Regulations – Divisions – [Div2.58-2.69] Standard business sponsorship applications – [4.5.2.3] Assessment of lawfulness – Overseas business (issued 18 March 2018)..
[43] See pre 24 November 2012 version of rr.2.60E(b) and (c), criteria for approval as a visiting academic sponsor.

'Operating a business' implies ongoing regular activities. As such, a business which has no ongoing business activities (e.g. a shelf company) could not meet this requirement. For a business operating in Australia, relevant evidence could encompass many forms, not limited to balance sheets, profit and loss statements, business tax returns, or business activity statement (BAS). It should be noted that the term 'operating a business' appears to be broader than the concept of 'trade' (buying and selling of goods and services). While a business that is trading will be 'operating' as a business, a business may be 'operating' although it has not yet commenced trading.

Attestation and declaration - employing local labour and discriminatory recruitment practices – r.2.59(f)

Under r.2.59(f), an applicant for approval must have attested in writing that the applicant has a strong record of, or a demonstrated commitment to, employing local labour; and declared in writing that the applicant will not engage in discriminatory recruitment practices.[44] A 'discriminatory recruitment practice' is defined in r.2.57(1) as a recruitment practice that directly or indirectly discriminates against a person based on the immigration status or citizenship of the person, other than a practice engaged in to comply with a Commonwealth, State or Territory law.

The intention behind the original attestation requirement was to ensure that employers seeking to access the pool of overseas labour already had a strong record of, or a demonstrated commitment to, employing local labour and non-discriminatory work practices.[45] However the attestation was not binding on the sponsor and the Department was unable to take action when an employer acted in a manner contrary to the attestation.[46] While the sponsorship obligation in r.2.87C seeks to address this problem,[47] for the purposes of assessing an application for approval as a standard business sponsor there does not appear to be any scope to assess the veracity of any attestation and/or declaration provided by the employer, and the Tribunal's task is limited to finding whether or not a relevant written attestation and declaration has been provided.

For further information on the applicable obligation under Division 2.19 relating to discriminatory recruitment practices see MRD Legal Services Commentary: Sponsorship Obligations.

No adverse information or reasonable to disregard any adverse information – r.2.59(g)

Under r.2.59(g) the Minister or, Tribunal on review, must be satisfied that there is no adverse information known to Immigration about the applicant or a person associated with the applicant; or it is reasonable to disregard any adverse information known to Immigration about the applicant or a person associated with the applicant. The definitions of 'adverse information' and 'associated with' differ depending on whether the application for approval as a sponsor was made before or on/after 18 March 2018.

'Adverse information' and 'associated with' - applications made before 18 March 2018

'Adverse information' is defined in r.1.13A (previously r.2.57(3)) as any adverse information relevant to a person's suitability as a sponsor or nominator.[48] A non-exhaustive list of kinds of adverse information is also provided, including information that the person (or an associated person) has

[44] As amended with effect to all live applications on 19 April 2016 by the Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 (F2016L00523). Previously this required the applicant to attest in writing that they had a strong record of, or a demonstrated commitment to, employing local labour and non-discriminatory employment practices.
[45] Explanatory Statement to SLI 2009, No.115, p17.
[46] Explanatory Statement to F2016L00523, p.5.
[47] Explanatory Statement to F2016L00523, p.5.
[48] r.1.13A as inserted by SLI 2015 No.242. The definition was previously found in 2.57(3), which was repealed by the same amending regulations.

become insolvent or has breached certain laws (or is the subject of certain kinds of investigative or administrative action relating to suspected breaches of those laws).[49] The laws relate to discrimination, immigration, industrial relations, occupational health and safety, people smuggling and related offences, slavery, sexual servitude and deceptive recruiting, taxation, terrorism, trafficking in persons and debt bondage.[50] Some of the listed kinds of information require consideration or action by a competent authority (a Department or authority administering or enforcing the law).[51]

The conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[52]

The definition of 'associated with' is found in r.1.13B (formerly r.2.57(3)).[53] A person is 'associated with' another person (i.e. the sponsoring or nominating entity) in the circumstances referred to in r.1.13B, i.e. if they are an officer, partner or member of a committee of management of the entity (or a related or associated entity; depending on the kind of entity).[54]

'Adverse information' and 'associated with' - applications made on or after 18 March 2018

Adverse information

For applications as approval as a sponsor made on or after 18 March 2018, 'adverse information' is still defined in r.1.13A as any adverse information relevant to the person's suitability as an approved sponsor or as a nominator, however the non-exhaustive list of the types of information that this includes is different from the pre-18 March 2018 definition.[55]

As with the pre-18 March 2018 definition, this list includes information that the person has contravened a law of the Commonwealth, a State or a Territory or is under investigation, information that the person is subject to disciplinary action or subject to legal proceedings in relation to a contravention of such a law or has been the subject of administrative action for a possible contravention of such a law, and information that they have become insolvent. However, unlike under the pre-March 2018 definition, no list of relevant types of law is given, nor is there a 3 year restriction on the occurrence of these events.

The non-exhaustive list now also specifies that 'adverse information' includes information that the person has given, or caused to be given, to the Minister, an officer, the Tribunal or an assessing authority a bogus document, or information that is false or misleading in a material particular. 'False or misleading information in a material particular' is defined in r.1.13A(4) as information that is false or misleading at the time it is given and relevant to any of the matters the Minister may consider when making a decision under the Act or Regulations, regardless of whether or not the decision was made because of that information. A 'bogus document' is defined in s.5(1) of the Act one that the Minister *reasonably suspects*:

- purports to have been, but was not, issued in respect of the person; or

[49] r.1.13A. The reference to becoming insolvent means insolvent within the meaning of ss.5(2) and (3) of the *Bankruptcy Act 1966* and section 95A of the *Corporations Act 2001.*
[50] r.1.13A(2).
[51] 'Competent authority' has the meaning given by r.2.57(1): r.1.13A(4).
[52] r.1.13A(3).
[53] r.1.13B as inserted by SLI 2015 No.242. The definition was previously found in 2.57(3), which was repealed by the same amending regulations.
[54] r.1.13B(5) includes a number of definitions. The term 'officer' is defined as, for a corporation or an entity that is neither an individual or corporation, having the same meaning in s.9 of the *Corporations Act 2001*. In relation to an 'entity', this is defined as including an entity within the meaning of s.9 of the *Corporations Act 2001*; and a body of the Commonwealth, a State or a Territory. And the term 'related body corporate' has the same meaning as in s.50 of the *Corporations Act 2001*.The term 'associated entity' is further defined in r.1.03 as having the same meaning in s.50AAA of *Corporations Act 2001*.
[55] r.1.13A as repealed and substituted by F2018L00262.

- is counterfeit or has been altered by a person who does not have authority to do so; or
- was obtained because of a false or misleading statement, whether or not made knowingly.

Both these concepts have been the subject of judicial consideration in the context of Public Interest Criterion 4020, discussed in more detail in the MRD Legal Services Commentary Bogus Documents, False or Misleading Information, PIC 4020.

Associated with

'Associated with' has a meaning affected by r.1.13B.[56] The meaning given in r.1.13B for applications made on or after 18 March 2018 is much broader than that previously in place, and is an inclusive definition, not intended to limit the circumstances in which persons can be found to be associated with each other.[57] It includes, for example, people who are or were spouses or de facto partners, people who are or were members of the same immediate, blended or extended family, or even people or have or had common friends or acquaintances.[58] The definition was drafted with this intention that it encompass the wide range of associations among family, friends and associates which can be used to continue unacceptable or unlawful business practice visa different corporate entities.[59]

Reasonable to disregard?

Even if such information is known to the Department, the decision maker may disregard it if it is reasonable to do so. In determining whether it is reasonable to disregard the information, decision-makers may take into account factors including, for example, the nature of the adverse information, how the information arose (including the credibility of the source), whether the adverse information arose recently or a long time ago, and whether the applicant has taken any steps to ensure the circumstances that led to the adverse information did not recur).[60]

The objective of r.2.59(g) is to allow the Minister to consider information about the applicant's suitability as a sponsor or nominator in deciding whether to approve an application. It might be reasonable to disregard information if, for example, the relevant information about the contravention arose some time ago and the person had developed practices and procedures to ensure the relevant conduct was not repeated. To illustrate, if a person was found to have breached occupational health and safety legislation two years ago but had since appointed an occupational health and safety manager and had a clean occupational health and safety record, it may be reasonable to disregard the original breach.[61]

Where there is adverse information in the nature of a finding of a contravention of law by a Court or competent authority, the nature of the action taken in relation to the contravention may also be relevant to determining the severity of the matter and whether it is reasonable to disregard the adverse information, i.e. whether the finding resulted in an infringement notice, a fine or a court imposed penalty with an associated public finding. PAM3 indicates that these circumstances should be considered as having increasing degrees of significance and, where a court has imposed a penalty for a breach, it is less likely that it will be reasonable to disregard the adverse information.[62]

[56] See r.1.03 as amended by F2018L00262.
[57] r.1.13B(3) and see Explanatory Statement to F2018L00262, item 3.
[58] r.1.13B(1)(a)(i), (ii), (v), as inserted by F2018L00262.
[59] Explanatory Statement to F2018L00262, item 15.
[60] PAM3: Migration Regulations – Divisions – [Div1.2/reg1.13A] Adverse information and skilled visas (regulation 1.13A and 1.13B) – [4.4.2] Disregarding Adverse Information (issued 18 March 2018).
[61] Explanatory Statement to SLI 2009, No.115, p.18. PAM3: Migration Regulations – Divisions – [Div1.2/reg1.13A] Adverse information and skilled visas (regulation 1.13A and 1.13B) – [4.4.2] Disregarding Adverse Information (issued 18 March 2018).
[62] PAM3: Migration Regulations – Divisions – [Div1.2/reg1.13A] Adverse information and skilled visas (regulation 1.13A and 1.13B) – [4.4.2] Disregarding Adverse Information (issued 18 March 2018).

The guidelines are not exhaustive and the determination of whether it is reasonable to disregard the information is a question for the relevant decision maker, having regard to all relevant circumstances of the case.

Intention relating to establishing business or fulfilling contractual obligations - r.2.59(h)

Regulation 2.59(h) applies to an applicant who is lawfully operating a business outside Australia (and not inside Australia), and is seeking approval as a standard business sponsor in relation to either:

- *for applications for approval made before 18 March 2018*: a holder of, or applicant, or proposed applicant for, a Subclass 457 visa (the 'visa applicant'); or

- *for applications for approval made on or after 18 March 2018*: a holder of a Subclass 482 or 457 visa, or an applicant or proposed applicant for a Subclass 482 visa (the 'visa applicant').[63]

This criterion requires the Tribunal to consider whether the applicant intends for the visa applicant to:

- establish, or assist in establishing, on behalf of the applicant, a business operation in Australia with overseas connections, or
- fulfil, or assist in fulfilling, a contractual obligation of the applicant.

This criterion retains certain requirements that were in the repealed cl.457.223(5) *Overseas – sponsored business stream* in Schedule 2 to the Regulations and is similar in terms to the repealed cl.457.223(5)(i) but replaces language of 'genuine and realistic commitment' to establish business operations with 'intention' to do so.[64]

Departmental guidelines (PAM3) give the following as examples of the kinds of evidence that may be provided in relation to this criterion: a company or business expansion plan, a joint venture agreement or contract between the applicant for approval as a sponsor and an Australian party.[65] An example of when an issue in relation to this requirement would arise for consideration is if the plan is simply a brief or vague declaration of the applicant's intention to establish a business operation in Australia.[66] In these circumstances there may be doubt as to whether there is an 'intention' for the visa applicant to establish the relevant business or fulfil the relevant contractual obligation.

Transfer, recovery and payment of costs – r.2.60S

Regulation 2.60S provides for a criteria additional to those in r.2.59 and 2.60M. In general terms, r.2.60S(2) and (3) require a decision maker to be satisfied that the applicant has not sought to transfer its costs, recover its costs or cause another person (including a migration agent) to pay its costs associated with becoming a sponsor or recruiting non-citizens, including for the purposes of nomination under s.140GB(1) of the Act.[67] For applications for approval as a sponsor made on or

[63] r.2.59(h) was amended by F2018L00262 for applications made on or after 18 March 2018, consistent with broader changes to the temporary employer sponsored visa stream.
[64] Explanatory Statement to SLI 2009, No.203 at p.21.
[65] PAM3: Migration Regulations – Divisions – [Div2.58-2.69] Standard business sponsorship applications – [4.5.4] Operating a business outside Australia (issued 18 March 2018).).
[66] In *Chendu Siwa Digital Communication Equipment Co Ltd v MIBP* [2016] FCCA 2497 the Minister was not satisfied r.2.59(e) was met in circumstances where the main evidence supplied was a brief, two page summary of generalized information. The Minister's reasons indicated that ordinarily a business plan describes (among other things) the business, its objectives, marketing and operational strategies, target market, financial forecasts, a statement of business goals and a plan for how those goals are to be accomplished. Although not the subject of argument, the Court stated that these were observations of common sense and reasonably open to the Minister (at [10]-[11]).
[67] Inserted by Migration Amendment Regulation 2013 (No.5) (SLI 2013, No.147) for applications for approval as a sponsor not finally determined on 1 July 2013, and all such applications made on or after that date:.

after 18 March 2018, there is the additional requirement that there has been attempt to and no actual transfer, recovery or causing of another person to pay the costs associated with the nomination itself, including any nomination fee.[68]

This requirement reflects the obligation in r.2.87, which applies to sponsors charging, transferring or recovering costs and which if breached may result in cancellation or barring.

Regulation 2.60S(4) provides that the Minister may disregard a criterion referred to in sub-regulation (2) or (3) if the Minister consider is reasonable to do so. The Explanatory Statement which accompanied the regulations inserting this provision states that an example of when the Minister may consider it reasonable to disregard the criteria in r.2.60S(2) or (3) is where a sponsor inadvertently has a minor failure that, one identified, is rectified by the sponsor.[69]

While Departmental guidelines (PAM3) indicate that where the 'questions relating to costs associated with becoming an approved sponsor or recruiting a visa holder have all been answered in the negative on the application form or it has been confirmed in writing by the applicant at a later date that they have not taken such action, officers may be satisfied that the requirement is met with no further enquiry unless there is evidence to the contrary',[70] if there is any other evidence of an applicant not satisfying this criterion, it must be considered. In this regard, the criterion is like any other requiring the Minister to reach a state of satisfaction as to it being met.

Term of approval

Applications for approval made before 18 March 2018

Section 140G(1) of the Act provides that an approval as a sponsor may be on terms specified *in the approval*. The terms of approval as a standard business sponsor must be of a kind prescribed by the Regulations.[71] Regulation 2.63(1), as in force immediately prior to 18 March 2018,[72] provides that a kind of term of an approval as a standard business sponsor is the duration of the approval. Rather than actually identifying a specific period, event or date which triggers the cessation of the approval, r.2.63(2) provides that the duration of the approval may be specified as a period of time, as ending on a particular date or as ending on the occurrence of a particular event. This means it is at the discretion of the decision maker to determine the period of time, date or event which will trigger the cessation of the approval. The term of approval must be specified as part of the approval.

It is for the decision maker to specify the term of the approval. There is no maximum or minimum specified in the Regulations.

In determining the term of approval the decision-maker may have regard to Departmental policy which (as in force prior to 18 March 2018) specified a period of 5 years commencing from the date of approval as a Standard Business Sponsor in most instances.[73] However, regard should always be

[68] See r.2.60S(2)(ba) and (bb) and r.2.60S(3)(a)(ia) and (3)(b)(ia) inserted by F2018L00262 for applications made on or after 18 March 2018.
[69] Explanatory Statement to SLI 2013 No.147, Attachment C, p.6.
PAM3: Migration Regulations – Divisions – [Div2.58-2.69] Standard business sponsorship applications – [4.5.5] Transfer, recovery and payment of costs (issued 18 March 2018).
[71] s.140G(2).
[72] r.2.63 was amended to refer only to temporary work sponsors (i.e. not standard business sponsors) for applications made on or after 18 March 2018 by F2018L00262.
[73] PAM3: Migration Regulations – Schedule – Temporary Work (Skilled) visa (subclass 457) - sponsorships – [4.6] Terms of approval of sponsorship (reissued 24/03/17). While five years is indicated as applying in most instances, the policy outlines various other periods. For example, it indicates that if a business has been established in Australia for less than 12 months

had to the individual circumstances of the case. See MRD Legal Services Commentary: Variation of terms of approval of sponsorship for further information on variation of a term of approval.

Applications for approval made on or after 18 March 2018

Section 140G(3) of the Act also provides that an actual term of approval may be prescribed by the Regulations, and for applications for approval as a sponsor made on or after 18 March 2018, the term of approval of sponsorship is prescribed under this provision by r.2.63A. It provides that approval as a standard business sponsor starts on the day on which approval is granted and ceases 5 years later.[74]

However, for Australian businesses, if they are already a standard business sponsor because of an earlier approval, the new approval will commence immediately after the earlier approval ceases, unless there has been an intervening cancellation of the first approval, but will only run for 5 years from the approval date.[75] This means there can be no advantage gained from 'early' applications for renewal.[76]

Accordingly, for applications for approval made on or after 18 March 2018, the term of approval will be determined by operation of law, and no decision needs to be made on this question. Further, from that date, there is no longer a variation of term process for standard business sponsorships. Rather, following or prior to the expiration of a term of approval, a new application for approval will need to be lodged.

Relevant Case Law

Chengdu Siwa Digital Communication Equipment Co Ltd v MIBP [2016] FCCA 2497	
Lee v Lee's Air Farming Ltd [1961] AC 12	
Moller v MIMA [2007] FMCA 168	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2009 (No.5)	SLI 2009, No.115
Migration Amendment Regulations 2009 (No.9)	SLI 2009, No.202
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)	SLI 2009, No.203

prior to becoming an approved sponsor and has not been approved as a standard business sponsor in the preceding 12 month period, the sponsorship should be approved for a period of 18 months from the approval date. It states that if the sponsor has been granted 'Accredited Status', the sponsorship should be approved for a period of six years commencing from the date of approval. Departmental policy differs from the intention originally stated in the Explanatory Statement to SLI 2009, No. 115, p.22 which referred to the standard business sponsorship ceasing 24 months after the day on which the standard business sponsor was approved, unless subsequently varied.

[74] r.2.63A(2)(a) and (4)(b).

[75] r.2.63A(2)(b), (3)(b) and (4)(a).

[76] See Explanatory Statement to F2018L00262, items 63 to 65.

Migration Amendment Regulations 2009 (No.13)	SLI 2009, No.289
Migration Amendment Regulations 2010 (No.1)	SLI 2010 No.38
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment Regulation 2013 (No.5)	SLI 2013, No.145
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146
Migration Amendment (Temporary Sponsored Visas) Act 2013	No.122, 2013
Migration Amendment (Visa Application Charge and Related Matters No.2) Regulation 2013	SLI 2013, No.253
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Available Decision Templates

The following decision templates are available for use:

- **Standard Business Sponsorship Approval (r.2.59)** - This template is designed for use in a review of a decision to not approve an application for approval as a standard business sponsor.

Last updated/ reviewed: 26 March 2018

Subclass 124 (Distinguished Talent) (Migrant) (Class AL) and Subclass 858 (Distinguished Talent) (Residence) (Class BX)

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Relevant legislative amendments

Overview

Distinguished Talent visas are permanent visas for persons who have an internationally recognised record of exceptional and outstanding achievement in a profession, a sport, the arts, or academia and research or have provided specialised assistance to the Australian Government in matters of security.[1] They provide permanent residence to outstanding individuals, who would not qualify under the other visa categories but who will make substantial contributions to the Australian community because of their international achievements.[2]

There are two subclasses for onshore and offshore applicants and two 'streams' within the Distinguished Talent visa criteria for both onshore and offshore applicants.[3] The first stream provides for applicants with an internationally recognised record of exceptional and outstanding achievement in a specified area, and the second provides for applicants who have provided specialised security assistance to the Australian Government. The stream of internationally recognised record of achievement is more commonly reviewed by the Tribunal and is thus the focus of this Commentary. The criteria for this stream require substantial evaluative judgment on the part of decision makers and so it is appropriate to have regard to Departmental policy when assessing them. However, as policy in relation to these subclasses frequently goes beyond the legislative provisions, decision makers should approach it with caution. For further guidance on the appropriate application of policy see MRD Legal Services' commentary: Application of policy

Merits Review

Subclass 124

A decision to refuse a Subclass 124 (Distinguished Talent) (Migrant) (Class AL) visa is a decision reviewable by the Tribunal under Part 5 of the *Migration Act 1958* (the Act) if the visa applicant is sponsored or nominated under s 338(5)(b). This is only likely to arise under the category of internationally recognised record of achievement where a Form 1000 is included with the application.[4]

The application for review must be lodged within 70 days after the visa applicant is notified of the visa refusal decision.[5] The nominator has standing to apply for review.[6]

[1] cls 124.211(2) and (4) and cls 858.212(2) and (4) of Schedule 2 to the Migration Regulations 1994 (the Regulations).
[2] Policy – Migration Regulations – Schedules > –Sch2 Visa 124 - Distinguished Talent – Purpose; and Policy – Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent - Purpose (as re-issued 19/11/2016).
[3] The Distinguished Talent (Migrant) (Class AL) (Subclass 124) visa is for offshore visa applicants and can be made whilst the visa applicant is either onshore or offshore. However, the visa applicant must be outside Australia when the visa is granted: cls 124.411. The Distinguished Talent (Migrant) (Class BX) (Subclass 858) is for onshore visa applicants: item 1113(3)(a) and (b).
[4] In relation to the security assistance category of a Subclass 124 application, there is no Form 1000 requirement and as such there would be no nominator in Australia who would have standing to apply for review.
[5] reg 4.10(1)(c).
[6] s 347(2)(b).

Subclass 858

A decision to refuse a Subclass 858 (Distinguished Talent) (Residence) (Class BX) visa is a decision reviewable by the Tribunal under s 338(2) of the Act if at the time of visa application the visa applicant is in Australia, but is not in immigration clearance. The application for review must be made within 21 days after the visa applicant is notified of the visa refusal decision.[7] The visa applicant has standing to apply for review.[8] In addition, the review applicant must be in the migration zone when he or she applies for review.[9]

Requirements for Valid Visa Application – Schedule 1

The requirements for making a valid Class AL and Class BX visa application are prescribed in items 1112 and 1113 of Schedule 1 to the Migration Regulations 1994 (the Regulations) respectively. These are:

- the specified form;[10]
- visa application charge(s);[11]
- the application must be made at the place and in the manner specified;[12]
- *for Class BX (Subclass 858) applicants* – the applicant must be in Australia but not in immigration clearance;[13] and
- *for visa applications made on or after 1 July 2006* – where the visa applicant seeks to meet the requirements of cl 124.211(2)/858.212(2) and claims to have an internationally recognised record of exceptional and outstanding achievement, the application must be accompanied by a completed approved form 1000.[14]

Applications by members of the family unit of a person who is an applicant for a Distinguished Talent visa can be made at the same time and place as and combined with the application by that person.[15]

[7] reg 4.10(1)(a).
[8] s 347(2)(a).
[9] s 347(3).
[10] item 1112(1) and item 1113(1) for Class AL and Class BX respectively. For applications made on or after 18 April 2015, the approved form is the form specified by the Minister in a legislative instrument made under reg 2.07(5): item 1112(1) and item 1113(1) as amended by Migration Amendment (2015 Measures No. 1) Regulation 2014 (SLI 2015, No.34), Schedule 6, items [22] and [24]. For applications made before 18 April 2015, form 47SV was prescribed in item 1112(1) and item 1113(1).
[11] item 1112(2) and item 1113(2).
[12] item 1112(3)(a) and item 1113(3)(a). For applications made on or after 18 April 2015, the application must be made at the place and in the manner, if any, specified by the Minister in a legislative instrument made under reg 2.07(5): item 1112(3)(a) and item 1113(3)(a) as amended by Migration Amendment (2015 Measures No. 1) Regulation 2014 (SLI 2015, No.34), Schedule 6, items [23] and [25]. For applications made before 18 April 2015, application must be made by posting or delivering by courier to the address specified by legislative instrument: item 1112(3)(a) and item 1113(3)(aa). Note that reference to specification of addresses in item 1112(3)(a) and item 1113(3)(aa) was amended by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30), Schedule 1, item [17] omitting reference to 'Gazette Notice' and substituting with 'legislative instrument made by the Minister' with effect from 22 March 2014. However, instruments in force immediately before the commencement of that provision have effect after that date as if made under the amended provision: Schedule 1, item [314].
[13] item 1113(3)(b).
[14] item 1112(3)(c) and item 1113(3)(d). Form 1000 *Nomination for Distinguished Talent* is a nomination in which the applicant's record of achievement in an 'area' is attested to by an Australian citizen, or an Australian permanent resident, or an eligible New Zealand citizen or an Australian organisation, who has a national reputation in relation to the area (see note below cl 124.211(2)(e) and cl 858.212(2)(e)). This requirement was inserted by items [1]-[2] of Schedule 2 to Migration Amendment Regulations 2006 (No. 2) SLI 2006 No. 123. Transitional provision is in reg 4(2) of SLI 2006, No. 123.
[15] item 1112(3)(b) and item 1113(3)(c).

Time of Application Criteria

The 'distinguished talent' criteria in cls 124.211 and 858.212 are the same for both visa subclasses and are discussed below. Subclass 858 applicants must additionally meet criteria relating to visa status at the time of application as discussed below.

Time of application criteria common to both subclasses

Clauses 124.211 and 858.212 require that the applicant either:

- has an internationally recognised record of exceptional and outstanding achievement in one of the following areas:
    - a profession;
    - a sport;
    - the arts;
    - academia and research;[16] and
- is still prominent in the area;[17] and
- would be an asset to the Australian community;[18] and
- would have no difficulty in obtaining employment, or in becoming established independently, in Australia in the area;[19] and
- if the visa application was made on or after 1 July 2006, produces a completed approved form 1000;[20] and
- if the applicant has not turned 18, or is at least 55 years old, at the time of application – would be of exceptional benefit to the Australian community.[21]

OR

- the applicant has provided specialised assistance to the Australian Government in matters of security in the opinion of the Minister acting on the advice of:
    - the Minister responsible for an intelligence or security agency within the meaning of the *Australian Security Intelligence Organisation Act 1979*; or
    - the Director-General of Security .[22]

The secondary time of application criteria for a Subclass 124 applicant require the secondary applicant to be a member of the family unit of, and have made a combined application with, a person

[16] cl 124.211(2)(a) and cl 858.212(2)(a).
[17] cl 124.211(2)(b) and cl 858.212(2)(b).
[18] cl 124.211(2)(c) and cl 858.212(2)(c).
[19] cl 124.211(2)(d) and cl 858.212(2)(d).
[20] cl 124.211(2)(e) and cl 858.212(2)(e). An approved form 1000 nomination requires the applicant's record of achievement in the area to be attested to by an Australian citizen, or an Australian permanent resident, or an eligible New Zealand citizen or an Australian organisation, who has a national reputation in relation to the area. The Form 1000 requirement was inserted by items [3]-[4] of Schedule 2 to Migration Amendment Regulations 2006 (No. 2) (SLI 2006, No.123). Transitional provision is in reg 4(2) of SLI 2006 No. 123.
[21] cl 124.211(2)(f) and cl 858.212(2)(f).
[22] cl 124.211(4) and cl 858.212(4).

who satisfies or has satisfied the primary criteria in Subdivision 124.21 (time of application criteria for primary applicants).[23]

The secondary time of application criteria for a Subclass 858 applicant are slightly different and require the secondary applicant to be a member of the family unit of a Subclass 858 applicant who appears to satisfy the criteria in Subdivision 858.21 and the Minister has not decided to grant or refuse to grant the visa to that other person.[24]

For visa applications made between 1 November 2003 and 18 November 2016, regulations 1.12(6) and (7) provided *additional* definitions of 'member of a family unit' to the standard definition found in reg 1.12(1), directed at applicants for a Distinguished Talent visa who were under 18 at the time of application. For visa applications made on or after 19 November 2016, both the standard definition in reg 1.12(2) and the modified definition in reg 1.12(7) are relevant for applicants who were under 18 at the time of application, with only reg 1.12(2) being relevant for applicants over 18.[25] For further information, see MRD Legal Services commentary: Member of a Family Unit (regulation 1.12).

Additional time of application requirements – Subclass 858

In addition to the above 'distinguished talent' criterion, Subclass 858 applicants must also not, at time of application, hold or have last held, a specified visa.[26] If the applicant is not the holder of a substantive visa at the time of application, the applicant must meet Schedule 3 criteria 3001, 3003 and 3004.[27] There is no provision for the Schedule 3 criteria to be waived.

Time of Decision Criteria

At the time of decision, the following criteria must be met:[28]

- for both subclasses – the applicant and members of the applicant's family unit must satisfy various public interest criteria[29] and certain passport requirements;[30]
- for Subclass 124 – where the applicant has previously been in Australia, the applicant must satisfy certain special return criteria.[31]

[23] cl 124.311.
[24] cl 858.311.
[25] reg 1.12 as amended by Migration Legislation Amendment (2016 Measures No.4) Regulation 2016 (F2016L01696)
[26] cl 858.211(1) and (2)(b). For visa applications made on or after 23 March 2013, the specified visas are: an Electronic Travel Authority (Class UD), Maritime Crew (Temporary) (Class ZM), Sponsored (Visitor) (Class UL), Superyacht Crew (Temporary) (Class UW), Subclass 400 (Temporary Work (Short Stay Specialist)), Tourist (Class TR), Visitor (Class TV), Subclass 600 (Visitor), special purpose visa and Subclass 456 (Business (Short Stay)) visa (see items [261] – [272], in Schedule 6, and item [1201] in Schedule 8 to the Migration Legislation Amendment Regulation 2013 (No. 1) (SLI 2013, No. 32)). For visa applications made prior to 23 March 2013, the specified visas are: Electronic Travel Authority (Class UD), Long Stay (Visitor) (Class TN), Maritime Crew (Temporary) (Class ZM), Short Stay Sponsored (Visitor) (Class UL) (also known as a Sponsored (Visitor) (Class UL)), Short Stay (Visitor) (Class TR), Superyacht Crew (Temporary) (Class UW), Tourist (Class TR), Visitor (Class TV), special purpose visas and Subclass 456 (Business (Short Stay)).
[27] cl 858.211(2)(a).
[28] There was also previously a discretionary criterion permitting the requiring of an assurance of support, found in cl 124.223 and cl 858.222, but these were repealed from 9 August 2008 by Migration Amendment Regulations 2008 (No. 3) (SLI 2008, No.166). The amendment applies to all visa applications made on or after 9 August 2008 as well as visa applications made, but not finally determined, before that date.
[29] cl 124.221, cl 124.224, cl 124.225, cl 124.226, cl 124.228, cl 124.322, cl 124.325, cl 124.327 and cl 858.221, cl 858.223, cl 858.224, cl 858.225, cl 858.227, cl 858.322, cl 858.324 and cl 858.326.
[30] For visa applications made on or after 1 July 2005 but before 24 November 2012, applicants must meet cl 124.227, cl 858.226. For visa applications made on or after 24 November 2012 applicants must meet PIC 4021: cl 124.221(a), cl 124.322(a), cl 858.221(a) and cl 858.322(a): see items [40], [42], [246] and [248], respectively, in Schedule 2 to the Migration Legislation Amendment Regulation 2012 (No. 5) (SLI 2012, No.256). Public Interest Criterion 4021 requires that, unless it is unreasonable to require the applicant to hold a passport, he or she must hold a valid passport that was: issued to the applicant by an official source; is in the form issued by the official source, and is not in a class of passports specified in a written instrument: inserted by item [297] in Schedule 2 to the Migration Legislation Amendment Regulation 2012 (No. 5).
[31] cl 124.222.

The secondary time of decision criteria require the secondary applicant to be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a Subclass 124 or 858 visa,[32] unless, in the case of a Subclass 858 applicant, the secondary applicant meets one of the exceptions in cls 858.321(3) or (4). Various public interest criteria, and in the case of a Subclass 124 applicant special return criteria, must also be met by secondary applicants at the time of decision.[33]

Legal Issues

There is limited case law in relation to this visa category and its requirements. Decisions tend to turn on the criteria in cl 124.211(2)/cl 858.212(2) as discussed below.

Record of exceptional and outstanding achievement

The ordinary meaning of 'record' does not require that the record be quantifiable as large or lengthy or as having been sustained over a period of time. A record is an aggregation or a list, not necessarily a large aggregation or a long list.[34] Once the record of achievement is identified, the question then is whether it amounts to one which is of exceptional and outstanding quality.

In determining whether the visa applicant has a 'record of exceptional and outstanding achievement', the criterion requires a demonstrated excellence in the relevant occupation which is out of the ordinary.[35] It is not required that the applicant be a 'living treasure'.[36] The circumstances that will meet this requirement will vary across different professions and activities as some will require far greater levels of knowledge and skill by a visa applicant to rise above the ordinary and the merely competent.

While the criteria in both cl 124.211 and cl 858.212 must be satisfied at the time of application, it may be relevant to consider events subsequent to that point in time, if they tend to shed light on circumstances as at the date of application.[37]

When considering whether an applicant has an internationally recognised record of exceptional and outstanding achievement in a particular sport, evidence of recognition from the international governing body of that sport may be relevant, such as success in competitions endorsed by that body or an international ranking.[38] However, the relevant test is that posed by the terms of the relevant criterion, and care should be taken to avoid treating any particular achievement as a requirement.[39]

[32] cl 124.321 and cl 858.321.
[33] cls 124.322-124.327 and cls 858.322-858.326. For applications made on or after 1 July 2005 but before 24 November 2012, secondary applicants also must meet cl 124.326 and cl 858.325.
[34] *Zhang v MIMA* [2007] FMCA 664 (Cameron FM, 9 May 2007) at [36]-[37].
[35] *Gaffar v MIMIA* [2000] FCA 293 (French J, 15 March 2000) at [19]-[20]. The Court was considering the phrase 'exceptional record of achievement' in an earlier category of skilled residence visa (Clause 805.21 omitted by statutory rules 1999 No 220 from 1 November 1999). The Court found that the criterion required something that made the applicant's record unusual or special or out of the ordinary, and that the Immigration Review Tribunal had taken an unduly restrictive approach to the criterion in the circumstances of the case. The reasoning in *Gaffar* appears applicable to the current subclasses, taking into account the similar language of the statutory provisions.
[36] *Gaffar v MIMIA* [2000] FCA 293 (French J, 15 March 2000) at [20].
[37] This follows the principle in *Bretag v Immigration Review Tribunal* [1991] FCA 582, a partner visa case. In *Singh v MIBP* [2018] FCCA 506 (Judge Riley, 9 February 2018) the Court found no error in the Tribunal's approach to evidence of competition performance occurring after the date of visa application, whereby the Tribunal referred to the principle in *Bretag* but concluded that the applicant's post application achievements did not point to the existence of an internationally recognised record of exceptional and outstanding achievement at the time of application (at [8], [26]). On appeal, the Federal Court also held that the Tribunal's approach was correct: *Singh v MHA* [2018] FCA 1337 (Middleton J, 27 August 2018) at [13]-[14].
[38] The Court in *Singh v MIBP* [2018] FCCA 506 (Judge Riley, 9 February 2018) characterised a query from the Tribunal about international rankings as a legitimate question to assist in determining whether the applicant had an internationally recognised record of exceptional and outstanding achievement (at [36]). Although not the subject of specific argument before the Court, no error was found in *Singh v MIBP* [2017] FCCA 2992 (Judge Riethmuller, 6 December 2017) where again the absence of an

With regard to 'exceptional and outstanding' achievement, Departmental policy states the following, among other things:

- that applicants should be eminent in the top echelons of their 'field';
- they should demonstrate extraordinary and remarkable abilities and be superior to others in their 'field';
- claims of an 'excellent' level of performance in a job, particularly where the benefits of such performance may only be realised locally, would not be regarded as exceptional and outstanding achievement;
- a single achievement by the applicant, particularly where it appears to be the only significant achievement, would not be regarded as a 'record of exceptional and outstanding' achievement. It is anticipated that an applicant would have a record of *sustained* achievement that is unlikely to diminish in the future;
- an applicant would be expected to have achievements remarkable in relation to that 'field' and in relation to other participants in that 'field'. An applicant should be at the very top of their 'field'. [40]

However, while the Tribunal should have regard to policy in considering whether an applicant's achievements amount to 'exceptional and outstanding' achievement in one of the prescribed areas, the requirements list above appear to go beyond the legislative requirements. Accordingly, the Tribunal should not treat the policy as determinative, but rather ensure its consideration reflects the terms of the legislation. Thus, for example, to the extent that the policy suggests that a single achievement cannot amount to a 'record' when determining a record of achievement, it should not be followed. However, the extent of the record of achievement can be relevant to the determination of whether the record meets the description of 'exceptional and outstanding'. For further guidance on the appropriate application of policy see MRD Legal Services' commentary: Application of policy.

It should be noted that throughout the Departmental policy, reference is made to the applicant's 'field'. However, the reference to 'field' does not reflect the actual wording of the criterion, which relates to a record of exceptional and outstanding achievement in one of the specified 'areas' of a profession, a sport, the arts, or academia and research. The term 'field' can easily equate to a profession or a sport. However, where an applicant claims exceptional achievement in the area of 'the arts' or 'academia and research', care should be taken to apply the language of the Regulations. Using the terminology of the narrower concept of 'field' in these circumstances could give rise to a risk of failure to apply the correct test.

international ranking and lack of participation in competitions endorsed by the international government body were factors taken into account by the Tribunal when rejecting a claim that the applicant had an internationally recognised record of exceptional and outstanding achievement in sport (see paragraph [13]).

[39] Such an argument was raised, though ultimately rejected by the Court, in *Singh v MIBP* [2018] FCCA 506 (Judge Riley, 9 February 2018 at [36]) In a couple of instances in this judgment the Court did note that the Tribunal had used language other than that of the test cl 858.212 and indicated that this was less than ideal, though was overall satisfied in this instance that the Tribunal had applied the correct test.

[40] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – The "internationally recognised achievement" category - What does 'exceptional mean' and Policy requirements, and Policy – Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent – The "internationally recognised achievement" category - What does 'exceptional mean' and Policy requirements (as re-issued 19/11/2016).

Internationally recognised

The record of exceptional and outstanding achievement must be 'internationally recognised'. Achievement in a profession, a sport, the arts, or academia and research that has not been recognised at an *international* level would therefore not meet the criterion.

This requirement was considered in *Singh*, which concerned an applicant who argued before the Tribunal that national level competition successes in his sport of wrestling in both India and Australia resulted in international recognition, even though he had not yet competed at an international level.[41] The Tribunal had regard to this argument, but was ultimately not satisfied that his national level participation had been recognised internationally, having regard in particular to his absence from the wrestling world ranking system and the lack of evidence he competed in any international events or events sponsored by the peak international body.[42] The Tribunal was not satisfied that competing in national competitions in two countries of itself necessarily translated to an internationally recognised record of exceptional and outstanding achievement. While argument before the Court focused on whether the Tribunal had considered the applicant's claims as put and possibly applied a more generous test than provided by the Regulations, the Court did not find any error in the Tribunal's reasoning.[43] Although no error was found, the Court's consideration of the second argument serves as a reminder to ensure reasoning is framed by the particular wording of the relevant provision (cl 858.212 / cl 124.211).[44]

In another recent *Singh* judgment, also considering wrestling, the Court highlighted that there is a distinction between a competition where people from overseas are present as competitors and an internationally recognised record of exceptional and outstanding achievement.[45] These two judgments highlight that evidence about the level of competition relied on by sportspeople, including endorsement by the international government body, may be critical in determining whether a claimed record of exceptional and outstanding achievement in their sport can be said to be 'internationally recognised'.

While providing some useful guidance as to this criterion, the Departmental policy appears to go beyond the legislative requirements. The policy states that 'internationally recognised' in this context means that a person's achievements have or would be acclaimed as exceptional and outstanding in any country where the relevant field is practised and that an achievement that may attract national acclaim would not be considered as 'internationally recognised' unless that achievement is in a field practised in other countries (including Australia) and has or would attract similar acclaim in those countries.[46]

Departmental policy identifies the following points as relevant to determining whether the record of outstanding achievement is internationally recognised:[47]

- the international standing of the country, where the applicant's achievements were realised, in respect of the particular field;

[41] *Singh v MIBP* [2017] FCCA 2992 (Judge Riethmuller, 6 December 2017) at [5].
[42] *Singh v MIBP* [2017] FCCA 2992 (Judge Riethmuller, 6 December 2017) at [12]-[13].
[43] *Singh v MIBP* [2017] FCCA 2992 (Judge Riethmuller, 6 December 2017) at [21], [29].
[44] This was similarly the subject of argument in *Singh v MIBP* [2018] FCCA 506 (Judge Riley, 9 February 2018) though again in that instance no error was found (see [28], [30]).
[45] *Singh v MIBP* [2018] FCCA 506 (Judge Riley, 9 February 2018) at [28].
[46] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – The "internationally recognised achievement" category - Policy requirements; and Policy – Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent – The "internationally recognised achievement" category – Policy requirements (as re-issued 19/11/2016).
[47] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – The "internationally recognised achievement" category – International recognition required, and Policy - Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent The "internationally recognised achievement" category – International recognition required (as re-issued 19/11/2016).

- the standing of the achievement in relation to Australian standards; and
- the standing of the achievement in relation to international standards.

The policy provides the example of an applicant rated at or near the top of their field in their home country as being expected to have an internationally recognised record of exceptional and outstanding achievement if:

- the field is undertaken and recognised in a number of countries, including Australia; and
- the achievement would be similarly recognised in relation to international and Australian standards for that field.

Contrary to the position taken in Departmental policy, there is no specific legislative requirement that the area or 'field' must be undertaken in Australia for a record of achievement in a field or occupation to be 'internationally recognised'. This element may more properly be considered in relation to whether the visa applicant would be an 'asset to the Australian community' in accordance with cl 124.211(2)(c) / 858.212(2)(c).

Still prominent in the area

The visa applicant must still be prominent in the area in which they have an internationally recognised record of exceptional and outstanding achievement.[48] It is not enough that they have a record of past achievement that is internationally recognised as outstanding and exceptional; the visa applicant must continue to have some prominence in that area.

There is no court authority considering this provision. The Tribunal should apply the ordinary meaning of the term 'prominent'. The term 'prominent' does not require that the visa applicant maintain the level of achievement referred to in relation to cl 124.211(2)(a)/858.212(2)(a), but only that they continue to have a degree of importance or prominence in the area in which that record of achievement has been recognised. Departmental policy however refers to the need to maintain the integrity of the distinguished talent program that successful applicants not be assessed on past performance only but require *current prominence* in their area, and that an applicant claiming distinguished talent in a particular area, but who has not been active in that area for more than 2 years, would not be regarded as retaining prominence in that area.[49] Care should be taken not to raise the reference to 2 years to the level of a statutory requirement. The Tribunal should have regard to all the circumstances of the case in determining whether the person is 'still prominent'.

Would be an asset to the Australian community

Departmental policy states that the intention of cl 124.211(2)(c) / 858.212(2)(c) is that the applicant's settlement in Australia will benefit the Australian community, not just the applicant and/or nominator (or prospective employer).[50] However, the policy then goes on to state that the reference to the Australian community is to be interpreted in terms of Australia as a whole and not just a local community in geographic terms or a particular social, cultural or business community in Australia. This

[48] cl 124.211(2)(b) and cl 858.212(2)(b).
[49] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – The "internationally recognised achievement" category - Must still be prominent; and Policy – Migration Regulations - Schedules > Sch2 Visa 858 - Distinguished Talent - The "internationally recognised achievement" category - Must still be prominent (as re-issued 19/11/2016).
[50] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – Must be an asset to Australia; and Policy – Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent – Must be an asset to Australia (as re-issued 19/11/2016).

approach may be viewed as imposing an additional criterion of the community 'as a whole' narrower than what is required by the Regulations, along the lines of the reasoning of the Federal Magistrates Court in the case of *Wolseley v MIMA*.[51] (For further detail of *Wolseley*, see 'Exceptional Benefit to the Australian Community' below.) While the Court in that case was addressing the phrase 'exceptional benefit to the Australian community' in relation to a criterion applicable to applicants under 18 or over 55, in circumstances where the Tribunal decision had accepted that the applicant would be an asset to the Australian community and its reasoning may be limited in its application to this criterion, its discussion is useful in this context and acts as a reminder not to impose additional requirements on applicants outside the terms of the regulations.

'Asset' does not only refer to economic benefit. It could also refer to social and/or cultural benefit to the Australian community.[52] Departmental policy sets out the following considerations in relation to determining whether the applicant would be an asset to the Australian community:[53]

- the applicant would contribute to the betterment of the Australian community economically, socially or culturally, depending on the applicant's intended field of activity, or raising Australia's sporting, artistic or academic standards internationally;
- the benefit to the community is clearly apparent and not simply conjecture on the part of the applicant or decision maker; and
- the applicant is not involved in an area that is outside the generally accepted social or cultural norms of most people in Australia, likely to be offensive to large segments of the Australian community, or would otherwise give rise to controversy were the applicant to enter Australia as a distinguished talent.

The policy states that the fact that the applicant might introduce and/or transfer skills to Australia would not alone be sufficient to satisfy this criterion.[54] It would be necessary to explain how this would be an asset to the Australian community.

Obtaining employment or becoming established independently

The requirement in cl 124.211(2)(d) and cl 858.212(2)(d) is that the applicant would have no difficulty in obtaining employment, or in becoming established, in Australia in the area. When assessing this criterion, Departmental policy states that consideration can be given to the following:[55]

- employment contracts or offers of employment related to the area of achievement. This may be evidenced by current and future employment opportunities from employers, employment/recruitment agencies, or organisations involved with the area of achievement at the national level;
- evidence of self-employment or opportunities to establish a viable business within the area of achievement; and

[51] [2006] FMCA 1149 (McInnis FM, 11 August 2006).
[52] Policy – Migration Regulations - Schedules > Sch2 Visa 124 - Distinguished Talent – Must be an asset to Australia; and Policy – Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent – Must be an asset to Australia (as re-issued 19/11/2016).
[53] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – Assessing whether asset to Australia; and Policy – Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent - Assessing whether asset to Australia (as re-issued 19/11/2016).
[54] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – Assessing whether asset to Australia; and Policy – Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent – Assessing whether asset to Australia (as re-issued 19/11/2016).
[55] Policy – Migration Regulations – Schedules > Sch2 Visa 124 – Employability – Assessing this criterion; and Policy – Migration Regulations > Schedules > Sch2 Visa 858 – Distinguished Talent - Employability – Assessing this criterion (as re-issued 19/11/2016).

- evidence of sponsorships, scholarships, grants or other payments intended to support the applicant while they are engaged in activities related to the area of achievement.

The Tribunal may have regard to any of the pieces of evidence listed above in determining whether the applicant satisfies this criterion. However, care should be taken so as to not impose a legislative requirement that the above documents are required in order to satisfy the criterion. The Tribunal may also have regard to other relevant evidence provided which does not fit into any of the listed categories but may indicate that the applicant will have no difficulty obtaining employment, or becoming established, in the area in Australia.

The policy also states that evidence of income which is unrelated to the area of achievement cannot satisfy cl 124.211(2)(d) and cl 858.212(2)(d), and existing funds and assets held by the applicant do not contribute to satisfying the requirement.[56] However, to the extent that the policy appears to exclude assets or income unrelated to the area, the Tribunal should instead focus on the terms of the regulation and consider whether existing funds and/or assets held by the applicant may assist them to establish themselves in Australia while they seek out opportunities in their area.

Nomination

For applications made from 1 July 2006[57] where the applicant is seeking to meet the provisions of cl 124.211(2) / 858.212(2), the approved Form 1000 must accompany the visa application.[58] The Form 1000 itself[59] indicates that the Regulations require the applicant to be nominated by an Australian citizen, permanent resident, eligible New Zealand citizen or Australian organisation with a national reputation in the same field as the applicant. However, there is no such requirement in the body of the Regulations. Rather, both cl 124.211(2)(e) and cl 858.212(2)(e) of Schedule 2 indicate in a note that the form 1000 requires the applicant's record of achievement to be attested to by such a person. Because the inclusion of nominator requirements is found in a note rather than a separate criterion, and in the absence of judicial consideration, it is unclear whether it is in fact a legal requirement for the Form 1000 to be completed by a person such referred to in the note despite Departmental policy[60] referring to it as a 'Schedule 2 requirement'. While a note forms part of the Regulations[61] and regard should be had to it in construing cl 124.211(2)(e) and cl 858.212(2)(e), it appears that the note is an extension to what the text of the provisions require. The preferable approach would be to assess this criterion with reference to what Form 1000 requires, and whether it has been completed. For example, if the form is completed by an individual, it needs to be completed by an Australian citizen or permanent resident or eligible New Zealand citizen, and that person needs to describe how they have acquired a national reputation. It would appear, however, to go beyond the requirements of the Regulations to assess whether that person in fact has a national reputation.

[56] Policy – Migration Regulations – Schedules > Sch2 Visa 124 – Employability – Assessing this criterion; and Policy – Migration Regulations > Schedules > Sch2 Visa 858 – Distinguished Talent - Employability – Assessing this criterion (as re-issued 19/11/2016).
[57] reg 2 of Migration Amendment Regulations 2006 (No.2) SLI 2006 No. 123; Items 1112(3)(c) and 1113(3)(d) of Schedule 1 to the Migration Regulations and paragraphs 124.211(2)(e) and 858.212(2)(e) of Schedule 2 to the Migration Regulations inserted by Schedule 2 to SLI 2006 No. 123.
[58] Item 1112(3)(c) and item 1113(3)(d).
[59] Accessed at https://immi.homeaffairs.gov.au/form-listing/forms/1000.pdf on 8 August 2019.
[60] Policy – Migration Regulations – Schedules > Sch2 Visa 124 – Nomination – Status of nominator; and Policy – Migration Regulations > Schedules > Sch2 Visa 858 – Distinguished Talent - Nomination – Status of nominator (as re-issued 19/11/2016).
[61] Section 13(1) of the *Acts Interpretation Act 1901* (applicable to the Regulations due to the operation of s 13(1) of the *Legislation Act 2003*) provides that all material forms part of an Act.

If the form is being completed by an Australian organisation, as the Regulations do not define what an Australian organisation is for the purposes of this criterion,[62] decision makers should start with the ordinary meaning of the word.[63]

Exceptional benefit to the Australian community

Consideration of the phrase 'exceptional benefit to the Australian community' only arises if the applicant has not turned 18, or is at least 55 years old, at the time of application and must therefore meet cl 124.211(2)(f) or 858.212(2)(f).

This subclause requires consideration of whether an applicant is of exceptional benefit to the particular field of endeavour, and the Court has held that it is logically consistent that if an applicant is of exceptional benefit to his or her particular field, he or she will be of exceptional benefit to the Australian community.[64] It is erroneous to think of the 'community *as a whole*' as this is effectively introducing an additional criterion.[65] In *Wolseley,* the Tribunal had found that the applicant's settlement in Australia would be of exceptional benefit to the particular field of print-making, but was not satisfied that it would be of exceptional benefit 'to the Australian community as a whole'. The Court held that by introducing the concept of 'community as a whole' (which was referred to in the version of Departmental policy in effect at the time) the Tribunal erred by introducing an additional criterion which was unnecessary. The Court further held that subclause 124.211(2) is a criterion which of itself narrows the application of the person concerned to a particular field of endeavour that would be an asset to the Australian community, and the benefit to a particular field of endeavour by its nature would clearly be a benefit to the Australian community.

Departmental policy has been adjusted and now refers to assessing whether the applicant would be of exceptional benefit to the Australian community in terms of the applicant's contribution to the field in Australia 'elevating the international standing of the particular field in Australia'.[66] However, references in the policy to specific requirements for an applicant who is under 18 should be treated with care. They refer to specific requirements that may be seen as narrower than what is required by the Regulations. The Tribunal should consider the circumstances of each case and not elevate the policy to the level of statutory requirements.

The policy suggests that the benefit would need to be immediately realised and ongoing in the future and that it would not be expected that an applicant who intended retiring in Australia or pursuing other activities within a few years of arrival would satisfy this criterion.[67] Again this introduces an additional requirement inconsistent with the Regulations. The Tribunal should not apply this policy inflexibly and should not elevate it to the level of legislative requirement. The length of the expected benefit may contribute to a determination of whether the benefit is 'exceptional' in some circumstances. However, a short-lived benefit may be exceptional in other circumstances.

[62] While reg 2.57(1) defines the phrase Australian organisation for Part 2A of the Act as meaning a body corporate, a partnership or an unincorporated association (other than an individual or a sole trader) that is lawfully established in Australia, it does not apply to applications for either a Subclass 124 or 858 visa: reg 2.56.
[63] Departmental policy in fact suggests a 'broad interpretation' be given: Policy – Migration Regulations – Schedules > Sch2 Visa 124 – Distinguished Talent – Nomination – Meaning of 'Australian organisation'; and Policy – Migration Regulations – Schedules > Sch2 Visa 858 – Distinguished Talent – Nomination – Meaning of 'Australian organisation' (as re-issued 19/11/2016).
[64] *Wolseley v MIMA* [2006] FMCA 1149 (McInnis FM, 11 August 2006) at [46]-[49].
[65] *Wolseley v MIMA* [2006] FMCA 1149 (McInnis FM, 11 August 2006) at [48].
[66] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – If under 18 years old or 55 years or older – Exceptional benefit; and Policy – Migration Regulations – Schedules > Sch2 Visa 858 - Distinguished Talent – If under 18 years old or 55 years or older – Exceptional benefit (as re-issued 19/11/2016).
[67] Policy – Migration Regulations – Schedules > Sch2 Visa 124 - Distinguished Talent – If under 18 years old or 55 years or older – Ongoing benefit; and Policy – Migration Regulations > Sch2 Visa 858 - Distinguished Talent If under 18 years old or 55 years or older – Ongoing benefit (as re-issued 19/11/2016).

Available Decision Templates

There is no decision template specific to the Distinguished Talent Visa Classes. It is recommended that the generic decision template be used in these cases.

Relevant Case Law

Gaffar v MIMIA [2000] FCA 293	
Singh v MIBP [2017] FCCA 2992	
Singh v MIBP [2018] FCCA 506	Summary
Wolseley v MIMA [2006] FMCA 1149	Summary
Zhang v MIMA [2007] FMCA 664	Summary

Relevant legislative amendments

Migration Amendment Regulations 2006 (No. 2)	SLI 2006, No. 123	No.2/2006
Migration Amendment Regulations 2008 (No. 3)	SLI 2008, No.166	No.5/2008
Migration Legislation Amendment Regulation 2012 (No. 5)	SLI 2012, No.256	No.10/2012
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32	No.3/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30	No.2/2014
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015, No.34	No.1/2015
Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016	F2016L01696	No.4/2016

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Subclass 186
Employer Nomination (Permanent) (Class EN)

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Overview

The Employer Nomination (Permanent) (Class EN) visa is a permanent visa introduced on 1 July 2012,[1] which replaced the Subclass 120 and 855 (Labour Agreement) visas, and the Subclass 121 and 856 (Employer Nomination) visas.[2] There is one subclass: Subclass 186.[3]

The Subclass 186 visa is part of the Employer Nomination scheme (ENS). The ENS enables employers to sponsor highly skilled workers to fill skilled vacancies in their business. Employers can employ skilled workers from overseas, or temporary residents who are living and working in Australia.

This scheme involves two stages:

- approval of a nominated position in Australia under r.5.19 of the Migration Regulations 1994 (the Regulations) or pursuant to a labour agreement; and
- grant of a permanent visa (Subclass 186) on the grounds that the visa applicant is the subject of either an approved temporary residence transition nomination, an approved direct entry nomination or a nomination made in accordance with a labour agreement.

For information on the first stage, nominations, see MRD Legal Services commentary: Regulation 5.19 - Employer nominations).

A person may be granted a Subclass 186 visa by meeting the requirements of one of three alternative 'streams', being:

- the Temporary Residence Transition stream;
- the Direct Entry stream; and
- the Labour Agreement stream.[4]

Primary applicants must meet common criteria as well as the criteria for the stream in which they apply for the visa.

Merits review

A decision to refuse a Subclass 186 visa is a reviewable decision under Part 5 of the Act:

- if the application was made in the migration zone;[5] or
- if the application was made outside the migration zone but the applicant was present in the migration zone when the primary decision was made.[6]

[1] Introduced by Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82).
[2] Explanatory Statement to SLI 2012 No.82, p.51.
[3] Item 1114B(4) of Schedule 1 to the Regulations.
[4] Note that prior to 18 March 2018 this was referred to as the 'Agreement stream', but was amended by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[5] s.338(2) of the *Migration Act 1958* (the Act).
[6] s.338(7A), s.347(3A).

In both cases, it is the visa applicant who has standing to apply for review,[7] and the applicant must be inside the migration zone at the time of lodging the review application.[8]

Visa application requirements

An application for an Employer Nomination (Permanent) (Class EN) visa must be made in the approved form and in the place, and manner specified.[9] An applicant may be in or outside Australia at the time of application, but not in immigration clearance.[10] An applicant in Australia must hold a substantive visa or a Bridging Visa A, B or C.[11]

For a visa application to be valid, the primary applicant must make a declaration that the position to which the application relates is a position nominated:

- under r.5.19 of the Regulations; or
- *for positions nominated prior to 18 March 2018* in accordance with a labour agreement that is in effect, by an employer that is a party to the labour agreement.[12]

In addition, for visa applications made on or after 14 December 2015, the primary applicant must also make a declaration in the application as to whether or not they have (or a combined applicant has) engaged in conduct in relation to the application that contravenes s.245AS(1) of the Act.[13]

Whether these declarations have been made is a question of fact, though typically these requirements will be satisfied by completion of relevant questions and the making of a declaration as prompted by the application form.

Employer nominations under r.5.19 are discussed in MRD Legal Services commentary Regulation 5.19 - Employer Nomination.

An application by a person claiming to be a member of the family unit of a primary applicant may be made at the same time as, and combined with, the application by that person.[14]

[7] s.347(2)(a).
[8] s.347(3) and (3A).
[9] Item 1114B(1) and (3)(a) of Schedule 1 to the Regulations. For applications made prior to 18 April 2015, the prescribed form is form1408 (Internet) and must be made as an Internet application. The application may be made in or outside Australia, but not in immigration clearance. These provisions were amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No. 34) for applications made on or after 18 April 2015 to provide that the approved form and place and manner which the application must be made, if any, are specified by the Minister in a legislative instrument under r.2.07(5).
[10] Item 1114B(3)(c).
[11] Item 1114B(3)(c).
[12] Item 1114B(3)(d). Note that from 18 March 2018 even positions nominated as part of a labour agreement must be made under r.5.19, so that the terms of 11144B(3)(d) were amended by F2018L00262 to refer simply to positions nominated under r.5.19.
[13] Item 1114B(3)(da) as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242) and applying to an application for a visa made on or after 14 December 2015. Section 245AS of the Act prohibits a person from offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The term 'sponsorship-related event' is defined in s.245AQ of the Act, but relevantly includes such events as a person applying for approval of the nomination of a position in relation to an applicant for a sponsored visa or the grant of such a visa.
[14] Item 1114B(3)(e).

Visa criteria

The criteria for a Subclass 186 visa are set out in Part 186 of Schedule 2 to the Regulations. They comprise primary and secondary criteria. At least one person included in the application must meet the primary criteria. An applicant may be in or outside Australia when the visa is granted, and must not be in immigration clearance.[15]

Primary criteria

The primary criteria are not divided between time of application and time of decision criteria. However, some criteria require the decision-maker to be satisfied of the existence of certain matters as at the time of the visa application (for example, the requirement for some applicants to hold or be eligible to hold a licence, registration or membership of a professional body). Unless otherwise specified, all criteria must be satisfied at the time a decision is made on the application.[16]

All primary applicants must meet common criteria and meet the criteria in one of three alternative streams:

- the Temporary Residence Transition stream;
- the Direct Entry stream; or
- the Labour Agreement Stream.[17]

Common criteria

The common criteria that must be met by all primary applicants are set out in cl.186.21. These are:

- **occupation licencing** - if it is mandatory in the State or Territory where the position to which the application relates is located that a person:
  - hold a licence of a particular kind, or
  - hold a registration of a particular kind, or
  - be a member (or a member of a particular kind) of a particular professional body,

  to perform tasks of the kind to be performed in the occupation to which a position relates, then the applicant must be, or be eligible to become, the holder of the licence or registration or a member of the body, *at the time of application*;[18]
- **future employment** - the position to which the application relates will provide the applicant the employment referred to in the application for nomination approval;[19]

[15] cl.186.411.
[16] Note to Division 186.2.
[17] Note to Division 186.2. Note that prior to 18 March 2018 the 'Labour Agreement' stream was referred to as the 'Agreement stream', this was amended by F2018L00262.
[18] cl.186.211. Note that the Australian and New Zealand Standard Classification of Occupations (ANZSCO) refers to registration, licensing and professional membership requirements at the Unit Group level for each group of occupations. Registration and licensing requirements are generally specified in the Commonwealth, State/Territory legislation that applies to a specific occupation or trade and administered by a specific authority specified in the legislation: PAM3: Migration Regulations - Schedules > Employer Nomination Scheme (subclass 186 visa) – visa applications –[11] EN-186 mandatory registration, licensing or similar (policy reissued on 13 April 2018).
[19] cl.186.212.

- **no 'payment for visas' conduct** – the applicant has not engaged in conduct that breaches ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act, or it is reasonable to disregard the conduct (see discussion below);[20]
- **public interest criteria** - the applicant, and each member of the family unit who is an applicant for a Subclass 186 visa, must satisfy certain public interest criteria (PIC)[21] and certain special return criteria,[22] and each member of the primary applicant's family unit who is *not* an applicant for a Subclass 186 visa must satisfy certain PIC;[23] and
- **passport** - *for visa applications made before 24 November 2012*, the applicant must hold a valid passport that was issued to the applicant by an official source, and is in the form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport.[24]

Criteria for the Temporary Residence Transition stream

The Temporary Residence Transition stream is for Subclass 457 visa holders and Subclass 482 holders who have worked for their employer for at least the last two or three years and whose employer wants to offer them a permanent position in that same occupation.[25] In addition to the common criteria, applicants for this stream must meet the following additional criteria:

- **age** - *at the time of application*,
  - for applications made on or after 18 March 2018, the applicant must not have turned 45,
  - for applications made before 18 March 2018, the applicant must not have turned 50,

  unless in a specified class of persons;[26]
- **English language** - *at the time of application:*
  - for applications made on or after 1 July 2017, the applicant must have had competent English;
  - for applications made before 1 July 2017 the applicant must have had vocational English,

  unless in a specified class of persons (see below for discussion of this criterion);[27]

[20] cl.186.212A, as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. In general terms, these provisions place prohibitions on people asking for or receiving a benefit, or offering to provide or providing a benefit, in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.
[21] cl.186.213. These PIC are (for primary visa applicant and secondary applicants): PIC 4001, 4002, 4003, 4004, 4010, 4020, 4021 (for visa applications from 24 November 2012) and, if 18 at the time of application, PIC 4019. Each member of the family unit who is a Subclass 186 applicant and has not turned 18 at the time of application must satisfy PIC 4015 and 4016. PIC 4021 was added for new applications from 24 November 2012 by Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256), which repealed the similar criterion that was found in cl.186.215. Further information on some of these criteria can be found in the following Legal Services Commentaries: Public Interest Criteria 4001, Bogus Documents/False or Misleading Information – PIC 4020.
[22] cl.186.214. These are These are special return criteria 5001, 5002 and 5010. For information on these criteria, see Legal Services Commentary: Special Return Criteria.
[23] cl.186.213(6). These are PIC 4001, 4002, 4003 and 4004.
[24] cl.186.215, omitted by SLI 2012, No.256 and replaced by the very similarly termed PIC 4021, which applies to visa applications made on or after 24 November 2012.
[25] PAM3: Migration Regulations - Schedules - Employer Nomination Scheme (subclass 186) - visa applications – [4] Policy intent - [4.2] Objectives of the programme (policy reissued 13 April 2018).
[26] cl.186.221, as amended from 18 March 2018 by F2018L00262. For the relevant instrument, see the 'ExmtAge' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.
[27] cl.186.222, amended for applications made on or after 1 July 2017 by Migration Legislation Amendment (2017 Measures No.3) Regulations 2017 (F2017L00816). For the relevant instrument, see the 'EngLangExempt 186/187' tab (visa applications

- **nomination requirements** – all of the following must be satisfied (see below for discussion of this criterion):
    - the position to which the application relates must be the position:

        where the nomination was made before 18 March 2018

        - nominated in an application for approval that seeks to meet the requirements of r.5.19(3) (i.e. a nomination in the Temporary Residence Transition stream);
        - in relation to which the applicant is identified as the holder of a Subclass 457 visa; and
        - in relation to which the declaration included as part of the visa application was made; [28]

        where the nomination was made on or after 18 March 2018

        - nominated in an application for approval that is made in relation to a visa in the Temporary Residence Transition stream;
        - nominated in an application for approval that identifies the applicant in relation to the position; and
        - in relation to which the declaration included as part of the visa application was made;[29]
    - the Minister has approved the nomination,[30] and it has not subsequently been withdrawn;[31]
    - there is no adverse information known to Immigration about the person who made the nomination or a person associated with that person (or it is reasonable to disregard any such information)(see discussion below);[32]
    - the position is still available to the applicant;[33] and
    - the visa application was made no more than 6 months after the nomination was approved;[34] and
- **health criteria** - the applicant and each member of the family unit applying for a Subclass 186 visa satisfies PIC 4007 (health); each family member who is *not* applying for a Subclass 186 visa must also meet PIC 4007, unless it would be unreasonable to require them to undergo an assessment for it;[35] and
- **skills assessment** – *for visa applications made on or after 18 March 2018*, if the Minister (or the Tribunal on review) requires the applicant to demonstrate that he or she has the skills necessary to perform the tasks of the occupation to which the position relates, the applicant demonstrates that he or she has those skills in the manner specified.[36]

made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.

[28] cl.186.223(1).
[29] cl.186.223(1) as amended by F2018L00262.
[30] cl.186.223(2).
[31] cl.186.223(3).
[32] cl.186.223(3A), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[33] cl.186.223(4).
[34] cl.186.223(5).
[35] cl.186.224. For further information on PIC 4007, see the Legal Services Commentary, Health Criteria.
[36] cl.186.225 as inserted by F2018L00262.

Criteria for the Direct Entry Stream

The Direct Entry stream is for persons who are untested in the Australian labour market and are applying for a visa from outside Australia or are applying from inside Australia but are not eligible for the Temporary Residence Transition stream.[37] In addition to the common criteria, applicants for this stream must satisfy the following additional criteria:

- **age** - *at the time of application*:
    - for applications made on or after 1 July 2017, the applicant must not have turned 45;
    - for applications made before 1 July 2017, the applicant must not have turned 50;

  unless in a specified class of persons;[38]
- **English language** - *at the time of application*, the applicant must have had competent English unless in a specified class of persons (see below for discussion of this criterion);[39]
- **nomination requirements** – all of the following must be satisfied (for discussion of this criterion see below):
    - the position to which the application relates must be the position:
        - nominated in an application for approval that seeks to meet the requirements of r.5.19(4)(h)(i) or r.5.19(2) as in force before 1 July 2012 (i.e. not a regional employer nomination),[40] or *where the position is nominated on or after 18 March 2018* that seeks to meet the requirements of r.5.19(10) (i.e. for a Subclass 186 in Direct Entry stream) and is made in relation to a visa in the Direct Entry stream;[41] and
        - in relation to which the declaration required for the visa application was made; [42] and
        - *for applications made on or after 1 July 2017* in relation to which the applicant is identified in the application under r.5.19(4)(a)(ii),[43] or *where the nomination is made on or after 18 March 2018* is nominated in an application for approval that identifies the applicant in relation to the position;[44]
    - the person who will employ the applicant is the person who made the nomination;[45]
    - the Minister has approved the nomination,[46] and it has not subsequently been withdrawn;[47]
    - there is no adverse information known to Immigration about the person who made the nomination or a person associated with that person (or it is reasonable to disregard any such information) (see discussion below);[48]

[37] PAM3: Migration Regulations - Schedules - Employer Nomination Scheme (subclass 186) - visa applications – [4] Policy intent – [4.2] Objectives of the programme (policy reissued 13 April 2018).
[38] cl.186.231, as amended for visa applications made on or after 1 July 2017 by F2017L00816. For the relevant instrument, see the 'Exmt Age' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business Visas.
[39] cl.186.232. For the relevant instrument, see the 'EngLangExempt186/187' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business Visas.
[40] cl.186.233(1)(a).
[41] cl.186.223(1)(a) as amended by F2018L00262.
[42] cl.186.233(1).
[43] cl.186.223(1)(aa) inserted by F2017L00816 for applications on or after 1 July 2017.
[44] cl.186.223(1)(a)(i) as inserted by F2018L00262.
[45] cl.186.233(2), as amended by SLI 2015, No.242.
[46] cl.186.233(3).
[47] cl.186.233(4).

- the position is still available to the applicant;[49] and
- the visa application was made not more than six months after the nomination was approved;[50]

- **skills** – *at the time of application* a specified assessing authority had assessed the applicant's skills as suitable for the occupation, and the applicant has been employed in the occupation for at least 3 years (N.B. the skills assessment and employment must meet certain requirements depending on the date of visa application as discussed below),[51] unless the applicant is in a specified class of persons;[52] and
- **health criteria** – the applicant and each member of the family unit who is applying for a Subclass 186 visa must satisfy PIC 4005 (health, no waiver); each family member who is *not* applying for a Subclass 186 visa must also meet PIC 4005, unless it would be unreasonable to require them to undergo assessment for it.[53]

Criteria for the Labour Agreement stream

The Labour Agreement stream is for persons who are being sponsored by an employer who is a party to a labour agreement that is in effect.[54] In addition to the common criteria, applicants for this stream must meet the following additional criteria:

- **age** –
  - *for visa applications made before 18 March 2018* either the applicant had not turned 50 at the time of application, or the Minister has agreed in the applicable labour agreement that persons who have turned 50 may be employed;[55]
  - *for visa applications made on or after 18 March 2018* either the applicant had not turned 45 at the time of application, or the Minister has agreed in the applicable labour agreement that persons who have turned 45 may be employed;[56]
- **nomination requirements** – all of the following must be satisfied:
  - *where the nomination was made before 18 March 2018*

    the position to which the application relates must be nominated by an employer in accordance with a current labour agreement to which the employer is a party and be identified in the application for the grant of the visa,[57] or

    where the nomination was made on or after 18 March 2018

[48] cl.186.233(4A), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[49] cl.186.233(5).
[50] cl.186.233(6).
[51] cl.186.234(2), as amended by Migration Amendment (Skills Assessment) Regulation 2013 (SLI 2013, No.233) (for visa applications made on or after 28 October 2013) and again by Migration Legislation Amendment (2014 Measures No.1) Regulation 2014 (SLI 2014, No.82) (for visa applications made on or after 1 July 2014).
[52] cl.186.234(3). For the relevant instrument, see the 'ExmtSkills' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business Notices.
[53] cl.186.235. For further information on PIC 4005, see the Legal Services Commentary, Health Criteria.
[54] PAM3: Migration Regulations - Schedules - Employer Nomination Scheme (subclass 186) - visa applications – [4] Policy intent – [4.1] Objectives of the programme (policy reissued 13 April 2018). Note that prior to amendments made by F2018L00262 commencing on 18 March 2018, this stream was referred to as the 'Agreement stream'.
[55] cl.186.241.
[56] cl.186.241 as amended by F2018L00262.
[57] cl.186.242(1). The term *labour agreement* is defined in r.1.03 of the Regulations to mean a formal agreement entered into between the Minister, or the Employment Minister, and a person or organisation in Australia under which an employer is authorised to recruit persons to be employed by that employer in Australia.

the position to which the application relates is the position nominated in an application for approval that identifies the applicant in relation to the position and is made in relation to a visa in a Labour Agreement stream;[58]

- *only where the nomination was made before 18 March 2018* the requirements of the labour agreement have been met in relation to the application;[59]
- the nomination has been 'approved',[60] and has not subsequently been withdrawn;[61]
- there is no adverse information known to Immigration about the person who made the nomination or a person associated with that person (or it is reasonable to disregard any such information)((see discussion below);[62]
- the position is still available to the applicant;[63]

- **terms/conditions of employment** - the terms and conditions of employment for the position will be no less favourable than the terms and conditions that are, or would be provided, to an Australian citizen or permanent resident performing equivalent work in the same workplace;[64]

- **qualifications/experience** - the applicant has the qualifications, experience and other attributes that are suitable for the position;[65] and

- **English language** – *for visa applications made on or after 18 March 2018*, the applicant must have English language skills that are suitable to perform the occupation to which the position relates;[66]

- **work experience** – *for visa applications made on or after 18 March 2018*, the applicant must have worked in the occupation to which the position relates or a related field for at least 3 years, unless the Minister considers it reasonable to disregard this requirement;[67]

- **demonstration of skills** – *for visa applications made on or after 18 March 2018*, if the Minister (or the Tribunal on review) requires the applicant to demonstrate that he or she has the skills that are necessary to perform the tasks of the occupation to which the position relates, the applicant must demonstrate this in the manner specified;[68]

- **health criteria -** the applicant and each member of the family unit who is applying for a Subclass 186 visa must satisfy PIC 4005 (health, no waiver); each family member who is *not* applying for a Subclass 186 visa must also meet PIC 4005 unless it would be unreasonable to require them to undergo assessment for it.[69]

[58] cl.186.242(1) as amended by F2018L00262.
[59] cl.186.242(2). Clause 186.242(2) was repealed by F2018L00262, except where the nomination was made before 18 March 2018.
[60] cl.186.242(3).
[61] cl.186.242(4).
[62] cl.186.242(4A)(a) and (b), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[63] cl.186.242(5).
[64] cl.186.242(6).
[65] cl.186.244(1) and (2).
[66] cl.186.243(2) as inserted by F2018L00262.
[67] cl.186.242(3) as inserted by F2018L00262.
[68] cl.186.242(4) as inserted by F2018L00262.
[69] cl.186.244. For further information on PIC 4005, see the Legal Services Commentary Health Criteria.

Secondary criteria

Secondary applicants for a Subclass 186 visa must be a member of the family unit of the primary applicant who holds a Subclass 186 visa granted on the basis of satisfying the primary criteria, and have made a combined application with the primary applicant.[70] Additionally, they must be included in any nomination approved in respect of the primary applicant,[71] satisfy various public interest criteria and special return criteria,[72] and (for visa applications made before 24 November 2012) meet passport requirements.[73] Secondary applicants must also satisfy the decision maker that they have not engaged in 'payment for visa' conduct that constitutes a contravention of the Act, or that is reasonable to disregard the conduct. [74]

Key issues

Common criteria – no 'payment for visas' conduct

Applicants in each of the three streams must meet a number of common criteria. These requirements relevantly include a requirement that the applicant has not, in the previous three years, engaged in conduct that breaches ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act.[75] These provisions place prohibitions on people asking for, receiving, offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.

Where the applicant has engaged in such conduct in the previous 3 years, an applicant may nevertheless satisfy the requirement if it is reasonable to disregard that conduct.[76] Whether it is reasonable to disregard such conduct will be a question for the decision maker, and all relevant circumstances of the individual case should be considered.[77] This potentially encompasses not only the conduct itself and the circumstances in which it occurred, but also the applicant's broader circumstances outside of that conduct.

[70] cl.186.311. For further information on member of a family unit, see Legal Services commentary: Member of a Family Unit (r. 1.12).
[71] cl.186.312.
[72] cl.186.313 and cl.186.314.
[73] cl.186.315, omitted by SLI 2012 No.256 and replaced by the similarly worded PIC 4021 for visa applications made on or after 24 November 2012.
[74] cl.186.312A as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. Specifically, in the previous three years, applicants must not have engaged in conduct that constitutes a contravention of ss.245AR(1), 245AS(1), 245AT(1) or 245AU(1) of the Act. In general terms, these provisions place prohibitions on people asking for or receiving a benefit, or offering to provide or providing a benefit, in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.
[75] cl.186.212A(a), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[76] cl.186.212A(b).
[77] The Explanatory Statement introducing this requirement does not provide any guidance as to when it would be reasonable to disregard the conduct, but indicates that these matters will be detailed in departmental policy: Explanatory Statement to SLI 2015, No.242 at p.17. At the time of writing there were no published Departmental guidelines on these matters within PAM3. Refer PAM3: Employer Nomination Scheme (subclass 186) - visa applications – [11.6] EN-186 - No payment for visas conduct (policy reissued on 13 April 2018).

Nomination requirements

Applicants in all streams must meet a number of nomination requirements, as set out in cl.186.223, 186.233 and 186.242. These requirements must be met at time of decision. Questions may arise about what nominations can be relied on, and whether there is adverse information about the nominator.

Can a pre-1 July 2012 nomination be relied on?

Whether a pre-1 July 2012 nomination can be relied on depends on the particular stream being considered and the date of visa application.

In the *Temporary Residence Transition* stream, an employer nomination made before 1 July 2012 cannot be relied upon to satisfy the criteria for a Subclass 186 visa in the Temporary Residence Transition stream. This is because cl.186.223 refers to a nomination that seeks to meet the requirements of r.5.19(3) or, from 18 March 2018, to nominations made in relation to visas in the Temporary Residence Transition stream, provisions which are only applicable to nomination applications made on or after 1 July 2012.[78]

In contrast, in the *Direct Entry* stream, an employer nomination made before 1 July 2012 can be relied upon to satisfy the criteria for a Subclass 186 visa in the Direct Entry stream. Clause 186.233(1)(a) expressly refers both to nominations which seek to meet the requirements of relevant parts of r.5.19 as in force before 1 July 2012 and as currently in force. The nomination cannot however be a regional employer nomination, as that would not be a nomination which seeks to meet the requirements of r.5.19(4)(h)(i) or r.5.19(2) as in force prior to 1 July 2012.

For positions nominated in the *Labour Agreement* stream prior to 18 March 2018, there is no nomination approval under r.5.19, so that the amendments to r.5.19 that commenced on 1 July 2012 do not impact the nomination requirements in this stream.[79] The question of whether a nomination in this stream approved prior to 1 July 2012 is acceptable would be a question of fact for the Tribunal, having regard to the nomination and the terms of the labour agreement itself.

Can a pre-18 March 2018 nomination be relied on?

The nomination scheme in r.5.19 was revised again on 18 March 2018, and corresponding changes were made to the terms of cl.186.223 (Temporary Residence Transition stream), cl.186.233 (Direct Entry stream) and cl.186.242 (Labour Agreement stream) which are expressed to apply only where the position referred to in those requirements was nominated in an application on or after 18 March 2018.[80] This means that a nomination before 18 March 2018 can be relied on for a visa application made on, before or after 18 March 2018 (subject to comments above about pre 1 July 2012 nominations), because the changes to visa criteria are linked to the nomination date, and only the nomination identified on at time of visa application can be relied on (see discussion immediately below).

Can a new nomination be relied on?

It is a requirement for both the Temporary Residence Transition and Direct Entry streams (cl.186.223 and cl.186.233 respectively) that the *position* to which the visa application relates is the *position* in

[78] Regulation 5.19 was substituted by SLI 2012, No.82, an amendment expressed to apply only to nominations made on or after 1 July 2012. See Schedule 13 to the Regulations, part 1 item [101], for transitional arrangements.
[79] Note that the terms of cl.186.242 and r.5.19 were amended to incorporate a nomination approval under r.5.19 for positions in this stream, but only for nominations of positions made on or after 18 March 2018.
[80] F2018L00262.

relation to which the declaration mentioned in paragraph 1114B(3)(d) of Schedule 1 was made. It is clear that this requirement could not be satisfied by a later nomination made by a different employer,[81] and on current authority a nomination in respect of the same position made by the same employer could also not be relied on to meet these Schedule 2 criteria.[82]

This was the view taken in *Singh v MIBP* [2017] FCAFC 105[83] (which concerned an almost identically worded criterion for a Subclass 187 visa). The Court considered whether it would be futile to grant relief to the applicant if an argued s.359A error were made out, where the visa application was refused on the basis that the associated nomination had been refused. The Court reasoned that the words in cl.187.233 refer to a factual event, that is, whether an employer nomination had been made, and about which the visa applicant made the required declaration in the visa application, meaning even if the applicant were able to obtain a further nomination for the same position from their employer this new nomination would not be the one in relation to which the declaration was made. Further, the 'position' referred to is a particular position that exists at the time at which the employer nomination is submitted for approval.[84]

Although the Court's comments were strictly *obiter*, they are nonetheless persuasive in relation to Subclass 187 visas. As the relevant Subclass 186 criteria are in the same terms, the Court's reasoning also appears applicable to cl.186.223 and cl.186.233. It follows from this that in practice where a nomination is refused, the visa applicant will not meet cl.186.223 or cl.186.233 (as applicable) unless there is also a review of that decision pending.

Adverse information

The nomination requirements in all three streams are only met if there is no 'adverse information' known to Immigration about the person (or employer) who made the nomination or a person 'associated with' them, or it is reasonable to disregard any such information.[85]

'Adverse information' is defined in r.1.13A as any adverse information relevant to a person's suitability as a sponsor or nominator. A non-exhaustive list of kinds of adverse information is also set out in r.1.13A, and includes matters such as the contravention of laws, but the list differs depending on whether the visa application was made before or on/after 18 March 2018.[86] The term 'associated with' is also given a non-exhaustive definition, in r.1.13B, but again this varies depending on whether the visa applications was made before or an/after 18 March 2018. Both terms are discussed in more detail in the MRD Legal Services commentary Standard Business Sponsor.

As drafted, the relevant provisions refer to adverse information 'known to Immigration'. Where the information in question comes to the Tribunal's attention but is not known to Immigration, it is unclear

[81] *Hasan v MIBP* [2016] FCCA 1049 (Judge Smith, 13 May 2016). This judgment considered cl.187.223(1)(c) but the interpretation would appear equally applicable to almost identically worded cl.186.223(1)(c) and cl.186.233(1)(c).
[82] That is also the interpretation reflected in Departmental policy: PAM3: Employer Nomination Scheme (subclass 186) - visa applications – [8.1.3] TRT – Position must be that for which the visa application was made and [9.1] DE Linking the position applied for to the one nominated (policy reissued 13 April 2018).
[83] *Singh v MIBP* [2017] FCAFC 105 (Judge Mortimer, 14 July 2017), at [88].
[84] See also *Kaur v MIBP* [2017] FCCA 564 (Judge Lucev, 29 March 2017) which also considered whether the applicant could meet 186.223 in circumstances where the associated nomination had been refused. Similarly, the Court reasoned that even if the applicant were able to obtain a further nomination for the same position from their employer this new nomination would not be the one to which the Schedule 1 declaration was made. *Singh v MIBP* [2016] FCCA 2229 (Judge Riley, 12 August 2016), also concerned the equivalent requirements for a Subclass 187 visa. In that matter the Court followed the interpretation of cl.187.233(1)(b) adopted in *Hasan* (at [33]-[34]), yet appeared to go somewhat further by commenting that 'any nomination for a position that the applicant could now obtain would not satisfy cl.187.233' (at [35]). Note, in contrast, that in *Khanom v MIBP* [2016] FCCA 3259 (Judge Smith, 16 December 2016), the Court appeared to implicitly accept that a second nomination by the same employer in respect of the same position could satisfy cl.187.233, when considering whether the Tribunal had acted reasonably in refusing to await the outcome of that second nomination application.
[85] cll.186.223(3A); 186.233(4A) and 186.242(4A), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[86] r.1.13A was repealed and substituted by F2018L00262.

whether it would fall within the operation of this provision. However, in practice, this issue could be overcome by notifying Immigration of the information in question.

Where 'adverse information' is known, the decision-maker must go on to consider whether it is reasonable to disregard it.[87] The Regulations do not provide any guidance on when it may be reasonable to disregard such information, and this will depend on the circumstances of the case. Departmental guidelines suggest the following factors may be relevant:

- the nature of the adverse information;
- whether the adverse information arose recently or a long time ago;
- how the adverse information became known, including the credibility of the source of the adverse information;
- whether the allegations have been substantiated or not, e.g. whether the applicant has been convicted or an offence under Australian law or investigations are ongoing;
- whether the applicant has provided evidence to demonstrate that they have rectified any issues where relevant (such as repaying monies to an underpaid employee) and taken steps to ensure the circumstances that led to the adverse information do not recur;
- whether the applicant has demonstrated subsequent compliance;
- whether the conduct of concern is likely to recur;
- information about relevant findings made by a competent authority in relation to the adverse information, and the significance the competent authority attached to the adverse information;
- whether there are any compelling circumstances affecting the interests of Australia.[88]

The policy goes on to list examples of circumstances in which it may be reasonable to disregard adverse information and circumstances in which it is unlikely to be reasonable to disregard adverse information. These lists are not exhaustive and the determination of whether it is reasonable to disregard the information is a question for the relevant decision maker, having regard to all relevant circumstances of the case.

Skills requirements – Direct Entry stream

Clause 186.234, a criterion for the Direct Entry stream, requires that *at the time of application* one of two alternatives is satisfied, as discussed below.[89]

First alternative – skills assessment and work experience

To satisfy the first alternative (cl.186.234(2)) two requirements must be met.

- Firstly, a specified assessing authority must have, *at the time of application*, assessed the applicant's skills as suitable for the occupation.[90] Additionally,
    - *if the visa application was made on or after 28 October 2013*, the skills assessment must not be one for a Subclass 485 (Temporary Graduate) visa,[91]

[87] cll.186.223(3A)(b); 186.233(4A)(b) or 186.242(4A)(b).
[88] PAM3: Div1.2/Reg1.13A - Adverse information and skilled visas (regulation r.1.13A and r.1.13B) > [4.4.2] Disregarding of adverse information (policy reissued 18 March 2018).
[89] cl.186.234(a).
[90] cl.186.234(2)(a). The applicable assessing authorities are specified, by reference to the relevant occupation, by written instrument, which can be accessed through the Register of Instruments: Business Visas (see 'Occ186/442/457&Noms' tab).

- *if the visa application was made on or after 1 July 2014*, the date of the skills assessment must not be more than 3 years before the visa application was made or, if a shorter period of validity was specified in the assessment, that shorter period must not have ended.[92]

- Secondly, the applicant must have been employed in the occupation for at least 3 years *at the time of application*.[93] Additionally, if the visa application was made *on or after 1 July 2013*, the employment must have been on a full time basis at the level of skill required for the occupation.[94]

Specified assessing authority – what is the relevant instrument?

As the requirement for a suitable skills assessment (from a specified assessing authority) must be met as at the time of application, it would appear that the applicable instrument specifying the relevant assessing authority is that in force at time of application.[95]

However, some instruments that were previously in force have been revoked and replaced by instruments which on their terms apply to visa applications made prior to their respective dates of commencement. For example, IMMI 16/060 commenced on 1 July 2016, but purports to apply to visa applications made on or after 1 July 2015 and before 1 July 2016. The instruments that were in force during that period, IMMI 15/092 and IMMI 15/108, have been revoked. However, in each instance the 'new' instrument does not differ in substance (for the purposes of cl.186.234(2)(a)) from the instrument actually in force during the period it purports to apply to. Further, it appears that the intention of the 'new' instruments is to preserve the substantive lists in place during the periods to which they are expressed to apply.[96] Accordingly, while technically the instrument in force at time of application should arguably be applied, it appears there will be no practical difference in applying the current instruments according to their specified terms.

Please see the Register of Instruments: Business Visas ('Occ186/442/457&Noms' tab) for the relevant instruments.

Which occupation must have been assessed?

Although not expressly stated in cl.186.234(2)(a), reading the Direct Entry stream criteria as a whole and having regard to the ENS scheme as a whole, 'the occupation' for this criterion is the occupation to which the position identified in the nomination relates.[97] That is, the occupation which corresponds to the tasks to be performed in the position as identified in the nomination. In particular, this reading is supported by the reference in cl.186.233(1)(a) to r.5.19(h)(i), a requirement which links the tasks of a position to a specified occupation.[98]

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[91] cl.186.234(2)(aa) inserted by SLI 2013, No.233.
[92] cl.186.234(2)(ab) and (ac) inserted by SLI 2014, No.82.
[93] cl.186.234(2)(b).
[94] cl.186.234(2)(b) amended by Migration Legislation Amendment Regulation 2013 (No. 3) (SLI 2013, No. 146).
[95] See the 'Occ186/442/457&Noms' tab of the Legal Services Register of Instruments: Business Visas.
[96] See Explanatory Statements (including Statements of Compatibility with Human Rights) to IMMI 13/041, IMMI 13/020, IMMI 13/064, IMMI 13/065, IMMI 14/049, IMMI 15/091 and IMMI 16/060.
[97] This is consistent with relevant Departmental policy which states that 'a positive skills assessment for an occupation other than the 6-digit ANZSCO occupation code on the nomination does not meet legislative requirements to be accepted': PAM3: 186 - Employer Nomination Scheme (subclass 186 visa) – [9.11.2] Skills as at time of visa application (reissued 13 April 2018).
[98] That this is the case was implicitly accepted in *Sutherland v MIBP* [2017] FCA 806 (Judge Moshinsky, 19 July 2017). In that matter, the Court considered cl.186.234(2)(a), specifically, whether the Tribunal had erred by holding that the applicant did not hold a suitable skills assessment for the approved nominated occupation. In its reasoning, the Court held that whether the skills assessment put forward by the applicant satisfied the requirements of cl.186.234(2)(a) and, in particular, whether the 'assessing authority had assessed the applicant's skills as suitable for the occupation', is a question of fact for the Tribunal to determine. In that matter, the nominated occupation was 'Management Accountant', but the skills assessment had been carried out in respect of the now replaced ASCO classification of 'Accountant'.

Must the employment have been on a full time basis?

For visa applications made before 1 July 2013 there is no express requirement that the employment be on a full-time basis. The term 'employed' is not further defined for these purposes, and so should be given its ordinary meaning, which would encompass patterns of work other than full-time.

For visa applications made on or after 1 July 2013 it is an express requirement that the 3 years of employment was on a full-time basis. The term 'full-time' is not further defined in the Regulations and should be given its ordinary meaning. Departmental policy suggests 'full-time' involves working at least 35 hours per week.[99]

Does only Australian employment experience count?

There is no legislative restriction on where the employment was based. For the purposes of cl.186.234(2) overseas employment can be taken into account.

Does the employment have to have been recent or continuous?

There is also no particular requirement as to when the applicant was employed in the occupation, or any requirement that the employment be continuous or with the same employer. A cumulative total of 3 years of relevant employment will therefore be sufficient to meet cl.186.234(2)(b).

What occupation does the employment need to be in?

Although not expressly set out in cl.186.234(2)(b), it seems clear the employment must be in the same occupation to which the skills assessment relates. As discussed above, this must be occupation identified in the nomination as relevant to the nominated position.

Must the applicant be qualified to perform the occupation?

For applications made on or after 1 July 2013 it is an express requirement of cl.186.234(2)(b) that the employment be at the level of skill required for the occupation. However, even for applications made before 1 July 2013, it's likely that as a question of fact in order to be employed in a particular occupation an applicant must have been working at the necessary skill level for the occupation.

In determining the relevant skill level of a particular occupation, the Australian and New Zealand Standard Classification of Occupations (ANZSCO) may be of assistance. It uses several hierarchies in classifying occupations, with the indicative skill level of occupations outlined at the 'unit group' level. However, while ANZSCO may be a useful tool, there is no express requirement that the skills listed in ANZSCO be demonstrated, in contrast to criteria for other employer nominated visas,[100] and care should be taken not to rigidly apply information in ANZSCO as if there were such a requirement.

As well as indicative skills levels, ANZSCO also includes for each occupation a 'lead statement', a concise description of the nature of the occupation summarising the main activities undertaken, and a list of representative tasks carried out. This information, as well as information about any qualifications, licences or registrations necessary to perform the occupation, may be relevant in determining whether the applicant was in fact employed in the relevant occupation.

[99] PAM3: Employer Nomination Scheme (subclass 186 visa) – visa applications – [9.12] Must have been employed in the nominated occupation for 3 years (reissued 13 April 2018). Note that this policy (at [9.12.4]) indicates departmental delegates can apply this requirement on a pro rata basis, so, for example, persons working part-time at 50% of the full time rate over 6 years would also satisfy cl.186.234(2)(b). However, such an approach does not appear open on the terms of the criterion.
[100] See for example cl.187.234.

Second alternative – exempt persons

The nomination criterion in cl.186.234 may alternatively be satisfied if the applicant is, *at the time of application*, in a class of persons specified in the relevant instrument. The range of exempt persons varies depending on the applicable instrument.

Although the relevant instrument in force at the time of writing, IMMI17/058, purports to apply to all live applications, given the exemption is to be considered at the time of application, it appears that the applicable instrument is the one which is in force at the time of application.[101]

Therefore, for visa applications made on or after 1 July 2017, the following persons are specified for cl.186.234(3):

- persons who are employed in certain occupations, namely:
    - researchers, scientists and technical specialists at ANZSCO skill levels 1 or 2, who have applied for a visa to occupy a position as nominated by Australian scientific government agencies;
    - academics who have applied for a visa to occupy a position as nominated by a university in Australia; and [102]
- persons who are currently in Australia as the holder of a Subclass 444 or 461 visa[103] and have been working with their nominating employer in their nominated occupation for at least two years (excluding any periods of unpaid leave) in the last three years immediately before making their visa application.[104]

For visa applications made prior to and on or after 1 July 2015 but before 1 July 2017, in addition to the above listed classes of exempt person, the following persons are specified for cl.186.234(3):

- persons who have applied under the Regulations for a visa, and whose earnings will be at least equivalent to the current Australian Tax Office's top individual income tax rate.[105]

The policy basis for exemption was that a nominator is unlikely to pay a salary at this level to a person unless they are fully confident of the person's skills and ability.[106] Information on income tax rates is available from the ATO website. It provides that for the financial year 2016-17, for example, the top income category is $180,001 and over.[107] This exemption was removed for applications made on or after 1 July 2017, as part of measures intended to strengthen the integrity of Subclass 186 visas.[108]

For visa applications made *prior to* 1 July 2015, in addition to the above classes of exempt person, the following persons are also specified for cl.186.234(3):

[101] This is consistent with Departmental policy, though the policy appears to have been adopted as a way to preserve a previous 'entitlement' to rely on this exemption, rather than as a reflection of a view that the instrument in force at time of application should be applied as a matter of correct application of the law. See PAM3 – Migration Regulations – Schedules – Employer Nomination Scheme (Subclass 186 visa) – visa applications – [7.12] DE Skills – Scenario 2: Persons not required to demonstrate skills (reissued 27 July 2017) and the Department's media release of 4 July 2017.
[102] IMMI 17/058. See ExmtSkillsAgeEng 186&187' tab of the Register of Instruments: Business visas . 'Academic' is further defined in the instrument itself by reference to ANZSCO.
[103] Subclasses 444 (Special Category) and 461 (New Zealand Citizen Family Relationship (Temporary)) are temporary visas specifically for New Zealand citizens and their family members.
[104] IMMI 15/109. See the 'ExmtSkillsAgeEng 186&187' tab of the Register of Instruments: Business visas.
[105] IMMI 15/083. See the 'ExmtSkillsAgeEng 186&187' tab of the Register of Instruments: Business visas
[106] PAM3: Employer Nomination Scheme (subclass 186 visa) – visa applications > EN-186 Direct Entry (DE) stream > DE – Skills – Scenario 2: Persons not required to demonstrate their skills > Nominated earnings at least equivalent to ATO top individual tax rate (policy issue date 1/07/17 – not reflected in current release).
[107] https://www.ato.gov.au/Rates/Individual-income-tax-rates/ (accessed 14 December 2016).
[108] See Explanatory Statement to IMMI 17/058, under the the 'ExmtSkillsAgeEng 186&187' tab of the Register of Instruments: Business visas.

- Ministers of Religion (ANZSCO 272211) who have applied for a visa to occupy a position as nominated by a religious institution.[109]

For applications made on or after 1 July 2015, 'Minister of Religion' is no longer specified by instrument as a class of person for cl.186.234(3).[110] The effect of this change in the instrument means that an applicant who applied for this visa on or after 1 July 2015 as a 'Minister of Religion' can no longer satisfy the exemption in cl.186.234(3) on this basis. Instead, they will need either to fall within one of the other above specified classes of person or fulfil the skills requirement in cl.186.234(2).

English language requirement – Temporary Residence Transition and Direct Entry streams

The criteria for Temporary Residence Transition stream require that the applicant *had* vocational English (application made before 1 July 2017) or competent English (application made on or after 1 July 2017) at the time of application unless he or she is in a class of persons specified in the applicable instrument.[111] The criteria for the Direct Entry stream require that the applicant *had* competent English at the time of application, unless in a class of persons specified in the applicable instrument.[112]

'Vocational English' is defined by r.1.15B and 'competent English' by r.1.15C. These definitions are explained in detail in the MRD Legal Services Commentary English Language Ability - Skilled/Business Visas, but in general terms an applicant must either hold a specified passport or achieve certain scores in specified language tests.

Can the applicant sit an English test after making the visa application?

The terms of each of these criteria expressly require that the applicant had the requisite level of English proficiency at the time of application. Neither cl.186.222 nor cl.186.232 can be satisfied by test scores achieved after the date of application. The language of these criteria can be distinguished from that considered by the High Court in *MIAC v Berenguel.*[113]

[109] IMMI 12/060. See the 'ExmtSkills' tab of the Register of Instruments: Business visas. The instrument that contained this exemption (IMMI 12/060) was revoked from 1 July 2015 and was replaced by a new instrument (15/083). IMMI 15/083 was then revoked and replaced by IMMI 17/058. Neither of these Instruments specify 'Minister of Religion' as an exempt person. While not specified in the instrument or the explanatory statement, it appears that IMMI 15/083 was only intended to apply to visa applications made on or after 1 July 2015. The effect of this is that an applicant who applies for a Subclass 186 visa on or after 1 July 2015 on the basis of the nominated occupation of Minister of Religion would not satisfy the skills exemption cl.186.234(b). The term 'religious institution' is defined in r.1.03. 'Religious institution' is defined in r.1.03.

[110] IMMI 15/082. While not specified in the instrument, it appears that this change was in line with a suite of amendments aimed at achieving increased integrity within the Minister of Religion Cohort in Australia's Permanent Employer Sponsored Visa programme. See, for example, the Explanatory Statement to IMMI 15/092.

[111] cl.186.222, subject to amendment from 1 July 2017 by F2017L00816. For the relevant instrument, see the 'EngLangExempt 186/187' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.

[112] cl.186.232, subject to amendment from 1 July 2017 by F2017L00816. For the relevant instrument, see the 'EngLangExempt 186/187' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.

[113] (2010) 264 ALR 417. The High Court held in this judgment that cl.885.213, a time of application criterion for a skilled visa which requires the applicant to have either vocational English or competent English, could be satisfied by a test undertaken after an application had been made. However, the Court's analysis turned on the particular language of the criterion in issue (not merely the definition of 'vocational English' or 'competent English') and the identified purpose of that specific criterion.

Exempt applicants

An applicant is exempt from the English requirements if, *at the time of application*, they are in a class of persons specified by instrument under cl.186.222(b) and cl.186.232(b).[114] The range of exempt persons varies depending on the applicable instrument.

Although the relevant instrument in force from 1 July 2017 to 17 March 2018, IMMI 17/058, purported to apply to all live applications, it has since been repealed, and given the exemption is to be considered at the time of application, it appears that the applicable instrument is the one which is in force at the time of application.[115]

For visa applications made on or after 1 July 2017, for the purposes of 186.222(b) (i.e. for applicants in the Temporary Residence Transition stream), the following class of person is specified:

- persons who have completed at least five years of full-time study in a secondary and/or higher education institution where all of the tuition was delivered in English.[116]

There are no exemptions specified for cl.186.232(b) (Direct Entry stream) for visa applications made on or after 1 July 2017.

For visa applications made on or after 1 July 2015 and prior to 1 July 2017 the following persons are specified for cl.186.222(b) and cl.186.232(b):

- persons whose earnings will be at least equivalent to the current Australian Tax Office top individual income tax rate (see discussion above).[117]

In addition, for cl.186.222(b) only (i.e. visa applicants in the Temporary Residence Transition stream only) the following persons are also specified:

- persons who have completed at least five years of full-time study in a secondary and/or higher education institution where all of the tuition was delivered in English.[118]

For visa applications made *prior to* 1 July 2015, in addition to the two classes of exempt person above, the following persons are also specified for both cl.186.222(b) and cl.186.232(b):

- Ministers of Religion (ANZSCO 272211) who have applied for a visa to occupy a position as nominated by a religious institution.[119]

[114] For the relevant instrument, see the 'EngLangExempt186/187' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (where visa application made on or after 1 July 2015) of the Register of Instruments: Business visas.

[115] This is consistent with Departmental policy, though the policy appears to have been adopted as a way to preserve a previous 'entitlement' to rely on this exemption, rather than as a reflection of a view that the instrument in force at time of application should be applied as a matter of correct application of the law. See See PAM3 – Migration Regulations – Schedules – Employer Nomination Scheme (Subclass 186 visa) – visa applications – [6.10.2.1] TRT high income earners and [7.9.2.1] DE high income earners (reissued 27 July 2017); and the Department's media release of 4 July 2017.

[116] For visa applications made on or after 18 March 2018, see IMMI 18/045, for visa applications made 1 July 2017 to 17 March 2018, see IMMI 17/058. Note that IMMI 17/058 was repealed by IMMI 18/045, but the repeal is expressed not to apply whether the nomination and/or visa application was made before 18 March 2018. In any event, the specifications made under these instruments are the same. See the ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.

[117] IMMI 15/083. For the relevant instrument, see the 'ExmtSkillsAgeEng 186&187' tab of the Register of Instruments: Business visas.

[118] IMMI 15/083. For the relevant instrument, see the 'ExmtSkillsAgeEng 186&187' tab of the Register of Instruments: Business visas.

[119] IMMI 12/059. See the 'EngLangExempt186/187' tab of the Register of Instruments: Business visas. The instrument that contained this exemption (IMMI 12/059) was revoked from 1 July 2015 and was replaced by a new instrument (IMMI 15/083) which no longer specifies 'Minister of Religion' as an exempt class of person. While not specified in the instrument or the explanatory statement, it appears that IMMI 15/083 is only intended to apply to visa applications made on or after 1 July 2015.

For visa applications made on or after 1 July 2015, 'Minister of Religion' is no longer specified by instrument as a class of person for cl.186.222(b) or cl.186.232(b).[120] The effect of this change in the applicable instrument is that an applicant who applied for the visa on or after 1 July 2015 as a 'Minister of Religion' can no longer satisfy the English language exemptions in cl.186.222(b) or cl.186.232(b) on this basis. Instead, they will need either to fall within one of the other above specified classes of person or fulfil the English requirement in cl.186.234(2).

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulation 2012 (No.2)	SLI 2012 No.82
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012 No.256
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013 No.146
Migration Amendment (Skills Assessment) Regulation 2013	SLI 2013 No.233
Migration Legislation Amendment (2014 Measures No.1) Regulation 2014	SLI 2014 No.82
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015 No.34
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Legislation Amendment (2017 Measures No.3) Regulations 2017	F2017L00816
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Relevant case law

Hasan v MIBP [2016] FCCA 1049	
Kaur v MIBP [2017] FCCA 564	Summary
Khanom v MIBP [2016] FCCA 3259	
MIAC v Berenguel [2010] HCA 8; (2010) 264 ALR 477	Summary
Singh v MIBP [2016] FCCA 2229	Summary
Singh v MIBP [2017] FCAFC 105	Summary
Sutherland v MIBP [2017] FCA 806	

The effect of this is that an applicant who applies for a Subclass 186 visa on or after 1 July 2015 on the basis of the nominated occupation of Minister of Religion would not satisfy the English language exemption cl.186.222(b) or cl.186.232(b). The term 'religious institution' is defined in r.1.03.

[120] IMMI 15/083 and IMMI 17/058. While not specified in the instrument, it appears that this change was in line with a suite of other amendments aimed at achieving increased integrity within the Minister of Religion Cohort in Australia's Permanent Employer Sponsored Visa programme. See, for example, the Explanatory Statement to IMMI 15/092.

Available decision templates

There is one subclass specific template:

- **Subclass 186 visa refusal** – this template is suitable for all Subclass 186 visa applications. The template asks users to select the visa stream in issue (Temporary Residence Transition stream, Direct Entry stream, or Agreement stream). For each stream, the user can select from 6 or 7 individual criteria in issue (licence/registration requirements, provision of employment, age, English proficiency, nomination of a position, qualifications / experience, skills assessment / employment, labour agreement, or other).

Last updated/reviewed: 28 May 2019

Subclass 187

Regional Employer Nomination (Permanent) (Class RN)

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Overview

The Regional Employer Nomination (Permanent) (Class RN) visa is a permanent visa introduced on 1 July 2012,[1] which replaced the Subclass 119 and 857 employer nomination visas.[2] There is one subclass: Subclass 187.[3]

The Subclass 187 visa is part of the Regional Sponsored Migration scheme (RSMS). This scheme involves two stages:

- approval of a nominated position in Australia under r.5.19 of the Migration Regulations 1994 (the Regulations) or pursuant to a labour agreement; and
- grant of a permanent visa (Subclass 187) on the grounds that the visa applicant is the subject of either an approved temporary residence transition nomination, an approved direct entry nomination or a nomination made in accordance with a labour agreement.

For information on the first stage, nominations, see MRD Legal Services commentary: Regulation 5.19 - Employer nominations.

Participation in the RSMS is restricted to businesses actively and lawfully operating in regional Australia. The RSMS helps businesses in regional, remote or low population growth areas, outside the major metropolitan centres of Brisbane, Gold Coast, Sydney, Newcastle, Wollongong, Melbourne and Perth to recruit skilled workers to fill positions that are unable to be filled from the local labour market.[4]

A person may be granted a Subclass 187 visa by meeting the requirements of one of two alternative 'streams', being the Temporary Residence Transition stream and the Direct Entry stream.[5] Primary applicants must meet common criteria as well as the criteria for the stream in which they apply for the visa.

Merits review

A decision to refuse a Subclass 187 visa is reviewable under Part 5 of the Act:

- if the application was made in the migration zone;[6] or
- if the application was made outside the migration zone but the applicant was present in the migration zone when the primary decision was made.[7]

In both cases, it is the visa applicant who has standing to apply for review,[8] and the applicant must be inside the migration zone at the time of lodging the review application.[9]

[1] Inserted by Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82).
[2] Explanatory Statement to SLI 2012 No.82, p.53.
[3] Item 1114C(1) and (3)(a) of Schedule 1 to the Regulations.
[4] PAM3: Migration Regulations – Schedules - Regional Sponsored Migration Scheme (subclass 187) – visa applications – [4.1] Strategic context (policy reissued 13 April 2018).
[5] On introduction, the visa contained a third 'Agreement stream', however this was not used and was ultimately removed from the criteria for this visa by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[6] s.338(2) of the *Migration Act 1958* (the Act).
[7] s.338(7A), s.347(3A).

Visa Application Requirements

An application for a Regional Employer Nomination (Permanent) (Class RN) visa must be made in the approved form and in the place and manner specified.[10] An applicant may be in or outside Australia at the time of application, but not in immigration clearance.[11] An applicant in Australia must hold a substantive visa or a Bridging Visa A, B or C.[12]

For a visa application to be valid, the primary applicant must make a declaration that the position to which the application relates is a position nominated:

- under r.5.19 of the Regulations; or
- in accordance with a labour agreement that is in effect, by an employer that is a party to the labour agreement.[13]

In addition, for visa applications made on or after 14 December 2015, the primary applicant must also make a declaration in the application as to whether or not they have (or a combined applicant has) engaged in conduct in relation to the application that contravenes s.245AS(1) of the Act.[14]

Whether these declarations have been made is a question of fact, though typically these requirements will be satisfied by the completion of relevant questions and the making of a declaration as prompted by the application form (or other related documentation).

Employer nominations under r.5.19 are discussed in MRD Legal Services commentary Regulation 5.19 - Employer Nomination.

An application by a person claiming to be a member of the family unit of a primary applicant may be made at the same time as, and combined with, the application by that person.[15]

Visa Criteria

The criteria for a Subclass 187 are set out in Part 187 of Schedule 2 to the Regulations. They comprise primary and secondary criteria. At least one person included in the application must meet

[8] s.347(2)(a).
[9] s.347(3) and (3A).
[10] Item 1114C(1) and (3)(a). For applications made prior to 18 April 2015, the prescribed form is form1408 (Internet) and must be made as an Internet application. The application may be made in or outside Australia, but not in immigration clearance. These provisions were amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No. 34) for applications made on or after 18 April 2015 to provide that the approved form and place and manner which the application must be made, if any, are specified by the Minister in a legislative instrument under r.2.07(5).
[11] Item1114C(3)(b).
[12] Item 1114C(3)(c).
[13] Item 1114C(3)(d). Note that from 18 March 2018 the references to labour agreements were removed from this provision by F2018L0062, consistent with the removal of the Agreement stream from this vis atype.
[14] Item 1114C(3)(da) as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242) and applying to visa applications made on or after 14 December 2015. Section 245AS of the Act prohibits a person from offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The term 'sponsorship-related event' is defined in s.245AQ of the Act, but relevantly includes such events as a person applying for approval of the nomination of a position in relation to an applicant (or proposed applicant) for a sponsored visa or the grant of such a visa.
[15] Item 1114C(3)(e).

the primary criteria. An applicant may be in or outside Australia when the visa is granted, but must not be in immigration clearance.[16]

Primary criteria

The criteria for a Subclass 187 visa are not divided between time of application and time of decision criteria. However, some criteria require the decision-maker to be satisfied of the existence of certain matters as at the time of the visa application (for example, the requirement for some applicants to hold or be eligible to hold a licence, registration or membership of a professional body - discussed below). Unless otherwise specified, all criteria must be satisfied at the time a decision is made on the application.[17]

All primary applicants must meet common criteria that apply to all primary applicants. In addition, primary applicants must meet the criteria in one of two alternative streams: the Temporary Residence Transition stream or the Direct Entry stream.[18]

Common criteria

The common criteria that must be met by all primary applicants, are set out in cl.187.21. These are:

- **occupation licencing -** if it is mandatory in the State or Territory in which the position to which the application relates is located that a person
    - hold a licence of a particular kind, or
    - hold a registration of a particular kind, or
    - be a member (or a member of a particular kind) of a particular professional body,

  to perform tasks of the kind to be performed in the occupation to which a position relates, then the applicant must be, or be eligible to become, the holder of the licence or registration or a member of the body, *at the time of application*;[19]
- **future employment -** the position to which the application relates will provide the applicant with the employment referred to in the application for approval;[20]
- **no 'payment for visas' conduct** – the applicant has not engaged in conduct that breaches ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act, or it is reasonable to disregard the conduct (see discussion below);[21]
- **public interest criteria -** the applicant and each member of their family unit who is an applicant for a Subclass 187 visa must satisfy certain public interest criteria (PIC)[22] including,

[16] cl.187.411.
[17] Note to Division 187.2.
[18] On introduction, the visa contained a third 'Agreement stream', however this was not used and was ultimately removed from the criteria for this visa by F2018L00262.
[19] cl.187.211. Note that the Australian and New Zealand Standard Classification of Occupations (ANZSCO) refers to registration, licensing and professional membership requirements at the Unit Group level for each group of occupations. Registration and licensing requirements are generally specified in the Commonwealth, State/Territory legislation that applies to a specific occupation or trade and administered by a specific authority specified in the legislation: PAM3: Migration Regulations – Schedules – Regional Sponsored Migration Scheme (subclass 187) – visa applications – [10.1] Mandatory registrations, licensing or similar (policy reissued 13 April 2018).
[20] cl.187.212.
[21] cl.187.212A, as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. In general terms, these provisions place prohibitions on people asking for or receiving a benefit, or offering to provide or providing a benefit, in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.
[22] cl.187.213(1)-(5) and cl.187.214. These PIC are (for primary visa applicant and secondary applicants): PIC 4001, 4002, 4003, 4004, 4010, 4020, 4021 (for visa applications from 24 November 2012) and, if 18 at the time of application, PIC 4019.

for visa applications made on or after 24 November 2012, PIC 4021 relating to travel documents,[23] and certain special return criteria,[24] and each member of the primary applicant's family unit who is *not* an applicant for a Subclass 187 visa must satisfy certain public interest criteria;[25] and

- **passport** - *for applications made prior to 24 November 2012*, the applicant must hold a valid passport that was issued to the applicant by an official source, and is in the form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport.[26]

Criteria for the Temporary Residence Transition stream

The Temporary Residence Transition stream is for Subclass 457 visa holders who have worked for their employer for at least the last two years, and Subclass 482 holders who have worked for their employer for at least the last three years, where their employer wants to offer them a permanent position in that same occupation.[27]

In addition to the common criteria, applicants for this stream must meet the following additional criteria:

- **age** - at the time of application:
    - for applications made on or after 18 March 2018, the applicant must not have turned 45;
    - for applications made before 18 March 2018, the applicant must not have turned 50,

  unless in a specified class of persons;[28]
- **English language** - at the time of application:
    - for applications made on or after 1 July 2017, the applicant must have had competent English;
    - for applications made before 1 July 2017, the applicant must have had vocational English,

  unless in a specified class of persons (see below for discussion of this criterion);[29]

Each member of the family unit who is an Subclass 187 applicant and has not turned 18 at time of application must satisfy 4015 and 4016. PIC 4021 was added for new applications from 24 November 2012 by Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256), which repealed the similar criterion that was found in cl.187.215. Further information on some of these criteria can be found in the following MRD Legal Services Commentaries: Public Interest Criteria 4001, Bogus Documents/False or Misleading Information – PIC 4020.

[23] cl.187.213(1) amended by Migration Legislation Amendment Regulations 2012 (No.5) (SLI 2013, No.256).

[24] cl.187.214. These are special return criteria 5001, 5002 and 5010. For information on these criteria, see Legal Services Commentary: Special Return Criteria.

[25] cl.187.213(6). These are PIC 4001, 4002, 4003 and 4004.

[26] cl.187.215, omitted by SLI 2013 No.256 and replaced by the very similarly termed PIC 4021, which applies to visa application made on or after 24 November 2012.

[27] PAM3 – Migration Regulations – Schedule 2 - Regional Sponsored Migration Scheme (subclass 187) – visa applications-[4.2] Objectives of the programme (policy reissued 13 April 2018).

[28] cl.187.221, as amended by F2018L00262. For the instrument specifying exempt persons see the 'ExmtAge' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the MRD Legal Services Register of Instruments: Business visas.

[29] cl.187.222, as amended from 1 July 2017 by Migration Legislation Amendment (2017 Measures No.3) Regulations 2017 (F2017L00816). For the instrument specifying exempt persons see the EngLangExempt186/187' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the MRD Legal Services Register of Instruments: Business visas . 'Vocational English' is defined in r.1.1.15B, for information see the MRD Legal Services Commentary, English Language Ability - Skilled/Business Visas.

- **nomination requirements** – all of the following must be satisfied (see below for discussion of this criterion):

    - the position to which the application relates must be the position:

        - *where the nomination was made before 18 March 2018* nominated in an application for approval that seeks to meet the requirements of r.5.19(3) (i.e. a nomination in the Temporary Residence Transition stream) OR *where the nomination was made on or after 18 March 2018* nominated in an application for approval that is made in relation to a visa in the Temporary Residence Transition stream;

        - *where the nomination was made before 18 March 2018* in relation to which the applicant is identified as the holder of a Subclass 457 visa OR *where the nomination was made on or after 18 March 2018* nominated in an application for approval that identifies the applicant in relation to the position; and

        - in relation to which the declaration included as part of the visa application was made;[30]

    - the Minister has approved the nomination[31] and it has not subsequently been withdrawn;[32]

    - there is no adverse information known to Immigration about the person who made the nomination or a person associated with that person (or it is reasonable to disregard any such information)(see discussion below);[33]

    - the position to which the application relates is located in regional Australia[34] and is still available to the applicant;[35]

    - the visa application was made no more than 6 months after the nomination was approved;[36]

- **health criteria -** the applicant and each member of the family unit who is applying for the visa must satisfy PIC 4007 (health),[37] and each family member who is *not* an applicant for the visa must also satisfy PIC 4007, unless it would be unreasonable to require them to undergo an assessment; and[38]

- **skills assessment** – for visa applications made on or after 18 March 2018, if the Minister requires the applicant to demonstrate that he or she has the skills that are necessary to

[30] cl.187.223(1), as amended by F2018L00262 in relation to positions nominated in an application made under r.5.19 on or after 18 March 2018.
[31] cl.187.223(2).
[32] cl.187.223(3).
[33] cl.187.223(3A)(a) and (b), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[34] cl.187.223(4). 'Regional Australia' is defined as a part of Australia specified by the Minister in an instrument in writing. However, the relevant instrument for visa applications made prior 18 March 2018 is currently unclear. Prior to 18 March 2018, cl.187.111 referred to the definition of 'regional Australia' in r.5.19(7), however this was amended by F2018L00262 to refer to r.5.19(16) without any application or transitional provision. All instruments made under r.5.19(7) have been repealed from 18 March 2018, and the only instrument made under r.5.19(16) is expressed to apply only to visa applications made on or after 18 March 2018 (MRD Legal Services Register of Instruments: Business visas). Accordingly, it seems there is no current specification for this definition, where the visa application was made prior to 18 March 2018. For further advice on this issue, please contact MRD Legal Services.
[35] cl.187.223(5).
[36] cl.187.223(6).
[37] cl.187.224(1), (2).
[38] cl.187.224(3). For further information on PIC 4007, see the MRD Legal Services Commentary: Health Criteria.

perform the tasks of the occupation to which the position relates, the applicant demonstrates that he or she has those skills in the manner specified by the Minister.[39]

Criteria for the Direct Entry stream

The Direct Entry stream is for persons who are untested in the Australian labour market and are applying for a Regional Sponsored Migration scheme visa from outside Australia or are applying from within Australia but are ineligible for the Temporary Residence Transition stream.[40]

In addition to the common criteria, applicants for this stream must satisfy the following additional criteria:

- **age** - at the time of application:
    - for applications made on or after 1 July 2017, the applicant must not have turned 45;
    - for applications made before 1 July 2017, the applicant must not have turned 50,

  unless in a class of specified persons;[41]
- **English language** - at the time of application:
    - for applications made on or after 1 July 2017, the applicant must have had competent English; and
    - for applications made before 1 July 2017 the applicant must have had competent English unless in a class of specified persons;[42]
- **nomination requirements** – all of the following must be satisfied:[43]
    - the position to which the application relates must be the position:
        - nominated in an application for approval that seeks to meet the requirements of: r.5.19(4)(h)(ii) [genuine need for regionally located position], or r.5.19(4) as in force before 1 July 2012 [regional sponsored stream requirements],[44] or *where the position is nominated on or after 18 March 2018* that seeks to meet the requirements of r.5.19(12) [occupations for Subclass 187 in the Direct Entry stream] and is made in relation to a visa in the Direct Entry Stream;[45] and
        - in relation to which the visa application declaration was made;[46] and
        - *for nominations made on or after 1 July 2017* in relation to which the applicant is identified in the application under r.5.19(4)(a)(ii),[47] or *for*

[39] cl.187.225 inserted by F2018L00262, for visa applications made on or after 18 March 2018.
[40] PAM3 – Migration Regulations – Schedule 2 - Regional Sponsored Migration Scheme (subclass 187) – visa applications-[4.2] Objectives of the programme (policy reissued 13 April 2018).
[41] cl.187.231, amended from 1 July 2017 by F2017L00816. For the relevant instrument, see the 'ExmtAge' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the MRD Legal Services Register of Instruments: Business visas. 'Competent English' is defined in r.1.15C, for information see the MRD Legal Services Commentary, English Language Ability - Skilled/Business Visas.
[42] cl.187.232. For the relevant instrument, see the 'EngLangExempt186/187' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) of the MRD Legal Services Register of Instruments: Business visas .
[43] cl.187.233(1)
[44] cl.187.233(1)(a).
[45] cl.187.233(1)(a)(ii) & (iii) as inserted by F2018L00262.
[46] cl.187.233(1)(b).

nominations made on or after 18 March 2018 nominated in an application for approval that identifies the application in relation to the position.[48]

- the person who will employ the applicant is the nominator in the application for approval;[49]
- the nomination has been approved,[50] and not subsequently been withdrawn;[51]
- there is no adverse information known to Immigration about the person who made the nomination or a person associated with that person (or it is reasonable to disregard any such information)(see discussion below);[52]
- the position is still available to the applicant;[53]
- the visa application was made not more than 6 months after the nomination was approved;[54]

- **skills** - *at the time of application* one of three alternatives was satisfied:
  - the applicant was a person in a class of persons specified in an instrument;[55] or
  - if the applicant's occupation is specified in the relevant instrument and s/he did not obtain the necessary qualification in Australia, the applicant's skills had been assessed as suitable for the occupation by the specified assessing authority (N.B. the skills assessment must meet certain requirements depending on date of visa application, as discussed below), and *for visa applications made on or after 18 March 2018*, the applicant has been employed in the occupation for at least 3 years on a full time basis and at the level of skill required for the occupation;[56] or
  - if neither of the above applies, the applicant had the qualifications listed in ANZSCO as being necessary to perform the tasks of the occupation and *for visa applications made on or after 18 March 2018*, the applicant has been employed in the occupation for at least 3 years on a full time basis and at the level of skill required for the occupation; [57]
- **health criteria -** the applicant and each member of the family unit of a person who is applying for the visa must satisfy PIC 4005 (health),[58] and each family member who is *not* applying for a Subclass 187 visa must also satisfy PIC 4005, unless it would be unreasonable to require them to undergo an assessment.[59]

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[47] cl.187.233(1)(aa) inserted by F2017L00816, and repealed by F2018L00262.
[48] cl.187.233(1)(a)(i) inserted by F2018L00262.
[49] cl.187.233(2). See also *Yeap v MIBP* [2016] FCCA 1173 (Judge Heffernan, 24 May 2016) at [16], where the Court confirmed it is a question of fact for the Tribunal to determine whether the employer is the same person or body corporate as the nominator.
[50] cl.187.233(3).
[51] cl.187.233(4).
[52] cl.187.233(4A)(a) and (b), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[53] cl.187.233(5).
[54] cl.187.233(6).
[55] cl.187.234(a). For the relevant instrument, see the 'ExmtSkills' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made or after 1 July 2015) of the MRD Legal Services: Register of Instruments – Business visas.
[56] cl.187.234(b), as amended by F2018L00262 to add cl.187.234(b)(vii). For the relevant instrument, see the 'Occ187' tab of the MRD Legal Services: Register of Instruments – Business visas.
[57] cl.187.234(c). Note that this provision was repealed and substituted by F2017L00816 for applications made on or after 1 July 2017 to clarify that the alternative in (c) is only available if the occupation was not specified for (b) or the applicant obtained the necessary qualification in Australia. See Explanatory Statement to F2017L00816 at p.47. It was amended again by F2018L00262 for visa applications made on or after 18 March 2018, to add the employment experience requirement.
[58] cl.187.235(1), (2).
[59] cl.187.235(3). For further information on PIC 4007, see the MRD Legal Services Commentary: Health Criteria.

Secondary criteria

Secondary applicants for a Subclass 187 visa must be a member of the family unit of a primary applicant who holds a Subclass 187 visa granted on the basis of satisfying the primary criteria for the grant of the visa,[60] and have made a combined visa application with the primary applicant.[61] The requirement that the primary applicant already holds a Subclass 187 visa limits the circumstances in which the Tribunal can meaningfully review this criterion. Additionally, secondary applicants must be included in any nomination approved in respect of the primary applicant,[62] satisfy various public interest criteria and special return criteria,[63] and (for visa applications made before 24 November 2012) meet passport requirements.[64] Secondary applicants must also satisfy the decision maker that they have not engaged in 'payment for visa' conduct that constitutes a contravention of the Act, or that is reasonable to disregard the conduct. [65]

For further information on who is a member of a family unit, see MRD Legal Services commentary: Member of a Family Unit (r. 1.12).

Key issues

Common criteria – no 'payment for visas' conduct

Applicants in both streams must meet a number of common criteria. These requirements relevantly include a requirement that the applicant has not, in the previous three years, engaged in conduct that breaches ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act.[66] These provisions place prohibitions on people asking for, receiving, offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.

Where the applicant has engaged in such conduct in the previous 3 years, an applicant may nevertheless satisfy the requirement if it is reasonable to disregard that conduct.[67] Whether it is reasonable to disregard such conduct will be a question for the decision maker, and all relevant circumstances of the individual case should be considered.[68] This potentially encompasses not only the conduct itself and the circumstances in which it occurred, but also the applicant's broader circumstances outside of that conduct.

[60] cl.187.311(a).
[61] cl.187.311(b).
[62] cl.187.312.
[63] cl.187.313 and cl.187.314. Note that cl.401.313 was amended by SLI 2013 No.256 for visa applications made on or after 24 November 2012 to include PIC 4021 (travel documents).
[64] cl.187.315, omitted by SLI 2013, No.256 and replaced by the similarly worded PIC 4021 for visa applications made on or after 24 November 2012.
[65] cl.187.312A as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. Specifically, in the previous three years, applicants must not have engaged in conduct that constitutes a contravention of ss.245AR(1), 245AS(1), 245AT(1) or 245AU(1) of the Act. In general terms, these provisions place prohibitions on people asking for or receiving a benefit, or offering to provide or providing a benefit, in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.
[66] cl.187.212A(a), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[67] cl.187.212A(b).
[68] The Explanatory Statement introducing this requirement does not provide any guidance as to when it would be reasonable to disregard the conduct, but indicates that these matters will be detailed in departmental policy: Explanatory Statement to SLI 2015, No.242 at p.17. At the time of writing there were no published Departmental guidelines on these matters within PAM3. Refer PAM3: Migration Regulations – Schedule 2 - Regional Sponsored Migration Scheme (subclass 187) – visa applications - [10.6] RN-187 - No payment for visas conduct (policy reissued on 27 July 2017).

Nomination requirements

Applicants in both streams must meet a number of nomination requirements, as set out in cls.187.223 and 187.233. These requirements must be met at time of decision. Questions may arise about what nominations can be relied on, and whether there is adverse information about the nominator.

Can a pre-1 July 2012 nomination be relied on?

Whether a pre-1 July 2012 nomination can be relied on depends on the particular stream being considered and the date of visa application.

In the Temporary Residence Transition (TRT) stream, an employer nomination made before 1 July cannot be relied upon because, prior to 18 March 2018, cl.187.223 refers to a nomination that seeks to meet the requirements of r.5.19(3) (i.e. a nomination in the Temporary Residence Transition stream), and, after 18 March 2018, requires the nomination to have been made in relation to a visa in the Temporary Residence Transition stream. As this stream is only applicable to nomination applications made on or after 1 July 2012,[69] this criterion cannot be met by a nomination applied for before that date.

Whereas, in the Direct Entry (DE) stream, a pre-1 July 2012 nomination can be relied on because cl.187.233(1)(a) expressly refers both to nominations which seek to meet the requirements of r.5.19(4) as in force before 1 July 2012 and as currently in force.[70]

Can a pre-18 March 2018 nomination be relied on?

The nomination scheme in r.5.19 was revised again on 18 March 2018, and corresponding changes were made to the terms of cl.187.223 and 233 which are expressed to apply only where the position referred to in those requirements was nominated in an application on or after 18 March 2018. This means that a nomination made before 18 March 2018 can be relied on for a visa application made on, before or after 18 March 2018 (subject to comments above about pre 1 July 2012 nominations), because the changes to visa criteria are linked to the nomination date, and only the nomination identified on at time of visa application can be relied on (see discussion immediately below).

Can a new nomination be relied on?

It is a requirement for both the Temporary Residence Transition and Direct Entry streams (cl.187.223 and cl.187.233 respectively) that the position to which the visa application relates is the position in relation to which the declaration mentioned in paragraph 1114C(3)(d) of Schedule 1 was made. It is clear that this requirement could not be satisfied by a later nomination of a position made by a different employer,[71] and on current authority a nomination in respect of the same position made by the same employer could also not be relied on to meet these Schedule 2 criteria.[72] This was the view taken in *Singh v MIBP* [2017] FCAFC 105.[73] The Court considered whether it would be futile to grant relief to the applicant, if an argued s.359A error were made out, where the visa application was refused on the basis that the associated nomination had been refused. The Court reasoned that the words in cl.187.233 refer to a factual event, that is, whether an employer nomination had been made, and about which the visa applicant made the required declaration in the visa application, meaning

[69] Regulation 5.19 was substituted by SLI 2012 No.82, an amendment expressed to apply only to nominations made on or after 1 July 2012. See Schedule 13 to the Regulations, part 1 item [101], for transitional arrangements.
[70] Note that cl.187.233(1)(a) was amended by F2018L00262, but only where the relevant position was nominated on or after 18 March 2018.
[71] *Hasan v MIBP* [2016] FCCA 1049 (Judge Smith, 13 May 2016). This judgment considered cl.187.223(1)(c) but the interpretation would appear equally applicable to the identically worded cl.187.233(1)(c).
[72] That is also the interpretation reflected in Departmental policy: PAM3: Migration Regulations – Schedule 2 – Regional Sponsored Migration Scheme (subclass 187) – visa applications – [8.1] TRT Linking the position applied for to the one nomination – [8.1.3] Position must be that for which the visa application was made (policy reissued 13 April 2018).
[73] *Singh v MIBP* [2017] FCAFC 105 (Judge Mortimer, 14 July 2017), at [88].

even if the applicant were able to obtain a further nomination for the same position from their employer this new nomination would not be the one in relation to which the declaration was made. Further, the 'position' referred to is a particular position that exists at the time at which the employer nomination is submitted for approval.[74] Although the Court's comments were strictly *obiter*, they are nonetheless persuasive. It follows from this that in practice where a nomination is refused, the visa applicant will not meet cl.187.233 unless there is also a review of that decision pending.

Adverse information

The nomination requirements in all three streams are only met if there is no 'adverse information' known to Immigration about the person (or employer) who made the nomination or a person 'associated with' them, or it is reasonable to disregard any such information.[75]

'Adverse information' is defined in r.1.13A as *any* adverse information relevant to a person's suitability as a sponsor or nominator. A non-exhaustive list of kinds of adverse information is also set out in r.1.13A, and includes matters such as the contravention of laws, but the list differs depending on whether the visa application was made before or on/after 18 March 2018.[76] The term 'associated with' is given a non-exhaustive definition by r.1.13B, but again this varies depending on whether the visa application was made before or on/after 18 March 2018. Both terms are discussed in more detail in the MRD Legal Services commentary Standard Business Sponsor.

As drafted, the relevant provisions refer to adverse information 'known to Immigration'. Where the information in question comes to the Tribunal's attention but is not known to Immigration, it is unclear whether it would fall within the operation of this provision. However, in practice, this issue could be overcome by notifying Immigration of the information in question.

Where 'adverse information' is known, the decision-maker must go on to consider whether it is reasonable to disregard it.[77] The Regulations do not provide any guidance on when it may be reasonable to disregard such information, and this will depend on the circumstances of the case. Departmental guidelines suggest the following factors may be relevant:

- the nature of the adverse information;
- whether the adverse information arose recently or a long time ago;
- how the adverse information became known, including the credibility of the source of the adverse information;
- whether the allegations have been substantiated or not, e.g. whether the applicant has been convicted or an offence under Australian law or investigations are ongoing;
- whether the applicant has provided evidence to demonstrate that they have rectified any issues where relevant (such as repaying monies to an underpaid employee) and taken steps to ensure the circumstances that led to the adverse information do not recur;

[74] See also *Kaur v MIBP* [2017] FCCA 564 (Judge Lucev, 29 March 2017) which also considered whether the applicant could meet 186.223 in circumstances where the associated nomination had been refused. Similarly, the Court reasoned that even if the applicant were able to obtain a further nomination for the same position from their employer this new nomination would not be the one to which the Schedule 1 declaration was made. *Singh v MIBP* [2016] FCCA 2229 (Judge Riley, 12 August 2016), also concerned the equivalent requirements for a Subclass 187 visa. In that matter the Court followed the interpretation of cl.187.233(1)(b) adopted in *Hasan* (at [33]-[34]), yet appeared to go somewhat further by commenting that 'any nomination for a position that the applicant could now obtain would not satisfy cl.187.233' (at [35]). Note, in contrast, that in *Khanom v MIBP* [2016] FCCA 3259 (Judge Smith, 16 December 2016), the Court appeared to implicitly accept that a second nomination by the same employer in respect of the same position could satisfy cl.187.233, when considering whether the Tribunal had acted reasonably in refusing to await the outcome of that second nomination application.

[75] cll.187.223(3A); 187.233(4A) and 187.242(4A), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.

[76] r.1.13A as a whole was repealed and substituted by F2018L00262.

[77] cll.187.223(3A)(b); 187.233(4A)(b) or 187.242(4A)(b).

- whether the applicant has demonstrated subsequent compliance;
- whether the conduct of concern is likely to recur;
- information about relevant findings made by a competent authority in relation to the adverse information, and the significance the competent authority attached to the adverse information;
- whether there are any compelling circumstances affecting the interests of Australia.[78]

The policy goes on to list examples of circumstances in which it may be reasonable to disregard adverse information and circumstances in which it is unlikely to be reasonable to disregard adverse information. These lists are not exhaustive and the determination of whether it is reasonable to disregard the information is a question for the relevant decision maker, having regard to all relevant circumstances of the case.

English language requirement – Temporary Residence Transition and Direct Entry streams

Clause 187.222, for the Temporary Residence Transition stream, requires that the applicant *had* vocational English (application made before 1 July 2017) or competent English (application made on or after 1 July 2017) at the time of application, and cl.187.232, for the Direct Entry stream, requires that the applicant *had* competent English at the time of application, unless in a class of persons specified by the Minister in an instrument in writing.[79]

'Vocational English' is defined by r.1.15B and 'competent English' by r.1.15C. These definitions are explained in detail in the MRD Legal Services Commentary, English Language Ability - Skilled/Business Visas, but in general terms an applicant must either hold a specified passport or achieve certain scores in specified language tests.

Can the applicant sit an English test after making the visa application?

The terms of each of these criteria expressly require that the applicant had the requisite level of English proficiency at the time of application, so that they cannot be satisfied by test scores achieved after the date of application. The language of these criteria can be distinguished from that considered by the High Court in *MIAC v Berenguel*.[80]

Exempt applicants

An applicant is exempt from the English requirements if, at the time of application, they are in a class of persons specified by instrument under cl.187.222(b) and cl.187.232.[81]

Although the relevant instrument in force from 1 July 2017 to 17 March 2018, IMMI 17/058, purported to apply to all live applications, it has since been repealed, and given the exemption is to be

[78] PAM3: Div1.2/Reg1.13A - Adverse information and skilled visas (regulation r.1.13A and r.1.13B) > [4.4.2] Disregarding of adverse information (policy reissued 18 March 2018).
[79] For the relevant instrument, see the 'EngLangExempt186/187' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (visa applications made on or after 1 July 2015) in the MRD Legal Services Register of Instruments: Business visas.
[80] (2010) 264 ALR 417. The High Court held in this judgment that cl.885.213, a time of application criterion for a skilled visa which requires the applicant to have either vocational English or competent English, could be satisfied by a test undertaken after the application has been made. However, the Court's analysis turned on the particular language of the criterion in issue (not merely the definition of 'vocational English' or 'competent English') and the identified purpose of that criterion.
[81] For the relevant instrument, see the 'EngLangExempt186/187' tab (visa applications made before 1 July 2015) or the 'ExmtSkillsAgeEng 186&187' tab (where visa application made on or after 1 July 2015) of the MRD Legal Services Register of Instruments: Business visas.

considered at the time of application, it appears that the applicable instrument is the one which is in force at the time of application.[82]

For visa applications made on or after 1 July 2017, for the purposes of cl.187.222(b) only (i.e. visa applicants in the Temporary Residence Transition stream), the following class of person is specified:

- persons who have completed at least five years of full-time study in a secondary and/or higher education institution where all of the tuition was delivered in English.[83]

There are no exemptions specified for cl.187.232(b) (Direct Entry stream) for visa applications made on or after 1 July 2017.

For all visa applications made on or after 1 July 2015 and prior to 1 July 2017, the following persons are specified for cl.187.222(b) and cl.187.232:

- persons whose earnings will be at least equivalent to the current Australian Tax Office top individual income tax rate (see discussion above).[84]

In addition, for cl.187.222(b) only, the following persons are also specified:

- persons who have completed at least five years of full-time study in a secondary and/or higher education institution where all of the tuition was delivered in English are also specified.[85]

For visa applications made *prior to* 1 July 2015, in addition to the two classes of person above, the following persons are specified for cl.187.222(b) and cl.187.232(b):

- Ministers of Religion (ANZSCO 272211) who have applied for a visa under the Regulations to occupy a position as nominated by a religious institution.[86]

Skills requirements – Direct Entry stream

Clause 187.234, a criterion for the Direct Entry stream, requires that *at the time of application* one of the three alternatives is satisfied, as discussed below.[87]

[82] This is consistent with Departmental policy, though the policy appears to have been adopted as a way to preserve a previous 'entitlement' to rely on this exemption, rather than as a reflection of a view that the instrument in force at time of application should be applied as a matter of correct application of the law. See PAM3 – Migration Regulations – Schedules – Employer Nomination Scheme (Subclass 187 visa) – visa applications – [6.3.2] TRT English language proficiency exemptions and [7.9.2] DE English language proficiency exemptions (version reissued 27 July 2017); and the Department's media release of 4 July 2017.

[83] For visa applications made on or after 18 March 2018, see IMMI 18/045, for visa applications made 1 July 2017 to 17 March 2018, see IMMI 17/058. See the 'ExmtSkillsAgeEng 186&187' tab of the MRD Legal Services Register of Instruments: Business visas. Note that IMMI 17/058 was repealed by IMMI 18/045, but the repeal is expressed not to apply whether the nomination and/or visa application was made before 18 March 2018. In any event, the specifications made under these instruments are the same.

[84] IMMI 15/083. See the 'ExmtSkillsAgeEng 186&187' tab of the MRD Legal Services Register of Instruments: Business visas

[85] IMMI 15/083. See the 'ExmtSkillsAgeEng 186&187' tab of the MRD Legal Services Register of Instruments: Business visas.

[86] IMMI 12/059. See the 'EngLangExempt186/187' tab of the MRD Legal Services Register of Instruments: Business visas. The instrument that contained this exemption (IMMI 12/059) was revoked from 1 July 2015 and was replaced by a new instrument (15/083). IMMI 15/083 was then revoked and replaced by IMMI 17/058. Neither of these Instruments specify 'Minister of Religion' as an exempt person. While not specified in the instrument or the explanatory statement, it appears that IMMI 15/083 is only intended to apply to visa applications made on or after 1 July 2015. The effect of this is that an applicant who applies for a Subclass 187 visa on or after 1 July 2015 on the basis of the nominated occupation of Minister of Religion would not satisfy the English language exemption cl.187.222(b) or cl.187.232(b)

[87] Departmental policy suggests that applicants can be taken to satisfy the skills criterion if they are a researcher, scientist or technical specialist employed by an Australian government scientific agency, or if they are academics employed by a university in Australia: Migration PAM3: Sch2 Visa 187 - Regional Sponsored Migration Scheme > RN-187 Direct Entry stream > Scenario

First alternative – in specified class of persons

The first alternative is a person specified by instrument under cl.187.234(a).

For applications made on or after 1 July 2017, the following class of persons is specified:

- persons who are currently in Australia as the holder of a subclass 444 or 461 visa and have been working with their nominating employer in their nominated occupation for at least two years (excluding any periods of unpaid leave) in the last three years immediately before making their visa application.[88]

For applications made prior to 1 July 2017, all applicable versions of the instrument specify the same two quite narrow classes of persons:

- persons who are nominated for a visa under the Regulations for a position where their nominated earnings will be at least equivalent to the current Australian Tax Office top individual income tax rate;[89] and

- persons who are currently in Australia as the holder of a subclass 444 or 461 visa and have been working with their nominating employer in their nominated occupation for at least two years (excluding any periods of unpaid leave) in the last three years immediately before making their visa application. [90]

Although the relevant instrument in force from 1 July 2017 to 17 March 2018, IMMI17/058, purported to apply to all live applications, it has since been repealed and given the exemption is to be considered at the time of application, it appears that the applicable instrument is the one which is in force at the time of application.[91]

The policy basis for the income exemption was that the nominator is unlikely to pay a salary at this level to a person unless they are fully confident of the person's skills and ability. Information on income tax rates is available from the ATO website. It provides that for the financial year 2016-17, for example, the top income category is $180,001 and over.[92]

3: Applicants required to demonstrate their skills > Policy exemptions (policy reissued on 1/07/17). Prior to 1 July 2015, the departmental policy also suggested that if the occupation associated with the relevant nominated position is Minister of Religion the applicant could be taken to satisfy the skills criterion. These policies have no legislative basis and accordingly should not be applied.

[88] For applications made on or after 18 March 2018, see IMMI 18/045. For visa applications made 1 July 2017 to 17 March 2018 see IMMI 17/058, both listed the 'ExmtSkillsAgeEng 186&187' tab of the MRD Legal Services Register of Instruments: Business visas. Note that IMMI 17/058 was repealed by IMMI 18/045, but the repeal is expressed not to apply whether the nomination and/or visa application was made before 18 March 2018. In any event, the specifications made under these instruments are the same.

[89] As noted above, the category of exemption has been excluded by the instrument currently in force (IMMI 17/058), which commenced on 1 July 2017 but is expressed to apply to all live applications (see Part 4 – Application of this instrument). However, it appears that the applicable instrument is the one in force *at the time of visa application*, and in any event Departmental policy is to continue to apply this exemption to visa applications made before 1 July 2017: PAM3 – Migration Regulations – Schedules – Employer Nomination Scheme (Subclass 187 visa) – visa applications – [7.11] Scenario 1: Persons not required to demonstrate their skills – [7.11.1] Specified by legislative instrument (version of policy reissued 27 July 2017); and the Department's media release of 4 July 2017.

[90] IMMI 12/060 and 15/083. For the applicable instrument see the MRD Legal Services: Register of Instruments – Business visas, for visa applications made before 1 July 2015, see the 'ExmtSkills' tab, for applications made on or after 1 July 2015, see the 'ExmtSkillsAgeEng 186&187' tab.

[91] This is consistent with Departmental policy, expressed as a continued application of the high income exemption for applications made prior to 1 July 2017, though the policy appears to have been adopted as a way to preserve a previous 'entitlement' to rely on this exemption, rather than as a reflection of a view that the instrument in force at time of application should be applied as a matter of correct application of the law. See PAM3 – Migration Regulations – Schedules – Employer Nomination Scheme (Subclass 187 visa) – visa applications – [7.11] Scenario 1: Persons not required to demonstrate their skills – [7.11.1] Specified by legislative instrument (version of policy reissued 27 July 2017; and the Department's media release of 4 July 2017.

[92] https://www.ato.gov.au/Rates/Individual-income-tax-rates/ (accessed 14 December 2016).

Visa subclasses 444 (Special Category) and 461 (New Zealand Citizen Family Relationship (Temporary)) are temporary visas specifically for New Zealand citizens and their family members.

If an applicant is not in one of the specified classes of person, the decision maker should then consider whether cl.184.234(b) applies.

Second alternative – specified occupation, qualification not obtained in Australia

The second alternative applies only if the applicant's occupation is specified by written instrument and the applicant did not obtain the necessary qualification in Australia.

Relevant instrument

Given this criterion must be met at the time of application, it appears the instrument in force at the time of application should be considered.[93] While a range of occupations are specified for this provision, they are primarily trade occupations.

Did not obtain necessary qualification in Australia

Although somewhat unclear, in determining whether 'the applicant did not obtain the *necessary qualification* in Australia' for cl.187.234(b), it doesn't appear that decision makers are required to consider whether the qualification in question meets the skill levels specified for the occupation by ANZSCO (as is required for cl.187.234(c)).[94] Rather, it seems that all that is required is consideration of whether the qualification relied on by the applicant to demonstrate they can perform the duties of the nominated position was obtained in Australia or overseas.[95] If it was obtained overseas, then the applicant must have a skills assessment meeting the applicable requirements to satisfy this criterion. If it was obtained in Australia, then cl.187.234(b) doesn't apply, and decision makers should go on to consider whether cl.187.234(c) is met.

Skills assessment requirements

If cl.187.234(b) applies, note that the requirement is that the applicant's skills *had been* assessed as suitable by the specified assessing authority.[96] As this criterion must be met at time of application, the skills assessment must have been made by the date of visa application (though evidence of the assessment may be obtained or provided at a later date).

If required, the skills assessment must meet certain requirements, depending on the date of visa application. For visa applications made on or after 1 July 2013, the assessment must not be for a Subclass 485 (Temporary Graduate) visa.[97] Additionally, for visa applications made on or after 1 July 2014, there is a restriction relating to the age of the skills assessment. If the assessment specifies a

[93] For the relevant instrument, see the 'Occ187' tab of the MRD Legal Services: Register of Instruments – Business visas.
[94] Such an interpretation would be inconsistent with the different language used in cl.187.234(b) and (c) – the latter specifically requires comparison against ANZSCO.
[95] This interpretation is consistent with Departmental policy, which provides simply that if a person is nominated for a trade occupation specified in the legislative instrument but does not have a relevant Australian trade qualification, they must have a positive skills assessment from TRA or VETASSESS (as appropriate): PAM3: Migration Regulations – Schedule 2 - Regional Sponsored Migration Scheme (Subclass 187) – visa applications – [9.12] Scenario 2: Requiring a skills assessment from a specific assessing authority (policy reissued 13 April 2018).
[96] In *Sutherland v MIBP* [2017] FCA 806 (Judge Moshinsky, 19 July 2017), the Court considered the almost identical provision under cl.186.234(2)(a), specifically, whether the Tribunal had erred by holding that the applicant did not hold a suitable skills assessment for the approved nominated occupation. In its reasoning, the Court held that whether the skills assessment put forward by the applicant satisfied the requirements of cl.186.234(2)(a) and, in particular, whether the 'assessing authority had assessed the applicant's skills as suitable for the occupation', is a question of fact for the Tribunal to determine. In that matter, the nominated occupation was 'Management Accountant', but the skills assessment had been carried out in respect of the now replaced ASCO classification of 'Accountant'.
[97] cl.187.234(b) as amended by Migration Legislation (Skills Assessment) Regulation 2013 (SLI 2013, No.233) and again by Migration Legislation Amendment (2014 Measures No.1) Regulation 2014 (SLI 2014, No.82) (re-numbered, so that this requirement is in cl.187.234(b)(iv) for visa applications made on or after 1 July 2014).

period of validity of less than 3 years after the date of assessment, then that period must not have ended.[98] Otherwise, not more than 3 years must have passed since the date of the assessment.[99]

Employment requirement

For visa applications made on or after 18 March 2018 it is an additional requirement that, as at the time of visa application, the applicant has employed in the occupation for at least 3 years on a full time basis and at the level of skill required for the occupation.[100]

The criterion does not specify where or when this employment must have occurred, or that it would need to have been continuous, so that to impose any requirements in this respect would appear to go beyond the terms of the Regulations.[101]

Third alternative – qualifications listed in ANZSCO

If neither cl.187.234(a) or (b) applies, then cl.187.234(c) must be met – that the applicant had the qualifications listed in ANZSCO as being necessary to perform the tasks of the occupation. The applicant must have had those qualifications at the time of visa application. Clause 187.234(c) was repealed and substituted for applications made on or after 1 July 2017 to clarify that this third alternative is only available where either their occupation was not specified for cl.187.234(b) or their qualification was obtained in Australia.[102] This clarification was made to avoid the inference that if an applicant could not meet the requirements of cl.187.234(b), even though that alternative was applicable, then they could satisfy the less stringent requirements of cl.187.234(c).[103]

For visa applications made on or after 18 March 2018 it is an additional requirement that, as at the time of visa application, the applicant has employed in the occupation for at least 3 years on a full time basis and at the level of skill required for the occupation.[104]

'ANZSCO' stands for the Australian and New Zealand Standard Classification of Occupations, and is defined in r.1.03.[105] It uses several hierarchies in classifying occupations, with the indicative skill level for occupations outlined at the 'unit group' level.

It is not enough that an applicant has completed relevant study in circumstances where the formal qualification itself was not issued to satisfy cl.187.234(c). In *Dhimal v MIBP* Judge Lucev found there was no discretion for the Tribunal to find the applicant could meet cl.187.234(c) in circumstances where she did not actually hold the relevant qualifications at the time of the making of the visa application.[106]

[98] cl.187.234(b)(v), inserted by SLI 2014 No.82.
[99] cl.187.234(b)(vi), inserted by SLI 2014 No.82.
[100] cl.187.234(b)(vii), inserted by F2018L00262.
[101] Departmental policy indicates that it intends the experience to be recent, but does not have to be immediately prior to the visa application. It also indicates that full time should be considered as 35 hours per week: PAM3: Migration Regulations – Schedule 2 - Regional Sponsored Migration Scheme (Subclass 187) – visa applications – [9.12.4] Must have been employed in the nominated occupation for 3 years (policy reissued 13 April 2018).
[102] F2017L00816.
[103] See Explanatory Statement to F2017L00816 at p.47.
[104] cl.187.234(c)(iii), inserted by F2018L00262.
[105] 'ANZSCO' is defined differently depending on the date of visa application. For visa applications made on or after 1 July 2010 but before 1 July 2013, and visa applications not finally determined on 1 July 2010, 'ANZSCO' is defined by r.1.03 to mean the Australian New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics as current on 1 July 2010: r.1.03 as inserted by Migration Amendment Regulations 2010 (No.6) (SLI 2010 No.133). For visa applications made on or after 1 July 2013 'ANZSCO' has the meaning specified by the Minister in an instrument in writing: r.1.03 as amended by Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013 No.146) (for the relevant instruments, see the Occ186/442/457&Noms tab of the Register of Instruments – Business visas).
[106] *Dhimal v MIBP* [2016] FCCA 1094 (Judge Antoni Lucev, 10 May 2016) at [16].

Australian qualification

If the applicant relies on an Australian qualification, the qualification must be as specified in ANZSCO for the occupation associated with the nominated position. Although this will be a question of fact, having regard to the circumstances of the individual case, having a *higher* qualification than that listed in ANZSCO does not of itself mean the applicant has the qualifications listed in ANZSCO.[107]

Overseas qualification

If the applicant relies on formal overseas qualifications, whether they are equivalent to those listed in ANZSCO for the relevant occupation must be considered. The country education profiles (CEPs) maintained by the National Office of Overseas Skills Recognition (NOOSR) may be of assistance in undertaking this assessment. These describe the educational systems of over 100 countries and provide guidelines for comparability of overseas qualifications to Australian qualifications (please contact Library for assistance in accessing).

On the job training / work experience

For many trade occupations, the indicative skill level is an AQF Certificate III 'including at least two years of on the job training' or an AQF Certificate IV. When framed in these terms, it appears that the on the job training must be *part of* the qualification (either undertaken as part of the qualification or a requirement to receive the qualification). However, PAM3 suggests that 2 years of post-qualification experience in Australia may also satisfy ANZSCO requirements in the alternative to 2 years of on the job training as part of the Certificate III qualification.[108] The question was considered in *Dhimal v MIBP,* but ultimately left unresolved.[109]

Older departmental policy (PAM3) suggested that AQF Certificate IV qualifications must also include an on the job training component.[110] However, unless such training forms part of the qualifications listed in ANSZCO as being necessary to perform the tasks of the occupation, such a requirement appears to exceed the terms of the Regulations and should not be applied. The current version of PAM3 specifically states that AQF Certificate IV qualifications do not include an on the job training component.[111]

For some occupations, ANZSCO indicates that a certain period (e.g. 3 years) of relevant experience may substitute for formal qualifications. Framed in this way, it appears that the work experience must not only be of the period required but of a kind sufficient to 'substitute' for the formal qualifications.[112]

[107] Departmental policy highlights that higher level qualifications may not be relevant to the actual occupation: PAM3: Migration Regulations - Schedules - Regional Sponsored Migration Scheme (Subclass 187) – visa applications – [9.13] Scenario 3: Applicants required to demonstrate their skills – [9.13.1.6] AQF Certificate III, IV and Diploma qualifications (policy reissued 13 April 2018).

[108] PAM3: Migration Regulations - Schedules - Regional Sponsored Migration Scheme (Subclass 187) – visa applications – [9.13] Scenario 3: Applicants required to demonstrate their skills – [9.13.1.3] On the job training (policy reissued 13 April 2018).

[109] In *Dhimal v MIBP* [2016] FCCA 1094 (Judge Antoni Lucev, 10 May 2016), a question of whether an applicant could satisfy ANZSCO requirements on the basis of post-qualification work experience was before the Court. Although the Court determined the matter on consideration of whether the applicant's unpaid work experience satisfied ANZSCO requirements, it appears that it accepted that, consistent with the position in PAM3, ANZSCO allows for a degree of flexibility in determining whether an applicant has the necessary on-the-job training.

[110] PAM3: Sch2 Visa 187 - Regional Sponsored Migration Scheme (policy reissued on 14/12/15).

[111] PAM3: Migration Regulations - Schedules - Regional Sponsored Migration Scheme (Subclass 187) – visa applications – [9.13] Scenario 3: Applicants required to demonstrate their skills – [9.13.1.6] AQF Certificate III, IV and Diploma qualifications (policy reissued 13 April 2018).

[112] This is the approach adopted in Departmental policy: PAM3: Migration Regulations - Schedules - Regional Sponsored Migration Scheme (Subclass 187) – visa applications – [9.13] Scenario 3: Applicants required to demonstrate their skills – [9.13.1.4] Work Experience (policy reissued 13 April 2018).

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulation 2012 (No.2)	SLI 2012 No.82
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012 No.256
Migration Amendment (Skills Assessment) Regulation 2013	SLI 2013 No.233
Migration Legislation Amendment (2014 Measures No.1) Regulation 2014	SLI 2014 No.82
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015 No.34
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Legislation Amendment (2017 Measures No.3) Regulations 2017	F2017L00816
Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Relevant case law

Dhimal v MIBP [2016] FCCA 1094	Summary
Hasan v MIBP [2016] FCCA 1049	
Kaur v MIBP [2017] FCCA 564	Summary
Khanom v MIBP [2016] FCCA 3259	
MIAC v Berenguel [2010] HCA 8; (2010) 264 ALR 477	Summary
Singh v MIBP [2016] FCCA 2229	Summary
Yeap v MIBP [2016] FCCA 1173	
Singh v MIBP [2017] FCAFC 105	Summary
Sutherland v MIBP [2017] FCA 806	

Available Decision Templates

There is one subclass specific template:

- **Subclass 187 visa refusal** – this template is suitable for all Subclass 187 visa applications. The template asks users to select the visa stream in issue. For each stream, the user can select from 6 or 7 individual criteria in issue (licence/registration requirements, provision of employment, age, English proficiency, nomination of a position, skills / qualifications, skills / experience, labour agreement, or other).

Last updated/reviewed: 23 April 2018

Subclass 188:
Business Innovation and Investment (Provisional) visa

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Overview

The Business Skills (Provisional) (Class EB) is a temporary visa introduced on 1 July 2012 for persons intending to establish a new, or manage an existing, business in Australia, make a 'designated investment' with a State / Territory government or make certain complying investments in Australian government bonds, an Australian proprietary company or other prescribed types of investment.[1] It has one subclass, Subclass 188,[2] and replaces former visa subclasses 160, 161, 162, 163, 164 and 165.[3]

A Subclass 188 visa may be granted by to a primary applicant who satisfies the criteria for one of the seven visa 'streams'. These are the:

- Business Innovation stream;
- Business Innovation Extension stream;
- Investor stream;
- Significant Investor stream;
- Significant Investor Extension stream;
- Premium Investor stream; and
- Entrepreneur stream.

The Business Innovation, Business Innovation Extension and Investor streams are open to visa applications from 1 July 2012.[4] The Significant Investor and Significant Investor Extension streams were introduced on 24 November 2012 and only apply to visa applications made on or after that date.[5] The Premium Investor stream was open to visa applications from 1 July 2015.[6] The Entrepreneur stream was open to visa applications from 10 September 2016.[7]

The requirements for making a valid application differ depending upon which visa 'stream' the applicant is seeking to satisfy. The Business Innovation, Business Innovation Extension, Investor, and Entrepreneur streams require the applicant to have been nominated by a State or Territory

[1] Inserted by Migration Amendment Regulation 2012 (No.2) (SLI 2012, No.82).
[2] Item 1202B(7) of Schedule 1 to the Migration Regulations 1994 (the Regulations).
[3] See item 1202A(3)(aa) which states that an application by a person seeking to satisfy the primary criteria of these subclasses must be made before 1 July 2012. See p.42 of the Explanatory Statement to SLI 2012 No. 82 which notes that the effect of this amendment is to prevent further applications being made on and after 1 July 2012 for a Business Skills (Provisional) (Class UR) visa by persons seeking to satisfy the primary criteria for a Subclass 160, 161, 162, 163, 164 or 165 visa and that these subclasses of visa are replaced by the new Subclass 188 (Business Innovation and Investment (Provisional)) visa.
[4] See SLI 2012, No. 82.
[5] Inserted by Migration Amendment Regulation 2012 (No.7) (SLI 2012, No.255).
[6] See Migration Amendment (Investor Visa) Regulation 2015 (SLI 2015, No. 102).
[7] See Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016 (F2016L01391).

government agency.[8] The Significant Investor and Significant Investor Extension streams require the applicant to have been nominated by a State or Territory government or the CEO of Austrade.[9] The Premium Investor stream requires the applicant to have been nominated by the CEO of Austrade.[10] In some cases, the applicant must be invited by the Minister to apply (see Visa Application Requirements below).

Primary applicants must meet common criteria as well as the criteria for the stream in which they apply for the visa. Members of the family unit who apply for Subclass 188 visas must meet secondary criteria for members of the family unit.

Merits review

A decision to refuse the grant of an onshore Subclass 188 visa application is a reviewable decision under Part 5, s.338(2) of the *Migration Act 1958* (the Act). The visa applicant has standing to apply for review.[11]

For there to be a valid application for review the applicant must be in the migration zone at the time of lodging the review application.[12]

The Tribunal does not have jurisdiction to review visa refusal decisions where the visa application was made offshore, or where the visa application was made while an applicant was onshore but the review application was made while they were offshore.

Visa Application Requirements

An application for a Business Skills (Provisional) (Class EB) visa must be made in the approved form and in the place and manner specified.[13] An applicant may be in or outside Australia at the time of application, but not in immigration clearance.[14]

In order to make a valid visa application, an applicant seeking to satisfy the primary criteria in the **Business Innovation, Investor, Significant Investor, Premium Investor or Entrepreneur streams** must have been invited, in writing, by the Minister to apply for the visa in that particular stream; and must have applied within the period stated in the invitation.[15] In addition, an applicant for the **Business Innovation, Investor and Entrepreneur streams** must have been nominated by a State or Territory government agency. An applicant for the **Significant Investor stream** must be nominated by either a State or Territory government agency, or the CEO of Austrade.[16] An applicant for the

[8] Items 1202B(4), 1202B(5), 1202B(6) and 1202B(6D) of Schedule 1 to the Regulations.
[9] Item 1202B(6A), 1202B(6B) of Schedule 1 to the Regulations.
[10] Item 1202B(6C) of Schedule 1 to the Regulations.
[11] s.347(2)(a).
[12] s.347(3).
[13] Items 1202B(1) and (3)(a). For applications made prior to 18 April 2015, the prescribed form is form 1397 (Internet) and must be made as an Internet application. These provisions were amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No. 34) for applications made on or after 18 April 2015 to provide that the approved form and place and manner which the application must be made, if any, are specified by the Minister in a legislative instrument under r.2.07(5).
[14] Item 1202B(3)(b).
[15] Items 1202B(4), (6), (6A), (6C) and (6D).
[16] Item1202B(6A) of Schedule 1 to the Regulations.

Premium Investor stream requires the applicant to have been nominated by the CEO of Austrade.[17] There are no prescribed forms for nomination. The nomination is however recorded electronically in SkillSelect.[18]

An applicant seeking to satisfy the primary criteria in the **Business Innovation Extension stream** must hold a Subclass 188 visa in the Business Innovation stream, have held that visa for at least 3 years, not have held more than one Subclass 188 visa and be nominated by a State / Territory government agency.[19]

An applicant seeking to satisfy the primary criteria in the **Significant Investor Extension stream** must either hold a Subclass 188 visa in the Significant Investor stream that they have held for at least 3 years; or must hold a Subclass 188 visa in the Significant Investor Extension Stream and have not held more than one Subclass 188 visa in the Significant Investor Extension stream.[20]

An application by a person claiming to be a member of the family unit of a primary applicant may be made at the same time as, and combined with, the application by that person.[21]

Visa Criteria

The criteria for a Subclass 188 are set out in Part 188 of Schedule 2 to the Migration Regulations 1994 (the Regulations). They comprise primary and secondary criteria. At least one person included in the application must meet the primary criteria. The criteria for a Subclass 188 visa are not divided between time of application and time of decision criteria. However, some criteria require the decision-maker to be satisfied of the existence of certain matters as at the time of the invitation to apply for the visa.

Primary criteria

Primary applicants must meet common criteria that apply to all primary applicants. In addition, primary applicants must meet the criteria in one of seven alternative streams:

- the Business Innovation stream;
- the Business Innovation Extension stream;
- the Investor stream;
- the Significant Investor stream;
- the Significant Investor Extension stream;
- the Premium Investor stream;
- the Entrepreneur stream.

[17] Item 1202B(6C) of Schedule 1 to the Regulations.
[18] PAM3: Sch2 Visa 188 - Business Innovation and Investment (Provisional) – Applying for a Business Skills (Provisional) (Class EB) visa (compilation 14/10/2016).
[19] Item 1202B(5).
[20] Item 1202B(6B).
[21] Item 1202B(3)(d).

Common criteria

The common criteria that must be met by all primary applicants, regardless of which stream they have selected, are set out in cl.188.21. These are:

- **history of business / investment activities -** the applicant and the applicant's spouse or de facto partner must not have a history of involvement in business or investment activities that are of a nature that is not generally acceptable in Australia (see below for further details):[22]
- **nomination not withdrawn -** the nominating State or Territory government agency, or the CEO of Austrade, has not withdrawn the nomination.[23] Whether a nomination has been withdrawn is a factual matter for the decision maker;

  public interest criteria and special return criteria - the applicant and each member of the family unit of the applicant who is an applicant for the visa must satisfy certain public interest criteria, some of which only apply to children under 18,[24] and certain special return criteria.[25] In addition, it is a primary criterion that each member of the family unit who is *not* an applicant for the visa must satisfy certain public interest criteria;[26]
- **passport requirements -** or applications made prior to 24 November 2012, the applicant must satisfy cl.188.215 – that is, hold a valid passport that was issued to the applicant by an official source, and is in the form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport.[27] This criterion has been replaced by the very similarly termed PIC 4021, which applies to visa applications made on or after 24 November 2012.[28]

Criteria for the Business Innovation stream

Applicants seeking to satisfy the primary criteria for a Subclass 188 visa in the Business Innovation stream must also meet the stream specific criteria set out in cl.188.22.

Invitation and age or business / investment proposal

Clause 188.221(1) requires that the applicant was invited, in writing, by the Minister to apply for the visa.[29] This reflects the Schedule 1 requirement that an applicant be invited to apply for a visa for the visa application to be valid, and thus will be satisfied in all cases where there is a valid visa application.

In addition, the applicant must either not have turned 55 at the time of the invitation; or alternatively be proposing to establish or participate in business or investment activity that the nominating State/Territory government agency has determined is of exceptional economic benefit to the State/Territory in which the agency is located.[30] Whether the nominating agency has determined the activity to be of exceptional economic benefit, is a matter of fact. Departmental Guidelines (PAM3)

[22] cl.188.211.
[23] cl.188.212. This requirement was amended by SLI 2015, No. 102 to include reference to the CEO of Austrade for visa applications made or on after 1 July 2015
[24] cl.188.213. These are (PIC) 4001 (character), 4002 (security), 4003 (foreign policy interests), 4004 (debt to Commonwealth), 4010 (establishment in Australia) and 4020 (false/misleading information), and if they had turned 18 at the time of application, they must also satisfy PIC 4019 (Australian values). Each member of the family unit of the applicant who is also an applicant and has not turned 18 must satisfy PIC 4015 (lawful removal of child) and 4016 (best interest of child). See the MRD Legal Services commentaries for further information on PIC 4001 and PIC 4020: Public Interest Criterion 4001, Bogus Documents / False or Misleading Information / PIC 4020.
[25] cl.188.214(1), (2). These are 5001, 5002 and 5010. See MRD Legal Services commentary: Special Return Criteria
[26] cl.188.213(6). These are PIC 4001, 4002, 4003 and 4004.
[27] cl.188.215. Omitted by SLI 2012, No. 256.
[28] Inserted into cl.188.213(1): SLI 2012, No. 256.
[29] cl.188.221(1).

note that this alternative criterion is designed to give the nominating state/territory the flexibility to nominate applicants 55 or over in those circumstances.[31]

Points test

The applicant is required to score at least the number of points on the 'business innovation and investment points test' specified a written instrument.[32] The business innovation and points test is that set out in Schedule 7A.[33]

In calculating an applicant's score under Schedule 7A, Parts 7A.2 – 7A.5 and Parts 7A.7 – 7A.10 are to be added together.[34] However, where an applicant's circumstances satisfy more than one prescribed qualification under any of these Parts except for Part 7A.9 (e.g. has both a diploma and a bachelor degree in business under Part 7A.4), only the qualification which attracts the highest number of points is to be given to the applicant.[35]

Residence, business career, ownership and asset requirements

Other primary criteria relate to residence, business career, ownership and asset requirements and require that:

- the applicant demonstrates that there is a need for him/her to be resident in Australia to establish or conduct the proposed business activity;[36]
- the applicant has overall had a successful business career;[37]
- for at least 2 of the 4 fiscal years immediately before the time of the invitation, the applicant had an ownership interest in one or more established main businesses that had an annual turnover of at least AUD500,000 in each of those years;[38]
- if the applicant was engaged in one or more businesses providing professional, technical or trade services for at least 2 of the 4 fiscal years immediately before the time of the invitation, the applicant was directly engaged in the provision of the services, as distinct from the general direction of the operation of the business, for no more than half the time spent by the applicant from day to day in the conduct of the business;[39]
- the business and personal assets of the applicant and/or his or her spouse or de facto partner:
  - that can be applied to the establishment or conduct of a business in Australia have a net value of at least AUD800,000 at the time of the invitation;[40]
  - are lawfully acquired and are available for transfer to Australia within 2 years after the grant of a visa;[41]
- the nominating State/Territory government agency is satisfied that the net value of the business and personal assets of the applicant and/or the applicant's spouse or de facto

[30] cl.188.221(2).
[31] PAM3: Sch2 Visa 188 - Business Innovation and Investment (Provisional) – The EB-188 visa main applicant – Business innovation stream primary applicants – Age requirement (compilation 14/10/2016).
[32] cl.188.222(1). To find the applicable instrument, please see the 'PointsBusStreams' tab under the MRD Legal Services Register of Instruments – Business Visas.
[33] r.1.03.
[34] Note that any score under Part 7A.6 is not counted.
[35] cl.188.222(2).
[36] cl.188.223.
[37] cl.188.224. See below for further details.
[38] cl.188.225(1).
[39] cl.188.225(2).
[40] cl.188.226.
[41] cl.188.228.

partner, other than those that can be applied to the establishment or conduct of a business in Australia, is sufficient to allow them to settle in Australia;[42]

- the applicant genuinely has a realistic commitment to:
  - establish a qualifying business in Australia or participate in an existing qualifying business in Australia;[43]
  - maintain a substantial ownership interest in that qualifying business;[44] and
  - maintain a direct and continuous involvement in the management of the qualifying business from day to day, and in the making of decisions that affect the overall direction and performance of the qualifying business, in a manner that benefits the Australian economy.[45]

Public interest criteria

It is a *primary* criterion for the grant of a Subclass 188 visas in the Business Innovation stream that:

- the applicant and each member of the family unit who is an applicant for the visa must satisfy PIC 4005 (health criteria);[46]
- each member of the family unit who is *not* an applicant for the visa satisfies PIC 4005, unless it would be unreasonable to require the person to undergo an assessment in relation to that criterion.[47]

Criteria for the Business Innovation Extension stream

The criteria for applicants seeking to satisfy the primary criteria for a Subclass 188 visa in the Business Innovation Extension stream are set out in cl.188.23 and require:

- the applicant demonstrates that there is a need for him/her to be resident in Australia to operate the main business;[48]
- for at least the 2 years immediately before the application was made, the applicant had an ownership interest in one or more main businesses that were actively operating in Australia, and continues to have that ownership interest;[49]
- the applicant genuinely has a realistic commitment to:
  - maintain the ownership interest mentioned above; and
  - maintain a direct and continuous involvement in the management of the main business from day to day, and in the making of decisions that affect the overall direction and performance of the main business, in a manner that benefits the Australian economy;[50]
- the applicant and each member of the family unit who is an applicant for the visa must satisfy PIC 4007 (health);[51]

[42] cl.188.227.
[43] cl.188.229(1).
[44] cl.188.229(2)(a).
[45] cl.188.229(2)(b).
[46] cl.188.229A(1), (2). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[47] cl.188.229A(3). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[48] cl.188.231.
[49] cl.188.232.
[50] cl.188.233
[51] cl.188.234(1), (2). For further information about PIC 4007 please see MRD Legal Services Commentary Health Criteria.

- each member of the family unit who is *not* an applicant for the visa satisfies PIC 4007, unless it would be unreasonable to require the person to undergo an assessment in relation to the criterion.[52]

Criteria for the Investor stream

Applicants seeking to satisfy the primary criteria for a Subclass 188 visa in the Investor stream must meet the criteria set out in cl.188.24. These are detailed below.

Invitation and age or business / investment proposal

The applicant must be invited, in writing, by the Minister to apply for the visa.[53]

In addition, the applicant either must not have turned 55 at the time of the invitation or must be proposing to establish or participate in business or investment activity that the nominating State/Territory government agency has determined is of exceptional economic benefit to the State/Territory in which the agency is located.[54]

Points test

The applicant is required to score at least the number of points on the 'business innovation and investment points test' specified in a written instrument.[55] The business innovation and investment points test is that set out in Schedule 7A.[56]

In calculating an applicant's score under Schedule 7A, Parts 7A.2 – 7A.4 and Parts 7A.6 – 7A.10 are to be added together.[57] However where an applicant satisfies more than one prescribed qualification under any of these Parts except for Part 7A.9 (e.g. has both a diploma and a bachelor degree in business under Part 7A.4), only the qualification which attracts the highest number of points is to be given to the applicant.[58]

Eligible investment

The applicant is required to demonstrate that he or she has overall had a successful record of eligible investment activity or qualifying business activity.[59] For further information on overall 'successful record', see below.

The applicant must also establish that he/she has a total of at least 3 years' experience of direct involvement in managing one or more qualifying businesses or eligible investments,[60] and have demonstrated a high level of management skill in relation to these.[61]

Value of investments and asset requirements

Other primary criteria relevant to the length of time and amount of the applicant's investments held are as follows:

[52] cl.188.234(3). For further information about PIC 4007 please see MRD Legal Services Commentary Health Criteria.
[53] cl.188.241(1). This reflects the Schedule 1 requirement in item 1202B(6) that an applicant be invited to lodge a valid visa application under this stream.
[54] cl.188.241(2).
[55] cl.188.242(1). To find the applicable instrument, please see the 'PointsBusStreams' tab under the MRD Legal Services' Register of Instruments – Business Visas.
[56] r.1.03.
[57] Note that any score under Part 7A.5 is not included.
[58] cl.188.242(2).
[59] cl.188.243(1).
[60] cl.188.243(2).
[61] cl.188.243(3).

- for at least one of the 5 fiscal years immediately before the time of invitation:
  - the applicant maintained direct involvement in managing a qualifying business, and the applicant and/or his/her spouse or de facto partner had an ownership interest of at least 10% of the total value of the business;[62]

    or
  - the applicant maintained direct involvement in managing eligible investments of the applicant and/or his/her spouse or de facto partner, and the total net value of the eligible investments was at least AUD1,500,000;[63]
- the business and personal assets of the applicant and/or his/her spouse or de facto partner:
  - had a net value of at least AUD2,250,000 for the 2 fiscal years immediately before the time of invitation;[64]
  - are lawfully acquired and are available for transfer to Australia within 2 years after the grant of a visa.[65]

Designated investment requirements

There are a number of criteria related to the making of a 'designated investment':

- the applicant has made a designated investment of at least AUD1,500,000 in the State/Territory in which the nominating State/Territory agency is located, and has made the investment in the name of the applicant or in the name of the applicant and his or her spouse or de facto partner.[66] Further, the funds used to make the designated investment must have been unencumbered and accumulated from either or both of the following:
  - one or more qualifying businesses conducted by the applicant and/or the applicant's partner;
  - eligible investment activities of the applicant and/or the applicant's spouse or de facto partner;[67]
- the applicant genuinely has a realistic commitment to continue to maintain business or investment activity in Australia after the designated investment matures;[68] and
- the applicant has a genuine intention to reside for at least 2 years in the State/Territory in which he/she made the designated investment application.[69]

For further information on 'designated investments' see below.

Public interest criteria

Primary applicants must also met public interest criteria relating to health for the grant of a Subclass 188 visa under the Investor stream, namely that:

- the applicant and each member of the family unit of a person who is an applicant for the visa satisfy PIC 4005 (health);[70]

[62] cl.188.244(a).
[63] cl.188.244(b).
[64] cl.188.245.
[65] cl.188.247.
[66] cl.188.246(1).
[67] cl.188.246(2).
[68] cl.188.248(1).
[69] cl.188.248(2).

- each member of the family unit who is *not* an applicant for a Subclass 188 visa satisfies PIC 4005 unless it would be unreasonable to require the member to undergo assessment.[71]

Criteria for the Significant Investor stream

The criteria for the Significant Investor stream will depend on the date of the visa application. An applicant seeking to satisfy the primary criteria for a Subclass 188 visa in the Significant Investor stream must meet the stream specific criteria set out in cl.188.25.

They are:

- the applicant was invited, in writing, by the Minister to apply for the visa;[72]
- *if the applicant applied for the visa on or after 1 July 2015*:
  - the applicant has made a complying significant investment, within the meaning of regulation 5.19C as in force at the time of application, of at least AUD5,000,000 and has a genuine intention to hold it for at least 4 years;[73]
  - the applicant has given to the Minister evidence that the investment complies with the requirements set out in regulation 5.19C as in force at the time of application;[74]
  - the applicant has given the Minister a completed copy of approved form 1412, signed by the applicant and each other applicant who is aged at least 18;[75]
  - if the applicant was nominated by a State or Territory government agency, the applicant, and/or the applicant's spouse or de facto partner, has a genuine intention to reside in the State/Territory whose government agency nominated the applicant;[76]
- *if the applicant applied for the visa prior to 1 July 2015*:
  - the applicant has given to the Minister a completed copy of approved form 1413 for each investment in a managed fund on which the complying investment is based;[77]
  - the applicant has made a complying investment of at least AUD5,000,000 and has a genuine intention to hold it for at least 4 years;[78]

[70] cl.188.249(1),(2). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[71] cl.188.249(3). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[72] cl.188.251.
[73] cl.188.252 as amended by SLI 2015, No. 102 and applying to visa applications made on or after 1 July 2015. Note that it is Departmental policy to invite an applicant to make a complying investment only in the final stages of processing a visa application, and to give them a specified period in which to do so (currently 28 days): PAM3: Sch2 Visa 188 - Business Innovation and Investment (Provisional) – Significant Investor Stream primary applicants – Inviting the applicant to make investment (compilation 14/10/16). The Court in *Zhang v MIBP* [2017] FCCA 134 found this policy to be a relevant consideration in the Tribunal's assessment of an applicant's request for additional time to make such an investment where that had not been the determinative issue before the delegate.
[74] cl.188.253(1) as amended by SLI 2015, No. 102 and applying to visa applications made on or after 1 July 2015.
[75] cl.188.253(2). According to the note accompanying this clause, form 1412 is a deed under which the signatories acknowledge they are responsible for their financial and legal affairs, undertake not to bring an action against the Commonwealth in relation to any loss relating to the complying significant investment, and release the Commonwealth from any liabilities in relation to any loss relating to the complying significant investment.
[76] cl.188.254 as amended by SLI 2015, No. 102 and applying to visa applications made on or after 1 July 2015.
[77] cl.188.253 as it applied prior to amendments in SLI 2015, No.102 for visa applications made prior to 1 July 2015. According to the note accompanying this clause prior to its amendment from 1 July 2015, form 1413 includes a declaration that the investments made by a managed fund for the benefit of clients are limited to one or more of the purposes specified by the Minister for r.5.19B(2)(c).
[78] cl.188.252 as it applied to prior to amendments in SLI 2015, No.102 for visa applications made prior to 1 July 2015. Note that it is Departmental policy to invite an applicant to make a complying investment only in the final stages of processing a visa application, and to give them a specified period in which to do so : PAM3: Sch2 Visa 188 - Business Innovation and Investment (Provisional) – Significant Investor Stream primary applicants – Inviting the applicant to make investment (compilation 14/10/16). The Court in *Zhang v MIBP* [2017] FCCA 134 found this policy to be a relevant consideration in the Tribunal's assessment of an applicant's request for additional time to make such an investment where that had not been the determinative issue before the delegate.

- the applicant has given the Minister a completed copy of approved form 1412, signed by the applicant and each other applicant who is aged at least 18;[79]
- the applicant has a genuine intention to reside in the State/Territory whose government agency nominated the applicant;[80]

- in addition, for visa applications made either prior to, or on or after, 1 July 2015:
  - the applicant and each member of the family unit who is an applicant for the visa must satisfy PIC 4005 (health);[81]
  - each member of the family unit who is *not* an applicant for the visa satisfies PIC 4005 unless it would be unreasonable to require the member to undergo assessment.[82]

Criteria for the Significant Investor Extension stream

The applicable version of the criteria will depend on the date of the Subclass 188 visa application. The criteria for applicants seeking to satisfy the primary criteria for a Subclass 188 visa in the Significant Investor Extension stream are set out in cl.188.26. These are:

- *if the applicant applied for the visa on or after 1 July 2015 where the most recent Subclass 188 visa in the Significant Investor stream held by the applicant was granted on the basis of an application made on or after 1 July 2015*:
  - the applicant continues to hold a complying significant investment within the meaning of regulation 5.19C as in force at the time the application for that most recent Subclass 188 visa was made;[83]
  - the applicant has given the Minister evidence that the applicant holds an investment as required by regulation 5.19C as in force at the time for that most recent Subclass 188 visa was made;[84]
- *if the applicant applied for the visa before 1 July 2015 or if the applicant applied for the visa on or after 1 July 2015 where the most recent Subclass 188 visa in the Significant Investor stream held by the applicant was granted on the basis of an application made before 1 July 2015*:
  - the applicant continues to hold the complying investment within the meaning of regulation 5.19B as in force at the time the application for that most recent Subclass 188 visa was made;[85]
  - the applicant has given to the Minister a completed copy of approved form 1413 for each investment in a managed fund on which the complying investment is based;[86]

[79] cl.188.253(2) as it stood prior to the 1 July 2015 amendments by SLI 2015, No.102, According to the note accompanying this clause prior to its amendment, form 1412 is a deed under which the signatories acknowledge they are responsible for their financial and legal affairs, undertake not to bring an action against the Commonwealth in relation to any loss relating to the complying investment, and release the Commonwealth from any liabilities in relation to any loss relating to the complying investment.
[80] cl.188.254 as it stood prior to the 1 July 2015 amendments by SLI 2015, No.102.
[81] cl.188.255(1), (2). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[82] cl.188.255(3). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[83] cl.188.261(1B).
[84] cl.188.261(3)(b).
[85] cl.188.261(1) as it applied prior to amendments in SLI 2015, No.102 for visa applications made prior to 1 July 2015; cl.188.261(1A) for visa applications made on or after 1 July 2015.
[86] cl.188.261(3) as it applied prior to amendments in SLI 2015, No.102 for visa applications made prior to 1 July 2015; cl.188.261(3)(a) for visa applications made on or after 1 July 2015. According to the note accompanying this clause, form 1413 includes a declaration that the investments made by a managed fund for the benefit of clients are limited to one or more of the purposes specified by the Minister for r.5.19B(2)(c).

- for any part of the complying investment, or complying significant investment, that is/was a direct investment in an Australian proprietary company:
  - if the period of direct investment was less than 2 years, the company was a qualifying business for the whole period; or
  - if the period of the direct investment was 2 years or more, the company was a qualifying business for at least 2 years; or
  - if the company has been unable to operate as a qualifying business, the Minister (or Tribunal on review) is satisfied that the applicant made a genuine attempt to operate the business as a qualifying business;[87]
- the applicant has given the Minister a completed copy of approved form 1412, signed by the applicant and each other applicant aged at least 18;[88]
- the applicant and each member of the family unit who is an applicant for the visa must satisfy PIC 4007 (health);[89]
- each member of the family unit who is *not* an applicant for the visa satisfies PIC 4007, unless it would be unreasonable to require the person to undergo an assessment.[90]

Criteria for the Premium Investor stream

The Premium Investor stream is available where the application for the Subclass 188 visa is made on or after 1 July 2015. The criteria for applicants seeking to satisfy the primary criteria in the Premium Investor stream are set out in cl.188.27. They are:

- the applicant was invited, in writing, by the Minister to apply for the visa;[91]
- the applicant has made, on or after the time of application, a complying premium investment (within the meaning of regulation 5.19D as in force at the time of application) of at least AUD15,000,000;[92]
- the applicant has a genuine intention to hold the complying premium investment for the whole of the visa period (except any part of the investment that is a philanthropic contribution);[93]
- the applicant has given the Minister evidence that the investment complies with the requirements set out in regulation 5.19D as in force at the time of application;[94]
- the applicant has given the Minister a completed copy of approved form 1412, signed by the applicant and each other applicant aged at least 18;[95]

[87] cl.188.261(2).
[88] cl.188.261(4). According to the note accompanying this clause, form 1412 is a deed under which the signatories acknowledge they are responsible for their financial and legal affairs, undertake not to bring an action against the Commonwealth in relation to any loss relating to the relevant investment, and release the Commonwealth from any liabilities in relation to any loss relating to the relevant investment.
[89] cl.188.262(1), (2). For further information about PIC 4007 please see MRD Legal Services Commentary Health Criteria.
[90] cl.188.262(3). For further information about PIC 4007 please see MRD Legal Services Commentary Health Criteria.
[91] cl.188.271.
[92] cl.188.272(1).
[93] cl.188.272(2). According to the note accompanying this clause, a complying premium investment may be based on one or more investments or one or more philanthropic contributions, or a combination of both.
[94] cl.188.273(1).
[95] cl.188.273(2). According to the note accompanying this clause, form 1412 is a deed under which the signatories acknowledge they are responsible for their financial and legal affairs, undertake not to bring an action against the Commonwealth in relation to any loss relating to the complying premium investment, and release the Commonwealth from any liabilities in relation to any loss relating to the complying premium investment.

- the applicant and each member of the family unit who is an applicant for the visa must satisfy PIC 4005 (health);[96]
- each member of the family unit who is *not* an applicant for the visa satisfies PIC 4005, unless it would be unreasonable to require the person to undergo an assessment.[97]

Criteria for the Entrepreneur stream

Applicants seeking to satisfy the primary criteria for a Subclass 188 visa in the Entrepreneur stream must meet the criteria set out in cl.188.28. These are detailed below.

Invitation and age or business / investment proposal and language requirement

The applicant must be invited, in writing, by the Minister to apply for the visa.[98]

The applicant either must not have turned 55 at the time of the invitation or, if over 55, the nominating State or Territory government agency has determined that the complying entrepreneur activity the applicant is undertaking or proposing to undertake is or will be of exceptional economic benefit to the State/Territory in which the agency is located.[99]

At the time of the invitation to apply for the visa, the applicant must also have competent English.[100] Please see the MRD Legal Services commentary English Language Ability – Skilled/Business Visas for more information on 'competent English'.

Undertaking of complying entrepreneur activity

The applicant must be undertaking, or proposing to undertake, a complying entrepreneur activity. Additionally, they must have a genuine intention to undertake, and continue to undertake, the complying entrepreneur activity in Australia in accordance with those agreements mentioned in r.5.19E(3)(b).[101]

Business and personal asset requirement

The nominating State or Territory government agency must be satisfied that the net value of the business and personal assets of the applicant, their spouse or de facto partner, or their combined assets, are sufficient to allow them to settle in Australia.[102]

Public interest criteria

Primary applicants must also meet public interest criteria relating to health, namely that:

- the applicant and each member of their family unit of a person who is an applicant for the visa satisfy PIC 4005 (health);[103]
- each member of the applicant's family unit who is *not* an applicant for a Subclass 188 visa satisfies PIC 4005 unless it would be unreasonable to require the member to undergo assessment.[104]

[96] cl.188.274(1) and (2). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[97] cl.188.274(3). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[98] cl.188.281(1).
[99] cl.188.281(2).
[100] cl.188.281(3).
[101] Cl.188.282.
[102] cl.188.283. Please see the MRD Legal Services commentary Definition of Spouse and Definition of 'De facto Partner' (Section 5CB - post 1 July 2009) for more details.
[103] cl.188.288(1),(2). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.

Secondary criteria

The secondary criteria for applicants who are members of the family unit of a person who satisfies the primary criteria, must be satisfied at the time of decision and require that:

- the applicant is a member of the family unit of a person who holds a Subclass 188 visa granted on the basis of satisfying the primary criteria;[105]
- the applicant satisfies specified public interest and special return criteria;[106]
- *for visa applications made prior to 24 November 2012:* the applicant holds a valid passport or it would be unreasonable to require the applicant to hold a passport;[107] and
- If the secondary applicant has turned 18 and the primary applicant holds a Subclass 188 visa in the Significant Investor, Significant Investor Extension or Premium Investor streams, the secondary applicant must have given the Minister a completed copy of form 1412.[108]

Key Issues

'Actively operating' main business

The Business Innovation Extension stream requires an ownership interest in one or main businesses that were actively operating in Australia.[109] The phrase 'actively operating' is not defined in the Regulations, however in *Shahpari v MIBP*[110] the Court held that it was open to the Tribunal to find that the expression involved a consideration of whether the business exhibited activity of a 'repetitive, continuous and permanent character' in which the business actively sought to generate business, in fact generated trade and custom, and derived some financial gain for its activities in the relevant period.[111] Ultimately it is a finding of fact for the decision-maker as to whether a main business is 'actively operating'.

Complying investment – r.5.19B

The making or holding of a 'complying investment' is a requirement of both the Significant Investor and Significant Investor Extension streams where the visa application was made before 1 July

[104] cl.188.288(3). For further information about PIC 4005 please see MRD Legal Services Commentary Health Criteria.
[105] cl.188.311. For further information on member of a family unit, see MRD Legal Services commentary: Member of a Family Unit (r. 1.12)
[106] cl.188.312. These include PIC 4001 (character), 4002 (national security), 4003 (weapons of mass destruction), 4004 (debt to Commonwealth), 4010 (undue costs) and 4020 (false or misleading information). Additionally, depending on the circumstances of the secondary and primary applicants, the applicant must satisfy PIC 4017, 4018, 4019 and if the primary applicant holds a Subclass 188 visa in the Business Innovation, Investor, Significant Investor or Premium Investor streams, the secondary applicant must satisfy PIC 4005 (health); or if the primary applicant holds a Subclass 188 in the Business Innovation Extension or Significant Investor Extension streams, the secondary applicant must satisfy PIC 4007 (health). Clause 188.312(1) was amended in respect of visa applications made on or after 24 November 2012, to include PIC 4021 (passport requirements) and replace the omitted cl.188.314: SLI 2012, No.256. The secondary applicant must also meet special return criteria 5001, 5002 and 5010: cl.188.313.
[107] For visa applications made prior to 24 November 2012 this requirement is contained in cl.188.314. For visa applications made on or after 24 November 2012, this requirement has effectively been replaced by the similarly worded PIC 4021, which is a requirement of cl.188.312(1).
[108] cl.188.311A.
[109] As per cl.188.232
[110] *Shahpari v MIBP* [2016] FCCA 513 (Judge Wilson, 11 March 2016)
[111] *Shahpari v MIBP* [2016] FCCA 513 (Judge Wilson, 11 March 2016) at [71].

2015.[112] It is also a requirement for the Significant Investor Extension stream where the visa application is made on or after 1 July 2015, if the most recent Subclass 188 visa in the Significant Investor stream held by the applicant was granted on the basis of a previous visa application made before 1 July 2015.[113] The term is defined under r.5.19B and includes both requirements relating to the investment, and requirements relating to the investor.

Investment requirements

A complying investment must consist of one or more of the following:

- an investment in a government bond of the Commonwealth, a State or Territory; or
- a direct investment in an Australian proprietary company that is not listed on an Australian stock exchange and has not been established wholly or substantially for the purpose of creating compliance with these investment requirements, and where the investment is an ownership interest in the company; or
- an investment in a managed fund (directly or through an investor directed portfolio service) for a purpose specified by the Minister in an instrument in writing.[114] See below more information on 'managed fund' and a list of purposes specified in the current instrument.

Further, the funds used to make the investment must be unencumbered and lawfully acquired.[115]

Investor requirements

Under r.5.19B, the investor must be an individual and must make the investment either personally; with the investor's spouse or de facto partner; by means of a company or a trust.[116]

If an investor withdraws money from a complying investment, or cancels the investment, and proceeds to make an investment of at least the value of the withdrawn money or cancelled investment in one or more other investments of the type prescribed above, and no more than 30 days passes between these two events, the investment is taken not to have ceased to be a complying investment during the intervening period.[117]

Complying significant investment – r.5.19C

The making of a 'complying significant investment' is a requirement of the Significant Investor stream where the visa application was made on or after 1 July 2015.[118] It is also a requirement for the Significant Investor Extension stream where the most recent Subclass 188 visa in the Significant Investor stream held by the applicant was granted on the basis of an application made on or after 1 July 2015.[119] The term is defined under r.5.19C and includes both requirements relating to the investment, and to the person making the investment (the investor).

[112] As per cl.188.252 and cl.188.261 as they applied prior to amendments in SLI 2015, No.102 for visa applications made prior to 1 July 2015.
[113] As per cl.188.261(1A).
[114] r.5.19B(2). For the applicable instrument see the '5.19B' tab in the MRD Legal Services' Register of Instruments – Business Visas.
[115] r.5.19B(3).
[116] r.5.19B(4) and (5) Where the investment is made by a company, that company is one in which the investor holds all of the issued shares or the investor and the investor's spouse or de facto partner hold all of the issued shares: r.5.19B(5)(c). Where the investment is made by means of a trust, that trust is lawfully established of which the investor, or the investor and the his/her spouse or de facto partner are the sole trustees; and of which the investor, or the investor and his/her spouse or de facto partner are the sole beneficiaries: r.5.19B(5)(d).
[117] r.5.19B(6).
[118] As per cl.188.252.
[119] As per cl.188.261(1B).

Investment requirements

A complying significant investment must be of a kind permitted by the requirements specified in an instrument by the Minister.[120]

As at the date of writing, there has only been one instrument made since 1 July 2015.[121] It specifies that the investment of AUD5,000,000 must include a total of at least AUD500,000 invested, or to be invested, in one or more venture capital funds[122], and a total of at least AUD1,500,000 in emerging companies investments.[123] Any remaining portion of the investment may be invested in one or more balancing investments.[124]

Further, the funds used to make the investment must be unencumbered and lawfully acquired.[125] The investment must be lawful and must not form the basis for security or collateral for a loan.[126]

Investor requirements

Under r.5.19C, the investor must be an individual and must make the investment either personally; with the investor's spouse or de facto partner; or by means of a company or a trust.[127]

If an investor withdraws funds from the investment, or cancels the investment, and then reinvests the funds within 30 days of the withdrawal or cancellation, the investment is taken not to have ceased to be a complying significant investment.[128]

Complying premium investment – r.5.19D

The making or holding of a 'complying premium investment' is a requirement of the Premium Investor stream. The term is defined under r.5.19D and includes requirements relating to the investment, philanthropic contributions, and to the investor. A complying premium investment may be a based on an investment or a philanthropic contribution, or a combination of both.[129] Any philanthropic contribution must be approved for regulation 5.19D in writing by a State or Territory government agency.[130]

[120] r.5.19C(5) and (6). See the 'CompInvestments 5.19C&D' tab of the Register of Instruments - Business Visas.
[121] IMMI 15/100. See the 'CompInvestments 5.19C&D' tab of the Register of Instruments - Business Visas for the applicable instrument.
[122] A 'venture capital fund' is, broadly speaking a venture capital partnership or fund registered under the Venture Capital Act 2002. For the full list of requirements, see the 'CompInvestments 5.19C&D' tab of the Register of Instruments - Business Visas.
[123] Emerging companies investments are made through one or more managed investment funds in relation to certain permitted investments (for example securities quoted on the Australia Securities Exchange). For the full list of requirements, see the 'CompInvestments 5.19C&D' tab of the Register of Instruments - Business Visas.
[124] 'Balancing investments' are certain permitted investments made through one or more management investment funds. For the full list of requirements, see the 'CompInvestments 5.19C&D' tab of the Register of Instruments - Business Visas.
[125] r.5.19C(3).
[126] r.5.19C(4). The Explanatory Statement to SLI 2015 No.102 provides that, for an investment to be lawful, it must be compliant with the Foreign Investment Review Board (FIRB).
[127] r.5.19C(9) and (10) Where the investment is made by a company, that company is one in which the investor holds all of the issued shares or the investor and the investor's spouse or de facto partner hold all of the issued shares: r.5.19C(10)(c). Where the investment is made by means of a trust, that trust is lawfully established of which the investor, or the investor and the his/her spouse or de facto partner are the sole trustees; and of which the investor, or the investor and his/her spouse or de facto partner are the sole beneficiaries: r.5.19C(10)(d).
[128] r.5.19C(7) and (8).
[129] r.5.19D(1).
[130] r.5.19D(6).

Investment requirements

A complying significant investment must be of a kind permitted by the requirements specified in an instrument by the Minister.[131]

The funds used to make the philanthropic contribution or investment must be unencumbered and lawfully acquired.[132] The investment must be lawful and must not form the basis for security or collateral for a loan.[133]

Investor requirements

Under r.5.19D, the investor must be an individual and must make an investment or philanthropic contribution (or both) either personally; with the investor's spouse or de facto partner; or by means of a company or a trust.[134]

If an investor withdraws funds from the investment, or cancels the investment, and then reinvests the funds within 30 days of the withdrawal or cancellation, the investment is taken not to have ceased to be a complying significant investment.[135]

Complying entrepreneur activity – r.5.19E

The undertaking of, or proposal to undertake, a 'complying entrepreneur activity', coupled with a genuine intention to continue to undertake such an activity, is a requirement of the Entrepreneur stream.[136] The term is defined under r.5.19E, and requires the activity relate to an innovative idea that is proposed to lead to the commercialisation of a product or service in Australia or the development of a business or enterprise in Australia.[137] The activity must not relate to one specified by a legislative instrument made under r.5.19E(6)(a).[138] For current instruments, see the 'Specification of Entities and Excluded Complying Entrepreneur Activities' tab of the Register of Instruments – Business Visas.

The activity must be the subject of one or more legally enforceable funding agreements.[139] The agreement must be between the 'entrepreneurial entity' (either the applicant, body corporate, or a partnership) and one or more of the entities covered by r.5.19E(5).[140] If the applicant is not the entrepreneurial entity, they must personally have held, at the time the agreement was entered into, at

[131] See the 'CompInvestments 5.19C&D' tab of the Register of Instruments - Business Visas.
[132] r.5.19D(4).
[133] r.5.19D(5). The Explanatory Statement to SL2015 No.102 provides that, for an investment to be lawful, it must be compliant with the Foreign Investment Review Board (FIRB).
[134] r.5.19D(11) and (12). Where the investment is made by a company, that company is one in which the investor holds all of the issued shares or the investor and the investor's spouse or de facto partner hold all of the issued shares: r.5.19D(12)(c). Where the investment is made by means of a trust, that trust is lawfully established of which the investor, or the investor and the his/her spouse or de facto partner are the sole trustees; and of which the investor, or the investor and his/her spouse or de facto partner are the sole beneficiaries: r.5.19D(12)(d).
[135] r.5.19D(9) and (10).
[136] cl. 188.282.
[137] r.5.19E(2). Departmental guidelines (PAM3) indicate that in determining whether an activity is related to an 'innovative idea', regard may be had to whether the concept is supported by the relevant nominating body: PAM3: Div5.3/reg5.19E – Complying entrepreneur activity.
[138] r.5.19E(2)(b). The Explanatory Statement to F2016L01391 states that this provision is intended to allow for activities that are not deemed to be sufficiently innovative be excluded: p.7.
[139] r.519E(3)(b).
[140] r.5.19E(3)(b). By r.5.19E(5) these entities must be both a body established by or an agency of the Commonwealth or a State or Territory; a body corporate; a partnership; an unincorporated body; an individual; the sole trustee of a trust, or the trustee together of a trust with more than one trustee; and an entity specified by the Minister in a legislative instrument under r.5.19E(6)(b). For a list of entities specified by the Minister under r.5.19E(6)(b), see the 'Specification of Entities and Excluded Complying Entrepreneur Activities' tab of the Register of Instruments – Business Visas.

least a 30% share in the ownership of the entrepreneurial entity.[141] The total amount of funding provided or to be provided under the agreement or agreements must be at least $200,000,[142] and, under the agreement, at least 10% of the funding must be payable to the entrepreneurial entity within 12 months from the day the activity commences.[143] There must be a business plan that the delegate considers to be appropriately formulated to lead to a result set out in r.5.19E(2)(a)(i) or (ii), that is, the commercialisation of a product or service in Australia or the development of an enterprise or business in Australia.[144] Lastly, all funding provided or to be provided to the entrepreneurial entity under the agreement must be unencumbered and lawfully acquired.[145]

Designated investment

The making of a 'designated investment' is a requirement of the Investor stream of this visa.[146] A 'designated investment' is an investment in a security specified by legislative instrument.[147] The investments specified by such a notice must meet certain requirements specified in r.5.19A(2). For the current instrument see the 'Securities' tab of the Register of Instruments - Business Visas.

For a security to be specified it must have the following features:[148]

- an investment in the security matures in not less than 4 years from its date of issue;
- repayment of principal is guaranteed by the issuing authority;
- an investment in the security cannot be transferred or redeemed before maturity except by operation of law or under other conditions acceptable to the Minister;
- investment in the security is open to the general public at commercially competitive rates of return; and
- the Minister is satisfied that the Commonwealth will not be exposed to any liability as a result of an investment in the security by a person.

Departmental guidelines (PAM3) indicate that an applicant will be formally invited by the Department to select and make a designated investment, and that this would be the final stage of processing of the visa application. Following an invitation, applicants are required to send a form 1031 to the relevant State / Territory Treasury Corporation who are required to complete the relevant parts of the form and return it to the Department.[149] However, there is nothing in the Regulations to prevent an applicant from unilaterally making such a designated investment in the absence of a formal invitation from the Department, so long as it complies with the requirements set out above.

[141] r.5.19E(3)(c). PAM3 indicates that the intention of this requirement is to allow for up to 3 co-founders or partners to be granted entrepreneur visas for any single business venture, while ensuring each entrepreneur has a substantial interest in the business. See, PAM3: Div5.3/reg5.19E – Complying entrepreneur activity.
[142] r.5.19E(3)(d).
[143] r.5.19E(3)(e). PAM3 suggests that where the entrepreneurial entity consists of more than one entrepreneur, the 10% must be paid to at least one of the applicants or to the entity. See, PAM3: Div5.3/reg5.19E – Complying entrepreneur activity..
[144] r.5.19E(3)(e).
[145] r.5.19E(4). PAM3 indicates that it is open to presume that any funding from the sources referred to in an instrument made under r.5.19E(6)(b) is unencumbered and lawfully acquired. See, PAM3: Div5.3/reg5.19E – Complying entrepreneur activity.
[146] As per cl.188.246.
[147] cl.188.111 and r.5.19A. Note that reference in r.5.19A to 'may specify by Gazette Notice' was replaced by 'may, by legislative instrument, specify' for visa applications made on or after 22 March 2014 to reflect the fact that legislative instruments are no longer required to be published in the Gazette: Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30). However, SLI 2014, No. 30 does not affect the effect of existing instrument specified under r.5.19A.
[148] r.5.19A(2).
[149] see PAM3: Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB-188 Visa Main Applicant – Investor Stream primary applicants – Designated investment criteria (compilation14/10/2016).

Eligible investment

Under the Investor stream, an applicant is required to demonstrate (as one alternative) a successful record of eligible investments.[150] Clause 188.112 defines an 'eligible investment' as each of the following:

- an ownership interest in a business;
- cash on deposit;
- stocks or bonds;
- real estate;
- gold or silver bullion

if a person owns it for the purpose of producing a return in the form of income or capital gain, and not for personal use.

Further, a loan to a business is deemed to be an eligible investment if a person makes it for the purpose of producing a return in the form of income or capital gain.[151]

Fiscal year

'Fiscal year' is a term referred to in the primary criteria for the Business Innovation and Investor streams.[152] It is defined in r.1.03 as follows:

> *in relation to a business or investment, means:*
> *(a) if there is applicable to the business or investment by law an accounting period of 12 months — that period; or*
> *(b) in any other case — a period of 12 months approved by the Minister in writing for that business or investment.*

Fiscal years vary between businesses and countries. Practically, a 'fiscal year' simply means a 12 month period that is generally acceptable in the relevant country as applying to the business or investment for financial reporting purposes. For example, generally, in Australia, the fiscal year starts on 1 July and ends on 30 June.

Main business

The Business Innovation and Business Innovation Extension streams require an ownership interest in one or more main businesses.[153] 'Main business' for these purposes is defined in r.1.11. It is discussed in detail in the MRD Legal Services commentary Main business (r.1.11).

Managed fund

If the applicant applied for the visa:

[150] As per cl.188.243 and cl.188.244.
[151] cl.188.113.
[152] At cl.188.225, cl.188.244 and cl.188.245.
[153] As per cl.188.225 and cl.188.232.

- before 1 July 2015 and is seeking to satisfy either the Significant Investor or Significant Investor Extension streams, or;
- after 1 July 2015 and is seeking to satisfy the Significant Investor Extension stream where the most recent Subclass 188 visa in the Significant Investor stream held by the applicant was granted on the basis of an application made before 1 July 2015,

- then the applicant must have given an approved form 1413 to the Minister in relation to each investment made in a 'managed fund' on which the complying investment is based.[154] A complying investment (see discussion above) is described in 5.19B and in the context of an investment in a managed fund (directly or through an investor directed portfolio service), such an investment must be for a purpose specified in a written instrument. For the current Instrument see the '5.19B' tab of the Register of Instruments - Business Visas. The current legislative instrument specifies those categories as:
  - infrastructure projects in Australia;
  - cash held by Australian deposit taking institutions;
  - bonds issued by the Commonwealth Government or by a state or territory government;
  - bonds, equity, hybrids and other corporate debt in Australian companies and trusts listed on
  - the Australian Stock Exchange;
  - bonds or term deposits issued by Australian financial institutions;
  - real estate in Australia;
  - Australian agribusiness;
  - annuities issued by an Australia registered life company in accordance with ss.9 of 12A of the *Life Insurance Act 1995*;
  - loans secured by mortgages over the above eight types of investments;
  - derivatives used for portfolio management and non-speculative purposes which constitute no more than 20 per cent of the total value of the managed fund; and
  - other managed funds that invest in the above list of investments.[155]

'Managed fund' is defined in r.1.03 as follows:

> ***managed fund*** *means an investment to which all of the following apply:*
> *(a) the investment is made by a member:*
> *(i) acquiring interests in a managed investment scheme (within the meaning of the Corporations Act 2001); or*
> *(ii) acquiring a financial product mentioned in paragraph 764A(1)(d), (e) or (f) of the Corporations Act 2001 that may result in a payment from an approved benefit fund (within the meaning of the Life Insurance Act 1995), or a statutory fund maintained under the Life Insurance Act 1995;*
> *(b) the investment is not able to be traded on a financial market (within the meaning of section 767A of the Corporations Act 2001);*

[154] cl.188.253 and cl.188.261 as they applied prior to amendments in SLI 2015, No.102 for visa applications made prior to 1 July 2015; cl.188.261(3)(a) for visa applications made on or after 1 July 2015.
[155] IMMI 13/092.

(c) if the investment is interests in a managed investment scheme—no representation has been made to any member of the scheme that the interests will be able to be traded on a financial market;
(d) the issue of the interest or the financial product is covered by an Australian financial services licence issued under section 913B of the Corporations Act 2001.[156]

Managed funds are not required to have a guarantee of repayment of principal or a maturity date, or a lock in period for any of the investment options.[157]

Net value of assets

Both the Business Innovation and Investor streams refer to the 'net value' of the business and personal assets of the applicant and/or the applicant's spouse or de facto partner.[158] Please see the MRD Legal Services Commentary Net Assets for further details.

Ownership interest

Various references to 'ownership interest' are found in the criteria for the Business Innovation, Business Innovation Extension and Investor streams.[159] For these purposes this term is defined in s.134(10) of the Act.[160] Please see the MRD Legal Services commentary Main business (r.1.11) for further details.

Overall successful business career

For a Subclass 188 visa to be granted in the Business Innovation stream, the applicant must have overall had a successful business career.[161]

The policy intention, as outlined in Departmental guidelines (PAM3), is to measure the business performance of the applicant for their entire business career.[162] In any assessment of the applicant's business career, the performance of businesses in which the applicant has had a management role is a relevant factor.[163]

Departmental guidelines (PAM3) state that an applicant's overall business career should not be considered successful if:

- the applicant has been declared bankrupt in the last 5 years;
- the applicant is (or has been) actively involved in a business that is (or has been) subject to insolvency, receivership or liquidation; or

[156] Definition as repealed and substituted by Migration Amendment (2014 Measures No.2) Regulation 2014 (SLI 2014, No.199), for all live applications as at 12 December 2014 and all applications made on and after that date.
[157] PAM3: Sch2 Visa 188 - Business Innovation and Investment (Provisional) - The EB-188 Visa Main Applicant – Significant Investor Stream primary applicants at [50.4] (compilation 30/06/2015).
[158] cl.188.226, cl.188.227, cl.188.244 and cl.188.245.
[159] cl.188.225, cl.188.229, cl.188.232, cl.188.233, cl.188.244 and through the definition of 'eligible investment' in cl.188.112.
[160] r.1.03.
[161] cl.188.224.
[162] PAM3: GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (compilation 10/09/2016).
[163] PAM3: GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (compilation10/09/2016).

- the business has suffered recent trading losses and the business is considered unlikely to be successful in the longer term and this can be attributed to the applicant's role and decision making in the business.[164]

Departmental guidelines (PAM3) state account should be taken of the applicant's level of decision-making and responsibility in any failed business; how many times the applicant has experienced bankruptcy or been involved in a failed business; and the applicant's history in business since any bankruptcy, insolvency, receivership or liquidation.[165]

However, the guidelines also state that in making the assessment, decision-makers should take into account external economic factors that may affect the success of a business including the impact of external trends, e.g. recession/inflation; a fall in property values; a drop in world commodity/raw material prices; changes in taxation/tariff regimes (or similar) adversely affecting the trading position of the business; and whether any recent trading loss incurred by the business was the result of market forces, other external adverse economic factors or the legitimate movement of assets out of the business, as opposed to poor business acumen and/or poor management decisions by the applicant. External personal factors beyond the applicant's control, such as family illness or the actions of a business partner, would also impact whether the applicant has had an overall successful business career unless the applicant contributed to the success of the business both before and after the situation.[166]

Whilst the Tribunal may have regard to the considerations outlined in Departmental guidelines (PAM3) in assessing whether the applicant has overall had a successful business career, care should be taken not to rigidly apply the policy in PAM3 when making this assessment and it should not be raised to the level of a legislative requirement.

Overall successful record of eligible investment or qualifying business activity

An applicant for a Subclass 188 visa in the Investor stream is required to demonstrate that he/she has overall had a successful record of eligible investment activity or qualifying business activity.[167]

Accordingly to Departmental guidelines (PAM3), the policy intention behind this requirement is to assess the applicant's performance in qualifying businesses or eligible investments for the totality of their business and investment career.[168] In any assessment of the applicant's activities, the performance of the qualifying businesses and/or eligible investments is a relevant factor.[169]

In the Department's view a closer examination of an applicant's overall qualifying business and/or eligible investment activities may be required if:

- in disposing of a business or investment, the applicant achieved a sale value significantly less than the original value;

[164] PAM3: GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (compilation10/09/2016).
[165] PAM3: GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (compilation10/09/2016).
[166] PAM3: GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (compilation10/09/2016).
[167] cl.188.243(1).
[168] PAM3: Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (compilation14/10/2016).
[169] PAM3: Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (compilation14/10/2016).

- a pattern of decreasing profitability, market share, business growth and/or competitive advantage in a business or investment coincided with the period of the applicant's involvement in that business or investment;
- an investment portfolio shows a pattern of decreasing profitability;
- a business in which the applicant has invested has a record of trading losses.[170]

Departmental guidelines provide the following circumstances where this criterion generally should not be considered satisfied under the policy:

- if the applicant has experienced bankruptcy;
- is or has been actively involved in a business that is, or has been, subject to insolvency, receivership or liquidation; or
- the business has suffered recent trading losses and is considered unlikely to be successful in the longer term.[171]

However, the guidelines note that it is not intended that an applicant would fail this criterion if the loss is short-term.[172]

Moreover, in making the assessment, the guidelines state that decision-makers should have regard to relevant external economic factors and the applicant's reasons for responding or not responding to those factors. These external economic factors include for example, the impact of external economic trends such as recession or inflation, a fall in stock market prices or property values, or a change in taxation/tariff regime adversely affecting the trading position of the business.[173]

Qualifying business

The requirement to either demonstrate a commitment to establishing or participating in a 'qualifying business' or a record of management or investment in such a business are contained within the criteria for the Business Innovation, Investor and Significant Investor Extension streams.[174] The term is defined in r.1.03 and its meaning is discussed in detailed in the MRD Legal Services commentary Main business (r.1.11).

The applicant's business history

A common criterion to the Subclass 188 visa (i.e. applicable to all seven streams) is that the applicant and his/her spouse or de facto partner must not have a history of involvement in business or investment activities of a nature that is not generally acceptable in Australia.[175]

According to Departmental guidelines (PAM3) the purpose of this provision is to guard against the entry of persons who may otherwise satisfy Business Skills visa criteria, but whose business is in an

[170] PAM3: Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (compilation14/10/2016).
[171] PAM3: Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (compilation14/10.2016).
[172] PAM3: Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (compilation 14/10/2016).
[173] PAM3: Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (compilation14/10/2016).
[174] As per cl.188.229, cl.188.243, cl.188.244 and cl.188.261.
[175] cl.188.211.

industry, or whose business practices are of a nature that would generally be unacceptable to the Australian community, were the business to operate in Australia.[176]

In considering this criterion it is not appropriate to equate unlawfulness of activities with 'not generally acceptable in Australia'. It may well be that some conduct is unlawful, but is not of a nature that is not generally acceptable in Australia.[177] Examples of such conduct could include advertising by business signage which does not comply with by-laws or SP bookmaking, either as a bookmaker or as a better.[178]

The expression 'not generally acceptable in Australia' requires consideration of whether an applicant, or his or her spouse or de facto, has a history of involvement in business activities that are of a nature that the larger part, or most, of people in Australia would not or do not approve of.[179] The issue is not whether a 'history of involvement' was 'not generally acceptable in Australia', but rather whether the nature of relevant business activities in which the applicant was involved had that character.[180]

'Business activities' can include the manner in which a business is conducted for profit, as well as the profit-making activities themselves. The criterion allows a decision-maker to consider a primary applicant's compliance with laws, standards, ethics, and community expectations in the course of conducting a legitimate business in Australia.[181] The standards governing unacceptable business activities would usually be identifiable by reference to Australia's laws and prevailing business ethics and practices. In doubtful situations, decision-makers would have access to expert or experienced sources of advice and information about relevant business standards.[182]

Departmental guidelines (PAM3) provide the following examples of business activities that may not be acceptable:

- contravention of government laws (e.g. quarantine or tax evasion);
- criminal convictions relating to business activities;
- serious disregard of industry, licensing and regulations;
- fraudulent trade practices;
- Foreign Investment Review Board violations; and
- not providing 'fair pay' for employment.

However, the guidelines also note the unacceptable business activity or practice should be more than a minor, one-off event for such activities or practices to constitute 'a history'.[183] Whilst the Tribunal may have regard to the considerations outlined in Departmental guidelines (PAM3) in assessing

[176] PAM3: GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – The applicant's business history (compilation10/09/2016).
[177] *Lee v MIAC* (2009) 180 FCR 149 at [33]. The Court held the Tribunal did not misapply cl.892.214, in that it did not equate unlawfulness with non-satisfaction of cl.892.214. As all Business Skills visas have as a Schedule 2 criterion a requirement that the applicant and their spouse or de facto partner 'not have a history of involvement in business activities, or business practices that are of a nature that is not generally acceptable in Australia' the Court's reasoning appears applicable to the similarly worded criterion in cl.188.211.
[178] *Lee v MIAC* (2009) 180 FCR 149 at [34].
[179] *Lee v MIAC* (2009) 180 FCR 149 at [51].
[180] *Lee v MIAC* [2008] FMCA 1523 (Smith FM, 25 November 2008) at [14], construing cl.892.214. This point was not specifically addressed on appeal in *Lee v MIAC* (2009) 180 FCR 149. However, the Court did not express any disagreement with the reasoning of Smith FM.
[181] *Lee v MIAC* [2008] FMCA 1523 (Smith FM, 25 November 2008) at [18]. This point was not specifically addressed on appeal in *Lee v MIAC* (2009) 180 FCR 149, however the Court did not express any disagreement with the reasoning of Smith FM.
[182] *Lee v MIAC* [2008] FMCA 1523 (Smith FM, 25 November 2008) at [31]. This point was not specifically addressed on appeal in *Lee v MIAC* (2009) 180 FCR 149. However, the Court did not express any disagreement with the reasoning of Smith FM.
[183] PAM3: GenGuide M – Business Skills visas – Visa application and related procedures - Other Business-Related Requirements – The applicant's business history (compilation10/09/2016).

whether an applicant has a history of involvement in business or investment activities of a nature that is not generally acceptable in Australia, care should be taken not to rigidly apply the policy in PAM3 when making this assessment and it should not be raised to the level of a legislative requirement.

Relevant case law

Lee v MIAC [2008] FMCA 1523	Summary
Lee v MIAC [2009] FCA 977; (2009) 180 FCR 149	Summary
Shahpari v MIBP [2016] FCCA 513	Summary
Zhang v MIBP [2017] FCCA 134	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82
Migration Amendment Regulation 2012 (No.7)	SLI 2012, No.255
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012, No.256
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (2014 Measures No.2) Regulation 2014	SLI 2014, No.199
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015, No.34
Migration Amendment (Investor Visa) Regulation 2015	SLI 2015, No.102
Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016.	SLI 2016, No.141

Available decision templates

Currently there are no templates specific to this subclass. Members should use the Generic template.

Last updated/reviewed: 3 May 2018

Subclass 401
Temporary Work (Long Stay Activity) (Class GB) visa

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Overview

The Class GB Temporary Work (Long Stay Activity) visa is a temporary work visa introduced on 24 November 2012.[1] It contains one visa subclass: Subclass 401.[2] It replaced the pre-existing Subclass 411 (Exchange), 421 (Sport), 428 (Religious Worker) and 427 (Domestic Worker (Temporary) – Executive) visas as part of an overall simplification of the temporary work visa program.[3] This visa type was repealed, and so closed to new applications, on 19 November 2016.[4] It was replaced from that date by the Class GG Temporary Activity visa, containing one subclass; Subclass 408 (Temporary Activity).

Temporary work visas allow people to participate in highly specialised work, specific professions, cultural, social or research activities in Australia on a temporary basis. A person may be granted a Subclass 401 visa by meeting the requirements of one of four alternative 'streams', being:

- the Exchange stream;
- the Sport stream;
- the Religious Worker stream; or
- the Domestic Worker (Executive) stream.

Primary visa applicants must meet common criteria as well as criteria for the stream in which they apply for the visa. These are set out in Part 401 of Schedule 2 to the Migration Regulations 1994 (the Regulations).

There is there is a three-stage application process for the Subclass 401 visa which requires:

- a person seeking approval to be a temporary work sponsor;
- an approved sponsor nominating an occupation or activity in relation to a visa holder, proposed visa applicant or a visa applicant; and
- a person applying for the relevant class of visa.

For information relating to sponsorship and nominations, see Legal Services Commentaries Temporary Work Sponsor and Temporary Work Nominations.

Merits review

For primary decisions, the Tribunal has jurisdiction to review decisions to refuse the grant of a Subclass 401 visa under s.338(2) (onshore applications) or s.338(5) (offshore applications).

For onshore applications, s.338(2)(a) to (c) of the *Migration Act 1958* (the Act) require that a decision to refuse a visa is reviewable if the visa could be granted to a person in the migration zone, and the person made the application in the migration zone after being immigration cleared. In addition,

[1] Introduced by Migration Legislation Amendment Regulation 2012 (No.4) (SLI 2012, No.238).
[2] Item 1232(4) of Schedule 1 to the Regulations.
[3] Explanatory Statement to SLI 2012, No.238, Attachment B. These subclasses were repealed by SLI 2012, No.238 from 24 November 2012.
[4] Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743).

s.338(2)(d) imposes additional requirements for certain prescribed temporary visas to be reviewable (including Subclass 401). Section 338(2)(d) was amended with effect for decisions made from 13 December 2018.

Decisions made before 13 December 2018

A decision made before 13 December 2018 to refuse a Subclass 401 visa is a reviewable decision under Part 5 of the Act in circumstances where:

- if the visa applicant made the application while in the migration zone, the applicant is 'sponsored by an approved sponsor' at the time the application for review is made[5] *or* an application for review of a decision not to approve the sponsor has been made and that decision is pending,[6] *or*
- if the visa applicant made the application outside the migration zone, they are sponsored or nominated in accordance with s.338(5)(b) of the Act.[7]

In the former circumstance the visa applicant has standing to apply for review;[8] in the latter circumstance the sponsor has standing.[9]

Decisions made after 13 December 2018

A decision made on or after 13 December 2018 to refuse a Subclass 401 visa is a reviewable decision where:

- if the visa applicant made the application while in the migration zone, at the time the decision to refuse to grant the visa is made:

  (i) the non-citizen is identified in an approved nomination that has not ceased; or

  (ii) a review of a decision under s.140E not to approve the sponsor of the non-citizen is pending; or

  (iii) a review of a decision under s.140GB not to approve the nomination of the non-citizen is pending.[10]

- if the visa applicant made the application outside the migration zone, they are sponsored or nominated in accordance with s.338(5)(b) of the Act.[11]

[5] s.338(2)(d) as prescribed in the *Migration Act 1958* before the 13 December 2018 amendments, and r.4.02(1A). Note that for s.338(2)(d), the term 'sponsored' is defined by r.4.02(1AA) as including being identified in a nomination under s.140GB of the Act by an approved sponsor. For the purposes of s.338(2)(d)(i), there is no requirement that the nomination be approved at the time the review application is lodged, as it will be sufficient for an applicant to be identified in an application for a nomination made under s.140GB that is yet to be decided. However, a nomination that has ceased or otherwise lapsed would not fulfil the requirements in s.338(2)(d)(i). See *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015). For detailed discussion of s.338(2)(d) and caselaw considering the Subclass 457 temporary visa, see MRD Legal Services commentary: Subclass 457.

[6] s.338(2)(d)(ii), as prescribed in the Act before the 13 December 2018 amendments. The expression 'decision not to approve the sponsor' in s.338(2)(d)(ii) includes a decision not to approve a nomination under s.140GB. Accordingly, s.338(2)(d)(ii) will be satisfied where, at the time the review application is lodged, there is either a pending application for review of a decision not to approve the sponsor as a standard business sponsor under s.140E or a pending application for review of a decision not to approve the nomination under s.140GB. See *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015).

[7] s.338(5) and cl.401.412.

[8] s.347(2)(a).

[9] s.347(2)(b).

[10] s.338(2)(d)(i)-(iii) as amended by the *Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018* (No.90 of 2018). While s.338(2)(d) also allows for circumstance where the non-citizen is sponsored by an approved sponsor, this only applies where it is not a criterion for the grant of the visa that the non-citizen is identified in an approved nomination.

Requirements for standing remain unchanged following the 13 December 2018 amendments (see above).

For decisions made after 13 December 2018, the Tribunal also has jurisdiction to review a visa refusal decision in relation to secondary applicants where those applicants did not seek to satisfy the primary criteria, and the applicant meets the requirements of s.338(2)(a) to (c).[12] The person with standing to seek review is 'a person to whose application the decision relates'.[13]

Visa application requirements

Item 1232 of Schedule 1 to the Regulations sets out the requirements for making a valid visa application for a Class GB (Subclass 401) visa.[14]

The application must be made on the approved form and the prescribed fee must be paid.[15] Applicants may be inside or outside Australia at the time the application is made, but not in immigration clearance and the application must be made at the place and in the manner specified.[16]

An application must specify the person who has identified the applicant in a nomination for the purposes of s.140GB of the Act (i.e. the nominator), and specify that the person is a long stay activity sponsor, an exchange sponsor, a sport sponsor, a religious worker sponsor,[17] or an applicant for such a sponsorship.[18]

In addition, for visa applications made on or after 14 December 2015, the primary applicant must also make a declaration in the application as to whether or not they have (or a combined applicant has) engaged in conduct in relation to the application that contravenes s.245AS(1) of the Act.[19]

An application made by a person claiming to be the member of the family unit of a primary applicant, may be made at the same time as, and combined with the application by that person or any other person claiming to be a family unit member.[20]

[11] s.338(5) and cl.401.412. These requirements remain unchanged following the introduction of No.90 of 2018, and the Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707).
[12] r.4.02(4)(q) as inserted by F2018L01707.
[13] r.4.02(5)(p), as inserted by F2018L01707.
[14] Introduced by SLI 2012 No.238, and amended since by Migration Legislation Amendment Regulation 2013 (No. 2) (SLI 2013, No. 96), Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 (SLI 2013, No.118) and Migration Amendment (Visa Application Charge) Regulation 2013 (SLI 2013, No. 228). Item 1232 was repealed by F2016L01743 on 19 November 2016.
[15] Item 1232(1) and (2). For applications made prior to 18 April 2015, the prescribed form is form 1401. This provision was amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No. 34) for applications made on or after 18 April 2015 to provide that the approved form is that specified by the Minister in a legislative instrument under r.2.07(5).
[16] Item 1232(3)(a),(aa), (b) and (c). For applications made on or after 18 April 2015, these provisions were amended by SLI 2015, No. 34 provide that the place and manner which the application must be made, if any, is specified by the Minister in a legislative instrument under r.2.07(5).
[17] 'Long stay activity sponsor, 'exchange sponsor', 'sport sponsor' and 'religious worker sponsor' are all defined in r.1.03, as in force prior to 19 November 2016. See Legal Services commentary Temporary Work Sponsor for further discussion of these terms.
[18] Item 1232(3)(d).
[19] Item 1232(3)(da) as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242) and applying to an application for a visa made on or after 14 December 2015. Section 245AS of the Act prohibits a person from offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The term 'sponsorship-related event' is defined in s.245AQ of the Act, but relevantly includes such events as a person applying for approval of the nomination of a position in relation to an applicant for a sponsored visa or the grant of such a visa.
[20] Item 1232(3)(e).

Visa criteria

The criteria for a Subclass 401 visa are set out in Part 401 of Schedule 2 to the Regulations.[21] They consist of primary and secondary criteria. With limited exceptions, discussed below, at least one person included in the application must meet the relevant primary criteria.

Primary criteria

The primary criteria are not divided between time of application and time of decision criteria. However, some criteria require the decision maker to be satisfied of the existence of certain matters at the time of application (for example, holding certain kinds of substantive visas). Unless another point in time is specified, all criteria must be satisfied at the time a decision is made on the application.[22]

All primary applicants must meet the 'common criteria' and the criteria in one of four alternative streams:[23]

- the Exchange stream;[24]
- the Sport stream;[25]
- the Religious Worker stream;[26] or
- the Domestic Worker (Executive) stream.[27]

Note that the Domestic Worker (Executive) stream is only available for visa applications made on or after 23 March 2013.[28]

Common criteria

The common criteria that must be met by all primary applicants are set out in subdivision 401.21. They are as follows:

- **visa history** – if the applicant was in Australia at the time of application, one of two alternatives must be met:
  - if they held a substantive temporary visa at the time of application, that visa must not have been a Subclass 403 visa in the Domestic Worker (Diplomatic or Consular) stream, a Subclass 426, a Subclass 771 or special purpose visa;[29] or
  - if they did not hold a substantive visa at time of application, both:
    - the last substantive temporary visa was not one of those listed above, and
    - the applicant satisfies Schedule 3 criteria 3002, 3003, 3004 and 3005;

[21] Part 401 of Schedule 2 was repealed by F2016L01743 on 19 November 2016.
[22] Note at Division 401.2.
[23] Note at Division 401.2.
[24] Subdivision 401.22.
[25] Subdivision 401.23.
[26] Subdivision 401.24.
[27] Subdivision 401.25.
[28] This stream was added by Migration Amendment Regulation 2013 (No.1) (SLI 2013, No.32).
[29] cl.401.211(a). For special purpose visas, see s.33 of the Act.

- **nomination requirements** – each of the following must be met:
  - the applicant is identified in an approved nomination of an occupation or activity,[30]
  - the nomination was made by a person who was, at the time the nomination was approved, a long stay activity sponsor, an exchange sponsor, a sport sponsor or a religious worker sponsor,[31] and
  - the approval of the nomination has not ceased;[32]
- **no adverse information about nominator** - either there is no adverse information known to immigration about the person who made the approved nomination or an associated person, or it is reasonable to disregard such information (discussed below);[33]
- **no 'payment for visas' conduct** – the applicant has not engaged in conduct that breaches ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act, or it is reasonable to disregard the conduct;[34]
- **health insurance** – the applicant must have adequate arrangements in Australia for health insurance during the period of the applicant's intended stay in Australia;[35]
- **genuine temporary stay** – the applicant must genuinely intend to stay temporarily in Australia to carry out the occupation or activity for which the visa is granted, having regard to certain specified matters (discussed below);[36]
- **adequate means of support** – the applicant must have or have access to adequate means to support himself or herself during the period of their intended stay;[37]
- **public interest criteria** – the applicant must satisfy various public interest criteria (PIC)[38] including, for visa applications made on or after 24 November 2012, PIC 4021 relating to travel documents, and satisfy certain special return criteria;[39] and
- **passport** – *for visa applications made before 24 November 2012*, the applicant must hold a valid passport that was issued to the applicant by an official source, in the form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport.[40]

Criteria for the Exchange stream

The Exchange stream is intended to facilitate the entry of skilled persons under exchange arrangements giving Australian residents reciprocal opportunities to work with overseas organisations,

[30] cl.401.212(1).
[31] cl.401.212(2). 'Long stay activity sponsor, 'exchange sponsor', 'sport sponsor' and 'religious worker sponsor' are all defined in r.1.03 of the Regulations, as in force prior to 19 November 2016. See Legal Services commentary Temporary Work Sponsor for further discussion of these terms.
[32] cl.401.212(3). Regulation 2.75A provides for the cessation of nominations relevant to Subclass 401.
[33] cl.401.212(4).
[34] cl.401.212A, as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. In general terms, these provisions place prohibitions on people asking for or receiving a benefit, or offering to provide or providing a benefit, in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.
[35] cl.401.213.
[36] cl.401.214.
[37] cl.401.215.
[38] cl.401.216. These are PIC 4001, 4002, 4003, 4004, 4005, 4013, 4014, 4020 and (for visa application made on or after 24 November 2012) 4021. Also, if the applicant had turned 18 at the time of application, PIC 4019 must be satisfied or, if the applicant had not turned 18, PIC 4012, 4017 and 4018 must be satisfied. Information on some of these PIC is available from the following Legal Services commentaries: Public Interest Criterion 4001, Public Interest Criterion 4013 and Bogus Documents/False or Misleading information – PIC 4020.
[39] cl.401.217. These are special return criteria 5001, 5002 and 5010. See Legal Services commentary: Special Return Criteria.
[40] cl.401.218, omitted by Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256) and replaced by the very similarly termed PIC 4021, which applies to visa applications made on or after 24 November 2012.

promoting international understanding and cooperation.[41] In addition to the common criteria applicants for this stream must satisfy the following criteria:

- **nomination requirements** – the applicant is identified in a nomination by a long stay activity sponsor who is a party to an exchange agreement, or by an exchange sponsor, and the nomination meets the criteria in r.2.72J(3) (nomination criteria specific to the Exchange stream);[42] and
- **exchange agreement** – an exchange agreement between the long stay activity sponsor or the exchange sponsor and a reciprocating foreign organisation is still in place.[43]

Criteria for Sport stream

The Sport stream enables the entry of sportspersons to participate in sporting activities and/or to engage in competition with Australian residents. The purpose of this stream is to improve the quality of a sport in Australia through participation in high-level competition and training with Australian residents.[44] In addition to the common criteria, applicants for this stream must meet the following criteria:

- **nomination requirements –** the applicant is identified in a nomination by a long stay activity sponsor who is a sporting organisation, or a by sport sponsor, and the nomination meets the criteria in r.2.72J(4) (nomination criteria specific to the Sport stream);[45] and
- **formal arrangements** – if the nominated activity for which the applicant was identified in the nomination required a formal arrangement to be in place between the long stay activity/sport sponsor and the applicant, the formal arrangement is still in place.[46]

Criteria for Religious Worker stream

The Religious Worker stream provides for the temporary entry of persons who will be full-time religious workers in Australia.[47]

In addition to the common criteria, applicants in this stream must be identified in a nomination by a long stay activity sponsor who is a religious institution or by a religious worker sponsor, and the nomination must meet the criteria in r.2.72J(5).[48] These criteria (specific to approval of a nomination in

[41] PAM3 - Sch2 Visa 401 - Temporary Work (Long Stay Activity) – The GB-401 streams – Exchange at [2.2] (reissued on 19 May 2016).
[42] cl.401.221. 'Long stay activity sponsor' is defined in r.1.03 as a person who is an approved sponsor and is approved as a sponsor in relation to the long stay activity sponsor class by the Minister under subsection 140E(1) of the Act, on the basis of an application made before 19 November 2016. 'Exchange sponsor' is defined in r.1.03 (as in force prior to 19 November 2016) as a person who is an approved sponsor and is approved as a sponsor in relation to the exchange sponsor class by the Minister under subsection 140E(1) of the Act, on the basis of an application made before 24 November 2012. See Legal Services commentary Temporary Work Sponsor for further discussion.
[43] cl.401.222. Note that it is a requirement for approval of a relevant nomination that such an agreement be in place: r.2.72J(3)(a).
[44] PAM3 - Sch2 Visa 401 - Temporary Work (Long Stay Activity) – The GB-401 streams – Sport at [2.3] (reissued on 19 May 2016).
[45] cl.401.231. Long stay activity sponsor' is defined in r.1.03 as a person who is an approved sponsor and is approved as a sponsor in relation to the long stay activity sponsor class by the Minister under subsection 140E(1) of the Act, on the basis of an application made before 19 November 2016. 'Sport sponsor' is defined in r.1.03 (as in force prior to 19 November 2016) as a person who is an approved sponsor and is approved as a sponsor in relation to the sport sponsor class by the Minister under subsection 140E(1) of the Act, on the basis of an application made before 24 November 2012. See Legal Services commentary Temporary Work Sponsor for further discussion.
[46] cl.401.232. Where it is proposed that the visa applicant will be a player, a coach or an instructor in relation to an Australian sporting team or sporting organisation, it is a requirement for the approval of a relevant nomination that a formal agreement has been entered in to: r.2.72J(4)(b)(i).
[47] PAM - Sch2 Visa 401 - Temporary Work (Long Stay Activity) – The GB-401 streams – Religious Worker at [2.4] (reissued on 19 May 2016).
[48] cl.401.241. The terms 'long stay activity sponsor', 'religious institution' and 'religious worker sponsor' are defined in r.1.03 (though note the definition of religious worker sponsor was repealed on 19 November 2016). See Legal Services commentary Temporary Work Sponsor for further discussion.

the Religious Worker stream) relate to the type of work the visa applicant will do (not for profit, directly serves religious objectives of nominator) and the visa applicant's qualifications and experience to do that work.

Criteria for the Domestic Worker (Executive) stream

The Domestic Worker (Executive) stream provides for the temporary entry of persons to be employed as domestic workers by Subclass 457 visa holders who are senior executives of overseas organisations or Subclass 403 (Privileges and Immunities stream) visa holders who are senior executives of foreign government agencies.[49] This stream was added to Subclass 401 for visa applications made on or after 23 March 2013.[50]

In addition to the common criteria, applicants for this stream must meet the following criteria:

- **nomination requirements** - the applicant is identified in a nomination by a long stay activity sponsor who is a foreign organisation or foreign government agency, and the nomination meets the criteria in r.2.72J(6) (nomination criteria specific to Domestic Work (Executive) stream);[51] and
- **employment standards** - the applicant is to be employed or engaged in Australia in accordance with the standards for wages and working conditions provided for under relevant Australian legislation and awards.[52]

Secondary criteria

The secondary visa criteria require secondary applicants to be a member of the family unit of a person who holds one of the following visas, granted on the basis of satisfying the primary criteria:

- a Subclass 401 visa;
- a Subclass 411 (Exchange) visa;
- a Subclass 421 (Sport) visa;
- a Subclass 428 (Religious Worker) visa; or
- *for applications made on or after 23 March 2013*, a Subclass 427 (Domestic Worker (Temporary) Executive visa).[53]

There is no requirement that the application be made at the same time as or combined with that of the primary applicant, and the inclusion of the now repealed Subclasses 411, 421, 427 and 428 as alternative primary visas that may be held allows a secondary applicant to apply as a member of a family unit for an equivalent visa (i.e. Subclass 401), even though those subclasses have closed to new applications. For information on the definition of member of a family unit, see Legal Services commentary: Member of a Family Unit (r.1.12).

Secondary applicants must also satisfy requirements in relation to sponsorship,[54] and a number of other requirements which mirror the common primary criteria including in relation to health

[49] PAM3 - Sch2 Visa 401 - Temporary Work (Long Stay Activity) – The GB-401 streams – Domestic Worker (Executive) at [2.5] (reissued on 19 May 2016).
[50] SLI 2013, No.32.
[51] cl.401.251(1) and (2). 'Foreign government agency' is defined in r.2.57(1).
[52] cl.401.251(3).
[53] cl.401.311, as amended by SLI 2013, No.32.
[54] cl.401.312.

insurance,[55] genuine temporary stay,[56] means of support[57], public interest and special return criteria,[58] and (for visa applications made before 24 November 2012) passports.[59] Secondary applicants must also satisfy the decision maker that they have not engaged in conduct that constitutes a contravention of the Act, or that is reasonable to disregard the conduct. [60]

Key issues

Nomination requirements – common and stream specific criteria

There are both common criteria and criteria specific to each of the four streams relating to nominations. The common criteria require that an applicant is the subject of a current, approved nomination made by one of several specified approved sponsor types,[61] while the each of the stream criteria link the visa application to sponsor types and nomination requirements specific to the relevant stream.[62] These criteria should be considered as at the time of decision.

Can an applicant rely on a new nomination?

While applicants for all streams must specify in their visa application the person who has identified them in a nomination,[63] that requirement is not expressly linked to the Schedule 2 criteria. Accordingly, it appears that an applicant can rely on a nomination other than the one approved or applied for at the time of visa application to meet these Schedule 2 criteria.

Can an applicant change sponsors?

Again, while applicants for all streams must specify in their visa application the person who has identified them in a nomination,[64] there doesn't appear to be any restriction on the nominator (sponsor) changing between time of application and time of decision, as long as all relevant requirements are met (e.g. nomination approved by time of decision on the visa application). While the applicant must be the subject of a nomination by someone who is or has applied to be a sponsor at the time of application, and must be the subject of an approved nomination by an approved sponsor in the relevant stream by the time of decision, there is no express link between the requirements for making a valid visa application and meeting these Schedule 2 criteria.

[55] cl.401.313
[56] cl.401.314.
[57] cl.401.315.
[58] cl.401.316 and cl.401.317. Clause 401.316 was amended by SLI 2012, No.256 to include PIC 4021 for visa applications made on or after 24 November 2012.
[59] cl.401.318, omitted by SLI 2012, No.256 and replaced by the very similarly worded PIC 4021 for visa applications made on or after 24 November 2012.
[60] cl.401.312A as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. Specifically, in the previous three years, applicants must not have engaged in conduct that constitutes a contravention of ss.245AR(1), 245AS(1), 245AT(1) or 245AU(1) of the Act. In general terms, these provisions place prohibitions on people asking for or receiving a benefit, or offering to provide or providing a benefit, in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.
[61] cl.401.212(1)-(3).
[62] cl.401.221 (Exchange stream), cl.401.231 (Sport stream), cl.401.241 (Religious Worker stream) and cl.401.251 (Domestic Worker stream).
[63] Item 1232(3)(d)(i).
[64] Item 1232(3)(d)(i).

Adverse information about nominator – common criterion

It is a common criteria that either there is no adverse information known to Immigration about the person who made the approved nomination or a person associated with the nominator, or it is reasonable to disregard any such adverse information.[65]

'Adverse information' is defined for these purposes as *any* adverse information relevant to a person's suitability as an approved sponsor, *including* information that the person or an associated person: [66]

- has been found guilty by a court of an offence under a Commonwealth, State or Territory law; or
- has, to the satisfaction of a competent authority,[67] acted in contravention of a Commonwealth, State or Territory law; or
- has been the subject of administrative action (including being issued with a warning), by a competent authority, for a possible contravention of a Commonwealth, State or Territory law; or
- is under investigation, subject to disciplinary action or subject to legal proceedings in relation to an alleged contravention of a Commonwealth, State or Territory law; or
- has become insolvent within the meaning of s.5(2) and (3) of the *Bankruptcy Act 1966* and s.95A of the *Corporations Act 2001*.

The law which has been contravened, or has possibly been contravened, must relate to one or more of the following matters: discrimination, immigration, industrial relations, occupational health and safety, people smuggling and related offences, slavery, sexual servitude and deceptive recruiting, taxation, terrorism, trafficking in persons and debt bondage.[68] Further, the conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[69]

A person is 'associated with' another person (i.e. the sponsor or nominator) in the following circumstances:[70]

- a person is associated with a corporation if the person is an officer of the corporation, a related body corporate or an associated entity;
- a person is associated with a partnership if the person is a partner of the partnership;
- a person is associated with an unincorporated association if the person is a member of the association's committee of management; or
- a person is associated with an entity that is not one of the above categories if the person is an officer[71] of the entity.

If it is established that relevant 'adverse information' exists, the decision-maker must go on to consider whether it is reasonable to disregard that information. The Regulations do not provide any

[65] cl.401.212(4).
[66] r.1.13A as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242). The definition was previously referred to in the since repealed cl.401.111 and r.2.57.
[67] 'Competent authority' is defined by r.2.57(1) to mean a Department or regulatory authority that administers or enforces a law that is alleged to have been contravened: r.1.13A(4).
[68] r.1.13A(b).
[69] r.1.13A(c).
[70] r.1.13B as inserted by SLI 2015 No.242. The definition was previously referred to in the repealed cl.401.111 and r.2.57.
[71] 'Officer' is defined in r.1.13B as having the same meaning in s.9 of the *Corporations Act 2001*.

guidance on when it may be reasonable to disregard such information, and this will depend on the circumstances of the case. Departmental guidelines suggest the following factors may be relevant:

- the nature of the adverse information;
- how the adverse information arose, including the credibility of the source of the adverse information;
- in the case of an alleged contravention of a law, whether the allegations have been substantiated or not;
- whether the adverse information arose recently or a long time ago;
- whether the applicant has taken any steps to ensure the circumstances that led to the adverse information did not recur; and
- information about relevant findings made by a competent authority in relation to the adverse information, and the significance attached by the competent authority to the adverse information.[72]

This list is not exhaustive and the determination of whether it is reasonable to disregard the information is a question for the relevant decision maker, having regard to all relevant circumstances of the case.

No 'payment for visas' conduct – common criterion

Clause 401.212A requires that the applicant has not, in the previous three years, engaged in conduct that breaches ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act.[73] These provisions place prohibitions on people asking for, receiving, offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.

Where the applicant has engaged in such conduct in the previous 3 years, an applicant may nevertheless satisfy the requirement if it is reasonable to disregard that conduct.[74] Whether it is reasonable to disregard such conduct will be a question for the decision maker, and all relevant circumstances of the individual case should be considered.[75] This potentially encompasses not only the conduct itself and the circumstances in which it occurred, but also the applicant's broader circumstances outside of that conduct.

Genuine temporary stay – common criterion

Under cl.401.214, it is a common primary visa criterion that the applicant genuinely intends to stay temporarily in Australia to carry out the occupation or activity for which the visa is granted, having regard to:

[72] PAM3 - Migration Regulations - Divisions - Sponsorship Applicable to Division 3A of Part 2 of the Act - Sponsorship – No adverse information – reg 2.59(g) (reissued on 14 October 2016).
[73] cl.401.212A(a), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[74] cl.401.212A(b).
[75] The Explanatory Statement introducing this requirement does not provide any guidance as when it would be reasonable to disregard the conduct, but indicates that the these matters will be detailed in departmental policy: Explanatory Statement to SLI 2015, No.242 at p.17. At the time of writing there were no published Departmental guidelines on these matters within PAM3.

(a) whether the applicant has complied substantially with the conditions to which the last substantive visa, or any subsequent bridging visa, held by the applicant was subject;

(b) whether the applicant intends to comply with the conditions to which the Subclass 401 visa would be subject; and

(c) any other relevant matter.

This criterion should be considered as at the time of decision.

It is for the applicant to put forward sufficient material on which the decision-maker can be satisfied as to the genuineness of the intention to stay temporarily. In assessing the material that is put forward, a decision maker should not start from a position that the intention to stay temporarily is not genuine. The decision maker should reflect on all the evidence, and having weighed the circumstances, determine whether it is satisfied the applicant intends to stay temporarily in Australia for the purpose of the visa. While 'genuine intention' necessarily has a subjective element, the criterion itself requires the decision maker to look at past behaviour as indicative.

Note that similarly worded 'genuine intention' criteria are specified for the grant of certain visitor and student visas.[76]

A similar requirement must be met by secondary Subclass 401 visa applicants, however in that instance intention to comply with conditions is not a mandatory consideration.[77]

Complied substantially with conditions of last visa

The wording of cl.401.214(a) – '*conditions to which the last substantive visa, or any subsequent bridging visa…was subject*' – suggests that this provision requires consideration of compliance with conditions attached to the last visa held by the applicant, whether that is/was a substantive visa or a bridging visa held subsequently to their last substantive visa.[78] That is, compliance with conditions attached to *either* the last substantive visa *or* the subsequent bridging visa (whichever is/was the last visa held at time of decision) must be considered, not compliance with the conditions attached to both of these visas. This contrasts with some other versions of this criterion that apply to other subclasses and which require compliance with conditions attaching to both the last substantive and any bridging visa held.

Although cl.401.214(a) has not been the subject of judicial consideration, the concept of 'substantial compliance' has been considered by courts in the student visa context. In relation to a similarly worded student visa criterion, courts have clarified that a requirement that an applicant has complied substantially with the conditions of a previous visa requires substantial compliance with each and every condition individually,[79] rather than a global assessment of overall compliance with all visa conditions attached to a visa.[80] Further, it has been held in the student visa context that the term 'substantial compliance' contemplates that some degree of non-compliance with visa conditions may

[76] cl.57x.223(1)(a), cl.576.222(1)(a), cl.580.226(1)(a), cl.500.212 (student visas) and cl.600.211 (visitor visa).
[77] cl.401.314.
[78] This wording is in contrast to (now repealed) criteria specified for the grant of various student visas, cl.57x.235 for Subclasses 570 and 572-575, and cl.571.237 and 576.233 for Subclasses 571 and 576 respectively, which required that '[i]f the application was made in Australia, the applicant has complied substantially with the conditions that apply or applied to the last of any substantive visas held by the applicant, **and** to any subsequent bridging visa'.
[79] *Weerasinghe v MIMIA* [2004] FCA 261 (Ryan J, 19 March 2004) at [12]; *Chowdhury v MIMIA* [2005] FMCA 1243 (Barnes FM, 6 September 2005) at [32]-[34]; *Musapeta v MIAC* [2007] FMCA 729 (Smith FM, 8 May 2007) at [29]-[31], referring to cl.560.213, 573.212, 572.212 and 573.235 respectively.
[80] *Musapeta v MIAC* [2007] FMCA 729 (Smith FM, 8 May 2007) at [29]-[30] and *Chen v MIAC* [2011] FMCA 177 (Burnett FM, 8 April 2011) at [19]-[20].

be permitted,[81] so that absolute technical compliance is not required,[82] but that there are some conditions to which the concept of substantial compliance has no logical application.[83] It appears that these principles would be equally applicable to cl.401.214(a). For further discussion, see the Legal Services commentary: Substantial Compliance with Visa Conditions.

Intention to comply with conditions to which Subclass 401 visa would be subject

The Act provides for the Regulations to set out certain conditions to which all visas or visas of a particular class are subject, and gives the Minister power to specify that a particular visa is also subject to certain additional conditions.[84] The conditions which apply to a visa and which may be imposed on a visa are specified in the applicable part of Schedule 2 for each visa subclass.[85] For a Subclass 401 visa, the conditions which must be imposed are set out at cl.401.611 and the conditions which may be imposed are set out at cl.401.613.

Given the language of cl.401.214(b) - '*conditions to which the Subclass 401 visa would be subject*' – and the statutory distinction between conditions to which a visa is subject and conditions which the Minister may impose on a visa, it appears that in assessing this provision consideration should be limited to those conditions which *must* be imposed. Such an interpretation also has the benefit of certainty. The contrary approach, which involves considering what conditions are likely to be imposed in the future, is necessarily speculative.

Any other relevant matters

What is encompassed by the requirement to have regard to 'any other relevant matter' will necessarily depend on the facts of the particular case. Departmental guidelines (PAM3) outline a range of matters which may be relevant, including:

- the applicant's circumstances in their home country. This may include their personal circumstances such as their current employment, family situation, future prospects, and general circumstances of their country, civil unrest, economic strife, famine;
- whether the position has been created to secure the person's stay in Australia;
- the personal attributes and employment background of the applicant and their ability to undertake the nominated position, including the applicant's current occupation, current skill level and whether they have undertaken the same or similar work in Australia or overseas
- whether the applicant's proficiency in English is consistent with the nominated employment.[86]

While PAM3 may provide guidance as to matters which may be relevant in a particular case, the specific circumstances of the individual case should always be considered, and care taken not to treat this policy as a legislative requirement.

[81] *Kim v Witton* (1995) 59 FCR 258 at [271].
[82] *Gurung v MIMIA* [2002] FCA 772 (Tamberlin J, 26 July 2002) at [13].
[83] *Jayasekara v MIMIA* (2006) 156 FCR 199 at [12]. The Court held that in such instances the regulations should be read as not admitting any qualification of substantial compliance.
[84] s.41.
[85] r.2.05(1) and (2).
[86] PAM3 - Sch2 Visa 401 - Temporary Work (Long Stay Activity) – GB 401 – Primary applicant – common criteria at [26.5] (reissued on 19 May 2016).

Relevant Case law

Ahmad v MIBP [2015] FCAFC 182	Summary
Chen v MIAC [2011] FMCA 177	Summary
Chowdhury v MIMIA [2005] FMCA 1243	
Gurung v MIMIA [2002] FCA 772	Summary
Jayasekara v MIMIA [2006] FCAFC 167 (2006); 156 FCR 199	Summary
Kim v Witton [1995] FCA 1508; (1995) 59 FCR 258	
Musapeta v MIAC [2007] FMCA 729	
Weerasinghe v MIMIA [2004] FCA 261	Summary

Relevant legislative amendments

Title	Reference number
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012, No.256
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32
Migration Legislation Amendment Regulation 2013 (No. 2)	SLI 2013, No.96
Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013	SLI 2013, No.118
Migration Amendment (Visa Application Charge) Regulation 2013	SLI 2013, No.228
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015, No.34
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (No. 90 of 2018)	C2018A00090
Migration Amendment (Enhanced Integrity) Regulations 2018	F2018L01707

Available Decision Templates/Precedents

There is one subclass specific template/precedent:

- Subclass 401 visa refusal – this template is suitable for al Subclass 401 visa applications. The template asks users to select the applicable visa stream (Exchange, Sport, Religious Worker and Domestic Worker). For each stream, the user can select from a range of individual criteria in issue (e.g. Schedule 3, nomination requirements, genuine temporary stay, adequate means of support, conditions of work, type of agreement or other).

Last updated/reviewed: 16 January 2019

Subclass 402
Training and Research (Class GC) visa

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Overview

The Class GC Training and Research visa is temporary work visa introduced from 24 November 2012,[1] which contains one visa subclass: Subclass 402.[2] It replaced the pre-existing Subclass 419 (Visiting Academic), 442 (Occupational Trainee) and 470 (Professional Development) visas as part of an overall simplification of the temporary work visa program.[3] This visa type was repealed, and so closed to new applications, on 19 November 2016.[4] It was replaced from that date by the Class GF Training visa, containing one subclass: Subclass 407 (Training and Research) and, in respect of the Research stream, by the Class GG Temporary Activity visa, containing one subclass: Subclass 408 (Temporary Activity).

Temporary work visas allow people to participate in highly specialised work, specific professions, cultural, social or research activities in Australia on a temporary basis. The Subclass 402 visa aims to promote international goodwill by allowing Australian organisations to sponsor persons to travel to Australia to participate in occupational training, research or professional development activities.[5]

A person may be granted a Subclass 402 visa by meeting the requirements of one of three alternative 'streams', being:

- the Occupational Trainee stream;
- the Research stream; or
- the Professional Development stream.

Primary visa applicants must meet common criteria as well as the criteria for the stream in which they apply for the visa. These are set out in Part 402 of Schedule 2 to the Migration Regulations 1994 (the Regulations).[6]

The grant of a Subclass 402 visa also involves sponsorship and, in the case of the Occupational Trainee stream where the occupational training will not be provided to the applicant by the Commonwealth, nomination by a training and research or occupational trainee sponsor. For information relating to sponsorship and nomination requirements, see the MRD Legal Services Commentaries Temporary Work Sponsor and Temporary Work Nominations.

Merits Review

The Tribunal has jurisdiction to review decisions to refuse the grant of a Subclass 402 visa under s.338(2) (onshore applications) or s.338(5) (offshore applications).

For onshore applications, s.338(2)(a) to (c) of the *Migration Act 1958* (the Act) require that a decision to refuse a visa is reviewable if the visa could be granted to a person in the migration zone, and the

[1] Introduced by Migration Legislation Amendment Regulation 2012 (No.4) (SLI 2012, No.238).
[2] Item 1233(7) of Schedule 1 to the Regulations.
[3] Explanatory Statement to SLI 2012 No.238, Attachment B. These subclasses were repealed by SLI 2012 No.238 from 24 November 2012.
[4] Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743).
[5] PAM3 - Migration Regulations - Schedules > Sch2 Visa 402 - Training and Research - Background (reissued on 1 July 2016).
[6] Part 402 was repealed on 19 November 2016 by F2016L01743.

person made the application in the migration zone after being immigration cleared. In addition, s.338(2)(d) imposes additional requirements for certain prescribed temporary visas, including Subclass 402, to be reviewable. Section 338(2)(d) was amended with effect for decisions made from 13 December 2018.

Decisions made before 13 December 2018

A decision made before 13 December 2018 to refuse a Subclass 402 visa is a decision reviewable under Part 5 of the Act in circumstances where:

- the visa applicant made the application in relation to the Occupational Trainee stream or the Research stream whilst in the migration zone,[7] and the applicant is 'sponsored by an approved sponsor' at the time the application for review is made[8] *or* an application for review of a decision not to approve the sponsor has been made and that decision is pending;[9] or

- the visa applicant made the application in relation to the Professional Development stream and the visa applicant is sponsored in accordance with s.338(5)(b).[10]

In the former circumstance, the visa applicant has standing to apply for review,[11] and in the latter circumstance the sponsor has standing.[12]

Decisions made on or after 13 December 2018

A decision made on or after 13 December 2018 to refuse a Subclass 402 is a reviewable decision where:

- the visa applicant made the application in relation to the Occupational stream or the Research stream while in the migration zone and at the time of the decision to refuse to grant the visa is made:

  (i) the non-citizen is identified in an approved nomination that has not ceased; or

  (ii) a review of a decision under s.140E not to approve the sponsor of the non-citizen is pending; or

  (iii) a review of a decision under s.140GB not to approve the nomination of the non-citizen is pending; or

  (iv) the non-citizen is sponsored by an approved sponsor (however, this will not be an option for the Occupational Trainee stream where training is not supplied by the Commonwealth);[13] *or*

[7] s.338(2)(b).
[8] s.338(2)(d) as prescribed in the Act before the 13 December 2018 amendments, and r.4.02(1A). Note that for s.338(2)(d) the term 'sponsored' is defined by r.4.02(1AA) as including being identified in a nomination under s.140GB of the Act by an approved sponsor. For the purposes of s.338(2)(d)(i), there is no requirement that the nomination be approved at the time the review application is lodged, as it will be sufficient for an applicant to be identified in an application for a nomination made under s.140GB that is yet to be decided. However, a nomination that has ceased or otherwise lapsed would not fulfil the requirements in s.338(2)(d)(i). See *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015).
[9] s.338(2)(d)(ii). The expression 'decision not to approve the sponsor' in s.338(2)(d)(ii) includes a decision not to approve a nomination under s.140GB. Accordingly, s.338(2)(d)(ii) will be satisfied where, at the time the review application is lodged, there is either a pending application for review of a decision not to approve the sponsor as a standard business sponsor under s.140E or a pending application for review of a decision not to approve the nomination under s.140GB. See *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015).
[10] s.338(5) and cl.402.411.
[11] s.347(2)(a).
[12] s.347(2)(b).

- the visa applicant made the application in relation to the Professional Development stream and the visa applicant is sponsored in accordance with s.338(5)(b).[14]

In the former circumstance, the visa applicant has standing to apply for review,[15] and in the latter circumstance the sponsor has standing.[16]

For decisions made on or after 13 December 2018, the Tribunal also has jurisdiction to review a visa refusal decision in relation to secondary applicants in Occupational Trainee and Research streams, where the applicant did not seek to satisfy the primary criteria, the visa was refused because the applicant did not satisfy the secondary criteria, and the applicant meets the requirements of s.338(2)(a) to (c).[17] For these applications, the person with standing is 'a person to whose application the decision relates'.[18]

Visa application requirements

Item 1233 of Schedule 1 to the Regulations sets out the requirements for making a valid visa application for a Class GC (Subclass 402) visa.[19]

The application must be made on the approved form and the prescribed fee must be paid.[20] Applicants seeking to satisfy the primary criteria in the Occupational Trainee and Research streams may be in or outside Australia when the application is made, though not in immigration clearance.[21] Applicants seeking to satisfy the primary criteria in the Professional Development stream must be outside Australia.[22] Requirements for the method of lodging applications and relevant addresses are specified by written instrument.[23]

Applicants are also required to specify in the visa application certain details about their sponsor, depending on the stream they are applying for. These are as follows:

- Occupational Trainee stream:
  - if seeking to undertake occupational training that will be provided by the Commonwealth, the application must specify the person who has agreed, in writing, to be the applicant's training and research sponsor or occupational trainee sponsor,[24] and specify that the

[13] s.338(2)(d)(i)-(iv) as amended by the *Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018* (No.90 of 2018). s.338(2)(d)(iv) can be relied on except if it is a criterion for the grant of the visa that the non-citizen is identified in an approved nomination that has not ceased. Occupational Trainee stream applications where training is not provided by the Commonwealth require a nomination under cl.402.221(a), and therefore only s.338(2)(d)(i)-(ii) can be relied on as a basis for finding a reviewable decision.
[14] s.338(5) and cl.402.411.
[15] s.347(2)(a).
[16] s.347(2)(b).
[17] r.4.02(4)(q) as introduced by Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707).
[18] s.347(2)(d) and r.4.02(5)(p) inserted by F2018L01707.
[19] Item 1233 was repealed on 19 November 2016 by F2016L01743.
[20] Item 1233(1) and (2). For applications made prior to 18 April 2015, the prescribed form is form 1402. This provision was amended by Migration Amendment (2015 Measures No. 1) Regulation 2015 (SLI 2015, No. 34) for applications made on or after 18 April 2015 to provide that the approved form is that specified by the Minister in a legislative instrument under r.2.07(5).
[21] Item 1233(4) and (5).
[22] Item 1223(6).
[23] Item 1233(3)(a). For relevant instrument, see the 'App Address' tab of the Register of Instruments: Business visas. Note, for applications made on or after 18 April 2015, these provisions were amended by SLI 2015, No. 34 to provide that the place and manner which the application must be made, if any, is specified by the Minister in a legislative instrument under r.2.07(5).
[24] The terms 'training and research sponsor' and 'occupational trainee sponsor' are defined in r.1.03.

person is either such a sponsor or has a pending application to be approved as such as sponsor;

- if seeking to undertake a program of training that will not be provided by the Commonwealth, the application must specify the person who has identified the applicant in a nomination for s.140GB of the Act and specify that the person is either a training and research sponsor, an occupational trainee sponsor or a person who has a pending application to be approved as such a sponsor;[25]

- Research stream – the application must specify the person who has agreed in writing to be the applicant's training and research sponsor or visiting academic sponsor,[26] and specify that the person is such a sponsor or has a pending application to be approved as such a sponsor,[27] and, for visa applications made on or after 14 December 2015, the applicants must also make a declaration in the application as to whether or not they have (or a combined applicant has) engaged in conduct in relation to the application that contravenes s.245AS(1) of the Act.[28]

- Professional Development Stream – the application must specify the person who has agreed in writing to be the applicant's professional development sponsor.[29]

An application made by a person claiming to be the member of the family unit of a primary applicant may be made at the same time as, and combined with, the application by that person.[30]

Visa criteria

The criteria for a Subclass 402 visa are set out in Part 402 of Schedule 2 to the Regulations.[31] They comprise of primary and secondary criteria. With limited exceptions, discussed below, at least one person included in the application must meet the primary criteria.

Primary criteria

The primary criteria are not divided between time of application and time of decision criteria. However, some criteria require the decision-maker to be satisfied of the existence of certain matters as at the time of application (for example, holding certain kinds of substantive visas). Unless otherwise specified, all criteria must be satisfied at the time a decision is made on the application.[32]

All primary applicants must meet the common criteria and the criteria in one of three alternative streams:

[25] Item 1233(4).
[26] The terms 'training and research sponsor' and 'visiting academic sponsor' are defined in r.1.03 (though note the definition of visiting academic sponsor was repealed on 19 November 2016 by F2016L01743).
[27] Item 1233(5).
[28] Subitem 3 of 1233(5) as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242) and applying to an application for a visa made on or after 14 December 2015. Section 245AS of the Act prohibits a person from offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The term 'sponsorship-related event' is defined in s.245AQ of the Act, but relevantly includes such events as a person applying for approval of the nomination of a position in relation to an applicant for a sponsored visa or the grant of such a visa.
[29] Item 1233(6). 'Professional development sponsor' is defined in r.1.03.
[30] Item 1223(3)(b).
[31] Part 402 was repealed on 19 November 2016 by F2016L01743.
[32] Note to Division 402.2.

- the Occupational Trainee stream;[33]
- the Research stream;[34] or
- the Professional Development stream.[35]

Common criteria

The common criteria that must be met by all primary applicants are set out in cl.402.21. They are as follows:

- **visa history -** if the applicant was in Australia at the time of application, one of two alternatives must be met:
  - if they held a substantive temporary visa at time of application, that visa must not be a Subclass 403 visa in the Domestic Worker (Diplomatic or Consular) stream, a Subclass 426 visa, Subclass 771 or special purpose visa;[36] or
  - if they did not hold a substantive visa at time of application, both:
    - the last substantive temporary visa was not one of those listed above, and
    - the applicant satisfies Schedule 3 criteria 3002, 3004 and 3005;[37]
- **age -** the applicant either has turned 18, or has not turned 18 and seeks to enter Australia to participate in an occupational training program relating to sport, or has not turned 18 and exceptional circumstances exist for the grant of the visa;[38]
- **health insurance** - the applicant has adequate arrangements in Australia for health insurance, during the period of the applicant's intended stay in Australia;[39]
- **genuine temporary stay -** the applicant genuinely intends to stay temporarily in Australia to carry out the occupation, program or activity for which the visa is granted, having regard to certain specified matters (discussed below);[40]
- **adequate means of support** - the applicant must have adequate means to support himself or herself, or access to adequate means to support himself or herself, during the period of the applicant's intended stay in Australia;
- **public interest criteria** - the applicant must satisfy various public interest criteria (PIC) including, for visa applications made on or after 24 November 2012, PIC 4021 relating to travel documents,[41] and special return criteria;[42] and

[33] cl.402.22.
[34] cl.402.23.
[35] cl.402.24.
[36] cl.402.211(a). For special purpose visas, see s.33 of the Act.
[37] cl.402.211(b).
[38] cl.402.212.
[39] cl.402.213.
[40] cl.402.214.
[41] cl.402.216. These are PIC 4001, 4002, 4003, 4004, 4005, 4013, 4014, 4020 and (for visa applications made on or after 24 November 2012) 4021. Also, if the applicant had turned 18 at the time of application, PIC 4019 must be satisfied or, if the applicant had not turned 18, PIC 4012, 4017 and 4018 must be satisfied.
[42] cl.402.217. These are special return criteria 5001, 5002 and 5010.

- **passport** - *for visa applications made before 24 November 2012*, the applicant must hold a valid passport that was issued to the applicant by an official source, in the form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport.[43]

Criteria for the Occupational Trainee stream

The Occupational Trainee stream is for for persons who want to improve their occupational skills (including in the field of sport) through participation in workplace-based training in Australia with an Australian organisation, government agency or foreign government agency.[44] It contains a number of specific criteria as follows:

- **sponsorship requirements** - if the occupational training *is* to be provided by the Commonwealth, it is a requirement that a training and research sponsor or occupational trainee sponsor has agreed, in writing, to be the approved sponsor in relation to the applicant and the sponsor has not withdrawn its agreement to be the approved sponsor in relation to the applicant, and has not ceased to be an approved sponsor;[45]

- **nomination requirements -** if the occupational training *is not* to be provided by the Commonwealth, then the following requirements must be met:

  - the applicant is identified in a nomination by a training and research sponsor or an occupational trainee sponsor; and
  - the nomination meets the criteria in regulation 2.72I; and
  - the approval of the nomination has not ceased under r.2.75A; and
  - either there is no adverse information known to Immigration about the nominator or an associated person, or it is reasonable to disregard any such information (discussed below).[46]

- **occupational opportunities** - occupational opportunities available to Australian citizens or permanent residents of Australia will not be adversely affected if the visa is granted;[47] and

- **study requirements** - if the primary applicant was in Australia at the time of application and at that time held a Subclass 570, 572, 573, 574 or 575 student visa or, if they did not hold a substantive visa at the time of application but their last substantive visa was one of those student visas, then they must satisfy one of two alternative requirements:[48]

  EITHER

[43] cl.402.218, omitted by Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256) and replaced by the very similarly termed PIC 4021, which applies to visa applications made on or after 24 November 2012.
[44] PAM3 - Migration Regulations - Schedules > Sch2 Visa 402 – Who can apply (reissued on 1 July 2016).
[45] cl.402.221(1)(b). The terms 'training and research sponsor' and 'occupational trainee sponsor' are defined in r.1.03 (though note the definition of occupational trainee sponsor was repealed on 19 November 2016 by F2016L01743). For information on sponsorship see MRD Legal Services Commentary Temporary Work Sponsor. Occupational training 'provided by the Commonwealth' for this criterion includes training to be provided by a body corporate incorporated for a public purpose under an Act or regulations under an Act, or by an authority or body (other than a body corporate) established for a public purpose under an Act or regulations made under an Act: cl.402.221(2).
[46] cl.402.221(1)(a). The terms 'training and research sponsor' and 'occupational trainee sponsor' are defined in r.1.03 (though note the definition of occupational trainee sponsor was repealed on 19 November 2016 by F2016L01743). For information on sponsorship and nomination see MRD Legal Services Commentaries Temporary Work Sponsor and Temporary Work Nominations.
[47] cl.402.222. For guidance on the application of this criterion see PAM3 - Migration Regulations - Schedules > Sch2 Visa 402 – Training and Research – Primary applicant - Stream Criteria – Occupational Trainee Stream - Impact on Australian citizens and permanent residents (reissued on 1 July 2016).
[48] cl.402.223.

- the applicant has completed[49] the principal course,[50] at the diploma level or higher, in Australia in relation to which the visa held at time of application / last substantive visa was granted;[51] and

- they seek to undertake occupational training closely related to the principal course; and

- they would complete the occupational training within 12 months;

OR

- the applicant has completed the principal course (of any level) in Australia in relation to which the visa held at time of application / last substantive visa was granted; and

- they must complete a period of practical employment experience in order to obtain registration in a profession in which registration is a prerequisite for the practice of the profession in the applicant's usual country of residence or Australia.

Criteria for the Research stream

The Research stream is for academics invited to participate in collaborative research in Australia by an Australian tertiary or research institution.[52]

The additional criteria that must be satisfied for the Research stream are:

- **sponsorship requirements** - each of the following requirements in relation to the applicant's sponsor must be satisfied:[53]
  - a training and research sponsor or visiting academic sponsor has agreed in writing to be the approved sponsor in relation to the applicant;[54] and
  - the sponsor is an Australian tertiary or research institution,
  - the sponsor has not withdrawn its agreement to be the sponsor in relation to the applicant and has not ceased to be the sponsor; and
  - either there is no adverse information known to Immigration about the sponsor or a person associated with the sponsor, or it is reasonable to disregard any such adverse information (discussed below).

[49] 'Completed' in relation to a principal course means, for an award course, having met the academic requirements for the award, and for a non-award course, having met course requirements: cl.402.111. The academic requirements for the award of an academic qualification do not include the formal conferral of the award. Therefore, a person can complete a principal course before the award is formally conferred (see Note to definition in cl.402.111).
[50] 'Principal course' is defined by r.1.40 (cl.402.111), so that if an applicant for a Subclass 402 visa has undertaken a course of study that is a registered course, the course is the principal course. 'Registered course' is defined by r.1.03 as a course of education or training provided by an institution, body or person that is registered, under the *Education Services for Overseas Students Act 2000*, to provide the course to overseas students. A current list of registered providers and courses appears in the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS).
[51] Where an applicant undertakes two or more related courses of study, r.1.40(3) explains how a decision-maker is to determine which course is the principal course. Departmental policy for Subclass 402 provides that if a student visa has been granted for 2 or more courses, in circumstances where no one course is a prerequisite to any other, any of the courses can be considered a principal course: PAM3 - Sch2 Visa 402 - Training and Research > Visa 402 - Main Applicant - Stream Criteria – Occupational Trainee Stream – students who are enrolled in more than one course (reissued on 1 July 2016).
[52] PAM3 > Sch2 Visa 402 - Training and Research – Introduction – Who can apply (reissued on 1 July 2016).
[53] cl.402.231.
[54] The terms ' training and research sponsor' and 'visiting academic sponsor' are defined in r.1.03 (note that the definition of visiting academic sponsor was repealed on 19 November 2016 by F2016L01743). For further information on sponsorship, see MRD Legal Services Commentary: Temporary Work Sponsor.

- **no 'payment for visas' conduct** – the applicant has not engaged in conduct that breaches ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act, or it is reasonable to disregard the conduct (discussed below);[55]
- **research project** - the applicant will observe or participate in an Australian research project at the sponsoring Australian tertiary or research institution and in collaboration with other academics employed by the institution;[56]
- **current or past employment -** the applicant must be employed, or have formerly been employed, as an academic[57] at a tertiary education institution or research institution and have a significant record of achievement[58] in his or her field;[59] and
- **salary restrictions** - the applicant will not receive from the sponsor a salary, scholarship or allowance, other than an allowance for living expenses in Australia and travel costs.[60]

Criteria for the Professional Development Stream

The Professional Development stream is for groups of professionals, managers and government officials from overseas who wish to come to Australia to enhance their professional or managerial skills by undertaking professional development training.[61] It contains a number of specific criteria that must be met:

- **sponsorship requirements** - each of the following requirements in relation to the applicant's sponsor must be satisfied:[62]
  - a professional development sponsor has agreed in writing to be the approved sponsor in relation to the applicant;[63] and
  - the sponsor has not withdrawn its agreement to be the sponsor in relation to the applicant and has not ceased to be the sponsor; and
  - either there is no adverse information known to Immigration about the sponsor or a person associated with the sponsor, or it is reasonable to disregard any such adverse information (discussed below);
- **overseas employer** - the applicant has an overseas employer and is in a managerial or professional position in relation to the overseas employer;[64]

[55] cl.402.231A, as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. In general terms, these provisions place prohibitions on people asking for or receiving a benefit, or offering to provide or providing a benefit, in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.
[56] cl.402.232.
[57] The term 'academic' is not defined in the Regulations and so should be given its ordinary meaning, being a teacher or researcher in a university or college: Macquarie Dictionary online, accessed 20 March 2018.
[58] 'Significant record of achievement' is not further defined in the Regulations. Departmental policy suggests that evidence the applicant has had their research published in reputable academic journals or other reputable serials in their field of expertise may be relevant to assessing this requirement: PAM3 > Sch2 Visa 402 - Training and Research – Primary Applicant – Stream criteria – Research stream – who is an academic (reissued 1 July 2016).
[59] cl.402.233.
[60] cl.402.234.
[61] PAM3 > Sch2 Visa 402 - Training and Research – Introduction – Who can apply (reissued on 1 July 2016).
[62] cl.402.241.
[63] 'Professional development sponsor' is defined in r.1.03.
[64] cl.402.242. 'Overseas employer' is defined by cl.402.111 & r.2.57(1). 'Managerial or professional position' is not further defined, and these terms should be given their ordinary meaning. Departmental guidelines outline typical duties for these positions and refer to the occupations listed in ANZSCO Major Groups 1 and 2 (Managers and Professionals, respectively): PAM3 > Sch2 Visa 402 - Training And Research - Primary Applicant - Stream Criteria – Professional Development stream (reissued on 1 July 2016).

- **financial commitments** - there is no information indicating that any of the parties to the professional development agreement are unable to meet their financial commitments under the agreement;[65] and

- **professional development program, relevant skills and English proficiency -** *the sponsor* must be satisfied that the applicant:
  - will undertake the professional development program mentioned in the visa application;[66]
  - has managerial or other professional skills and work experience that are relevant to the program;[67] and
  - has the required English language proficiency for the purposes of undertaking the professional development program as mentioned in the visa application.[68]

Secondary criteria

The secondary visa criteria require secondary visa applicant's to be a member of the family unit of a person who holds one of the following visas, granted on the basis of satisfying the primary criteria:

- a Subclass 402 visa in the Occupational Trainee stream;
- a Subclass 402 visa in the Research stream;
- a Subclass 419 (Visiting Academic) visa; or
- a Subclass 442 (Occupational Trainee) visa.[69]

There can accordingly be no Subclass 402 visa granted to secondary applicants where the primary applicant's visa is in the Professional Development Stream.

There is no requirement that the visa application be combined with that of the primary applicant, and the inclusion of the now repealed Subclasses 419 and 442 as alternative primary visas that may be held allows a secondary applicant to apply as a member of a family unit for an equivalent visa (i.e. Subclass 402), even though those subclasses have closed to new applications. This is an exception to the general requirement that at least one member of the family unit satisfies the Subclass 402 primary criteria.

For information on the definition of member of a family unit, see MRD Legal Services commentary: Member of a Family Unit (r. 1.12).

Several sponsorship requirements must also be satisfied where the primary applicant's visa (the visa mentioned in cl.402.311) was applied for on or after 14 September 2009. They are that the approved sponsor of the primary applicant:[70]

- has agreed in writing to be the sponsor of the secondary applicant,
- has not withdrawn its agreement to be the sponsor in relation to the primary applicant,

[65] cl.402.243.
[66] cl.402.244(a).
[67] cl.402.244(b).
[68] cl.402.245.
[69] cl.402.311.
[70] cl.402.312.

- has not ceased to be the sponsor of the secondary applicant, and

- either there is no adverse information known to Immigration about the sponsor or a person associated with the sponsor, or it is reasonable to disregard any such adverse information.[71]

There are also a number of other criteria for secondary applicants which mirror the common primary criteria, including that:

- the applicant genuinely intends to stay temporarily in Australia as a member of the family unit of the primary applicant, having regard certain matters;[72]

- the applicant has adequate arrangements in Australia for health insurance during the period of his or her intended stay in Australia;[73]

- the applicant has adequate means or access to adequate means to support himself or herself during the period of his or her intended stay in Australia;[74]

- the applicant satisfies various public interest criteria (PIC) including, for visa applications made on or after 24 November 2012, PIC 4021 relating to travel documents,[75] and certain special return criteria;[76]

- *for visa applications made before 24 November 2012*, the applicant must hold a valid passport that was issued to the applicant by an official source, in the form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport;[77] and

- an applicant in Research stream must also satisfy the decision maker that they have not engaged in 'payment for visa' conduct, or that is reasonable to disregard the conduct.[78]

Key issues

Age requirement – common criterion

Under cl.402.212, it is a common primary criterion that either:

- the applicant has turned 18; or

[71] The terms 'adverse information' and 'associated with' are defined in r.1.13A and r.1.13B, as discussed below.
[72] cl.402.314.
[73] cl.402.313.
[74] cl.402.315.
[75] cl.402.316. These are 4001, 4002, 4003, 4004, 4005, 4013, 4014, 4020 and (for visa applications made on or after 24 November 2012) 4021. Also, if the applicant had turned 18 at the time of application, PIC 4019 must be satisfied, or if they had not turned 18, PIC 4017 and 4018 must be satisfied.
[76] cl.402.317. These are special return criteria 5001, 5002 and 5010.
[77] cl.402.318, omitted by SLI 2012, No.256 and replaced by the very similarly termed PIC 4021, which applies to visa applications made on or after 24 November 2012.
[78] cl.402.312A as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. Specifically, in the previous three years, applicants must not have engaged in conduct that constitutes a contravention of ss.245AR(1), 245AS(1), 245AT(1) or 245AU(1) of the Act. In general terms, these provisions place prohibitions on people asking for or receiving a benefit, or offering to provide or providing a benefit, in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.

- the applicant has not turned 18 and seeks to enter Australia to participate in an occupational training program relating to sport; or

- the applicant has not turned 18 and exceptional circumstances exist for the grant of the visa.

This criterion doesn't specify what point in time it should be considered against – but there is a general note to this division that all criteria must be satisfied at the time a decision is made on the application.[79] There is nothing on the face of the provision which prevents it from being assessed at the time of decision, and assessing at that point seems consistent with the apparent purpose of the requirement (to restrict grant of the visa to adults, except in certain circumstances). Further, the use of present tense in the text of the provision suggests it was intended to be considered at time of decision. However, departmental guidelines suggest it should be considered at time of application.[80]

Whether 'exceptional circumstances' exist is a question of fact for the decision maker. The term 'exceptional circumstances' is not defined, and 'exceptional' should be given its ordinary, non-technical meaning, in the sense that exceptional circumstances are those circumstances which are unusual, not typical.[81]

Genuine intention requirement – common criterion

Under cl.402.214, it is a common primary visa criterion that the applicant genuinely intends to stay temporarily in Australia to carry out the occupation, program or activity for which the visa is granted, having regard to:

- whether the applicant has complied substantially with the conditions to which the last substantive visa, or any subsequent bridging visa, held by the applicant was subject;

- whether the applicant intends to comply with the conditions to which the Subclass 402 visa would be subject; and

- any other relevant matter.[82]

This criterion should be considered at the time of decision.

It is for the applicant to put forward sufficient material on which the decision-maker can be satisfied as to the genuineness of the intention to stay temporarily. In assessing the material that is put forward, a decision maker should not start from a position that the intention to stay temporarily is not genuine. The decision maker should reflect on all the evidence, and having weighed the circumstances, determine whether it is satisfied the applicant intends to stay temporarily in Australia for the purpose of the visa. While 'genuine intention' necessarily has a subjective element, the criterion itself requires the decision maker to look at past behaviour as indicative.

Note that similarly worded 'genuine intention' criteria are specified for the grant of certain visitor and student visas.[83]

[79] Note to Division 402.2.
[80] PAM3 > Sch2 Visa 402 - Training and Research - Primary Applicant - Common Criteria – Age criterion (reissued on 1 July 2016).
[81] See Oxford Dictionary online, accessed 20 March 2018.
[82] cl.402.214.
[83] cl.57x.223(1)(a), cl.576.222(1)(a), cl.580.226(1)(a), cl.500.212 (student visas) and cl.600.211 (visitor visa).

A similar requirement must be met by secondary Subclass 402 visa applicants, however in that instance intention to comply with conditions is not a mandatory consideration.[84]

Complied substantially with conditions of last visa – cl.402.214(a)

The wording of cl.402.214(a) – *'conditions to which the last substantive visa, or any subsequent bridging visa…was subject*' – suggests that this provision requires consideration of compliance with the last visa held by the applicant, whether that is/was a substantive visa or a bridging visa held subsequently to their last substantive visa.[85] It indicates that compliance with conditions attached to *either* the last substantive visa *or* the subsequent bridging visa (whichever is/was the last visa held at time of decision) must be considered, not compliance with the conditions attached to both of these visas.

Although cl.402.214(a) has not been the subject of judicial consideration, the concept of 'substantial compliance' has been considered by courts in the student visa context. In relation to a similarly worded student visa criterion, courts have clarified that a requirement that an applicant has complied substantially with the conditions of a previous visa requires substantial compliance with each and every condition individually,[86] rather than a global assessment of overall compliance with all visa conditions attached to a visa.[87] Further, it has been held in the student visa context that the term 'substantial compliance' contemplates that some degree of non-compliance with visa conditions may be permitted,[88] so that absolute technical compliance is not required,[89] but that there are some conditions to which the concept of substantial compliance has no logical application.[90] It appears that these principles would be equally applicable to cl.402.214(a). For further discussion, see the MRD Legal Services commentary: Substantial Compliance with Visa Conditions.

Conditions to which Subclass 402 visa would be subject – cl.402.214(b)

The conditions which a Subclass 402 visa must or may be subject to depend on which stream of visa the applicant seeks to be granted, and are set out at cl.402.6. Given the language of cl.402.214(b) - '*conditions to which the Subclass 402 visa would be subject*' – and the statutory distinction between conditions to which a visa 'is subject' and conditions which the Minister 'may impose' on a visa,[91] it appears consideration should be limited to those conditions which *must* be imposed. Such an interpretation also has the benefit of certainty. The contrary approach, which involves considering what conditions are likely to be imposed in the future, is necessarily speculative.

For the Occupational Trainee stream the conditions which must be imposed are 8102 (work restriction), 8303 (no disruptive/violent conduct), 8501 (maintain health insurance) and 8516 (continue to satisfy criteria).[92]

[84] cl.402.314.
[85] This wording is in contrast to (now repealed) criteria specified for the grant of various student visas, cl.57x.235 for Subclasses 570 and 572-575, and cl.571.237 and 576.233 for Subclasses 571 and 576 respectively, which required that '[i]f the application was made in Australia, the applicant has complied substantially with the conditions that apply or applied to the last of any substantive visas held by the applicant, **and** to any subsequent bridging visa'.
[86] *Weerasinghe v MIMIA* [2004] FCA 261 (Ryan J, 19 March 2004) at [12]; *Chowdhury v MIMIA* [2005] FMCA 1243 (Barnes FM, 6 September 2005) at [32]-[34]; *Musapeta v MIAC* [2007] FMCA 729 (Smith FM, 8 May 2007) at [29]-[31], referring to cl.560.213, 573.212, 572.212 and 573.235 respectively.
[87] *Musapeta v MIAC* [2007] FMCA 729 (Smith FM, 8 May 2007) at [29]-[30] and *Chen v MIAC* [2011] FMCA 177 (Burnett FM, 8 April 2011) at [19]-[20].
[88] *Kim v Witton* (1995) 59 FCR 258 at [271].
[89] *Gurung v MIMIA* [2002] FCA 772 (Tamberlin J, 26 July 2002) at [13].
[90] *Jayasekara v MIMIA* (2006) 156 FCR 199 at [12]. The Court held that in such instances the regulations should be read as not admitting any qualification of substantial compliance.
[91] Section 41(1) of the Act and r.2.05(1) refer to conditions to which a visa 'is subject', in contrast to s.41(3) and r.5.05(3) which refer to visa conditions which may be imposed.
[92] cl.402.611(1).

For the Research stream the conditions which must be imposed are 8103 (no salary), 8107 (maintain participation in activity), 8303 (no disruptive/violent conduct), 8501 (maintain health insurance) and 8516 (continue to satisfy criteria).[93]

For the Professional Development stream the conditions which must be imposed are conditions 8102 (work restriction), 8303 (no disruptive/violent conduct), 8501 (maintain health insurance), 8516 (continue to satisfy criteria), 8531 (must not remain after visa) and 8536 (must not discontinue/deviate from professional development program).[94]

Any other relevant matters – cl.402.214(c)

What is encompassed by the requirement to have regard to 'any other relevant matter' will necessarily depend on the facts of the particular case. Departmental guidelines (PAM3) outline a range of matters which may be relevant:

- the applicant's immigration history (for example, previous travel, compliance with immigration laws of Australia or other countries, previous visa applications/compliance action);
- personal circumstances in the applicant's home country that may encourage them to seek a visa to enter Australia (for example, military service commitments, economic situation, civil disruption);
- the credibility of the applicant in terms of character and conduct (for example, false and misleading information provided with the visa application);
- whether the position or arrangement appears to have been created because of the need of the visa applicant (e.g. because the visa applicant is related to the employer or organiser or the salary level appears inconsistent with that for persons undertaking similar work or activities);
- the applicant's current occupation and current skill level (training and experience) in that occupation or the applicant's field of study (whether current or recently completed) or area of expertise and current skill level;
- whether the applicant's proficiency in English is sufficient to undertake the proposed activity; and
- the number of times the applicant has undertaken the same or similar activity in Australia, whether on a Subclass 402 or other visas.[95]

While PAM3 may provide guidance as to matters which may be relevant in a particular case, the specific circumstances of the individual case should always be considered, and care taken not to treat this policy as a legislative requirement.

[93] cl.402.611(2).
[94] cl.402.611(3).
[95] PAM3 > Sch2 Visa 402 - Training and Research - Primary Applicant - Common Criteria – Genuine applicant (reissued on 1 July 2016).

Adverse information about nominator / sponsor – all streams

There are criteria in each of the streams (and a secondary visa criterion) which require that either there is no adverse information known to Immigration about a sponsor/nominator (as relevant) or a person associated with the sponsor/nominator, or it is reasonable to disregard any such adverse information.[96]

'Adverse information' is defined for these purposes as any adverse information relevant to a person's suitability as an approved sponsor, including information that the person or an associated person: [97]

- has been found guilty by a court of an offence under a Commonwealth, State or Territory law; or
- has, to the satisfaction of a competent authority,[98] acted in contravention of a Commonwealth, State or Territory law; or
- has been the subject of administrative action (including being issued with a warning), by a competent authority, for a possible contravention of a Commonwealth, State or Territory law; or
- is under investigation, subject to disciplinary action or subject to legal proceedings in relation to an alleged contravention of a Commonwealth, State or Territory law; or
- has become insolvent within the meaning of s.5(2) and (3) of the *Bankruptcy Act 1966* and s.95A of the *Corporations Act 2001*.

The law which has been contravened, or has possibly been contravened, must relate to one or more of the following matters: discrimination, immigration, industrial relations, occupational health and safety, people smuggling and related offences, slavery, sexual servitude and deceptive recruiting, taxation, terrorism, trafficking in persons and debt bondage.[99] Further, the conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[100]

A person is 'associated with' another person (i.e. the sponsor or nominator) in the following circumstances:[101]

- a person is associated with a corporation if the person is an officer of the corporation, a related body corporate or an associated entity;
- a person is associated with a partnership if the person is a partner of the partnership;
- a person is associated with an unincorporated association if the person is a member of the association's committee of management; or
- a person is associated with an entity that is not one of the above categories if the person is an officer[102] of the entity.

[96] cl.402.224(1)(iv) (Occupational trainee scheme, only applicable where Commonwealth not providing training), cl.402.431(d) (Research stream), cl.402.214(c) (Professional Development stream) and cl.403.212(d) (secondary visa applicants).
[97] r.1.13A as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242). The definition was previously referred to in the since repealed cl.402.111 and r.2.57
[98] 'Competent authority' is defined by r.2.57(1) to mean a Department or regulatory authority that administers or enforces a law that is alleged to have been contravened: r.1.13A(4).
[99] r.1.13A(b).

If it is established that relevant 'adverse information' exists, the decision-maker must go on to consider whether it is reasonable to disregard that information. The Regulations do not provide any guidance on when it may be reasonable to disregard such information, and this will depend on the circumstances of the case. Departmental guidelines suggest the following factors may be relevant:

- the nature of the adverse information;
- how the adverse information arose, including the credibility of the source of the adverse information;
- in the case of an alleged contravention of a law, whether the allegations have been substantiated or not;
- whether the adverse information arose recently or a long time ago;
- whether the applicant has taken any steps to ensure the circumstances that led to the adverse information did not recur; and
- information about relevant findings made by a competent authority in relation to the adverse information, and the significance attached by the competent authority to the adverse information.[103]

This list is not exhaustive and the determination of whether it is reasonable to disregard the information is a question for the relevant decision maker, having regard to all relevant circumstances of the case.

Sponsorship / nomination requirements – all streams

It is a criterion for each stream that a relevant sponsor has agreed in writing to sponsor the applicant and has not withdrawn its agreement.[104] This includes applicants in the Occupational Trainee stream whose training will be provided by the Commonwealth. For applicants in the Occupational Trainee stream whose training won't be provided by the Commonwealth, it is a criterion that the applicant be identified in a nomination by a relevant approved sponsor, that this nomination meets the criteria in r.2.72I and that the approval of this nomination has not ceased under r.2.75A (period of approval).[105]

Although these criteria do not specify whether they are to be considered against the time of application or time of decision, having regard to the scheme as a whole, and reference in the criteria to agreements not being withdrawn and nominations not having ceased, it appears they should be considered as at the time of decision.

Can an applicant change sponsors?

While for each stream an applicant must specify in their visa application the person who has agreed in writing to be their approved sponsor or the person who has identified them in a nomination (if

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[100] r.1.13A(c).
[101] r.1.13B as inserted by SLI 2015 No.242. The definition was previously referred to in the repealed cl.402.111 and r.2.57.
[102] 'Officer' is defined in r.1.13B as having the same meaning in s.9 of the *Corporations Act 2001*.
[103] PAM3 > Sponsorship Applicable to Division 3A of Part 2 of the Act - Sponsorship > Criteria for the Approval as a Sponsor. The Subclass 402 PAM3 directs readers to this part of PAM3 (reissued on 1 July 2016).
[104] cl.402.221(b) (Occupational Trainee stream – Commonwealth providing training), cl.402.231(a) & (c) (Research stream) and cl.402.241(a) & (b) (Professional Development Stream).
[105] cl.402.221(a).

Occupational Trainee stream and training not provided by Commonwealth),[106] that requirement is not expressly linked to these Schedule 2 criteria. Accordingly, it appears that an applicant's sponsor (or nominator, as relevant) can change between time of application and time of decision, and still meet the relevant Schedule 2 stream criteria.

Can an applicant rely on a new nomination?

For applicants in the Occupational Trainee stream whose training won't be provided by the Commonwealth, there are requirements relating to nominations in cl.402.221(a). As discussed above, it appears these requirements should be considered at the time of decision. While a nomination identifying the applicant must have been made at the time of application in order to meet visa application requirements,[107] there is no express requirement that the nomination relied on to meet cl.402.221(a) be the same as the nomination applied for or in place at the time of visa application. Accordingly, it appears that different nominations can be relied on to meet the visa application requirements and the Schedule 2 criterion.

Financial commitments – Professional Development stream

It is a criterion for the Professional Development stream that there is no information indicating that any of the parties to the professional development agreement are unable to meet their financial commitments under the agreement.[108]

A 'professional development agreement' is defined as a written agreement between a person applying for approval as a professional development sponsor and an overseas employer of the person who is intended to be a primary sponsored person.[109] It is a criterion for the approval of an application to be a professional development sponsor that the applicant be a party to such an agreement.[110] The agreement sets out which party (e.g. overseas employer, sponsoring organisation or visa applicant) will cover various costs associated the proposed temporary stay, including travel to and from Australia, tuition, accommodation and living expenses, and health insurance.[111]

The terms of cl.402.243 don't require a decision maker to be satisfied that the financial commitments under this agreement will be met, rather, it requires satisfaction that there is no information indicating any parties are unable to meet those commitments. In contrast, there is a criterion for approval as a professional development sponsor which requires a decision maker to be satisfied each of the parties to the professional development agreement has the capacity to meet its financial commitments.[112]

Sponsor's requirements – Professional Development stream

There are a number of requirements in the Professional Development stream which relate to *the sponsor's* satisfaction of certain matters.

The sponsor must be satisfied that the applicant:

[106] Item 1233(4), 1223(5) and 1223(6).
[107] Item 1223(4), which requires an applicant to specify 'the person who has identified the applicant in a nomination for section 140GB of the Act'.
[108] cl.402.243.
[109] cl.402.111 and r.2.57(1).
[110] r.2.60(1)(c).
[111] PAM3 > Sch2 Visa 402 - Training And Research - Primary Applicant - Stream Criteria – Professional Development stream – Ability to meet financial commitments and costs (reissued on 1 July 2016).
[112] r.2.60(1)(g).

- will undertake the professional development program mentioned in the visa application;[113]
- has managerial or other professional skills and work experience that are relevant to the program ;[114] and
- has the required English language proficiency for the purposes of undertaking the professional development program as mentioned in the visa application.[115]

Departmental guidelines indicate that the relevant professional development sponsor's satisfaction in relation to these matters should be evidenced by a letter provided by the sponsor.[116] The Class GC visa application form (Form 1402) prompts applicants for the Professional Development stream to attach such a letter to their visa application. However, there is no requirement under the Regulations that a letter be provided and other forms of evidence (e.g. oral evidence given at hearing) may demonstrate the sponsor is satisfied about the relevant matters, and that cl.402.244 and cl.402.245 are met.

No 'payment for visas' conduct – Research stream

Applicants in the Research stream must have not, in the previous three years, engaged in conduct that breaches ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act.[117] These provisions place prohibitions on people asking for, receiving, offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.

Where the applicant has engaged in such conduct in the previous 3 years, an applicant may nevertheless satisfy the requirement if it is reasonable to disregard that conduct.[118] Whether it is reasonable to disregard such conduct will be a question for the decision maker, and all relevant circumstances of the individual case should be considered.[119] This potentially encompasses not only the conduct itself and the circumstances in which it occurred, but also the applicant's broader circumstances outside of that conduct.

Relevant Case law

Ahmad v MIBP [2015] FCAFC 182	Summary
Chen v MIAC [2011] FMCA 177	Summary
Chowdhury v MIMIA [2005] FMCA 1243	
Gurung v MIMIA [2002] FCA 772	Summary

[113] cl.402.244(a).
[114] cl.402.244(b).
[115] cl.402.245.
[116] PAM3 > Sch2 Visa 402 - Training And Research - Primary Applicant - Stream Criteria – Professional Development stream - (reissued on 1 July 2016).
[117] cl.402.212A(a), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[118] cl.402.212A(b).
[119] The Explanatory Statement introducing this requirement does not provide any guidance as when it would be reasonable to disregard the conduct, but indicates that the these matters will be detailed in departmental policy: Explanatory Statement to SLI 2015, No.242 at p.17. At the time of writing there were no published Departmental guidelines on these matters within PAM3.

Jayasekara v MIMIA [2006] FCAFC 167 (2006); 156 FCR 199	Summary
Kim v Witton [1995] FCA 1508 (1995) 59 FCR 258	
Musapeta v MIAC [2007] FMCA 729	
Weerasinghe v MIMIA [2004] FCA 261	Summary

Relevant legislative amendments

Title	Reference number
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012, No.256
Migration Amendment (2015 Measures No. 1) Regulation 2015	SLI 2015, No.34
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (No. 90 of 2018)	C2018A00090
Migration Amendment (Enhanced Integrity) Regulations 2018	F2018l01707

Available Decision Templates/Precedents

There is one subclass specific template:

- Subclass 402 visa refusal – this template is suitable for all Subclass 402 visa applications. The template asks users to select from one of the three visa streams (Occupational trainee, Research and Professional Development streams). For each stream, the user can select from a range of individual criteria in issue (e.g. Schedule 3, age, English, genuine temporary stay, sponsorship, employment, program, finances, other etc.).

Last updated/reviewed: 16 January 2019

Temporary Activity Visas
Class GG - Subclass 408 (Temporary Activity)
Class GF - Subclass 407 (Training)

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Overview

The Temporary Activity (Class GG) visa, which contains the Subclass 408 (Temporary Activity) visa, and the Training (Class GF) visa, which contains the Subclass 407 (Training) visa, commenced on 19 November 2016.[1] They are part of the temporary work visa framework, which permits various types of work and activity in Australia, and were introduced as part of the Government's visa simplification and deregulation and digital transformation agendas.[2] The new visa types were accompanied by associated changes designed to streamline the previously existing requirements of sponsorship, nomination, visa application and grant.[3]

The Subclass 408 visa replaced a number of visas and streams that were in place prior to 19 November 2016, including the Subclass 401 (Temporary Work (Long Stay Activity)) visa and the Research stream in the Subclass 402 (Training and Research) visa.[4] This is reflected in the variety of activity types covered by the visa, such as sports, religious work and research, and the structure of the visa, which requires both common and stream-specific criteria to be satisfied.

The Subclass 407 visa replaced the now repealed Subclass 402 (Training and Research) (Class GF) visa.[5] There is a single set of primary visa criteria for this visa, which are similar to those which were in the occupational training stream of the Subclass 402 visa.

There are various sponsorship and nomination requirements for these visas, discussed under the heading Visa Criteria, below. For information about sponsorship and nomination requirements, see the MRD Legal Services Commentaries Temporary Work Sponsor and Temporary Work Nominations.

Merits review

Subclass 408

Onshore visa applications

A decision to refuse a Subclass 408 visa is reviewable under Part of 5 of the *Migration Act 1958* (the Act) if the visa applicant made the application while in the migration zone (s.338(2)).[6] In that circumstance a review application must be made by the visa applicant.[7]

Offshore visa applications

The decision will also be reviewable if the visa applicant made the application while outside the migration zone, and they were sponsored by an Australian citizen / permanent resident, company or partnership that operates in the migration zone, a New Zealand citizen who holds a special category visa, or, for decisions made after 13 December 2018, a Commonwealth agency (s.338(9) and

[1] Introduced by the Migration Amendment (Temporary Activity) Visas Regulation 2016 (F2016L01743).
[2] See Explanatory Statement to F2016L01743, p.1.
[3] See Explanatory Statement to F2016L01743, p.1.
[4] Other visas / streams it replaced were: the Invited Participant stream in the Subclass 400 (Temporary Work (Short Stay Activity)) visa; the Subclass 416 (Special Program) visa; the Subclass 420 (Temporary Work (Entertainment)) visa; and the Subclass 488 (Superyacht Crew) visa. See Legal Services Bulletin No.6/2016 for further details of the reforms.
[5] Although the Research stream of the Subclass 402 has been incorporated into the Subclass 408 visa.
[6] As Subclass 408 is not prescribed for the purposes of s.338(2)(d), only s.338(2)(a), (b) and (c) need to be satisfied.
[7] s.347(2)(a).

r.4.02(4)(p)).[8] 'Sponsored' in this context is specifically defined by reference to the definition of *passes the sponsorship test* in cl.408.111. In that circumstance it is the sponsor who must make the application for review.[9]

Because offshore Subclass 408 visa applications seeking a stay of less than 3 months do not require sponsorship, it is unlikely the Tribunal will have jurisdiction to review such decisions. The Tribunal would only have jurisdiction if the relevant organisation or institution has met the requirements of paragraph (a) of the definition of 'passes the sponsorship test', including being approved as a relevant kind of sponsor, even though they are only required to meet the less onerous 'passes the support test' criterion for the grant of the visa.

Although not free from doubt, it seems that for offshore visa refusals, the requirement in r.4.02(4)(p) that the visa applicant be sponsored 'as referred to in paragraph (a) of the definition of *passes the sponsorship test* in clause 408.111' requires that there be a current written agreement in place (per the terms of the definition), made by a relevant entity who is an approved sponsor at the time the application for review is made. It does not appear r.4.02(4)(p) will be met where an application for approval as a sponsor is still pending with the Department, or has been refused but is the subject of a pending Tribunal review application. For further assistance please contact MRD Legal Services.

Subclass 407

A decision to refuse a Subclass 407 visa is reviewable under Part 5 of the Act in the following circumstances.

Decisions made before 13 December 2018

- if the visa applicant made the application while in the migration zone, the applicant is sponsored by an approved sponsor at the time the application for review is made *or* an application for review of a decision not to approve the sponsor has been made and that decision is pending;[10] or
- if the visa applicant made the application while outside the migration zone, and the visa applicant was sponsored or nominated as required by a criterion for the grant of the visa by an Australian citizen / permanent resident, company or partnership that operates in the migration zone or a New Zealand citizen who holds a special category visa.[11]

Applications for review in the former circumstances must be made by the visa applicant,[12] and in the latter the sponsor or nominator.[13]

[8] For decisions made before 13 December 2018, r.4.02(4)(p)(ii) as inserted by F2016L01743 sets out these types of sponsors. For decisions made from this date, r.4.02(4)(p)(ii) as substituted by the Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707) provides that a nominator or sponsor must be a person, company or partnership referred to in r.4.02(4AA), which lists the same categories of sponsors, with the addition of Commonwealth agencies.
[9] s.347(2)(d); and r.4.02(5)(o) as inserted by F2016L01743.
[10] s.338(2)(d) and r.4.02(1A)(b) as substituted by F2016L07143. Although there has been no judicial consideration of s.338(2) as it applies to subclass 407 visa refusal decisions, there has been considerable recent consideration of this provision as it applies to subclass 457 visa refusal decisions including, for example, what factual circumstances will satisfy the requirement that a visa applicant is 'sponsored by an approved sponsor'. This body of case law appears applicable in this context, because of the similarity of the visa schemes. For further discussion, see the MRD Legal Services commentary page Subclass 457 visa.
[11] r.4.02(4)(o) as inserted by Migration Amendment (Enhanced Integrity) Regulations 2018. See the MRD Legal Services commentary page Subclass 457 visa for discussion of the (relevantly) identically worded r.4.02(4)(l).
[12] s.347(2)(a).
[13] s.347(2)(d) and r.4.02(5)(n).

Decisions made on or after 13 December 2018

- If the visa applicant made the application while in the migration zone, one of these circumstances must exist at the time of the refusal decision;
    - the applicant is identified in an approved nomination that has not ceased; *or*
    - a review of a decision not to approve the sponsor is pending; *or*
    - a review of a decision not to approve the nomination is pending; *or*
    - except if it is a criterion for the grant of the visa that the applicant is identified in an approved nomination that has not ceased, the applicant is sponsored by an approved sponsor (this option will only apply where the sponsor is a Commonwealth agency);[14] *or*
    - the applicant is a secondary applicant.[15]
- If the visa applicant made the application while outside the migration zone, one of these circumstances existed at the time of the refusal decision;
    - the applicant is identified in an approved nomination that has not ceased, and the nominator was at the time the nomination was approved, a person, company or partnership referred to in r.4.02(4AA); *or*
    - a review of a decision not to approve the proposed sponsor is pending and the proposed sponsor was a person, company or partnership referred to in r.4.02(4AA); *or*
    - a review of the decision not the approve the nomination is pending and the nominator was a person, company or partnership referred to in r.4.02(4AA); *or*
    - the applicant is a secondary applicant; *or*
    - except if it is a criterion for the grant of the visa that the applicant is identified in an approved nomination that has not ceased, the applicant is sponsored by an approved sponsor and the sponsor is, at that time, a Commonwealth agency.[16]

Applications for review relating to onshore applicants must be made by the visa applicant[17] or, for secondary applicants, 'a person to whose application the decision relates'.[18] For offshore applications,

[14] s.338(2)(d) as substituted by *Migration and Other Legislation Amendment (Enhanced integrity) Act 2018 No.90, 2018*. For prescribed visas, including Subclass 407 (Training), which require approval of a nomination, one of s.338(2)(d)(i)(ii) or (iii) must be met at the time of the refusal decision (cl.407.214). For prescribed visas which do not need a nomination such as Subclass 407 (Training) where the sponsor is a Commonwealth agency, one of s.338(2)(d)(ii) or (iv) must be met at the time of the refusal decision (cl.407.213).

[15] s.338(9) and r.4.02(4)(q), which was inserted by F2018L01707, provides that a decision to refuse to grant a visa prescribed under r.4.02(1A) (which includes Subclass 407) is reviewable if the non-citizen did not seek to satisfy the primary criteria and the grant of the visa was refused because they did not meet the secondary criteria, and s.338(2)(a)-(c) are met in relation to the non-citizen and the visa.

[16] s.338(9) and r.4.02(4)(o) as substituted by F2018L01707. The final option will only apply where the sponsor is a Commonwealth agency as there is no nomination requirement. Regulation 4.02(4AA) requires the nominator or sponsor to be an Australian citizen, company or partnership that operates in the migration zone, holder of a permanent visa, or New Zealand citizen who holds a special category visa or a Commonwealth agency.

[17] s.347(2)(a).

[18] s.338(9) and r.4.02(5)(p) as inserted by F2018L01707.

the person with standing is the person who applied to become the sponsor or who nominated the applicant.[19]

Where there are combined onshore review applications and the Tribunal does not have jurisdiction to review the decision in relation to the primary applicant because s.338(2)(d) is not met, it will have jurisdiction in relation to the secondary applicants under s.338(9) and r.4.02(4)(q) (assuming the review application is otherwise valid). In these circumstances, the finding of no jurisdiction in relation to the primary applicant should be put to any secondary applicants under s.359A (or s.359AA). There would also be no basis for a fee refund,[20] even though the review application would be futile.

Visa application requirements

Subclass 408

The requirements for a valid Subclass 408 visa application are set out in item 1237 of Schedule 1 to the Migration Regulations 1994 (the Regulations), and include the following requirements:

- **form** – as specified in a legislative instrument (see TempWorkApps tab of the Register of Business Instruments for current instrument);[21]
- **manner and place** – as specified in a legislative instrument, currently requires it to be an online application (see TempWorkApps tab of the Register of Business Instruments for current instrument);[22]
- **fee** – there are reduced fees for certain applicants specified by legislative instrument, currently for those applicants seeking to participate in an Australian Government endorsed event and for certain entertainment applicants (see TempWorkApps tab of the Register of Business Instruments for current instrument);[23]
- **location** – visa applicant can be in or outside Australia when the application is made, but not in immigration clearance;[24]
- **sponsorship** – except for applicants seeking to participate in an Australian Government endorsed event and applicants outside Australia seeking a stay of less than 3 months, the application must specify a person who has agreed to be the applicant's sponsor and who is either a temporary activities sponsor or a person who has applied to be a temporary activities sponsor and whose application is yet to be decided;[25]

[19] s.347(2)(d) and r.4.02(5)(n) as amended by F2018L01707.
[20] Fees can be refunded in the limited circumstances prescribed in r.4.14.
[21] Item 1237(1).
[22] Item 1237(3), item 1 in table.
[23] Item 1237(2).
[24] Item 1237(3), item 2 in table.
[25] Item 1237(4)-(5). This requirement can also be met, for visa applications made before 18 May 2017, by a person who is or has applied for approval as a long stay activity sponsor, a training and research sponsor, a special program sponsor, an entertainment sponsor or a superyacht crew sponsor.

- **last visa held** – there are certain requirements relating to an applicant's current or last held visa;[26]

- **declaration** – the primary visa applicant must make declaration as to whether or not any applicant has engaged in conduct which would be in contravention of s.245AS(1), a provision essentially prohibiting the giving of a payment or other benefit in return for sponsorship.[27]

Subclass 407

The requirements for a valid Subclass 407 visa application are set out in item 1238 of Schedule 1 to the Regulations, and are essentially the same as listed above for the Subclass 408 visa, with the exception of the requirements relating to sponsorship, which are as follows:

- the application must specify the person who has agreed to be the applicant's approved sponsor, that sponsor must be a temporary activities sponsor or a person who has applied to be a temporary activities sponsor and whose application is yet to be decided;[28] and

- unless that person is a Commonwealth agency, that person must have nominated a program of occupational training in relation to the applicant, this nomination must be identified in the visa application and either be approved or pending.[29]

Visa criteria

Subclass 408

A primary visa applicant must satisfy all of the common criteria set out in Subdivision 408.21 of Schedule 2 to the Regulations and, in order to satisfy common criterion cl.408.219A, meet the requirements of one of 10 alternative clauses set out in Subdivision 408.22 such that it can be said one of these clauses applies to the applicant. Most of the clauses have different alternatives within them, for example the sport clause has within it one set of requirements for people wanting to train at an elite level and another set for people already playing or coaching or adjudicating at an elite level.[30] All criteria must be satisfied at the time a decision is made on the application.[31]

Common criteria

The common criteria are:

- **no adverse consequences for Australian employment / training** – the applicant does not intend to engage in activities that will have adverse consequences for employment or training

[26] Item 1237(3), items 3-5 in table.
[27] Item 1237(3), item 6 in table.
[28] This requirement can also be met, for visa applications made before 18 May 2017, by a person who is or has applied for approval as a professional development sponsor or a training and research sponsor: item 1238(3), table item 4(b).
[29] Item 1238(3) items 3-5 in table.
[30] cl.408.222(2) and (3).
[31] See Note 2 under Heading to Subdivision 408.2.

opportunities, or conditions of employment, for Australian citizens or Australian permanent residents;[32]

- **health insurance** – must have adequate arrangements for period of intended stay;[33]
- **genuine temporary entrant** – the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted, having regard to compliance with past visa conditions and other matters (see below for further discussion);[34]
- **visa held** – the applicant must not hold a permanent visa or a temporary visa of a kind specified by legislative instrument (none currently specified);[35]
- **adequate means of support** – the applicant has adequate means or access to adequate means to support themselves during the period of intended stay;[36]
- **public interest and special return criteria –** various must be satisfied;[37]
- **no payment for visas conduct** – the applicant has not, in the previous 3 years, engaged in conduct in contravention of ss.245AR(1), 245AS(1), 245AT(1) or 245AU(1) of the Act (essentially relating to payments for visas or sponsorship) or that it is reasonable to disregard such conduct;[38]
- **no work as entertainer** – the applicant cannot be performing as an entertainer or otherwise be involved in entertainment production, unless they meet the specific requirements of the Australian Government endorsed events or entertainment alternative clauses (cl.408.229 or 408.229A);[39]
- **alternative clause applies** – it is a common criterion that one of the alternative clauses set out in Subdivision 408.22 applies to the applicant.[40]

Alternative criteria

Subdivision 408.22 sets out a number of alternative clauses, one of which must apply to the applicant in order for the applicant to satisfy the primary criterion in cl.408.219A.[41] Each alternative includes requirements relating to the particular activity that the applicant proposes to undertake and most of the alternatives require that the sponsoring organisation or institution either 'passes the sponsorship test' or, if the visa application is made offshore and the length of proposed stay is less than three months, 'passes the support test'. These terms are both defined in cl.408.111 and discussed further below.

[32] cl.408.211.
[33] cl.408.212.
[34] cl.408.213. The relevant considerations are: if the applicant has held a substantive visa, whether they have complied substantially with the conditions to which the last substantive visa, or any subsequent bridging visa, held by the applicant was subject; and whether the applicant intends to comply with the conditions to which the Subclass 408 visa would be subject and any other relevant matter.
[35] cl.408.214.
[36] cl.408.215.
[37] cl.408.216 & 408.217. Relevant criteria to be satisfied include health criterion 4005 (see Health Criteria commentary page for further discussion) and PIC 4020 relating to the provision of false or misleading information or bogus documents (see the Bogus Documents, False or Misleading Information, PIC 4020 commentary page for further discussion).
[38] cl.408.218.
[39] cl.408.219.
[40] cl.408.219A.
[41] Note that one of the requirements of the Domestic Worker clause (cl.408.224(b)(ii)) was amended to refer to the new 482 visa, with affect for all live applications, on 18 March 2018: Migration Legislation Amendment (Temporary Skills Shortgage Visa and Complementary Reforms) Regulation 2018 (F2018L000262).

The only exception is the Australian Government endorsed event stream, which does not have any sponsorship requirements and only requires an applicant to be of a class of persons specified by instrument and proposing to undertake work directly associated with an event specified by instrument.[42] To date the type of events specified are major international sporting events and government conferences. The relevant instruments can be accessed from the '408Events&Classes' tab of the Register of Business Instruments.

Subclass 407

There is a single set of criteria which a primary visa applicant must satisfy at the time of decision, as follows:

- **age** – *at the time of decision* an applicant must have turned 18 or, if not, there exist exceptional circumstances for the grant of the visa;[43]
- **English** – the applicant must have 'functional English' (as defined in s.5(2) of the Act - see the English Language Ability - Skilled/Business Visas commentary for further information);[44]
- **sponsorship** – an approved temporary activities sponsor[45] has agreed, in writing, to be the sponsor of the applicant, has not withdrawn that agreement and has not ceased to be the sponsor of the applicant at time of decision;[46]
- **nomination** – unless the approved sponsor is a Commonwealth agency, the sponsor has nominated a program of occupational training in relation to the applicant which has been approved (on the basis of the criteria in r.2.72A) and has not ceased;[47]
- **no adverse information** – either there is no adverse information known to 'Immigration'[48] about the sponsor or a person associated with the sponsor or it is reasonable to disregard any such information;[49]
- **no adverse consequences for Australian employment / training** – the applicant does not intend to engage in activities that will have adverse consequences for employment or training opportunities, or conditions of employment, for Australian citizens or Australian permanent residents;[50]
- **health insurance** – must have adequate arrangements for period of intended stay;[51]
- **genuine temporary entrant** – the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted, having regard to compliance with past visa conditions and other matters (see below for further discussion);[52]

[42] cl.408.229.
[43] cl.407.211.
[44] cl.407.212.
[45] Or, if the visa application was made on or before 18 May 2017, a professional development sponsor or a training and research sponsor.
[46] cl.407.213.
[47] cl.407.214(a)-(c).
[48] Immigration is defined in r.1.03 as 'the Department administered by the Minister administering the *Migration Act 1958*', regardless of the name of that department.
[49] cl.407.214(d). 'Adverse information' is defined in r.1.13A, 'associated with' is defined in r.1.13A.
[50] cl.407.215.
[51] cl.407.216.

- **visa held** – the applicant must not hold a permanent visa or a temporary visa of a kind specified by legislative instrument (none currently specified);[53]

- **adequate means of support** – the applicant has adequate means or access to adequate means to support themselves during the period of intended stay;[54]

- **public interest and special return criteria –** various must be satisfied;[55]

- **no payment for visas conduct** – the applicant has not, in the previous 3 years, engaged in conduct in contravention of ss.245AR(1), 245AS(1), 245AT(1) or 245AU(1) of the Act (essentially relating to payments for visas or sponsorship) or that it is reasonable to disregard such conduct.[56]

Key legal issues

Genuine intention requirement

It is a primary visa criterion for all Subclass 408 and Subclass 407 visas that the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted, having regard to:

- if the applicant has held a substantive visa - whether the applicant has complied substantially with the conditions to which the last substantive visa, or any subsequent bridging visa, held by the applicant was subject;

- whether the applicant intends to comply with the conditions to which the Subclass 408/407 (as applicable) visa would be subject; and

- any other relevant matter.[57]

This criterion should be considered at the time of decision.[58]

A similar requirement must be met by secondary Subclass 408 and Subclass 407 visa applicants, however in that instance intention to comply with conditions is not a mandatory consideration.[59]

Complied substantially with conditions of last visa

The wording of cl.408.213(a) and 407.217(a) – *'conditions to which the last substantive visa, or any subsequent bridging visa…was subject*' – creates some uncertainty as to the scope of the

[52] cl.407.217. The relevant considerations are: if the applicant has held a substantive visa, whether they have complied substantially with the conditions to which the last substantive visa, or any subsequent bridging visa, held by the applicant was subject; and whether the applicant intends to comply with the conditions to which the Subclass 407 visa would be subject and any other relevant matter.
[53] cl.407.218.
[54] cl.407.219.
[55] cl.407.219A & 407.219B. Relevant criteria to be satisfied include health criterion 4005 (see Health Criteria commentary page for further discussion) and PIC 4020 relating to the provision of false or misleading information or bogus documents (see the Bogus Documents, False or Misleading Information, PIC 4020 commentary page for further discussion)
[56] cl.407.219C.
[57] cl.408.213 & cl.407.217.
[58] Note 2 under the 408.2 and 407.2 division headings makes clear that all criteria must be satisfied at the time a decision is made on the visa application.
[59] cl.408.315 & cl.407.315.

consideration and which visa (or visas) must be assessed for substantial compliance. On one view, the use of the word 'or' suggests that this provision requires consideration of compliance with the last visa held by the applicant, whether that is/was a substantive visa or a bridging visa held subsequently to their last substantive visa.[60] It could alternatively be argued use of the word 'or' effectively acts as a conjunction conditional on the relevant circumstance arising, such that consideration of substantial compliance is directed to the last substantive visa and any subsequent bridging visas *where applicable*. Given this provision also includes the option for the decision maker to have regard to 'any other relevant matter', which would also allow the decision maker to consider the applicant's compliance with visa conditions attached to any previous visa, this second interpretation would appear preferable as it is consistent with the context in which the issue of substantial compliance is being considered.[61]

What constitutes 'substantial compliance' with visa conditions has been considered by the courts in the student visa context, as discussed in the MRD Legal Services commentary: Substantial Compliance with Visa Conditions. It appears that the same principles would apply here.

Conditions to which Subclass 408 or Subclass 407 visa would be subject

While it is clear that conditions to which the Subclass 408/407 visa 'would be subject' includes mandatory conditions, there is some doubt as to whether this also includes discretionary conditions. On one view, if the Tribunal considers that certain discretionary conditions would be imposed in the future, then those could be seen as conditions to which the visa 'would' be subject in the future. However, on another view, given the statutory distinction between conditions to which a visa 'is subject' and conditions which the Minister 'may impose' on a visa,[62] the phrase '*conditions to which the Subclass 408 visa would be subject*' (and the 407 equivalent) could be limited to those conditions to which a visa 'is subject' if the visa is granted, and not those which 'may be imposed'.[63] Given also the speculative nature of assessing whether a discretionary condition may or may not be imposed by a decision-maker in the future, and the circularity in attempting to decide this when considering whether the applicant intends to comply with those conditions, the better view is to consider only mandatory conditions as conditions to which the visa 'would be subject'.

For primary Subclass 408 visa applicants the conditions which must be imposed are 8107 (maintain participation in activity) and 8303 (no disruptive / violent conduct).[64] Additionally, for visas granted on the basis of the entertainment clause applying, condition 8109 (time / place of engagements must not change) must be imposed.[65]

[60] This wording is in contrast to (now repealed) criteria specified for the grant of various student visas, cl.57x.235 for Subclasses 570 and 572-575, and cl.571.237 and 576.233 for Subclasses 571 and 576 respectively, which required that '[i]f the application was made in Australia, the applicant has complied substantially with the conditions that apply or applied to the last of any substantive visas held by the applicant, **and** to any subsequent bridging visa'.
[61] Departmental guidelines on cl.408.213 refer to the general guidelines on 'Substantial compliance with visa conditions' in PAM3 - Sch8 - Visa conditions - About visa conditions', which do support the reading of 'or' as 'as well as' if applicable. However, these guidelines state that it 'does not deal with the Schedule 2 'genuine intention' primary/secondary criterion for certain temporary work visas that includes 'substantial compliance' as a factor in assessing that 'genuine intention' criterion. Nothing in this Part is to be regarded as relevant in assessing those various Schedule 2 'genuine intention' criteria': PAM3 - Sch8 - Visa conditions - About visa conditions at [6] (reissued 18/4/15).
[62] A visa is either subject to specified conditions (s.41(1) and r.2.05(1)) or the Minister may impose certain conditions on a visa (s.41(3) and r.2.05(2)): *Krummrey v MIMIA* (2005) 147 FCR 557 at [28].
[63] The Full Federal Court in *Krummrey v MIMIA* at [29] interpreted the language of a condition which 'must be imposed' in Schedule 2 as being a condition to which visas 'are' subject. There is no further action of 'imposing' the condition.
[64] cl.408.611(a).
[65] cl.408.611(b).

For primary Subclass 407 visa applicants the conditions which must be imposed are 8102 (no work), 8303 (no disruptive / violent conduct), 8501 (maintain health insurance) and 8516 (continue to satisfy visa criteria).[66]

Any other relevant matters

What is encompassed by the requirement to have regard to 'any other relevant matter' will necessarily depend on the facts of the particular case.

In respect of the Subclass 408 criterion, Departmental guidelines (PAM3) outline a range of matters which may be relevant:

- the applicant's circumstances in their home country – this may include their personal circumstances such as their current employment, family situation, future prospects and general circumstances of their country such as civil unrest, economic strife or famine;
- whether the position has been created to secure the person's stay in Australia;
- the personal attributes and vocational or employment background of the applicant and their ability to undertake the position;
- whether the applicant's proficiency in English is consistent with their supported activities (noting applicants are not required to undertake English language testing).[67]

The guidelines also direct decision makers to consider whether the applicant is attempting to circumvent proper migration channels through use of temporary visas to maintain on-going residence in Australia.[68]

While PAM3 may provide guidance as to matters which may be relevant, the specific circumstances of the individual case should always be considered, and care taken not to treat this policy as a legislative requirement. For further discussion on the role of policy in Tribunal decision making, please see the MRD Legal Services Commentary Application of Policy.

For Subclass 407 visas, cl.407.217, Departmental policy states that 'this criterion must be assessed in accordance with the direction given by the Minister under section 499 for Genuine Temporary Entry'.[69] However, no such direction appears to have been given.[70]

Can a Subclass 408 visa applicant change activities?

Yes, subject to the application being valid for the other activity type, there doesn't appear to be any restriction on a visa applicant changing the basis for their application, provided the requirements of the other clause are met.

[66] cl.407.611.
[67] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Genuine entrant for temporary stay – clause 408.213 (issued 19 November 2016).
[68] While the guidelines go on to limit delegates in granting visas where this would result in a cumulative stay of longer than four years, there is no legislative basis for this. While the total length of stay may be relevant in assessing an applicant's intentions, a genuine intention to stay temporarily is not necessarily inconsistent with being in Australia for a cumulative period of over four years.
[69] PAM3 – Migration Regulations – Schedules – Training (Subclass 407) visa – Part 6 Assessing a Training visa (subclass 407) application - Schedule 2 eligibility criteria - Primary criteria - Genuine Temporary Entry (reissued 12 May 2017).
[70] Directions 53 & 69 relate to a similar genuine temporary entrant requirement for student visas, but they are expressed to apply only to student visas and do not appear to apply more broadly.

Although the activity types covered by the Subclass 408 visa are quite varied, such that in practice it is unlikely an applicant would meet the substantive criteria of more than one alternative clause, where there are closely related alternatives within the one clause (for example sports trainee for cl.408.222(2) and elite player/coach/instructor/adjudicator for cl.408.222(3)) it may be possible for an applicant to successfully change the basis of their application.

However, there are some Schedule 1 requirements which will mean that a visa application will not be valid for other activities. In particular, certain applicants specified by legislative instrument are required to pay no visa application fee or a much reduced fee (currently certain Australian Government endorsed event and entertainment applicants – see 408Events&Classes & 408ReducedVAC tabs of the Register of Business Instruments).[71] Further, an application for an Australian Government endorsed event activity visa will not identify a sponsor, as sponsorship is not a requirement, but this is required for a valid application for other activities.[72]

Sponsorship / support test

With the exception of the Australian Government endorsed event clause, each of the alternative clauses for the Subclass 408 visa requires that there is a sponsor who either 'passes the sponsorship test' or, where the visa application is made offshore for an intended stay of less than 3 months, a supporter who 'passes the support test', as defined in cl.408.111. Within particular activities there are different requirements as to the identity of the sponsor or supporter. For example, for the sports clause to apply a 'sporting organisation' as defined in r.2.57[73] must pass the relevant test, and for the entertainment clause to apply, there must be an 'eligible sponsor' or 'eligible supporter' as relevant, defined in cl.408.229A.

Passes the sponsorship test

The definition of 'passes the sponsorship test' requires:[74]

- the person is an approved sponsor who has agreed to writing to be the sponsor, and has not withdrawn that agreement or ceased to be the sponsor of the applicant, and
- there is no adverse information known to Immigration about the person or an associated person, or it is reasonable to disregard such information, and
- if the person is not a temporary activities sponsor – the application was made on or before 18 May 2017.

The term 'approved sponsor' is defined in s.5 of the Act as (relevantly) a person who has been approved by the Minister under s.140E in relation to a class prescribed by the regulations for the purpose of s.140E(2) and whose approval has not been cancelled under s.140M, or otherwise ceased to have effect under s.140G in relation to that class. Section 140G provides, among other things, for a specified duration of sponsorship being imposed as a term of the approval. Accordingly, the relevant sponsorship must still be in force at the time a decision is made on the visa application in order for the organisation / institution to pass the sponsorship test.

[71] Schedule 1, item 1237(2)(a)(i)-(iii).
[72] Item 1237(3) item 3 and 1237(4)-(5).
[73] See cl.408.111.
[74] cl.408.111.

The 'no adverse information requirement' mirrors a criterion for approval as a temporary work sponsor, but is included as a visa criterion to ensure that a visa application can be refused if adverse information comes to light about a sponsor after the approval of the sponsorship.[75] Departmental policy indicates that specific areas for concern in this caseload are the use of unpaid positions in contravention of Australian workplace law and the compliance of religious institutions with local government zoning laws.[76] For further discussion of these requirements, including the definitions of 'adverse information' and 'associated with', please see the discussion of the equivalent sponsorship criterion in the Temporary Work Sponsor commentary page. Note that the definitions of these terms changed on 18 March 2018 (for visa applications made on or after that date).[77]

The final requirement is a provision designed to allow sponsors approved before the reform of this scheme on 19 November 2016 to continue to sponsor visa applicants for a limited period.

Passes the support test

'Passes the support test' essentially introduces a less onerous type of 'sponsorship' where a visa application is made overseas for a proposed period of stay of less than three months. It requires only that:[78]

- a letter of support is provided if requested by the Minister, outlining various specified details of the proposed activity;[79] and
- that there is no 'adverse supporter information' known to Immigration about the person or organisation or a person associated with the person or organisation, or it is reasonable to disregard any such information.

The term 'adverse supporter information' is defined in cl.408.112, however the applicable version of this clause depends on the date of visa application. For applications made before 18 March 2018, the definition set out in cl.408.112 is in very similar terms to 'adverse information' as used in the definition of 'passes the sponsorship test' as discussed above. The revised version of cl.408.112, which applies to visa applications made on or after 18 March 2018,[80] contains a similar list of events which might constitute adverse supporter information (noting the definition is non-exhaustive), but without the time restriction of the events occurring in the previous 3 years, and the addition of an additional example – being the provision of a bogus document or false or misleading information.

Can a visa applicant change sponsors / supporters?

Yes.

For visa applications where 'passing the sponsorship test' is a criterion (i.e. applications made in Australia, or offshore for more than a 3 month stay), there is a Schedule 1 requirement to identify a person who has agreed to be the applicant's sponsor and who is either an approved sponsor of a

[75] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Part 4 – Assessing a Temporary Activity visa application – the sponsorship test and the support test (issued 19 November 2016).
[76] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Part 4 – Assessing a Temporary Activity visa application – the sponsorship test and the support test – unpaid activities and PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – 3. Religious worker 408.223 – Religious institution – does it pass the sponsorship test – adverse information (issued 19 November 2016).
[77] F2018L00262.
[78] cl.408.111.
[79] Note that PAM3 guidelines indicate that the Department will seek more details, as a matter of policy, than reflected in the terms of cl.408.111: see PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa - Assessing a Temporary Activity visa application – the sponsorship test and the support test – meaning of 'passes the support test' (issued 19 November 2016).
[80] Clause 408.112 was amended by F2018L00262.

relevant kind or seeking such approval. However, there is no requirement that this person be the same as the person or organisation which is then relied on to meet the relevant Schedule 2 criterion. The possibility of the sponsor changing during the course of a visa application being processed is specifically contemplated by a note to the definition of 'passes the sponsorship test' which provides that 'the sponsor may be, but is not required to be, the same as the sponsor (or applicant for approval as a sponsor) specified in the visa application'.

For visa applications where 'passing the support test' is a criterion, there is no requirement that the supporter be identified at the visa application stage and no other restriction which would prevent the person or organisation changing during the course of a visa application being decided.

Religious Workers

For a Subclass 408 visa, the Religious Worker alternative clause sets out requirements substantively the same as the criteria in the Religious Worker stream of the repealed Subclass 401 visa and related nomination criteria.[81] The clause will apply if the following requirements are met:

- the applicant seeks to enter or remain in Australia to provide services as a religious worker; and
- the applicant has been invited to provide the services by a religious institution that is lawfully operating in Australia; and
- the applicant will be engaged on a full-time basis to work or participate in an activity in Australia that is predominately non-profit in nature, and directly serves the religious objects of the religious institution; and
- the applicant has appropriate qualifications and experience to undertake the work or activity; and
- the religious institution passes the sponsorship test or support test, as applicable (see above for discussion of these alternatives).

What is a religious institution?

'Religious institution' is defined in r.1.03 as a body:

(a) the activities of which reflect that it is a body instituted for the promotion of a religious object; and

(b) the beliefs and practices of the members of which constitute a religion due to those members:

(i) believing in a supernatural being, thing or principle; and

(ii) accepting the canons of conduct that give effect to that belief, but that do not offend against the ordinary laws; and

[81] Explanatory Statement to F2016L01743, p.21.

(c) that meets the requirements of section 50-50 of the *Income Tax Assessment Act 1997*; and

(d) the income of which is exempt from income tax under section 50-1 of that Act.

Section 50-1 of the *Income Tax Assessment Act 1997* provides that the income of certain entities is exempt from income tax including registered charities. However, charities are not automatically exempt. Section 50-50 places conditions on the exemption, which relate to its physical presence in Australia, compliance with governing rules and application of income and assets solely for the purpose for which it is established. Additionally, the institution must be registered under the *Australian Charities and Not-for-Profits Commission Act 2012,*[82] and endorsed by the Commissioner as exempt from income tax.[83] If an institution has been endorsed as exempt, this means the requirements of both (c) and (d) of the definition of 'religious institution' are met.

Generally, a charity which has been endorsed as exempt from income tax will have a document from the Commissioner confirming this, referred to as 'Evidence of Notification of Endorsement for Charity Tax Concessions'. Alternatively, the status of a particular institution can be checked through the Australian Charities and Not for Profits Commission (www.acnc.gov.au).[84]

Even if the institution has obtained this tax exemption, a decision maker would still need to consider whether the requirements of (a) and (b) are met before concluding whether a particular institution meets the definition of 'religious institution' under the Regulations.

What activities are covered?

Two requirements of cl.408.223 relate to the activity to be performed in Australia: the applicant must be seeking to enter or remain in Australia to provide services as a religious worker (purpose of stay), and to work or participate on a full-time basis in an activity in Australia that is predominately non-profit in nature, and that directly serves the religious objects of the religious institution.[85]

In determining whether an applicant seeks to enter or remain in Australia to provide services as a 'religious worker' (a term which is not defined), it may be relevant to consider whether someone other than a religious worker could provide the proposed services. For example, a teacher looking after the social and personal well-being of children and young adults may be characterised as pastoral care, but may not require a qualified religious worker.[86]

In determining whether the activity 'directly serves' the religious objects of the institution, it will generally be relevant to consider those objects, the relationship between the proposed activity and the objects, and the ordinary meaning of the words 'directly' (in a direct way) and 'serves' (be of use to, contribute to, promote).[87] Such activities will generally involve work of a devotional nature, for example conducting worship, providing spiritual leadership, teaching of religion, ministering, providing pastoral care or proselytising.[88]

[82] s.50-47 and definition of 'ACNC type entity' in s.995-1 of the *Income Tax Assessment Act 1997* and s.25-5(5) of the *Australian Charities and Not-for-Profit Commissions Act 2012*.
[83] s.50-52 and s.50-105 of the *Income Tax Assessment Act 1997.*
[84] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa –Activity type criteria – 3.Religious Worker 408.223 – Religious Institution (issued 19 November 2016).
[85] cl.408.223(a) & (c).
[86] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa –Activity types under the GG-408 visa – 3. Religious Worker (issued 19 November 2016).
[87] Definitions drawn from Macquarie Dictionary online (www.macquariedictionary.com.au accessed 25 September 2017).
[88] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa –Activity type criteria – 3.Religious Worker 408.223 – Work or participation that directly serves the religious objects of the institution (issued 19 November 2016).

PAM3 lists the following types of work/activity which are better characterised as support functions, and would not meet this requirement (where it is the main purpose of the proposed stay):

- providing ancillary support to a religious institution such as domestic work, preparing magazines/newsletters, providing meals for the community,
- being involved in building or construction projects for a religious institution, or
- undertaking training or courses to attain a qualification within the institution or organisation.[89]

However, these policy guidelines are not binding and should not be applied as a rule. There may be circumstances where this type of work could properly be characterised as directly serving the religious objects of an institution.

The requirement that the applicant will be 'engaged on a full-time basis' is not further defined by the Regulations. Departmental policy refers to the Fair Work Ombudsman definition, considering full-time work as involving work of at least 38 hours a week, with the proviso that a flexible approach may be needed to take account of work serving the congregation outside standard working hours (e.g. out of hours pastoral care) and multiple duties being carried out.[90]

What are appropriate qualifications and experience?

An applicant seeking to meet the requirements of the Religious Worker clause must have appropriate qualifications and experience to undertake the work or activity proposed.[91] What is required will necessarily depend on the particular work proposed, and may also turn on the practices of a particular institution. For example, non-qualified missionaries are common within the Church of Jesus Christ of Latter Day Saints (Mormon Church), such that standard training for a mission may be the only appropriate qualification or experience required to undertake the proposed activity.[92] Relevant evidence might include employment records, employment references, records of study at theological institutions or evidence of the usual practice of the relevant religious institution.[93]

Relevant Case law

Chowdhury v MIMIA [2005] FMCA 1243	
Gurung v MIMIA [2002] FCA 772	Summary
Jayasekara v MIMIA [2006] FCAFC 167; (2006) 156 FCR 199	Summary

[89] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa –Activity type criteria – 3.Religious Worker 408.223 – Work or participation that directly serves the religious objectives of the institution (issued 19 November 2016).
[90] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Activity type criteria – 3.Religious Worker 408.223 – Engaged on a full-time basis (issued 19 November 2016).
[91] cl.408.223(d).
[92] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Activity type criteria – 3.Religious Worker 408.223 – Religious Work (issued 19 November 2016).
[93] PAM3 – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Activity type criteria – 3.Religious Worker 408.223 – Religious Work (issued 19 November 2016). Note that Department policy states an applicant must have had an ongoing association of more than 2 years with the institution and to have previously served in a similar capacity to meet this requirement. While these type of factors may be relevant to assessing cl.408.223(d), to the extent the policy frames them as stand-alone requirements, it exceeds the terms of the Regulations and should not be applied.

Kim v Witton [1995] FCA 1508; (1995) 59 FCR 258	
Musapeta v MIAC [2007] FMCA 729	
Weerasinghe v MIMIA [2004] FCA 261	Summary

Relevant legislative amendments

Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (No. 90)	C2018A00090
Migration Amendment (Enhanced Integrity) Regulations 2018	F2018L01707

Available Decision Templates/Precedents

A Subclass 408 visa refusal precedent is available for use which provides text for a number of issues including 'genuine intention to stay temporarily' and issues arising under the alternative activities/streams which can be used to satisfy cl.408.219A.

Last updated/reviewed: 11 February 2019

Subclass 457 visa

Overview

Tribunal's jurisdiction – primary decisions made after 13 December 2018

- Onshore visa applications
  - Primary visa applicants
  - Secondary visa applicants
    - Combined review applications
- Offshore visa applications
  - Secondary visa applicants

Tribunal's jurisdiction – primary decisions made before 13 December 2018

- Onshore visa applications
  - Standard business sponsor stream
    - Visa applications from 14 September 2009
    - Visa applications before 14 September 2009
  - Labour agreement stream
  - Other streams
  - Secondary visa applicants
  - Effect of sponsorship or nomination cessation/cancellation or sponsorship bar on jurisdiction
- Offshore visa applications
  - Secondary visa applicants

Requirements for valid visa application

Time of application criteria

Time of decision criteria

- Complied substantially with conditions on previous visas: cl.457.221
  - Condition 8107
- Must hold substantive visa: cl.457.221A
- The visa streams: cl.457.223
  - Labour agreements – cl.457.223(2)
  - Standard business sponsorship - cl.457.223(4)
    - Approved nomination of an occupation - cl.457.223(4)(a)
    - Nominated occupation specified in an instrument – cl.457.223(4)(aa)
    - Direct employment in business of nominator – cl.457.223(4)(ba)
    - Intention to perform occupation is genuine and position is genuine – cl.457.223(4)(d)
    - Applicant has skills necessary to perform tasks of nominated occupation – cl.457.223(4)(da)
    - Applicant's skills demonstrated in the manner specified - cl.457.223(4)(e)
    - English language requirements - cl.457.223(4)(eb) and (ec)
    - No adverse information about sponsor, or reasonable to disregard information - cl.457.223(4)(f)
    - General issues arising under cl.457.223(4)

Visa applications made before 23 March 2013 - Service sellers - cl.457.223(8)
Pre-24 November 2012 entry streams – cl.457.223 (7), (7A), (9), (10)
Independent Executives - Further stay Independent Executives - cl.457.223(7), (7A)
Persons accorded certain privileges and immunities - cl.457.223(9)
Invest Australia Support Skills agreement (IASS) - cl.457.223(10)
No 'payment for visa' conduct: cl.457.223A
Other time of decision criteria: cl.457.223B - 457.228

Other issues

Circumstances applicable to grant
Family members – applying for further stay
Family members – location

Relevant case law

Relevant legislative amendments

Available decision templates

Attachments

Flowchart: Assessing English language requirements
Table: Subclass 457 – Does the Tribunal have jurisdiction under s.338(2)(d) for primary decisions made before 13 December 2018?

Overview

The Subclass 457 is a temporary visa which provides for long-term entry up to four years for people with employment in Australia. It provides streamlined entry arrangements for businesses employing staff from overseas on a temporary basis. The Subclass 457 visa is within the Temporary Business Entry Class UC, which was introduced on 1 November 1995 and provides for non-citizens with skills needed by Australian businesses to come and work temporarily in Australia. This visa was closed to new applications from 18 March 2018, and replaced with the new Class GK Subclass 482 (Temporary Skills Shortage) visa,[1] though it remains a significant caseload before the Tribunal.

On introduction the class only contained one subclass – Subclass 456 Business (Short Stay) visa. The Subclass 457 Business (Long Stay) visa was added on 1 August 1996. The Subclass 457 (Business (Long Stay)) visa was renamed the Subclass 457 (Temporary Work (Skilled)) visa for applications made from 24 November 2012.[2] The new name is defined to include the old, and vice versa.[3] The new name is intended to better reflect the purpose of the Subclass 457 visa to provide for temporary entry of skilled

[1] Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[2] Migration Amendment Regulations 2012 (No. 4) (SLI 2012, No.238).
[3] r.1.03.

workers, not to cater for temporary business visitors who have more appropriate visa options under the visitor program.[4] The Subclass 456 visa was repealed from 23 March 2013.[5]

The Subclass 457 visa underwent significant amendments from 14 September 2009 to reflect changes to the temporary work sponsorship scheme brought about by the *Migration Legislation Amendment (Worker Protection) Act 2008* and associated amending regulations.[6] From 24 November 2012, further amendments were made to the Subclass 457 visa to move the visa within the temporary work framework and to remove several 'streams' of applicant who may be granted this visa.[7] A number of integrity measures were introduced into the Subclass 457 programme through further amendments in 2013.[8]

The different 'streams' under which an applicant may be granted this visa are set out in cl.457.223.[9] While cl.457.223(1) expresses these as alternative criteria, which means that the applicant may potentially satisfy any of the streams, in practice, it should be clear from the application itself that the applicant will only have claims against a particular stream.[10]

For visa applications made on or after 23 March 2013, the entry streams under Subclass 457 are:

- employment in Australia under a labour agreement; and
- sponsorship / nomination for employment in an occupation by a standard business sponsor.

For visa applications made before this date, applicants could also satisfy an additional entry stream for service sellers representing overseas companies. In addition, for applications made before 24 November 2012, applicants could also seek to satisfy one of three further alternative streams, namely:

- Independent Executives proposing to maintain their ownership interest of a business in Australia;
- persons who will be engaged in diplomatic-type work and entitled to certain privileges and immunities; or
- employment in Australia under an Invest Australia Supported Skills (IASS) agreement.

Warning: This commentary is based on the regulations relevant to all applications made on or after 1 March 2003. If you have enquiries as to statutory framework governing applications made before that date please contact MRD Legal Services.

Tribunal's jurisdiction – primary decisions made after 13 December 2018

For primary decisions made after 13 December 2018, the Tribunal has jurisdiction to review decisions to refuse the grant of a Subclass 457 visa under s.338(2) (onshore applications) or s.338(9) (offshore

[4] Explanatory Statement to SLI 2012, No.238.
[5] The Subclass 456 visa was repealed by Migration Amendment Regulation 2013 (No.1) (SLI 2013, No. 32).
[6] Migration Amendment Regulations 2009 (No.5) (SLI 2009, No.115) as amended by Migration Amendment Regulations 2009 (No. 5) Amendment Regulations 2009 (No.1) (SLI 2009, No.203).
[7] SLI 2012, No.238. The effect of SLI 2012, No.238 is summarised in Legislation Bulletin No.9/2012, 29 October 2012.
[8] Migration Amendment Regulation 2013 (No.5) (SLI 2013, No.145). The effect of SLI 2012, No.238 is summarised in Legislation Bulletin No.10/2013, 1 July 2013.
[9] cl.457.223.
[10] The Schedule 1 requirements contain different visa application requirements depending on whether the applicant wishes to satisfy the primary criteria under cl.457.223(4) (standard business sponsor stream) or cl.457.223(2) (labour agreement stream). See items 1223(3)(d) and (da).

applications). Both s.338(2) and r.4.02(4)(l) of the Regulations (made under s.338(9)) were amended with effect from 13 December 2018. For matters where the primary decision was made before that date, please see below.

Onshore visa applications

Primary visa applicants

For onshore visa applications, a decision to refuse to grant a Subclass 457 visa is reviewable in certain circumstances as set out in s.338(2). Paragraphs (a) to (c) of s.338(2) apply in all cases, requiring that the visa could be granted to a person in the migration zone, and the person made the application in the migration zone after being immigration cleared (which would always be the case for a valid onshore Subclass 457 visa application).

Paragraph 338(2)(d) imposes an additional requirement for certain prescribed temporary visas to be reviewable (including Subclass 457).[11] There are four alternative requirements, however the fourth is only applicable if it is *not* a criterion for the grant of the visa that the non-citizen is identified in an approved nomination that has not ceased under the regulations. In each instance the requirement must be met *at the time the decision to refuse to grant the visa is made*. The alternatives are:

(i) the non-citizen is identified in an approved nomination that has not ceased under the regulations;[12] or

(ii) a review of a decision under s.140E not to approve the sponsor of the non-citizen is pending; or

(iii) a review of a decision under s.140GB not to approve the nomination of the non-citizen is pending; or

(iv) *except if it is a criterion for the grant of the visa that the non-citizen is identified in an approved nomination that has not ceased*, the non-citizen is sponsored by an approved sponsor.[13]

For primary 457 visa applicants seeking to meet the requirements of the standard business sponsor stream, it is a criterion for the grant of the visa that the applicant be identified in an approved nomination. Accordingly one of the first three alternative requirements (s.338(2)(d)(i)-(iii)) must be met, *at the time the decision to refuse to grant the visa is made*. This means that, at that point in time, a nomination identifying the applicant must be approved, or a decision not to approve their sponsor be pending review before the Tribunal, or a decision to refuse the nomination be pending review before the Tribunal, for the decision to be a Part-5 reviewable decision.

Unlike the situation for pre-13 December 2018 refusals, s.338(2)(d) will not be met where the visa applicant is identified only in a nomination application which is pending at the relevant time.[14]

[11] A Subclass 457 visa is prescribed for s.338(2)(d): r.4.02(1A).
[12] See r.2.75 for cessation of nominations associated with 457 visas.
[13] Section 338(2)(d) as introduced by the Migration and Other Legislation Amendment (Enhance Integrity) Act 2018 (No.90 of 2018), with effect for decisions made on or after 13 December 2018.
[14] This is now clear from the amended terms of s.338(2)(d), and was the intended effect: see Explanatory Memorandum to the Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017, p.6.

The following table illustrates when, having regard to the status of the associated sponsorship and nomination application process *at the time of visa refusal*, s.338(2)(d) will be satisfied, for an onshore 457 visa refusal.

		Status of **sponsor** application (s.140E)				
		Made but not yet decided	Approved	Refused, review pending	Refused, no review pending	Approval ceased
Status of **nomination** (s.140GB)	Made but not yet decided	No	No	Yes	No	No
	Approved	N/A	Yes	Yes	N/A	Possibly (within 3 months)
	Refused, review pending	Yes	Yes	Yes	Yes	Yes
	Refused, no review pending	No	No	Yes	No	No
	Ceased	No	No	Yes	No	No

Similarly, for primary visa applicants seeking to meet the requirements of the labour market stream it is a criterion for the grant of the visa that the applicant be identified in an approved nomination, such that one of the first three alternative requirements (s.338(2)(d)(i)-(iii)) must be met, *at the time the decision to refuse to grant the visa is made.* However, in practice, as there is no separate sponsor approval process requirement for the labour market stream, only two of the alternatives will be applicable – where the nomination has been approved and not ceased or where the nomination is refused with a review pending before the Tribunal.

An application for review may only be made by the non-citizen who is the subject of that decision.[15]

Secondary visa applicants

The Tribunal has jurisdiction to review decisions to refuse to grant a Subclass 457 visa to a secondary applicant under s.338(9) and r.4.02(4)(q). Regulation 4.02(4)(q) provides that a decision to refuse to grant a visa prescribed under r.4.02(1A) (which includes Subclass 457) to a non-citizen is reviewable where the non-citizen did not seek to satisfy the primary criteria and the visa was refused because they did not satisfy the secondary criteria; and the requirements of s.338(2)(a) to (c) are met in relation to the non-citizen and visa.[16] An application for review of the decision may only be made by a person to whose application the decision relates.[17]

[15] s.347(2)(a).
[16] r.4.02(4)(q) as introduced by the Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707). Section 338(2)(a) requires that the visa could be granted while the non-citizen is in the migration zone, which will be met in all cases of an application for a subclass 457 visa. Section 338(2)(b) and (c) require the applicant to be in the migration zone at the time of visa application and

These applications may also potentially be reviewable under s.338(2) on the same basis as that discussed below for decisions made before 13 December 2018. However, it would not be necessary to determine whether this is separately the case, given that if the review application did not meet the requirements in r.4.02(4)(q) (and by extension s.338(2)(a) to (c)), it would not be reviewable under s.388(9) nor s.338(2).

Combined review applications

Where there are combined review applications and the Tribunal does not have jurisdiction to review the decision in relation to the primary applicant because s.338(2)(d) is not met, it will have jurisdiction in relation to the secondary applicants under r.4.02(4)(q) (assuming the review application is otherwise valid). In these circumstances, the finding of no jurisdiction in relation to the primary applicant should be put to any secondary applicants under s.359A (or s.359AA). There would also be no basis for a fee refund,[18] even though the review application would be futile.

Offshore visa applications

For offshore applications, a decision to refuse to grant the visa is prescribed by r.4.02(4)(l) as a reviewable decision for the purposes of s.338(9) and a review of the decision can be sought by the person who applied to become the sponsor or who nominated the non-citizen.[19] The Tribunal has jurisdiction to review these decisions if the applicant is outside Australia at the time of the visa application[20] and one of three alternative requirements are met, *at the time the decision to refuse to grant the visa is made*:

(i) the non-citizen is identified in an approved nomination that has not ceased under r.2.75 and the nominator was a person, company or partnership of a particular kind; or

(ii) a review of a decision under s.140E of the Act not to approve the sponsor of the non-citizen is pending, and the sponsor was a person, company or partnership of a particular kind; or

(iii) a review of a decision under s.140GB of the Act not approve the nomination is pending, and the nominator was a person, company or partnership of a particular kind.[21]

The relevant kinds of entity are a person, company or partnership that is either:

(a) an Australian citizen; or

(b) a company that operates in the migration zone; or

not to have been in immigration clearance or have been refused immigration clearance and not subsequently immigration cleared at the time of the decision to refuse the visa.

[17] r.4.02(4)(p) as introduced by No.90 of 2018.

[18] Fees can be refunded in the limited circumstances prescribed in r.4.14.

[19] r.4.02(5)(k).

[20] Although the text of the regulation refers only to 'the time of application' without specifying whether this means the review or visa application, when read in the context of s.338 as a whole and with regard to the intention behind the insertion of r.4.02(4)(l), it is clear that the regulation was intended to apply to visa applications lodged offshore. Prior to amendments made by the Migration Amendment Regulations 2004 (No.8), a decision to refuse an application for a Subclass 457 visa lodged offshore was reviewable under s.338(5), which applies only to visas which could not be granted while the applicant is in the migration zone. Changes to the Subclass 457 Schedule 2 criteria had the result that s.338(5) was no longer applied to Subclass 457 visas, so r.4.02(4)(l) was inserted to preserve a right of review in respect of offshore visa applications.

[21] r.4.02(4)(l) as repealed and substituted by the Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707), for primary decisions made on or after 13 December 2018.

(c) a partnership that operates in the migration zone; or

(d) the holder of a permanent visa; or

(e) a New Zealand citizen who holds a special category visa; or

(f) a Commonwealth agency.[22]

This effectively mirrors the requirements for onshore visa applicants, with the additional requirement as to the sponsor's identity. See above for discussion of those requirements. The above table concerning the Tribunal's jurisdiction for primary applicants who applied onshore mirrors the jurisdiction in respect of offshore primary applicants.

Secondary visa applicants

The Tribunal also has jurisdiction to review a decision to refuse a visa to a non-citizen who applied for the visa from outside of Australia if the non-citizen did not seek to satisfy the primary criteria for the grant of the visa and their visa was refused because they did not satisfy the secondary criteria for the grant of the visa.[23] The person who applied to become the sponsor or who nominated the non-citizen has standing.[24]

Tribunal's jurisdiction – primary decisions made before 13 December 2018

For visa applications made before 23 March 2013, Class UC contained two subclasses - Subclass 456 and Subclass 457.[25] A decision to refuse a Subclass 457 visa may be reviewable by the Tribunal; however a decision to refuse a Subclass 456 visa is not.[26] The tribunal has jurisdiction to review decisions to refuse the grant of a Subclass 457 visa under s.338(2) (onshore applications) or s.338(9) (offshore applications) of the Act.

Onshore visa applications

For onshore visa applications, a decision to refuse to grant a Subclass 457 visa is reviewable in certain circumstances as set out in s.338(2). Paragraphs (a) to (c) of s.338(2) apply in all cases, requiring that the visa could be granted to a person in the migration zone, and the person made the application in the migration zone after being immigration cleared (which would be the case for a valid onshore Subclass 457 visa application).

Paragraph 338(2)(d) imposes an additional requirement for certain prescribed visas to be reviewable (including Subclass 457),[27] in cases where a criterion for the visa grant requires the visa applicant to be sponsored (which includes being identified in a nomination) by an approved sponsor.[28] In these

[22] r.4.02(4AA) as inserted by Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707).
[23] r.4.02(4)(l)(iv) as inserted by Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707).
[24] r.4.02(5)(k).
[25] The Subclass 456 visa was repealed by SLI 2013, No. 32.
[26] A decision to refuse a Subclass 456 visa is not a decision reviewable as it does not fulfil any of the jurisdictional grounds under s.338 of the Act.
[27] A Subclass 457 visa is prescribed for s.338(2)(d): r.4.02(1A).
[28] Paragraph 338(2)(d) applies to primary decisions made on or after 14 October 2003. This requirement was inserted by the *Migration Legislation Amendment (Sponsorship Measures) Act 2003.* The term 'approved sponsor' is defined in s.5(1) of the Act as

circumstances, s.338(2)(d), as prescribed in the Act before being repealed by No.90 of 2018, also requires that at the time the application to review the Subclass 457 decision is made:

- the non-citizen is sponsored (or identified in a nomination) by an approved sponsor (s.338(2)(d)(i)); or
- an application for review of a decision not to approve the sponsor (or nomination) has been made but the review is pending (s.338(2)(d)(ii)).

The application of this additional requirement depends on the stream under which the application has been made (e.g. under the Standard Business Sponsorship, Labour Agreement or other streams), when the primary decision was made and whether the applicant is a primary or secondary applicant for the visa.

Standard business sponsor stream

Visa applications from 14 September 2009

To meet the criteria for this stream, the primary applicant must be the subject of an approved nomination that has not ceased: cl.457.223(4)(a).[29] Accordingly, to be a reviewable decision, the additional requirement in s.338(2)(d) must be met.[30]

A Subclass 457 review applicant can meet subparagraph 338(2)(d)(i) or (ii) or both, depending on the status of the related sponsor approval under s.140E or nomination under s.140GB at the time of the review application.

In short, a decision is reviewable where, **at the time the review application is made** (or within the prescribed period for applying for review),[31] either:

a person approved as a sponsor under s.140E in relation to a prescribed class and the approval has not been cancelled under s.140M or otherwise ceased to have effect; or a person, other than the Minister, who is a party to a work agreement. Being 'sponsored' includes being identified in a nomination under s.140GB of the Act: r.4.02(1AA) as inserted by SLI 2009 No.115, amended by SLI 2009 No.203, and repealed by F2018L01707 for applications from 14 September 2009 where the primary decision was made before 13 December 2018.

[29] As discussed further below, before 14 September 2009, cl.457.223(4)(i) expressly required the applicant to be sponsored by an approved sponsor within the meaning of s.140D. For new applications made on or after that time, that requirement was removed (by SLI 2009, No.202), but there were requirements in cl.457.223(4)(a) for the applicant to be the subject of an approved nomination, which remained following a further amendment by the Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146). To enable merits review in relation to Subclass 457 visa refusals for decisions made on or after 14 September 2009 under the new criteria, the definition of 'sponsored' in the Regulations was expanded by r.4.02(1AA) to include 'being identified in a nomination under s.140GB of the Act': r.4.02(1AA), inserted by SLI 2009, No.115 as amended by SLI 2009, No.203, and repealed by F2018L01707. See the Explanatory Statement to SLI 2009 203, p.80.

[30] In *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015), the Federal Court confirmed that the definition of the word 'sponsored' in s.337, which applies to s.338(2)(d), picks up the meaning of 'sponsored' in r.4.02(1AA) which states that 'sponsored' includes being identified in a nomination under s.140GB. The judgment was consistent with earlier judgments in *MIAC v Islam* [2012] FCA 195 (Robertson J, 9 March 2012) at [53] and *Diamant v MIBP* [2014] FCCA 21 (Judge Lucev, 31 January 2014) 26 at [26] which respectively held that it is a criterion for the grant of a Subclass 457 Visa in cl.457.223(2)(b)(ii) (for the labour agreement stream) and in cl.457.223(4)(a)(i)(A) and (ii)(A) (standard business sponsor stream) that the applicant be sponsored by an approved sponsor.

[31] Although this has not been judicially considered, the Department of Immigration has taken the view that if one of the preconditions in s.338(2)(d) is met within the time allowed for applying for review, even if it occurs after the lodgement of the Subclass 457 review application, the satisfaction of the precondition 'completes' the application for review that was not yet valid at the time it was initially made: see the orders made in Md Monir Hossain v MIBP (SYG1309/2015) and Chandni Dineshbhai Patel v MIBP (MLG919/2016). This appears to be based on authorities such as *MIAC v Mon Tat Chan* (2008) 172 FCR 193 in the visa application context and *Kirk v MIMA* (1998) 87 FCR 99 in the review application context. However, there is no obligation on the Tribunal to wait for a new sponsorship or nomination application to be made in circumstances where an applicant makes such a request: *Ramjali v MIBP* [2016] FCCA 2296 at (Barnes J, 22 August 2016) at [34]. The first instance judgment was upheld on appeal and special leave refused, though this point was not addressed by the Federal Court or High Court: *Ramjali v MIBP* [2017] FCA 271 (Bromwich J, 20 March 2017); *Ramjali v MIBP* [2017] HCASL 179 (Gageler J, 15 August 2017. For further discussion see Part 1.4.5 of Chapter 1 to the MRD Procedural Law Guide.

- s.338(2)(d)(i) – the Subclass 457 visa applicant is identified in a nomination under s.140GB of the Act by an approved sponsor.[32] This includes a nomination application that has not yet been determined, or an approved nomination.[33] It does not include a nomination that has been refused with no review sought of that refusal,[34] or a nomination that has expired.[35] It likely does also not include a nomination made on or after 18 March 2018.[36] If there has not yet been any sponsorship approval given, the decision is not reviewable.[37] If the approval as a sponsor had expired, but was in force at the time the nomination was made, it is likely that the decision is reviewable;[38] or

- s.338(2)(d)(ii) – there is a pending application for review of a decision not to approve the sponsor as a standard business sponsor under s.140E, or a pending review of a decision not to approve the nomination under s.140GB.[39]

For a detailed breakdown of these jurisdictional issues, please see the table at the end of the commentary Subclass 457 - Does the Tribunal have jurisdiction under s.338(2)(d)? or contact MRD Legal Services for assistance.

Visa applications before 14 September 2009

Immediately before 14 September 2009, it was a criterion for grant of a Subclass 457 visa that the applicant 'is sponsored by an approved sponsor within the meaning of section 140D of the Act'.[40] In this

[32] In *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [98], the Federal Court confirmed that the definition of the word 'sponsored' in s.337, which applies to s.338(2)(d), picks up the meaning of 'sponsored' in r.4.02(1AA) which states that 'sponsored' includes being identified in a nomination under s.140GB. In the context of s.338(2)(d)(i), the requirement that the applicant is 'sponsored by an approved sponsor' includes, by virtue of r.4.02(1AA), a person being identified in a nomination under s.140GB.

[33] See *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [111] to [112]. The Court found an earlier judgment in *MIBP v Lee* [2014] FCCA 2881 (Judge Nicholls, 10 December 2014) to be incorrect insofar as it was held that there must be an 'approved' nomination of an occupation to satisfy s.338(2)(d)(i) as this did not give effect to the terms of r.4.02(1AA), that for s.337 and s.338, 'sponsored' includes being identified in a nomination under s.140GB. The Federal Court's judgment was consistent the lower court judgment in *Kandel v MIBP* [2015] FCCA 2013 (Judge Street, 7 August 2015) which held that the requirements in s.338(2)(d)(i) would be met where there was an application for nomination identifying the applicant made by an approved sponsor when the review application was made.

[34] *Dyankov v MIBP* [2017] FCAFC 81 (Logan, Griffiths & Moshinsky JJ, 23 May 2017) at [59].

[35] See obiter comments in *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [113] and *Gulati v MIBP* [2016] FCCA 2263 (Judge Cameron, 19 July 2016), upheld in *Gulati v MIBP* [2017] FCA 255 (Judge Bromwich, 15 March 2017).

[36] Nominations made on or after that date cannot support an outstanding application for a Subclass 457 visa as they are made in relation to applicants/proposed applicants for Subclass 482 visas or to holders of Subclass 482 or Subclass 457 visas: r.2.72(1) as repealed and substituted by F2018L00262. While there is no authority directly on point, it would appear that the nomination must be one which is capable of supporting the grant of the visa. See, e.g., *Dyankov v MIBP* [2017] FCAFC 81, where the Court held that s.338(2)(d)(i) is not satisfied where a nomination has been refused at the time the review application is lodged (and review had not been sought of the nomination decision), and relied in part on the purpose of s.338(2)(d), which was to prevent abuse where visa applicants may try to extend their stay in Australia in circumstances where they had no prospect of satisfying the relevant criteria.

[37] See *Singh v MIBP* [2018] FCCA 2769 (Judge Lucev, 27 September 2018) where sponsorship and nomination applications had been lodged but not determined at the time of the application for review. The decision was not reviewable because the sponsor was not an 'approved sponsor,' defined in s.5(1) of the Act as a person who 'has been approved' under s.140E and that approval had not been cancelled or otherwise ceased.

[38] This has not been the subject of judicial consideration, but a beneficial construction of the provision would appear to encompass reading it as 'identified in a nomination, where that nomination was made by an approved sponsor', even though the approval as a sponsor may have subsequently ceased; noting that a nomination can continue in force for 3 months after the sponsor's approval ceases: r.2.75(2)(d).

[39] *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [99]. The Court held that the expression 'decision not to approve the sponsor' in s.338(2)(d)(ii) includes both the approval of the sponsor under s.140E and the approval of the nomination under s.140GB. The Court overturned the primary judgment in *Ahmad v MIBP* [2015] FCCA 1486 (Judge Street, 29 May 2015) at [18]-[19] which held that the reference to 'the sponsor' in s.338(2)(d)(ii) is not one that picks up the meaning of 'sponsored' in r.4.02(1AA) and that s.338(2)(d)(ii) only referred to an application for review of a decision not to approve the sponsor under s.140E.

[40] cl.457.223(4)(i) as in force immediately before 14 September 2009. This criterion applied to those seeking to meet the Australian business sponsorship stream in cl.457.223(4).

context, the additional requirement in s.338(2)(d) is met where there is either an approved sponsor under s.140D, or review of a decision not to approve the sponsor pending before the Tribunal.[41]

Labour agreement stream

In the case of applications made under the Labour Agreement stream, it is also a criterion that the non-citizen be sponsored by an approved sponsor, in the sense of being identified in a nomination under s.140GB.[42] Accordingly, a decision to refuse a Subclass 457 visa application in this stream is reviewable under s.338(2)(d)(i), if the visa applicant is identified in an approved or pending nomination application under s.140GB.[43] The Tribunal may also have jurisdiction under s.338(2)(d)(ii) where there is a pending review of a decision not to approve a nomination under s.140GB.[44] As there is no separate 'sponsor' approval process in the labour agreement stream, there can be no related 'review of a decision not to approve the sponsor' under s.140E which would satisfy s.338(2)(d)(ii).[45]

Other streams

For onshore primary applicants who applied under a different stream or category (i.e. one which does not require sponsorship, such as the Service Seller stream (cl.457.223(8)),[46] the Tribunal would have jurisdiction under s.338(2), but the requirement in s.338(2)(d) would not apply.

Secondary visa applicants

The additional requirement in s.338(2)(d) may or may not apply to secondary applicants, depending on the circumstances of the case and whether there is a criterion requiring the secondary applicant to be sponsored. There are two possible criteria that may be seen as requiring a secondary applicant to be sponsored: cll.457.324(1) and (2).

Subclause 457.324(1) requires a secondary applicant to be 'included in any nomination that is required in respect of the primary applicant' at the time of the decision on the secondary applicant's visa application.[47] This would occur, for example, as required by r.2.72(6) in circumstances where the primary and secondary applicant already held Subclass 457 visas at the time of the nomination. This criterion on its terms appears to require the secondary applicant to be sponsored in the sense of being 'identified in a s.140GB nomination'. As a result, where a secondary applicant is required to be identified in this way

[41] See *Kim v MIAC* [2007] FMCA 166 (Smith FM, 6 February 2007) and *Farooq v MIAC* [2008] FMCA 45 (Nicholls FM, 25 January 2007).

[42] In *MIAC v Islam* [2012] FCA 195 (Robertson J, 9 March 2012), Robertson J held that a decision to refuse an application made under the Labour Agreement stream is a reviewable decision insofar as it satisfies the opening words of s.338(2)(d). The Court held in that case that by virtue of cl.457.223(2)(b)(ii) (as then in force), it was a criterion for the grant of the visa that the non-citizen was 'sponsored by an approved sponsor'. At the level of identifying whether it is a criterion for the grant of the visa, that criterion answers the opening words of s.338(2)(d) read with r.4.02(1AA), that is, that it was a criterion for the grant of the visa that the non-citizen is identified in a nomination under s.140GB of the Act by an approved sponsor.

[43] *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [111] to [112]. Although the Court didn't refer expressly to the Labour Agreement stream, the findings of the Court would apply equally to this stream.

[44] *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [99]. Again, although the Court didn't refer expressly to the Labour Agreement stream, the findings of the Court would apply equally to this stream.

[45] The Court in *MIAC v Islam* [2012] FCA 195 (Robertson J, 9 March 2012) at [34] confirmed that there was no sponsorship approval process for a party to a labour agreement in the sense contemplated by s.140E. Instead, the applicant must be nominated by a 'party to the labour agreement': cl.457.223(2)(c).

[46] Note that the Service Sellers stream (cl.457.223(8)) was removed by SLI 2013 No.32 for visa applications made on or after 23 March 2013.

[47] cl.457.324 as amended by SLI 2012, No.238, requires that the applicant is either included in the nomination that is required in respect of the primary applicant, or satisfy one of four alternative requirements where they are not included in the nomination. This criterion has included these two limbs in some form since amendments on 14 September 2009 (SLI 2009, No.202). Prior to those amendments cl.457.324 contained only one requirement, being that the applicant is included in any nomination that is required in respect of the primary applicant in accordance with the approved form.

under 457.324(1), the extended definition of 'sponsored' applies and the secondary applicant must meet the additional requirement in s.338(2)(d).

However, cl.457.324(1) is not a criterion that needs to be met in all cases. Where the secondary applicant is not included in a nomination required for the primary applicant at the time of the decision on the secondary applicant's visa application, the secondary applicant will be required to satisfy cl.457.324(2). This might occur for example where the secondary applicant made a subsequent separate application for the Subclass 457 visa, or where there is no nomination required in respect of the primary applicant because the stream does not require a nomination or the primary applicant was already granted a visa so their nomination ceased under r.2.75(2)(c).[48] In these circumstances, the secondary applicant must instead meet cl.457.324(2), which does not require them to be sponsored in the relevant sense.[49] As there is no criterion directly requiring the secondary applicant to be sponsored in such cases, the additional requirement in s.338(2)(d) would not appear to apply.

On one view, although there is no *direct* requirement for the secondary applicant to be sponsored, there nevertheless may be circumstances where the secondary applicant is taken to be subject to a requirement that they are sponsored. In *Kim v MIAC*, the Court held that where there was a combined application for review by primary and secondary applicants, s.338(2)(d) applies both to a primary visa applicant and also to each secondary applicant whose qualification for the visa depends upon a primary applicant meeting a sponsorship criterion.[50] The Court's reasoning turned heavily on its understanding that the secondary applicants' review applications could not succeed without the primary applicant.[51] This reasoning was applied in *Sharma v MIBP*,[52] in which the Court agreed with the construction in *Kim* and held that it applies equally where only a secondary applicant applies for review (i.e. not in a combined application).[53] However, there is some argument that as the decision in *Kim* was made in a materially different statutory context to the present one, reliance on that decision when construing the Tribunal's jurisdiction now, as in *Sharma,* would be in error. In particular, the sponsorship provisions, the Subclass 457 visa criteria and s.337 of the Act have all materially changed since the judgement in *Kim* was handed down.[54]

Should the judgements in *Kim* and *Sharma* be confined in this way, the question remains as to whether the term 'sponsored' can be construed more broadly to include circumstances outlined in cl.457.324(2).

[48] Note that there are two possible approaches to the circumstance whereby a secondary applicant is included in a nomination, but the nomination in respect of the primary visa has ceased by operation of r.2.75(2)(c) and a secondary applicant seeks review of the refusal of their visa application. Ultimately, on either approach, the decision in respect of the secondary applicant would meet the terms of s.338(2). On one view, the nomination as a whole ceases, so it cannot be said that the secondary applicant remains 'identified in a nomination' at the time the review application is lodged. However, at that time no nomination would be required in respect of the primary applicant (as their visa already granted) so that sl.457.324(1) would not be a criterion for the grant of a visa to the secondary applicant. Rather, the relevant criterion to be satisfied would be cl.457.324(2) and, as discussed below, there would be no criterion that the applicant be 'sponsored', so that s.338(2)(d) would simply not apply. However, in 1412960 [2016] AATA (3 August 2016, Deputy President Forgie and Senior Member Holmes), the Tribunal considered this scenario and took the view that r.2.75 only applies to a nomination in respect of a primary visa applicant. Accordingly, the granting of a Subclass 457 visa to the primary applicant would not affect the nomination of the secondary applicant, it would still be in force, and on that basis the secondary applicant would satisfy s.338(2)(d)(i).

[49] The alternative criterion in cl.457.324(2) instead requires that the sponsor has agreed in writing that the secondary applicant may be a secondary sponsored person (as defined in r.2.57).

[50] [2007] FMCA 166 (Smith FM, 6 February 2007) at [22]-[26].

[51] The Court observed that for secondary applicants, the situation would be futile if the primary applicant was unable to satisfy s.338(2)(d). Thus s.338(2)(d) applies to secondary applicants dependent upon a primary applicant's sponsorship by reference to whether there is a reviewable decision for a primary applicant. It is not clear whether subsequent amendments to the primary or secondary criteria for Subclass 457 visas would alter a Court's approach to the assessment of jurisdiction of secondary applicants.

[52] *Sharma v MIBP* [2016] FCCA 1073 (Judge Manousaridis, 6 May 2016).

[53] at [15].

[54] See discussion of the extent to which the Tribunal is bound by the decision in *Sharma* in 1412960 [2016] AATA (3 August 2016); Deputy President Forgie and Senior Member Holmes at [29]-[34].

This was considered in 1412960 in circumstances where the Tribunal declined to follow *Kim* and *Sharma.* In that case, the Tribunal found that word 'sponsored' has the same meaning as in the Regulations and no more. The Tribunal considered the broader legislative scheme and reasoned that given the care with which the term 'sponsor' is defined in r.1.03 to have the meaning provided for in r.1.20 and in r.4.02 insofar as it includes being identified in a s.140GB nomination only, there is no room to go beyond those definitions and to consider the ordinary meaning of the word 'sponsor'. In the context of cl.457.324(2) then there is no requirement that the applicant be sponsored so as to engage the operation of s.338(2)(d).[55]

Effect of sponsorship or nomination cessation/cancellation or sponsorship bar on jurisdiction

For the decision to be reviewable, the requirements in s.338(2)(d) need be satisfied at the time the review application is made. If the nomination or sponsorship ceases or is cancelled before the review application is lodged, jurisdiction under s.338(2)(d)(i) may be affected, depending on the circumstances of the case (see jurisdiction table below for consideration of those circumstances). Conversely, where the sponsor or nomination approval ceases or is cancelled *after* the review application is lodged, the Tribunal does not 'lose' jurisdiction to review the Subclass 457 visa refusal if the earlier review application was validly made.

In the context of s.338(2)(d)(ii), while a pending review of a decision not to approve a sponsor or nomination will satisfy the requirement in s.338(2)(d)(ii), a pending review of a decision to cancel an approved sponsorship will not satisfy this requirement.[56]

A bar imposed on a sponsor under s.140M of the Act, whether imposed before or after the review application is lodged, would not affect an existing approval as a sponsor or approved nomination and would not result in the Tribunal 'losing' jurisdiction to review the Subclass 457 visa refusal.[57]

Offshore visa applications

For offshore applications, a decision to refuse to grant the visa is prescribed by r.4.02(4)(l) as a reviewable decision for the purposes of s.338(9). That regulation requires that the applicant is outside Australia at the time of the visa application[58] and was sponsored or nominated, as required by a criterion for the grant of the visa, by an Australian citizen, or company / partnership operating in the migration zone, or a permanent visa holder or a New Zealand citizen holding a special category visa.[59] In these situations, it is the sponsor or nominator who has the right of review.[60]

[55] 1412960 [2016] AATA (3 August 2016); Deputy President Forgie and Senior Member Holmes at [45].
[56] s.338(2)(d)(ii) refers specifically to a review of a decision not to approve the sponsor (nomination).
[57] In contrast to cancellation under s.140M(1)(a) or (b) , the imposition of a sponsorship bar under s.140M(1)(c) or (d) does not of itself result in the cancellation of the approved sponsorship.
[58] Although the text of the regulation refers only to 'the time of application' without specifying whether this means the review or visa application, when read in the context of s.338 as a whole and with regard to the intention behind the insertion of r.4.02(4)(l), it is clear that the regulation was intended to apply to visa applications lodged offshore. Prior to amendments made by the Migration Amendment Regulations 2004 (No.8), a decision to refuse an application for a Subclass 457 visa lodged offshore was reviewable under s.338(5), which applies only to visas which could not be granted while the applicant is in the migration zone. Changes to the Subclass 457 Schedule 2 criteria had the result that s.338(5) was no longer applied to Subclass 457 visas, so r.4.02(4)(l) was inserted to preserve a right of review in respect of offshore visa applications.
[59] Sub-regulation 4.02(4)(l)(ii) applies when the applicant was sponsored or nominated as required by a criterion for the grant of a visa. It does not require that there be a criterion that requires the non-citizen to be sponsored or nominated by a company that operates in the migration zone: *Phornpisutikul v MIBP* [2016] FCCA 1934 (Judge Smith, 19 August 2016) at [12].
[60] r.4.02(5)(k). *Phornpisutikul v MIBP* [2016] FCCA 1934 (Judge Smith, 19 August 2016) at [13].

For review applications made on or after 14 September 2009 there is no criterion for Subclass 457 visa applications in the standard business sponsorship stream that requires sponsorship. However, there is a criterion relating to nomination, which requires an applicant seeking to meet the primary criteria for grant of the visa to be identified in an approved nomination which has not ceased under r.2.75.[61]

There has been little judicial consideration of r.4.02(4)(l) and although the requirement in r.4.02(4)(l)(ii), that the non-citizen was sponsored or nominated as required by a criterion for the grant of the visa by a relevant entity, is in broadly similar terms to s.338(2)(d) there are significant textual differences which mean judicial consideration of that provision is not directly applicable in this context.[62] In particular, there is no equivalent of s.338(2)(d)(ii) dealing specifically with the circumstance whereby a nomination has been refused but merits review sought, and the provision uses the past tense 'was'. Although not free from doubt, it appears that the word 'nominated' in r.4.02(4)(l)(ii) should be read to mean being identified in an application for approval of a nomination. Coupled with the word 'was', this requirement would be met if the visa applicant has been identified in a nomination at some point prior to the review application being lodged, regardless of whether that nomination has been approved, refused or ceased. Although this would involve a favourable jurisdiction decision in circumstances where there is no approved nomination in place and so a visa criterion not presently met, which would seem to argue against this construction,[63] because it is the sponsoring employer who has standing to apply for review in offshore matters, accepting jurisdiction wouldn't necessary be futile. This because the employer could also make a new nomination application, and are still (by making the visa review application) arguably pursuing the matter. By contrast, to read the requirement that the non-citizen 'was…nominated' as being met only where the visa applicant was identified in a nomination that has been approved would exclude applications where the associated nomination had been refused but is the subject of an application for review before the Tribunal or an associated nomination application is still pending before the Minister, which seems unlikely to be the intended effect of the provision.

The Tribunal does not have jurisdiction to review a decision to refuse to grant a Subclass 457 visa if the applicant was overseas at time of application and was sponsored or nominated by a company or partnership that does not operate in the migration zone.[64]

Secondary visa applicants

As for primary offshore visa applicants, the Tribunal will have jurisdiction if a secondary visa applicant was outside Australia at the time of the visa application and was sponsored or nominated, as required by a criterion for the grant of the visa, by (relevantly) a company / partnership operating in the migration zone. This requires consideration of whether one of the criteria for the visa sought was a criterion requiring that the secondary applicant was sponsored or nominated. There are two possible criteria that may be seen as requiring a secondary applicant to be sponsored: cll.457.324(1) and (2). As discussed in more detail

[61] cl.457.223(4)(a).

[62] This textual difference reflects that r.4.02(4)(l) was not drafted to reflect the terms of s.338(2)(d) but rather was introduced to maintain the right of review for visa refusals previously covered by s.338(5), at a time when a change was made from offshore subclass 457 applications being limited to offshore grants (and so falling within the terms of s.338(5)) to being able to be granted on or offshore: see Explanatory Statement to Migration Amendment Regulations 2004 (No.8) (SR 2004, No.390), p.8.

[63] See discussion in *Dyankov v MIBP* [2017] FCAFC 81 (Logan, Griffiths and Moshinsky JJ, 23 May 2017) at [52] – [55], considering application of s.338(2)(d) where a nomination has been refused and no review sought. However, note that the interpretation adopted by the Court in that judgment relies not only on the purpose of s.338(2)(d) but also the specific terms of that provision, including the contemplation of merits review of a nomination decision in s.338(2)(d)(ii), an equivalent of which is absent from r.4.02(4)(l).

[64] r.4.02(4)(l)(ii)(B) and (C). The decision is also not reviewable under s.338(5) because cl.457.223(4) permits sponsorship by an overseas company, or other entity and the visa is one that may be granted in or outside Australia, regardless of the applicant's location at time of visa application. This does not meet the requirement of s.338(5)(a) that the visa is one that could not be granted while the applicant is in the migration zone and s.338(5)(b) that the criterion requires sponsorship by, among others, an Australian citizen or a company or partnership that operates in the migration zone.

above, cl.457.324(1) would apply if a secondary applicant was included in a nomination that was required in respect of the primary applicant, and if this were not the case, it would appear there is no applicable sponsorship or nomination criterion (and therefore no jurisdiction in this context), as it is doubtful cl.457.324(2) could be characterised in this way.

It is unclear whether cl.457.324(1) applies to a subsequent entrant application. On one view, as r.4.02(4)(l)(ii) could be met if the visa applicant has been identified in a nomination at some point in the past (see above), then if the applicant was, in an initial application, included in a nomination required in respect of the primary applicant, cl.457.324(1) would arguably apply. However, it appears that cl.457.324(1) does not have any work to do in relation to subsequent applicants, given that a subsequent applicant will not have be included in any nomination that is required in respect of the primary applicant. It would follow that it would not need to be met, and the Tribunal would not have jurisdiction in such a case.

Requirements for valid visa application

The requirements for making a valid Class UC visa are found at item 1223A of Schedule 1 to the Regulations, and in r.2.07AA.[65] Note that the Subclass 456 visa was removed from Class UC for visa applications made on or after 23 March 2013.[66]

Where the applicant is seeking a Subclass 457 visa, there are requirements as to application form and charges,[67] where the application must be made[68] and, in certain circumstances, where the applicant must be when their application is made.[69] There are minor differences in these requirements depending on whether the visa application was made before, or on or after 1 July 2013.[70] For visa applications made on or after 14 December 2015, the primary applicant must also make a declaration in the application as to whether or not they have (or a combined applicant has) engaged in conduct in relation to the application that contravenes s.245AS(1) of the Act.[71]

In addition, for persons seeking to satisfy the primary criteria on the basis of the standard business sponsorship requirements in cl.457.223(4), the following must be met:

- the application must specify the person who has nominated, or who proposes to nominate, an occupation in relation to the applicant; and
- the application must be accompanied by evidence that that person:

[65] Note that r.2.07AA provides special status to APEC Business Travel Card applicants/holders.
[66] SLI 2013 No. 32. Consequential amendments were made to Item 1223A of Schedule 1 to the Regulations to reflect the removal of the subclass.
[67] Item 1223A(1)(b) - (bc) and 1223A(2) of Schedule 1 to the Regulations.
[68] Item 1223A(3)(aa) of Schedule 1 to the Regulations for applications made on or after 1 July 2013. Schedule 1, item 1223A(3)(aa) - (ag) and (ca) for applications made before this date.
[69] Schedule 1, item 1223A(3)(ag), which applies only to visa applications made before 1 July 2013, provides that the applicant must be outside Australia and the application must be made outside Australia. For all other applicants, and all applications made on or after 1 July 2013, there is no requirement to be in a particular location when the application is made (but applicants must not be in immigration clearance).
[70] Amendments to Schedule 1, item 1223A were made by SLI 2013, No.146, applying to all visa applications made on or after 1 July 2013. These amendments relate to generally requiring applications to be made using the internet and removing restrictions on the location of certain applicants when the visa application is made.
[71] Item 1223A(3)(e) as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242). Section 245AS of the Act prohibits a person from offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event. The term 'sponsorship-related event' is defined in s.245AQ of the Act, but relevantly includes such events as a person applying for approval of the nomination of a position in relation to an applicant for a sponsored visa or the grant of such a visa.

- is a standard business sponsor; or
- has applied for approval as a standard business sponsor but whose application has not yet been decided; or
- has an approved nomination, and that nomination has not ceased; and

- the person who has nominated, or proposes to nominate, the occupation is not the subject of a sponsorship bar.[72]

For persons seeking to satisfy the primary criteria on the basis of the labour agreement requirements in cl.457.223(2):

- the application must specify the person who has nominated, or proposes to nominate, an occupation in relation to the applicant; and
- if the visa applicant is outside Australia at the time of making the application - the labour agreement must have been approved; or
- where the visa applicant is in Australia at the time of making the application:
  - the labour agreement must have been approved; or
  - the person who proposes to nominate an occupation in relation to the applicant must have made a submission to the Minister to enter into a labour agreement.[73]

An application by an applicant claiming to be a member of the family unit of a primary applicant may be made at the same time and place as, and combined with, the primary applicant's application.[74]

Note that consequential technical amendments were made to item 1223A of Schedule 1 to the Regulations to reflect the removal of the Further stay Independent Executives stream (cl.457.223(7A)), the Invest Australia Supported Skills (IASS) agreement stream (cl.457.223(10)) and the privileges and immunities (cl.457.223(9)) stream affecting new applications made on or after 24 November 2012.[75] Consequential amendments were also made to reflect the removal of Subclass 456 for visa applications made on or after 23 March 2013.[76]

Time of application criteria

If the primary visa applicant is outside Australia at time of application, there are no time of application criteria.

If the applicant is in Australia at the time of application, he/she must satisfy cl.457.211 of Schedule 2 to the Regulations. Clause.457.211 requires that applicants onshore at the time of application either:

[72] Schedule 1, item 1223A(3)(d).
[73] Schedule 1, item 1223A(3)(d)(a).
[74] Schedule 1, item 1223A(3)(c).
[75] SLI 2012, No.238.
[76] SLI 2013, No. 32.

- to currently hold a substantive visa[77] other than a Subclass 771 (Transit) visa or a special purpose visa;[78] or
- if they do not hold a substantive visa, their last substantive visa must not have been a Subclass 771 (Transit) visa or a special purpose visa and they must satisfy Schedule 3 criteria 3003, 3004 and 3005.[79]

Schedule 3 criterion 3003

This criterion only applies to applicants who have not held a substantive visa since 1 September 1994 and who, on 31 August 1994, were either an illegal entrant or the holder of an entry permit that was not valid beyond 31 August 1994. Accordingly, it rarely arises for consideration. Where it does apply, there are a range of matters the decision maker must be satisfied of, similar to those set out in Criterion 3004 (discussed below).

Schedule 3 criterion 3004

Criterion 3004 applies to all applicants who cease to hold a substantive or criminal justice visa at any point on or after 1 September 1994,[80] and to applicants who entered Australia unlawfully on or after that date who have not subsequently been granted a substantive visa.[81] It requires satisfaction of a range of matters, as follows:

- the applicant is not the holder of a substantive visa because of factors beyond the applicant's control;[82] and
- there are compelling reasons for granting the visa;[83] and
- the applicant has complied substantially with the conditions that apply or applied to the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit) and any subsequent bridging visa; or the conditions that apply or applied to the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect) and any subsequent bridging visa;[84] and
- either:
  - in the case of an applicant who ceased to hold a substantive or criminal justice visa on or after 1 September 1994 - the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa;[85] or
  - in the case of an applicant who entered Australia unlawfully on or after 1 September 1994 - the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the

[77] r.1.03 defines 'substantive visa' as a visa other than a bridging visa, criminal justice visa or enforcement visa.
[78] For special purpose visas see definition in s.5(1) and s.33 of the Act.
[79] Clause 457.211 was amended and cl.457.212 removed by SLI 2009, No.202. These changes apply in relation to visa applications made, but not finally determined, before 14 September 2009 and visa applications made on or after 14 September 2009.
[80] 3004(a). 'Substantive visa' is defined in s.5(1) of the Act as substantive visa means a visa other than a bridging visa, a criminal justice visa or an enforcement visa.
[81] 3004(b).
[82] 3004(c).
[83] 3004(d).
[84] 3004(e). 'Entry permit' has the meaning given by subsection 4(1) of the Act as in force immediately before 1 September 1994, and includes an entry visa operating as an entry permit (see s.5(1)).
[85] 3004(f)(i).

grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully;[86] and

- the applicant intends to comply with any conditions subject to which the visa is granted;[87] and
- if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.[88]

In *Quan v MIMAC*[89] the Court considered the requirements of criterion 3004 in the context of cl.457.211(b)(ii). In that case, the Tribunal found that the applicant would not have been entitled to the grant of a Subclass 457 visa on the day on which the applicant last held a substantive visa because as of that day the applicant did not have the sponsorship required for the grant of a Subclass 457 visa. The Court held that the Tribunal was correct in finding that the applicant did not meet cl.3004(f)(i) on this basis.[90] As such, it was not necessary for the Tribunal to consider whether there were compelling reasons for granting the visa pursuant to cl.3004(d) given that the applicant was unable to satisfy all the mandatory criteria necessary for the grant of a Subclass 457 visa.

Schedule 3 criterion 3005

Schedule 3 criterion 3005 states:

> *A visa or entry permit has not previously been granted to the applicant on the basis of the satisfaction of any of the criteria set out in:*
>
> *(a) this Schedule; or*
>
> *(b) Schedule 6 of the Migration (1993) Regulations; or*
>
> *(c) Regulation 35AA or subregulation 42(1A) or (IC) of the Migration (1989) Regulations.*

'This Schedule' in 3005(a) means Schedule 3, so that 3005 is not satisfied where a visa has previously been granted to a visa applicant on the basis of the satisfaction of a Schedule 3 criterion, as set out in a Schedule 2 criterion.[91] That is, a person can be 'saved' by the Schedule 3 provisions only once.[92]

[86] 3004(f)(ii).
[87] 3004(g).
[88] 3004(h). For provisions on transitional (temporary) visas, see Migration Reform (Transitional Provisions) Regulations (SR 1994, 261).
[89] [2013] FCCA 1254 (Judge Emmett, 2 September 2013).
[90] This reasoning was adopted in *Kaur v MIBP* [2018] FCCA 141 (Judge Harnett, 24 January 2018), which confirmed the relevant time for assessing whether an applicant would have been entitled to be granted the visa if they applied for the visa on the date they last held a substantive visa, including the assessment of time of decision criteria, is the date on which the substantive visa was last held.
[91] *Sapkota v MIBP* [2014] FCAFC 160 (Kenny, Greenwood, Tracey, Perram and Robertson JJ) at [27] –[28], rejecting the construction adopted at first instance in *Sapkota v MIBP* [2014] FCCA 1285 (Judge Burchardt, 27 June 2014).
[92] PAM3: Migration Regulations - Schedules > Sch3 – Additional criteria applicable to unlawful non-citizens and certain bridging visa holders > Criterion 3005 – Purpose of criterion 3005 (19/05/2016).

Time of decision criteria

There are various time of decision criteria to be satisfied by the primary applicant.[93] Each of these are discussed below. Included amongst these is cl.457.223 which contains different visa 'streams', one of which the applicant must satisfy. The streams available to be satisfied depend on the date of application for the visa. The satisfaction of a particular stream ultimately affects the period of the visa and conditions to which the visa is subject.

Briefly, the primary criteria are:

- the applicant complied substantially with conditions on previous visas: cl.457.221;
- the applicant holds a substantive visa: cl.457.221A;
- the applicant meets one of the visa 'streams' in cl.457.223;
- the applicant has not engaged in 'payment for visa conduct' in the previous three years or it is reasonable to disregard the conduct: cl.457.223A;[94]
- there is evidence of adequate arrangements in Australia for health insurance: cl.457.223B;
- for applicants nominated as medical practitioners, evidence of recognition of qualifications and entitlement to practise in Australia: cl.457.223C;
- the applicant satisfies specified public interest criteria: cl.457.224;
- the applicant satisfies special return criteria: cl.457.225;[95]
- *for visa applications made before 24 November 2012* - members of the family unit of an applicant who seeks to meet the requirements of cl.457.223(7A)[96] (both applicants and non-applicants) meet specified public interest criteria: cl.457.227;[97]
- *for visa applications made before 1 July 2009* - the interdependent partner (or a dependent child of that partner) of a person who seeks to meet the requirements of cl.457.223(7A)[98] meets specified public interest and special return criteria: cl.457.227A;[99] and
- *for visa applications made before 24 November 2012* - the applicant holds a valid passport or it would be unreasonable to require this: cl.457.228.[100]

[93] cl.457.22.
[94] Clause 457.223A was inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242) and applies to an application for a visa made after 14 December 2015, or an application not finally determined at that date.
[95] Clause 457.225 was amended by SLI 2012, No.238 to include reference to special return criterion 5010. The amendment applies to visa applications made before 24 November 2012 but not finally determined before that date, and visa applications made on or after 24 November 2012.
[96] The further stay Independent Executive stream in cl.457.223(7A) was removed for visa applications made on or after 24 November 2012 by SLI 2012, No.238.
[97] Clause 457.227 was omitted by SLI 2012, No.238 for visa applications made on or after 24 November 2012.
[98] The Further Stay Independent Executive stream in cl.457.223(7A) was removed for visa applications made on or after 24 November 2012 by SLI 2012, No.238.
[99] Clause 457.227A was omitted by Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144) for visa applications made on or after 1 July 2009.
[100] Clause 457.228 was omitted by Migration Legislation Amendment Regulation 2012 (No.5) (SLI 2012, No.256) for visa applications made on or after 24 November 2012. For applications made after 24 November 2012, PIC 4021 requires the applicant to hold a valid passport unless it would be unreasonable to require the applicant hold a passport.

Note that cl.457.226 and 457.226A were repealed for all applications made on or after 24 November 2012.[101] Those criteria related to AusAID students or recipients and fully funded students, and were considered no longer necessary as they are encapsulated in special return criterion 5010 (in cl.457.225). Additionally, cl.457.228 was omitted for new applications made on or after 24 November 2012 with the passport requirement contained therein now being contained in the new public interest criterion 4021 which must be satisfied before an applicant can meet cl.457.224(1).[102]

Complied substantially with conditions on previous visas: cl.457.221

Clause 457.221 applies only to applicants who are in Australia. It requires that the applicant has complied substantially with the conditions that apply or applied to the last of any substantive visas held by the applicant and to any subsequent bridging visa.[103] Criteria requiring substantial compliance with previous visas applied, until recently, to student visas also and there is significant case law explaining the proper legal approach to 'substantial compliance' in that context. Given the similarity of the phrase, these authorities are relevant here. For further information on the legal approach to 'complied substantially' see the MRD Legal Services Commentary: Substantial Compliance with Visa Conditions.

Condition 8107

Condition 8107 applies to all Subclass 457 visa holders except for the pre-24 November 2012 further stay Independent Executives (i.e. persons who satisfied cl.457.223(7A)). For details please see MRD Legal Services Commentary Visa Conditions 8104, 8105 and 8107.

Must hold substantive visa: cl.457.221A

Clause 457.221A in its current form only applies to visa applications made on or after 14 September 2009.[104] It applies to applicants who were outside Australia at the time of application and apart from the fact that it must be met at time of decision, its requirements are the same as those in cl.457.211 applicable to onshore visa applicants. At time of decision the applicant must either hold a substantive visa, other than a Subclass 771 (Transit) visa or a special purpose visa,[105] or if the applicant does not hold a substantive visa, the last substantive visa held was not a Subclass 771 (Transit) visa or a special purpose visa and the applicant satisfies Schedule 3 criteria 3003, 3004 and 3005 (see above for discussion of these criteria).

In *Quan v MIMAC*[106] the Court considered the requirements of criterion 3004 in Schedule 3 to the Regulations in the context of cl.457.211(b)(ii), as discussed above. The judgment appears equally applicable in the context of cl.457.221A.

[101] Clauses 457.226 and 457.226A were omitted by SLI 2012, No.238 for visa applications made before 24 November 2012 but not finally determined before that date, and visa applications made on or after 24 November 2012.
[102] Clause 457.224 was omitted by SLI 2012, No.256 for visa applications made before 24 November 2012 but not finally determined before that date, and visa applications made on or after 24 November 2012.
[103] As amended by Migration Amendment Regulations 2004 (No.8) (SR 390 of 2004) and applying to visa applications made on or after 2 April 2005. For visa applications made from 1 January 2004 to 1 April 2005, cl.457.221 as amended by Migration Amendment Regulations 2003 (No.11) (SR 363 of 2003) applied to an *applicant in Australia at time of application*. For visa applications made from 1 March 2003 to 31 December 2003, cl.457.221 as amended by Migration Amendment Regulations 2002 (No.10) (SR 348 of 2002) applied to *an application made in Australia*.
[104] SLI 2009 No.202.
[105] For special purpose visas see definition in s.5(1) and s.33 of the Act.
[106] [2013] FCCA 1254 (Judge Emmett, 2 September 2013).

For visa applications made on or after 2 April 2005 but prior to 14 September 2009, the previous version of cl.457.221A requires that an applicant who is in Australia at the time of decision but applied for the visa whilst outside Australia must be the holder of a substantive visa mentioned in cl.457.211(a), (b), (c) or (ca). This creates an anomaly as it is referring to provisions of cl.457.211 which have been repealed. However, this issue rarely arises for consideration by the Tribunal. If it is an issue, contact MRD Legal Services for assistance.

For visa applications made prior to 2 April 2005, this is not a criterion that must be met.

The visa streams: cl.457.223

For applications made on or after 23 March 2013, cl.457.223 provides that the applicant must meet the requirements of one of the two visa 'streams' in subclause (2) or (4).[107] For applications made before this date, applicants could satisfy an additional stream, being cl.457.223(8), and for applications made before 24 November 2013, there are three additional streams which could be satisfied.[108] Generally an applicant applies for a particular stream and provides evidence to satisfy that stream. These streams are discussed further below.

Clause 457.1 deals with the interpretation of key terms relevant to cl.457.223. For the meaning of standard business sponsor and other terms, reference is made to the definitions provided in r.1.03. For details regarding approval of business nominations, please refer to the MRD Legal Services commentary: Nomination and approval of an occupation for Subclass 457. For further detail about standard business sponsorship see the MRD Legal Services commentary: Approval as Standard Business Sponsor- r.2.59.

Labour agreements – cl.457.223(2)

Under cl.457.223(2), an applicant meets requirements on the basis of a labour agreement if:

- **occupation in labour agreement –** the occupation specified in the application is covered by the terms of a labour agreement;
- **current approved nomination –** there is an approved nomination of an occupation in relation to the applicant under s.140GB and the approval has not ceased to have effect under r.2.75;
- **subject of the nomination –** the applicant is nominated by a party to the labour agreement;
- **skills and experience –** if the Minister requires the applicant to demonstrate s/he has skills and experience suitable to perform the occupation, the applicant has demonstrated this in the manner specified;
- **labour agreement requirements –** the Minister is satisfied the requirements of the labour agreement have been met; and

[107] The Service Sellers stream (cl.457.223(8)) was removed by SLI 2013, No.32. The amendment applies to visa applications made on or after 23 March 2013.
[108] On 24 November 2012, the Independent Executives stream (cl.457.223(7A)) and the Invest Australia Supported Skills (IASS) agreement stream (cl.457.223(10)) were removed and were not replaced. The stream for persons who were accorded certain privileges and immunities (cl.457.223(9)) was also removed for visa applications made on or after 24 November 2012 as those persons are now eligible for a Subclass 403 (International Relations) visa in the Privileges and Immunities stream: SLI 2012, No.238. The streams provided for in cl. 457.223(3) - Regional headquarters (RHQ) Agreements and.457.223(5) - Sponsorship – overseas business, were removed by SLI 2009, No.202. RHQ agreements have been repealed completely. Amendments made to cl.457.223(4) effectively incorporated matters relating to nominations by an overseas business, rendering the separate subclause unnecessary.

- **no adverse information -** there is no adverse information known about a party to the labour agreement or a person associated with it, or it is reasonable to disregard such information.[109]

'Labour agreement' is defined in r.1.03 of the Regulations and means a formal agreement entered into between the Minister, or the Employment Minister, and a person or organisation in Australia under which an employer is authorised to recruit persons to be employed by that employer in Australia. Cases involving Labour agreements are rarely seen at the Tribunal.

Standard business sponsorship - cl.457.223(4)

Subclause 457.223(4) relates to applicants sponsored by a standard business sponsor. This is the most common category of Subclass 457 visa that the Tribunal deals with and has been substantially amended in recent times.[110] While previously this stream applied to applicants whose sponsor was operating a business in Australia, from 14 September 2009, the criteria in this sub-clause apply whether the sponsor is operating a business either inside or outside Australia. For more information, including a comparative table of the changes to cl.457.223(4), see Legislation Bulletin No.13/2009.

Subclause 457.223(4) requires:

- **current approved nomination –** a nomination of an occupation in relation to the applicant has been approved under s.140GB, the nomination was made by a person who was a standard business sponsor at the time the nomination was approved, and the approval has not ceased to have effect under r.2.75;[111]
- **specified occupation –** the nominated occupation is specified in a written instrument;[112]
- **specified occupation / employment –** either:
    - the applicant is employed to work in the nominated occupation, AND if the person who made the approved nomination met r.2.59(d) or (e) or r.2.68(e) or (f) in the person's most recent approval as a standard business sponsor, the applicant is employed to work in a position in the person's business or in a business of an associated entity of a person, OR if the person who made the approved nomination met r.2.59(h) or r.2.68(i) in the person's most recent approval as a standard business sponsor, the applicant is employed to work in a position in the person's business; or
    - the nominated occupation is specified in an instrument in writing;[113]
- **genuine intention / position –** the applicant's intention to perform the occupation is genuine and the associated position is genuine;[114]

[109] Amendments to cl.457.223(2)(b) and (d) were made by SLI 2009 No.202, applying to all visa applications not finally determined as at 14 September 2009. Amendments to cl.457.223(2)(b), removing a transitional provision relating to the pre-14 September 2009 scheme, were made by SLI 2013 No.146, applying to all visa applications not finally determined on 1 July 2013, and applications made on or after that date.
[110] All the criteria in this stream were amended on 14 September 2009 and these changes apply to all visa applications not finalised as at that date, as well as visa applications made on or after that date: SLI 2009 No.202. The amendments to cl.457.223(4) on 14 September 2009 were made by substituting the entire subclause. Those amendments were stated as applying to all visa applications not finally determined as at 14 September 2009 or made on or after that date. Consequently previous amendments to this subclause, involving different points in time, were effectively removed. Further amendments were made by SLI 2013 No.146, applying to all visa applications not finally determined on 1 July 2013, and all visa applications made on or after that date.
[111] cl.457.223(4)(a) as amended by SLI 2013 No.146, for all visa applications not finally determined on 1 July 2013 and visa applications made on or after that date.
[112] cl.457.223(aa).
[113] cl.457.223(4)(ba). Previously cl.457.223(4)(ba) dealt specifically with labour hire businesses. This was amended by SLI 2013 No.146 for all visa applications not finally determined on 1 July 2013 and applications made on or after that date.

- **skills, qualifications and employment –** the applicant has the skills, qualifications and employment background that the Minister considers necessary to perform the nominated occupation;[115]
- **demonstration of skills –** the applicant be able to demonstrate in the manner specified by the Minister, if so required by Minister, that he or she has the skills necessary to perform the occupation;[116]
- **English language –**
    - certain applicants need to have a prescribed level of English language proficiency;[117]
    - if required to demonstrate her or his English language proficiency, an applicant must do so in the manner specified by the Minister;[118]
- **no adverse information –** there is no adverse information known to Immigration about a party to the labour agreement or a person associated with it, or it is reasonable to disregard such information.[119]

Aspects of the above requirements are further discussed below.

Approved nomination of an occupation - cl.457.223(4)(a)

The terms of cl.457.223(4)(a) require that the visa applicant and the business activity or occupation specified in the visa application be the subject of an approved nomination that is still current. Essentially there are three elements to this requirement:

- a nomination of an occupation under s.140GB *in relation to the visa applicant* has been approved;
- at the time the nomination was approved, the person making the nomination was a standard business sponsor; and
- at the time of decision on the Subclass 457 visa application, the approval of the nomination has not ceased to have effect as provided for in r.2.75.[120]

It will be a question of fact as to whether the visa applicant is the subject of an approved nomination. As this is a time of decision criterion and a decision to refuse to approve a nomination is a separately reviewable decision under Part 5 of the Act,[121] this may require consideration of the circumstances of a related review application.[122] Note that it must be a nomination applied for before 18 March 2018

[114] cl.457.223(4)(d).
[115] cl.457.223(4)(da). Inserted by SLI 2013 No.146 for all visa applications not finally determined on 1 July 2013, and visa applications made on or after that date.
[116] cl.457,223(4)(e).
[117] cl.457.223(4)(eb).
[118] cl.457.223(4)(ec).
[119] cl.457.223(4)(f).
[120] Clause 457.223(4)(a) as amended by SLI 2013, No.146. This amendment applies to all visa applications made on or after 1 July 2013 as well as visa applications made prior to but not finally determined on that date. The amendments removed transitional provisions that related to the pre-14 September 2009 scheme, and were intended to clearly articulate that Subclass 457 visa applicants who apply under the standard business sponsorship stream should be subject to a related nomination which has been approved and is still valid: see Explanatory Statement to SLI 2013 No.146, p.11.
[121] s.338(9) and r.4.02(4)(d).
[122] In *Kaur v MIBP* [2016] FCCA 1730 (Judge Smith, 20 July 2016) the Court appeared to suggest that such circumstances may also include situations in which a nomination decision is infected by 'unfairness'. Judge Smith held at [72] that circumstances in which the effect of a decision to refuse approval of a nomination is that a person may not be entitled to the grant of a related visa, the fact finding relevant to the application for that other visa is, subject to the availability of review, almost inevitably diverted by a legally flawed decision to refuse approval. Applying *Wei v MIBP* (2015) 90 ALJR 213, the Court held that the unfairness in relation to an associated nomination decision, being a misrepresentation as to the date of response to a Departmental letter was due, did not

(whether approved before or after that date), because of changes to the legislative scheme which mean that nomination applications made on or after that date are not made in relation to applicants or proposed applicants for Subclass 457 visas.[123]

A nomination would not be approved unless there was an approved standard business sponsor or, for cl.457.223(2), a party to a work agreement. There was formerly an alternative for nomination of business activities under r.1.20H as in force prior to 14 September 2009. However this was repealed with effect from 1 July 2013 and applicants can no longer meet this provision on that basis.[124]

The focus of this subclause is on an approved nomination of the relevant kind, rather than being 'sponsored'. Therefore, where a decision to refuse approval as a sponsor has been made and an application for review of that decision has been lodged, even a successful outcome on review will not suffice to enable the applicant to meet the elements of cl.457.223(4)(a) until there is an approved nomination based upon the approval as a standard business sponsor. In these circumstances, where the related review has been remitted for reconsideration on the basis that the person is approved as a standard business sponsor, the Tribunal considering the Subclass 457 visa application may wish to allow some time for a decision to be made in relation to the related nomination. In considering a request to adjourn the review of a Subclass 457 visa refusal pending the outcome of a nomination application or review of a nomination refusal, the Tribunal must act reasonably in light of the specific circumstances of the case.[125]

The cessation of the approval for a Subclass 457 visa is provided for in r.2.75. Under r.2.75, approval of a nomination ceases on the earliest of the following:

- the date Immigration receives written notification of withdrawal of the nomination by the approved sponsor;
- 12 months after the day the nomination is approved (except in certain circumstances, see below);
- the day a Subclass 457 visa is granted to the proposed applicant for the occupation on the basis of the nomination;
- 3 months after the day on which approval as a standard business sponsor ceases;
- the day approval as a standard business sponsor is cancelled under s.140M(1);
- if approval of a nomination is given to a party to a work agreement the day on which the work agreement ceases.

Note that r.2.75(2)(b), which provides for cessation 12 months after nomination approval, does not apply to a nomination made before 18 March 2018 if the person identified in the nomination applied for a 457 visa before 18 March 2018 *and* they applied to the Tribunal for a review of a decision to refuse to grant that visa within 12 months after the day on which the nomination was approved.[126] This is a 'savings'

infect the Tribunal's decision as the applicant was well aware of the unfairness involved in the nomination decision and had some means of addressing the unfairness, even if she could not apply for merits review of that decision herself (at [74]).

[123] Rather, they are made in relation to applicants/proposed applicants for Subclass 482 visas or to *holders* of Subclass 482 or Subclass 457 visas. See r.2.72(1) as repealed and substituted by F2018L00262.

[124] SLI 2013 No.146.

[125] See for example *Chen v MIBP* [2016] FCCA 2351 (Judge Smith, 15 September 2016). In *Chen*, the Court found the Tribunal had not acted in a legally unreasonable manner in deciding not to adjourn its decision so as to wait for the outcome of a nomination application in circumstances where a previous nomination had expired and a subsequent nomination application had been refused and the Tribunal found it was uncertain if and when the applicant would become the subject of an approved nomination.

[126] Clause 6704(15) of Schedule 13 to the Regulations, as inserted by F2018L00262.

provision introduced as part of reforms to the temporary sponsored work visa program, intended to avoid situations where an application is successful in their review but the related nomination has ceased to be in effect, noting it would now not be possible to make a new nomination to support the 457 visa.[127] However, it appears this savings provision only has effect for nominations which had not yet ceased by operation of r.2.75(b) as at 18 March 2018.

There is no longer any reference in cl.457.223(4)(a) to the visa applicant being 'employed' by the sponsor. The current sponsorship framework recognises that the relationship between sponsor and visa applicant may not always be an employment relationship.[128] However, there are certain restrictions requiring an applicant to be employed in the sponsor's business or an associated entity of the sponsor in cl.457.223(4)(ba). For further guidance see below.

There is also no longer any requirement that the applicant be 'sponsored' by the same person at time of decision as at time of application. Although item 1223A(3)(d) of Schedule 1 requires the visa application to specify the nominator or proposed nominator, unlike the pre 14 September 2009 criteria, the terms of cl.457.223(4)(a) do not require that it must be a nomination by the same sponsor at time of decision as existed at the time the visa application was made. Provided the visa applicant is the subject of the relevant approved nomination made by an approved sponsor the applicant will be able to meet cl.457.223(4)(a). Accordingly, an applicant may change their proposed sponsor, for example, where the applicant has been given a better job offer for the same occupation by a different sponsor subsequent to being nominated by their original sponsor.

Nominated occupation specified in an instrument – cl.457.223(4)(aa)

Clause 457.223(4)(aa) requires that the nominated occupation is specified in an instrument in writing for r.2.72(10)(a) or (aa) that is in effect.[129] Regulation 2.72(10)(a) applies to nominations made before 1 July 2010, whilst r.2.72(10)(aa) applies to nominations made on or after 1 July 2010. The instrument, and consequently the specified occupations, may change during the processing of a visa application, including after the associated nomination has been approved.[130] The relevant instrument is the one that is in effect at the time of decision. The instrument for r.2.72(10)(a) refers to occupations under the Australian Standard Classification of Occupations (ASCO), while the instrument for r.2.72(10)(aa) refers to the Australian New Zealand Standard Classification of Occupations (ANZSCO).

At the time of writing, IMMI 17/060, which commenced on 1 July 2017, is expressed to apply in relation to nomination of occupations made on or after 1 July 2017 or made or not finally determined before 1 July 2017.[131] Therefore it appears that where the associated nomination was approved *before* 1 July 2017, IMMI 16/059 (as amended by IMMI 17/040) will be the instrument that is 'in effect' for cl.457.223(4)(aa).[132] See the 'Occ186/442/457&Noms' tab of the Register of Instruments – Business Visas for the relevant instrument and the Nomination of Occupation: 2.72 commentary page for further discussion of instruments made under 2.72(10)(a) & (aa).

[127] Explanatory Statement to F2018L00262, Attached C item 178.
[128] Explanatory Statement to SLI 2009 No.202 at 13.
[129] cl.457.223(4)(aa) as amended by Migration Amendment Regulations 2010 (No.6) (SLI 2010, No.133).
[130] This seems to be contemplated by the imposition of cl.457.223(4)(aa) as a requirement additional to there being an approved nomination that is still in force, as required by cl.457.223(4)(a).
[131] See s.9. This is regardless of whether an associated visa application was made before, on or after 1 July 2017.
[132] Note that IMMI 17/081 only (relevantly) purports to repeal IMMI 16/059 in relation to nominations to which IMMI 17/060 applies (see Schedule 1 Part 2 item (1)(a)). Further, note that IMMI 12/022 is also still in force, so that for nomination applications made between 1 July 2010 and 30 June 2012 this will also be an instrument that is 'in effect'.

Note that instruments made under r.2.72(10)(aa) generally include exclusions of specific roles and/or additional requirements relating to the particular position in specifying some occupations, and these should be considered in determining whether cl.457.223(4)(aa) is satisfied.[133]

Direct employment in business of nominator – cl.457.223(4)(ba)

Clause 457.223(4)(ba) requires visa applicants to be employed to work in the nominated occupation. It also requires them to be employed to work in certain businesses, depending on whether the employer's sponsorship was approved as a person lawfully operating a business in Australia or as a person lawfully operating a business outside Australia.[134] If the sponsor was approved on the basis of lawfully operating a business in Australia (per r.2.59(d), r.2.59(e), r.2.68(e) or r.2.68(f)), then the applicant must be employed in the sponsor's business, or the business of an associated entity. If the sponsor was approved on the basis of lawfully operating a business outside of Australia (per r.2.59(h) or r.2.68(i)) then the applicant must be employed to work in the sponsor's business only. This provision mirrors requirements imposed on visa holders by condition 8107 and certification required at nomination stage (see r.2.72(10)(e)(i) and (iii)).

There is an exception if the occupation is listed in an instrument specified for cl.457.223(4)(ba)(i). The excepted occupations, broadly speaking, are various types of medical professionals and senior executives. See the 'Occ-Ex' tab of the Register of Instruments – Business Visas for the relevant instrument. The intention of the exception is to continue the exclusion of the on-hire industry from the Temporary Sponsored Skilled Migration Program, unless the nominated occupation is specified by the Minister in an instrument in writing.[135] Although there is no express wording as in cl.457.223(4)(aa), it appears from the context as a time of decision requirement and the purpose of the provision, that the relevant instrument is the one that is in effect at the time of decision.

Intention to perform occupation is genuine and position is genuine – cl.457.223(4)(d)

Clause 457.223(4)(d)(i) requires the applicant to satisfy the decision maker that the applicant's intention to perform the occupation is genuine. Clause 457.223(4)(d)(ii) further requires the applicant to satisfy the decision maker, that the position associated with the nominated occupation is genuine and is intended to ensure that the position has not been created only for obtaining entry to Australia for the applicant.[136]

Both cl.457.223(4)(d)(ii) and the identically worded r.2.72(10)(f) should be approached in the same manner.[137] The starting point is the proper identification of the relevant occupation and position. The word

[133] Note that r.2.72(10)(aa) was amended on 1 July 2017 by Migration Amendment (Specification of Occupations) Regulations 2017 (F2017L00848) to include an express requirement that such additional specifications as to the applicability of the occupation to the nominee are met, and the same amending regulations inserted r.2.72(10AAA) to put beyond doubt the Minister's power to make such specifications. Some guidance on the content of these requirements, referred to as 'caveats' or 'ineligibility conditions', can be found in the PAM3 Policy Instructions on nominations, see Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.8] Advice on occupations with a caveat (reissued 1 October 2017).

[134] Previously cl.457.223(4)(ba) contained requirements specific to labour hire businesses. This was amended by SLI 2013 No.146 for all visa applications not finally determined on 1 July 2013 and applications made on or after that date. The amended provision is still intended to exclude on-hire businesses from the Temporary Skilled Migration Program, unless the nominated occupation is specified by the Minister in an instrument in writing (see Explanatory Statement to SLI 2013 No.146, p.57).

[135] Explanatory Statement to SLI 2013 No.146, p.56.

[136] This criterion replaces former cl.457.223(4)(h) that the position to be filled by the applicant has not been created only for the purposes of securing entry to Australia, but retains same 'policy intention': Explanatory Statement to SLI 2009 No.202, p.21. There is an equivalent requirement for approval of the nomination that the position associated with the nominated occupation is genuine in r.2.72(10)(f), inserted by SLI 2013, No.146 for all nominations not finally determined on 1 July 2013 and nominations made on or after that date.

[137] *Khan v MIBP* [2016] FCCA 333 (Judge Manousaridis, 19 February 2016). For guidance on how to approach r.2.72(10)(f) see: *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091 (Judge Manousaridis, 19 February 2016) and MRD Legal Services commentary: Nomination and Approval of an Occupation for Subclass 457 – Regulations 2.72 and 2.73.

'occupation' denotes one of the occupations specified in ANZSCO consisting of a set of jobs whose main tasks are characterised by a high degree of similarity.[138] What distinguishes one occupation from another is the set of tasks associated with each occupation. The expression 'nominated occupation' is the name of an occupation together with a six digit number nominated by an approved sponsor that corresponds to the name of an occupation and associated six digit number that is contained in the ANZSCO as specified in an instrument in writing made by the Minister. The 'nominated occupation' must bear the description and tasks associated with that occupation that is specified by ANZSCO.[139] The word 'position' in this context refers to the tasks it is claimed the applicant in relation to whom an occupation has been nominated under s.140GB has been or will be employed to perform by the approved sponsor.[140]

In *Bakri v MIBP*, Judge Smith emphasised that the task of the decision maker in this context is not simply to determine whether the positions exists, but instead involves a qualitative analysis of the position as against the circumstances and evidence given in support of its existence.[141] In undertaking this task, the Court in *Khan v MIBP* held that cl.457.223(4)(d)(ii) may fail to be satisfied where: the tasks the applicant claims he has been employed to perform or will be employed to perform are not equivalent or substantially equivalent to the tasks ANZSCO associates with the nominated occupation; or the applicant has not in fact been employed to perform those tasks, or will not be employed to undertake those tasks, or a sufficient proportion of those tasks.[142] Judge Manousaridis went on to indicate that the following questions may be relevant in determining whether cl.457.223(4)(d)(ii) is satisfied:

(a) What is the occupation that has been nominated in relation to the applicant?

(b) How is the nominated occupation described in ANZSCO, and what are the tasks ANZSCO associates with the nominated occupation?

(c) What are the tasks the applicant claims he or she has been employed or will be employed to perform?

(d) Are the tasks the applicant claims he or she has been employed or will be employed to perform in that position tasks that are equivalent or substantially equivalent to the tasks associated with the nominated occupation, as specified by ANZSCO?

(e) If (d) is answered in the affirmative, has the applicant in reality performed the tasks he or she has been engaged to perform, or will the applicant perform the tasks he or she will be engaged to perform?

In some circumstances it may be relevant to consider the general tasks set out in higher levels of the ANZSCO hierarchy, rather than just the occupation description (e.g. description at the Major Group or Minor Group level).[143] However, the legislative scheme is designed to enable applicants to obtain Subclass 457 visas only in respect of certain specific occupations in relation to which a skills shortage has been identified, and not in respect of other occupations, even though they may be closely related and

[138] *Khan v MIBP* [2016] FCCA 333 (Judge Manousaridis, 19 February 2016) at [9].
[139] *Khan v MIBP* [2016] FCCA 333 (Judge Manousaridis, 19 February 2016) at [6].
[140] *Khan v MIBP* [2016] FCCA 333 (Judge Manousaridis, 19 February 2016) at [10].
[141] [2015] FCCA 3059 (Judge Smith, 1 October 2015); upheld on appeal in *Bakri v MIBP* [2016] FCA 396 (Gilmour J, 22 April 2016). Both the Court at first instance and the appeal Court applied the earlier authority in *Cargo First Pty Ltd v MIBP* (2015) 298 FLR 138, which considered the similar (and related) 'genuineness' requirement in r.2.72(10)(f).
[142] *Khan v MIBP* [2016] FCCA 333 (Judge Manousaridis, 19 February 2016) at [13]. See also *Aulakh v MIBP* [2015] FCCA 467 (Judge Jarrett, 4 March 2015).
[143] *Pasricha v MIBP* [2017] FCA 779 (Moshinsky J, 12 July 2017) at [51].

in the same ANZSCO groupings.[144] In that context, a focus on the detailed tasks that distinguish the particular occupation in question will generally be appropriate.[145]

Departmental guidelines (PAM3) suggest that genuine intention to perform the occupation may be in question where the visa applicant's qualifications/competencies or employment background appear to be significantly inconsistent with the nominated occupation.[146] PAM3 suggests that decision makers should generally consider this requirement met on the basis that the related nomination has already been approved,[147] however following judgment in *Bakri*, (above) such an approach should be treated with caution.

PAM3 provides the following examples of factors that may be considered when assessing the applicant's intention:

- the applicant's immigration history;
- personal circumstances in the applicant's home country that may encourage them to seek a visa to enter Australia;
- the credibility of the applicant in terms of character and conduct; and
- the applicant's age, qualifications and employment history to the applicant's proposed employment in Australia.[148]

Applicant has skills necessary to perform tasks of nominated occupation – cl.457.223(4)(da)

Clause 457.223(4)(da) requires an applicant to have the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation.[149]

While a decision-maker also has the power to require a visa applicant to demonstrate they have the skills necessary to perform the nominated occupation (see below) this criterion means that where it is clear on the evidence before a decision maker that an applicant does not have the necessary skills, qualifications or employment background to do so, a decision can be made on the application without having to require a demonstration of skills.[150]

There is no threshold legislative standard for determining the skills, qualifications and employment background necessary to perform the tasks of the nominated occupation, although in determining this question, the Tribunal may be guided by the *Australian Standard Classification of Occupations* (ASCO) in relation to occupations nominated before 1 July 2010, or the *Australian and New Zealand Standard Classification of Occupations* (ANZSCO) for occupations nominated on or after 1 July 2010.[151] However,

[144] *Pasricha v MIBP* [2017] FCA 779 (Moshinsky J, 12 July 2017) at [49].
[145] *Pasricha v MIBP* [2017] FCA 779 (Moshinsky J, 12 July 2017) at [50].
[146] PAM3: Migration Regulations - Schedules > Sch2 Visa 457 - Temporary Work (Skilled) – 457 visa applications - [4.7.5] Genuine intention and position (reissued on 1 October 2017).
[147] PAM3: Migration Regulations - Schedules > Sch2 Visa 457 - Temporary Work (Skilled) – 457 visa applications – [4.7.5] Genuine intention and position (reissued on 1 October 2017).
[148] PAM3: Migration Regulations - Schedules > Sch2 Visa 457 - Temporary Work (Skilled) – 457 visa applications – [4.7.5] Genuine intention and position (reissued on 1 October 2017).
[149] Inserted by SLI 2013 No.146 for all visa applications not finally determined on 1 July 2013, and visa applications made on or after that date.
[150] Explanatory Statement to SLI 2013 No.146, p.57.
[151] See criteria for approval of nomination of occupation under r.2.72, with specific criteria referring to ASCO for nominations made before 1 July 2010 in r.2.72(8), (10)(a) and (10)(d) and ANZSCO for nominations made on or after 1 July 2010 in r.2.72(8A),

caution must be used in applying the ASCO or ANZSCO and members must not place absolute reliance on that tool. The determination of each application requires more than a narrow matching process between an applicant's tasks and an ASCO or ANZSCO occupational definition. In assessing this criterion, the regulations in this context do not require formal or full skills assessment, as is required for other skilled permanent visa subclasses, although one may be requested under cl.457.223(4)(e) as outlined below. In considering an earlier version of this clause, the Court in *Joshi v MIMIA* held the sensible and correct approach requires the ascertainment of the attributes and skills of an applicant and how those attributes and skills are being applied in the workplace for remuneration.[152]

Similarly, the certification referred to in r.2.72(10)(d) or (e) provided as part of the nomination process, identifies the tasks of the nominated position and the qualifications and experience of the proposed applicant for the occupation. This certification provides some guidance in the assessment of both the tasks of the nominated occupation and whether the applicant has the necessary skills, qualifications and employment background for the nominated occupation.

Applicant's skills demonstrated in the manner specified - cl.457.223(4)(e)

Where the Minister, or Tribunal on review, may be satisfied an applicant has the necessary qualifications or employment background to perform the tasks of the nominated occupation, but nonetheless has reservations about the applicant's skills, it may request the applicant to demonstrate his or her possession of those skills in a particular way. Clause 457.223(4)(e) requires the visa applicant to demonstrate he or she has the skills to perform the nominated occupation – but only if the decision maker requires the applicant to do. If the applicant is so required, he or she must demonstrate their skills in the manner specified by the decision maker.

Generally this criterion will arise for consideration where either the delegate at primary level has required the applicant to demonstrate that he or she has the required skills and has failed to do so in the manner specified or, alternatively, where the evidence before the Tribunal indicates that the applicant may not have the requisite skills to perform the nominated occupation, for example following an adverse referral. It is open to the Tribunal upon review to consider for itself whether the applicant should be required to demonstrate that he or she has the necessary skills, although the Tribunal should have regard to the fact that the delegate required it and any reasons of the delegate for requiring it.

Need to demonstrate skills

There is no threshold legislative standard for determining whether there is a need for the applicant to demonstrate that he or she has the skills required for the nominated occupation. Consideration of the skills required to perform the nominated occupation and whether the applicant has, on the available evidence, demonstrated possession of those skills may indicate whether there is a need for the applicant to meet this criterion.

Requesting and demonstrating skills

If the decision maker considers it necessary for the applicant to demonstrate he or she has the skills to perform the nominated occupation, consideration must be given to the manner in which a demonstration of those skills is necessary. Clause 457.223(4)(e) requires that, where the applicant has been required to demonstrate that he or she has the skills that are necessary, that the applicant does so *in the manner*

(10)(aa) and (10)(e). Further information about the nomination scheme is available in the MRD Legal Services commentary Nomination of Occupation: r.2.72.

[152] *Joshi v MIMIA* [2005] FMCA 1116 (McInnis FM, 12 August 2005).

specified by the Minister. The specified manner is not limited in the Regulations, but may include, for example, the provision of qualifications, licences, evidence or registration, reference letters or a formal skills assessment by the relevant assessing authority for the occupation.

Under departmental policy, certain applicants are required to demonstrate they have the requisite skills by providing the outcome of a Subclass 457 visa skills assessment.[153] The Department's PAM3 guidelines state that '[u]nder policy, if TRA (Trades Recognition Australia) supports a 457 Skills Assessment for the nominated occupation and passport country of the visa applicant, officers should require the applicant to demonstrate that they have the skills necessary to perform the nominated occupation, by completing such an assessment, in accordance with paragraph 457.223(2)(d) and 457.223(4)(e)'.[154] The policy also imposes such a requirement for certain occupations.[155] However, it should be noted that the Regulations in this context do not require formal or full skills assessment, as is required for other skilled permanent visa subclasses.

Once the Tribunal has determined further demonstration of the applicant's skills is necessary and the method in which those skills are to be demonstrated, the Tribunal should advise the applicant and provide him or her with an opportunity to provide that evidence.

English language requirements - cl.457.223(4)(eb) and (ec)

English language proficiency requirements are contained in cl.457.223(4)(eb) and (ec) as explained below and in the flowchart attachment.[156] Both cl.457.223(4)(eb) and (ec) must be met. They are not alternatives or part of a 'cascading checklist' of items to which the decision-maker must have regard.[157]

Clause 457.223(4)(eb) specifies the level of language proficiency, if any, that is required for an applicant.[158] Where clause 457.223(4)(eb) applies, it requires the applicant to have undertaken a specified language test and achieved a specified score on that test. However, it only applies if the applicant is not covered by cl.457.223(6) (highly paid employees exception) and is not an 'exempt applicant'.[159] Clause 457.223(4)(ec) allows the decision-maker to specify a manner in which the applicant must demonstrate English language proficiency.

Highly paid employees exception

Applicants are not required to demonstrate the specified level of English proficiency under cl.457.223(4)(eb) where:

[153] Availability of the assessment to prospective Subclass 457 visa applicants is based on the occupation and passport country of the applicant. The assessment process may not be available for all passport countries and every occupation that can be nominated for a Subclass 457 visa. DEEWR/TRA are progressively introducing the assessment for nominated occupations and passport countries. The DoI/TRA website has a list of those occupations and passport countries for which a formal Subclass 457 visa skills assessment is available – link here.
[154] PAM3: Migration Regulations - Schedules > Sch2 Visa 457 - Temporary Work (Skilled) – 457 visa applications - [4.7.7.2] TRA 457 skills assessment available for occupation & passport country (reissued 1 October 2017). The policy goes on to list certain categories of persons who are exempt from this policy requirement.
[155] PAM3: Migration Regulations - Schedules > Sch2 Visa 457 - Temporary Work (Skilled) – 457 visa applications - [4.7.7.3] Occupation is a Program and Project Administrator or a Specialist Manager NEC (reissued on 1 October 2017).
[156] Separate English proficiency requirements in respect of visa applicants who were required to hold a mandatory licence, registration or membership to perform the nominated occupation previously existed in cl.457.223(4)(ea), however this paragraph was repealed on 19 April 2016, affecting all live applications as at that date by the *Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016* (F2016L00523).
[157] *Tran v MIBP* [2016] FCCA 1984 (Judge Nicholls, 2 August 2016) at [36].
[158] Amendments to this provision made by SLI 2013, No.146 were replaced by SLI 2014 No.32, for all visa applications made but not finally determined as at 22 March 2014 or made on or after that date.
[159] cl.457.223(4)(eb)(i) and (ii).

- their base rate of pay, under the terms and conditions of employment about which the nomination was approved, is at least the level of salary specified in the relevant legislative instrument; and
- it is 'in the interests of Australia' that the applicant be granted a Subclass 457 visa.[160]

The instrument specifying the level of salary and method of calculating the salary can be found at the '457Eng' tab of the Register of Instruments – Business Visas and is the instrument in effect at the time of decision. Note that, for applications made on or after 1 July 2017, no specification has been made and such applications cannot rely on this exception.[161] The instrument in force at the time of writing, IMMI 17/057, specifies a salary of $96,400 per annum, for visa applications made before 1 July 2017. It specifies that the base rate of pay has the same meaning as in r.2.57(1), which broadly means the rate of pay payable to an employee for their ordinary hours of work, not counting any other additional bonuses or payments.[162]

Whether or not it is in the interests of Australia that an applicant be granted a Subclass 457 visa is a question of fact and will depend on the circumstances of a particular case. Departmental policy no longer provides any specific guidance in this respect, however relevant factors may include whether the business may be reducing its local workforce, whether Australia's relationship with a foreign government would be affected, and/or whether Australia's business, economic or trade interests would benefit from the granting of the visa.

Exempt applicants

An 'exempt applicant' is defined in cl.457.223(11) as a person in a class specified in a written instrument. If the applicant is an *exempt applicant* within cl.457.223(11), then the applicant is not required to demonstrate the specified level of English proficiency under cl.457.223(4)(eb).

The instrument specifying exempt applicants can be found at the '457Eng' tab of the Register of Instruments – Business Visas. The relevant instrument is the instrument in effect at the time of decision. At the time of writing the instrument (IMMI 17/057) details various classes of 'exempt applicant' for cl.457.223(11) which broadly speaking include: certain passport holders; applicants who have completed a minimum of 5 years full-time secondary or higher study in English; applicants who have demonstrated English language ability at the level required for cl.457.223(4)(eb) when obtaining a registration, licence or membership required by their nominated occupation; certain applicants who lodged their visa applications before 1 July 2013 and have nominated certain kinds of occupation.[163]

[160] cl.457.223(6).
[161] See Explanatory Statement to Migration (IMMI 17/057: English Language Requirements for Subclass 457 visas) Instrument 2017.
[162] For r.2.57(1), 'base rate of pay' means the rate of pay payable to an employee for his or her ordinary hours of work, but not including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, or any other separately identifiable amounts. This definition is based on the definition of base rate of pay in section 16 of the *Fair Work Act 2009.* An applicant's ordinary hours of work are not defined, but the *Fair Work Act 2009* requires an employer not to request a full-time employee to work any more than 38 hours per week unless the additional hours are reasonable. In determining whether the additional hours are reasonable, the usual patterns of work in the industry, or the part of an industry in which the employee works should be taken into account.[163] Note that while the exceptions relating to certain pre-1 July 2013 applications do not appear in IMMI 17/057, the terms of that instrument purports to preserve them as they exist in paragraphs 7(d) and 7(d) of the previously in force instrument, IMMI 15/028.
[163] Note that while the exceptions relating to certain pre-1 July 2013 applications do not appear in IMMI 17/057, the terms of that instrument purports to preserve them as they exist in paragraphs 7(d) and 7(d) of the previously in force instrument, IMMI 15/028.

If the Tribunal finds the applicant is an exempt applicant and cl.457.223(4)(eb) does not apply, the Tribunal must make findings to that effect, but cannot make a permissible direction on this basis and should go on to consider another criterion.[164]

Specified English language test score

If cl.457.223(4)(eb) applies, the applicant must have:

- undertaken a language test specified in the applicable legislative instrument;[165] and
- achieved the score specified in the instrument, within the period specified in a single attempt at the test.[166]

The instrument specifying the relevant tests and test scores is the instrument in effect at the time of decision and can be found on the '457Eng' tab of the Register of Instruments – Business Visas. At the time of writing, the relevant instrument specified the followings tests and scores for the purpose of cl.457.223(4)(eb)(v):

English test	Minimum band score	Minimum scores for English test components			
		Listening	Reading	Speaking	Writing
IELTS test	Overall band score 5.0	4.5	4.5	4.5	4.5
OET	-	B	B	B	B
TOEFL iBT	Total band score 35[167]	3	3	12	12
PTE	Overall band score 36	30	30	30	30
CAE	Overall band score 154	147	147	147	147

The score must have been achieved in a single attempt and within a specified period.[168] A 'single attempt at the test' means that the applicant achieved the required score for the required test in a single test sitting as opposed to achieving the required test score across multiple test sittings.[169]

The period currently specified in the instrument for meeting the English requirement is 3 years from the date of the visa application.[170]

In *Guder v MIBP,*[171] the Court found the Tribunal ought to have given the applicant an opportunity to address the issue of when during the three year period (if at all) it was appropriate for the Tribunal to make its decision, in circumstances where she'd not yet achieved the requisite tests scores but not asked

[164] Under s.349(2)(c) of the Act the Tribunal has the power to remit a matter for reconsideration in accordance with such directions as permitted by the Regulations. Regulation 4.15(1)(b) prescribes a permissible direction as that the applicant must be taken to have satisfied a specified criterion for the visa. It will be necessary for the Tribunal to identify a criterion of the visa which the applicant satisfies in order to be able to remit the matter for reconsideration in accordance with the Act.
[165] cl.457.223(4)(eb)(iv).
[166] cl.457.223(4)(eb)(v).
[167] Note that although IMMI 17/057 lists the total ban score for TOEFL iBT as 3**6**, from 18 March 2018 (including for applications made before that date) this should be read as 3**5**: see clause 6702(3) of Schedule 13 to the Regulations, as inserted F2018L00262.
[168] cl.457.223(4)(eb)(ii) as substituted by SLI 2014 No.32 for all applications not finally determined as at 22 March 2014, as well as applications made on or after that date. Note that the use of the singular 'score' in cl.457.223(4)(eb)(v) could arguably suggest that it is only the overall band score specified in the relevant instrument, as opposed to the individual component scores, which needs to be achieved to satisfy this criterion. This was raised but not considered or decided in *Gowda v MIBP* [2016] FCCA 3491 (Judge Riethmuller, 31 August 2016) at [8].
[169] Explanatory Statement to SLI 2014 No.32, at 11.
[170] IMMI 17/057, item 9.
[171] [2017] FCCA 2527 (Judge Driver, 7 November 2017).

for further time in which to attempt to do so.[172] A failure to do so was a breach of s.360 in that case.[173] As such, it is advisable that when the English requirement is in issue, the Tribunal put the applicant on notice of the time period available for meeting the requirement and their ability to request an adjournment, and that any remaining part of the three year period be expressly taken into account in determining any requests for further time to undertake tests.

Need to demonstrate English language proficiency in specified manner – cl.457.223(4)(ec)

In addition, decision-makers may require the applicant to demonstrate his or her English language proficiency in a specified manner. This can be done either by primary decision-makers or the Tribunal on review. If the applicant does not demonstrate it in the manner specified, the criterion will not be met. There is nothing in the language, structure, or context of cl.457.223(4)(ec) of the Regulations to say that a decision maker cannot require further demonstration of English language proficiency even where an applicant satisfies cl.457.223(4)(eb).[174]

Given that cl.457.223(4)(ec) does not specify the level of English language proficiency and operates in conjunction with (eb) where applicable, the practical circumstances in which the Tribunal might consider it appropriate to require an applicant to demonstrate his or her English language proficiency would appear limited. The Court in *Tran v MIBP* recognised this but provided examples of where decision-makers might require an applicant to demonstrate their English skills. The Court held that it might be appropriate to require an applicant to demonstrate English language proficiency in a specified manner, notwithstanding them having already undertaken the language test and provided evidence of having achieved the relevant score, for example where there are concerns about whether an applicant actually sat for the language test, or errors in the reporting of the test results occurred.[175]

If the delegate has required the applicant to demonstrate English language proficiency under this sub-clause, the Tribunal should have regard to the delegate's reasons for doing so, but may make its own determination as to whether it requires the applicant to demonstrate their English language proficiency. It is clear that cl.457.223(4)(ec) is a non-compellable power. There is nothing to indicate that cl.457.223(4)(ec) imposes a duty on the Tribunal nor that the Tribunal is required to consider whether or not to exercise the power.[176] If the Tribunal does not require the applicant to demonstrate his or her English proficiency in a specified manner, cl.457.223(4)(ec) does not apply.

This criterion does not specify a level of English language proficiency. If the applicant is required to have a particular level of English language proficiency under cl.457.223(4)(eb), then the Tribunal may require the applicant to demonstrate they have that level of English language proficiency and specify the manner in which they can demonstrate that proficiency. However, if the applicant is an exempt applicant or person to whom cl.457.223(6) applies, no level of English language proficiency is specified by the regulations. In these circumstances, while it may be open to the Tribunal to use cl.457.223(4)(ec) to require the applicant demonstrate English language proficiency in a specified manner, it appears that this does not contemplate imposing a requirement for a *particular level* of English language proficiency from which the

[172] [2017] FCCA 2527 (Judge Driver, 7 November 2017) at [17]. This judgment considered IMMI15/028 which also specified 3 years from the date of the visa application as the period during which the English requirement can be met. .
[173] The first instance judgment was upheld on appeal, the Federal Court finding that the issue of whether Mrs Guder should be given more time to meet the English language requirement by adjourning the AAT hearing to allow that to occur, was an issue arising in relation to the decision under review for s.360: *MIBP v Guder* [2018] FCA 626 (Griffiths J, 11 May 2018) at [41].
[174] *Tran v MIBP* [2016] FCCA 1984 (Judge Nicholls, 2 August 2016) at [46].
[175] *Tran v MIBP* [2016] FCCA 1984 (Judge Nicholls, 2 August 2016) at [45].
[176] *Tran v MIBP* [2016] FCCA 1984 (Judge Nicholls, 2 August 2016) at [48].

applicant has otherwise been exempted, as to do so would appear contrary to an apparent legislative intention to exempt these applicants from those requirements.

No adverse information about sponsor, or reasonable to disregard information - cl.457.223(4)(f)

Clause 457.223(4)(f)(i) requires that nothing adverse is known to Immigration about the person who made the approved nomination or a person associated with that person. This criterion concerns adverse information known about the standard business sponsor (as the person who made the approved nomination) or adverse information known about a person associated with the sponsor.

'Adverse information' is defined in r.1.13A (previously r.2.57(3)) as any adverse information relevant to a person's suitability as a sponsor or nominator.[177] A non-exhaustive list of kinds of adverse information is also provided, including information that the person (or an associated person) has become insolvent or has breached certain laws (or is the subject of certain kinds of investigative or administrative action relating to suspected breaches of those laws).[178] The laws relate to discrimination, immigration, industrial relations, occupational health and safety, people smuggling and related offences, slavery, sexual servitude and deceptive recruiting, taxation, terrorism, trafficking in persons and debt bondage.[179] Some of the listed kinds of information require consideration or action by a competent authority (a Department or authority administering or enforcing the law).[180]

The conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[181]

The definition of 'associated with' is found in r.1.13B (formerly r.2.57(3)).[182] A person is 'associated with' another person (i.e. the sponsoring or nominating entity) in the circumstances referred to in r.1.13B, i.e. if they are an officer, partner or member of a committee of management of the entity (or a related or associated entity; depending on the kind of entity).[183]

As drafted, cl.457.223(4)(f)(i) refers to adverse information 'known to Immigration'.[184] Where the information in question comes to the Tribunal's attention but is not known to Immigration, it is unclear whether it would fall within the operation of this provision. However, in practice, this issue could be overcome by notifying Immigration of the information in question.

Where 'adverse information' is known, the decision-maker must go on to consider whether it is reasonable to disregard it. The Regulations do not provide any guidance on when it may be reasonable to disregard such information, and this will depend on the circumstances of the case. The Explanatory Statement to the regulations that introduced this requirement stated that it might be reasonable to disregard information if, for example, the person had developed practices and procedures to ensure the

[177] r.1.13A as inserted by SLI 2015 No.242. The definition was previously found in 2.57(3), which was repealed by the same amending regulations.
[178] r.1.13A. The reference to becoming insolvent means insolvent within the meaning of ss.5(2) and (3) of the *Bankruptcy Act 1966* and section 95A of the *Corporations Act 2001.*
[179] r.1.13A(2).
[180] 'Competent authority' has the meaning given by r.2.57(1): r.1.13A(4).
[181] r.1.13A(3).
[182] r.1.13B as inserted by SLI 2015 No.242. The definition was previously found in 2.57(3), which was repealed by the same amending regulations.
[183] r.1.13B(5) includes a number of definitions. The term 'officer' is defined as, for a corporation or an entity that is neither an individual or corporation, having the same meaning in s.9 of the *Corporations Act 2001*. In relation to an 'entity', this is defined as including an entity within the meaning of s.9 of the *Corporations Act 2001*; and a body of the Commonwealth, a State or a Territory. And the term 'related body corporate' has the same meaning as in s.50 of the *Corporations Act 2001*.The term 'associated entity' is further defined in r.1.03 as having the same meaning in s.50AAA of *Corporations Act 2001*.
[184] 'Immigration' is defined in r.1.03 as the Department administered by the Minister administering the *Migration Act 1958* and so doesn't appear to encompass the Tribunal.

relevant conduct that gave rise to the past contravention was not repeated. For example, if a person was found to have breached occupational health and safety legislation two years ago but had since appointed an occupational health and safety manager and had a clean occupational health and safety record, it may be reasonable to disregard the original breach.[185] Departmental guidelines additionally suggest the following factors may be relevant:

- the nature of the adverse information;
- how the adverse information became known, including the credibility of the source of the adverse information;
- in the case of an alleged contravention of a law, whether the allegations have been substantiated or not;
- whether the adverse information arose recently or a long time ago;
- whether the person has taken any steps to ensure the circumstances that led to the adverse information did not recur; and
- information about relevant findings made by a competent authority in relation to the adverse information, and the significance attached by the competent authority to the adverse information.[186]

This list is not exhaustive and the determination of whether it is reasonable to disregard the information is a question for the relevant decision maker, having regard to all relevant circumstances of the case.

The business sponsor integrity requirements are repeated in the secondary visa applicant criteria.[187] The requirements for visa applicants (both primary and secondary) mirror the requirements for approval as a standard business sponsor and nomination of occupation.[188] Similarly, waiver provisions apply to those requirements.[189]

General issues arising under cl.457.223(4)

The sponsor - meaning of 'person'

Subclause 457.223(4) refers to nomination of an occupation by a 'person' and the business activities of the 'person' who made the approved nomination. There is no definition of 'person' for the purposes of Subclass 457.[190] Section 22 of the *Acts Interpretation Act 1901* provides that in any Act, unless the contrary intention appears, '*expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no one", "one", "another" and "whoever")*, *include a body politic or corporate as well as an individual…'*. There does not appear to be any contrary intention for the purposes of cl.457.223(4). The definition of 'associated with' in cl.457.111(3), for the purposes of the business integrity criterion in cl.457.223(4)(f) and other provisions within the business sponsorship scheme, make

[185] Explanatory Statement to SLI 2009 No.115, at 18.
[186] PAM3: Reg1.13A - Adverse information > Circumstances in which it may be reasonable to disregard the adverse information (policy reissued 1/1/2016) refers decision makers to the relevant instruction for such conduct by the sponsor or nominator. The relevant guidance in this context has been extracted from PAM3 – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – sponsorships – [4.5.6] No adverse information (policy reissued 01/01/17).
[187] cl.457.324B.
[188] r.2.59(g)(i) for sponsorship approval and r.2.72(9)(a) for approval of nomination.
[189] r.2.59(g)(ii) and r.2.72(9)(b).
[190] Prior to 14 September 2009, cl.457.111 stated that 'person' includes an unincorporated body of persons.

clear that the references to a 'person' in cl.457.223(4) would include a corporation, a partnership, an unincorporated association or other entity.[191]

Visa applications made before 23 March 2013 - Service sellers - cl.457.223(8)

On 23 March 2013, the 'Service Seller' stream in cl.457.223(8) was removed from Subclass 457.[192] The change only affects visa applications made on or after 23 March 2013,[193] and accordingly applicants who made applications before 23 March 2013 must still be considered against this stream.

Subclause 457.223(8) is for a visa applicant who claims to be a representative of a supplier of services who is located outside Australia and who proposes to represent the employer in Australia. The representation must involve negotiating, or entering into agreements for the sale of services, but not involve the actual supply, or direct sale, of the services. The third requirement under this clause is that the Minister (or Tribunal on review) must be satisfied that the proposal has not been made only for the purposes of securing entry of the applicant to Australia.

There are no current PAM3 guidelines for this stream.[194] The Tribunal would only have jurisdiction to review the Subclass 457 visa application if the visa applicant is onshore.

This stream does not commonly arise for consideration by the Tribunal in Subclass 457 reviews.

Pre-24 November 2012 entry streams – cl.457.223 (7), (7A), (9), (10)

On 24 November 2012, 3 entry streams were removed from Subclass 457 as part of the Government's program of simplification and deregulation. The changes only affect visa applications made on or after 24 November 2012.[195] Accordingly, applicants who made applications before 24 November 2012 must still be considered against these additional streams. The streams relate to:

- Independent Executives proposing to maintain their ownership interest of a business in Australia;
- persons who will be engaged in diplomatic-type work and entitled to certain privileges and immunities; and
- employment in Australia under an Invest Australia Supported Skills (IASS) agreement.

These streams are further discussed below.

<u>Independent Executives - Further stay Independent Executives - cl.457.223(7), (7A)</u>

The Independent Executive (IE) stream (cl.457.223(7)) was omitted from the Regulations on 14 September 2009[196] and the 'continuing' IE stream in cl.457.223(7A) was omitted from the Regulations on 24 November 2012.[197]

[191] See r.2.57(2) of Part 2A, inserted by SLI 2009 No.115.
[192] SLI 2013, No.32. For visa applications made on or after 23 March 2013, this cohort of applicants is catered for by the Business Visitor stream in the Subclass 600 visa (see Explanatory Statement to SLI 2013, No.32 at 45).
[193] SLI 2013, No.32.
[194] Justice Rares in *Goo v MIAC* [2007] FCA 391 (Rares J, 9 March 2007) commented that PAM3 (at that time) ascribed an operation to cl.457.223(8) and (5) which did not appear 'to be capable of any support in those regulations and appeared to reveal a misconstruction of what that clause provided.'
[195] SLI 2012 No.238. Also note that prior to 14 September 2009, there were 8 streams. The regional headquarters stream (cl.457.223(3)) was removed and not replaced. The overseas business sponsorship stream (cl.457.223(5)) was removed as a separate stream and effectively incorporated into the standard business sponsorship stream in cl.457.223(4): SLI 2009, No.202.
[196] SLI 2009 No.202 - this applies to all visa applications as at 14 September 2009, whether made before or after that date.

Most relevantly for the Tribunal, the 'continuing' IE stream allowed existing Subclass 457 visa holders who were granted the visa on the basis of being an IE to obtain a further visa. It provided a 'once only' opportunity for temporary business stay for a further 2 years for persons who wish to maintain ownership of an existing business in Australia conducted by them as a principal. Clause 457.223(7A) could only be satisfied if a person held a visa previously on the basis of satisfying the requirements of cl.457.223(7) as in force before 14 September 2009. This stream was removed for visa applications made on or after 24 November 2012, as there are no longer any Subclass 457 visa holders that would satisfy cl.457.223(7A).[198]

Persons accorded certain privileges and immunities - cl.457.223(9)

Certain persons who made their visa application before 24 November 2012, who will perform quasi-diplomatic work in Australia, are eligible for a visa under cl.457.223(9). Eligibility for a Subclass 457 visa under this stream is available to persons who were accorded privileges and immunities under the *International Organisations (Privileges and Immunities) Act 1963* or the *Overseas Missions (Privileges and Immunities) Act 1995* and the Foreign Minister had provided a written recommendation that the applicant should be granted the visa. This stream has been removed from Subclass 457 for visa applications made on or after 24 November 2012 as those persons are now eligible for a Temporary Work (International Relations) (Class GD) (Subclass 403) visa in the privileges and immunities stream.

Invest Australia Support Skills agreement (IASS) - cl.457.223(10)

For visa applications made before 24 November 2012, a Subclass 457 visa can be granted under cl.457.223(10) to persons whose proposed occupation in Australia was covered by an Invest Australia Supported Skills (IASS) agreement.

An IASS agreement for those applications is defined in r.1.16B as an agreement entered into, for the purpose of making a 'significant investment in Australia', between an organisation outside Australia and the Minister and Industry Minister, to provide for the entry to, and stay in, Australia of staff members of the organisation for the purposes of the investment.[199] However, as IASS agreements are no longer in use, this stream was removed from Subclass 457 for visa applications made on or after 24 November 2012.[200]

No 'payment for visa' conduct: cl.457.223A

Clause 457.223A requires that the applicant has not, in the previous three years, engaged in conduct that constitutes a breach of ss.245AR(1), 245AS(1), 245AT(1) or 245AU of the Act.[201] These provisions were introduced on 14 December 2015 and place prohibitions on people asking for, receiving, offering to provide or providing a benefit in return for the occurrence of a sponsorship-related event.[202] The meanings of 'benefit' and 'sponsorship-related event' in this context are provided under s.245AQ of the Act.

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[197] SLI 2012 No.238.
[198] cl.457.223(7A) was omitted by SLI 2012, No.238. See Explanatory Statement to SLI 2012 No.238.
[199] The definition of 'IAAS agreement' in r.1.03 and r.1.16B was omitted for visa applications made on or after 24 November 2012 by SLI 2012 No.238.
[200] SLI 2012 No.238. See Explanatory Statement to SLI 2012 No.238, at 65.
[201] cl.457.223A(a), as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015. As the offence and civil penalty provisions were only inserted from 14 December 2015, it does not appear that conduct before that time could be said to breach those sections.
[202] These provisions were inserted by the *Migration Amendment (Charging for a Migration Outcome) Act 2015* (No. 161, 2015) from 14 December 2015.

Where the applicant has engaged in such conduct in the previous 3 years, an applicant may nevertheless satisfy the requirement if it is reasonable to disregard that conduct.[203] Whether it is reasonable to disregard such conduct will be a question for the decision maker, and all relevant circumstances of the individual case should be considered.[204] This potentially encompasses not only the conduct itself and the circumstances in which it occurred, but also the applicant's broader circumstances outside of that conduct.

The 'payment for visa conduct' requirements are also mirrored in the secondary visa applicant criteria.[205]

Other time of decision criteria: cl.457.223B - 457.228

With limited exceptions relating to the now repealed 'Service sellers' and quasi-diplomatic streams,[206] cl.457.223B requires the Tribunal be satisfied that a primary applicant has adequate arrangements for health insurance in Australia for the period of intended stay in Australia. This criterion applies from 14 September 2009, regardless of whether the visa application was made before or after 14 September 2009.[207]

Clause 457.223C only applies to an applicant whose nominated occupation is a medical practitioner. It requires that the applicant's qualifications are recognised by the relevant Australian authority for registration of medical practitioners, entitling the applicant to practise as a medical practitioner. It applies to all applications as at 14 September 2009, regardless of whether the visa application was made before or after 14 September 2009.[208]

Clauses 457.224, 457.227[209] (for pre-24 November 2012 visa applications) and cl.457.227A[210] (for pre-1 July 2009 visa applications) require the applicant to satisfy certain public interest criteria (PIC).[211] These include:

[203] cl.457.223A(b).
[204] The Explanatory Statement introducing this requirement does not provide any guidance as when it would be reasonable to disregard the conduct, but indicates that the these matters will be detailed in departmental policy: Explanatory Statement to SLI 2015, No.242 at p.17. At the time of writing there were no published Departmental guidelines on these matters within PAM3.
[205] cl.457.324C, as inserted by SLI 2015 No. 242 and applying to all new visa applications and visa applications not finally determined as at 14 December 2015.
[206] Note that for visa applications made prior to 24 November 2012, cl.457.223B also does not apply to applicants who met requirements of the quasi-diplomatic stream in cl.457.223(9) or for applications made prior to 23 March 2013 to applicants who met the requirements of the service seller stream in cl.457.223(8). The reference in cl.457.223B to cl.457.223(9) was omitted for visa applications made on or after 24 November 2012 by SLI 2012 No.238. The reference in cl.457.223B to cl.457.223(8) was omitted for visa applications made on or after 23 March 2013 by SLI 2013 No.32.
[207] SLI 2009 No.202. Clause 457.223B was amended by Migration Amendment Regulations 2010 (No.1) (SLI 2010, No.38). The amendment applies in relation to all visa applications not yet finalised as at 27 March 2010 or made on or after that date. Note that for applications made on or after 18 November 2017, there was a brief period prior to disallowance of the Migration Legislation Amendment (2017 Measures No.4) Regulations 2017 at 17:59 on 5 December 2017 during which a slightly different form of cl.457.223B applied. However, as this is a criterion falling to be determined at the time of decision, and the criterion as amended by the disallowed Regulations is no longer in force, the form as in force prior to amendment by these Regulations should be applied.
[208] SLI 2009 No.202.
[209] Clause 457.227 was omitted by SLI 2012 No.238.
[210] Clause 457.227A was omitted by SLI 2009 No.144.
[211] Note that prior to 24 November 2012, the requirement for the primary applicant and family members to satisfy certain public interest criteria were contained in clauses 457.224, 457.227 and cl.457.227A (for pre-1 July 2009 visa applications). Clause 457.227 was omitted by SLI 2012 No.238. Clause 457.227A was omitted by SLI 2009, No.144 for visa applications made on or after 1 July 2009. Note PIC 4020 does not apply in relation to cl. 457.227A as the relevant amending regulations, Migration Amendment Regulations 2011 (No.1) (SLI 2011, No.13), do not include an amendment to this clause.

- PIC 4021 which requires, for applications made on or after 24 November 2012, the applicant to hold a valid passport unless it would be unreasonable to require the applicant to hold a passport;[212] and
- PIC 4020 that there is no evidence before the Minister that the applicant gave, or caused to be given, a bogus document or false or misleading information in relation to the application for the visa or a visa held in the 12 months before the visa application was made.[213] For further detail on PIC 4020 see MRD Legal Services Commentary: Bogus Documents/False or Misleading Information.

Clause 457.224 also requires the applicant to meet PIC 4006A. This criterion permits certain aspects of the health requirements to be waived in circumstances where the relevant nominator provides an undertaking that the relevant employer will meet all costs related to the disease or condition that causes the applicant to fail to meet paragraph 4006A(1)(c).[214] If the visa applicant is applying on a basis which does not require them to be the subject of a nomination with a 'relevant nominator', such as where the applicant seeks to fall within the 'service sellers' stream (pre-23 March 2013 cl.457.223(8)), the waiver in PIC 4006A(c) will not be available. For further information in relation to PIC 4006A see the MRD Legal Services commentary: Health Criteria.

Applicants who are outside Australia and who have previously been in Australia must also satisfy special return criteria: cl.457.225.[215]

Clauses 457.226 and 457.226A were repealed for all applications made on or after 24 November 2012.[216] Those criteria related to AusAID students or recipients and fully funded students, and were considered no longer necessary they are encapsulated in special return criterion 5010 (in cl.457.225). For further information see MRD Legal Services Legislation Bulletin 9/2012.

For applications made on or after 1 July 2005 and before 24 November 2012, cl.457.228 requires the applicant to hold a valid passport unless it would be unreasonable to require the applicant to be the holder of a passport.[217] This requirement is now contained in PIC 4021 outlined above.[218]

[212] PIC 4021 inserted by SLI 2012 No.256.
[213] PIC 4020 was inserted by SLI 2011, No.13 for visa applications made on or after 2 April 2011, as well as visa applications made but not finally determined before that date.
[214] PIC 4006A(2) as amended by Migration Amendment Regulations 2009 (No.13) (SLI 2009, No.289). The term 'relevant employer' in PIC 4006A was replaced with 'relevant nominator' as defined in 4006A(3). The amendment applies to *visa* applications made on or after 9 November 2009 as well as those made prior to, but not finally determined by that date.
[215] Note that special return criterion 5010 has been inserted into the requirements to be met for the time of decision criterion cl.457.225 for all applications. As a consequence, cll.457.226 and 457.226A have been repealed: SLI 2012, No.238.
[216] Clauses 457.226 and 457.226A were omitted by SLI 2012 No.238. The amendments apply to visa applications made before 24 November 2012 but not finally determined before that date, and visa applications made on or after 24 November 2012.
[217] cl.457.228, inserted by Migration Amendment Regulations 2005 (No.4) (SLI 2005, No.134). The amendment applies in relation to a visa application made on or after 1 July 2005. Clause 457.228 was omitted by item SLI 2012 No.256.
[218] PIC 4021 inserted by SLI 2012 No.256. The amendment applies to visa applications made on or after 24 November 2012.

Other issues

Circumstances applicable to grant

The applicant may be in or outside Australia at the time of grant of the visa, but not in immigration clearance. This provision applies to applications for visas made on or after 2 April 2005.[219] If the visa application was made prior to that date and this arises as an issue please consult with MRD Legal Services.

Family members – applying for further stay

Certain people may be regarded as family unit members of primary Subclass 457 visa holders for the purposes of subsequent Subclass 457 visa applications, without needing to prove that they are dependent on the visa holder, or usually resident in their household. The requirements differ depending on whether the subsequent visa application was made prior to, or on or after 19 November 2016.[220] For further details see MRD Legal Services commentary: Member of a Family Unit (regulation 1.12).

Family members – location

Family members can be in different locations to each other at the time of application and visa grant, provided each person meets the requirements of Subclass 457. Family unit members who lodge their application either separately from, or combined with, the main applicant may be in different locations to the main applicant and/or other family unit members at the time of application and visa grant. Requirements for the location of applicants seeking to satisfy the secondary criteria for the grant of a visa, and the form their application must be in differ depending on whether the visa application is made before or on or after 1 July 2013.[221] For applications made before 1 July 2013, family unit members who are applying on the basis of an Australian linked business sponsorship or agreement may be onshore or offshore at the time of application, but must make the application either electronically or non-electronically in Australia.[222] Family unit members who are applying on the basis of an overseas business sponsorship may be onshore or offshore at the time of application, but must make the application non-electronically either at a Business Centre in Australia or at an overseas mission. For applications made on or after 1 July 2013, applicants can be in or outside Australia at the time of visa application, but must not be in immigration clearance,[223] and must make their application as an internet application using a form specified by the Minister.[224] If they are unable to lodge their application in that way because of circumstances specified in an instrument by the Minister, the application may be made in a way and using

[219] These amendments were inserted by SR 390 of 2004.
[220] For visa applications made prior to 19 November 2016 see r.1.12(10), inserted by SLI 2009, No.42. For visa applications made on or after 19 November 2016, see r.1.12(5), inserted by Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016 (F2016L01696).
[221] Amendments made by SLI 2013 No.146 for visa applications made on or after 1 July 2013.
[222] Item 1223A(3)(ca).
[223] Item 1223A(3)(aa).
[224] Item 1223A(1)(b) and (bb).

a form specified by the Minister in that instrument.[225] See the 'Form&Fees' tab of the Register of Instruments – Business Visas for the relevant instrument.

Relevant case law

Ahmad v MIBP [2015] FCCA 1486	Summary
Ahmad v MIBP [2015] FCAFC 182	Summary
Aulakh v MIBP [2015] FCCA 467	Summary
Bakri v MIBP [2015] FCCA 3059	Summary
Bakri v MIBP [2016] FCA 396	
Bodenstein v MIAC [2009] FCA 50	Summary
Cargo First Pty Ltd v MIBP [2015] FCCA 2091	Summary
Chen v MIBP [2016] FCCA 2351	
Diamant v MIBP [2014] FCCA 21	Summary
Dyankov v MIBP [2016] FCCA 2167	
Dyankov v MIBP [2017] FCAFC 81	Summary
Fernandez v MIMIA [2005] FCA 1170	
Farooq v MIAC [2008] FMCA 45	
Goo v MIAC [2007] FCA 391	
Gowda v MIBP [2016] FCCA 3491	Summary
Guder v MIBP [2017] FCCA 2527	Summary
MIBP v Guder [2018] FCA 626	Summary
Gulati v MIBP [2016] FCCA 2263	Summary
Gulati v MIBP [2017] FCA 255	
MIAC v Islam [2012] FCA 195	Summary
Islam v MIAC [2011] FMCA 991	Summary
Joshi v MIMIA [2005] FMCA 1116	Summary

[225] Item 1223A(1)(ba) and (bc).

Kaur v MIBP [2016] FCCA 1730	Summary
Kaur v MIBP [2018] FCCA 141	Summary
Kandel v MIBP [2015] FCCA 2013	Summary
Khan v MIBP [2016] FCCA 333	Summary
Kim v MIAC [2007] FMCA 166	Summary
Kirk v MIMA [1998] FCA 1174	
Lee v MIAC [2007] FMCA 1802	Summary
MIBP v Lee [2014] FCCA 2881	Summary
Li v MIAC [2011] FMCA 167	
Lobo v MIMIA [2003] FCAFC 168	Summary
Lukac v MIMIA [2004] FCA 1641	Summary
Moller v MIMA [2007] FMCA 168	Summary
MIAC v Mon Tat Chan [2008] FCAFC 155	Summary
Nassif v MIMIA [2005] FMCA 1868	
Pasricha v MIBP [2017] FCA 779	Summary
Phornpisutikul v MIBP [2016] FCCA 1934	Summary
Quan v MIMAC [2013] FCCA 1254	
Ramjali v MIBP [2016] FCCA 2296	
Ramjali v MIBP FCA 271	
Sam v MIAC [2007] FMCA 1217	
Sam v MIAC [2007] FCA 1976	
Sapkota v MIBP [2014] FCAFC 160	Summary
Sapkota v MIBP [2014] FCCA 1285	Summary
Singh v MIBP [2018] FCCA 2769	
Tran v MIBP [2016] FCCA 1984	Summary
Sharma v MIBP [2016] FCCA 1073	Summary
Xavier Fernandez v MIMIA [2005] FMCA 960	Summary
Wyse v MIMA [2006] FMCA 1362	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulation 2002 (No.2)	SR 2002, No.86
Migration Amendment Regulations 2002 (No.10)	SR 2002, No.348
Migration Amendment Regulations 2003 (No.11)	SR 2003, No.363
Migration Amendment Regulations 2004 (No.8)	SR 2004, No.390
Migration Amendment Regulations 2005 (No.4)	SLI 2005, No.134
Migration Amendment Regulations 2009 (No.2)	SLI 2009, No.42
Migration Amendment Regulations 2009 (No.5)	SLI 2009, No.115
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144
Migration Amendment Regulations 2009 (No.9)	SLI 2009, No.202
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)	SLI 2009, No.203
Migration Amendment Regulations 2009 (No.13)	SLI 2009, No.289
Migration Amendment Regulations 2010 (No.1)	SLI 2010 No.38
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133
Migration Amendment Regulations 2011 (No.1)	SLI 2011, No.13
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Legislation Amendment Regulation 2012 (No.5)	SLI 2012, No.256
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32
Migration Amendment Regulation 2013 (No.5)	SLI 2013, No.145
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146
Migration Amendment (Visa Application Charge and Related Matters No.2) Regulation 2013	SLI 2013, No.253
Migration Amendment (Clarifying Subclass 457 Requirements) Regulation 2015	SLI 2015 No.185
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523
Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016	F2016L01696
Migration Amendment (Specification of Occupations) Regulations 2017	F2017L00818
Migration Legislation Amendment (2017 Measures No.4) Regulations 2017	F2017L01425
Migration Legislation Amendment (Temporary Skill Shortage Visa and	F2018L00262

Complementary Reforms) Regulations 2018	
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018	No. 90 of 2018
Migration Amendment (Enhanced Integrity) Regulations 2018	F2018L01707

Available decision templates

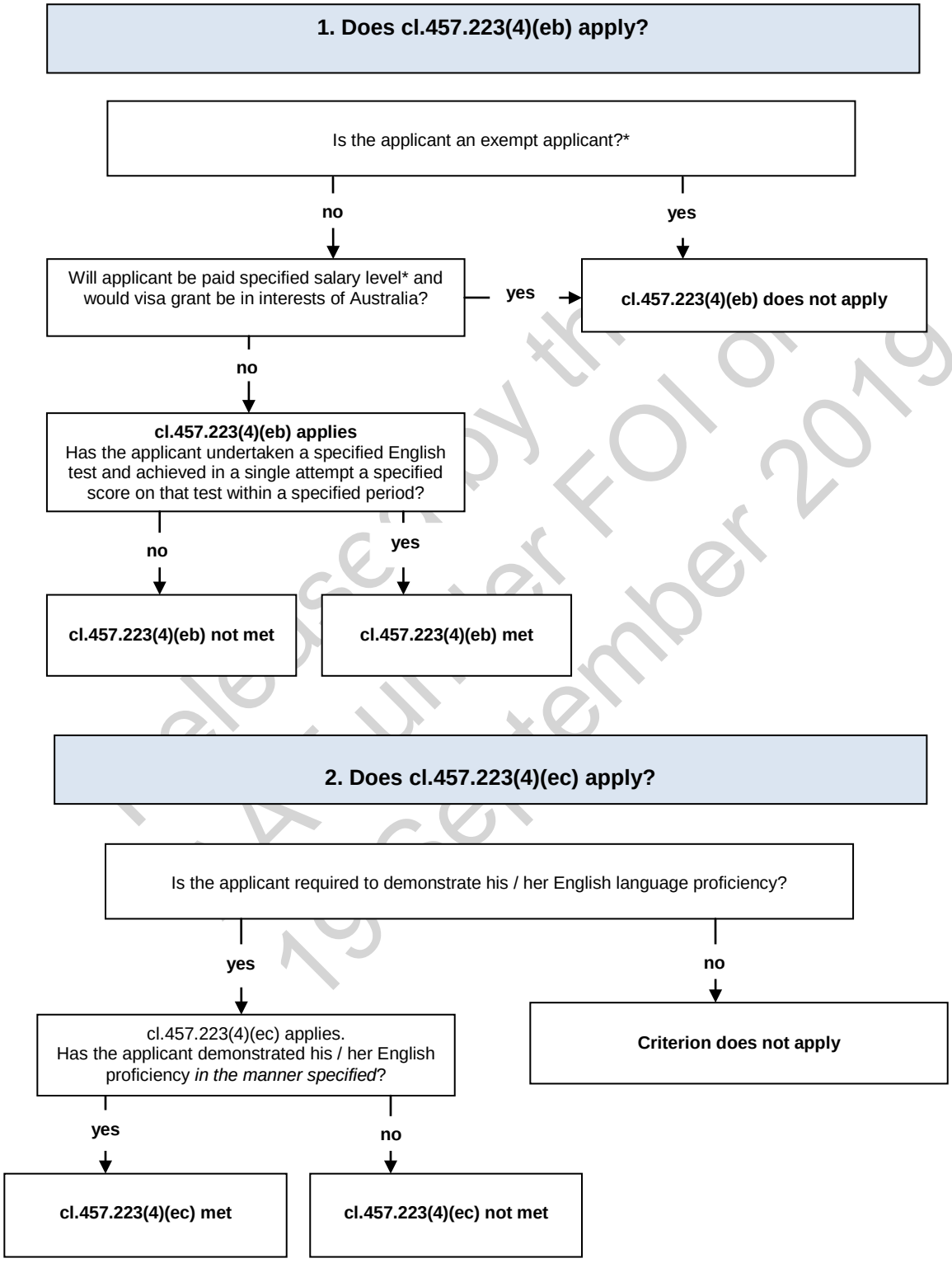
The following decision templates are designed specifically for Subclass 457 reviews:

- **Subclass 457 – General -** this template is suitable for Subclass 457 cases where the visa application was made on or after 2 April 2005 and intended for use in cases *other than* where the issue is whether the visa applicant's sponsor is an approved business sponsor (cl.457.223(4)) (see below).
- **Subclass 457 – Standard Business Sponsor** - This template is for use in review of a decision to refuse a Subclass 457 visa where the application is made on the basis of employment by an approved Standard Business Sponsor (cl.457.223(4)). It is suitable for all issues in relation to cl.457.223(4), including Skills and English language. The template is only suitable for visa applications made on or after 1 March 2003.

Last updated/reviewed: 27 March 2019

Attachments

Flowchart: Assessing English language requirements



*** See** '457Eng' tab of Register of Instruments: Business visas for relevant specification

Table: Subclass 457 – Does the Tribunal have jurisdiction under s.338(2)(d) for primary decisions made before 13 December 2018?

This table shows whether or not a Subclass 457 visa refusal decision is reviewable by the Tribunal, which depends on the status of the related processes concerning approval as a sponsor under s.140E and approval of a nomination under s.140GB **at the time the person applies for review of the visa refusal** (or within the time for applying for review). The table is only relevant to primary decisions that were made before 13 December 2018, for which the Tribunal's jurisdiction is determined by s.338(2)(d) as prescribed in the Act before being repealed by No.90 of 2018.

		Status of **sponsor** application (s.140E)				
		Made but not yet decided	Approved	Refused, review pending	Refused, no review pending	Approval ceased
Status of **nomination** (s.140GB)	Made but not yet decided	No[1]	Yes[2]	Yes[3]	No[4]	Probably[5]
	Approved	N/A[6]	Yes[2]	Yes[3]	N/A[6]	Probably[7]
	Refused, review pending	Yes[8]	Yes[8]	Yes[3/8]	Yes[8]	Yes[8]
	Refused, no review pending	No[9]	No[9]	Yes[3]	No[9]	No[9]
	Ceased	No[9]	No[9]	Yes[3]	No[9]	No[9]

[1] On the basis of *Singh v MIBP* [2018] FCCA 2769 (Judge Lucev, 27 September 2018) the decision is not reviewable under s.338(2)(d)(i) as the applicant is not sponsored by an 'approved sponsor', defined in s.5(1) of the Act as a person approved under s.140E and whose approval has not been cancelled or otherwise ceased. On the basis of *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) (*Ahmad*) the decision is not reviewable under s.338(2)(d)(ii) as there is no pending review of a decision under s.140E or s.140GB.

[2] s.338(2)(d)(i) is met as the applicant is identified in an application for a nomination (or an approved nomination) under s.140GB by an approved sponsor.

[3] s.338(2)(d)(ii) is met as there is a pending application for review of the decision not to approve the sponsor under s.140E.

[4] The decision is not reviewable under s.338(2)(d)(i) because the applicant is not sponsored by an 'approved sponsor' as defined in s.5(1) and required by s.338(2)(d)(i) (see *Singh v MIBP* [2018] FCCA 2769 (Judge Lucev, 27 September 2018).

[5] The decision is not reviewable under s.338(2)(d)(ii) as there is no pending review of a decision under s.140E or s.140GB. It is unclear from *Ahmad* whether a pending s.140GB nomination application would satisfy s.338(2)(d)(i) where an earlier approval as a sponsor under s.140E had ceased. If the sponsor was approved under s.140E at the time the applicant was identified in the nomination under s.140GB, it is arguable that the Tribunal would have jurisdiction in this scenario as they would continue to be 'sponsored *by an approved sponsor*' as required by s.338(2)(d)(i). The subsequent cessation of the sponsor's approval would not appear to impact the validity of the nomination application itself, albeit that nomination would likely be refused at the primary stage.

[6] This scenario should not arise as the s.140GB nomination could not be approved without an approved s.140E sponsor. The decision is not reviewable under s.338(2)(d)(ii) as there is no pending review of a decision under s.140E or s.140GB, nor would it be reviewable under s.338(2)(d)(i) as the applicant is not sponsored by an approved sponsor. If the nomination was made by an approved sponsor that has since ceased, see the scenario at fn 7.

[7] The decision is not reviewable under s.338(2)(d)(ii) as there is no pending review of a decision under s.140E or s.140GB. Whether the Tribunal has jurisdiction depends on when the sponsor's approval ceased, as the approval under s.140E may continue for 3 months after the day on which an approval as a standard business sponsor ceases: r.2.75(2)(d). The question of whether the decision is reviewable under s.338(2)(d)(i) in these circumstances is unsettled, as it is unclear from *Ahmad* whether an approved s.140GB nomination would satisfy s.338(2)(d)(i) where the approval of the sponsor under s.140E has ceased. However, on a beneficial reading, it is likely that the requirement would be met as the applicant continues to be 'sponsored by an approved sponsor' as required by s.338(2)(d)(i), at least until the nomination ceases three months later under r.2.75(2)(d).

[8] s.338(2)(d)(ii) is met as there is a pending application for review of the decision not to approve the nomination under s.140GB.

[9] s.338(2)(d)(i) is not met. The applicant is not identified in a nomination under s.140GB (either approved or pending). Subsection 338(2)(d)(ii) is also not met as there is no pending review of a decision under s.140E or s.140GB.

Subclass 482 visa

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  - No adverse information or reasonable to disregard

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Overview

The Subclass 482 (Temporary Skill Shortage) (Class GK) visa enables employers to access temporary skilled overseas workers. It replaced the Subclass 457 (Temporary Work (Skilled)) visa from 18 March 2018.[1] It has three streams:

- Short-term stream: for occupations on the Short-term Skilled Occupation List and for visa grants of up to two years (or four years if an international trade obligation applies);
- Medium-term stream: for occupations on the Medium and Long-term Strategic Skills List and for visa grants of up to four years; and
- Labour Agreement stream: where an employer has a labour agreement with the Commonwealth to employ skilled overseas workers.

Applicants must apply for the stream to which the related nomination under s 140GB of the *Migration Act 1958* (the Act) relates, and satisfy the criteria for that stream as well as common criteria.

Tribunal's Jurisdiction – primary decisions made after 13 December 2018

For primary decisions made on or after 13 December 2018, the Tribunal has jurisdiction to review decisions to refuse the grant of a Subclass 482 visa under s 338(2) (onshore applications) or s 338(9) (offshore applications). Both s 338(2) and reg 4.02(4)(l) of the Regulations (made under s 338(9)) were amended with effect from 13 December 2018. For matters where the primary decision was made before that date, please see below.

Onshore visa applications

Primary visa applicants

For onshore visa applications, a decision to refuse to grant a Subclass 482 visa is reviewable in certain circumstances as set out in s 338(2). Paragraphs (a) to (c) of s 338(2) apply in all cases, requiring that the visa could be granted to a person in the migration zone, and the person made the application in the migration zone after being immigration cleared (which would always be the case for a valid onshore Subclass 482 visa application).

Paragraph 338(2)(d) imposes an additional requirement for certain prescribed temporary visas to be reviewable (including Subclass 482).[2] There are four alternative requirements, however the fourth is only applicable if it is *not* a criterion for the grant of the visa that the non-citizen is identified in an approved nomination that has not ceased under the Regulations. In each instance the requirement must be met *at the time the decision to refuse to grant the visa is made*. The alternatives are:

[1] Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018.
[2] A Subclass 482 visa is prescribed for s 338(2)(d): reg 4.02(1A).

(i) the non-citizen is identified in an approved nomination that has not ceased under the regulations;[3] or

(ii) a review of a decision under s.140E not to approve the sponsor of the non-citizen is pending; or

(iii) a review of a decision under s.140GB not to approve the nomination of the non-citizen is pending; or

(iv) *except if it is a criterion for the grant of the visa that the non-citizen is identified in an approved nomination that has not ceased*, the non-citizen is sponsored by an approved sponsor.[4]

All primary Subclass 482 visa applicants must be identified in an approved nomination.[5] Accordingly one of the first three alternative requirements (s 338(2)(d)(i)-(iii)) must be met, *at the time the decision to refuse to grant the visa is made*. This means that, at that point in time, a nomination identifying the applicant must be approved, or a decision not to approve their sponsor be pending review before the Tribunal, or a decision to refuse the nomination be pending review before the Tribunal, for the decision to be a Part-5 reviewable decision.

In contrast to refusals made before 13 December 2018, s 338(2)(d) will not be met where the visa applicant is identified only in a nomination application which is pending at the relevant time.[6]

The following table illustrates when, having regard to the status of the associated sponsorship and nomination application process *at the time of visa refusal*, s 338(2)(d) will be satisfied.

		Status of **sponsor** application (s 140E)				
		Made but not yet decided	Approved	Refused, review pending	Refused, no review pending	Approval ceased
Status of **nomination** (s 140GB)	Made but not yet decided	No	No	Yes	No	No
	Approved	N/A	Yes	Yes	N/A	Possibly (within 3 months)
	Refused, review pending	Yes	Yes	Yes	Yes	Yes
	Refused, no review pending	No	No	Yes	No	No
	Ceased	No	No	Yes	No	No

An application for review may only be made by the non-citizen who is the subject of that decision.[7]

[3] See reg 2.75 for cessation of nominations associated with Subclass 482 visas.
[4] Section 338(2)(d) as introduced by the *Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018* (No.90 of 2018), with effect for decisions made on or after 13 December 2018.
[5] See cl 482.121(1), which is applies to all primary applicants regardless of the stream applied for.

Secondary visa applicants

The Tribunal has jurisdiction to review a decision to refuse to grant a Subclass 482 visa to a secondary applicant under s 338(9) and reg 4.02(4)(q). Regulation 4.02(4)(q) provides that a decision to refuse to grant a visa prescribed under reg 4.02(1A) (which includes Subclass 482) to a non-citizen is reviewable where the non-citizen did not seek to satisfy the primary criteria and the visa was refused because they did not satisfy the secondary criteria; and the requirements of s 338(2)(a) to (c) are met in relation to the non-citizen and visa.[8] An application for review of the decision may only be made by a person to whose application the decision relates.[9]

These applications may also potentially be reviewable under s 338(2) on the same basis as that discussed below for decisions made before 13 December 2018. However, it would not be necessary to determine whether this is separately the case, given that if the review application did not meet the requirements in reg 4.02(4)(q) (and by extension s 338(2)(a) to (c)), it would not be reviewable under s 388(9) nor s 338(2).

Combined review applications

Where there are combined review applications and the Tribunal does not have jurisdiction to review the decision in relation to the primary applicant because s 338(2)(d) is not met, it will have jurisdiction in relation to the secondary applicants under s 338(9) and reg 4.02(4)(q) (assuming the review application is otherwise valid). In these circumstances, the finding of no jurisdiction in relation to the primary applicant should be put to any secondary applicants under s 359A (or s 359AA). There would also be no basis for a fee refund,[10] even though the review application would be futile.

Offshore visa applications

For offshore applications, a decision to refuse to grant a Subclass 482 visa is prescribed by reg 4.02(4)(l) as a reviewable decision for the purposes of s 338(9) and a review of the decision can be sought by the person who applied to become the sponsor or who nominated the non-citizen.[11] The Tribunal has jurisdiction to review these decisions if the applicant is outside Australia at the time of the visa application and one of three alternative requirements are met, *at the time the decision to refuse to grant the visa is made*:

(i) the non-citizen is identified in an approved nomination that has not ceased under reg 2.75 and the nominator was a person, company or partnership of a particular kind; or

(ii) a review of a decision under s 140E of the Act not to approve the sponsor of the non-citizen is pending, and the sponsor was a person, company or partnership of a particular kind; or

[6] This is now clear from the amended terms of s 338(2)(d), and was the intended effect: see Explanatory Memorandum to the Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017, p 6.
[7] s 347(2)(a).
[8] Reg 4.02(4)(q) as introduced by the Migration Amendment (Enhanced Integrity) Regulations 2018 (F2018L01707). Section 338(2)(a) requires that the visa could be granted while the non-citizen is in the migration zone, which will be met in all cases of an application for a Subclass 482 visa. Section 338(2)(b) and (c) require the applicant to be in the migration zone at the time of visa application and not to have been in immigration clearance or have been refused immigration clearance and not subsequently immigration cleared at the time of the decision to refuse the visa.
[9] Reg 4.02(4)(p) as introduced by No.90 of 2018.
[10] Fees can be refunded in the limited circumstances prescribed in reg 4.14.
[11] Reg 4.02(5)(k).

(iii) a review of a decision under s 140GB of the Act not to approve the nomination is pending, and the nominator was a person, company or partnership of a particular kind.[12]

The relevant kinds of entity are a person, company or partnership that is either:

(a) an Australian citizen; or

(b) a company that operates in the migration zone; or

(c) a partnership that operates in the migration zone; or

(d) the holder of a permanent visa; or

(e) a New Zealand citizen who holds a special category visa; or

(f) a Commonwealth agency.[13]

This mirrors the requirements for onshore visa applicants, with the additional requirement as to the sponsor's identity. See above for discussion of those requirements. The person who applied to become the sponsor or who nominated the non-citizen has standing.[14]

Secondary visa applicants

The Tribunal has jurisdiction to review a decision to refuse a Subclass 482 visa to an applicant who applied for the visa from outside of Australia if the applicant did not seek to satisfy the primary criteria for the grant of the visa and their visa was refused because they did not satisfy the secondary criteria for the grant of the visa.[15] The person who applied to become the sponsor or who nominated the non-citizen has standing.[16]

Tribunal's jurisdiction – primary decisions made before 13 December 2018

Onshore visa applications

For primary decisions made before 13 December 2018, a decision to refuse to grant a Subclass 482 visa application made onshore is reviewable under s 338(2). In addition, all primary applicants must meet the requirements of s 338(2)(d). Section 338(2)(d) applies to certain prescribed visas, including Subclass 482,[17] where a criterion for the visa grant requires the visa applicant to be sponsored (which includes being identified in a nomination) by an approved sponsor.[18] To meet the criteria for the visa, primary visa applicants must be the subject of an approved nomination which has not ceased, and the person who made the nomination must have been an approved sponsor at the time of approval: cl 482.212(1). Accordingly, and on the basis of case law applicable in the similar Subclass 457 context, the requirements in s 338(2)(d) must be met.

[12] Reg 4.02(4)(l) as repealed and substituted by F2018L01707 for primary decisions made on or after 13 December 2018.
[13] Reg 4.02(4AA) as inserted by F2018L01707.
[14] Reg 4.02(5)(k).
[15] Reg 4.02(4)(l)(iv) as inserted by F2018L01707.
[16] Reg 4.02(5)(k).
[17] Reg 4.02(1A).
[18] Being 'sponsored' includes being identified in a nomination under s 140GB: reg 4.02(1AA). An 'approved sponsor' is a person approved as a sponsor under s 140E in relation to a prescribed class and whose approval has not been cancelled under s 140M or otherwise ceased to have effect; or a person, other than the Minister, who is party to a work agreement: s 5(1).

There are alternative requirements in s 338(2)(d), each of which must be met *at the time the review application is made* (or within the prescribed period for applying for review). Either:

- s 338(2)(d)(i) – the Subclass 482 visa applicant is identified in a nomination under s 140GB by an approved sponsor.[19] This includes a nomination application that has not been determined, or an approved nomination. It does not include a nomination that has been refused with no review sought of that refusal,[20] or a nomination that has expired.[21] If there has not been any sponsorship approval given, the decision is not reviewable.[22] If the approval as sponsor has expired, but was in force at the time the nomination was made, it is likely the decision is reviewable;[23] or

- s 338(2)(d)(ii) – an application for review of a decision not to approve the sponsor (or nomination) has been made but the review is pending.[24]

The following table illustrates when, having regard to the status of the associated sponsorship and nomination application process *at the time the person applies for review of the visa refusal* (or within the time for applying for review), s 338(2)(d) will be satisfied.

		Status of **sponsor** application (s 140E)				
		Made but not yet decided	Approved	Refused, review pending	Refused, no review pending	Approval ceased
Status of **nomination** (s 140GB)	Made but not yet decided	No	Yes	Yes	No	Probably
	Approved	N/A	Yes	Yes	N/A	Probably
	Refused, review pending	Yes	Yes	Yes	Yes	Yes
	Refused, no review pending	No	No	Yes	No	No
	Ceased	No	No	Yes	No	No

[19] In *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [98], the Federal Court confirmed that the definition of the word 'sponsored' in s 337, which applies to s 338(2)(d), picks up the meaning of 'sponsored' in reg 4.02(1AA) which states that 'sponsored' includes being identified in a nomination under s 140GB. In the context of s 338(2)(d)(i), the requirement that the applicant is 'sponsored by an approved sponsor' includes, by virtue of reg 4.02(1AA), a person being identified in a nomination under s 140GB.

[20] *Dyankov v MIBP* [2017] FCAFC 81 (Logan, Griffiths & Moshinsky JJ, 23 May 2017) at [59].

[21] See obiter comments in *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [113] and *Gulati v MIBP* [2016] FCCA 2263 (Judge Cameron, 19 July 2016), upheld in *Gulati v MIBP* [2017] FCA 255 (Judge Bromwich, 15 March 2017).

[22] See *Singh v MIBP* [2018] FCCA 2769 (Judge Lucev, 27 September 2018) where sponsorship and nomination applications had been lodged but not determined at the time of the application for review. The decision was not reviewable because the sponsor was not an 'approved sponsor,' defined in s 5(1) of the Act as a person who 'has been approved' under s 140E and that approval had not been cancelled or otherwise ceased.

[23] This has not been the subject of judicial consideration, but a beneficial construction of the provision would appear to encompass reading it as 'identified in a nomination, where that nomination was made by an approved sponsor', even though the approval as a sponsor may have subsequently ceased; noting that a nomination can continue in force for 3 months after the sponsor's approval ceases: reg 2.75(2)(d).

[24] *Ahmad v MIBP* [2015] FCAFC 182 (Katzmann, Robertson and Griffiths JJ, 16 December 2015) at [99]. The Court held that the expression 'decision not to approve the sponsor' in s 338(2)(d)(ii) includes both the approval of the sponsor under s 140E and the approval of the nomination under s 140GB. However, while applications in the Labour Agreement stream may be reviewable on the basis of a pending nomination review, there is no separate sponsor approval process for these applications, meaning that jurisdiction cannot be invoked on the basis of a sponsorship review.

Secondary visa applicants

The additional requirement in s 338(2)(d) may or may not apply to secondary applicants, depending on the circumstances of the case and whether there is a criterion requiring the secondary applicant to be sponsored. There are two possible criteria which may be seen as requiring a secondary applicant to be sponsored: cll 482.315(a) and (b). The first of these provides that the applicant is listed on the primary applicant's nomination application, which may occur for example where, as required under reg 2.76(6), the primary and secondary applicant already held Subclass 482 or 457 visas at the time of the nomination. Where this applies, it appears the secondary applicant must meet s 338(2)(d). The second alternative requirement is that the sponsor has agreed in writing that the applicant may be a secondary sponsored person. In this instance, it is not a requirement to be sponsored in the relevant sense, and the requirement in s 338(2)(d) does not appear to apply. The Subclass 457 commentary at Onshore visa applications > Secondary visa applicants contains detailed discussion of this issue in relation to the equivalent criteria at cll 457.324(1) and (2).

Offshore visa applications

For offshore applications, a decision before 13 December 2018 to refuse to grant the visa is prescribed by reg 4.02(4)(l) as a reviewable decision for the purposes of s 338(9). That regulation requires that the applicant is outside Australia at the time of the visa application and was sponsored or nominated, as required by a criterion for the grant of the visa, by an Australian citizen, or company/ partnership operating in the migration zone, or a permanent visa holder or a New Zealand citizen holding a special category visa.[25] In these situations, it is the sponsor or nominator who has the right of review.[26] Given the significant textual differences in reg 4.02(4)(l) and s 338(2)(d), it appears that the judicial consideration of the latter is not applicable in this context, and that it is open to read reg 4.02(4)(l) as broadly capturing identification in a nomination at some point prior to the review application being lodged, regardless of whether it has been approved, refused or ceased.

Secondary visa applicants

As for primary offshore visa applicants, the Tribunal will have jurisdiction if a secondary visa applicant was outside Australia at the time of the visa application and was sponsored or nominated, as required by a criterion for the grant of the visa, by (relevantly) a company/partnership operating in the migration zone. This requires consideration of whether one of the criteria for the visa sought was a criterion requiring that the secondary applicant was sponsored or nominated. There are two possible criteria that may be seen as requiring a secondary applicant to be sponsored: cll 482.315(a) and (b). As discussed in more detail above, cl 485.315(a) would apply if a secondary applicant was included in a nomination that was required in respect of the primary applicant, and if this were not the case, it would appear there is no applicable sponsorship or nomination criterion (and therefore no jurisdiction in this context), as it is doubtful cl 482.315(b) could be characterised in this way.

Requirements for valid visa application

The requirements for making a valid Class GK visa are in item 1240 of Schedule 1 to the Regulations.

[25] Reg 4.02(4)(l)(ii) applies when the applicant was sponsored or nominated as required by a criterion for the grant of a visa. It does not require that there be a criterion that requires the non-citizen to be sponsored or nominated by a company that operates in the migration zone: *Phornpisutikul v MIBP* [2016] FCCA 1934 (Judge Smith, 19 August 2016) at [12].
[26] Reg 4.02(5)(k). *Phornpisutikul v MIBP* [2016] FCCA 1934 (Judge Smith, 19 August 2016) at [13].

For primary applicants, a person must have nominated a proposed occupation in relation to them for a visa in a stream, and the visa application must be in that same stream.[27] The application must identify the nomination, and the nomination must be both approved and current, or a decision on the nomination must be pending. The nominator must also not be the subject of a bar under s 140M.

Additionally, for certain specified occupations and classes of persons, the applicant's skills must have been assessed as suitable for the occupation by a specified assessing authority, or that assessment must be pending.[28]

Applicants can be inside or outside Australia, with the exception of applicants in the Short-term stream who have held more than one Subclass 482 visa in this stream, and the most recent of these visas was applied for in Australia. These applicants must be outside Australia, unless requiring them to be so would be inconsistent with an international trade obligation.[29]

There are also requirements relating to approved forms and fees.

Visa criteria

An applicant for a visa in a stream must satisfy the primary criteria, which include common criteria as well as criteria for the stream they have applied for. The other members of the applicant's family unit must satisfy the secondary criteria. All criteria must be satisfied at the time of decision.[30]

Common criteria

The common criteria in Subdivision 482.21 must be satisfied by all applicants seeking to meet the primary criteria. Some of the criteria most frequently in issue before the Tribunal are discussed below.

Complied substantially with conditions on previous visas: cl.482.211

Clause 482.211 applies only to applicants who are in Australia. It requires that the applicant has complied substantially with the conditions that apply or applied to the last of any substantive visas held by the applicant and to any subsequent bridging visa. For further information on the legal approach to 'complied substantially' see the MRD Legal Services Commentary: Substantial Compliance with Visa Conditions.

Current approved nomination: cl.482.212(1)

Subclause 482.212(1) requires that the nomination identified in the application has been approved under s 140GB; the person who made the nomination was an approved sponsor[31] at the time the nomination was approved; and the approval of the nomination has not ceased under reg 2.75. In effect, this means the visa application is linked to the one nomination, and this criterion could not be

[27] Item 1240(3)(f) of Schedule 1 to the Regulations.
[28] Item 1240(3)(g) of Schedule 1 to the Regulations. See the '482SkillsAss' tab of the Register of Instruments: Business visas for the relevant instrument setting out the occupations, classes and assessing bodies.
[29] Item 1240(3)(b) and (c) of Schedule 1 to the Regulations.
[30] See note to Division 482.2.
[31] 'Approved sponsor' is defined in s 5 as a person who has been approved by the Minister under s 140E in relation to a prescribed class, and whose approval has not been cancelled or otherwise ceased to have effect; or a person (other than a Minister) who is a party to a work agreement.

met on the basis of a subsequently lodged and approved nomination. Only nominations lodged on or after 18 March 2018 are capable of satisfying this requirement.[32]

As a decision to refuse to approve a nomination is a separately reviewable decision,[33] whether the applicant is the subject of a current approved nomination may require consideration of the circumstances of any related review of a decision to refuse the nomination identified in the application.

The cessation of a nomination is dealt with in reg 2.75. Under reg 2.75(2), approval of a nomination ceases at the earliest of the following:

- the date Immigration receives written notification of withdrawal of the nomination by the approved sponsor;
- 12 months after the day the nomination is approved, unless, at that time, there is a visa application made by nominee on the basis of the nomination that has not been finally determined;[34] and, if a visa application made by the nominee on the basis of the nomination is finally determined or withdrawn after 12 months after the day on which the nomination is approved – the day on which the visa application is finally determined or withdrawn;[35]
- the day a Subclass 482 visa is granted to the nominee;
- for Short-term and Medium-term stream nominations – the nomination end day (i.e. the day 3 months after the day on which the approval as a standard business sponsor ceases),[36] unless, on that day, the person is a standard business sponsor, or there is an application for approval as a standard business sponsor in relation to which a decision has not been made under s.140E;
- the day on which the sponsorship application mentioned in the above dot point is refused;
- for Short-term and Medium-term stream nominations, the day approval as a standard business sponsor is cancelled under s.140M(1);
- if approval of a nomination is given to a party to a work agreement and the nomination is in the Labour Agreement stream - the day on which the work agreement ceases.

Genuine position and intention to perform the occupation

Subclause 482.212(2) requires both that the applicant genuinely intends to perform the nominated occupation and the position associated with the nominated occupation is genuine. The latter requirement is also reflected in the related nomination criteria, and should be assessed in the same way. To begin with, the nominated occupation and position should be identified. The 'nominated occupation' is the occupation nominated by the nomination identified in the visa application.[37] Nominations (apart from those in the Labour Agreement stream) must be for certain occupations listed in a legislative instrument, each of which have a 6-digit code which corresponds to that

[32] Nominations before that date were, under the terms of reg 2.72, only made in relation to the holder of, or an application or proposed applicant for, a Subclass 457 (Temporary Work (Skilled)) visa.
[33] Section 338(9) and reg 4.02(2)(d).
[34] Reg 2.75(2)(b). This provision was amended by the Migration Amendment (Skilling Australians Fund) Regulations 2018 (F2018L01093) after the introduction of the Subclass 482 visa on 18 March 2018, but the amendment applied to all nominations made from that date. Previously, this provision provided for a nomination to cease 12 months after the day of approval, and because a Subclass 482 visa application can only be linked to a single nomination, the amendment was intended to address the unintended consequence that an unfinalised visa application could not be approved because the nomination had expired: Explanatory Statement to F2018L01093, p 16.
[35] Reg 2.75(2)(ba) as inserted by F2018L01093.
[36] Reg 2.75(3).
[37] Clause 482.111.

contained in the Australian New Zealand Standard Classification of Occupations (ANZSCO). 'Position' refers to the tasks it is claimed the applicant in relation to whom an occupation has been nominated has been or will be employed to perform by the approved sponsor.[38]

Case law in the Subclass 457 context provides guidance as to the required analysis. In *Bakri v MIBP*, Judge Smith emphasised that the task of the decision maker in this context is not simply to determine whether the position exists, but instead involves a qualitative analysis of the position as against the circumstances and evidence given in support of its existence.[39] The criterion may fail to be satisfied where: the tasks the applicant claims he has been employed to perform or will be employed to perform are not equivalent or substantially equivalent to the tasks ANZSCO associates with the nominated occupation; or the applicant has not in fact been employed to perform those tasks, or will not be employed to undertake those tasks, or a sufficient proportion of those tasks.[40]

In terms of the genuine intention of the applicant to perform the occupation, factors such as significant inconsistencies between the applicant's qualifications/competencies/employment background and the nominated occupation may be relevant.[41]

Necessary skills, qualifications and background

Subclause 482.212(3) requires the applicant to have the skills, qualifications and employment background necessary to perform the tasks of the nominated occupation. A decision maker can also require an applicant to demonstrate their skills in a specified manner (see below), but a decision could be made on cl 482.212(3) without requiring such a demonstration of skills provided there is clear evidence that the applicant does have the necessary skills, qualifications and background.

The ANZSCO can be used as guidance on the skill requirements for the nominated occupation, although the Tribunal should be careful not to place absolute reliance on this source.

Some applicants need to have commenced a skills assessment at the time of lodging the visa application.[42] Such an assessment would be relevant (though not necessarily determinative) to whether this criterion is met.

Skills demonstrated in manner specified

Where the Minister, or Tribunal on review, may be satisfied an applicant has the necessary qualifications or employment background to perform the tasks of the nominated occupation, but nonetheless has reservations about the applicant's skills, it may request the applicant to demonstrate his or her possession of those skills in a particular way. Subclause 482.212(4) requires the visa applicant to demonstrate he or she has the skills to perform the nominated occupation – but only if the decision maker requires the applicant to do. If the applicant is so required, he or she must demonstrate their skills in the manner specified by the decision maker.

[38] *Khan v MIBP* [2016] FCCA 333 (Judge Manousaridis, 19 February 2016) at [10]. While this judgment concerned cl.457.223(4)(d)(ii), the similar wording of the provisions and scheme means it would apply equally to cl 482.212(2).
[39] *Bakri v MIBP* [2015] FCCA 3059 (Judge Smith, 1 October 2015); upheld on appeal in *Bakri v MIBP* [2016] FCA 396 (Gilmour J, 22 April 2016). Both the Court at first instance and the appeal Court applied the earlier authority in *Cargo First Pty Ltd v MIBP* (2015) 298 FLR 138, which considered the similar (and related) 'genuineness' requirement in reg 2.72(10)(f).
[40] *Khan v MIBP* [2016] FCCA 333 (Judge Manousaridis, 19 February 2016) at [13]. See also *Aulakh v MIBP* [2015] FCCA 467 (Judge Jarrett, 4 March 2015).
[41] Policy – Migration Regulations – Schedules > Temporary Skill Shortage visa (subclass 482) – visa applications at [4.5.4] (last reissued 5 August 2018).
[42] Item 1240(3)(g) of Schedule 1 to the Regulations. See the '482SkillsAss' tab of the Register of Instruments: Business visas for the relevant instrument setting out the occupations and classes subject to this requirement.

Generally this criterion will arise for consideration where either the delegate has required the applicant to demonstrate that he or she has the required skills and they failed to do so in the manner specified or, alternatively, where the evidence before the Tribunal indicates that the applicant may not have the requisite skills. It is open to the Tribunal upon review to consider for itself whether the applicant should have to demonstrate that he or she has the necessary skills, although the Tribunal should have regard to the fact that the delegate required it and any reasons of the delegate for requiring it.

The manner in which an applicant may be required to demonstrate their skills is not defined or limited in the Regulations, but may include, for example, the provision of qualifications, licences, evidence or registration, reference letters or a formal skills assessment by the relevant assessing authority for the occupation. If the Tribunal determines that demonstration of the applicant's skills is necessary, the Tribunal should advise the applicant of this and the method in which the skills are to be demonstrated, and provide him or her with an opportunity to provide that evidence.

Not engaged in payment for visa sponsorship conduct

Clause 482.213 requires that the applicant has not, in the previous three years, engaged in conduct that constitutes a contravention of ss 245AR(1), 245AS(1), 245AT(1) or 245AU(1), or, if they have engaged in that conduct, it is reasonable to disregard it. These provisions relate to certain prohibited payments for visa sponsorship.[43] In brief, a person will contravene these sections if a benefit was asked for or received by them from another person in return for the occurrence of a 'sponsorship related event', or a benefit was offered or provided by them to another person in return for the occurrence of a 'sponsorship related event'. 'Sponsorship related event' is defined in s 245AQ as any of a number of events such as applying for approval as a sponsor under s 140E, making a nomination in relation to a person under s 140GB, or not withdrawing any such application/nomination.

Whether it is reasonable to disregard such conduct will be a question for the decision maker and all relevant circumstances of the individual case should be considered.

No adverse information or reasonable to disregard

Clause 482.216(a) requires that nothing adverse is known to Immigration about the person who nominated the nominated occupation or a person associated with that person. This criterion concerns adverse information about the approved sponsor or adverse information about a person associated with the sponsor. It is not clear whether, where the information comes to the Tribunal's attention but is not known to the Department, it would fall within the operation of this provision,[44] but this could practically be overcome by notifying the Department of the information in question.

'Adverse information' is defined in reg 1.13A as any adverse information relevant to the person's suitability as an approved sponsor or as a nominator, and includes a non-exhaustive list of types of adverse information. This includes information that the person has contravened a law of the Commonwealth, a State or a Territory or is under investigation, information that the person is subject to disciplinary action or subject to legal proceedings in relation to a contravention of such a law or has been the subject of administrative action for a possible contravention of such a law; information that they have become insolvent; and information that the person has given, or caused to be given, to the Minister, an officer, the Tribunal or an assessing authority a bogus document, or information that is false or misleading in a material particular. 'Information that is false or misleading in a material particular' is defined in reg 1.13A(4) as information that is false or misleading at the time it is given

[43] These provisions were inserted by the *Migration Amendment (Charging for a Migration Outcome) Act 2015* (No. 161, 2015) from 14 December 2015.

and relevant to any of the matters the Minister may consider when making a decision under the Act or Regulations, regardless of whether or not the decision was made because of that information. A 'bogus document' is defined in s 5(1) of the Act one that the Minister *reasonably suspects*:

- purports to have been, but was not, issued in respect of the person; or
- is counterfeit or has been altered by a person who does not have authority to do so; or
- was obtained because of a false or misleading statement, whether or not made knowingly.

Both these concepts have been the subject of judicial consideration in the context of Public Interest Criterion 4020, discussed in more detail in the MRD Legal Services Commentary Bogus Documents, False or Misleading Information, PIC 4020.

Regulation 1.13B provides for non-exhaustive circumstances in which two persons are 'associated with' each other. It includes, for example, people who are or were spouses or de facto partners, people who are or were members of the same immediate, blended or extended family, or even people or have or had common friends or acquaintances. The definition was drafted with this intention that it encompass the wide range of associations among family, friends and associates which can be used to continue unacceptable or unlawful business practice via different corporate entities.[45]

Reasonable to disregard

Where 'adverse information' is known, the decision-maker must go on to consider whether it is reasonable to disregard it: cl 482.216(b). The Regulations do not provide any guidance on when it may be reasonable to disregard such information. The Explanatory Statement to the Regulations which introduced the Subclass 482 visa indicates the discretion would be exercised to disregard information which did not have a serious bearing on the suitability of the business to sponsor overseas workers.[46] The Explanatory Statement relevant to a similarly worded criterion which applies to Subclass 457 applicants indicates it may be reasonable to disregard information if the person had developed practices and procedures to ensure the relevant conduct that gave rise to the past contravention was not repeated.[47] Departmental policy may also provide some guidance as to relevant factors to consider, such as the nature, currency and seriousness of the information, whether the information is substantiated, and whether the conduct of concern is likely to reoccur.[48] Ultimately, whether it is reasonable to disregard the information is a question for the relevant decision maker, having regard to all relevant circumstances of the case.

Short-term stream criteria

The following criteria must be met by applicants being assessed against the primary criteria in the Short-term stream.

[44] 'Immigration' is defined in reg 1.03 as the Department administered by the Minister administering the *Migration Act 1958* and therefore does not appear to encompass the Tribunal.
[45] Explanatory Statement to F2018L00262, item 15.
[46] Explanatory Statement to F2018L00262, item 15.
[47] Explanatory Statement to Migration Amendment Regulations 2009 (No.5) (SLI 2009, No.115) at p 18.
[48] Policy – Migration Regulations – Divisions > [Div1.2] Div1.2 – Interpretation > [Div1.2/reg 1.13A] Adverse information and skilled visas (regulation 1.13A and 1.13B) > 4.4.2 Disregarding of adverse information (reissued 5 August 2018).

Two years of experience in nominated occupation

Clause 482.221 requires the applicant to have worked in the nominated occupation or a related field for at least 2 years. This is intended to assist in ensuring the applicant has the skills to do the job and contribute to Australia's economy.[49]

The nominated occupation is the occupation nominated by the nomination identified in the visa application.[50] What constitutes a related field is a question of fact, and may depend on circumstances such as the nature of the relevant industry and any similarities between the tasks relevant to the nominated occupation, and the tasks undertaken in the purported related field. Departmental policy suggests that work experience must be undertaken at the same skill level as the nominated occupation in order to be relevant.[51] While this should not be applied inflexibly, if an applicant's experience is at a different skill level to the nominated occupation, it is difficult to see how they could be said to have worked in the nominated occupation or a related field.

The provision does not specify what is meant by 2 years. Departmental policy is that it is generally expected that the work experience should have been undertaken on a full-time basis (though not continuously) in the last five years, and that casual employment cannot be counted. In so far as this suggests that the work experience must be recent, this would appear to conflict with cl 482.221, which does not indicate any temporal element. If there is a concern with the currency of the experience, this may be more appropriately considered under cl 482.212(3). The need for experience to be full-time should also be treated with caution, given that cl 482.221 does not explicitly require the work to be undertaken on a full-time basis. The Tribunal should be careful to apply the words of the Regulation, and consider whether part-time arrangements or other work can be regarded as sufficient.

Genuine applicant for entry and stay as a short term visa holder

Clause 482.222 requires the applicant to be a genuine applicant for entry and stay as a short term visa holder because:

- they intend genuinely to stay in Australia temporarily, having regard to their circumstances, immigration history, and any other relevant matter; and
- they intend to comply with any conditions to which the visa is subject, having regard to their record of compliance with any conditions of previously held visas and the applicant's stated intention to comply with any conditions to which the visa may be subject; and
- of any other relevant matter.

This provides grounds for a comprehensive consideration of the *bona fides* of the visa applicant and reflects the intent of the Short-term stream to fill short-term vacancies in Australia.[52]

<u>Intends genuinely to stay in Australia temporarily</u>

In making an assessment of whether the applicant genuinely intends to stay in Australia temporarily, the decision-maker must consider the applicant's circumstances, immigration history, and any other relevant matter. Case law concerning a similarly worded student visa criterion indicates that this

[49] Explanatory Statement to F2018L00262 at Attachment B 'Features of the Subclass 482 visa'. This indicates that the requirement also encourages businesses to consider training and developing the skills of Australians before turning to overseas workers to address skill shortages.
[50] Clause 482.111.
[51] Policy – Migration Regulations – Schedules > Temporary Skill Shortage visa (subclass 482) – visa applications at [4.6.1] (last reissued 5 August 2018).
[52] Explanatory Statement to F2018L00262, item 168.

criterion requires an applicant to unqualifiedly intend their stay to be temporary,[53] and that if, at the time of decision, the applicant has a settled intention to seek a visa that will lead other than to temporary residence, that would be inconsistent with an intention to genuinely stay temporarily.[54] Departmental policy, while not binding, provides some useful guidance as to factors which may suggest that an applicant is a genuine temporary entrant, such as:

- intermittent periods of stay in Australia;
- not having established ongoing residence in Australia; and
- having substantially complied with the conditions on any previous visas.

Factors which may add weight to an assessment is not a genuine temporary entrant may include:

- having spent more than four cumulative years on Short-term Subclass 482 visa(s) in the last five years;
- having lodged two or more unsuccessful Subclass 482 visa applications, especially where the nominated occupation has changed per application and/or is not consistent with their previous employment or studies in Australia;
- economic or political circumstances in the applicant's home country would present as a significant incentive for the applicant not to return; and
- the applicant appears to be using the Subclass 482 and/or other visa programs to maintain ongoing residence in Australia (although the policy indicates that this does not mean someone cannot be a genuine temporary entrant where they have utilised a number of temporary visa programs, and is not of concern where the applicant has clearly utilised the relevant temporary programs for an appropriate purpose, e.g. visiting or studying in Australia).

To the extent that the Department's policy is to consider this requirement met where an international trade obligation (ITO) applies and the intended duration of stay is within the period permitted under the ITO, this should be treated with caution, as the question of whether an applicant genuinely intends to stay in Australia temporarily can only be answered having regard to the particular applicant's intentions.

Intention to comply with conditions and any other matter

In assessing whether the applicant is a genuine applicant for entry and stay as a short term visa holder, cl 482.222(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 482.222(b), decision-makers should have regard to which (and the circumstances in which) conditions are attached to Subclass 482 visas. These must include condition 8607 and 8501, while condition 8303 may be imposed. Condition 8501 requires maintenance of health insurance and 8303 provides that the holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community. Condition 8607 provides that the visa holder must:

[53] *Saini v MIBP* [2015] FCCA 2379 (Judge Cameron, 3 September 2015) at [23], upheld on appeal in *Saini v MIBP* [2016] FCA 858 (Justice Logan, 29 July 2016). Although there are differences in cl.482.222 and the criterion in issue in these cases (cl.572.223), the similarity of the structure of the provisions suggests the same reasoning would apply.
[54] *Saini v MIBP* [2016] FCA 858 (Justice Logan, 29 July 2016) at [30].

- work in the nominated occupation in the most recent Subclass 482 application (meaning that any change in occupation requires a new visa application);

- (except for certain specified occupations) work only for the sponsor who nominated the holder in that nomination, or, in certain circumstances, an associated entity;

- commence work within 90 days of arrival in Australia (if offshore at time of grant) or 90 days of the visa grant (if onshore at time of grant); and

- not cease employment for more than 60 consecutive days; and

- hold, maintain and comply with certain requirements in relation to any licensing, registration of membership mandatory for the nominated occupation.

Further, under cl 482.222(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 short term visa holder. It is for the decision-maker to determine whether there is 'any other relevant matter' that needs to be considered.

English language requirements

Clause 482.223(1) requires the applicant to satisfy any language test requirements specified by legislative instrument. In addition, cl 482.223(2) enables decision-makers to require the applicant to demonstrate his or her English language proficiency in a specified manner (see below).

The instrument specifying the English language test requirements for cl 482.223(1) can be found at the '482English' tab of the Register of Instruments – Business visas. The current instrument, IMMI 18/032, sets out test requirements for applicants other than exempt applicants.

Exempt applicants

An 'exempt applicant' is defined in the instrument as broadly including certain passport holders; applicants who have demonstrated English language ability at the level required in the instrument when obtaining a registration, licence or membership required by their nominated occupation; applicants who are employees of and nominated by a company operating an established overseas business or an associated entity and who will receive at least $96,500 annual earnings; and applicants who have completed a minimum of 5 years of full-time study in a secondary or higher education institution in English. Full-time study is further defined in relation to a secondary education institution as the standard number of contact hours that a student would undertake in the relevant country, and in relation to a higher education institution as completion of at least 3 subjects each semester or trimester. The broad terms of the instrument appear to allow decision-makers to have regard to cumulative periods of full-time secondary or higher study, as well as study at institutions offering Vocational Education and Training courses, as reflected in Departmental policy.[55]

If the Tribunal finds an applicant is an exempt applicant, then there is no language test specified for the applicant, and cl 482.223(1) does not apply. The Tribunal must make findings to that effect, but cannot make a permissible direction on this basis and should go on to consider another criterion.[56]

[55] Policy – Migration Regulations – Schedules > Temporary Skill Shortage visa (subclass 482) – English proficiency at [4.6.3.3] (last reissued 5 August 2018).
[56] Section 349(2)(c) of the Act gives the Tribunal the power to remit a matter for reconsideration in accordance with such directions as permitted by the Regulations. Regulation 4.15(1)(b) prescribes a permissible direction as that the applicant must

Test requirements

The instrument requires that the applicant:

a) the applicant took an approved English language test on a particular day (the test day);

b) achieved the required scores on the test day in a single attempt; and

c) the test day is not more than 3 years before the day on which the applicant provided evidence of the matter mentioned in (b).

The approved tests, such as the IELTS, and required test scores, including overall band scores and certain test component scores, are also set out in the instrument. The test scores for Short-term stream applicants are generally slightly less onerous than those for Medium-term stream applicants.

The terms of the instrument do not impose any time limit on taking tests to achieve the required scores, as long as *evidence* of the required scores as achieved in a single attempt is provided to the Tribunal within 3 years of the test day. The Department's policy, however, provides that the test must have been completed within 3 years of the valid visa application lodgement date,[57] and the Explanatory Statement to the Regulations which introduced Subclass 482 indicated an intention for the requirements for the Short-term stream to be the same as existed for Subclass 457,[58] for which there was a time period of 3 years from the date of the visa application.[59] Despite this, the instrument clearly conflicts with the policy, and the Tribunal should not follow it.

Given that the only time limitation is an inability to rely on a test score more than 3 years old, the Tribunal may receive requests for adjournments from applicants seeking to achieve the required test scores. Whether the Tribunal should grant an adjournment will depend on the circumstances of the case. In addition, even where the applicant does not request an adjournment, in light of *Guder v MIBP*,[60] it is advisable that the Tribunal put the applicant on notice of their ability to request an adjournment when the English requirement is in issue. *Guder v MIBP* concerned the Subclass 457 language proficiency criterion, for which there was a 3 year period to meet the requirement. The Court found the Tribunal should have given the applicant an opportunity to address the issue of when during the 3 year period (if at all) it was appropriate for the Tribunal to make its decision, in circumstances where she had not yet achieved the requisite test scores but not asked for further time in which to attempt to do so.[61] A failure to do so was a breach of s 360.[62]

Need to demonstrate English language proficiency in a specified manner

Decision-makers may also require the applicant to demonstrate his or her English language proficiency in a specified manner. If the applicant does not demonstrate their proficiency in the manner specified, cl 482.223(2) will not be met.

This appears to operate in conjunction with cl 482.223(1) such that further demonstration could be required even if the applicant satisfies that requirement. Case law in relation to a similar Subclass 457

be taken to have satisfied a specified criterion for the visa. It will be necessary for the Tribunal to identify a criterion of the visa which the applicant satisfies in order to be able to remit the matter for reconsideration in accordance with the Act.

[57] Policy – Migration Regulations – Schedules > Temporary Skill Shortage visa (subclass 482) – English proficiency at [4.6.3.2] (last reissued 5 August 2018).

[58] Explanatory Statement to FL2018L00262 at p 47.

[59] IMMI 17/057.

[60] *Guder v MIBP* [2017] FCCA 2527.

[61] *Guder v MIBP* [2017] FCCA 2527 (Judge Driver, 7 November 2017) at [17].

[62] The first instance judgment was upheld on appeal, the Federal Court finding that the issue of whether Mrs Guder should be given more time to meet the English language requirement by adjourning the AAT hearing to allow that to occur, was an issue arising in relation to the decision under review for s 360: *MIBP v Guder* [2018] FCA 626 (Griffiths J, 11 May 2018) at [41].

requirement suggested that the limited practical circumstances in which it may be appropriate to require further demonstration include where there are concerns about whether an applicant actually sat for the language test, or errors in the reporting of the test results occurred.[63]

If the delegate required the applicant to demonstrate English language proficiency under cl 482.223(2), the Tribunal should have regard to the delegate's reasons for doing so, but may make its own determination as to whether it requires the applicant to demonstrate their English language proficiency. If the Tribunal does not require the applicant to demonstrate his or her English proficiency in a specified manner, cl 482.223(2) does not apply.

This criterion does not specify a level of proficiency. In circumstances where the applicant is an exempt applicant (such that no level of English language proficiency is specified by the Regulations), it does not appear open to impose a requirement for a *particular level* of English language proficiency from which the applicant has otherwise been exempted, as to do so would appear contrary to an apparent legislative intention to exempt these applicants from those requirements.

Employment in nominated occupation and in sponsor's business

Clause 482.224 requires the applicant to work in the nominated occupation. It also requires them to be employed to work in a position in certain businesses, depending on whether the sponsor, at the time the nomination was approved, was or was not an 'overseas business sponsor'. An overseas business sponsor is a standard business sponsor who was lawfully operating a business outside Australia and not inside Australia at the time the sponsorship approval was granted, or at the time of the most recent variation of the approval.[64]

If the sponsor was approved on the basis of lawfully operating a business in Australia (per reg 2.59(f) or reg 2.68(f)), then the applicant must be employed in the sponsor's business, or the business of an associated entity. If the sponsor was approved on the basis of lawfully operating a business outside of Australia (per reg 2.59(h) or reg 2.68(i)) then the applicant must be employed to work in the sponsor's business only. This provision mirrors requirements imposed on visa holders by condition 8607 and criteria which must be met at the nomination stage (see regs 2.72(11) and (12)). 'Associated entity' is defined in reg 1.03 as having the same meaning in s 50AAA of *Corporations Act 2001.*

There is an exception to this requirement if the occupation is listed in an instrument. See the 'ExemptOccs' tab of the Register of Instruments – Business visas for the relevant instrument. The exempted occupations are a range of medical professionals and senior executives.

Medium-term stream criteria

Applicants being assessed against the primary criteria in the Medium-term stream must meet a number of criteria, each of which replicate criteria in the Short-term stream, including that the applicant:

- cl 482.231 – has worked in the nominated occupation or related field for at least two years (see above).

[63] Tran v *MIBP* [2016] FCCA 1984 (Judge Nicholls, 2 August 2016) at [4].
[64] Reg 1.03.

- cl 482.232 – satisfies any specified language test requirements, and demonstrates English language proficiency in the manner specified by the Minister if required to do so (see above).

- cl 482.233 – unless in a specified nominated occupation, is employed to work in the nominated occupation and in a position in the nominator's business or an associated entity (see above).

Labour agreement stream criteria

The criteria for applicants being assessed against the primary criteria in the Labour Agreement stream include that the applicant:

- cl 482.241 – is nominated in an occupation that is the subject of a work agreement between the Commonwealth and the person who nominated the occupation.

- cl 482.242 – has worked in the nominated occupation or related field for at least two years. This is the same requirement discussed above in relation to the Short-term stream, except that it can be disregarded if it is reasonable in the circumstances.

- cl 482.243 – the applicant has English language skills that are suitable to perform the nominated occupation.

Other issues

Family members

Family members, whether lodging a separate or combined application with other applicants, can be in different locations to each other at the time of application and visa grant, provided each person meets the requirements of Subclass 482.

Certain people may be regarded as family unit members of primary Subclass 482 visa holders for the purposes of subsequent Subclass 482 visa applications, without needing to prove that they are dependent on the visa holder, or usually resident in their household. Clause 482.312(2) and reg 1.12(5) enable a secondary applicant who holds a Subclass 482 or 457 visa on the basis that they were a member of the family unit of a primary holder of these visas, and have been included in a Subclass 482 application with a primary applicant, to be granted a Subclass 482 visa if they are a spouse or defacto of the primary applicant; or a (not married nor engaged) child or step-child of the primary applicant (or their spouse or defacto) who has not turned 23, or has and is dependent on the primary applicant (or their spouse or defacto) as defined in reg 1.05A(1)(b); or is a dependent child of such a person.

Relevant case law

Ahmad v MIBP [2015] FCAFC 182	Summary

Aulakh v MIBP [2015] FCCA 467	Summary
Bakri v MIBP [2015] FCCA 3059	Summary
Bakri v MIBP [2016] FCA 396	
Dyankov v MIBP [2017] FCAFC 81	Summary
Guder v MIBP [2017] FCCA 2527	Summary
MIBP v Guder [2018] FCA 626	Summary
Gulati v MIBP [2016] FCCA 2263	Summary
Gulati v MIBP [2017] FCA 255	
Khan v MIBP [2016] FCCA 333	Summary
Phornpisutikul v MIBP [2016] FCCA 1934	Summary
Saini v MIBP [2015] FCCA 2379	Summary
Saini v MIBP [2016] FCA 858	Summary
Singh v MIBP [2018] FCCA 2769	
Tran v MIBP [2016] FCCA 1984	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262	No.1/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018	F2018L01093	No.2/2018
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018	No.90 of 2018	No.3/2018
Migration Amendment (Enhanced Integrity) Regulations 2018	F2018L01707	No.5/2018

Available decision precedents

A Subclass 482 precedent for use in decisions is available for use in reviews of a decision to refuse a Subclass 482 visa. It contains text for a number of criteria common to each stream, text for several

Short-term stream and Medium-term stream specific criteria, and an ‘other’ option for use where the review is about another criterion, or is in the Labour Agreement stream.

Last updated/reviewed: March 2019

Temporary Work Nominations

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  - No adverse information: r.2.72A(11)
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  - No adverse consequences for Australians: r.2.72A(13)
  - Applicant has functional English: r.2.72A(14)
  - Genuine training opportunity: r.2.72A(16)
  - Alternative criteria are met: r.2.72A(15), r.2.72B
- Generic criteria – Subclass 401, 402 and 420 visas
  - Visa holder or applicant identified in the nomination – r.2.72A(4)
  - Nomination lists family members unless reasonable to disregard – r.2.72A(5), (6)
  - Provision of three types of information – r.2.72A(7)
  - Certification relating to 'payment for visa' conduct (post 14/12/15) – r.2.72A(8A)
  - No adverse information – r.2.72A(9)
- Prescribed criteria - specific criteria for subclasses 401, 402 and 420: r.2.72D, I and J
  - Subclass 420 (Temporary Work (Entertainment)) nomination: r.2.72D
  - Subclass 402 (Training and Research) nomination: r.2.72I
  - Subclass 401 (Temporary Work (Long Stay Activity)) nomination: r.2.72J

Notification of nomination decision: r.2.74

Period of approval of nomination: r.2.75A

Relevant case law

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Available decision templates

Overview

For several current and recently repealed visas in the temporary work visa scheme, a three-stage application process exists:

- firstly, a person seeks approval to be a temporary work sponsor[1] or temporary activities sponsor,
- secondly, an 'approved sponsor'[2] or person who has applied to be an approved sponsor or is party to negotiations for a work agreement[3] nominates an occupation, program, or activity in relation to a non-citizen, and
- thirdly, the non-citizen applies for the relevant class of visa.

This Commentary addresses the nomination application process, criteria, and period of approval for nominations associated with the current Subclass 407 (Training) visa and the following recently repealed subclasses of temporary work visas:[4]

- Subclass 401 (Temporary Work (Long Stay Activity));
- Subclass 402 (Training and Research);[5] and
- Subclass 420 (Temporary Work (Entertainment)).[6]

For information regarding approval as a temporary work sponsor, see MRD Legal Services Commentary: Temporary Work Sponsor and for information regarding the grant of a temporary work visa, see MRD Legal Services Commentary: Overview - Temporary Work Visas.

Under the current legislative framework, temporary work visas form part of the enforceable sponsorship framework at Division 3A of Part 2 of *the Migration Act 1958* (the Act),[7] which sets out the prescribed criteria and processes to be satisfied for the approval of an approved sponsor's nomination of an occupation, program or activity in relation to a visa holder of, or an applicant, or a proposed applicant for a visa of a 'prescribed kind'.[8] The 'prescribed kind' of visas are set out in Part 2A Division 2.17 of the Regulations; these are currently Subclass 407, 457 and 482 visas, and prior to 19 November 2016 included other former temporary work visas.[9] Accordingly, with limited

[1] The term 'temporary work sponsor' is currently defined in r.1.03 as meaning any of the following: special program sponsor, entertainment sponsor, superyacht crew sponsor, long stay activity sponsor and training and research sponsor. For further details about temporary work sponsors, please see MRD Legal Services commentary: Temporary Work Sponsorship.
[2] 'Approved sponsor' is defined in s.5 of the Act as either a person approved as a sponsor under s.140E of the Act in relation to a class of sponsor prescribed by the regulations (r.2.58), or a person (other than the Minister) who is a party to a work agreement.
[3] The *Migration Amendment (Skilling Australians Fund) Act 2018* (No 38, 2018) amended s.140GB to enable these nominations to be lodged by the latter two categories of persons for nominations lodged after 12 August 2018, or not decided at that time.
[4] While the term 'temporary work sponsor' is defined in r.1.03, the term 'temporary work visa' referred to in this commentary is not defined in the legislation, and refers only to nominations in relation to the visa subclasses referred to in this commentary.
[5] Note that only the Occupational Trainee stream in the Subclass 402 (Training and Research) visa is subject to the three-stage process. The other two streams within that subclass (the Professional Development stream and the Research stream) have no nomination requirements: see Part 402 of Schedule 2 to the Regulations.
[6] These visa subclasses were repealed from 19 November 2016 by the Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743).
[7] Temporary work visa applications and nominations made on or after 14 September 2009 were brought into the sponsorship framework by the *Migration Legislation Amendment (Worker Protection) Act 2008* (the Worker Protection Act), and the Migration Amendment Regulations 2009 (No.5) (SLI 2009 No.115), (SLI 2009 No. 230) and (SLI 2009 No.203) (the amending regulations).
[8] s.140GB.
[9] r.2.72A – r.2.72J were repealed and substituted by new r.2.72A and r.2.72B from 19 November 2016 by F2016L01743.

exceptions,[10] a visa application for a Subclass 407 visa, or a Subclass 401, 402 or 420 visa application made before 19 November 2016, requires that the visa applicant be the subject of an approved nomination at the time of decision in order for the visa to be granted.[11]

Please note that from 19 November 2016 no new nominations for Subclass 401, 402 and 420 visa applicants can be made, including by legacy sponsors[12] and including for legacy visa applications[13] made before 19 November 2016.[14]

An associated nomination must be made in accordance with the prescribed process and meet the specified criteria, which are discussed below. Unlike nominations for Subclass 457 or Subclass 482 visas under s.140GB and r.2.72, nominations for other temporary work visas do not have to meet the Labour Market Testing condition introduced from 23 November 2013.

For sponsorship, nomination and visa application processes in relation to Subclass 457 visas – see the MRD Legal Services Commentary Standard Business Sponsor, Nomination of Occupation: r.2.72 and Subclass 457 visa respectively. For information about nominations and the temporary work visa scheme prior to 24 November 2012, please contact MRD Legal Services.[15]

Tribunal's jurisdiction and powers

A decision to refuse to approve a nomination by an approved temporary work sponsor made on or after 14 September 2009 under s.140GB(2) is a decision reviewable by the Tribunal under Part 5 of the Act.[16] The approved sponsor who made the nomination has standing to apply for review.[17]

Process for nomination for temporary work visas

Section 140GB(3) provides that the Regulations may establish a process for the Minister to approve an approved sponsor's nomination. The prescribed process for a nomination associated with Subclass 407 visas is set out in r.2.73A, and prior to 19 November 2016 the prescribed process for nominations associated with Subclass 401, 402 and 420 visas was set out in r.2.73A – r.2.73B. The main differences between these nomination processes are the different prescribed forms and nomination fees payable. It is a criterion for approval of all temporary work nominations that the

[10] The exceptions are for Subclass 407 visa applicants whose approved sponsor is a Commonwealth agency: cl.407.214; for Subclass 402 visa applicants in the Occupational Trainee stream where the occupation training is to be provided to the applicant by the Commonwealth: cl.402.221 (as in force immediately prior to 19 November 2016); and for Subclass 402 visa applicants in the Research stream, or the Professional Development stream where nomination is not a requirement in these two streams.
[11] Clause.407.214; and clauses 401.221, 401.231, 401.241, 402.221, 420.222 as in force immediately before 19 November 2016.
[12] Classes of sponsor repealed from 19 November 2016 by F2016L01743, i.e. professional development sponsor, special program sponsor, superyacht crew sponsor, long stay activity sponsor, training and research sponsor, and entertainment sponsor.
[13] Temporary work visas repealed from 19 November 2016 by F2016L01743, i.e. Subclasses 401, 402 and 420.
[14] See Part 60 of Schedule 13 to the Regulations, as inserted by F2016L01743; and Explanatory Statement to F2016L01743, p.52.
[15] Subclass 411, 419, 421, 423, 427, 428 and 442 visas were repealed with effect from 24 November 2012 by Migration Legislation Amendment Regulation 2012 (No.4) (SLI 2012, No.238) and the associated nomination processes in respect of these visas are no longer contained in this commentary.
[16] s.338(9) and r.4.02(4)(d).
[17] s.347(2)(d) and r.4.02(5)(c).

application is made in accordance with the applicable process.[18]

Process for nomination for Subclass 407 visas: r.2.73A

The process for nomination of a program of occupational training in relation to a Subclass 407 visa is set out in r.2.73A of the Regulations.[19] This regulation states that the person may nominate the program in accordance with a process specified in a legislative instrument, which may specify the relevant form, fee and other application requirements. For the relevant instrument see the 'Form&Fees' tab of the MRD Legal Services Register of Instruments: Business Visas.

Process for nomination for Subclass 401 and 402 visas: r.2.73A (pre 19 November 2016)

The process for nomination of an occupation, activity or program in relation to a Subclass 401 and 402 visas was set out in r.2.73A of the Regulations as in force immediately prior to 19 November 2016.[20]

Who can make a nomination?

For nominations made between 24 November 2012 and 18 November 2016, r.2.73A (relevantly) applies to a person who is nominating an occupation, program or activity under s.140GB(1)(b); and who identifies in the nomination an occupation, a program or an activity in relation to a visa and a person who will work or participate in the occupation, program or activity who is a holder of, an applicant for, or a proposed applicant for a Subclass 401 or 402 visa.[21]

Nomination requirements

The person seeking approval of the nomination must make the application in accordance with the approved form and be accompanied by the prescribed application fee.[22]

For nomination applications made on or after 2 April 2011, if there is no instrument specified, the application must be posted, delivered (by courier or by hand) or faxed to an office of Immigration in Australia.[23] For the applicable instruments, see the 'AppAddress' tab of Register of Instruments - Business Visas.

In addition, for applications made on or after 14 December 2015 – if the person identifies in the nomination the holder of, an applicant for, or a proposed applicant for a Subclass 401 visa, the person must provide the written certification in r.2.72A(8A) as to whether or not the person has engaged in 'payment for visa' conduct that constitutes a contravention of s.245AR(1) of the Act: r.2.72A(8A).[24]

Process for nomination for Subclass 420 visas: r.2.73B (pre 19 November 2016)

The process for nomination of an occupation, program or activity in relation to a Subclass 420

[18] r.2.72A(4); and r.2.72A(3) as in force immediately prior to 19 November 2016.
[19] As substituted by F2016L01743.
[20] r.2.73A was repealed and substituted by F2016L01743 from 19 November 2016.
[21] r.2.73A(1)(b) as substituted by SLI 2012, No.238 for nominations made on or after 24 November 2012.
[22] r.2.73A (3), (3A) and (4), as substituted by SLI 2012, No.238.
[23] r.2.73A(5) was amended by Migration Amendment Regulations 2011 (No.1) (SLI 2011, No.1) and applies to the nomination of an occupation, program or activity made on or after 2 April 2011. An instrument made under r.2.73A(5) prior to amendment continues in force as if it were an instrument made under the amended regulation: r.3(3).
[24] r.2.73A(3C) as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015, No.242) and applying to applications for approval of a nomination made after 14 December 2015.

(Temporary Work (Entertainment)) visa is set out in r.2.73B of the Regulations as in force immediately prior to 19 November 2016.[25]

Who can make a nomination?

For nominations made between 24 November 2012 and 18 November 2016, r.2.73B (relevantly) applies to a person: who is nominating an occupation or an activity under s.140GB(1)(b); and who identifies in the nomination, as the person who will participate in the occupation or activity the holder of, or an applicant or proposed applicant for, a Subclass 420 (Temporary Work (Entertainment)) visa.[26]

Nomination requirements

The person making the approval must make the application in accordance with the approved form and be accompanied by the prescribed application fee.[27]

For nomination applications made on or after 2 April 2011, if there is no instrument specified, the application must be posted, delivered (by courier or by hand) or faxed to an office of Immigration in Australia.[28] (See the 'AppAddress' tab of Register of Instruments - Business Visas).

In addition, for applications made after 14 December 2015 – the person making the nomination must provide the written certification in r.2.72A(8A) as to whether or not the person has engaged in 'payment for visa' conduct that constitutes a contravention of s.245AR(1) of the Act: r.2.72A(8A).[29]

Criteria for approval of nomination

Under s.140GB(2), the Minister *must* approve an approved sponsor's nomination if prescribed criteria are satisfied. The prescribed criteria for approval of nomination are set out in the current r.2.72A and r.2.72B in respect of Subclass 407 visas, and r.2.72A, r.2.72D, r.2.72I and r.2.72J as in force immediately prior to 19 November 2016, in respect of Subclass 401, 402 and 420 visas which included both generic and specific criteria for each subclass. These criteria are discussed below.

Approved sponsor

At the time a decision is made on a person's nomination application, the person must be an approved sponsor: s.140GB(2)(ab).[30]

[25] r.2.73B was repealed and substituted by F2016L01743 from 19 November 2016.
[26] r.2.73B(1) as amended by SLI 2012, No.238.
[27] r.2.73B(3), (4), (5) as in force immediately prior to 19 November 2016.
[28] r.2.73B(6) as amended by SLI 2011, No.1. An instrument made under r.2.73B(6) prior to amendment continues in force as if it were an instrument made under the amended regulation: r.3(3).
[29] r.2.73B(3A) as inserted by Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (SLI 2015 No.242) and applying to applications for approval of a nomination made after 14 December 2015.
[30] Section 140GB(2)(ab) was inserted on 12 August 2018, and applied to all nominations lodged from or not decided at that date: item 37 of Schedule 1 to No 38, 2018.

Criteria for approval of nomination – Subclass 407

Regulations 2.72A and 2.72B set out the criteria for approval of nominations of a program of occupational training in relation to the holder or, or proposed applicant for, a Subclass 407 visa.[31] Unless the sponsor is a Commonwealth agency, it is a criterion for the grant of a Subclass 407 visa that a primary visa applicant is identified in an approved nomination.[32]

Nominator must be relevant class of sponsor: r.2.72A(3)

The Minister, or the Tribunal on review, must be satisfied that the person making the nomination is a temporary activities sponsor,[33] or for nominations made on or before 18 May 2017, a professional development sponsor or a training and research sponsor.[34]

Each of these classes of sponsor are defined in r.1.03 to mean a person who is an 'approved sponsor',[35] and is approved as a sponsor in relation to the relevant sponsor class by the Minister under s.140E(1) of the Act. For the professional development sponsor and training and research sponsor classes, the approval must have been on the basis of an application made before 19 November 2016.

Nomination made in accordance with prescribed process: r.2.72A(4)

Regulation 2.72A(4) requires that the Minister must be satisfied that the sponsor made the nomination in accordance with r.2.73A – for details see above.

Nominee will participate in nominated program: r.2.72A(5)

Under r.2.72A(5), the Minister must be satisfied that the nominee will participate in the nominated program. This will allow the refusal of the nomination if the visa applicant is assessed as not having a genuine intention to participate.[36]

Family members included in nomination unless reasonable to disregard: r.2.72A(6), (7)

If the nominee holds a visa, the Minister must be satisfied that the sponsor has listed on the nomination each secondary sponsored person[37] who holds the same visa on the basis of that person's relationship to the nominee. However, the Minister may disregard the fact that one or more secondary sponsored persons are not listed on the nomination if satisfied that it is reasonable in the circumstances to do so.

Further guidance in relation to a similar requirement in the pre-19 November 2016 version of r.2.72A(5) and (6) can be found below.

Details of proposed employers and location of work provided: r.2.72A(8), (9)

Regulation 2.72A(8) requires that the Minister is satisfied that the sponsor has provided information regarding proposed employers and the location of work. Specifically, the sponsor is required to

[31] As substituted by F2016L01743 for applications made on or after 19 November 2016.
[32] cl.407.214 of Schedule 2 to the Regulations.
[33] r.2.72A(3).
[34] r.2.72A(3)(b) as in force before 12 August 2018.
[35] 'Approved sponsor' is defined in s.5 of the Act as either a person approved as a sponsor under s.140E of the Act in relation to a class of sponsor prescribed by the regulations (r.2.58), or a person (other than the Minister) who is a party to a work agreement.
[36] Explanatory Statement to F2016L01743, p.42.
[37] 'Secondary sponsored person' has the meaning given in r.2.57(1): r.1.03. A 'secondary sponsored person' is a person who met the secondary visa criteria and was last identified in the approved nomination by the sponsor or was sponsored as a

provide:

- information that identifies the employer/s in relation to the nominated program, including the location and contact details of each employer and the relationship between the sponsor and employer if they are not the same person;
- information that identifies the location/s where the nominated program will be carried out; and
- information that identifies each member of the nominee's family unit who holds, or proposes to apply for, the same visa as the nominee on the basis of satisfying the secondary criteria.

If the nominated program is a volunteer role,[38] r.2.72A(9) defines employer to include the person or organisation responsible for the tasks to be carried out as part of the nominated program.

There appears to be some overlap between the requirements of r.2.72A(6) and r.2.72A(8)(c) in terms of identifying family members of visa holders. However, while r.2.72A(6) only relates to 'listing' *visa holders* who meet the definition of 'secondary sponsored person', r.2.72A(7)(c) applies to visa holders, as well as proposed secondary visa applicants.

Certification relating to 'payment for visa' conduct – r.2.72A(10)

Regulation 2.72A(10) requires that the nominator has, as part of the nomination, certified in writing whether or not they have engaged in conduct, in relation to the nomination, that constitutes a contravention of s.245AR(1) of the Act.

A person contravenes s.245AR(1) of the Act if they ask for (or receive) a benefit from another person in return for the occurrence of a sponsorship-related event. The meaning of 'sponsorship-related event' is detailed in s.245AQ of the Act, but relevantly includes a person making a nomination under s.140GB of the Act in relation to an applicant for a sponsored visa.

The certification must be provided 'as part of the nomination'. While the wording of r.2.72A(10) would suggest that the certification must have been provided at the time the application for the nomination was made, it is also arguable that a certification provide to the decision-maker, including the Tribunal upon review, would form 'part of the nomination'.

Ultimately, in the context of a review before the Tribunal, it will be a question of fact as to whether the certification has been provided.

No adverse information: r.2.72A(11)

Under r.2.72A(11) the Minister must be satisfied that there is no adverse information known to Immigration about the sponsor or a person associated with the sponsor; or it is reasonable to disregard any adverse information known to Immigration about the sponsor or a person associated with the sponsor.

Adverse information

'Adverse information' is defined in r.1.13A (previously r.2.57(3)) as any adverse information relevant

member of the family unit of a primary sponsored person. The secondary sponsored person must either still hold the relevant visa connected to the sponsorship, or it was the last substantive visa held and the person is still in the migration zone.

[38] A person is defined as performing a 'volunteer role' under r.2.57(5) if: (a) the person will not receive remuneration for performing the duties of the position other than reimbursement for reasonable expenses incurred by the person in performing the duties, or prize money; and (b) the duties would not otherwise be carried out by an Australian citizen or permanent resident in return for wages.

to a person's suitability as an approved sponsor or nominator.[39] A non-exhaustive list of kinds of adverse information is also provided, including information that the person (or an associated person) has become insolvent or has breached certain laws (or is the subject of certain kinds of investigative or administrative action relating to suspected breaches of those laws).[40] The laws relate to discrimination, immigration, industrial relations, occupational health and safety, people smuggling and related offences, slavery, sexual servitude and deceptive recruiting, taxation, terrorism, trafficking in persons and debt bondage.[41] Some of the listed kinds of information require consideration or action by a competent authority (a Department or authority administering or enforcing the law).[42] The conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[43]

For applications made on or after 18 March 2018, 'adverse information' is still defined as any adverse information relevant to the person's suitability as an approved sponsor or nominator, however the non-exhaustive list of the types of adverse information is broader. For example, the relevant types of laws are not given and there is no 3 year restriction on the occurrence of the conviction or other event. In addition, the list also gives as an example, the provision of a bogus document or information that is false or misleading in a material particular, to the Minister, an officer, assessing authority, or the Tribunal.[44]

The definition of 'associated with' is found in r.1.13B (formerly r.2.57(3)), and different definitions apply depending on whether the application was made before, or on or after 18 March 2018. Under the pre-18 March 2018 definition, a person is 'associated with' another person (i.e. the sponsoring or nominating entity) in the circumstances referred to in r.1.13B, i.e. if they are an officer, partner or member of a committee of management of the entity (or a related or associated entity; depending on the kind of entity).[45] For applications made on or after 18 March 2018, r.1.13B provides a non-exhaustive definition of the circumstances in which two persons are associated with each other. It includes a broader range of associations such as partners, family and family-like relationships, belonging to the same social group, unincorporated association or other body of persons, or having common friends or acquaintances, or being a consultant, adviser, officer, employer or employee.[46]

According to the Explanatory Statement to the amending Regulation which introduced the new r.2.72A(11), the definition of adverse information allows the Department to consider a wide range of matters in relation to the past conduct and likely future conduct of the applicant, including whether the applicant is likely to exploit sponsored visa holders or use those visa holders to meet labour requirements which are outside the intended scope of the visas.[47]

Departmental policy in relation to the former r.2.72A(9)(a) (see below) suggests that the 'adverse information' criterion is very broad and includes information that suggests that the terms and conditions of employment or engagement will be less than the Federal minimum standard. Employers

[39] r.1.13A as inserted by SLI 2015 No.242. The definition was previously found in 2.57(3), which was repealed by the same amending regulations.
[40] r.1.13A(1). The reference to becoming insolvent means insolvent within the meaning of ss.5(2) and (3) of the *Bankruptcy Act 1966* and s.95A of the *Corporations Act 2001.*
[41] r.1.13A(2).
[42] 'Competent authority' has the meaning given by r.2.57(1): r.1.13A(4).
[43] r.1.13A(3).
[44] r.1.13A as amended by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[45] r.1.13B as inserted by SLI2015 No.242. r.1.13B(5) includes a number of definitions. The term 'officer' is defined as, for a corporation or an entity that is neither an individual or corporation, having the same meaning in s.9 of the *Corporations Act 2001*. In relation to an 'entity', this is defined as including an entity within the meaning of s.9 of the *Corporations Act 2001*; and a body of the Commonwealth, a State or a Territory. Further, the term 'related body corporate' is defined as having the same meaning as in s.50 of the *Corporations Act 2001*. The term 'associated entity' is further defined in r.1.03 as having the same meaning in s.50AAA of *Corporations Act 2001*.
[46] r.1.13B as repealed and substituted by F2018L00262, for applications made on or after 18 March 2018.

and employees in the national workplace system are covered by the National Employment Standards (NES), under which employees are protected by minimum pay and conditions. For example, if it is apparent from the evidence that the sponsor is not going to pay the visa applicant or holder in accordance with Australian legislation and award, decision makers may refuse the nomination on the basis that there is 'adverse information' known to Immigration.[48]

Reasonable to disregard adverse information

Even though such adverse information is known to Immigration, it may be disregarded if reasonable to do so. 'Reasonable' is not defined under the legislation in this context.

Guidance is provided by Department policyin relation to the former r.2.72A(9) (see below), which states that there are no definitive rules in relation to when it is appropriate and reasonable to disregard adverse information that is known about a person making a nomination.[49] Decision makers must exercise judgment and assess the circumstances of each case on their merits. Factors which may be taken into account in deciding whether it is reasonable to disregard the adverse information include, but are not limited to:

- the nature of the adverse information
- how the adverse information arose
- whether the adverse information arose recently or a long time ago, and
- whether the applicant has taken any steps to ensure the circumstances which led to the adverse information do not recur.

These factors should be weighed up against the sponsor's claims before deciding whether to refuse the nomination on the basis of past non-compliance.

Deartmental policy also includes some examples of circumstances in which it may be reasonable to disregard adverse information may include situations where the sponsor has:

- developed practices and procedures to ensure the relevant conduct is not repeated;
- complied with sponsorship obligations on all other occasions and the decision maker was satisfied that the breach for which an infringement notice was issued was a one-off and is unlikely to recur;
- disassociated themselves from the overseas employer or agents involved in preparing fraudulent applications; or
- introduced additional quality control measures.[50]

The decision-maker should ensure that it has taken account of the individual circumstances of the

[47] Explanatory Statement to F2016L01743, p.43.
[48] Policy - Migration Regulations - Divisions - [Div2.11-Div2.23] Sponsorship applicable to Division 3A of Part 2 of the Act - Nominations for repealed temporary visas - General requirements for nomination approval - Adverse Information - Terms and conditions of employment (reissued on 01/01/2016).
[49] Policy - Migration Regulations - Divisions - [Div2.11-Div2.23] Sponsorship applicable to Division 3A of Part 2 of the Act - Nominations for repealed temporary visas - General requirements for nomination approval - Adverse information - Disregarding adverse information (reissued on 01/01/2016).
[50] Policy - Migration Regulations - Divisions - [Div2.11-Div2.23] Sponsorship applicable to Division 3A of Part 2 of the Act - Nominations for repealed temporary visas - General requirements for nomination approval - Adverse information - Disregarding adverse information (reissued on 01/01/2016).

case in deciding whether the criterion in r.2.72A(11) is met.

Occupational training will be provided directly by the sponsor: r.2.72A(12)

Under r.2.72A(12), the Minister must be satisfied that either:

- the occupational training will be provided directly by the sponsor;
- the sponsor is supported by a Commonwealth agency, and the Commonwealth agency has provided a letter endorsing the arrangement for the provision of occupational training;
- the sponsor is specified in a legislative instrument; or
- the occupational training will be provided in circumstances specified in a legislative instrument.

For the relevant instruments, please see the '407Noms&OccTraining' tab of the Register of Instruments - Business Visas.

According to the Explanatory Statement, the restrictions on the provision of third party training are an important new integrity measure to prevent Subclass 407 being used by sponsors who are operating as, in effect, labour hire firms. The improper use of occupational training was an issue with the repealed Subclass 402 visa, with the training being used in some cases as a pretext for the supply of labour to third party employers/trainers.[51]

No adverse consequences for Australians: r.2.72A(13)

Regulation 2.72A(13) requires that the Minister is satisfied that the sponsor does not engage in, or intend to engage in, activities that will have adverse consequences for employment or training opportunities, or conditions of employment, for Australian citizens or permanent residents. The Explanatory Statement explains that together with the 'genuine training opportunity' requirement in r.2.72A(16), this criterion will allow the Department to consider the 'business model' of the sponsor to ensure that the sponsor is genuinely engaged in occupational training and will not use the Subclass 407 visa for the purpose of introducing additional labour into the Australian labour market.[52]

Applicant has functional English: r.2.72A(14)

To satisfy r.2.72A(14), the Minister must be satisfied that the nominee has 'functional English'. Functional English is defined in s.5(2) of the Act and discussed in detail in the MRD Legal Services commentary: English Language Ability – Skilled/Business Visas.

Genuine training opportunity: r.2.72A(16)

Regulation 2.72A(16) requires that the Minister is satisfied that the nominated program is offered as a genuine training opportunity for a purpose referred in the subregulation of r.2.72B that applies. See immediately below for discussion of r.2.72B.

Alternative criteria are met: r.2.72A(15), r.2.72B

Regulation r.2.72A(15) merely states that r.2.72B applies to the nomination. In order to satisfy

[51] Explanatory Statement to F2016L01743, p.43.
[52] Explanatory Statement to F2016L01743, p.43.

r.2.72B, one of five alternate criteria must be met, which reflect the criteria which previously applied to nominations in relation to the Occupational Trainee stream of the Subclass 402 and the visa criteria in relation to the Professional Development stream of Subclass 402.

Occupational training required for registration: r.2.72B(2)

This subregulation applies if the occupational training is necessary for the nominee to obtain registration, membership or licensing in Australia, or in his/her home country in relation to the occupation of the nominee.[53] The registration, membership or licensing must be required for the nominee to be employed in his/her occupation in Australia or in their home country.[54] The Minister must also be satisfied that the duration of the occupational training is necessary for the nominee to obtain registration, membership or licensing in Australia or their home country in relation to his/her occupation, taking into account his/her prior experience.[55] The occupational training must be workplace based,[56] and the nominee must have appropriate qualifications and experience to undertake the occupational training.[57]

Occupational training to enhance skills: r.2.72B(3)

This subregulation applies if the occupational training is a structured workplace training program, specifically tailored to the training needs of the nominee and be of a duration that meets the specific training needs of the nominee.[58] The occupational training must be in relation to an occupation specified in a legislative instrument,[59] and the occupation must be applicable to the nominee in accordance with any additional specifications made by that instrument.[60] The nominated person must also have the equivalent of at least 12 months full-time experience in the occupation to which the occupational training relates in the 24 months immediately preceding the time of nomination.[61]

Departmental policy in relation to the previous criteria for approval of an occupational trainee nomination state that the training program must be primarily conducted in the workplace and not in a classroom or similar teaching environment. It is recognised that even workplace-based training may include some classroom-based training but indicates that no more than 30 per cent of the total training package can be classroom-based. An occupational training program should be at least 30 hours per week. Part-time classroom based study that is unrelated to the training is permitted as long as it does not interfere with the training program. A part-time load is defined by the tertiary institution providing the course. This study would not count towards the maximum 30 per cent classroom-based component of the training program.[62] However, these are not statutory requirements, and consideration should always focus on the terms of r.2.72B(3).

Occupational training for capacity building overseas: r.2.72B(4) – (6)

Subregulation 2.72B(4) applies if the Minister is satisfied that the nominated trainee is required to complete a period of no more than six months of practical experience, research or observation to

[53] r.2.72B(2)(a).
[54] r.2.72B(2)(b).
[55] r.2.72B(2)(c).
[56] r.2.72B(2)(d).
[57] r.2.72B(2)(e).
[58] r.2.72B(3)(a).
[59] r.2.72B(3)(b). For the relevant instrument, see the 'Occ186_442_457&Noms' tab of the Register of Instruments - Business Visas.
[60] r.2.72B(3)(ba) inserted by Migration Amendment (Specification of Occupations) Regulations 2017 (F2017L00818) on 1 July 2017. There were no transitional provisions in respect of this change, so that the additional requirement appears to apply to all live nomination applications, regardless of when made.
[61] r.2.72B(3)(c).
[62] Policy - Migration Regulations - Divisions - [Div2.11-Div2.23] Sponsorship applicable to Division 3A of Part 2 of the Act - Nominations for repealed temporary visas - Criteria for Approval of Nominations - Criteria for approval of occupational trainee nomination - Primarily in the workplace (reissued on 01/01/2016).

obtain a qualification from a foreign educational institution,[63] and the occupational training is a structured workplace-based training program specifically tailored to the training needs of the nominee.[64]

Subregulation 2.72B(5) applies if the Minister is satisfied that the occupational training is supported by a government agency, or by the government of the nominee's home country,[65] and is a structured workplace-based training program specifically tailored to the training needs of the nominee and of a duration that meets the specific training needs of the nominee.[66]

Subregulation 2.72B(6)[67] applies if the Minister is satisfied that the nominee has an overseas employer, is in a managerial or professional position in relation to that employer,[68] the training is relevant to, and consistent with, the development of the managerial or professional skills of the nominee,[69] the training will provide skills and expertise relevant to, and consistent with, the business of the employer,[70] and the primary form of the training is the provision of face-to-face teaching in a classroom or similar environment.[71]

Generic criteria – Subclass 401, 402 and 420 visas

Regulation 2.72A as in force immediately prior to 19 November 2016[72] sets out the generic criteria for approval of a nomination of an occupation, program or activity for Subclass 401, 402 and 420 visas (as relevant). It requires the Minister to be satisfied that the nomination be made in accordance with the process set out in r.2.73A - 2.73B depending on the subclass of visa to which the nomination relates (see above for discussion of the process).

Visa holder or applicant identified in the nomination – r.2.72A(4)

Under r.2.72A(4), it is a criterion for approval that the person has identified in the nomination, the visa holder, or an applicant, or a proposed applicant who will work or participate in the nominated occupation, program or activity. Practically, this means that the approved sponsor must provide the primary nominated person(s)' name, details etc. on the prescribed form. The term 'identified' is not defined in the legislation, but it appears to suggest that sufficient information must be provided to allow the primary nominated person's identity to be recognised or established.

Nomination lists family members unless reasonable to disregard – r.2.72A(5), (6)

Regulation 2.72A(5) only applies if the nomination identifies a 'visa holder'. Under r.2.72A(5), each 'secondary sponsored person'[73] who holds the same visa as the visa holder on the basis of the

[63] r.2.72B(4)(a).
[64] r.2.72B(4)(b).
[65] r.2.72B(5)(a).
[66] r.2.72B(5)(b).
[67] This category simplifies the process for professional development by removing the previous requirement, which existed under the repealed Subclass 402 visa, for a professional development agreement between a professional development sponsor and the nominee's overseas employer: Explanatory Statement to F2016L01743, p.44.
[68] r.2.72B(6)(a).
[69] r.2.72B(6)(b).
[70] r.2.72B(6)(c).
[71] r.2.72B(6)(d).
[72] r.2.72A was repealed and substituted by F2016L01743 from 19 November 2016.
[73] 'Secondary sponsored person' has the meaning given in r.2.57(1): r.1.03. A 'secondary sponsored person' is a person who met the secondary visa criteria and was last identified in the approved nomination by the sponsor or was sponsored as a member of the family unit of a primary sponsored person. The secondary sponsored person must either still hold the relevant visa connected to the sponsorship, or it was the last substantive visa held and the person is still in the migration zone.
'Primary sponsored person' has the meaning given in r.2.57(1): r.1.03. Essentially, such person is the primary visa holder, or prospective primary visa holder identified in the *approved nomination* by the sponsor or who satisfied the primary visa criteria

secondary sponsored person's relationship with the visa holder must also be listed on the nomination by the person in order for the nomination to be approved.[74] This is to ensure that:

- the nominator is aware of all the secondary sponsored persons who are connected to the primary sponsored person that is being nominated, and
- the liability for the family unit moves with the primary nominated person.[75]

Unlike r.2.72A(4) above, the term 'listed' is used in relation to secondary sponsored person(s), rather than the term 'identified'. While the term 'listed' is not defined in the legislation, it appears to suggest that it would be sufficient to simply state the name of secondary sponsored person(s) on the prescribed nomination form for the purposes of meeting r.2.72A(5). (However, it should be noted that family unit members of both visa applicants and visa holders are required to be 'identified' in r.2.72A(7)(c)).

An exception to this criterion is if the Minister (or the Tribunal on review) is satisfied that it is reasonable in the circumstances to disregard the fact that one or more secondary sponsored persons are not listed on the nomination.[76] The Explanatory Statement to the Regulation that introduced this requirement provides that an example of a circumstance in which it may be reasonable to disregard the requirement is where the relevant secondary sponsored person has left Australia and does not intend to return, but their visa is still in effect.[77]

Provision of three types of information – r.2.72A(7)

Regulation 2.72A(7) requires the nominator to provide three types of information in order to assist the Department to monitor whether the nominator is complying with the sponsorship obligations.[78] These three types of information are information that identifies:

- the employer(s) in relation to the nominated occupation, program or activity, including the location and contact details of each employer, and *if the person making the nomination and the employer are not the same person*, the relationship between the person and the employer;[79]
- the location(s) where the nominated occupation, program or activity will be carried out;[80] and
- each member of the family unit of the identified visa holder or applicant who holds, or proposes to apply for, the same visa as the identified visa holder or applicant on the basis of satisfying the secondary criteria.[81]

There appears to be some overlap between the requirements of r.2.72A(5) and r.2.72A(7)(c) in terms

on the basis of that sponsorship. The person must either still hold that visa, or no longer holds a substantive visa, but the visa obtained on the sponsorship was the last substantive visa held and the person is still in the migration zone.

[74] r.2.72A(5).

[75] See Explanatory Statement to SLI 2009, No.203, p.36.

[76] r.2.72A(6).

[77] See Explanatory Statement to SLI 2009, No.203, p.36.

[78] See Explanatory Statement to SLI 2009, No.203, p.36.

[79] r.2.72A(7)(a). In the case of a nominated occupation, program or activity that is a 'volunteer role', employer includes the person or organisation responsible for the tasks to be carried out as part of the nominated occupation, program or activity: r.2.72A(8). 'Volunteer role' is defined in r.2.57(5), which provides that a person will perform a *volunteer role* if the person will not receive remuneration for performing the duties of the position, other than reimbursement for reasonable expenses incurred in performing the duties, and prize money; and the duties would not otherwise be carried out by an Australian citizen or permanent resident in return for wages.

[80] r.2.72A(7)(b). This information will also assist the Department to monitor whether a person is complying with the person's sponsorship obligations: See Explanatory Statement to the SLI 2009, No.115, p.36.

[81] r.2.72A(7)(c).

of identifying family members of visa holders. However, while r.2.72A(5) only relates to 'listing' *visa holders* who meet the definition of 'secondary sponsored person', r.2.72A(7)(c) applies to visa holders, as well as proposed secondary visa applicants.

Certification relating to 'payment for visa' conduct (post 14/12/15) – r.2.72A(8A)

Regulation 2.72A(8A) applies if the nomination is made on or after 14 December 2015.[82] Where the nominator made the nomination in relation to a Subclass 401 or Subclass 420 visa, it requires that the nominator has, as part of the nomination, certified in writing whether or not they have engaged in conduct, in relation to the nomination, that constitutes a contravention of s.245AR(1) of the Act.

A person contravenes s.245AR(1) of the Act if they ask for (or receive) a benefit from another person in return for the occurrence of a sponsorship-related event. The meaning of 'sponsorship-related event' is detailed in s.245AQ of the Act, but relevantly includes a person making a nomination under s.140GB of the Act in relation to an applicant for a sponsored visa.

According to the Explanatory Statement to these amendments, the purpose of this requirement is to ensure that any person making a nomination provides the certification before the nomination is approved and, depending on the information provided, the Department may take further action to investigate the nominator and/or the nominee.[83]

The provisions in r.2.73A(3C) and r.2.73B(3A) require that the certification in r.2.72A(8A) must be provided 'as part of the nomination'. While the wording of this provision would suggest that the certification must have been provided at the time the application for the nomination was made, it is also arguable that a certification provide to the decision-maker, including the Tribunal upon review, would form 'part of the nomination'.

Ultimately, in the context of a review before the Tribunal, it will be a question of fact as to whether the certification has been provided.

No adverse information – r.2.72A(9)

Subregulation r.2.72A(9) requires that the Minister be satisfied that there is no 'adverse information' known to Immigration about the person or a person 'associated with' the person, unless it is reasonable to disregard it. For further details, see discussion above in relation to the current r.2.72A(11).

Prescribed criteria - specific criteria for subclasses 401, 402 and 420: r.2.72D, I and J

In addition to satisfying the generic criteria in r.2.27A, there are subclass specific criteria that must also be met for the approval of a nomination:

- r.2.72D - Subclass 420 (Temporary Work (Entertainment)) nomination
- r.2.72I - Subclass 402 (Training and Research) nomination
- r.2.72J – Subclass 401 (Temporary Work (Long Stay Activity)) nomination

Subclass 420 (Temporary Work (Entertainment)) nomination: r.2.72D

Regulation 2.72D, as in force immediately prior to 19 November 2016,[84] sets out the specific

[82] As inserted by SLI 2015, No.242.
[83] Explanatory Statement to SLI 2015, No.242.
[84] r.2.72D was repealed and substituted by F2016L01743.

nomination criteria that an entertainment sponsor must meet. It applies to nominations in respect of a Subclass 420 (Entertainment) visa and a Subclass 420 (Temporary Work (Entertainment)) visa.

The Subclass 420 (Entertainment) visa (Class TE) was closed from 24 November 2012, and replaced by the Subclass 420 (Temporary Work (Entertainment)) visa (Class GE).[85]

Regulation 2.72D applies to an entertainment sponsor who has nominated an occupation or activity in relation to a holder of, or an applicant or a proposed applicant for a Subclass 420 (Entertainment) visa under s.140GB(1)(b) of the Act.[86]

Given that 'Subclass 420 (Entertainment) visa' is defined in r.1.03 to include a Subclass (Temporary Work (Entertainment)) visa, and 'Subclass 420 (Temporary Work (Entertainment)) visa' is also defined in r.1.03 to include a Subclass 420 (Entertainment) visa,[87] the reference in r.2.72D(1) to 'Subclass 420 (Entertainment) visa' would cover both the old and the new Subclass 420 visa from 24 November 2012.[88] Only the requirements for nomination applications made on or after 24 November 2012 are discussed further below.[89]

Person making nomination must be an Entertainment Sponsor: r.2.72D(3)

In addition to the criteria set out in r.2.72A the Minister must be satisfied that the person making the nomination is an 'entertainment sponsor'.[90] The term 'entertainment sponsor' is defined in r.1.03 to mean a person who is an 'approved sponsor',[91] and is approved as a sponsor in relation to the entertainment sponsor class by the Minister under s.140E(1) of the Act.

To approve a nomination by the entertainment sponsor, the Minister must also be satisfied that the entertainment sponsor meets the criteria in one of the streams set out in r.2.72D(4) to r.2.72D(10).[92] These provisions largely reflect the criteria for a Subclass 420 (Entertainment) visa in cl.420.222 and 420.223 of Schedule 2 and ensure that the existing purpose of the visa is preserved. The purpose of the visa is to provide for people in the entertainment industry to perform as an entertainer, support an entertainer or participate in the making of productions, concerts or recordings.[93] The criteria are outlined below.

The specific streams of nomination for entertainment visa: r.2.72D(4) – (10)

Performing in film or television production subsidised by government: r.2.72D(4)

To satisfy the criteria for this stream the identified visa holder or applicant must be performing:

- as an entertainer under a performing contract for specific engagement(s) (other than non-profit engagements) in Australia;

[85] SLI 2012, No.238 for visa /nomination /sponsor/variation applications made on or after 24 November 2012 (but not a visa application made by a new born child under r.2.08).
[86] r.2.72D(1). For nominations made before 24 November 2012, in addition to entertainment sponsor who has nominated an occupation or activity, r.2.72D(1) also applies to the nomination of a 'program'. The reference to 'program' was removed by SLI2012, No.238 to clarify the policy intention that a nomination in relation to a Subclass 420 visa should be for an occupation or activity only: see Explanatory Statement to SLI 2012, No.238 for item [84].
[87] This is intended to ensure that a reference to the renamed Subclass 420 (Temporary Work (Entertainment)) visa can also be taken to be a reference to the Subclass 420 (Entertainment) visa. See definitions of 'Subclass 420 (Entertainment) visa' and 'Subclass 420 (Temporary Work (Entertainment) visa' in r.1.03 as inserted by SLI 2012, No.238.
[88] Explanatory Statement to SLI2012, No.238 for item [13].
[89] For information relating to the requirements for nomination applications in respect of Subclass 420 visas made prior to this date, please contact MRD Legal Services.
[90] r.2.72D(3).
[91] 'Approved sponsor' is defined in s.5 of the Act as either a person approved as a sponsor under s.140E of the Act in relation to a class of sponsor prescribed by the regulations (r.2.58), or a person(other than the Minister) who is a party to a work agreement.
[92] r.2.72D(2)(b) as amended by SLI 2012, No.238.
[93] Explanatory Statement to SLI 2009, No. 203, pp.41-42.

- in a film or television production subsidised in whole or in part by a government in Australia; and

- in a leading, major supporting or cameo role, or to satisfy ethnic or other special requirements.[94]

The term 'entertainer' is not defined in this context, although Department policy states that the word should be given broad interpretation.[95]

The nomination must be supported by a certificate given by the Arts Minister, or a person authorised by the Arts Minister, confirming that the relevant Australian content criteria have been meet.[96] Under the current arrangements, this certificate is forwarded by the Ministry for the Arts (MFTA), to the sponsor, and a copy forwarded to the Department and the relevant entertainment union. The certificate should also indicate that r.2.72D(4)(b) applies to the applicant and the relevant Australian content criteria have been met.[97]

It is also a requirement that the entertainment sponsor hold necessary relevant licences in respect of the work to which the nomination relates,[98] and has consulted with relevant Australian unions in relation to the employment or engagement of the identified visa holder or applicant in Australia.[99] Relevant Australian unions and their contact details are listed in Departmental guidelines to include: Media Entertainment and Arts Alliance (MEAA), Australian Directors Guild (ADG) and Musicians' Union of Australia (MUA).[100] Departmental policy recommends that if in doubt as to which is the relevant union, advice may be sought from the sponsor.[101]

Performing in film or television production not subsidised by government: r.2.72D(5)

If the film or television production is *not* subsidised in whole or in part by a government in Australia, the nomination application should be assessed under this stream.[102] The identified visa holder or applicant must be performing:

- as an entertainer under a performing contract for specific engagement(s) (other than non-profit engagements) in Australia;

- in a film or television production that is not subsidised in any way by a government in Australia; and

- in a leading, major supporting or cameo role, or to satisfy ethnic or other special requirements.[103]

[94] r.2.72D(4)(a).
[95] Policy - Migration Regulations - Schedules > Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Performing in a film or television production subsidised by government (reg. 2.72D(4)) (reissued on 19/04/2016).
[96] r.2.72D(4)(b).
[97] Policy – Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Performing in a film or television production subsidised by government (reg. 2.72D(4)) (reissued on 19/04/2016).
[98] r.2.72D(4)(c).
[99] r.2.72D(4)(d).
[100] Policy - Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Contact details for relevant Australian unions (reissued on 19/04/2016).
[101] Policy - Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Performing in a film or television production subsidised by government (reg. 2.72D(4)) (reissued on 19/04/2016).
[102] This is because this is a criterion in r.2.72D(5)(a)(ii).
[103] r.2.72D(5)(a).

The term 'entertainer' is not defined in this context, but Department policy is that the word be given broad interpretation.[104]

Similar to the nomination in relation to performing in film or television production with government subsidy, the nomination must be supported by a certificate given by the Arts Minister, or a person authorised by the Arts Minister. The certificate must confirm that citizens or residents of Australia have been afforded a reasonable opportunity to participate in all levels of the production and foreign/private investment guaranteed against the foreign returns by a distributor, in the production is greater than the amount to be spent on entertainers sponsored for entry.[105] Department policy provides that under current arrangements, this certificate is forwarded by the Ministry for the Arts to the sponsor, and a copy forwarded to the Department and the relevant entertainment union. Policy requires the wording on the certificate should indicate that r.2.72D(5)(b) applies to the applicant.[106]

The entertainment sponsor must also hold any necessary and relevant licences, and have consulted with relevant Australian unions in relation to the employment or engagement of the nominated person in Australia.[107]

Performing in productions not related to film or television: r.2.72D(6)

If the person identified in the nomination will be performing in productions unrelated to film or television, the nomination application should be assessed under this stream. The identified visa holder or applicant must be performing as an entertainer under a performing contract that is not related to a film or television production and is for 1 or more specific engagements in Australia, other than non-profit engagements.[108]

Again, the term 'entertainer' is not defined in this context, but Departmental policy is that the word be given broad interpretation.[109] Some examples of roles to be performed include: international music acts, live theatre performers, stage comedians, classical music performers, singers, actors for viral videos, etc.[110]

The Minister must be satisfied that the nominated activity will bring a 'net employment benefit' to the Australian entertainment industry.[111] 'Net employment benefit' is defined in r.2.57(4). It provides that the entry of a person to Australia is taken to confer a net employment benefit on Australia if the person seeks to enter or remain in Australia to carry out an activity individually or in association with a group; and the Minister is satisfied that the carrying out of the activity would lead to greater employment of Australian citizens or Australian permanent residents (or both) than if a person normally resident in Australia undertook the activity. In the Department's view, generally the employment of an Australian support act by international touring productions would satisfy the net

[104] Policy - Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Performing in a film or television production not subsidised by government (reg. 2.72D(5)) (reissued on 19/04/2016).
[105] r.2.72D(5)(b).
[106] Policy - Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Performing in a film or television production not subsidised by government (reg. 2.72D(5)) (reissued on 19/04/2016).
[107] r.2.72D(5)(c) and (d).
[108] r.2.72D(6)(a).
[109] Policy - Migration Regulations - Schedules > Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Performing in productions not related to film or television (reg. 2.72D(6)) (reissued on 19/04/2016).
[110] Policy - Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Performing in productions not related to film or television (reg. 2.72D(6)) (reissued on 19/04/2016).
[111] r.2.72D(6)(b).

employment benefit requirement.[112]

The entertainment sponsor must also hold any necessary and relevant licences in respect of the work to which the nomination relates,[113] and have consulted with relevant Australian unions in relation to the employment or engagement of the identified visa holder or applicant in Australia.[114] The entertainment sponsor must have also provided an itinerary specifying the dates and venues for all performances.[115]

Production roles other than as a performer: r.2.72D(7)

This stream applies where the identified visa holder or applicant will be directing, producing or taking another part (otherwise than as a performer) in a theatre, film, television or radio production, or a concert or recording to be performed or shown in Australia.[116]

The Minister must be satisfied that the nominated activity will bring a 'net employment benefit' to the Australian entertainment industry.[117] 'Net employment benefit' is defined in r.2.57(4). It provides that the entry of a person to Australia is taken to confer a net employment benefit on Australia if the person seeks to enter or remain in Australia to carry out an activity individually or in association with a group; and the Minister is satisfied that the carrying out of the activity would lead to greater employment of Australian citizens or Australian permanent residents (or both) than if a person normally resident in Australia undertook the activity. The term 'Australian entertainment industry' is not defined and should be interpreted in accordance with its ordinary meaning. It is for the sponsor to support a claim that a net employment benefit will result. The Department's view is that employment of an Australian support act by international touring productions would generally support a net employment benefit.[118]

The entertainment sponsor must also hold any necessary and relevant licences in respect of the work to which the nomination relates,[119] and must have consulted with relevant Australian unions in relation to the employment or engagement of the identified visa holder or applicant in Australia.[120] The entertainment sponsor must have also provided an itinerary specifying the dates and venues for the production, concert or recording.[121]

Support staff: r.2.72D(8)

Regulation 2.72D(8) relates to support staff assisting entertainers engaged 'for profit'.[122] Regulation 2.72D(8) requires that the identified visa holder or applicant will be supporting an entertainer or a body of entertainers in relation to a performing contract for one or more specific engagements (other than non-profit engagements) in Australia by assisting a performance or by providing personal services.[123]

For r.2.72D(8), the Minister must be satisfied that the nominated activity will bring a 'net employment

[112] Policy - Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Performing in productions not related to film or television (reg. 2.72D(6)) (reissued on 19/04/2016).
[113] r.2.72D(6)(c).
[114] r.2.72D(6)(d).
[115] r.2.72D(6)(e).
[116] r.2.72D(7)(a).
[117] r.2.72D(7)(b).
[118] Policy - Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Production roles other than as a performer (reg. 2.72D(7)) (reissued on 9/04/2016).
[119] r.2.72D(7)(c).
[120] r.2.72D(7)(d).
[121] r.2.72D(7)(e).
[122] The heading of r.2.72D(8) was substituted with 'Support staff for profit' by SLI 2012, No.238.
[123] r.2.72D(8)(a) as substituted by SLI2012, No.238.

benefit' to the Australian entertainment industry.[124] 'Net employment benefit' is defined in r.2.57(4). It provides that the entry of a person to Australia is taken to confer a net employment benefit on Australia if the person seeks to enter or remain in Australia to carry out an activity individually or in association with a group; and the Minister is satisfied that the carrying out of the activity would lead to greater employment of Australian citizens or Australian permanent residents (or both) than if a person normally resident in Australia undertook the activity. The term 'Australian entertainment industry' is not defined and should be interpreted in accordance with its ordinary meaning. It is for the sponsor to support a claim that a net employment benefit will result.

The entertainment sponsor must also hold any necessary and relevant licences in respect of the work to which the nomination relates[125] and have consulted with relevant Australian unions in relation to the employment or engagement of the identified visa holder or applicant in Australia.[126] The entertainment sponsor must have also provided an itinerary specifying the dates and venues for all performances.[127]

Non-profit engagements: r.2.72D(9)

This criteria will be met if the Minister is satisfied that the identified person will be:

- performing as an entertainer in one or more specific engagements that are for non-profit purposes; or
- supporting an entertainer or a body of entertainers in relation to one or more specific engagements that are for non-profit purposes, by assisting a performance, or by providing personal services.[128]

Unlike the other performer streams, this criterion does not require a performing contract, but does require the entertainment sponsor to have provided an itinerary specifying the dates and venues for all performances.[129]

Where the sponsor is a non-profit organisation, claims that an engagement is non-profit may be more easily accepted at face value. Department policy provides the following examples of how organisations might show their non-profit status:

- governing documents that prevent them from distributing profits or assets for the benefit of particular persons (there is usually a standard clause to this effect in such documents)
- documents of incorporation as a non-profit association under a relevant State law
- the business is listed as a deductible gift recipient (and whether the business is listed as a deductible gift recipient can be investigated by visiting www.business.gov.au and looking up the Australian Business Register (ABR)).[130]

Documentary program or commercial for use outside Australia: r.2.72D(10)

Regulation 2.72D(10) provides for circumstances in which a nomination by an entertainment sponsor in respect of a Subclass 420 visa holder or applicant where the identified person would make a

[124] r.2.72D(8)(b).
[125] r.2.72D(8)(c).
[126] r.2.72D(8)(d).
[127] r.2.72D(8)(e).
[128] r.2.72D(9)(a) as substituted by SLI 2012, No.238. See Explanatory Statement to SLI 2012, No.238 for item [88].
[129] r.2.72D(9)(b).
[130] Policy - Migration Regulations - Schedules - Sch2 Visa 420 - Temporary Work (Entertainment) - Specific criteria for approval of a GE-420 nomination - Non-profit engagements (reg. 2.72D(9)) (reissued on 19/04/2016).

documentary program or commercial that is for an overseas market, could be approved.[131]

To meet this criterion, the Minister must be satisfied that there is no suitable person in Australia who is capable of doing, and available to do, the nominated occupation or activity; and the nominated occupation or activity would not be contrary to the interests of Australia.[132]

Subclass 402 (Training and Research) nomination: r.2.72I

Although originally only relevant to Subclass 442 related nominations, following the introduction of the Subclass 402 (Training and Research) visa on 24 November 2012,[133] r.2.72I was amended to include the criteria for approval of nomination for the Occupational Trainee stream of the Subclass 402 visa (Training and Research).[134]

In respect of nominations made *prior to 24 November 2012*, r.2.72I applies to an occupational trainee sponsor who has nominated an occupation, program or activity in relation to a holder of, or an applicant or a proposed applicant for a Subclass 442 (Occupational Trainee) visa.[135]

For nominations made *between 24 November 2012 and 18 November 2016*,[136] r.2.72I applies to an occupational trainee sponsor or a training and research sponsor who has nominated an occupation, a program or an activity in relation to: a holder of, or an applicant for a Subclass 442 visa; or a holder of, an applicant or proposed applicant for a Subclass 402 visa.[137]

Only the requirements for nomination applications in respect of Subclass 402 visas (i.e. made on or after 24 November 2012) are discussed further below.[138]

Nominator must be an occupational trainee sponsor or training and research sponsor: r.2.72I(3)

In addition to the criteria in r.2.72A, to meet the additional criteria for this nomination stream, the Minister must be satisfied that the person making the nomination is an occupational trainee sponsor or a training and research sponsor.[139] The sponsor must also meet one of three streams of criteria in r.2.72I(4), (5) and (6).[140]

The term 'occupational trainee sponsor' is defined in r.1.03 to mean a person who is an 'approved sponsor',[141] and is approved as a sponsor in relation to the occupational trainee sponsor class by the Minister under s.140E(1) of the Act, on the basis of a sponsorship application made before 24 November 2012.[142]

The term 'training and research sponsor' is defined in r.1.03 to mean a person who is an approved sponsor, and is approved as a sponsor in relation to the training and research sponsor class by the

[131] r.2.72D(10)(a). See also Explanatory Statement to SLI2012, No. 238 for item [89].
[132] r.2.72D(10)(b) and (c).
[133] SLI2012, No.238.
[134] SLI2012, No.238 which applies to a visa /nomination/sponsor/variation application made on or after 24 November 2012 (but not a visa application made by a new born child under r.2.08). The other two streams within Subclass 402 visa (the Professional Development stream and the Research stream) do not have nomination requirements.
[135] r.2.72I(1).
[136] r.2.72I was repealed by F2016L01743 from 19 November 2016.
[137] r.2.72I(1) as amended by SLI 2012, No.238.
[138] For information relating to the requirements for nomination applications in respect of Subclass 442 visas made prior to this date, please contact MRD Legal Services.
[139] r.2.72I(3) as amended by SLI 2012, No.238.
[140] r.2.72I(2).
[141] 'Approved sponsor' is defined in s.5 of the Act as either a person approved as a sponsor under s.140E of the Act in relation to a class of sponsor prescribed by the regulations (r.2.58), or a person (other than the Minister) who is a party to a work agreement.
[142] See definition of 'occupational trainee sponsor' in r.1.03 as amended by SLI 2012, No.238.

Minister under s.140E(1) of the Act.[143]

The three streams of nomination for occupational trainee: r.2.72I(4) - (6)

Occupational training required for registration: r.2.72I(4)

This stream of nomination criteria was initially intended to ensure that a person is eligible for the Subclass 442 visa if the occupational training is required for registration, membership or licensing.[144] Under r.2.72I(4), the nominated occupation must be necessary for the identified visa holder or applicant (the nominated person) to obtain registration, membership or licensing in Australia, or in his/her home country in relation to the nominated person's occupation.[145] The registration, membership or licensing must be required for the nominated person to be employed in his/her occupation in Australia or in their home country.[146] The Minister must also be satisfied that the duration of the occupational training is necessary for the nominated person to obtain registration, membership or licensing in Australia or their home country in relation to his/her occupation, taking into account his/her prior experience.[147] The occupational training must be workplace based,[148] and the nominated person must have appropriate qualifications, experience and English language skills to undertake the occupational training.[149]

Occupational training to enhance skills: r.2.72I(5)

This stream of nomination criteria was initially intended to ensure that a person is only eligible for a Subclass 442 visa if the occupational training relates to an occupation specified by the Minister (which were intended to be the same as those specified for the purposes of a Subclass 457 visa) unless the person meets the requirements set out in r.2.72I(4) or (6) (relating to occupational training required for registration or for capacity building overseas).[150]

Under this stream, the nominated occupational training must be a structured workplace training program, specifically tailored to the training needs of the identified visa holder or applicant (the nominated person) and be of a duration that meets the specific training needs of the nominated person.[151] The nominated person must also have the equivalent of at least 12 months full-time experience in the occupation to which the nominated occupational training relates in the 24 months immediately preceding the time of nomination.[152]

Departmental policy states that the training program must be primarily conducted in the workplace and not in a classroom or similar teaching environment.[153] It is recognised that even workplace-based training may include some classroom-based training but indicates that no more than 30 per cent of the total training package can be classroom-based. An occupational training program should be at least 30 hours per week. Part-time classroom based study that is unrelated to the training is permitted as long as it does not interfere with the training program. A part-time load is defined by the tertiary institution providing the course. This study would not count towards the maximum 30 per cent

[143] The definition of 'training and research sponsor' in r.1.03 was inserted by SLI 2012, No.238 which applies to a visa/nomination/sponsor/variation application made on or after 24 November 2012 (but not a visa application made by a newborn child under r.2.08).
[144] Explanatory Statement to SLI 2009, No. 203, p.49.[145] r.2.72I(4)(a).
[145] r.2.72I(4)(a).
[146] r.2.72I(4)(b).
[147] r.2.72I(4)(c).
[148] r.2.72I(4)(ca).
[149] r.2.72I(4)(d).
[150] Explanatory Statement to SLI 2009, No. 203, p.49.
[151] r.2.72I(5)(a).
[152] r.2.72I(5)(c).
[153] Policy - Migration Regulations - Divisions - Sponsorship applicable to Division 3A of Part 2 of the Act - Nominations for repealed temporary visas - Criteria for Approval of Nominations - Criteria for approval of occupational trainee nomination - Primarily in the workplace (reissued on 01/01/2016).

classroom-based component of the training program.[154] However, these are not statutory requirements, and consideration should always focus on the terms of r.2.72I.

The nominated occupational training must relate to an occupation specified with its corresponding 6-digit code in an instrument for r.2.72I(5)(ba).[155] This instrument specifies occupations based on the ANZSCO.[156]

The identified visa holder or applicant must also have appropriate English language skills to undertake the nominated occupational training.[157] The purpose of this requirement is to provide that visa holders have sufficient proficiency in English to undertake the nominated occupational training and ensure that occupational health and safety standards are met.[158]

Occupational training for capacity building overseas: r.2.72I(6)

This stream was to ensure that a person was eligible for the Subclass 442 visa if the occupational training was for capacity building where the nominated person intended to return overseas at the completion of the occupational training.[159]

To meet the criteria for this stream, the nominated occupational training must not be available in the identified visa holder's (the nominated trainee's) home country.[160] One of the following requirements must also be met:[161]

- the nominated occupational training is supported by a government agency or the government of a foreign country that is the home country of the nominated trainee; or
- the nominated trainee is required to complete a period of no more than six months of practical experience, research or observation to obtain a qualification from a foreign educational institution; or
- the nominated trainee is a student of a foreign educational institution; or has graduated from a foreign educational institution during the 12 months preceding the time of nomination; and the nominated occupational training is to undertake research in Australia that is closely related to the course in which the student is or was enrolled at the foreign educational institution.

Some examples of research referred to in r.2.72I(6)(b)(iii) that, according to Department policy , may be eligible under this stream are:

- Postgraduate or undergraduate students undertaking research that is part of their overseas qualification but not a CRICOS registered course.
- PhD or Masters qualified researchers who are not employed by an education or research institution in their home country, have been awarded a post-graduate research fellowship and

[154] Policy - Migration Regulations - Divisions - Sponsorship applicable to Division 3A of Part 2 of the Act - Nominations for repealed temporary visas - Criteria for Approval of Nominations - Criteria for approval of occupational trainee nomination - Primarily in the workplace (reissued on 01/01/2016).
[155] r.2.72I(5)(ba) as inserted by SLI 2010, No.133.
[156] From 1 July 2013, 'ANZSCO' has the meaning specified by the Minister in an instrument in writing for this definition: r.1.03 as amended by Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146), which applies to nominations under s.140GB(1) and r.5.19, and visa applications made from 1 July 2013. See the 'Occ186/442/457&Noms' tab of Register of Instruments - Business Visas for the relevant instrument.
[157] r.2.72I(5)(d) as inserted by Migration Amendment Regulations 2010 (No.1) (SLI2010, No.38).
[158] See Explanatory Statement to SLI 2010, No.38, p.37.
[159] Explanatory Statement to SLI 2009, No.203 p.50.
[160] r.2.72I(6)(a).
[161] r.2.72I(6)(b).

are coming to Australia to conduct research in a field closely related to their studies.

- PhD or Masters qualified researchers who are not employed by an education or research institution in their home country but have been awarded a post-graduate research fellowship and are going to conduct research at an institution in Australia that has an ongoing research program in the applicant's specific field of expertise. This group will usually be supervised by a person in a senior academic position.

- PhD or Masters qualified researchers who are employed overseas by an education or research institution and are coming to Australia to conduct research in a field closely related to their studies. If people in this group have been invited to visit an Australian tertiary institution or research institution for the purpose of observing, or participating in, research at the institution, subclass 402 may be more appropriate.[162]

The nominated occupational training must also be a structured workplace-based training program specifically tailored to the nominated trainee,[163] and will give the nominated trainee additional or enhanced skills in the occupation to which the nominated occupational training relates.[164]

Reflecting the legislative intention that this stream is to facilitate training where the nominated person intends to return home, it is a criterion that the nominated person must intend to return to his or her home country after successfully completing the nominated occupational training.[165]

The nominated person must also meet the requirement in r.2.72I(6)(f) to have appropriate English language skills to undertake the nominated occupational training.[166] This is to ensure that visa holders have sufficient proficiency in English to undertake the nomination occupational training and ensure that occupational health and safety standards are met.[167]

Subclass 401 (Temporary Work (Long Stay Activity)) nomination: r.2.72J

Regulation 2.72J applies to nominations made *between 24 November 2012*[168] *and 18 November 2016*,[169] for a person who is:

- a long stay activity sponsor,[170]
- an exchange sponsor,[171]
- a sport sponsor,[172] or

[162] Policy - Migration Regulations - Divisions - Sponsorship applicable to Division 3A of Part 2 of the Act - Nominations for repealed temporary visas - Criteria for approval of nominations - Stream 3 - Occupational training for capacity building overseas - Research related to overseas studies (reissued on 01/01/2016).
[163] r.2.72I(6)(c).
[164] r.2.72I(6)(d).
[165] r.2.72I(6)(e).
[166] r.2.72I(6)(f) as inserted by SLI 2010, No.38.
[167] See Explanatory Statement to SLI 2010, No. 38, p.37.
[168] r.2.72J as inserted by SLI 2012, No.238. See also Explanatory Statement to SLI 2012, No.238 for item [119].
[169] r.2.72J was repealed by F2016L01743 from 19 November 2016.
[170] Defined in r.1.03 as a person who is an 'approved sponsor' (as defined in s.5(1)), and is approved as a sponsor in relation to the long stay activity sponsor class by the Minister under s.140E(1) of the Act on the basis of an application made before 19 November 2016.
[171] Defined in r.1.03 to mean a person who is an 'approved sponsor' (as defined in s.5(1)), and is approved as a sponsor in relation to the exchange sponsor class by the Minister under s.140E(1) of the Act, on the basis of a sponsorship application made before 24 November 2012. Note that this definition was repealed from 19 November 2016 by F2016L01743.
[172] Defined in r.1.03 to mean a person who is an 'approved sponsor' (as defined in s.5(1)) and is approved as a sponsor in relation to the sport sponsor class by the Minister under s.140E(1) of the Act, on the basis of an application made before 24 November 2012. Note that this definition was repealed by 19 November 2016 by F2016L01743.

- a religious worker sponsor;[173]

and who has nominated an occupation or an activity in relation to a holder of, or an applicant or a proposed applicant for a Subclass 401 (Temporary Work (Long Stay Activity) visa.[174]

According to the Explanatory Statement to the Regulation that introduced this stream, it was intended that sponsors approved in relation to an application made before 24 November 2012 could nominate a holder of, or an applicant or proposed applicant for a Subclass 401 visa for the term of the approval of the sponsorship.[175]

For applications made prior to 23 March 2013, the Minister must be satisfied that the person making the nomination meets the criteria contained in one of the three streams in r.2.72J(3) to (5), in addition to the criteria in r.2.72A.[176] For applications made on or after 23 March 2013, there is an additional stream in r.2.72J(6) that can be satisfied.[177]

The streams of nomination for a Subclass 401 related nomination: r.2.72J(3) - (6)

Staff exchange: r.2.72J(3)

This stream sets out the criteria relating to a staff exchange. A nomination must meet the requirements in r.2.72J(3) for the grant of a new Subclass 401 visa in the Exchange stream.[178]

Regulation r.2.72J(3) requires that if the person making the nomination is a long stay activity sponsor who is a party to an exchange agreement, or exchange sponsor, there must be a written agreement in place between the person and a reciprocating foreign organisation.[179] The written agreement must provide for the identified visa holder or applicant in the nomination (the nominee) to work for the relevant sponsor in the nominated occupation or activity in Australia for a specified period,[180] and provides a named person, who is an Australian citizen or an Australian permanent resident, with the opportunity to obtain experience with the reciprocating foreign organisation for a specific period.[181]

It is also a requirement that the exchange, as mentioned above, will be of benefit to both the nominee and the Australian citizen or Australian permanent resident.[182] The Minister must also be satisfied that the nominated position is a skilled position.[183]

Sporting activity: r.2.72J(4)

This stream sets out the nomination criteria relating to sporting activity, specifically, competitors in sporting events, contracted sports players, coaches, instructors, judges and adjudicators. A nomination that met one of the sets of requirements in r.2.72J(4) is a criterion for the grant of a

[173] Defined in r.1.03 to mean a person who is an 'approved sponsor' (as defined in s.5(1), and is approved as a sponsor in relation to the religious worker sponsor class by the Minister under s.140E(1) of the Act, on the basis of a sponsorship application made before 24 November 2012. Note that the definition was repealed from 19 November 2016 by F2016L01743.
[174] r.2.72J(1).
[175] Explanatory Statement to SLI 2012, No.238 for item [119].
[176] r.2.72J(2) as in force prior to 23 March 2013.
[177] r.2.72J(2) as amended by Migration Amendment Regulation (No.1) (SLI 2013, No.32). Subregulation 2.72J(6) was inserted by SLI 2013, No.32. Item [1] of Schedule 8 to SLI 2013, No.32 provides that the amendments apply in relation to an application for a *visa* made on or after 23 March 2013 necessitating the identification of the related visa application to determine the applicable version of r.2.72J. This would not have any practical impact for applications for nominations seeking to satisfy r.2.72J(6) as applicants for visas in the Domestic Worker (Executive) stream could only apply for a Subclass 401 visa in this stream on or after 23 March 2013. However, for the other streams in r.2.72J, the relevant visa application date will determine whether any additional assessment of the nomination application against r.2.72J(6) is required.
[178] Explanatory Statement to SLI 2012, No.238 for item [119].
[179] r.2.72J(3)(a).
[180] r.2.72J(3)(b).
[181] r.2.72J(3)(c).
[182] r.2.72J(3)(d).
[183] r.2.72J(3)(e).

Subclass 401 visa in the Sport stream.[184]

Regulation 2.72J(4) provides that if a person is a long stay activity sponsor who is a sporting organisation, or a sport sponsor, the Minister must be satisfied that:

- the identified visa holder or applicant (the nominee) entered either individually or as a team member, to compete in sporting event(s) in Australia,[185] or has been or will be appointed or employed under a contractual agreement: to assist a participant or team,[186] or an Australian citizen or permanent resident sportsperson who is known internationally in the field of sport, with a record of participation in international events in specified sporting event(s);[187] or

- the sponsor and the nominee have entered into a formal arrangement that provides for the nominee to be a player, a coach or an instructor in relation to an Australian sporting team or sporting organisation,[188] the formal arrangement specifies the period that the identified person will be a player, a coach or an instructor in relation to the Australian team or organisation,[189] and the arrangement will be of benefit to the sport in Australia.[190] The nominee must also have an established reputation in the field of sport;[191] and the sponsor must have provided a letter of endorsement from the national sporting body responsible for administering the sport in Australia certifying that: the nominee has the ability to play, coach or instruct at the Australian national level, and the participation of the nominee in the sport in Australia would benefit the sport in Australia by raising the standard of competition;[192] or

- the nominee will act as a judge or adjudicator at one or more sporting events or sporting competitions in Australia, and has the appropriate experience and skills to perform that role.[193]

The term 'sporting organisation' is defined in r.2.57(1) to mean an Australian organisation, a government agency, or a foreign government agency that administers or promotes sport or sporting events.

'Australian organisation' is defined in r.2.57(1) as a body corporate, a partnership or an unincorporated association (other than an individual or a sole trader) that is lawfully established in Australia. The term 'foreign government agency' is defined in r.2.57(1) to include an organisation that is conducted under the official auspices of a foreign national government that is operating in Australia, including foreign tourists and media bureaus, trade offices and other foreign government entities; a foreign diplomatic or consular mission in Australia; and an organisation that is conducted under the official auspices of an international organisation recognised by Australia that is operating in Australia.[194] The term 'government agency' is defined in r.2.57(1) to mean an agency of the Commonwealth or of a State or Territory. There is no definition of sport or sporting event in the legislation. In the absence of a definition, the ordinary meaning of the words would apply.

[184] Explanatory Statement to SLI 2012, No.238 for item [119].
[185] But not entered as a Taiwanese national claiming to represent Taiwan, China or the Republic of China: r.2.72J(4)(a)(i)(A).
[186] r.2.72J(4)(a)(i)(B). The person or team must be of a kind mentioned in r.2.72J(4)(a)(i)(A).
[187] r.2.72J(4)(a)(i)(C).
[188] r.2.72J(4)(b)(i).
[189] r.2.72J(4)(b)(ii).
[190] r.2.72J(4)(iii).
[191] r.2.72J(4)(iv).
[192] r.2.72J(4)(v).
[193] r.2.72J(4)(c).
[194] See definition of 'foreign government agency' as amended by SLI 2012, No.238.

Religious Work: r.2.72J(5)

This stream sets out the criteria relating to religious work. A nomination that met the requirements in r.2.72J(5) is a criterion for the grant of a Subclass 401 visa in the Religious Worker stream.[195]

Regulation 2.72J(5) requires that if the person is a long stay activity sponsor who is a religious institution, or a religious worker sponsor, the Minister, or the Tribunal, must be satisfied that the person identified in the nomination will be engaged on a full-time basis to work or participate in an activity in Australia that is predominately non-profit in nature, and directly serves the religious objectives of the sponsor; and has appropriate qualifications and experience to work or participate in the nominated position.

Domestic Work (Executive): r.2.72J(6)

This stream sets out the criteria relating to domestic workers and applies to applications made on or after 23 March 2013.[196] The purpose of this stream is to enable domestic workers of relevant executives to be granted a Subclass 401 visa, subject to satisfaction of other criteria, following the repeal of the Subclass 427 visa on 24 November 2012.[197]

Regulation 2.72J(6)(a) requires that if the nominator is an approved long stay activity sponsor who is a foreign government agency and the employer of the holder of a Subclass 403 visa in the Privileges and Immunities stream, or a foreign organisation lawfully operating in Australia and the employer of a Subclass 457 visa holder, the Subclass 403 or 457 visa holder must be the national managing director, deputy national managing director or state manager of an Australian office of the foreign government agency or foreign organisation.

Moreover, to meet the criteria for this stream, a nomination must satisfy r.2.72J(6)(c) - (f), which require that:

- the nominated person will be employed to undertake full-time domestic duties in the private household of the Subclass 403 or Subclass 457 visa holder who is employed by the long stay activity sponsor mentioned in r.2.72J(6)(a);[198]
- the number of domestic workers granted a visa for employment in the household of the Subclass 403 or Subclass 457 visa holder will not, at any time, exceed 3 (including the nominated person) at any time;[199]
- the nominated person has turned 18 and has domestic worker experience; and[200]
- the sponsor has provided evidence that the sponsor has been unable to find a suitable person in Australia for the nominated occupation, or the sponsor has provided evidence that there are compelling reasons for employing the nominated person.[201]

[195] Explanatory Statement to SLI 2012, No.238 for item [119].
[196] r.2.72J(6) inserted by SLI 2013, No.32. For further discussion on the transitional arrangements for the application of these amendments, see footnote above.
[197] See the Explanatory Statement to SLI 2013, No.32, p.60. The Subclass 427 (Domestic Worker (Temporary) – Executive) visa was repealed by SLI 2012, No.238.
[198] r.2.72J(6)(c).
[199] r.2.72J(6)(d).
[200] r.2.72J(6)(e).
[201] r.2.72J(6)(f).

Notification of nomination decision: r.2.74

The notification requirements for approval of a nomination for temporary work visas are the same as those applicable to Subclass 457 nominations. The Minister must notify an applicant for approval of a nomination, in writing, of a decision to approve or refuse a nomination within a reasonable period after making the decision; attaching a written copy of the approval or refusal and a statement of reasons for the refusal (if the decision is a refusal).[202]

What constitutes a 'reasonable period' in notifying a nomination decision is not defined in the Regulations. However, a notification may be considered to have been provided within a reasonable period if it is provided without undue delay after a decision has been made.[203]

If the application for nomination was made using approved form 1196 (Internet) or 1479N (Internet), the notification may be provided to the approved sponsor in an electronic form.[204]

Period of approval of nomination: r.2.75A

The period of approval of nomination is relevant for the purposes of determining whether a visa applicant for a temporary work visa meets Schedule 2 criteria, i.e. whether 'the approval of the nomination has not ceased under r.2.75A'.[205]

Regulation 2.75A sets out the period of approval of nomination for temporary work visas. It provides that an approval of a nomination ceases on the *earliest* of:

- the day on which Immigration receives written notification of the withdrawal of the nomination by the approved sponsor,
- 12 months after the nomination is approved,
- 3 months after the day on which the person's approval as a sponsor ceases,
- if the person's approval as a sponsor is cancelled under s.140M(1) of the Act - the day on which the person's approval as a sponsor is cancelled,[206] and
- the day on which the applicant, or the proposed applicant, who is identified in relation to the nominated occupation, program or activity, is granted a visa on the basis of that nomination.

[202] r.2.74(1).
[203] Explanatory Statement to SLI 2009, No. 115, p.29.
[204] r.2.74(2) as amended by F2016L01743.
[205] See cl.407.214(c) of Schedule 2 to the Regulations. See also cl.401.212(3), cl.402.221(1)(a)(iii), and cl.420.212(4) for applications made prior to 19 November 2016.
[206] r.2.75A(2)(d) as amended by SLI2012, No.238 in relation to nomination application made on or after 24 November 2012. The provision previously referred expressly to approvals given an approved sponsor who was not a party to a work agreement. The amendment is consequential to the removal of r.2.72A(2)(e) which related to parties to a work agreement.

Relevant case law

Suh v MIAC [2009] FCAFC 42; 175 FCR 515	Summary

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2009 (No. 5) (as amended)	SLI 2009 No.115
Migration Amendment Regulations 2010 (No.1)	SLI 2010, No.38
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133
Migration Amendment Regulations 2011 (No.1)	SLI 2011, No.13
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Amendment (Specification of Occupations) Regulations 2017	F2017L00818
Migration Amendment (Skilling Australians Fund) Act 2018	No 38, 2018
Migration Amendment (Skilling Australians Fund) Regulations 2018	F2018L01093
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Available decision templates

There are currently no templates available in relation to review of a temporary work nomination refusal. Members should use the Generic decision template.

Last updated/reviewed: 5 October 2018

Approval as a Temporary Work Sponsor

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Overview

The temporary sponsored work visa framework involves a two or three stage process. Firstly, a person or entity seeks approval as a relevant kind of sponsor, then in some instances the 'approved sponsor'[1] is then required to nominate an activity, occupation or program in respect of a non-citizen, and finally a non-citizen applies for a temporary work visa.

Under the *Migration Act 1958* (the Act) and Migration Regulations 1994 (the Regulations) a person may be approved as a sponsor in relation to one or more prescribed classes if prescribed criteria are met. Regulation 2.58 prescribes the classes of sponsor for these purposes. The currently prescribed classes of sponsor are standard business sponsor and temporary activities sponsor.[2] A temporary activities sponsor may sponsor visa applicants across three subclasses – the Subclass 407 (Training) visa, the Subclass 408 (Temporary Activity) visa, and the Subclass 403 Temporary Work (International Relations) visa under the Seasonal Worker Program stream. Temporary activities sponsors and the Subclass 407 and Subclass 408 visas were introduced as part of a significant reform of the temporary sponsored work visa scheme, which took effect from 19 November 2016.[3]

Prior to 19 November 2016, the prescribed classes of sponsor were standard business sponsor, professional development sponsor, and a further five classes of sponsor, namely:[4]

- a special program sponsor
- an entertainment sponsor

[1] 'Approved sponsor' is defined in s.5 of the Act as either a person approved as a sponsor under s.140E of the Act in relation to a class of sponsor prescribed by the regulations (r.2.58), or a person other than the Minister who is a party to a work agreement.
[2] As amended by Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743).
[3] F2016L01743.
[4] Six further classes of sponsor (exchange sponsor, foreign government agency sponsor, sport sponsor, domestic worker sponsor, religious worker sponsor and occupational trainee sponsor) were removed as prescribed classes of sponsor for applications made on or after 22 March 2014, as they had effectively been replaced by the Long stay activity sponsor class, and the Training and research sponsor class: Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30).

- a superyacht crew sponsor
- a long stay activity sponsor
- a training and research sponsor.

These five classes of sponsor form a group of sponsors referred to in the Regulations as 'temporary work sponsors'. 'Temporary work sponsor' is defined in r.1.03 as meaning any of those five classes. Applications for approval as a temporary work sponsor or a professional development sponsor must have been made before 19 November 2016.[5]

Prior to 19 November 2016, the definition of 'temporary work sponsor' included an additional seven types of sponsor: exchange sponsor, foreign government agency sponsor, visiting academic sponsor, sport sponsor, domestic worker sponsor, religious worker sponsor and occupational training sponsor. However, these additional sponsor types were, from 24 November 2012, no longer prescribed classes of sponsor, as the visas to which they related (Subclass 411, 415, 419, 421, 427, 428 and 442) had been repealed.[6] As a result, an application for approval as a sponsor as one of those types of sponsor must have been made before 24 November 2012.[7] From that date, they were replaced by the long stay activity sponsor and training and research sponsor.[8]

For applications made prior to 19 November 2016, the criteria for approval as a temporary work sponsor were set out in r.2.60A, with further criteria specific to approval for special program, entertainment, superyacht crew, long stay activity and training and research sponsors specified in rr.2.60D, F, K, L and M.[9]. The criteria for approval as a professional development sponsor were contained in r.2.60 alone.[10] For applications made on or after 19 November 2016, the criteria for approval of a temporary activities sponsor are set out in r.2.60.

This commentary addresses as the approval process for temporary activities sponsor (for applications made post-19 November 2016), and the requirements for approval as a temporary work sponsor (for applications made pre-19 November 2019) made on or after 14 September 2009.[11] For information regarding the nomination and visa stages, see MRD Legal Services Commentaries: Temporary Work Nominations, and Overview – Temporary Work Visas. For information about sponsorship approval prior to 14 September 2009, please contact MRD Legal Services.

[5] F2016L01743.
[6] Prior to 24 November 2012, there were 10 classes of sponsors in the r.1.03 definition of 'temporary work sponsor'. Two classes of sponsors: 'long stay activity sponsor' and 'training and research sponsor' were added to the definition of 'temporary work sponsor' in r.1.03 by Migration Legislation Amendment Regulation 2012 (No.4) (SLI 2012, No.238) Schedule 1, item [9] and Schedule 4, item [1], for applications made on or after 24 November 2012 for a visa, approval as a sponsor, approval of nomination or variation of the terms of an approval as a sponsor. Seven of these were removed as redundant by SLI 2014, No.30.
[7] r.2.60B, r.2.60C, r.2.60E, r.2.60G, r.2.60H, r.2.60I and r.2.60J as amended by SLI 2012, No.238 as at 24 November 2012. These regulations were subsequently removed from the Regulations by SLI 2014, No.30.
[8] r.2.60L and r.2.60M as inserted by SLI 2012, No.238 for applications made on or after 24 November 2012 for a visa, approval as a sponsor, approval of nomination or variation of the terms of an approval as a sponsor other than an application for a visa that is taken to have been made by a new born child under r.2.08.
[9] As in force immediately before 19 November 2016.
[10] As in force immediately before 19 November 2016.
[11] r.3(2)(c) Migration Amendment Regulations 2009 (No.5) (SLI 2009, No.115) as amended by SLI 2009, No. 203. This scheme does not apply in relation to an application for approval as a sponsor under r.1.20AA made on or after 14 September 2009 if the sponsorship is in relation to a visa application made before 14 September 2009: SLI 2009, No.115 as amended by SLI 2009, No. 203.

Tribunal's Jurisdiction and powers

A decision under s.140E to refuse to approve an application for approval as a sponsor in relation to one or more classes of sponsor is a decision reviewable under Part 5 of the Act.[12] A decision to refuse an application for approval as a temporary activities sponsor is a decision under s.140E of the Act. Also, where the application for approval as a temporary work sponsor and the visa application to which the sponsorship relates were both made on or after 14 September 2009, the primary decision on the temporary work sponsorship application will be made under s.140E of the Act.

In reviewing such a decision the Tribunal has the power to affirm the decision under review or to set the decision aside and substitute a new decision, that the sponsorship be approved.[13] A decision to approve a sponsorship must also specify the duration of that approval.[14]

For applications for approval as a temporary work sponsor made prior to 14 September 2009, or where the visa application to which the sponsorship relates was made prior to 14 September 2009, please contact MRD Legal Services for assistance.

Application process

The relevant application process for sponsorship approval differs depending on whether the application is for a temporary activities sponsorship or temporary work sponsorship, and in the case of temporary work sponsors, it further depends on the date of the application.

An application for approval as a 'temporary activities sponsor' or an application for approval as a 'temporary work sponsor' made on or after 14 September 2009, is an application under s.140E of the Act. Section 140F of the Act provides that regulations may establish a process for the Minister to approve a person as a sponsor and different processes may be prescribed for different kinds of visa and for different classes in relation to which a person may be approved as a sponsor. This process is prescribed in r.2.61.[15]

Temporary activities sponsors

For temporary activities sponsor applications, the application must be made using the internet, using the form specified by the Minister, and accompanied by the fee specified by the Minister.[16] The Minister may also specify a different way of making the application in specified circumstances, including the form and fee applicable.[17]

For the relevant instruments specifying the applicable form and fees, see the 'Form&Fees' tab of the MRD Legal Services Register of Instruments: Business Visas.

[12] s.338(9) and r.4.02(4)(a) as amended by SLI 2009, No.115 (as amended).
[13] s.349(2)(a) and (d).
[14] s.140G and r.2.63.
[15] Item 6002(2) of Schedule 13 to the Regulations, as inserted by F2016L01743.
[16] r.2.61(3A) as amended by F2016L01743, and again for applications made on or after 18 March 2018 by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[17] r.2.61(3B) as amended by F2016L01743.

Temporary work sponsors

For temporary work sponsorship applications lodged between 14 September 2009 and 18 November 2016, the person seeking approval as a sponsor must make the application in accordance with the approved form and pay the applicable application fee.[18]

For applications made between 2 April 2011 and 18 November 2016, the application must be posted, delivered (by courier or hand), or faxed to an address as specified by the Minister in an instrument in writing or, if no instrument has been made, to an office of Immigration in Australia.[19] For applications made prior to 2 April 2011, the application must be posted to an address specified by the Minister in an instrument or (if no instrument) to an office of Immigration in Australia, or delivered (by courier or hand) or faxed to an address specified by the Minister in an instrument.[20] For the relevant instrument, see the 'App Address' tab of the MRD Legal Services Register of Instruments: Business Visas. As this relates to the making of the application, the relevant instrument is the one in effect at the time of making the application.

Refunds for legacy cases

Where a sponsorship application for a foreign government agency sponsor or domestic worker sponsor was made before 24 November 2012 but not decided before that day, and is not associated with a Subclass 415 (Foreign Government Agency) visa or Subclass 427 (Domestic Worker (Temporary) – Executive) visa, the Minister may refund the application fee.[21]

For applications for approval as a long stay activity sponsor, training and research sponsor, special program sponsor, entertainment sponsor, superyacht crew sponsor or a professional development sponsor made before 19 November 2016, if the Minister has not approved or refused to approve the sponsorship and after 18 May 2017 the application is withdrawn, the Minister may refund the fee paid in accordance with r.2.61.

Criteria for approval as a Temporary Activities Sponsor (post 19 November 2016)

For applications made on or after 19 November 2016, the criteria specified in r.2.60 and the additional criteria in r.2.60S are applicable to applications for approval as a temporary activities sponsor. Regulation 2.60S is discussed below.

Applicant has applied for approval as a temporary work sponsor – r.2.60(a)

Under r.2.60(a), a mandatory criterion for approval as a temporary activity sponsor is that the applicant has applied for approval as a temporary activity sponsor in accordance with the process set out in r.2.61. For details, see above.

Applicant must not already be a sponsor of the same class – r.2.60(b)

An approved sponsor can sponsor any number of visa holders for a particular class. However, r.2.60(b) requires that the applicant is not already a temporary activities sponsor. This is to prevent a

[18] r.2.61(2) as in force immediately before 19 November 2016
[19] r.2.61(4) for temporary work sponsors other than superyacht crew sponsors, r.2.61(6) for superyacht crew sponsors, as in force immediately before 19 November 2016.
[20] r.2.61(4) for temporary work sponsors other than superyacht crew sponsors, r.2.61(6) for superyacht crew sponsors as in force prior to 2 April 2011.
[21] r.2.61(7) & (8) as inserted by SLI 2012, No.238 and repealed from 22 March 2014 by SLI 2014, No.30.

person having two concurrent approvals as the same class of sponsor.[22] If a person has already been approved as a temporary activities sponsor, the sponsorship approval must have ceased before they can meet this criterion.[23] As this is a criterion for approval of the sponsorship, and so must be met at time of decision, the passage of time may mean that an application that did not meet this criterion at primary level, may be able to meet this criterion on review.

It is possible for a sponsor to extend the duration of their current approval as a class of sponsor by applying to vary the duration of the approval. For further information see the MRD Legal Services commentary: Variation of Terms of Sponsorship.

Required type of entity – r.2.60(c)

Under r.2.60(c), the applicant must fall within one of the following categories (being relevant to the applicable Schedule 2 criteria for the Subclass 403, 407 or 408 visa sought):

- an Australian organisation that is lawfully operating in Australia;
- a government agency;
- a foreign government agency;
- a sporting organisation that is lawfully operating in Australia;
- a religious institution that is lawfully operating in Australia;
- a person who is the captain or owner of a superyacht, or
- an organisation that operates a superyacht; or a foreign organisation that is lawfully operating in Australia.

As can be seen from the categories above, apart from the specialised category of owners/captains of superyachts, individuals are not eligible to be temporary activities sponsors.

See below for further discussion of the terms 'Australian organisation', 'government agency', 'foreign government agency', 'foreign organisation', 'sporting organisation', 'religious institution' and 'lawfully operating'.

No adverse information or reasonable to disregard any adverse information – r.2.60(d)

Under r.2.60(d) the Minister (or, Tribunal on review) must be satisfied that there is no adverse information known to 'Immigration' about the applicant or a person associated with the applicant; or it is reasonable to disregard any adverse information known to Immigration about the applicant or a person associated with the applicant.

'Immigration' is defined in r.1.03 as the Department administered by the Minister administering the *Migration Act 1958*. Accordingly, where the information in question comes to the Tribunal's attention but is not known to Immigration, it is unclear whether it would fall within the operation of this provision. However, in practice, this issue could be overcome by notifying Immigration of the information.

[22] See Explanatory Statement to SLI 2009, No. 203 at p.22 in relation to the equivalent requirement in r.2.60A(b) as it existed prior to 19 November 2016.
[23] The duration of approval as a temporary activities sponsor is specified in the approval and may be a period of time; a particular date, or the occurrence of a particular event: r.2.63(2).

The terms 'adverse information' and 'associated with' are also further defined in the Regulations, as discussed immediately below, though the applicable definitions differ depending on the date of application for approval.

Definitions - Applications made before 18 March 2018

For applications made before 18 March 2018 'adverse information' is defined in r.1.13A (previously r.2.57(3)) as any adverse information relevant to a person's suitability as a sponsor or nominator.[24] A non-exhaustive list of kinds of adverse information is also provided, including information that the person (or an associated person) has become insolvent or has breached certain laws (or is the subject of certain kinds of investigative or administrative action relating to suspected breaches of those laws).[25] The laws relate to discrimination, immigration, industrial relations, occupational health and safety, people smuggling and related offences, slavery, sexual servitude and deceptive recruiting, taxation, terrorism, trafficking in persons and debt bondage.[26] Some of the listed kinds of information require consideration or action by a competent authority (a Department or authority administering or enforcing the law).[27]

The conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[28]

The definition of 'associated with' is found in r.1.13B (formerly r.2.57(3)).[29] A person is 'associated with' another person (i.e. the sponsoring or nominating entity) in the circumstances referred to in r.1.13B, i.e. if they are an officer, partner or member of a committee of management of the entity (or a related or associated entity, depending on the kind of entity).[30]

Departmental guidelines (PAM3) in this context note that adverse information could include records that the organisation has employed illegal workers in the past or has a history of non-compliance with sponsorship requirements. Examples of the latter are stated to include where an organisation has been refused a sponsorship application because of unsatisfactory immigration history or character, has sponsored persons who have breached visa conditions or have remained in Australia beyond their visa period, has a history of non-compliance with monitoring or other undertakings, or has previously had a sponsorship cancelled.[31]

Definitions - Applications made on or after 18 March 2018

For applications made on or after 18 March 2018, 'adverse information' is similarly defined in r.1.13A as *any* adverse information relevant to a person's suitability as an approved sponsor or nominator

[24] r.1.13A as inserted by SLI 2015 No.242. The definition was previously found in 2.57(3), which was repealed by the same amending regulations.
[25] r.1.13A(1). The reference to becoming insolvent means insolvent within the meaning of ss.5(2) and (3) of the *Bankruptcy Act 1966* and section 95A of the *Corporations Act 2001.*
[26] r.1.13A(2).
[27] 'Competent authority' has the meaning given by r.2.57(1): r.1.13A(4).
[28] r.1.13A(3).
[29] r.1.13B as inserted by SLI 2015 No.242. The definition was previously found in r.2.57(3), which was repealed by the same amending regulations.
[30] r.1.13B(5) includes a number of definitions. The term 'officer' is defined as, for a corporation or an entity that is neither an individual or corporation, having the same meaning in s.9 of the *Corporations Act 2001*. In relation to an 'entity', this is defined as including an entity within the meaning of s.9 of the *Corporations Act 2001*; and a body of the Commonwealth, a State or a Territory. Further, the term 'related body corporate' is defined as having the same meaning as in s.50 of the *Corporations Act 2001*. The term 'associated entity' is further defined in r.1.03 as having the same meaning in s.50AAA of *Corporations Act 2001*.
[31] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Part 4 – criteria for the approval as a sponsor – Regulation 2.60 - Criterion for approval as a temporary activities sponsor - Determining whether adverse information exists (compilation 19/11/2016).

(within the meaning of r.5.19). However, the non-exhaustive list of examples of what this will include has been amended.[32]

This list now provides that adverse information includes information that the person has contravened a law of the Commonwealth, a State or Territory; or is under investigation, subject to disciplinary action or subject to legal proceedings in relation to a contravention of such a law; or has been the subject of administrative action (including being issued with a warning) for possible contravention of such a law by a Department or regulatory authority that administers or enforces the law; or has become insolvent (within the meaning of s.95A of the *Corporations Act 2001*); or has given, or caused to be given, to the Minister, and officer, the Tribunal or an assessing authority a bogus document, or information that is false or misleading in a material particular.

'Information that is false or misleading in a material particular' is further defined in r.1.13A(4) as information that is false or misleading at the time it is given, and relevant to any of the matters the Minister may consider when making a decision under the Act or these Regulations, whether or not a decision is made because of that information. 'Bogus document' is defined in s.5(1) of the Act as, in relation to a person, a document that the Minister reasonably suspects is a document that: (a) purports to have been, but was not, issued in respect of the person; or (b) is counterfeit or has been altered by a person who does not have authority to do so; or (c) was obtained because of a false or misleading statement, whether or not made knowingly.[33]

'Associated with' is has a meaning which is affected by r.1.13B.[34] The terms of r.1.13B itself makes clear that it is not intended to be an exhaustive definition or limit the circumstances in which persons are associated with each other.[35] Further, the types of circumstance given as examples of when two persons will be associated with each other are very broad, particularly when considered in contrast to the pre-18 March 2018 version of r.1.13B. These include if two persons:

- are or were spouses or de facto partners, or
- are or were members of the same immediate, blended or extended family, or
- have or had a family like relationship, or
- belong or belonged to the same social group, unincorporated associated or other body of persons, or
- have or had common friends or acquaintances, or
- one is or was a consultant, adviser, partner, representative on retained, officer, employer, employee or member of the other, or any corporation or other body in which the other is or was involved, or
- a third person is or was a consultant, adviser, partner, representative on retainer, officer, employer, employee or member of both of them, or

[32] F2018L00262.
[33] These concepts have been the subject of judicial consideration in the context of Public Interest Criterion 4020. Although not directly applicable, such judgments may be of some assistance in this context. For further details see MRD Legal Commentary Bogus Documents, False or Misleading Information, PIC4020.
[34] r.1.03 as amended by F2018L00262.
[35] r.1.13B(3).

- they are or were related bodies corporate (within the meaning of the *Corporations Act 2001*), or

- one is or was able to exercise control over the other, or a third person is or was able to exercise influence or control over both of them.

The amendment of these definitions was aimed at ensuring they are flexible enough to capture abuses conducted through varied business and corporate arrangements.[36]

Reasonable to disregard – all applications

Even if such information is known to Immigration, the decision maker may disregard it if it is reasonable to do so. The objective of r.2.60(d) is to allow the Minister to consider information about the applicant's suitability as a sponsor in deciding whether to approve an application. Departmental guidelines state the factors which may be relevant in deciding whether it is reasonable to disregard adverse information include, but are not limited to:

- the nature of the adverse information;

- how it arose;

- how long ago the adverse information arose; and

- whether the applicant has taken any steps to ensure the circumstances giving rise to the adverse information did not recur.[37]

It might be reasonable to disregard information if, for example, the relevant information about the contravention arose some time ago and the person had developed practices and procedures to ensure the relevant conduct was not repeated; if the person complied with all other sponsorship obligations and the incident giving rise to the adverse information, e.g. an infringement notice, was a one-off incident unlikely to recur; or if the sponsor has dissociated themselves from an overseas employer or agent that was involved with preparing fraudulent applications or has introduced additional quality control measures.[38]

The decision-maker should ensure that it has taken account of the individual circumstances of the case in deciding whether the criterion in r.2.60(d) is met.

Applicant has capacity to comply with sponsorship obligations – r.2.60(e)

Under r.2.60(e) the decision-maker must be satisfied that the applicant has the capacity to comply with the sponsorship obligations that are applicable to a person who is or was a temporary activities sponsor. This is to ensure that a person is not approved as a sponsor if, for example, they do not have the financial resources to satisfy their sponsorship obligations.[39]

[36] Explanatory Statement to F2018L00262, item [15].
[37] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Part 4 – criteria for the approval as a sponsor – Regulation 2.60 – Criterion for approval as a temporary activities sponsor - Circumstances in which it may be reasonable to disregard the adverse information (compilation 19/11/2016).
[38] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Part 4 – criteria for the approval as a sponsor - Regulation 2.60 - Criterion for approval as a temporary activities sponsor - Circumstances in which it may be reasonable to disregard the adverse information (compilation 19/11/2016).
[39] See Explanatory Statement to SLI 2009, No.203 at p.22-23 in relation to the equivalent requirement in r.2.60A(d) as it existed prior to 19 November 2016.

Departmental guidelines refer to r.2.60(e) as essentially an assessment of the ongoing viability and financial strength of the person, including:

- evidence that the person has been trading or operating for a reasonable period of time (this will depend on the type of organisation and industry sector, however, 12 months may be considered 'reasonable' in most circumstances); and

- evidence that the person has an established reputation, or if a new organisation, has the management expertise and financial strength to show that it will continue to operate over the length of the sponsorship and beyond; and

- the capacity of the person to meet its obligations as an employer, for example, in relation to record keeping and payment of the salary and ages of any sponsored persons.[40]

While the Tribunal may have regard to these guidelines, it should ensure that it does not raise any of these matters to the level of a legislative requirement and should always bring its consideration back to the language of the Regulations.

Decision makers will need to determine the period for which the person would be subject to the relevant sponsorship obligation in order to assess the person's capacity to comply with the relevant obligation. For information relating to sponsorship obligations, including when and to whom they apply, see MRD Legal Services commentary: Sponsorship Obligations.

Criteria for approval as a Temporary Work Sponsor (14 September 2009 - 18 November 2016)

Section 140E(3) of the Act provides that different criteria may be prescribed for different classes in relation to which a person may be approved as a sponsor.

For applications made between 14 September 2009 and 18 November 2016, the generic criteria specified in r.2.60A[41] were applicable to all applications for approval as a temporary work sponsor, while r.2.60B-M set out criteria specific to particular classes of sponsor. Further, for applications made on or after 1 July 2013, and for applications not finally determined at that date, additional criteria in r.2.60S also apply.[42]

Exchange sponsors, foreign government agency sponsors, visiting academic sponsors, sport sponsors, domestic worker sponsors, religious worker sponsor and occupational trainee sponsors were all closed to new applications from 24 November 2012.[43] Only those temporary work sponsor classes open to new applications up until 18 November 2016 are discussed further below, i.e. special program sponsors, entertainment sponsors, superyacht crew sponsors, long stay activity sponsors and training and research sponsors. These classes of sponsor were closed to new applications from 19 November 2016.[44] For further information in relation to the older classes of temporary work sponsor, please contact MRD Legal Services.

[40] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Part 4 – criteria for the approval as a sponsor – Capacity to comply with obligations – reg 2.60A(d) (sic) - Assessing capacity to comply (compilation 19/11/2016).
[41] Repealed by F2016L01743.
[42] Inserted by Migration Amendment Regulation 2013 (No. 5) (SLI 2013, No. 145).
[43] r.2.60B, C, D, E, G, H, I and J, as amended by SLI 2012 No. 238, and repealed for applications made on or after 22 March 2014 by SLI 2014, No.30.
[44] r.2.60D, F, K, L and M, repealed by F2016L01743.

Generic criteria for approval as a temporary work sponsor - r.2.60A

Under s.140E, all classes of sponsor must satisfy the generic criteria in r.2.60A.

Applicant has applied for approval as a temporary work sponsor – r.2.60A(a)

Under r.2.60A(a), a mandatory criterion for approval as a temporary work sponsor is that the applicant has applied for approval as a temporary work sponsor in accordance with the process set out in r.2.61. For details on the process, see above.

Applicant must not already be a sponsor of the same class – r.2.60A(b)

An approved sponsor can sponsor any number of visa holders for a particular class. However, r.2.60A(b) requires that the applicant is not already a sponsor of the class for which the applicant is applying. An applicant may be an occupational trainee sponsor and apply for approval as a special program sponsor. However, that person cannot apply again for approval as an occupational trainee sponsor. This is to prevent a person having two concurrent approvals as the same class of sponsor.[45] If a person has already been approved as a sponsor for a particular class, the sponsorship approval must have ceased before they can meet this criterion for approval as a sponsor of that class.[46] As this is a criterion for approval of the sponsorship, and so must be met at time of decision, the passage of time may mean that an application that did not meet this criterion at primary level, may be able to meet this criterion on review.

Up until 18 November 2016, it was possible for a sponsor to extend the duration of their current approval as a class of temporary work sponsor by applying to vary the duration of the approval. For further information see the MRD Legal Services commentary: Variation of Terms of Sponsorship.

No adverse information or reasonable to disregard any adverse information – r.2.60A(c)

Under r.2.60A(c) the Minister (or, Tribunal on review) must be satisfied that there is no adverse information known to Immigration about the applicant or a person associated with the applicant; or it is reasonable to disregard any adverse information known to Immigration about the applicant or a person associated with the applicant. For further details, see discussion above in relation to temporary activities sponsors.

Applicant has capacity to comply with sponsorship obligations – r.2.60A(d)

Under r.2.60A(d) the decision-maker must be satisfied that the applicant has the capacity to comply with the sponsorship obligations that are applicable to a person who is or was a sponsor of the class for which the person has applied. This is to ensure that a person is not approved as a sponsor if, for example, they do not have the financial resources to satisfy their sponsorship obligations.[47] For further details, see discussion above in relation to temporary activities sponsors.

Sponsor specific criteria - r.2.60D, F, K, L and M

Special Program Sponsor – r.2.60D

The sponsorship approval process for approval as a special program sponsor closed to new applications from 19 November 2016.[48] For applications made prior to that date, in addition to the criteria in r.2.60A, an applicant for approval as a special program sponsor must meet the criteria specified in r.2.60D. Briefly these are:

[45] Explanatory Statement to SLI 2009, No. 203 at p.22.
[46] The duration of approval as a temporary work sponsor is specified in the approval and may be a period of time; a particular date, or the occurrence of a particular event: r.2.63(2).
[47] Explanatory Statement to SLI 2009, No.203 at p.22-23.
[48] r.2.60D repealed by F2016L01743.

- if proposing to conduct a youth exchange program approved by the Secretary or a special program of seasonal work (for visa applications made on or after 1 July 2012),[49] the applicant is an Australian organisation or a government agency, or in any other case is a community-based, non-profit Australian organisation or a government agency;[50]

- an applicant who is an Australian organisation must be lawfully operating in Australia;[51]

- the applicant is either a party to a special program agreement with the Secretary, or is proposing to conduct the School to School Interchange Program or School Language Assistants Program;[52] and

- the applicant proposes to conduct a special program, or a special program of seasonal work (for visa applications made on or after 1 July 2012),[53] that is a youth exchange program, or has the object of cultural enrichment or community benefits, and has been approved in writing by the Secretary.[54]

As many of these criteria rely upon the program having been approved by the Secretary or being party to a special program agreement with the Secretary, where such approval and/or agreement exists, the criteria will generally be met. In these circumstances it is unlikely that the criteria in r.2.60D will be in issue upon review.

Type of organisation

'Australian organisation' and 'government agency' are both defined in r.2.57(1). For more information regarding these terms and the concept of 'lawfully operating', see below.

Departmental guidelines indicate that the requirement in r.2.60D(a) that the applicant must be an Australian organisation, a community-based, non-profit Australian organisation, or a government agency, must be satisfied before a person can enter into a special program agreement with the Secretary, as required by r.2.60D(c) and that where such an agreement exists, this requirement may be taken to be satisfied.[55] Therefore, where a special program agreement exists, it is unlikely that either r.2.60D(a) or (c) will be in issue.

Party to a special program agreement

Regulation 2.60D(c) requires that the applicant is either a party to a special program agreement with the Secretary or is proposing to conduct the School to School Interchange Program or School Language Assistants Program. These two programs are exempted from the special program agreement requirement as they are long running programs that do not currently require such an agreement.[56]

[49] r.2.60D(a)(ia) was inserted by Migration Amendment Regulation 2012 (No.3) (SLI 2012, No.106) Schedule 1, items [2] and [17] and applies to visa applications made on or after 1 July 2012.
[50] r.2.60D(a).
[51] r.2.60D(b).
[52] r.2.60D(c).
[53] r.2.60D(d) as amended by Schedule 1, items [3] and [17] of SLI 2012, No.106, and applies to visa applications made on or after 1 July 2012.
[54] r.2.60D(d). Regulation 2.60D(d)(ii) was substituted for visa applications made on or after 22 March 2014, but the amendments were technical in nature and do not alter the substance of the requirement: SLI 2014, No.30.
[55] PAM3: Sponsorship applicable to Division 3A of Part 2 of the Act - Sponsorship > Temporary work sponsor – Special program sponsor - Type of organisation (reissued 14/10/2016).
[56] Explanatory Statement to SLI 2009, No.203 at pp.23-24.

The approved application form for applying for sponsorship approval asks whether the applicant has a special program agreement and, if yes, instructs that they attach it to the application.[57]

Special program of seasonal work

The term 'special program of seasonal work' is defined in r.1.03 to mean arrangements for the performance of seasonal work in Australia that have been made by an organisation approved by the Secretary, and approved in writing by the Secretary as a special program of seasonal work.[58]

Proposing to conduct a special program … approved by the Secretary

Regulation 2.60D(d)(i) requires that the program the applicant is proposing to conduct is a youth exchange program, or has the object of cultural enrichment or community benefits.[59] Where there is a special program agreement or it is one of the two programs exempt from the requirement for such an agreement in r.2.60D(c), this element can generally be taken to be met.

Regulation 2.60D(d)(ii) requires that the program has been approved in writing by the Secretary. The written approval may be made generally for the purposes of r.2.60D(d)(ii), or for visa applications made prior to 22 March 2014, the approval may have been made before 14 September 2009 under cl.416.222(b) or (c) of Schedule 2 to the Regulations as then in force.[60]

Transitional arrangements for Subclass 408 visa applications

Special program sponsors can 'pass the sponsorship test' in relation to Subclass 408 visa applicants applying under cl.408.228 (Youth exchange program, School to School Interchange Program, School Language Assistants Program, or Other programs) if the visa application is lodged by 18 May 2017.[61]

Entertainment Sponsor – r.2.60F

The sponsorship approval process for approval as an entertainment sponsor closed to new applications from 19 November 2016.[62] For applications made prior to that date, in addition to the criteria in r.2.60A, an applicant for approval as an entertainment sponsor must meet the criteria in r.2.60F. That is, the applicant must be:

- an Australian organisation that is lawfully operating in Australia;[63] or
- a government agency;[64] or
- an Australian citizen, Australian permanent resident or eligible New Zealand citizen who is usually resident in Australia;[65] or
- *for applications for approval as a sponsor made on or after 2 April 2011* - a foreign government agency.[66]

[57] Question 17, Form 1416S (design date 07/14); Question 14, Form 1377 (design date 09/09, and 07/12). Form 1377 is only used for applications made prior to 24 November 2012.
[58] This definition was inserted by Schedule 1, items [1] and [17] of SLI 2012, No.106 and applies to visa applications made on or after 1 July 2012.
[59] While not made clear from the opening words of r.2.60D(d), it would appear that the criteria in r.2.60D(d) would need to be satisfied by an applicant proposing to conduct either a special program of seasonal work or another kind of special program. The Explanatory Statement to SLI 2012, No.106 indicates the insertion of special program sponsors who propose to undertake a special program of seasonal work is to ensure they are also obliged to meet the criteria in r.2.60D(d), noting at p.14 that item [3] 'inserts a criterion to be satisfied by an applicant for approval as a special program sponsor who proposes to conduct a special program of seasonal work'.
[60] r.2.60D(d)(ii)(B), as it stood prior to 22 March 2014. Regulation 2.60D(d)(ii) was substituted for visa applications made on or after 22 March 2014, to remove reference to these types of now redundant approvals: SLI 2014, No.30.
[61] cls.408.111 and 408.228(2)(d)(i), (3)(c)(i), (4)(c)(i) and (5)(d)(i) as inserted by F2016L01743.
[62] r.2.60F repealed by F2016L01743.
[63] r.2.60F(a).
[64] r.2.60F(b).
[65] r.2.60F(c).

The terms 'Australian organisation', 'foreign government agency' and 'government agency' are defined in r.2.57(1). For further discussion of these terms and the concepts of 'lawfully operating', see below.

'Australian permanent resident' is relevantly defined in r.1.03 as a non-citizen who, being usually resident in Australia, is the holder of a permanent visa. Eligible New Zealand citizen is also defined in r.1.03. For further discussion of this definition, see MRD Legal Services commentary Eligible New Zealand Citizen.

The term 'usually resident' is not defined in the legislation. Whether a person is usually resident in Australia is a question of fact for the decision-maker.

For further information in relation to this term, see MRD Legal Services commentary Usually Resident.

Entertainment sponsors can 'pass the sponsorship test' in relation to Subclass 408 visa applicants applying under cl.408.229A if the visa application is lodged by 18 May 2017.[67]

Superyacht crew sponsor – r.2.60K

The sponsorship approval process for approval as a superyacht crew sponsor closed to new applications from 19 November 2016.[68] For applications made prior to that date, in addition to the criteria in r.2.60A, an applicant for approval as a Superyacht Crew Sponsor must be the captain or owner of a superyacht.[69] 'Superyacht' is defined in r.1.03 as a sailing ship or motor vessel of a kind that is specified by the Minister under r.1.15G to be a superyacht. Regulation 1.15G permits the Minister to specify by instrument in writing that a sailing ship of a particular kind or motor vessel of a particular kind is a superyacht for the purposes of the Regulations. To see the applicable instrument see the 'Superyacht' tab in the MRD Legal Services Register of Instruments: Business Visas.

It is unclear whether the instrument in effect at time of application for approval or time of decision is the applicable instrument. The criterion in r.2.60K must be satisfied at time of decision, which suggests that the instrument in effect at that time would be the applicable one and the Minister has the power to specify such requirements from time to time, including in the course of an application. The previous instrument referred to a ship/vessel which is '24 metres or longer in load line length',[70] without providing any explanation of what this meant. Arguably the current instrument is easier to apply and an applicant is unlikely to suffer any disadvantage through the application of the later instrument.

There is no indication in the instrument as to what constitutes a 'high value luxury' ship or vessel. In the absence of any definition, the ordinary meaning of the words should apply. It will be a question to be determined in the circumstances of the particular case.

Superyacht crew sponsors can 'pass the sponsorship test' in relation to Subclass 408 visa applicants applying under cl.408.225 (Superyacht crew) if the visa application is lodged by 18 May 2017.[71]

Long Stay Activity sponsor – r.2.60L

The sponsorship approval process for approval as a long stay activity sponsor closed to new applications from 19 November 2016.[72] For applications made between 24 November 2012[73] and 18

[66] r.2.60F(ba) inserted by SLI 2011, No.13 for applications for approval as a sponsor made on or after 2 April 2011.
[67] cls.408.111 and 408.229A(2)(c)(i), (3)(c)(i), (4)(c)(i), (5)(c)(i), (6)(c)(i), (7)(b)(i), (8)(b)(i) and (9)(a) as inserted by F2016L01743.
[68] r.2.60K repealed by F2016L01743.
[69] r.2.60K.
[70] IMMI 08/090, commenced 27 October 2008 (FRLI F2008L03773, 24 October 2008).
[71] cls.408.111 and 408.225(c)(i) as inserted by F2016L01743.

November 2016, regulation 2.60L provides that in addition to the criteria in r.2.60A, an applicant for approval as a long stay activity sponsor must be:

- a sporting organisation that is lawfully operating in Australia;[74] or
- a religious institution that is lawfully operating in Australia;[75] or
- an Australian organisation that is lawfully operating in Australia and has an agreement with a foreign organisation relating to the exchange of staff;[76] or
- a government agency that has an agreement with a foreign organisation relating to the exchange of staff;[77]
- a foreign government agency that has an agreement with a foreign organisation relating to the exchange of staff;[78]
- *for applications made on or after 23 March 2013*, a foreign government agency who is the employer of a Subclass 403 visa holder in the Privileges and Immunities stream who is the national managing director, deputy national managing director or state manager of an Australian office of the foreign government agency;[79] or
- *for applications made on or after 23 March 2013*, a foreign organisation lawfully operating in Australia who is the employer of a Subclass 457 visa holder who is the national managing director, deputy national managing director or state manager of an Australian office of the foreign organisation.[80]

Although a person is required to meet only one of the criteria in r.2.60L(2)(a) to (g) for approval as a long stay activity sponsor, it is possible for a person to meet more than one of these criteria. Accordingly, it is possible for an applicant to be both a sporting organisation and a religious institution and therefore able to make nominations in relation to both sporting and religious activities[81] up until 18 November 2016.[82]

Type of organisation

As set out above, r.2.60L refers to a number of different types of organisations. For further discussion of the meaning of 'Australian organisation', 'foreign government agency', 'foreign organisation', 'government agency', 'religious institution', 'sporting organisation' and 'lawfully operating', see below.

[72] r.2.60L repealed by F2016L01743.
[73] r.2.60L as inserted by SLI 2012, No.238 which applies to an application made on or after 24 November 2012 for a visa, approval as a sponsor, approval of a nomination or the variation of the terms of an approval as a sponsor other than an application for a visa that is taken to have been made by a new born child under r.2.08. The long stay activity sponsor class replaced the exchange sponsor, sport sponsor, religious worker sponsor and domestic worker sponsor classes, which were closed to new applications from 24 November 2012.
[74] r.2.60L(2)(a).
[75] r.2.60L(2)(b).
[76] r.2.60L(2)(c).
[77] r.2.60L(2)(d).
[78] r.2.60L(2)(e).
[79] r.2.60L(2)(f). Inserted by Migration Amendment Regulation 2013 (No.1) (SLI 2013, No.33).
[80] r.2.60L(2)(g). Inserted by SLI 2013, No.33.
[81] Explanatory Statement to SLI 2012, No.238 for item [57].
[82] Nominations in respect of Subclass 421 and 428 visas could no longer be made from 19 November 2016 as a result of the repeal of r.2.72E and H by F2016L01743.

Agreements with foreign organisations relating to the exchange of staff

To be eligible for sponsorship approval as a long stay activity sponsor, an Australian organisation, government agency or foreign government agency must have an agreement with an overseas organisation relating to the exchange of staff.[83]

Departmental guidelines (PAM3) note that this agreement must be in place but does not have to relate to any nominations made by the person. The guidance goes on to state that such an agreement may be evidenced by way of a formal agreement between the parties to the exchange and signed by both parties or letters from both the Australian organisation and the overseas organisation confirming the details of the exchange.[84] However, while the Tribunal should consider what evidence is sufficient for it to be satisfied of such an agreement, there is no statutory requirement for a *written* agreement to be in place and to the extent that PAM3 requires such a written agreement, it would be an error for the Tribunal not to consider other evidence of the agreement.

Transitional arrangements for Subclass 408 visa applications

Long stay activity sponsors can 'pass the sponsorship test' in relation to Subclass 408 visa applicants applying under cl.408.222 (Sports trainee or Elite player, coach, instructor or adjudicator), cl.408.223 (Religious worker), cl.408.224 (Domestic worker) or cl.408.227 (Staff exchange), if the visa application is lodged by 18 May 2017.[85]

Training and Research sponsor – r.2.60M

The sponsorship approval process for approval as a training and research sponsor closed to new applications from 19 November 2016.[86] For applications made between 24 November 2012[87] and 18 November 2016, regulation 2.60M provides that in addition to the criteria in r.2.60A, an applicant for approval as a training and research sponsor must be:

- an Australian organisation that is lawfully operating in Australia;[88] or
- a government agency;[89] or
- a foreign government agency.[90] and

The person must be:

- intending to engage in occupation training[91] or
- a tertiary or research institution.[92]

[83] r.2.60L(2)(c)-(e).
[84] PAM3: Sponsorship applicable to Division 3A of Part 2 of the Act - Sponsorship > Temporary work sponsor – Long stay activity sponsor – Organisations, agencies operating in Australia (reissued 14/10/2016).
[85] cls.408.111, 408.222(2)(e)(i) and (3)(e)(i), 408.223(e)(i), 408.224(j)(i) and 408.227(e)(i) as inserted by F2016L01743.
[86] r.2.60D repealed by F2016L01743.
[87] r.2.60M as inserted by SLI 2012, No.238, for applications made on or after 24 November 2012 for a visa, approval as a sponsor, approval of a nomination or the variation of the terms of an approval as a sponsor other than an application for a visa that is taken to have been made by a new born child under r.2.08. The training and research sponsor class replaced the visiting academic sponsor and occupational trainee sponsor classes, which were closed to new applications from 24 November 2012.
[88] r.2.60M(2)(a).
[89] r.2.60M(2)(b).
[90] r.2.60M(2)(c).
[91] r.2.60M(3)(a)
[92] r.2.60M(3)(b).

Type of organisation

The terms 'Australian organisation', 'government agency' and 'foreign government agency' are defined in r.2.57(1). For further information regarding these terms and the term 'lawfully operating', see below.

Intending to engage in occupation training or a tertiary or research institution

Regulations 2.60M(3)(a) and (b) require an applicant to be intending to engage in occupational training, or an applicant must be a tertiary or research institution. There is no definition of 'tertiary or research institution' in the legislation. See below for further discussion of the meaning of 'tertiary or research institution'.

Also, the term 'occupational training' is not defined in the legislation and in the absence of judicial consideration of the term in relation to this criterion, it is appropriate to apply the ordinary meaning of the term having regard to the legislative context.

Regulation 2.60M(3)(a) only requires an applicant to be *intending* to engage in occupational training, it does not require a person to be engaged in occupational training. Whether a person is 'intending' to engage in occupational training is a question of fact for the decision maker. As this is a criterion that must be met at time of decision, the passage of time may mean that an applicant who did not meet this criterion at primary level may be able to meet this criterion on review. Moreover, evidence regarding an applicant's 'intention' to engage in occupational training provided to the decision maker subsequent to the time of sponsorship application would also be relevant to the assessment of this criterion.

While an applicant is only required to meet r.2.60M(3)(a) *or* (b), it is possible for a person to meet more than one of these criteria. For example, it is possible for a person to be a tertiary or research institution that is intending to engage in occupational training, and therefore able to make nominations in relation to occupation training programs, or agree to be the approved sponsor of applicants or proposed applications for a Subclass 402 visa in the Research stream[93] up until 18 November 2016.[94]

For information regarding the Subclass 402 visa, see MRD Legal Services Commentary: Subclass 402 – Training and Research (Class GC).

Transitional arrangements for Subclass 407 and 408 visa applications

Training and research sponsors can 'pass the sponsorship test' in relation to Subclass 408 visa applicants applying under cl.408.226 (Research or Research (Student)), or sponsor a Subclass 407 visa applicant, if the visa application is lodged by 18 May 2017.[95]

Additional criteria for all sponsor classes – transfer, recovery and payment of costs - r.2.60S

In addition to the generic and sponsor specific criteria discussed above, all applicants for approval as a sponsor must also satisfy the additional criteria in r.2.60S,[96] which prevent an applicant from taking any action or seeking to take any action that would result in the transfer, recovery or payment of

[93] Explanatory Statement to SLI 2012, No.238 for item [57].
[94] Nominations in respect of Subclass 402 visas could no longer be made from 19 November 2016 as a result of the repeal of r.2.72I and Part 402 of Schedule 2 to the Regulations by F2016L01743.
[95] cls.408.111, 408.226(2)(c)(i) and (3)(d)(i) and 407.213 as inserted by F2016L01743.
[96] r.2.60S(1) and (2). Regulation 2.60S was inserted by Migration Amendment Regulation 2013 (No. 5) (SLI 2013, No. 145), for applications for approval as a sponsor made before 1 July 2013 and not finally determined at that date, and for applications for approval as a sponsor made on or after 1 July 2013.

certain costs to or from another person.[97] Regulation 2.60S applies to applications for approval as a sponsor for all classes of sponsor,[98] though the content of the provision has been added to several times since introduction.

Under r.2.60S, the decision maker is required to be satisfied that:

- the applicant has not taken/sought to take any action that would result in the transfer of costs to another person, or another person paying to a person costs, and has not recovered or sought to recover costs:
  - associated with the applicant becoming an approved sponsor,[99] or
  - that relate specifically to the recruitment of a non-citizen for the purposes of a nomination under s.140GB(1) of the Act;[100] and
  - *for applications made on or after 18 March 2018* associated with a nomination under s.140GB(1) of the Act (including a fee mentioned in r.2.73(5), (7) or r.2.73A(3)).[101]

In addition, if the applicant has agreed to be the sponsor of an applicant/proposed applicant for, or a holder of a Subclass 402, 416, or 488 visa, or for applications made on or after 19 November 2016, a Subclass 403 or 408 visa, the decision maker is required to be satisfied that:

- the applicant has not taken/sought to take any action that would result in: the transfer of costs to another person, or another person paying to a person costs, and has not recovered/sought to recover costs that relate specifically to the recruitment of that applicant/proposed applicant or holder.[102]

The kinds of costs contemplated specifically include migration agent costs.

Under r.2.60S(4), the decision maker may disregard the above requirements if he or she considers it reasonable to do so. This provision is intended to provide flexibility in the sponsorship program. The Explanatory Statement to the regulation that introduced this provision provides that an example of when it may be reasonable to disregard the criteria in r.2.60S(2) and (3) under r.2.60S(4) is where a sponsor inadvertently has a minor failure that, once identified, is rectified by the sponsor.[103]

[97] r.2.60S is designed to ensure that, if the sponsorship applicant took any action, or sought to take any action, that resulted in the transfer or recovery of certain costs from another person, or the payment of certain costs by another person, the application can be refused. This amendment also broadens the existing scope under r.2.87 to cover, in addition to cost recovery related actions, any actions that result in the transfer of certain costs to another person or the payment of certain costs by another person: see Explanatory Statement to SLI 2013, No.145 at p.6.
[98] For applications made on or after 19 November 2016, r.2.60S(2) and (3) (as amended by F2016L01743) provides that the criteria in r.2.60S must be satisfied for approval as a sponsor mentioned in any of r.2.59 and r.2.60. Prior to 19 November 2016, r.2.60S(2) and (3) provided that the criteria must be satisfied for approval as a sponsor mentioned in any of r.2.59 to r.2.60M. These Regulations contain or contained the prescribed criteria for approval for all classes of sponsors prescribed under r.2.58 for the purposes of s.140E(2).
[99] r.2.60S(2)(a) - (b) and r.2.60S(3)(a)(i) and (b)(i).
[100] r.2.60S(2)(c) – (d) and r.2.60S(3)(a)(ii) and (b)(ii).
[101] r.2.60S(2)(ba), (bb) and r.2.60S(3)(a)(ia) and (b)(ia), as inserted by F2018L00262.
[102] r.2.60S(2)(e) – (f) and r.2.60S(3)(c) – (d), as amended by F2016L01743.
[103] See Explanatory Statement to SLI 2013, No.145, at p.6.

Terms of approval

Terms specified in the approval

In relation to an application for approval made on or after 14 September 2009 under s.140E, s.140G(1) of the Act provides that an approval as a sponsor may be on terms specified *in the approval*. The terms of approval as a sponsor must be of a kind prescribed by the Regulations.[104] Regulation 2.63(1) provides that a kind of term of an approval as a temporary activities sponsor or a temporary work sponsor is the duration of the approval. Rather than actually identifying a specific period, event or date which triggers the cessation of the approval, r.2.63(2) provides that the duration of the approval may be specified as either:

- a period of time;
- as ending on a particular date; or
- as ending on the occurrence of a particular event.

This means it is at the discretion of the decision maker to determine the period of time, date or event which will trigger the cessation of the approval. The term of approval must be specified as part of the approval.

It is for the decision maker to specify the term of the approval. There is no maximum or minimum specified in the Regulations.

In determining the term of approval the decision-maker may have regard to Departmental policy which specifies a period of 5 years commencing from date of approval for a temporary activities sponsor,[105] and 3 years commencing from date of approval for a temporary work sponsor.[106] However, this should not be raised to the level of a legislative requirement and regard should always be had to the individual circumstances of the case. See MRD Legal Services Commentary: Variation of terms of approval of sponsorship for further information on variation of a term of approval.

Terms prescribed by the Regulations

In relation to an application for approval made on or after 14 September 2009 under s.140E, s.140G(3) of the Act provides that an actual term may be *prescribed* by the Regulations.

Special program sponsor[107] is the only class of 'temporary work sponsor' that has actual terms prescribed by the Regulations under s.140G(3). Regulation 2.64A(1) provides for the prescribed terms of approval as a special program sponsor for the purposes of s.140G(3). This was intended to ensure that the special program sponsor adheres to the special program as approved by the Minister and the special program agreement entered into with the Secretary.[108]

[104] s.140G(2).
[105] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Terms of approval of Temporary activities sposnorship (issued 19/11/2016).
[106] PAM3: Sponsorship applicable to Division 3A of Part 2 of the Act - Sponsorship - Terms of approval of sponsorship (reissued on 14/10/2016).
[107] Closed to new applications from 19 November 2016 by F2016L01743.
[108] Explanatory Statement to SLI 2009, No.203 at p.29.

For visa applications made prior to 1 July 2012, r.2.64A(2) provides that an approval as a special program sponsor has effect only in relation to:

- the special program specified in the application for approval, as varied from time to time by agreement between the special program sponsor and the Secretary;[109] and
- the special program agreement or agreements specified in the application for approval, as varied from time to time by agreement between the special program sponsor and the Secretary;[110] and
- the employer or employers specified in the application for approval.[111]

For visa applications made on or after 1 July 2012, r.2.64A(2) has been amended to extend the scope of an approval as a special program sponsor to cover any subsequent agreement with the Secretary to change from a special program of youth and cultural exchange to a special program of seasonal work and vice versa.[112] Regulation 2.64A(2) provides that an approval as a special program sponsor has effect only in relation to:

- the special program specified in the application for approval, as varied from time to time by agreement between the special program sponsor and the Secretary;[113] and
- the special program agreement or agreements specified in the application for approval, as varied from time to time by agreement between the special program sponsor and the Secretary;[114] and
- the employer or employers specified in the application for approval;[115] and
- if a special program is agreed by the sponsor and the Secretary subsequent to the approval - the special program that will operate for the duration of the approval, as varied from time to time by agreement between the special program sponsor and the Secretary;[116] and
- if a special program agreement is agreed by the sponsor and the Secretary subsequent to the approval - the agreement that will operate within the duration of the approval, as varied from time to time by agreement between the special program sponsor and the Secretary.[117]

Key definitions and concepts

The Regulations provide a number of definitions which specifically relate to temporary work sponsors, as well as some definitions that apply throughout the Regulations, but which are especially relevant in relation to temporary activities sponsors and temporary work sponsors. There are also a number of concepts relevant to the temporary work sponsor scheme which are not defined in the legislation.

[109] r.2.64A(2)(a).
[110] r.2.64A(2)(b).
[111] r.2.64A(2)(c).
[112] Explanatory Statement to SLI 2012, No.106.
[113] r.2.64A(2)(a).
[114] r.2.64A(2)(b).
[115] r.2.64A(2)(c).
[116] r.2.64A(2)(d) as inserted SLI 2012, No.106, for visa applications made on or after 1 July 2012.
[117] r.2.64A(2)(e) as inserted by SLI 2012, No.106, for visa applications made on or after 1 July 2012.

Australian organisation

It is an alternative criterion for approval of a temporary activities sponsor[118] and for a number of former temporary sponsor classes that the applicant is an 'Australian organisation' that is lawfully operating in Australia.[119] The term 'Australian organisation' also forms part of the definition of 'sporting organisation' in r.2.57(1), such that a 'sporting organisation' must be an 'Australian organisation'.

The term 'Australian organisation' is defined in r.2.57(1) as a body corporate, a partnership or an unincorporated association (other than an individual or a sole trader) that is lawfully established in Australia. As individuals and sole traders are expressly excluded from the definition of 'Australian organisation', they cannot be approved as sponsors on this basis.

See below for further information on the terms 'lawfully established', 'lawfully operating' and 'sporting organisation'.

Foreign government agency

For the purposes of the temporary work sponsorship scheme, the term 'foreign government agency' is defined in r.2.57(1). This is an alternative criterion for the approval of a temporary activities sponsor[120] as well as a number of former temporary work sponsor classes.[121] Moreover, 'foreign government agency' is a term in the definition of 'sporting organisation'. See below for further information on 'sporting organisation'.

The definition of 'foreign government agency' differs in relation to organisations conducted under the official auspices of an international organisation depending on the date of the application.

For applications made from 24 November 2012, the term 'foreign government agency' in r.2.57(1) is defined to include:

- an organisation that is conducted under the official auspices of a foreign national government and is operating in Australia including foreign tourist and media bureaus, trade offices and other foreign government entities;
- a foreign diplomatic or consular mission in Australia; and
- an organisation conducted under the official auspices of an international organisation recognised by Australia and that is operating in Australia.

For applications made prior to 24 November 2012, the definition contains no requirement that the agency conducted under the official auspices of an international organisation recognised by Australia be 'operating in Australia'. It only requires that the international organisation under whose auspices it operates be 'recognised' by Australia.[122]

[118] r.2.60(c)(i)
[119] These include criteria for approval as a special program sponsor: r.2.60D(a), (b), an entertainment sponsor: r.2.60F(a), a long stay activity sponsor: r.2.60L(2)(c) and a training and research sponsor: r.2.60M(2)(a), as in force immediately before 19 November 2016.
[120] r.2.60(c)(iii)
[121] These include criteria for approval as an entertainment sponsor: r.2.60F(ba), a long stay activity sponsor: r.2.60L(2)(e), (f) and a training and research sponsor: r.2.60M(2)(c), as in force immediately prior to 19 November 2016.
[122] For an application made on or after 24 November 2012 for a visa, approval as a sponsor, approval of a nomination or the variation of the terms of an approval as a sponsor other than an application for a visa that is taken to have been made by a new born child under r.2.08, the term 'foreign government agency sponsor' in r.2.57(1)(c) has been amended to require an organisation that is conducted under the official auspices of an international organisation recognised by Australia to be 'operating in Australia': SLI 2012, No.238.

The definition of 'foreign government agency' is an inclusive definition. It permits an agency that is established under the auspices of a foreign national government that is operating in Australia, for example, a tourism or cultural agency, to become an approved sponsor for an applicant for a Temporary Work (International Relations) Subclass 403 visa under the Seasonal Worker Program stream. There is no guidance in the legislation or in Departmental guidelines (PAM3) as to the requirements for being 'conducted under the auspices of a foreign national government'. However, this definition will not be met by an agency established at another level of government other than the national government, e.g. State or Local government.

The provision also requires that the agency established by the foreign national government 'is operating in Australia'. The applicable earlier version of PAM3 refers to circumstances where the agency may operate out of a diplomatic mission and not have a separate office 'or the person is coming to Australia to establish an office.'[123] This does not mean that a person seeking to establish an agency of this kind in Australia would meet this criterion. The language of the criterion clearly requires that the agency of the relevant kind is (currently) operating in Australia. However, an agency does not necessarily require a separate office of its own to be considered to be 'operating' as an agency.

Further, the definition of 'foreign government agency' covers an agency operating under the auspices of an international organisation which is recognised by Australia, such as the United Nations. There is no definition or explanation in the legislation as to what constitutes being 'recognised by Australia', however, the example of the United Nations given in the Explanatory Statement[124] and the International Organisation for Migration (IOM) in Departmental guidelines[125] gives some guidance as to the nature of the international organisation and recognition that this is intended to cover. Also, as mentioned above, for applications made before 24 November 2012, there is no requirement that the agency be 'operating in Australia', only that the international organisation under whose auspices it operates be 'recognised' by Australia.

Foreign organisation

In the context of the temporary work sponsorship scheme, the term 'foreign organisation' is relevant to the criteria for approval as temporary activities sponsor and a long stay activity sponsor.[126] 'Foreign organisation' is not defined in the Act or Regulations and there has been no judicial consideration of the term in these contexts, and its ordinary dictionary meaning should be applied. In this regard, Departmental guidelines (PAM3) refer to the Macquarie Dictionary which defines 'foreign' as meaning 'relating to, characteristic of, or derived from another country or nation; not native or domestic', 'external to one's own country or nation' and 'Organisation' as 'a body of persons organised for some end or work', 'any organised whole', 'the administrative personnel or apparatus of a business'.[127] PAM3 also refers decision makers to the definition of 'foreign company' found in s.9 of the Corporations Act which provides that it means:

> *(a) a body corporate that is incorporated in an external Territory, or outside Australia and the external Territories, and is not:*

[123] PAM3: Migration Regulations > Sponsorship applicable to Division 3A of Part 2 of the Act - Sponsorship > Party to a labour agreement > Foreign government agency sponsor at [54.2] (issued 15/08/2012).
[124] Explanatory Statement to SLI 2009, No. 203 at p.13.
[125] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[126] See r.2.60(c)(vii) for temporary activities sponsor; and r.2.60L(2)(c)-(e) (as in force immediately before 19 November 2016) for long stay activity sponsor, which require particular agencies to have an agreement with a 'foreign organisation' relating to the exchange of staff.
[127] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).

(i) a corporation sole; or
(ii) an exempt public authority; or

(b) an unincorporated body that:
(i) is formed in an external Territory or outside Australia and the external Territories; and
(ii) under the law of its place of formation, may sue or be sued, or may hold property in the name of its secretary or of an officer of the body duly appointed for that purpose; and
(iii) does not have its head office or principal place of business in Australia.[128]

However, care should be taken in applying s.9 of the Corporations Act as indicated by PAM3 given the difference between the wording of the items defined and the very different statutory context.

Government agency

It is an alternative criterion for the approval of a temporary activities sponsor[129] and a few former temporary work sponsor classes that the applicant is a 'government agency'.[130] 'Government agency' is also a term contained in the definition of 'sporting organisation'. The term 'government agency' is defined in r.2.57(1) as an agency of the Commonwealth or of a State or Territory. A list of Australian Government Departments, Statutory authorities and other government bodies are available at http://www.australia.gov.au/directories.

See below for further information on 'sporting organisation'.

Lawfully established

As mentioned above, 'lawfully established' is a concept within the definition of 'Australian organisation' in r.2.57(1) which is relevant to the temporary activities sponsor and a number of former temporary work sponsor classes. There is no definition of 'lawfully established' in the Act or Regulations and no judicial consideration of the term in this context and so its ordinary meaning should be applied. In determining whether the organisation is lawfully established the applicant must satisfy all registration requirements as specified under Australian laws that result from the way the applicant's organisation is structured and conducted. Departmental Guidelines suggest that this could include, for example, registration of an Australian Business number (ABN) for tax purposes and registration of a business name.[131]

In relation to the criterion in r.2.60M[132] that an Australian organisation that is a tertiary or research institution must be 'lawfully established' in Australia, Departmental guidelines (PAM3) note that tertiary institutions are established or recognised by or under Commonwealth, State or Territory laws and that an institution must be approved by the Commonwealth Minister for Education before the institution or its students can qualify for Australian government assistance.[133] This information would be relevant to determining what may be required by way of registration or other requirements to be

[128] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[129] r.2.60(c)(ii)
[130] These include criteria for approval as a special program sponsor: r.2.60D(a), an entertainment sponsor: r.2.60F(b), a long stay activity sponsor: r.2.60L(2)(d), and a training and research sponsor: r.2.60M(2)(b), as in force immediately before 19 November 2016.
[131] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[132] As in force immediately before 19 November 2016.
[133] PAM3: Sponsorship Applicable to Div 3A of Part 2 of the Act – Sponsorship > Temporary work sponsor - Criteria for approval as a training and research sponsor - Lawfully established in Australia (reissued on 14/10/2016).

lawfully established as a tertiary institution. The requirements for lawfully establishing a research institution will depend on the way in which the institution is structured and conducted. The Department's PAM3 refers to registration of an ABN for tax purposes and registration of a business name by way of example.[134]

Lawfully operating

There is no definition of 'lawfully operating' in the Act or Regulations and no judicial consideration of the term in relation to this criterion, nor in relation to other similarly worded criteria.[135] It is also appropriate therefore to apply the ordinary meaning of the term having regard to the legislative context.

To establish that the applicant is 'lawfully operating' in Australia, Departmental guidelines (PAM3) refer to satisfying all registration requirements as specified under Australian laws to establish that the organisation is lawfully operating in Australia. The relevant laws would depend upon the way the applicant's organisation is structured and conducted, for example, registration of an ABN for tax purposes and registration of a business name.[136] It should be noted that, given the definition of 'Australian organisation' includes the requirement of being 'lawfully established', the concept of 'lawfully operating' would appear to go beyond the requirement to just be legally registered. See 'lawfully established' above for information on this term.

'Lawfully operating' suggests that there is ongoing activity by the organisation and the applicant may need to provide evidence of ongoing activity in relation to this requirement. The Department's PAM3 indicates that where warranted, an applicant may be asked to provide evidence that the organisation involved in ongoing regular activities and has a system of record keeping that substantiates the activities claimed.[137] The Tribunal may have regard to this, but should not raise this to the level of a legislative requirement and bring its consideration back to the terms of the Regulations.

For the concept of 'lawfully operating' in Australia in relation to a religious institution in r.2.60(c)(v)and r.2.60L(2)(c)[138], Departmental guidelines suggest that if an ongoing place of worship or assembly is not compliant with land zoning laws, this may be relevant to whether the applicant is lawfully operating.[139] If the local government authority has taken action against the applicant for breach of the law, this may also give rise to adverse information within the meaning of r.1.13A (formerly r.2.57(3)) for the purposes of r.2.60(d) or r.2.60A(c)[140] (see discussion above). See 'below' for information regarding 'religious institution'.

In considering whether a tertiary or research institution is 'lawfully operating' in Australia (for the purposes of the training and research sponsorship requirement in r.2.60M[141]), PAM3 states that the applicant should be asked to provide evidence that the institution is involved in ongoing regular

[134] PAM3: Sponsorship Applicable to Div 3A of Part 2 of the Act – Sponsorship > Temporary work sponsor - Criteria for approval as a training and research sponsor - Lawfully established in Australia (reissued on 14/10/2016).
[135] A requirement that a business be 'lawfully operating' is in r.2.59(c) for Standard Business Sponsors, it also applies in relation to Employer Nomination under r.5.19(3)(b)(ii) and r.5.19(4)(b)(i). A requirement that the organisation is 'lawfully operating in Australia' is a criterion for approval of temporary activities sponsors and various former temporary work sponsor classes.
[136] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[137] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[138] As in force immediately before 19 November 2016.
[139] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[140] As in force immediately before 19 November 2016.
[141] As in force immediately before 19 November 2016.

activities and has a system of record keeping that substantiates the activities claimed,[142] although the Tribunal should consider whatever evidence it has before it to satisfy itself the organisation is lawfully operating. See 'tertiary institution or research institution' below for information on this term.

Religious institution

Religious institution is defined in r.1.03 to mean a body:

- the activities of which reflect that it is instituted for the promotion of a religious object;
- the beliefs and practices of the members of which constitute a religion, due to believing in a supernatural being, thing or principle and accepting canons of conduct that give effect to that belief but do not offend against ordinary laws;
- that meets the requirements of s.50-50 of the *Income Tax Assessment Act 1997* (Tax Act); and
- the income of which is exempt from income tax under s.50-1 of that Act.

The question of whether the activities of the institution promote a religious object may be relatively straightforward in respect of the major religions such as Christianity, Islam, Judaism and Buddhism. However, the term 'religious institution' is not confined to the major religions.

Departmental guidelines provide that a body is a religious institution if, amongst other things, the activities of it reflect that it is a body instituted for the promotion of a religious object. The guidance refers decision makers to written governing document/s such as memoranda and articles of association, constitutions, rules or charters, copies of annual reports and financial statements as evidence that the activities promote a religious object and notes that a membership that is established controlled and operated by family members and friends would not normally be an institution.[143]

It also notes that religious institutions will have activities in place that reflect the religious objectives of the organisation which are usually scheduled and advertised, and can include:

- conducting religious services and celebration of weddings, births, holy days etc
- regular meetings for fellowship, communion, study and/or prayer
- the existence of counselling and pastoral services and
- involvement in social services/social action.[144]

It nevertheless notes that some religious institutions would not demonstrate all these characteristics, for example, contemplative orders would not be expected to have a congregation, but would be expected to demonstrate an appropriate structure and purpose.[145]

[142] PAM3: Sponsorship Applicable to Div 3A of Part 2 of the Act – Sponsorship > Temporary work sponsor - Criteria for approval as a training and research sponsor - Lawfully established in Australia (reissued on 14/10/2016).
[143] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[144] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[145] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).

Departmental guidelines also identify that how an entity is defined for tax purposes is relevant to determining whether a body is a 'religious institution' for the purposes of the definition of that term in r.1.03 since, under (c) and (d) of that definition, the organisation must meet the requirements of s.50-50 of the *Income Tax Assessment Act 1997* and be an entity that is exempt from income tax under s.50-1 of that Act.[146] Thus, if the applicant has received Notification of Endorsement for Charity Tax Concessions by the Australian Taxation Office, this will be evidence that the applicant meets the requirements of s.50-50 of the Tax Act and the income is exempt from income tax under s.50-1 of that Act. If the applicant is registered as a business on the Australian Business Register, its tax concession/charity status can be checked on that register at www.abn.business.gov.au.

The applicant may still demonstrate that it meets the requirements of the Tax Act without an Endorsement for Charity Tax Concessions. The applicant may self-assess that it meets the relevant requirements of the Tax Act. In these circumstances the decision-maker will need to consider for itself whether the applicant meets s.50-50 and s.50-1 of the Tax Act. To assist with such a determination, the decision-maker may request that the applicant seek a Private Binding Ruling (PBR) from the Australian Tax Office as to their status as a religious institution. However, if the applicant does not wish to do so, the decision-maker must consider the matter for itself. If this is the case, contact MRD Legal Services for assistance.

A determination or PBR that the applicant is a 'religious institution' under the Tax Act is not in itself determinative of the question of whether the applicant meets the definition of 'religious institution' in r.1.03. The applicant must meet all the requirements of the definition.

Note that the Department has an 'agreed' arrangement for sponsorships by the International Society for Krishna Consciousness (ISKCON), that such sponsorships should be accompanied by a letter of support from the Secretary of the ISKCON National Executive.[147] There is no indication of who the agreement is with, but assuming that it is with the ISKCON National Executive, care should be taken not to treat this Departmental practice as a substitute for the legislative requirements. The necessity for such a letter of support does not directly relate to any of the elements of the definition of religious institution in r.1.03.

Sporting organisation

'Sporting organisation' is defined in r.2.57(1). It is a term relevant to the criteria for approval as a temporary activities sponsor and a long stay activity sponsor. The definition differs depending on the time of application.

For applications made for approval as a temporary activities sponsor, or for applications made on or after 24 November 2012 for approval as a long stay activity sponsor under r.2.60L[148], 'sporting organisation' is defined in r.2.57(1) as an Australian organisation, a government agency or a foreign government agency, that administers or promotes sport or sporting events.[149]

For the purposes of the long stay activity sponsor, the definition was revised to clarify the policy intention that an Australian organisation, government agency or foreign government agency must

[146] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[147] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[148] As in force immediately before 19 November 2016.
[149] 'Sporting organisation' in r.2.57(1) as amended by SLI 2012,No.238 which applies to an application made on or after 24 November 2012 for a visa, approval as a sponsor, approval of a nomination or the variation of the terms of an approval as a sponsor other than an application for a visa that is taken to have been made by a new born child under r.2.08.

have an agreement with an overseas organisation relating to the exchange of staff to be approved as a long stay activity sponsor. The purpose of this was to ensure that such a sponsor was not approved on the basis of broad criteria only to fail at the later nomination stage.[150]

Departmental guidelines also note that a foreign government agency or government agency can be considered a 'sporting organisation' by promoting an interest in sport.[151] See 'foreign government agency' and 'government agency' above for more information on these terms.

National sporting bodies, individual sports clubs and event organisers are examples of organisations that may apply for approval as temporary activities sponsors,[152] or long stay activity sponsors before 19 November 2016.

There is no definition of 'sport' or 'sporting event' in the legislation. In the absence of a definition, regard should be had to the ordinary meaning of the words.

Tertiary institution or research institution

In considering the criteria for approval of a training and research sponsor under r.2.60M,[153] the ordinary meaning of the terms 'tertiary or research institution' should be applied. Departmental guidelines state that under policy, an 'Australian tertiary institution' means an Australian university, Australian college of advanced education or an Australian Technical and Further Education (TAFE) college and includes both government-funded and privately-funded research institutions, referring decision makers to the Department of Education for further guidance.[154]

Australian tertiary institution or Australian research institution – visiting academic sponsor

For the pre 24 November 2012 visiting academic sponsor class, a criterion for approval under r.2.60E(a) that the applicant is an 'Australian tertiary institution' or 'Australian research institution'.

There is no definition of 'Australian tertiary institution' or 'Australian research institution' in the legislation. Prior to removal of the closure of this sponsor class, Departmental guidelines provided that an Australian university, college of advanced education or Technical and Further Education (TAFE) college met the terms Australian tertiary institution, but that if there was any doubt as to whether the applicant was a tertiary institution, decision-makers should contact the Department of Education as the relevant authority for obtaining supporting evidence on the issue.[155] The guidelines also give examples of the kinds of agencies that may apply as Australian research institutions, noting that the institution may be private or government-funded.[156]

[150] See Explanatory Statement to SLI 2012, No.238 for item [57].
[151] PAM3: Migration Regulations – Divisions > Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (issued 19/11/2016).
[152] Despite the fact that individual sports clubs may apply for approval, the sponsor of a Subclass 408 visa applying as a sports trainee must not be a sporting club that, as its primary activity, competes in sporting competitions below the Australian national level for the sport: cl.408.222(2)(d).
[153] As in force immediately before 19 November 2016.
[154] PAM3: Sponsorship Applicable to Div 3A of Part 2 of the Act – Sponsorship > Temporary work sponsor - Criteria for approval as a training and research sponsor – Australian tertiary/research institutions (reissued on 14/10/2016).

Relevant Case Law

There is currently no relevant case law in relation to temporary activities / work sponsors.

Relevant legislative amendments

Title	Reference number
Migration Amendment Regulations 2008 (No.3)	SLI 2008, No.166
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)	SLI 2009, No.203
Migration Amendment Regulations 2011 (No.1)	SLI 2011, No.13
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Available Decision Templates

There are currently no templates available in relation to review of a temporary activity / work sponsorship refusal. Members should use the Generic template

Last updated/reviewed: 14 May 2018

Variation of Terms of Approval of Sponsorship

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Overview

The Minister can approve a person as a sponsor in relation to one or more prescribed classes of sponsor.[1] An approval may be on terms specified in the approval and such terms must be of a kind prescribed by the Migration Regulations 1994 (the Regulations).[2] Section 140GA of the *Migration Act 1958* (the Act) provides for a process to be established by the Regulations that allows for the variation of a term of a person's approval as sponsor. It is this process of variation which is the focus of this commentary.

The purpose of allowing a term of approval to be varied is to simplify administrative processes by not requiring sponsors to apply for a further concurrent approval.[3] The intention is that the sponsor can apply to vary a term (e.g. duration of sponsorship approval) and will only need to be assessed against criteria specific to the term being varied, rather than against all the criteria for approval as a sponsor.[4]

Only the following kinds of sponsor during the following periods can (or could) apply to vary a term of the relevant sponsorship approval:

- *a standard business sponsor*:[5] from 14 September 2009,[6] until 17 March 2018;[7]
- *a temporary work sponsor*:[8] from 14 September 2009 until 24 November 2012 for exchange, foreign government agency, visiting academic, sport, domestic worker religious worker or occupational trainee sponsors;[9] OR until 19 November 2016 for long stay activity, training and research, entertainment, special program or a superyacht crew sponsors;[10]
- *a temporary activities sponsor*: from 19 November 2016 onwards.[11]

There are separate processes and criteria specified for variation of terms of approval for these types of sponsorship, discussed below in more detail.

[1] s.140E of *Migration Act 1958* (the Act). The classes of sponsor are listed in r.2.58 of the Migration Regulations 1994 (the Regulations).
[2] s.140G.
[3] Explanatory Statement to SLI 2009, No.115, p.24. Explanatory Statement to SLI 2009, No.203, p.32.
[4] Explanatory Memorandum to the Migration Legislation Amendment (Worker Protection) Bill 2008 at [76].
[5] A 'standard business sponsor' is defined in r.1.03 of the Regulations as a person who is an approved sponsor and who is approved as a sponsor in relation to the standard business sponsor class under s.140E(1) of the Act. 'Approved sponsor' is relevantly defined in s.5(1) of the Act as a person who has been approved as a sponsor and whose sponsorship approval has not been cancelled or ceased to have effect.
[6] The process for approving a variation of a term of approval as a sponsor was introduced by amendments to the Act and Regulations which commenced on 14 September 2009: *Migration Legislation Amendment (Worker Protection) Act 2008.* Migration Amendment Regulations 2009 (No.5) (SLI 2009, 115), as amended by Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1) (SLI 2009, 203) and Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.2) (SLI 2009, 230).
[7] Standard Business Sponsors were removed from the various provisions in the Regulations prescribing the variation process (r.2.63, r.2.65, r.2.66, r.2.67, 2.68, etc.) from 18 March 2018 by the Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018 (F2018L00262).
[8] A 'temporary work sponsor' was defined in r.1.03 (prior to amendment by the Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743) from 19 November 2016) as meaning any of the following: an 'exchange sponsor', a 'foreign government agency sponsor', a 'special program sponsor', a 'visiting academic sponsor', an 'entertainment sponsor', a 'sport sponsor', a 'domestic worker sponsor', a 'religious worker sponsor', an 'occupational trainee sponsor', a 'superyacht crew sponsor', a 'long stay activity sponsor' and a 'training and research sponsor'. Note that 'long stay activity sponsor' and 'training and research sponsor' were added to the classes of sponsor in relation to which a person may be approved as a sponsor as a result of Migration Amendment Regulations 2012 (No.4) (SLI 2012, No.238) which applies to applications for approval as a sponsor made on or after 24 November 2012. Note that each of those types of sponsors was further defined in r.1.03, prior to amendment or repeal from 19 November 2016 (F2016L01743).
[9] Applications for variation of this type of sponsorship closed on 24 November 2012: SLI 2012, No.238.
[10] r.2.65 as amended by F2016L01743. The various types of temporary work sponsors were replaced with the single temporary activities sponsor from 19 November 2016 by F2016L01743. There are some legacy arrangements for the closure of the temporary work sponsor class. Training and professional development sponsors can make a nomination linked to a Subclass 407 (Training) visa application until 18 May 2017: r.2.72A(3) as amended by F2016L01743. Sponsorship requirements for subclass 408 (Temporary Activity) visa applications can be met, for applications lodged before 18 May 2017, by a long stay activity sponsor, a training and research sponsor, a special program sponsor, an entertainment sponsor, a superyacht sponsor or a person who has applied for approval as such a sponsor and whose application has not yet been decided: item 1237 of Schedule 1 to the Regulations, as added by FL2016L01743.
[11] The various types of temporary work sponsors (defined in r.1.03) were replaced with the single temporary activities sponsor from 19 November 2016 by F2016L01743.

Tribunal's jurisdiction and powers

A decision not to vary a term specified in an approval is a decision reviewable by the Tribunal under Part 5 of the Act,[12] except in certain circumstances where the approval sought to be varied relates to a standard business sponsor operating a business outside Australia.

The Regulations provide that a decision made under s.140GA(2), about whether to vary the terms of approval, where the Minister did not consider the criteria in r.2.68(e) and (f) (*for decisions made before 18 March 2018*) or the criterion in r.2.68(g) (*for decisions made on or after 18 March 2018*) in relation to a standard business sponsor is not a decision reviewable under Part 5 of the Act.[13] The Minister is only required to consider these criteria if the applicant is lawfully operating a business in Australia, so that in practical terms the Tribunal only has jurisdiction in relation to decisions not to vary a term of approval as a standard business sponsor where the affected business is one operating in Australia.[14]

The approved sponsor who applied for a variation of the term of approval is the person who may make an application for review of the decision not to vary the term.[15]

On review, the Tribunal may:

- affirm the decision not to vary the term of approval; or
- set aside the decision under review and substitute a new decision, namely that the term of approval be varied in the manner specified by the Tribunal.[16]

Terms that may be varied

Section 140GA of the Act provides that the Regulations may establish a process for the Minister to vary a term of a person's approval as a sponsor and that the Minister must vary a term if it is of a kind prescribed by the Regulations and the prescribed criteria are satisfied. Only the duration of the approval is prescribed as a term of approval that may be varied for standard business sponsors (prior to 18 March 2018),[17] temporary work sponsors (prior to 19 November 2016) and temporary activities sponsors (from 19 November 2016).[18]

Determining duration of sponsorship approval as varied

Regulation 2.67 provides that the duration of the approval as a standard business sponsor (prior to 18 March 2018), or temporary work sponsor (prior to 19 November 2016) or a temporary activities sponsor (from 19

[12] s.338(9) and r.4.02(4)(n). Where the primary decision is to vary the duration of a term of approval as a sponsor, but the sponsor disagrees with the length of the term of approval as varied, this is not a decision reviewable under Part 5 of the Act.
[13] r.4.02(4C). Regulation 4.02(4C), r.2.68(e) and r.2.68(f) were all repealed on 18 March 2018: F2018L00262. However, clause 6704(16) of Part 67, Schedule 13 to the Regulations, inserted by F2018L00262, provides that r.4.02(4C) continues to apply to decisions made under s.140GA(2) for variation applications made before 18 March 2018, as if the reference to r.2.68(e) and (f) were a reference to r.2.68(g).
[14] Explanatory Statement to SLI 2009, No.115, p.67.
[15] r.4.02(5)(m).
[16] s.349(2).
[17] 2.67. Regulation 2.67 was amended from 18 March 2018 by F2018L00262 to omit the reference to 'standard business sponsor'. From that date, the duration of approvals of standard business sponsorship is determined by operation of r.2.63A, inserted by F2018L00262. See the MRD Legal Services commentary: Standard Business Sponsor for further detail.
[18] r.2.67. Regulation 2.67 was amended from 19 November 2016 by F2016L01743 to omit the reference to 'temporary work sponsor' and replaced this with 'temporary activities sponsor'.

November 2016) is a term which may be varied.[19] Regulation 2.63(2) provides that the duration of an approval may be specified in one of three ways:

- as a period of time;
- as ending on a particular date; or
- as ending on the occurrence of a particular event.[20]

This means it is at the discretion of the decision maker to determine the period of time, date or event which will trigger the cessation of the sponsorship approval as varied. In exercising this discretion the Tribunal may have regard to Departmental policy (PAM3), although it is not bound by it. PAM3 specifies that a decision maker may vary or extend the duration of the sponsorship approval by five years for all temporary activities sponsorships.[21] This period is intended to be consistent with the period of initial sponsorship approval specified in PAM3.[22]

There is little guidance available as to the kinds of circumstances in which it may be appropriate to apply a different period from that specified in the Departmental policy or determine the duration of the approval by reference to a date or particular event. This will depend upon the individual circumstances of the case. For example, if a sponsor is seeking to vary the term of approval for the purpose of sponsoring workers to meet certain contractual obligations, or for the purposes of a particular work project, the length of the contract or expected completion date of the project may be a relevant consideration in determining the duration of the approval as varied.

The period of approval as varied commences from the date of the decision on the *application to vary the term of approval* and continues until the relevant time as specified by the decision-maker. Departmental guidelines provide the following example of how this would operate in practice applying a period of five years for a variation approval to a standard business sponsorship approved for a period of five years:

> *…if a standard business sponsor successfully applies for variation one year after they first became approved as a standard business sponsor, the standard business sponsorship will effectively continue for a total of six years, that is, one year (initial sponsorship approval) plus five years (variation).*[23]

Process for variation of terms

Section 140GA(1) of the Act provides that the regulations may establish a process for the Minister to vary a term of a person's approval as a sponsor. Different processes may be prescribed for different kinds of visa and for different classes in relation to which a person may be approved as a sponsor.[24] The Regulations

[19] r.2.67 was amended from 19 November 2016 by F2016L01743 to omit the reference to 'temporary work sponsor' and replaced this with 'temporary activities sponsor'.
[20] r.2.63(2).
[21] PAM3: Migration Regulations – Divisions > Div 2.11 – Div 2.16 Temporary Work (Skilled) visa (subclass 457) – sponsorships – [4.7] Variation of terms of approval as a sponsor - varying the length of sponsorship agreement (compilation 17 January 2018) (N.B. this is the last compilation relevant to variation of standard business sponsorship approvals); and PAM3: Migration Regulations – Divisions > Div 2.11 – Div 2.23 Temporary Activities Sponsorship – Variation of terms of approval as a temporary activities sponsor – Applying for variation of a term of approval (compilation 17 January 2018).
[22] PAM3: Migration Regulations – Divisions > Div 2.11 – Div 2.16 Temporary Work (Skilled) visa (subclass 457) – sponsorships – [4.6] Terms of approval of sponsorship – sponsorship period (compilation 17 January 2018) (N.B. this is the last compilation relevant to variation of standard business sponsorship approvals); and PAM3: Migration Regulations – Divisions > Div 2.11 – Div 2.23 Temporary Activities Sponsorship – Variation of terms of approval as a temporary activities sponsor – Terms of approval of Temporary activities sponsorship (compilation 17 January 2018).
[23] PAM3: Migration Regulations – Divisions > Div 2.11 – Div 2.16 Temporary Work (Skilled) visa (subclass 457) – sponsorships – [4.7] Variation of terms of approval as a sponsor - varying the length of sponsorship agreement (compilation 17 January 2018) (N.B. this is the last compilation relevant to variation of standard business sponsorship approvals).
[24] s.140GA(3).

currently prescribe one process for variation of terms of approval of a temporary activities sponsorship. For applications made prior to 18 March 2018, the same process applied for variation of terms of approval of standard business sponsorship.[25] For applications made prior to 19 November 2016, the regulations also prescribed a different process for variation of terms of approval of a temporary work sponsorship.

Standard Business Sponsor and Temporary Activities Sponsor

Regulation 2.66 prescribes the process to apply for variation of terms of approval as a standard business sponsor (for applications made before 18 March 2018) and (from 19 November 2016) for variation of terms of approval as a temporary activities sponsor. This provision was amended from 19 November 2016 to add references to temporary activities sponsors,[26] and again from 18 March 2018 to remove references to standard business sponsors.[27]

The requirements of the process are that the application must be made in accordance with the approved or specified form and must be accompanied by a prescribed or specified fee.[28] For applications made on or after 1 July 2013, the application must be made using the internet.[29]

The approved form and fee requirements for an application to vary terms of approval as a standard business or temporary activities sponsor were/are the same as those required for making an application for approval as a standard business or temporary activities sponsor specified in r.2.61(3A)-(3B). This enables an application to vary terms of approval to be treated as an application for approval as a standard business or temporary activities sponsor in certain circumstances. The applicable versions of Departmental guidelines (PAM3) instruct officers that where the applicant's term of approval as a standard business sponsor has ceased after making an application for variation, but before a decision is made on the application, their application will also be a valid application for the purposes of making an application for approval as a sponsor and should be assessed as a new application for approval as a sponsor.[30] However, note that from 18 March 2018, variations of the terms of approval of standard business sponsorships were closed, and (although described as renewals) new applications for approval must be made on or prior to the approval duration ceasing.

Temporary Work Sponsor

Regulation 2.66A prescribes the process to apply for variation of terms of approval as a temporary work sponsor or, after 24 November 2012, *certain* temporary work sponsors.[31] That is, as a result of changes to the temporary work scheme on 24 November 2012 and the closure of certain visa subclasses and their accompanying sponsorship processes for approval,[32] not all temporary work sponsors can apply for variation of the terms of an approval. These changes only affect applications for variation of the terms of an approval

[25] r.2.66 was amended on 18 March 2018 to remove references to standard business sponsorship by F2018L00262.
[26] r.2.66 as amended by F2016L01743 from 19 November 2016 to include references to temporary activities sponsorship (no substantive change was made to r.2.66).
[27] r.2.66 as amended by F2018L00262 from 18 March 2018 to remove references to standard business sponsorship (no substantive change was made to r.2.66).
[28] r.2.66(2) - (4). Note that these requirements differ depending on whether the application was made before, or on or after 1 July 2013: see Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146).
[29] r.2.66(2), as amended by SLI 2013, No.146. Note that r.2.66(5), also inserted by SLI 2013 No.146, provides for the Minister to specify alternative ways, forms and fees for making the application.
[30] PAM3: Migration Regulations – Divisions > Div 2.11 – Div 2.23 Temporary Activities Sponsorship – Variation of terms of approval as a temporary activities sponsor – Applying for variation of a term of approval (compilation 17 January 2018) (N.B. this is the last compilation relevant to variation of standard business sponsorship approvals); and PAM3: Migration Regulations – Divisions > Div 2.11 – Div 2.16 Temporary Work (Skilled) visa (subclass 457) – sponsorships – [4.8] Process for applying to vary the terms of an existing subclass 457 sponsorship (compilation 17 January 2018).
[31] See r.2.65 and the heading to r.2.66A as amended by SLI2012, No.238. Note that r.2.66A was repealed on 19 November 2016 by F2016L01743.
[32] Amended by SLI 2012, No.238. The effect of SLI 2012, No.238 is summarised in Legislation Bulletin No.9/2012, 29 October 2012.

as a sponsor made on or after 24 November 2012.[33] Accordingly, persons who made applications before 24 November 2012 must still be considered against the criteria for the variation of terms of approval that were in effect prior to that date. All remaining classes of temporary work sponsorship were closed from 19 November 2016 and the provisions concerning variation of terms repealed.[34] Accordingly, no applications to vary the terms of approval of such sponsorships can be from that date.

Applications for variation of terms of approval made before 24 November 2012

Prior to 24 November 2012, each type of 'temporary work sponsor' could apply for the variation of the terms of an approval as a sponsor.[35] A 'temporary work sponsor' was defined in r.1.03 as meaning any of the following: an exchange sponsor, a foreign government agency sponsor, a special program sponsor, a visiting academic sponsor, an entertainment sponsor, a sport sponsor, a domestic worker sponsor, a religious worker sponsor, an occupational trainee sponsor or a superyacht crew sponsor.[36] Each of those types of sponsors is further defined in r.1.03.

The requirements for applying for variation of terms of approval as a temporary work sponsor were that the application must:

- be made in accordance with the approved form;[37]
- be accompanied by the prescribed fee;[38] and
- be made to the prescribed place.[39]

Different addresses and fax numbers may be specified for different classes of temporary work sponsor.[40]

Applications for variation of terms of approval made on or after 24 November 2012 and before 19 November 2016

On 24 November 2012 two new types of temporary work sponsors were introduced, the long stay activity sponsor and the training and research sponsor,[41] and the processes for approval of variation of terms of sponsorship were extended to these new temporary work sponsor schemes.[42] However as a consequence of the closure of Subclass 411, 415, 419, 421, 427, 428 and 442 visas and the accompanying sponsorship processes, the following types of temporary work sponsors were no longer able to apply for variation of terms of their sponsorship:

- exchange sponsor;
- foreign government agency sponsor;
- sport sponsor;
- domestic worker sponsor;

[33] See SLI 2012, No.238.
[34] F2016L01743.
[35] See r.2.65 as in force prior to 24 November 2012.
[36] See r.1.03 as in force prior to 24 November 2012.
[37] r.2.66A(1) for temporary work sponsors other than superyacht crew sponsors, r.2.66A(4) for superyacht crew sponsors.
[38] r.2.66A(2)(a) for temporary work sponsors other than superyacht crew sponsors, r.2.66A(5) for superyacht crew sponsors.
[39] r.2.66A(2)(b) for temporary work sponsors other than superyacht crew sponsors; r.2.66A(6) for superyacht crew sponsors to an address or fax number specified by instrument (see 'AppAddress' tab, Register of Instruments – Business Visas). Amendments were introduced by Migration Amendment Regulations 2011 (No.1) (SLI 2011, No.13) in relation to applications for approval of sponsorships made on or after 2 April 2011, providing that applications could be made to an office of Immigration where the address or fax number was not specified by Instrument.
[40] r.2.66A(3).
[41] SLI 2012, No.238 which applies applications for approval as a sponsor made on or after 24 November 2012: item 1 of Schedule 4.
[42] r. 2.66A as amended by SLI 2012, No.238.

- religious worker sponsor;
- occupational trainee sponsor; and
- visiting academic sponsor;[43]

From 24 November 2012 until 18 November 2016,[44] only special program sponsors, entertainment sponsors, superyacht crew sponsors, long stay activity sponsors and training and research sponsors could apply for the variation of the terms of an approval as a temporary work sponsor.[45]

The requirements for applying for variation of terms of approval as these classes of temporary work sponsors are that the application must:

- be made in accordance with the approved form;[46]
- be accompanied by the prescribed fee;[47] and
- be made to the prescribed place.[48]

Different addresses and fax numbers may be specified for different classes of temporary work sponsor.[49]

Criteria for variation

Section 140GA(2) of the Act provides that the Minister must vary a term specified in an approval if prescribed criteria are satisfied. There are different criteria prescribed for standard business sponsors, temporary work sponsors and temporary activities sponsors, and one common criterion that applies to all classes.

Standard Business Sponsor

Regulation 2.68 sets out the criteria for variation of terms of a standard business sponsor approval.[50] The criteria are that the Minister (or Tribunal on review) is satisfied that:

- the applicant applied for the variation in accordance with the process set out in r.2.66;[51]
- the applicant is a standard business sponsor;[52]

[43] See r.2.65 as amended by SLI 2012, No.238. The amendments apply to applications made on or after 24 November 2012 for variation of the terms of an approval as a sponsor: item [1] of Schedule 4.
[44] On 19 November 2016 all types of temporary work sponsorships were closed (F2016L01743) and r.2.66A repealed, so that no applications for variation of terms of approval of these types of sponsorship can be made.
[45] See r.2.65 as amended by SLI 2012, No.238. The amendments apply to applications made on or after 24 November 2012 for variation of the terms of an approval as a sponsor: item [1] of Schedule 4.
[46] r.2.66A(1)(a)-(d) as amended by SLI 2012, No.238 for long stay activity sponsors, training and research sponsors, entertainment sponsors and special program sponsors. The amendments apply to applications made on or after 24 November 2012 for variation of the terms of an approval as a sponsor:item [1] of Schedule 4. See r.2.66A(4) for superyacht crew sponsors.
[47] r.2.66A(2)(a) for long stay activity sponsors, training and research sponsors, entertainment sponsors and special program sponsors; r.2.66A(5) for superyacht crew sponsors.
[48] r.2.66A(2)(b) for long stay activity sponsors, training and research sponsors, entertainment sponsors and special program sponsors; r.2.66A(6) for superyacht crew sponsors to an address or fax number specified by instrument (see 'App Address' tab, Register of Instruments – Business Visas). Amendments were introduced by SLI 2011, No.13 in relation to applications for sponsorships approved on or after 2 April 2011, providing that applications could be made to an office of Immigration where the address or fax number was not specified by Instrument: r.3(2).
[49] r.2.66A(3).
[50] Note that r.2.68 was repealed from 18 March 2018 by F2018L00262.
[51] r.2.68(a).

- the applicant is lawfully operating a business in or outside Australia;[53]
- *if the applicant is lawfully operating a business in Australia* - the applicant has attested, in writing, that the applicant has a strong record of, or a demonstrated commitment to, employing local labour; and non-discriminatory employment practices; and has declared, in writing, that the applicant will not engage in 'discriminatory recruitment practices';[54] and
- there is no 'adverse information' known to Immigration about the applicant or a person 'associated with' the applicant or it is reasonable to disregard any such 'adverse information';[55] and
- *if the applicant is lawfully operating a business outside Australia only* - the applicant is seeking to vary the terms of approval as a standard business sponsor in relation to a Subclass 457 visa holder, applicant or prospective applicant, and the sponsorship applicant intends for such person to establish or assist in establishing on behalf of the sponsorship applicant, a business operation in Australia with overseas connections, or to fulfill or assist in fulfilling a contractual obligation.[56]

Criteria not applicable from 18 March 2018

Note that prior to 18 March 2018, four other criteria for variation of standard business sponsorship approvals were prescribed under 2.68 (r.2.68(e), (f), (j) and (k)). However, these do not apply from 18 March 2018.[57] These were:

- *if the applicant is lawfully operating a business in Australia, and has traded in Australia for 12 months or more* - the applicant meets the benchmarks for the training of Australian citizens and Australian permanent residents specified in an instrument in writing;[58]
- *if the applicant is lawfully operating a business in Australia, and has traded in Australia for less than 12 months* - the applicant has an auditable plan to meet the benchmarks specified in the written instrument;[59]
- the applicant has provided the number of persons who they propose to nominate during the period of approval as a standard business sponsor as varied, and, either, the proposed number is reasonable, or the applicant has agreed in writing to another number proposed by the Minister;[60] and
- either the applicant fulfilled any commitments and complied with applicable obligations relating to training requirements, or it is reasonable to disregard that requirement.[61]

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[52] r.2.68(b). 'Standard business sponsor' is defined in r.1.03 of the Regulations as a person who is an approved sponsor and who is approved as a sponsor in relation to the standard business sponsor class under s.140E(1) of the Act. 'Approved sponsor' is relevantly defined in s.5(1) of the Act as a person who has been approved as a sponsor and whose sponsorship approval has not been cancelled or ceased to have effect.
[53] r.2.68(d). 'Outside Australia' is further defined in r.1.03.
[54] r.2.68(g). This regulation was amended by Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 to include the requirement in r.2.68(g)(i) that the applicant declare that they will not engage in discriminatory recruitment practices. Those amendments apply to applications for the variation of the terms of approval of a sponsor, made on or after 19 April 2016, and applications made but not finally determined before 19 April 2016. See item 5401(2) of Sch.13 to of the amending regulation (F2016L00523). The meaning of 'discriminatory recruitment practices' is defined in r.2.57(1) as a recruitment practice that directly or indirectly discriminates against a person based on the immigration status or citizenship of the person, other than a practice engaged in to comply with a Commonwealth, State or Territory law.
[55] r.2.68(h). The meaning of 'adverse information' is explained in r.1.13A and 'associated with' in r.1.13B.
[56] r.2.68(i).
[57] See clause 6704(5) of Part 67, Schedule 13 to the Regulations, as inserted on 18 March 2018 by F2018L00262.
[58] r.2.68(e).
[59] r.2.68(f).
[60] r.2.68(j) inserted by SLI 2013, No.146. It applied to applications for variation of terms of approval as a sponsor made prior to but not finally determined on 1 July 2013, and applications made on or after that date. However, it does not apply to any application from 18 March 2018.
[61] r.2.68(k) inserted by SLI 2013, No.146. It applied to applications for variation of terms of approval as a sponsor made prior to but not finally determined on 1 July 2013, and applications made on or after that date. However, it does not apply to any application from 18 March 2018.

The criteria relating to training requirements were omitted in anticipation of the creation of a new nomination training contribution charge intended to replace these requirements, while the requirement to provide numbers of proposed nominees was omitted as being of no value to the variation process.[62]

Even if failure to satisfy one of these criteria was the reason for a Departmental delegate (before 18 March 2018) refusing to approve an application for variation, this will no longer be relevant to reviews conducted by the Tribunal. The remaining applicable criteria, as discussed below, should be considered and a decision made on the basis of their satisfaction (or otherwise) only.

Application for variation made in accordance with the prescribed process – r.2.68(a)

The application for variation must be made in accordance with the process in r.2.66. Information on this process is set out above.

Applicant is a standard business sponsor – r.2.68(b)

The applicant must be a standard business sponsor at the time of the decision on the application to vary the terms of the approval as a standard business sponsor. A 'standard business sponsor' is a person who is an approved sponsor and who is approved as a sponsor in relation to the standard business sponsor class under s.140E(1) of the Act.[63] 'Approved sponsor' is relevantly defined in s.5(1) of the Act as a person who has been approved as a sponsor and whose sponsorship approval has not been cancelled or ceased to have effect. If the approval as a standard business sponsor has ceased, there is no approval to vary.

The period of sponsorship approval is specified by the decision-maker as part of the approval of the sponsorship as either: a specified period; ending on a particular date; or ending on the occurrence of a particular event.[64]

If approval as a standard business sponsor has ceased before the decision on the application to vary has been made, Departmental guidelines (PAM3) recommend that the application to vary be considered as an application for approval as a standard business sponsor.[65] This is possible because the requirements for making an application for approval as a standard business sponsor and an application to vary a standard business sponsor approval are the same (see above).

Other criteria – r.2.68(d)-(i)

The remaining criteria for approval of an application to vary a term of approval as a standard business sponsor are largely similar or identical to criteria for approval as a standard business sponsor specified in r.2.59. For further information regarding these criteria, see the commentary Approval as a Standard Business Sponsor.

Temporary Activities Sponsor

Regulation 2.68A (as in force from 19 November 2016)[66] sets out the criteria for variation of terms of a temporary activities sponsor approval. The criteria are that the Minister is satisfied that:

[62] See Explanatory Statement to F2018L00262, item 53, item 56, item 178.
[63] r.1.03.
[64] r.2.63(2).
[65] PAM3:Migration Regulations – Divisions > Div 2.11 – Div 2.16 Temporary Work (Skilled) visa (subclass 457) – sponsorships – [4.7] Varying the length of sponsorship agreement (compilation 17 January 2018). This reflects comments in the Explanatory Statement to SLI 2009, No.115 at p.24.
[66] Regulation 2.68A was repealed and substituted from 19 November 2016 by F2016L01743, prior to that date it specified the criteria for variation of the terms of approval of a temporary work sponsorship.

- the person satisfies the criterion for approval as a temporary activities sponsor set out in r.2.60;[67] and

- the person has applied for the variation in accordance with the process referred to in r.2.61.[68]

Applicant satisfies criteria for approval as temporary activities sponsor – r.2.68A(a)

The criteria for approval as a temporary activities sponsor are prescribed in r.2.60, and are as follows:

- the applicant has applied for approval as a temporary activities sponsor in accordance with the process referred to in r.2.61;[69]

- the applicant is not already a temporary activities sponsor;[70]

- the applicant is an Australian organisation that is lawfully operating in Australia, or a government agency, or a foreign government agency, or a sporting organisation that is lawfully operating in Australia, or a religious institution that is lawfully operating in Australia, or a person who is the captain or owner of a superyacht, or an organisation that operates a superyacht, or a foreign organisation that is lawfully operating in Australia;[71]

- there is no adverse information known to Immigration about the applicant or a person associated with the applicant, or it is reasonable to disregard any such information;[72] and

- the applicant has the capacity to comply with the sponsorship obligations applicable to a person who is or was a temporary activities sponsor.[73]

These criteria are discussed in more detail in the MRD Legal Services Commentary: Approval as a Temporary Work Sponsor.

Applicant has applied for variation in accordance with prescribed process – r.2.68A(b)

The application to vary the terms of approval to the temporary activities must have been made in accordance with the prescribed process, as discussed above.

Temporary Work Sponsor

The criteria for variation of terms of approval for temporary work sponsors were specified in r.2.68A, as in force prior to 19 November 2016, and are the same for applications made before or after 24 November 2012.[74] The criteria are essentially the same as those for applying for approval of sponsorship in relation to the particular class, with the exception of the requirement that the sponsor is not already approved for the class of sponsor, which is not a criterion for variation.[75] The criteria are:

[67] r.2.68A(a) (as in force from 19 November 2016).
[68] r.2.68A(b) (as in force from 19 November 2016).
[69] r.2.60(a) (as in force from 19 November 2016).
[70] r.2.60(b) (as in force from 19 November 2016).
[71] r.2.60(c) (as in force from 19 November 2016). Note that 'superyacht' is defined in r.1.15G by reference to an instrument made by the Minister. The relevant instrument can be accessed from the Register of Instruments – Business visas.
[72] r.2.60(d) (as in force from 19 November 2016).
[73] r.2.60(e) (as in force from 19 November 2016).
[74] Note that r.2.68A was repealed and substituted from 19 November 2016 to instead specify the criterion for variation of a temporary activities sponsorship.
[75] As set out in r.2.60A(b). Classes of sponsor are specified in r.2.58.

- the application for variation was made in accordance with the process in r.2.66A;[76]
- the applicant satisfies the criteria for approval as a temporary work sponsor in r.2.60A(c) and (d);[77]
- the applicant satisfies the criteria for approval that applies to the class of sponsor in relation to which the application for the variation of a term of approval applies;[78] and
- the applicant is applying to vary the terms of approval of a class of sponsor and the applicant is in that class.[79]

Application for variation made in accordance with the prescribed process – r.2.68A(c)

The application to vary the terms of approval of the relevant temporary work sponsorship must have been made in accordance with the prescribed requirements applicable to that class of sponsor. There are different requirements specified by instrument for making an application to vary approval for the different classes of temporary work sponsor and specific requirements for making an application where the relevant class is superyacht crew sponsors. These requirements are referred to above.

Applicant satisfies criteria for approval as a temporary work sponsor – r.2.68A(a)

Criteria that apply to approval as a temporary work sponsor generally are specified in r.2.60A, as in force prior to 19 November 2016.[80] Regulation 2.68A(a) only requires the applicant for variation of the term of sponsorship approval to satisfy r.2.60A(c) and (d). These requirements are:

- unless it is reasonable to disregard, there is no 'adverse information' known to 'Immigration' about the sponsor or a person 'associated with' the sponsor; and
- the applicant has capacity to comply with the sponsorship obligations applicable to the class of sponsor for which they have applied.

These criteria are discussed in more detail detail in the MRD Legal Services Commentary: Approval as a Temporary Work Sponsor.

Applicant satisfies criteria for approval for relevant class of temporary work sponsor – r.2.68A(b)

There are criteria that apply only in relation to the specific classes of temporary work sponsor, i.e. criteria specific to an 'exchange sponsor', a 'foreign government agency sponsor', a 'special program sponsor', a 'visiting academic sponsor', an 'entertainment sponsor', a 'sport sponsor', a 'domestic worker sponsor', a 'religious worker sponsor', an 'occupational trainee sponsor' a 'superyacht crew sponsor', a 'long stay activity sponsor' or a 'training and research sponsor'. The criteria specific to each of these classes of sponsor were set out in rr.2.60B to 2.60M respectively.[81]

Note that the introduction of the long stay activity sponsor class and the training and research sponsor class from 24 November 2012 effectively replaced seven temporary work sponsor classes (exchange sponsor, foreign government agency sponsor, visiting academic sponsor, sport sponsor, domestic worker sponsor, religious worker sponsor, or occupational trainee sponsor can no longer apply for variation of terms of their

[76] r.2.68A(c). Note that r.2.66A was repealed from 19 November 2016 by F2016L01743.
[77] r.2.68A(a). Note that r.2.60A was repealed from 19 November 2016 by F2016L01743.
[78] r.2.68A(b).
[79] r.2.68A(d).
[80] Note that r.2.60A was repealed from 19 November 2016 by F2016L01743.
[81] Note: rr.2.60B, 2.60C, 2.60E, 2.60G, 2.60H, 2.60I, 2.60J were removed for visa applications made on or after 22 March 2014 as they had effectively been replaced by the Long stay activity sponsor class, and the Training and research sponsor class: Migration Amendment (Redundant and Other Provisions) Regulations 2014 (SLI 2014, No.30). Regulations 2.60D, 2.60F, 2.60K, 2.60L and 2.60M were then repealed from 19 November 2016 by F2016L01743, reflecting the closure of temporary work sponsorships from that date.

sponsorship).[82] As a result, these seven classes of temporary work sponsor were closed to new applications from that time.[83] From 19 November 2016, the remaining classes of temporary work sponsor were closed to new applications.[84]

For further information on the criteria for approval for the specific classes of temporary work sponsor, see MRD Legal Services Commentary: Approval as a Temporary Work Sponsor.

Applicant is in class of sponsor whose approval is sought to be varied – r.2.68A(d)

The applicant must be applying to vary the terms of approval of a class of sponsor and the applicant must be in that class. This ensures that there is an existing approval to vary. Classes of sponsor are identified in r.2.58, as in force prior to 19 November 2016.[85]

If an applicant has ceased to be a sponsor, there is no longer any existing approval to vary. If the relevant sponsorship approval ceases before a decision has been made on the application to vary the approval, it is intended that the application should be assessed as an application for approval as a sponsor under Division 2.13.[86] This is possible in practice because application requirements for approval mirror the application requirements for variation of an approval.

Common criterion – transfer, recovery and payment of costs – r.2.68J

Regulation 2.68J applies to all classes of sponsor and requires a decision maker to be satisfied that the applicant has not sought or taken any action to transfer, recover or cause another person to pay its costs associated with becoming a sponsor or recruiting non-citizens, including for the purposes of nomination under s.140GB(1) of the Act.[87] These costs specifically include migration agent costs.

For applications for variation of a term of approval made on or after 18 March 2018, r.2.68J also specifically requires a decision-maker to be satisfied that the applicant has not sought or taken any action to transfer, recover or cause another person to pay some or all of the costs associated with the nomination itself, including any nomination fee.[88]

Regulation 2.68J(4) provides that the Minister may disregard a criterion referred to in r.2.68J(2) or (3) if he or she considers is reasonable to do so. The Explanatory Statement which accompanied the Regulations which inserted this provision states that an example of when the Minister may consider it reasonable to disregard the criteria in r.2.68J(2) or (3) is where a sponsor inadvertently has a minor failure that, one identified, is rectified by the sponsor.[89]

[82] r.2.60L and r.2.60M set out the criteria for these sponsor types. Inserted by SLI 2012, No.238. The amendments apply to applications made on or after 24 November 2012 for approval as a sponsor.
[83] rr.2.60B, 2.60C, 2.60E, 2.60G, 2.60H, 2.60I, and 2.60J amended by SLI 2012, No.238 for applications made on or after 24 November 2012 for approval as a sponsor. These regulations were subsequently removed for visa applications made on or after 22 March 2014 as part of a 'cleanup' of redundant provisions: SLI 2014, No.30.
[84] F2016L01743.
[85] r.2.58 was amended from that date by F2016L01743.
[86] PAM3: Migration Regulations – Divisions > Div 2.11 – Div 2.23 Temporary Activities Sponsorship – Variation of terms of approval as a temporary activities sponsor – Applying for variation of a term of approval (compilation 17 January 2018). Explanatory Statement to SLI 2009, No.203, at p.32.
[87] r.2.68J(2)-(3). Inserted by Migration Amendment Regulation 2013 (No.5) (SLI 2013, No.147), and applies to all applications for approval as a sponsor not finally determined on 1 July 2013, and all such applications made on or after that date. Note that r.2.68J was subject to minor amendment from 19 November 2016 by F2016L01743.
[88] r.2.68J(2)(ba) & (bb), r.2.68J(3)(a)(ia) & (b)(ia) as inserted by F2018L00262.
[89] Explanatory Statement to SLI 2013 No.147, Attachment C p.6.

Notice of decision

The requirements for notice of a primary decision on an application to vary terms of approval as a standard business sponsor, temporary work sponsor or a temporary activities sponsor are set out in r.2.69. The requirements are that the notification of decision must:

- be in writing;[90]
- within a reasonable period after making the decision;[91]
- attach a written copy of the decision to vary or not to vary the term of the approval;[92] and
- if the decision is not to vary the term of the approval, attach a statement of reasons for the decision.[93]

There is no definition of 'reasonable period' for notifying a decision after it has been made in relation to r.2.69. However, according to the Explanatory Statement that introduced this requirement, a notification may be considered to have been provided within a reasonable period if it is provided without undue delay after a decision has been made.[94] The period must be reasonable in all the circumstances of the case.

For notices given prior to 18 March 2018, the Minister may provide the notification to the applicant in an electronic form if the application was made using approved form 1196 (Internet) or (from 19 November 2016) form 1478 (Internet).[95] From 18 March 2018, all notices can be given in electronic form.[96]

Relevant case law

There has been no judicial consideration of the variation of a term of approval as a standard business sponsor, temporary work sponsor or temporary activities sponsor to date.

Relevant legislative amendments

Title	Reference number
Migration Legislation Amendment (Worker Protection) Act 2008	No.159, 2008
Migration Amendment Regulations 2009 (No. 5) (as amended)	SLI 2009, No.115
Migration Amendment Regulations 2010 (No.1)	SLI 2010, No.38
Migration Amendment Regulations 2011 (No.1)	SLI 2011, No.13
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment Regulation 2013 (No.5)	SLI 2013, No.145

[90] r.2.69(1).
[91] r.2.69(1)(a).
[92] r.2.69(1)(b).
[93] r.2.69(1)(c).
[94] Explanatory Statement SLI 2009, No. 115, p.29.
[95] r.2.69(2). Amended to include reference to form 1478 (Internet) from 19 November 2016 by F2016L01743.
[96] r.2.69(2) as amended by F2018L00262.

Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015	SLI 2015 No. 242
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018	F2018L00262

Available decision templates

There are no templates currently available that deal specifically with the variation of a term of approval as a standard business sponsor, temporary work sponsor or temporary activities sponsor.

Please contact MRD Legal Services for further information if required.

Last updated/reviewed: 12 April 2018

Skilled occupation / Australian study requirement

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Overview

The terms 'skilled occupation' and 'Australian study requirement' are relevant to a wide range of skilled visas. This commentary focuses on General Skilled Migration (GSM) visas.[1]

To make a valid application for most GSM visas, the applicant must nominate a skilled occupation in the visa application form.[2] Criteria for these visas require that the applicant's skills have been assessed as suitable for the nominated skilled occupation. For some applications, if the assessment was based on qualifications obtained in Australia while the applicant held a student visa, the qualification must have been obtained as a result of studying a registered course.

The 'Australian study requirement' is included in the criteria for the grant of a number of GSM visas.[3] Broadly speaking, a person satisfies the requirement by completing a course or courses of specified kinds, over a specified period. The qualification used to satisfy the Australian study requirement must be closely related to the nominated skilled occupation.

This commentary addresses what is meant by skilled occupation and the requirements relating to skills assessments; the Australian study requirement; and the 'closely related' requirement.

In addition to the 'skilled occupation' criteria, there are other Schedule 2 visa criteria to which the nominated skilled occupation is relevant. These include criteria concerning employment in a skilled occupation, English language ability and points tests, which are discussed in other MRD Legal Services commentaries.[4]

Skilled occupation

Key concepts and definitions

Skilled occupation

'Skilled occupation' is defined in r.1.15I of the Migration Regulations 1994 (the Regulations) to mean, in relation to a person, an occupation of a kind:

- that is specified by the Minister in an instrument in writing to be a skilled occupation; and
- if a number of points are specified in that instrument as available - for which the number of points are available; and

[1] 'General Skilled Migration visa' is defined in r 1.03 to mean a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 885, 886 or 887 visa, granted at any time: inserted by Migration Amendment Regulations 2007 (No.7) (SLI 2007, No.257), amended by Migration Amendment Regulations 2012 (No.2) (SLI 2012, No.82).

[2] Items 1135(3)(c); 1136(4)(b)(ii), (5)(b)(ii), (6)(b)(iii); 1137(4) table item 4; 1138(4) table item 4; 1230(4) table item 4 First Provisional visa stream; 1228(3)(b)(ii); and for visa applications made before 23 March 2013 items 1229(4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii), or for visa applications made on or after 23 March 2013 items 1229(3)(k), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii) (as substituted by Migration Legislation Amendment Regulation 2013 (No.1) (SLI 2013, No.33). There are some exceptions, e.g. where the applicant already holds a relevant temporary skilled visa: see e.g. item 1230(5).

[3] Subclass 485 and repealed subclasses 175, 176, 475, 487, 885, and 886.

[4] Prior employment in a skilled occupation for a specified period is a Schedule 2 criterion for Subclass 175, 176 and 475 visas, and a qualification for the points test – see the Commentary: Employment in a Skilled Occupation. Applicants for most GSM visas are required to demonstrate or possess certain English language skills, with different standards and requirements for satisfying them depending on the subclass sought and the skilled occupation nominated – see the Commentary: English

- that is applicable to the person in accordance with the specification of the occupation.[5]

These occupations are specified in lists in instruments which can be found on the 'SOL-SSL' tab of the Register of Instruments: Skilled visas. There are a number of instruments concurrently in force that apply depending on the visa application and when it was made. For discussion of which instrument applies to a particular application and how the instruments are organised, see below.

ANZSCO

The occupation lists refer to 'ANZSCO' (Australian and New Zealand Standard Classification of Occupations) codes. The courts have observed that by referring in skilled occupation instruments to the ANZSCO code for each occupation, Parliament intended to import the defining criteria described in the applicable ANZSCO classification as the means to assess whether the visa applicant's nominated occupation qualifies as a 'skilled occupation'.[6] Occupations are grouped by ANZSCO into five hierarchical levels and classified by reference to defining criteria including a 'lead statement', 'skill level' and 'tasks'.[7]

For visa applications made on or after 1 July 2013 'ANZSCO' has the meaning specified by the Minister in an instrument in writing.[8] The instrument for this purpose is also the instrument which specifies skilled occupations, available on the 'SOL-SSL' tab in the Register of Instruments – Skilled visas. The definitions in current instruments refer to the Australian and New Zealand Standard Classification of Occupations as published by the Australian Bureau of Statistics, and may also specify a currency date. ANZSCO is available online.

Relevant assessing authority

'Relevant assessing authority' is defined in r.1.03 as a person or body specified under r.2.26B. Under r.2.26B(1), the Minister may, by instrument, specify a person or body as the relevant assessing authority for a skilled occupation and one or more countries for the purposes of an application for a skills assessment made by a resident of one of those countries. The Minister can not specify a person or body as a relevant assessing authority unless the Education or Employment Minister has approved the person or body in writing.[9] The instrument for the purposes of r.2.26B(1) is also the instrument which specifies skilled occupations for the purposes of r.1.15I. These instruments can be located on the 'SOL-SSL' tab in the Register of Instruments – Skilled visas. For discussion of which instrument applies to a particular application and how the instruments are organised, see below.

Registered course

'Registered course' is defined in r.1.03 as meaning a course of education or training provided by an institution, body or person that is registered, under Division 3 of Part 2 (or, for applications made before 23 March 2013, s.9) of the *Education Services for Overseas Students Act 2000* (ESOS Act), to

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Language Ability. An applicant's nominated skilled occupation is also relevant to a number of qualifications under the points test – see the Commentaries: Skilled Visas – overview, General Points Test (Schedule 6C) and General Points Test (Schedule 6D).

[5] Reg 1.15I(1)(a), (b) and (c) respectively, as inserted by Migration Amendment Regulations 2010 (No.6) (SLI 2010, No.133), (which applies to visa applications made on or after 1 July 2010 and applications not finally determined before that date) and as amended by Migration Amendment Regulations 2011 (No.3) (SLI 2011, No.74). There are no transitional provisions for this amendment, so it applies to all applications as of 1 July 2011: see r 3(2) and Note.

[6] *Seema v MIAC* (2012) 203 FCR 537 at [44].

[7] See *Parekh v MIAC* [2007] FMCA 633 (Smith FM, 10 March 2007) at [11].

[8] Reg 1.03 as amended by Migration Legislation Amendment Regulation 2013 (No.3) (SLI 2013, No.146). For applications made before 1 July 2013 'ANZSCO' was defined by r 1.03 to mean the Australian and New Zealand Standard Classification of Occupations, published by the Australian Bureau of Statistics as current on *1 July 2010*.

[9] Reg 2.26B(1A) as amended by Migration Amendment Regulations 2007 (No.1) (SLI 2007 No.69). There was an administrative oversight where the relevant assessing authority was not validly specified for certain occupations in visa applications made before 1 October 2011. Please contact MRD Legal Services for more information.

provide the course to overseas students.[10] Whether an education provider is registered to provide the course can be checked on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) website.[11] If the education provider is no longer registered to provide the course, historical data can be checked on the Provider Registration and International Students Management System (PRISMS).

Skilled occupation list instruments

The instrument that applies in any case will depend on the applicant's circumstances, as specified in the instrument itself. Each instrument contains lists of occupations which are specified as skilled occupations for the purposes of r.1.15I(1)(a). These occupations apply to different specified classes of persons, identified by the visa sought, the date of the visa application or invitation and certain other conditions. The lists also set out the relevant assessing authorities for r.2.26B(1).

The names of the lists, and the number of lists, have changed over time. For invitations issued and applications made on or after 18 March 2018, there are three lists called the 'Medium and Long-term Strategic Skills List' (MLTSSL), the 'Short-term Skilled Occupation List' (STSOL) and the 'Regional Occupational List' (ROL).[12] For invitations issued and applications made from 19 April 2017 until 17 March 2018, there were two lists called the MLTSSL and the STSOL.[13] For earlier invitations and applications, there were two lists called the 'Skilled Occupation List' (SOL) and 'Consolidated Sponsored Occupation List' (CSOL).

The Skilled Occupation Lists Instruments - Quick Guide sets out all current instruments and which cases they apply to. The following briefly explains the application of a number of key recent instruments.

LIN 19/051 and IMMI 18/051

LIN 19/051 applies to applications made or invitations issued from 11 March 2019 and IMMI 18/051 applies to applications made or invitations issued from 18 March 2018 to 10 March 2019.[14]

The MLTSSL, STSOL and ROL are in tables in each instrument.[15] A further table sets out which list applies to which applicants.[16] The MLTSSL generally applies to all persons invited to apply for subclass 189, 190 and 489 visas, applicants for subclass 485 visas, and their spouses or de facto partners.[17] The STSOL is only available to government nominated subclass 190/489 invitees and partners.[18] The ROL is only available to government nominated subclass 489 invitees and partners.[19]

[10] The definition was amended by SLI 2013 No.33 to reflect changes to the ESOS Act made by the *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2012* (Act No.9 of 2012). Section 9 was replaced by Division 3 of Part 2 (ss 9AA to 9AH), which now provides for a similar system of course registration.
[11] The CRICOS website is the official Australian Government website that lists all Australian education providers that offer courses to people studying in Australia on student visas and the courses offered.
[12] In addition to retaining the MLTSSL and STSOL, IMMI 18/051 introduced a Regional Occupation List (ROL). The subsequent instrument similarly includes the MLTSSL, STSOL and ROL.
[13] Amendments made to IMMI 16/059 by IMMI 17/040 on 19 April 2017 renamed the former SOL to the MLTSSL and the former CSOL to the STSOL; subsequent instruments have used the updated terminology.
[14] IMMI 18/051 was repealed by LIN 19/051. LIN 19/051 Part 3 s 13 provides that IMMI 18/051 continues to apply to applications made or invitations issued from 18 March 2018 to 10 March 2019.
[15] Sections 8, 9 and 10(1) of LIN 19/051; ss 8(1), 9(1) and 10(1) of IMMI 18/051.
[16] Section 7(1) of LIN 19/051; s 7(1) of IMMI 18/051.
[17] Items 1, 2, 3 and 4 of the table in s 7(1) of LIN 19/051; Items 1, 2, 3 and 4 of the table in s 7(1) of IMMI 18/051.
[18] Item 3 of the table in s 7(1) of LIN 19/051; Item 3 of the table in s 7(1) of IMMI 18/051.
[19] Item 4 of the table in s 7(1) of LIN 19/051; Item 4 of the table in s 7(1) of IMMI 18/051.

Where IMMI 18/051 applies and an occupation is marked with an 'A' in column 4 of the MLTSSL, its availability is further limited to subclass 189 invitees, subclass 485 applicants, and subclass 489 applicants who are not nominated by a government agency.[20]

IMMI 18/007 and IMMI 17/072

IMMI 18/007 applies to applications made or invitations issued from 17 January 2018 to 17 March 2018 and IMMI 17/072 applies to applications made or invitations issued from 1 July 2017 to 16 January 2018.[21]

The MLTSSL and STSOL are in tables in each instrument.[22] A further table sets out which list applies to which applicants.[23] The MLTSSL generally applies to all persons invited to apply for subclass 189, 190, or 489 visas, applicants for subclass 485 visas, and their spouses or de facto partners.[24] The STSOL is only available to government nominated subclass 190/489 invitees and their partners.[25]

Where an occupation is marked with a 'Y' in column 4 of the occupation list, its availability is further limited as follows:

- MLTSSL – these occupations apply only to subclass 189 invitees, subclass 485 applicants, and subclass 489 applicants who are not nominated by a government agency;[26]
- STSOL – these occupations apply only to government nominated subclass 489 applicants.[27]

IMMI 16/059

This instrument applies to visa applications made and invitations issued from 1 July 2016 to 30 June 2017.[28] There are two versions of the lists in this instrument applicable, depending on the time that invitations were issued or visa applications made.

Applications / invitations from 19 April 2017 to 30 June 2017

IMMI 16/059 was amended by IMMI 17/040 on 19 April 2017.[29] These amendments renamed the former SOL to the MLTSSL and the former CSOL to the STSOL and removed a number of occupations.[30] The MLTSSL is in Schedule 1 and the STSOL in Schedule 2.

The MLTSSL generally applies to all persons invited to apply for a Subclass 189, 190 or 489 visa, and their partners, and also to persons who make an application for a Subclass 485 visa.[31] Occupations

[20] Section 8(2) of IMMI 18/051.
[21] IMMI 17/072 was repealed by IMMI 18/007. IMMI 18/007 Part 2 of sch.1 provides that IMMI 17/072 continues to apply to invitations issued and applications made from 1 July 2017 to 16 January 2018. IMMI 18/007 was repealed by IMMI 18/051. IMMI 18/051 Part 2 of sch.1 provides that IMMI18/007 continues to apply to invitations issued and applications made from 17 January 2018 to 17 March 2018.
[22] Sections 8(1) and 9(1) of IMMI 18/007; ss 7(1) and 8(1) of IMMI 17/072
[23] Section 7(1) of IMMI 18/007; s 6(1) of IMMI 17/072.
[24] Items 1, 2 and 3 of the table in s 7(1) of IMMI 18/007; Items 1, 2 and 3 of the table in s 6(1) of IMMI 17/072.
[25] Item 3 of the table in s 7(1) of IMMI 18/007; Item 3 of the table in s 6(1) of IMMI 17/072.
[26] s 8(2) of IMMI 18/007; s 7(2) of IMMI 17/072.
[27] s 9(2) of IMMI 18/007; s 8(2) of IMMI 17/072.
[28] IMMI 16/059 was repealed by IMMI 17/081 in respect of persons to whom IMMI 17/072 applies (i.e. visa applicants/invitees from 1 July 2017 to 16 January 2018), so it continues to remain in force for earlier applications/invitations: Item 2(1)(c) Part 2 of sch 1 to IMMI 17/081.
[29] A compilation incorporating these amendments (and earlier amendments made by IMMI 16/118 which didn't affect the occupation lists) is available as 'IMMI 16/059 (Compilation No.2)'. The amendments made by IMMI 17/040 only applied to invitations and applications after IMMI 17/040 commenced on 19 April 2017 – see sch 3 to IMMI 16/059, inserted by Item 4 of sch 1 to IMMI 17/040, and Explanatory Statement to IMMI 17/040 at [7]-[10].
[30] Explanatory Statement to IMMI 17/040 at [3]-[4].
[31] Items 3-5 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.

marked ‘see note 25’ are restricted to applications for subclass 189, subclass 485, and non-government-nominated subclass 489 visas.[32]

The STSOL is only available to government nominated subclass 190/489 visa invitees and their partners. Occupations marked ‘see note 26’ are restricted to applications for government nominated subclass 489 visas.[33]

Applications / invitations from 1 July 2016 to 18 April 2017

The SOL and CSOL appeared in Schedule 1 and Schedule 2 to the instrument as in force at this time.[34] These applied in the same way as the renamed MLTSSL and STSOL except that they did not contain the ‘note 25’ and ‘note 26’ restrictions.

Earlier current instruments

These instruments are all structured in the same way as the original IMMI 16/059 (i.e. with the SOL and CSOL in Schedule 1 and Schedule 2). The differences generally relate to the types of visas covered and the number of occupations specified. In addition to Subclass 189, 190 or 489 applicants and their spouse or de facto partners, IMMI 13/065 and IMMI 13/064 also applied to the now repealed Subclass 487, 885 and 886 visas.[35] Instruments from IMMI 15/091 onwards make explicit the relationship between applicants and their spouses for the purpose of claiming points under Schedule 6D, part 6D.11, for Subclass 189, 190 and 489 visa applications.

Nominating a skilled occupation

With limited exceptions,[36] it is a Schedule 1 requirement for making a valid skilled visa application that an applicant has *nominated* a skilled occupation in the visa application form.[37]

In relation to applications for Subclasses 189, 190 and 489, there is an additional requirement that the skilled occupation nominated by the applicant must be the skilled occupation that was specified in the Minister’s invitation to apply for the visa.[38] Whether an applicant has nominated a skilled occupation, and what occupation has been nominated are findings of fact. There is no definition in the Regulations for the word ‘nominate’ and it is generally taken to refer to the occupation that the applicant has set out in the visa application form in response to the question ‘What is your nominated occupation?’. In making a determination as to what occupation has been nominated, it is necessary to have sufficient evidence (either the description of the occupation or the ANZSCO code) to identify a ‘skilled occupation’ as listed in the relevant instrument. Where the description and code don’t match each other, a finding must be made as to what occupation was actually nominated.

[32] Item 10 and note 25 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.
[33] Item 10 and note 26 of IMMI 16/059 as amended by IMMI 16/118 and IMMI 17/040.
[34] IMMI 16/059 (as originally made and as amended by IMMI 16/118, which did not affect these lists), before amendment by IMMI 17/040 (see above).
[35] Generally, SOL applies to subclass 885 or 886 applicants and CSOL applies to subclass 487 or 886 applicants (who were nominated by a State or Territory government agency) and their spouse or partner.
[36] E.g. where the applicant already holds a relevant temporary skilled visa: see e.g. item 1230(5).
[37] Items 1135(3)(c); 1136(4)(b)(ii), (5)(b)(ii), (6)(b)(iii); 1137(4) table item 4; 1138(4) table item 4; 1230(4) table item 4 First Provisional visa stream; 1228(3)(b)(ii); and for visa applications made before 23 March 2013 items 1229(4)(b)(ii), (5)(b)(ii), (6)(b)(iii), (7)(b)(ii), or for visa applications made on or after 23 March 2013 items 1229(3)(k), (5)(b)(ii), (6)(b)(iii) and (7)(b)(ii) (as substituted by SLI 2013, No.33.
[38] Items 1137(4) table item 4(b), 1138(4) table item 4(b) and 1230(4) table item 4(b) of sch 1, inserted by SLI 2012, No.82.

Can an applicant change his or her nominated skilled occupation?

Under the GSM scheme, an applicant is not permitted to change his/her nominated skilled occupation during the processing of the visa application.[39]

For subclass 189, 190 and 489 applicants who have made a mistake in their nominated occupation, it appears that they cannot correct that mistake. This is because the requirements for making a valid visa application for these visas include that the nominated skilled occupation is the one that is specified in the invitation to apply for the visa, and the visa criteria and Schedule 6D points test qualifications which refer to skilled occupation expressly relate to the time of invitation to apply for the visa, leaving no scope for 'correcting' the nominated skilled occupation.[40]

For other GSM visas, there is no clear answer as to whether an applicant can *correct a mistake* in the nominated occupation.[41] There are several cases in which applicants have alleged they had mistakenly nominated the wrong occupation, however in each of these cases, the Tribunal rejected at a factual level the assertion that the nominated occupation was incorrect.[42]

Obiter comments in *Chen v MIAC* suggest that where an applicant makes a mistake of this kind, the only option is to make another application.[43] On the other hand, the decisions in *Patel v MIAC*, *Shafiuzzaman v MIAC* and *Pavuluri v MIBP* leave open the possibility that it may be possible to correct an incorrect answer of this kind, for example under s.105 of the *Migration Act 1958* (the Act).[44]

For example, in *Pavuluri* the Tribunal expressed the view that, in principle, there may be circumstances in which it could find the nominated occupation on the visa application form to be something other than what was stated, if there was evidence to support a different characterisation of the nominated occupation at the time of the visa application, but found that this was not such a case.[45] While the Court did not reach a concluded view, it appears to have tentatively accepted the Tribunal's opinion, i.e. that it may be able to examine other evidence or material to clarify or explain precisely which occupation an applicant intended to specify.[46]

[39] *Patel v MIAC* (2011) 198 FCR 62 at [53] – [61], and *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [9] and [35] agreeing with what Robertson J said in *Patel*. In *Akbar v MIBP* [2019] FCA 515 (Collier J, 16 April 2019) the applicant sought to argue that the Court wasn't bound by the judgments in *Patel* and *Pavuluri*, but the Court did not think they were wrong and followed them.

[40] Items 1137(4) table item 4; 1138(4) table item 4; 1230(4) table item 4 First Provisional visa stream of Sch 1. Sub-cls 189.212(1), 190.212(1) and 489.222(1) of Sch 2; Sch 6D Parts 6D.3, 6D.4, 6D.6, 6D.7 and 6D.11.

[41] E.g. Subclass 485, 487, 885 and 886 visas.

[42] E.g. *Patel v MIAC* [2011] FMCA 399 (Nicholls FM, 1 June 2011) upheld on appeal in *Patel v MIAC* (2011) 198 FCR 62; *Chen v MIAC* [2011] FMCA 859 (Lloyd-Jones FM, 8 November 2011); *Shafiuzzaman v MIAC* [2011] FMCA 874 (Nicholls FM, 15 November 2011); *KC v MIAC* [2013] FCCA 296 (Cameron J, 17 May 2013); and *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014). In *Hemlata v MIBP* [2014] FCCA 968 (Judge Turner, 29 May 2014) it is not apparent whether the Tribunal had rejected the contention at a factual level; in any case it took the view that it was not possible for the applicant to correct or alter his nominated skilled occupation, or to change his nominated occupation during the processing of the application, and this was held to accord with *Patel* and *Chen*.

[43] [2011] FMCA 859 (Lloyd-Jones FM, 8 November 2011) at [58].

[44] [2011] FMCA 399 (Nicholls FM, 1 June 2011), upheld on appeal: *Patel v MIAC* (2011) 198 FCR 62; [2011] FMCA 874 (Nicholls FM, 15 November 2011); [2014] FCA 502 (Mortimer J, 16 May 2014). For detailed consideration of the applicability of ss.104-105 of the Act in this context, see *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [41]-[49]. Mortimer J's reasoning in *Pavuluri* regarding ss.104-105 of the Act was adopted in *Akbar v MIBP* [2019] FCA 515 (Collier J, 16 April 2019) at [57]-[58].

[45] *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [21]. In that case the appellant had explained that he had been ill-advised as to the appropriate occupation to nominate for his degree and, relying on s 105, asked the Tribunal to allow him to correct his occupation (from 'finance manager' to 'market research analyst') as he had made a mistake. The Tribunal found that the evidence did not support a finding that he had intended to nominate an occupation other than 'finance manager' and had made a 'mistake'. It found that his only 'mistake' was that, having recorded in his application the occupation he intended to specify, he subsequently discovered he had been ill-advised. The Court observed that while in colloquial terms that was a mistake, it was not a mistake in the sense of specifying on the visa application an occupation the appellant did not intend to specify, or a mistake of the kind capable of correction under s.105.

[46] *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [33].

Thus, while not free from doubt, it may be possible to find, as a matter of fact, that the occupation specified in the application form is not (*and was not*) the nominated occupation. However having regard to the concept of nominating an occupation as a requirement of a valid visa application, and the terms of the application form ('What is your nominated occupation?') the circumstances in which this may be open would appear to be narrowly confined. In considering this question, the applicant's explanation for the mistake would be relevant. Other relevant factors may include the match (or mismatch) between the occupations in question and the applicant's qualifications and experience, the skills assessment sought, and the relevant assessing authority specified on the application form.[47] It may not necessarily be enough that the applicant 'made a mistake' as a result of incorrect advice or lack of legal advice when completing the form.[48] However a finding that the mistake was in the nature of a clerical error may support a conclusion that the nominated occupation was other than as specified in the application form.[49]

The skills assessment

For many skilled visas, the applicant's skills must also have been *assessed as suitable* for the nominated skilled occupation. For certain Subclass 487, 885 and 886 applications and Subclass 189, 190 and 489 applications, this is a requirement for making a valid application under Schedule 1; for others it's a criterion for the grant of the visa under Schedule 2. Where it is a Schedule 2 criterion, there is an additional requirement that if the skills assessment was based on qualifications obtained in Australia while the applicant held a student visa, the qualification must have been obtained as a result of studying a registered course.

As a visa application requirement (Schedule 1)

For Subclass 189, 190 and 489 visa applications (other than applications in the 'Second Provisional visa' stream of Subclass 489) the applicant must *declare* in the application that the applicant's skills have been assessed as suitable by the relevant assessing authority.[50] For applications made on or after 28 October 2013 where the invitation to apply was given on or after that date, the declaration must include that this assessment was not for a Subclass 485 (Temporary Graduate) visa.[51] Because all that is required at this point is a declaration, any question as to existence or validity of the relevant skills assessment will not affect the validity of the visa application; however, it will affect the Schedule 2 visa criteria (discussed below), which require that the relevant assessing authority *had assessed* the skills as suitable for the nominated skilled occupation at the time of invitation to apply for the visa.[52]

For Subclass 487, 885 and 886 visa applications made on or after 1 January 2010, there are two alternative skills assessment requirements for making a valid visa application. Either:

- for applicants who did *not* nominate a skilled occupation specified by the Minister for these purposes, the applicant's skills must have been assessed as suitable by the relevant assessing authority, or

[47] In *obiter* comments the Court in *KC v MIAC* [2013] FCCA 296 (Cameron J, 17 May 2013) at [17] noted that a finding a mistake had been made was open to the Tribunal given an application for a skills assessment in respect of the 'correct' occupation had been made shortly prior to the lodgement of the visa application.
[48] E.g. *Chen v MIAC* [2011] FMCA 859 (Lloyd-Jones FM, 8 November 2011) and *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014).
[49] See the example provided in *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014) at [49], of a wrong skills assessment receipt number or reference number entered because of a typographical error.
[50] Items 1137(4) table item 4(c), 1138(4) table item 4(c) and 1230(4) table item 4(c) inserted by SLI 2012 No.82.
[51] Items 1137(4) table item (4)(c), 1138(4) table item (4)(c) and 1230(4) table item (4)(c) as substituted by Migration Amendment (Skills Assessment) Regulation 2013 (SLI 2013, No.233).
[52] Sub-cls 189.212(1), 190.212(1) and 489.222(1).

- for applicants whose nominated skilled occupation *is* specified by the Minister for these purposes, the applicant's skills must have been assessed by the relevant assessing authority on or after 1 January 2010 as suitable for that occupation.[53]

The relevant instrument can be located in the Register of Instruments: Skilled visas on the 'SOL-SSL'tab .

As a visa criterion (Schedule 2)

Apart from the cases discussed above (Subclass 487, 885 and 886 applications made on or after 1 January 2010, and Subclass 189, 190 and 489 applications), the skills assessment requirement is contained in Schedule 2, either as a time of application (or invitation) or a time of decision requirement. Where it is a 'time of decision' criterion, there is an associated requirement that the applicant must have applied for a skills assessment at the time of application. There are thus two kinds of Schedule 2 criteria relating to 'skilled occupation': those relating to the skills assessment application, and those relating to the assessment itself.

Application for a skills assessment

For Subclass 485 applications made on or after 23 March 2013, the application, when made, must have been *accompanied by evidence* that the applicant had applied for an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority.[54]

For Subclasses 485 visa applications made before 23 March 2013, Subclass 487 applications made at any time, and Subclass 885 and 886 visa applications made before 1 January 2010, it is a time of application criterion that the Minister is satisfied that the applicant has *applied for* an assessment of the applicant's skills for the nominated skilled occupation by a relevant assessing authority.[55] As this must be satisfied at the time of application, it cannot be met by a skills assessment application made after the date of application.[56]

Whether or not the applicant has applied for an assessment of his/her skills by a relevant assessing authority, or whether the visa application was accompanied by evidence of an assessment application, is a finding of fact. The relevant assessing authority for a given skilled occupation is listed in the same instrument as that specifying the skilled occupations: see the 'SOL-SSL' tab in the

[53] The requirement applies if the applicant is not seeking to satisfy the criteria for the grant of a Subclass 485 or 887 visa respectively, see items 1229(3)(aa), (ab) and 1136(3)(ba), (bb) as inserted by Migration Amendment Regulations 2009 (No.15) (SLI 2009, No.375); or for visa applications made on or after 23 March 2013 item 1229(3)(d) and (e) as inserted by SLI 2013, No.33; and 1136(3)(ba) and (bb) as inserted by SLI 2009, No.375. 'Relevant assessing authority' is defined in r 1.03 as a person or body specified under r 2.26B. For further information see Relevant assessing authority in this commentary.

[54] Clause 485.223 as inserted by SLI 2013, No.33. This criterion applies only to the Graduate Work stream. Although Part 485 is no longer structured as time of application and time of decision criteria the terms of the criterion are such that it must be satisfied at the time of application. For visa applications made on or after 1 July 2014 this requirement is arguably superfluous, as the assessment itself must also have been obtained at the time of application.

[55] Clause 485.214 as in force before 23 March 2013; cl 487.214; and for visa applications made prior to 1 January 2010, cll 885.212 and 886.212. Departmental guidelines for these provisions state that the applicant does not have to have applied to the assessing authority that is the relevant assessing authority for their nominated skilled occupation – it can be any relevant assessing authority (see e.g. Procedural Instruction – Migration Regulations – Schedules – Sch2 Visa 485-Skilled-Graduate – Skills Assessment at [8.1]: 15/02/2013 – 22/03/2013). However, having regard to r 2.26B which provides that an assessing authority is specified for a skilled occupation and the instrument itself which lists the relevant body against each occupation, it would not appear to be sufficient for an applicant to have applied for an assessment of their skills by a 'relevant assessing authority' that was not specified for their nominated skilled occupation

[56] *Patel v MIAC* (2011) 198 FCR 62. In considering cl 485.214 (as in force before 23 March 2013), Robertson J distinguished *Berenguel v MIAC* [2010] HCA 8 (French CJ, Gummow and Crennan JJ, 5 March 2010) and held that an application for the assessment was required to be made at the time of application. The Court did not expressly refer to the contrary view in the *obiter* comments in *Rai v MIAC* [2010] FMCA 472 (Cameron FM, 1 July 2010), where the Federal Magistrates Court applied *Berenguel* and observed that cll 485.214 and 487.214 could be satisfied anytime up until the decision on the application. An application for extension of time to appeal from *Rai* was dismissed, with the Court declining to comment on the correctness of the Federal Magistrate's conclusion that the Tribunal had erred in its application of *Berenguel*: *Rai v MIAC* [2010] FCA 1289 (Moore J, 2 December 2010) at [13].

Register of Instruments – Skilled visas.

Skills assessment

For Subclass 175, 176, 189, 190, 475, 485, 487, 489, 885 and 886 applications, the skills assessment criterion contained in Schedule 2 to the Regulations must be satisfied at either -

- time of invitation to apply (Subclasses 189, 190 and 489);[57]
- time of application (Subclasses 175, 176 and 475);[58] or
- time of decision (Subclasses 485,[59] 487, 885 and 886).[60]

The skills assessment criterion contains several elements:[61]

- the applicant's skills must have been assessed by the relevant assessing authority as suitable for the nominated skilled occupation; and
- *for Subclass 189, 190 and 489 visa applications made on or after 28 October 2013*, the assessment must not have been for a Subclass 485 (Temporary Graduate) visa;[62] and
- *for Subclass 189, 190, 485 and 489 visa applications made on or after 1 July 2014*, the skills assessment must be current and cannot be more than 3 years old at the relevant time. This is intended to ensure that applicants are not able to meet skills criteria by providing old assessments that may not meet current standards.[63] The requirement varies for the different subclasses, in the way it is expressed and the time it must be satisfied:
    - *for Subclass 189, 190 and 489* – **at the time of invitation to apply**, if the assessment specifies a period of validity of less than 3 years after the date of assessment then that period must not have ended, otherwise, not more than 3 years must have passed since the date of assessment;[64]
    - *for Subclass 485* – **at the time of decision**, the applicant's skills for the nominated skilled occupation must have been assessed during the last 3 years by a relevant

[57] Clauses 189.212, 190.212 and 489.222.
[58] Clauses 175.212(1), 176.212(1), 475.212(1).
[59] Clause 485.221 for visa applications made before 23 March 2013; cl 485.224(1) (as inserted by SLI 2013, No.33) for visa applications made between 23 March 2013 and 30 June 2014; cl 485.224(1) and (1A) as substituted by Migration Amendment (Temporary Graduate Visas) Regulation 2014 (SLI 2014 No.145) for visa applications made on or after 1 July 2014). For visa applications made on or after 23 March 2013, this criterion applies only to the Graduate Work stream. Sub-clause 485.224(1) was initially amended on 1 July 2014 for visa applications made on or after that date: Migration Legislation Amendment (2014 Measures No.1) Regulation 2014 (SLI 2014, No.82); this had the unintended effect of requiring the skills assessment criterion to be satisfied at the time of application, and was amended on 2 October 2014, applicable to visa applications made on or after 1 July 2014: SLI 2014, No.145.
[60] Clauses 487.223, 885.222 and 886.223. As explained above, where the skills assessment criterion is to be satisfied at time of decision, there is an associated time of application criterion effectively requiring the applicant to have *applied for* a skills assessment at that time.
[61] Clauses 175.212(1), 176.212(1), 189.212, 190.212 and 475.212(1); cl 485.224(1) (as inserted by SLI 2013 No.33 and as substituted by SLI 2014, No.82 for visa applications made on or after 1 July 2014) or cl 485.221 for visa applications made before 23 March 2013; and cll 487.223, 489.222, 885.222 and 886.223. For Subclass 485 visa applications made on or after 23 March 2013, this criterion applies only to the Graduate Work stream. Sub-cl 485.224(1) was initially amended on 1 July 2014 for visa applications made on or after that date (SLI 2014, No 82); this had the unintended consequence of requiring the skills assessment criterion to be satisfied at the time of application, and was amended on 2 October 2014, with new cl 485.224(1) and (1A), applicable to visa applications made on or after 1 July 2014: SLI 2014, No.145.
[62] Clauses.189.212(1), 190.212(1) and 489.222(1) as substituted by SLI 2013 No.233.
[63] Explanatory Statement to SLI 2014, No.82.
[64] Clauses 189.212(1)(c) and (d), 190.212(1)(c) and (d), 485.224(1)(b) and (c) and 489.222(1)(c) and (d) as inserted by SLI 2014, No.82, applicable to visa applications made on or after 1 July 2014.

assessing authority as suitable for that occupation; and if the assessment is expressed to be valid for a particular period, that period must not have ended;[65] and

- if the applicant's assessment was based on qualifications obtained in Australia while the holder of a student visa, the qualification must have been obtained as a result of studying a registered course.

The skills assessment criterion

The issues that arise in assessing the skills assessment criterion include whether there is a suitable skills assessment; whether it was based on a qualification obtained in Australia while the applicant held a student visa, and if so whether the qualification was obtained by studying a registered course; the evidence required; and whether an applicant can rely on a further skills assessment.

Suitable skills assessment

An applicant will satisfy the requirement to have a suitable assessment where there is evidence of an assessment from a relevant assessing authority stating the applicant's skills have been assessed as suitable for the nominated occupation.

In considering whether an assessment has been provided by a relevant assessing authority, the decision maker should consider whether the person or body who has made the assessment is the assessing body specified in the skilled occupation instrument. In some instances there may be more than one relevant assessing authority and/or a different assessing body depending on the country identified in the instrument.

In some cases there are restrictions on what skills assessments can be relied on: as mentioned above, for Subclass 189, 190 and 489 visa applications made on or after 28 October 2013 where the invitation to apply was given on or after that date, this skills assessment must not have been one for a Subclass 485 (Temporary Graduate) visa.[66] Thus, for these applications, a skills assessment given by the relevant assessing authority for the purposes of a Subclass 485 visa will not satisfy the suitable skills assessment requirements. In addition, for visa applications made on or after 1 July 2014 for these subclasses and for Subclass 485, the assessment must be no more than 3 years old, and current, at the relevant time, that is, for Subclasses 189, 190 and 489 the time of invitation to apply, for Subclass 485, the time of decision.

Where an applicant has provided a suitable skills assessment, but the relevant assessing authority subsequently revokes or withdraws the assessment, that assessment cannot be relied upon to satisfy the requirement that the skills have been assessed by the relevant assessing authority as suitable. This is because it cannot be said that the authority 'has assessed' the applicant's skills at the relevant time, when at that time a previously favourable assessment had been withdrawn.[67]

There may be some doubt as to whether this criterion can be met where the *application* for a skills assessment was required to be made at the time of application (see above) but was not made until

[65] Clause 485.224(1) as amended and (1A) as inserted by SLI 2014, No.145, applicable to visa applications made on or after 1 July 2013. This amendment was intended to correct an unintended consequence of amendments made by SLI 2014, No.82 which had the effect of changing this requirement from a time of decision criterion to a time of application criterion. The purpose of the amendment was to ensure that an applicant can be assessed as having suitable skills at the time of decision: Explanatory Statement to SLI 2014, No.82.

[66] Clauses.189.212(1), 190.212(1) and 489.222(1) as substituted by SLI 2013 No.233. Under r 2.26B(3), as inserted by SLI2013, No.233, a relevant assessing authority may set different standards for assessing a skilled occupation for different visa classes or subclasses.

[67] *Singh v MIBP* (2015) 233 FCR 34 at [40]. The Court also confirmed at [39] that it is inherent in the regulatory scheme that the relevant assessing authority has the capacity to withdraw or revoke a favourable skills assessment when it forms the view that that positive assessment should not stand.

after that time, in that the definite article in 'the relevant assessing authority' in the time of decision criterion could be construed as a reference back to the assessing authority referred to in the time of application criterion. In any event, if the time of application criterion is not satisfied, it will not be necessary to consider whether the related time of decision criterion could be satisfied.

Based on a qualification obtained in Australia

The second part of the skills assessment criterion is that if the assessment was based on a qualification obtained in Australia while the applicant was the holder of a student visa, that qualification was obtained as a result of studying a registered course.[68] This requirement only applies where the applicant's skills assessment was based on:

- a qualification obtained in Australia;
- while the applicant was the holder of a student visa.

It is usually evident on the face of the assessment whether or not the assessment was based on a qualification obtained in Australia. It may be necessary to seek confirmation from the assessing authority where this is not clear in order to determine whether it is necessary to consider if the qualification was obtained as a result of studying a registered course.

It appears that cl.485.221(2) does not apply to applicants who did not hold a student visa at all while undertaking the relevant course. Where the applicant did hold a student visa at some point during the relevant study, it is unclear at what point the applicant must have held the visa for cl.485.221(2) to apply. In the absence of judicial consideration of this provision, three interpretations of the expression 'a qualification obtained in Australia while the applicant was the holder of a student visa' appear to be available:

- the applicant must have held a student visa *when the qualification was obtained*; or
- the applicant must have held a student visa *at the time of completion of the relevant course*; or
- the applicant must have held a student visa *throughout the course and until the course was completed*.

The above problem of interpretation will only need to be addressed if the applicant held a student visa at some point while studying the relevant course which led to the qualification and the course was *not* a registered course.

Evidence of a suitable skills assessment

Assessing the evidence of a skills assessment involves different considerations depending on whether the skills assessment criterion is to be satisfied at the time of decision, time of application, or time of invitation to apply for the visa.

At time of decision

Where having a suitable skills assessment is a time of decision criterion, it is clear that evidence of the assessment can be given any time until the Tribunal's decision is made.[69] Additionally, whilst the

[68] 'Registered course' is defined in r 1.03 as meaning a course of education or training provided by an institution, body or person that is registered, under Division 3 of Part 2 (or, for visa applications made prior to 23 March 2013, s 9) of the ESOS Act, to provide the course to overseas students. The definition was amended with effect from 23 March 2013 to refer to Division 3 of Part 2 (instead of s 9), reflecting changes made to that Act (SLI 2013 No.33).

[69] Subclasses 485, 487, 885 and 886. See cl 485.224 (as inserted by SLI 2013 No.33) or cl 485.221 for visa applications made before 23 March 2013, cll 487.223, 885.222, 886.223. For Subclass 485 visa applications made on or after 23 March 2013 the

criteria suggest a continuous process (i.e. the making of an application for an assessment at time of application followed by obtaining a suitable skills assessment at time of decision), on the face of the legislation there does not appear to be any requirement that the assessment obtained be the direct result of the same assessment application made to the relevant assessing authority at time of the visa application.

At time of application

Where having a suitable skills assessment is a time of application criterion, it appears that the applicant must have been assessed at the time the visa application was made although the criterion could be met by evidence of that assessment provided after that time.[70]

There is a question as to whether the approach taken in *Berenguel v MIAC* would apply so that the criterion could be met by an assessment made after the time of application.[71] There is nothing in the terms of the criterion itself linking to the time of visa application, nor is there any related time of decision criterion which indicates a clear progression from the time of application. However, *Berenguel* has not been applied in this context, and the skills assessment requirement as a 'time of application' criterion may be distinguishable from the English language criterion considered in *Berenguel* on the basis of the context in which the visa is sought. The requirement for a suitable skills assessment is a time of application criterion only in relation to offshore applicants. The intention appears to be that an offshore applicant must have the relevant skills when making the application for the visa (which is evidenced by the suitable skills assessment), whereas onshore applicants are given further time to obtain the assessment up until a decision is made.

At time of invitation to apply

Where the criteria require the applicant to have a suitable skills assessment at the time of the invitation to apply for the visa (Subclasses 189, 190 and 489), the relevant skills assessment must exist at the time of invitation.[72] The applicant need not have *supplied* the actual assessment at the time of visa application, as the requirements for making a valid visa application require only a declaration that their skills have been assessed as suitable by the relevant assessing authority.[73] However, they must supply evidence by the time of decision that the relevant skills assessment existed at the time of invitation to apply for the visa.

<u>Can an applicant rely on a further skills assessment?</u>

For onshore visa applications, Subclasses 485 and 487 visa applications, and Subclass 885 and 886 visa applications made prior to 1 January 2010 where a suitable skills assessment is required, there are two relevant criteria relating to the skills assessment. The time of application criterion requires that the applicant has applied for a skills assessment 'by a relevant assessing authority'.[74] The time of decision criterion requires that the applicant's skills 'have been assessed by the relevant assessing

criteria are not divided into time of application and time of decision but the structure of Part 485 and the terms of the skills assessment criterion in cl 485.224 are such that the criterion is to be satisfied at the time of decision. This criterion applies only to the Graduate Work stream.

[70] Subclasses 175, 176 and 475. See cll 175.212, 176.212, 475.212.

[71] *Berenguel v MIAC* [2010] HCA 8 (French CJ, Gummow and Crennan JJ, 5 March 2010). The High Court held that cl 885.213, a 'time of application' English language criterion, could be satisfied by a language test taken after the date of application.

[72] Clauses 189.212, 190.212, 489.222.

[73] Items 1137(4) table item 4(c); 1138(4) table item 4(c) and 1230(4) table item 4(c) First Provisional visa stream of Sch 1 to the Regulations.

[74] Clauses 485.223 as inserted by SLI 2013, No.33 or cl 485.214 for visa applications made before 23 March 2013; cl 487.214; and for visa applications made prior to 1 January 2010, cll 885.212 and 886.212. For Subclass 485 visa applications made on or after 23 March 2013 the criterion requires that '[w]hen the application was made, it was accompanied by evidence that the applicant had applied for' the assessment. Although Part 485 criteria are no longer divided into time of application and time of decision, the terms of the criterion are such that it must be satisfied at the time of application. This criterion applies only to the Graduate Work stream

authority as suitable for that occupation'.[75] The use of the definite article 'the' before 'relevant assessing authority' in the time of decision criterion appears to suggest a reference back to the same assessing body as the one for which an application for an assessment was made at the time of application. On that view, the assessment would need to be by that assessing authority.

For offshore visa applications where a suitable skills assessment is required, the requirement to have a suitable skills assessment appears under the heading 'Criteria to be satisfied at time of application'. For the reasons given above, an applicant would not meet the requirement of having their skills assessed by the relevant assessing authority if the assessment was made after the visa application date. Thus any later suitable assessment whether by the same assessing body or a different assessing body would not meet this requirement.

Australian study requirement

The 'Australian study requirement', defined in r.1.15F of the Regulations, is relevant to a number of skilled visa subclasses for visa applications from 15 May 2009. Applicants for Subclass 485 visas must satisfy the requirement in the 6 months before the visa application was made and each degree, diploma or trade qualification used to satisfy the study requirement must be 'closely related' to the nominated skilled occupation. Certain applicants for Subclass 487, 885 and 886 visas must also satisfy the study requirement.[76] The requirement is also relevant to certain qualifications in the points test.[77] For Subclass 175, 176 and 475, the study requirement is an alternative to having work experience for a specified period before making the visa application.[78]

'Australian study requirement' is defined in r 1.15F.[79] A person meets the 'Australian study requirement' if they have completed one or more degrees, diplomas or trade qualifications for award by an Australian educational institution as a result of a course or courses:[80]

- that are 'registered courses' (as defined in r.1.03): r.1.15F(1)(a);
- that were completed in a total of at least 16 calendar months: r.1.15F(1)(b);
- that were completed as a result of at least 2 academic years study: r.1.15F(1)(c);[81]
- for which all instruction was conducted in English: r.1.15F(1)(d); and
- that the applicant undertook while in Australia as the holder of a visa authorising the applicant to study: r.1.15F(1)(e).

[75] Clauses 485.224 as inserted by SLI 2013, No.33 or cl 485.221 for visa applications made before 23 March 2013; and cll 487.223(1), 885.222(1) and 886.223(1). For Subclass 485 visa applications made on or after 23 March 2013 the criteria are not divided into time of application and time of decision but the structure of Part 485 and the terms of the skills assessment criterion in cl 485.224 are such that the criterion is to be satisfied at the time of decision. This criterion applies only to the Graduate Work stream.
[76] Clauses 487.212(2), 487.212(3); cll 885.211(2), 885.211(3); cll 886.211(2), 886.211(3).
[77] For discussion of the points system, see the MRD Legal Services Commentaries: Skilled Visas – Overview, General Points Test (Schedule 6C) and General Points Test Schedule 6D.
[78] Clauses 175.211, 176.211, 475.211.
[79] Reg 1.03 as amended by SLI 2009, No.84.
[80] 'Degree', 'diploma' and 'trade qualification' is defined in r 2.26AC(6) for visa applications made on or after 1 July 2012 following the omission of r 2.26A by SLI 2012, No.82. 'Completed' is defined in r 1.15F(2) as, in relation to a degree, diploma or trade qualification, having met the academic requirements for its award.
[81] The term 'academic year' is defined in r.1.03 to mean a period that is specified by the Minister as an academic year in an instrument in writing. Inserted by SLI 2009, No.84, the definition applies to visa applications made on or after 15 May 2009. The relevant instrument in writing can be located on the 'AcadYear' tab of the Register of Instruments: Skilled visas.

The elements of r.1.15F raise a number of issues that require consideration: the meaning of its terms - 'degree', 'diploma', 'trade qualification', 'completed', 'as a result of a course or courses', and 'registered course' - the timeframes for course completion; and finally, how an applicant can satisfy the requirement that they hold a visa authorising study.

Degree, diploma and trade qualification

The terms 'degree', 'diploma' and 'trade qualification for the purposes of the 'Australian study requirement' are defined in r.2.26AC(6) for visa applications made on or after 1 July 2012.[82] The main points of those definitions are:

- *'Degree'* - a formal educational qualification under the Australia Qualifications Framework (AQF), awarded by an Australian educational institution as a degree or postgraduate diploma for which the entry level to the course leading to the qualification is as specified; and, in the case of a bachelor's degree, not less than 3 years full-time study, or equivalent part-time study is required;

- *'Diploma'* - a diploma or an advanced diploma under the AQF awarded by a body authorised to award diplomas of those kinds; or an associate diploma or diploma within the meaning of the Register of Australian Tertiary Education (as current on 1 July 1999), awarded by a body authorised to award such diplomas.

- *'trade qualification'* – an Australian trade qualification obtained as a result of completion of an indentured apprenticeship, or a training contract or a qualification under the AQF of at least Major Group 3 in ANZSCO.[83]

The links to the AQF in r.2.26AC(6) do not import the entirety of the AQF into the Regulations.[84] For example, there are references to '*graduate certificate*' and '*associate degree*' in the AQF but not in the definitions of 'degree' or 'diploma' in the Regulations, and the precise content of those definitions leaves little room for judgment or discretion in this regard.

It has been held that a '*graduate certificate*' is not a 'degree', 'postgraduate diploma' or 'diploma' as defined in the Regulations.[85] In *Bhatt v MIAC*, Nicholls FM rejected the applicant's argument to the effect that a graduate certificate should be regarded as a postgraduate qualification embraced within the term 'postgraduate diploma', because 'the Regulations make no reference to it and make no provision for its incorporation into those terms as defined in the Regulations'.[86] In dismissing an appeal, Buchanan J observed that the relevant qualifications are 'explicitly and comprehensively stated by regulation' and '[l]ittle room is left by those who draft such regulations for the application of

[82] Reg 1.15F(2). Regulation 2.26A omitted and r 2.26AC inserted by SLI 2012 No.82. Sub-reg 2.26A(6) provided the same definition of these terms for the purpose of the '2 year study requirement'.
[83] The definition of 'trade qualification' was substituted by item [10] of Schedule 1 of SLI 2010, No,133. This definition applies to visa applications made before 1 July 2012 (see SLI 2012 No.82 for applications made on or after that date). To the extent the judgment in *Brar v MIBP* [2016] FCCA 951 (Judge Reithmuller, 23 March 2016) suggests otherwise, it should be treated with caution.
[84] *Bhatt v MIAC* [2012] FMCA 317 (Nicholls FM, 24 April 2012) at [50], upheld on appeal: *Bhatt v MIAC* [2012] FCA 918 (Buchanan J, 28 August 2012). This case concerned r 2.26A(6) but the reasoning would apply equally to r 2.26AC(6).
[85] The Department has taken the view that a graduate diploma does not meet the definition of 'degree' in r 2.26AC(6) as it is not the same qualification as a postgraduate diploma. This view appears to be based on an erroneous understanding of the Court's reasoning about graduate certificates in *Bhatt* and is also not supported by the wording in r 2.26AC(6). The Court in *Bhatt* appeared to use the terms 'graduate diploma' and 'postgraduate diploma' interchangeably at [15]-[16] and [19], further the Australian Qualifications Framework uses the term 'graduate diploma' in place of 'postgraduate diploma'. These would support the view that 'graduate diploma' and 'postgraduate diploma' are the same qualification. See AAT decision in 1705511, where the Tribunal found that a graduate diploma is a degree for the purpose of r 2.26AC(6).
[86] [2012] FMCA 317 (Nicholls FM, 24 April 2012) at [51], upheld on appeal in *Bhatt v MIAC* [2012] FCA 918 (Buchanan J, 28 August 2012). Buchanan J held that graduate certificates are not in name, recognition or significance the same qualification as

judgment or discretion'.[87] His Honour rejected the proposition that a graduate certificate either fell within the natural meaning of 'postgraduate diploma', or alternatively that its absence from the definitions was the result of inadvertence and having regard to the broader statutory purpose the regulations could be legitimately construed in the manner contended for. His Honour considered that the two qualifications are not generally regarded as the same. With respect to the alternative argument, he held that there was no basis to conclude that omission of a reference to graduate certificates was inadvertent, that no intent of the kind urged was discernible, and that the suggested construction required the rewriting of the stated conditions to create a new entitlement.

It has also been argued that an '*associate degree*' meets the requirements of r.1.15F because associate degrees are essentially the same as diplomas as both are included in the AQF at the same level and have the same entry requirements and study outcomes.[88] The Department's Policy Instruction provides that in some circumstances, an associate degree that has been suitably awarded does not meet the definition of 'diploma' as defined in r.2.26AC(6)(b), however the policy instruction does not elaborate on what is meant by 'in some circumstances'.[89] Overall, having regard to the reasoning in *Bhatt* both at first instance and on appeal, and the clear language of the Regulations, it does not appear that an 'associate degree' can be regarded as either a 'degree' or a 'diploma' under these definitions.[90]

This does not necessarily mean that an applicant who has been awarded a qualification such as a graduate certificate or an associate degree could not meet one of those definitions. Depending on the facts of the particular case, further evidence from the education provider could support a finding that an applicant who has relied on such a qualification meets the r.2.26AC(6) definition of 'degree' or 'diploma' even if that qualification is not mentioned in those definitions.[91]

The definition of 'trade qualification' is not limited in the same way as the definitions of 'degree' and 'diploma' and is wide enough to include a qualification such as an associate degree, depending on the circumstances. For example, an associate degree may be a qualification under the AQF, of at least the Certificate III level for a skilled occupation in ANZSCO Major Group 3, and thus a trade qualification as defined in r.2.26B(c).[92]

'Completed' a qualification

A person satisfies the study requirement if they have 'completed' 1 or more degrees, diplomas or trade qualifications for award by an Australian educational institution as a result of a course or

postgraduate diplomas and there was no basis for concluding that omission of reference to graduate certificate in r.2.26A(6) was inadvertent. This appears equally applicable to the replacement r 2.26AC(6).

[87] *Bhatt v MIAC* [2012] FCA 918 (Buchanan J, 28 August 2012) at [12].

[88] This was the argument put to the Tribunal in MRT decision 1318631 (K Raif, 12 February 2014). The Tribunal rejected the argument, referring to the 'quite specific' definitions in the Regulations and to *Bhatt v MIAC* [2012] FMCA 317 and on appeal [2012] FCA 918.

[89] Procedural Instruction – Migration Regulations – Divisions – Div1.2-Interpretation – [Div1.2/reg1.15F] Reg 1.15F – Australian Study Requirement: issued 01/07/2019).

[90] *Bhatt v MIAC* [2012] FMCA 317 (Nicholls FM, 24 April 2012). See in particular the *obiter* comments at [46], noting that 'associate degree' is included in AQF but not mentioned in the Regulations. This was not mentioned on appeal.

[91] For example, in MRT decision 0906621 (Richard Derewlany, 31 August 2011) the delegate was not satisfied that the applicant's Associate Degree met any of the definitions in r 2.26A(6). On review, the Tribunal had before it additional evidence from the education provider that: the applicant was enrolled in a Diploma of Event Management but had transferred her enrolment to an Associate Degree in Business when the provider invited her to do so; the study programme for both courses was identical; the applicant had met all the requirements for the diploma course; and following a request from the applicant, the provider had agreed to rescind the associate degree and to award the applicant a Diploma of Event Management. The Tribunal noted that although the Diploma had not yet been conferred, the applicant had completed the diploma at the relevant time in that she had met the academic requirements for its award. This decision predates the judgments in *Bhatt*, but does not appear to be inconsistent with the reasoning in those cases.

courses of a specified kind that were completed in a specified way.[93] 'Completed' in relation to a degree, diploma or trade qualification is defined to mean 'having met the academic requirements for its award'.[94] It is a finding of fact for the decision-maker whether a course has been completed.

In *Sapkota v MIAC,* Cowdroy J held the relevant date for determining when a student has completed the academic requirements is the date when the educational institution decides that the academic requirements have been met, namely, the date on which the results are finalised by the institution.[95] The date of submission of the final piece of assessment is not the relevant date, and nor is the date when the institution informs the student of the results, or the date of the formal conferral of the degree or other qualification at a graduation ceremony.[96]

The Court in *Sapkota* was concerned with the definition of 'completed' as it first appears in r.1.15F(1). However, the reasoning would appear to be equally applicable to the term as it appears in r.1.15F(1)(b) and (c) even though they are concerned with completion of the course rather than the resulting qualification. These requirements are discussed below.

As a result of a registered course or courses

A person satisfies the study requirement if they have completed 1 or more degrees, diplomas or trade qualifications for award by an Australian educational institution 'as a result of a course or courses' of a specified kind.[97]

While r.1.15F(1) allows a person to meet the requirement by the completion of multiple qualifications, it does not say that a particular qualification may be awarded following the completion of multiple courses; and it has been observed that this would be contrary to the basic structure of our education system, in which a student completes a particular course and is awarded the corresponding qualification.[98] In *Singh v MIBP* the Court observed that many courses have prerequisites but that does not mean that the prerequisites are part of the course that results in a particular qualification.[99]

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[92] E.g. in MRT decision 1411024, evidence from the relevant assessing authority confirmed that the applicant's Associate Degree in Civil Engineering was appropriate for his nominated occupation of Civil Engineering Draftsperson, which is specified in IMMI 14/049 as a skilled occupation with corresponding ANZSCO code 312311 and thus in ANZSCO Major Group 3.

[93] Reg 1.15F(1).

[94] Reg 1.15F(2), introduced by SLI 2008, No.56.

[95] *Sapkota v MIAC* [2012] FCA 981 (Cowdroy J, 7 September 2012) at [26], dismissing an appeal from *Sapkota v MIAC* [2012] FMCA 137 (Cameron FM, 1 March 2012). Although at [25] Cowdroy J referred to the point where the result of assessment for the final course of item of assessment required to complete the course has been made 'publicly available', at [26] this appears to be clarified as being the date on which results are finalized by the institution such that a student would be able to find out whether they had been satisfied if they contacted the institution. *Sapkota* was followed in *Bhagat v MIBP* [2014] FCCA 2198 (Judge Hartnett, 23 September 2014) where the Court rejected the applicant's contention that the relevant date for the 6 months requirement was the day on which he received confirmation that he had successfully completed and met the requirements of his Diploma, holding that the applicant was required to have completed the academic requirements of his diploma in the relevant period and did so outside that time constraint.

[96] Justice Cowdroy cited with approval the decision of Burchardt FM in *Venkatesan v MIAC* [2008] FMCA 409 (Burchadt FM, 10 April 2008) concerning an identically worded definition of 'completed' in item 1128CA(3)(l) of Sch 1 to the Regulations. The applicant in that case had been granted credit transfers after he had completed the relevant courses. The Court held an applicant completes the academic requirements for a course when the applicant achieves the necessary results or credits to be awarded the relevant qualifications and that credit transfers were purely administrative steps. In relation to the distinction between academic and administrative requirements for the award of a degree, his Honour observed that 'there was nothing more for the Applicant to do of an academic nature after 2 August 2006. What was required, admittedly, were certain steps, but they were purely administrative steps that did not require any form of academic effort by Mr Venkatesan nor any evaluation of any such effort by the university'.

[97] Reg 1.15F(1).

[98] *Singh v MIBP* [2014] FCCA 1666 (Judge Riley, 14 July 2014). The applicant had contended that his Certificate course should be regarded as part of his Management Diploma, relying on a previous decision where the Tribunal had reasoned that the applicant's Certificate and Diploma courses were combined to comprise one qualification in that the first and second courses were pre-requisites for completion of the Diploma. The Court upheld the Tribunal's rejection of that argument. While aspects of the Court's reasoning could also suggest that it would not be open to find that a single qualification was completed 'as a result of' multiple courses, the judgment should not be taken to go that far. The Tribunal in that case was willing to receive evidence

The mere fact that a particular course has pre-requisites courses does not mean that the qualification is completed 'as a result of' those pre-requisite courses.[100]

Ultimately, whether the study requirement is satisfied is a factual question that will depend on the evidence, including evidence from the education provider as to whether a qualification was completed or granted 'as a result of' a combination of courses.

Among other things, the course or courses undertaken to satisfy the study requirement must be registered courses. *'Registered course'* is defined in r.1.03.

Course completion - when and how

The course or courses must have been completed

- in a total of 16 calendar months (r.1.15F(1)(b)); and
- as a result of a total of at least 2 academic years study (r.1.15F(1)(c)).

The '16 calendar months' requirement directs attention to the chronological period over which the course or courses undertaken by the applicant were completed. Its focus is the period of time actually taken by the applicant to complete the course or courses. He or she must have completed the relevant course or courses over at least 16 calendar months. In contrast, the '2 academic years' requirement directs attention to the quantity of academic study required by the particular course or courses undertaken. The academic study required by the course or courses of study must total at least '2 academic years'. That is, sub-paragraph (c) is focused upon the duration of course work required for the course of study undertaken by the visa applicant measured by reference to the academic study years required to ordinarily complete the course or courses in question by full-time study.[101]

In other words, the '16 months' requirement in r.1.15F(1)(b) is a temporal requirement and the '2 academic years' requirement in r.1.15F(1)(c) is directed to workload - that is, at assessing an 'academic years' worth or quality or quantity of 'study' engaged in during a period satisfying the temporal test in r.1.15F(1)(b).[102]

Whether the 2 year study rule precludes consideration of credits given for *study in Australia* is discussed below.

At least 16 calendar months

Regulation 1.15F(1)(b) is concerned with completion of the course itself. The meaning of 'completed' in this context has not been judicially considered; however aspects of the reasoning in judgments considering the meaning of 'completed' as it first appears in r.1.15F(1), would appear to be equally

from the education provider confirming the applicant's claim that the Certificate and Diploma were 'part of the same course', or a 'single course or a packaged program of study', or 'a single, packaged course' but such evidence was not forthcoming. It was not suggested that such evidence could not have made any difference.

[99] [2014] FCCA 1666 (Judge Riley, 14 July 2014).

[100] See also *Singh v MIBP* [2015] FCCA 2499 (Judge Hartnett, 14 September 2015) where the Court held at [24] that the Tribunal had correctly concluded that the applicant's Business Certificates could not be counted as part of his Diploma of Management, as the evidence showed that they were pre-requisites rather than a part of the diploma itself.

[101] *Perumal v MIBP* [2014] FCA 555 (Bromberg J, 16 May 2014). The Court held that it was open to the Tribunal to conclude on the evidence before it that her degree required one and a half academic years of full-time study and that r 1.15F(1)(c) was not satisfied. The Court considered that the applicant's challenge focused on the time she spent in study rather than the amount of time required to undertake by course work the degree upon which she relied.

[102] *Nayeem v MIAC* [2010] FMCA 980 (Smith FM, 23 December 2010) at [21]-[22].

applicable in this context. In particular, if the view is taken that administrative steps taken by the university without any academic effort on the part of the applicant should not be counted for r.1.15F(1)(b), it would follow that the minimum 16 calendar month period should be calculated on the basis of the actual study to achieve the necessary results, and not on purely administrative steps such as recording of credits.[103] On that view, if the award of the qualification was based on credits from another course, the time taken to obtain those credits could only be counted toward the 16 calendar months if the other course meets other requirements of r.1.15F.[104] However, it is unclear whether this interpretation of 'completed' in r.1.15F(1)(b) would be adopted by a court.

At least 2 academic years study

Regulation 1.15F(1)(c) specifies a course or courses that were completed as a result of at least 2 academic years study. The term 'academic year' is defined in r.1.03 to mean a period that is specified as an academic year in an instrument.[105] The relevant instrument can be located in the Register of Instruments: Skilled visas on the 'AcadYear' tab. See below regarding the relevant instrument.

The current instrument at the time of writing defines an academic year as at least a total of 46 weeks, being the duration of a course or courses registered under the ESOS Act.[106] For the purposes of this definition, as long as a course is registered under the ESOS Act as having a duration of 92 weeks, and an applicant has 'completed' that course (i.e. met the academic requirements for its award),[107] r.1.15F(1)(c) will be satisfied, regardless of whether completion of the course involved benefit from credits, recognition of prior learning or the like.[108] The Court's reasoning in *Riaz v MIBP* suggests that this will be the case even if the prior study was not undertaken in Australia.[109] The Court held that 'study' in r.1.15(1)(c) denotes the activities educational institutions prescribe for the award of a degree, diploma or trade qualification and it is for those institutions to specify what is required for a person to complete a course that will result in the conferral of a relevant qualification, including the recognition of prior learning and course credits. Accordingly, the relevant question for r.1.15F(1)(c) is whether an applicant for the visa had 'completed', as defined in r.1.15F(2), a course or courses that had been registered under the ESOS Act as having a duration of at least 92 weeks.[110]

The registered duration of courses is recorded on CRICOS.

[103] *Sapkota v MIAC* [2012] FCA 981 (Cowdroy J, 7 September 2012) at [23]; *Venkatesan v MIAC* [2008] FMCA 409 (Burchardt FM, 10 April 2008) at [17].
[104] That is, the other course was a registered course, for which all instruction was conducted in English, that the applicant undertook while in Australia as the holder of a visa authorising the applicant to study: r.1.15F(1)(a), (d) and (e).
[105] Inserted by SLI 2009 No.84. The definition applies to visa applications made on or after 15 May 2009. The Explanatory Statements to IMMI 09/040 at [3] and LIN 19/085 at [4] indicate that the purpose of the instruments is to 'remove any uncertainty as to the number of weeks a course must be registered on the Commonwealth Register of Institutions and Courses for Overseas Students.'
[106] LIN 19/085 Part 2 s 6. This instrument commenced on 3 April 2019.
[107] Reg 1.15F(2).
[108] See *Riaz v MIBP* [2013] FCCA 2244 (Manousaridis J, 20 December 2013).
[109] *Riaz v MIBP* [2013] FCCA 2244 (Manousaridis J, 20 December 2013). In this case, the applicant had completed two registered courses, a certificate course and a diploma course, in a total of at least 16 calendar months, in English, while in Australia as the holder of a visa allowing him to study. The courses were registered for 52 and 40 weeks respectively. However, the diploma course included two subjects that were also included in the certificate course, and as the applicant had completed those subjects for the certificate course, his education provider did not require him to undertake them again for the diploma course. By reference to what was said in *Nayeem v MIAC* [2010] FMCA 980 (Smith FM, 23 December 2010), the Tribunal found that because of this credit transfer the applicant did not complete the usual or normal or approved full-time workload of the courses, and so had not completed the courses as a result of 2 academic years study. The Court held that this approach involved jurisdictional error, and that following the introduction of a definition of 'academic year' the judgment in *Nayeem* was not determinative of the issue.
[110] *Riaz v MIBP* [2013] FCCA 2244 (Manousardis J, 20 December 2013) at [41] & [50].

The relevant instrument

The instrument in effect at the time of writing is LIN 19/085. It commenced on 3 April 2019, and repealed the whole of IMMI 09/040.[111] In the absence of any transitional or savings provisions with respect to IMMI 09/040, it appears LIN 19/085 applies to all live applications. In any case, both instruments have maintained the policy standard which has been applied since 1 September 2007, that an academic year is at least a total of 46 weeks.[112]

Requirement to hold visa authorising study

Regulation 1.15F(1)(e) requires that the applicant undertook the relevant course or courses 'while in Australia as the holder of a visa authorising the applicant to study'.

It appears from the ordinary meaning of the provision that it requires that the applicant was the holder of a 'visa authorising study' throughout the time the applicant undertook the relevant course or courses. There is no definition of the term 'visa authorising study' in the legislation. A student visa would clearly come within the meaning of this term, but it may be inferred from the fact that the term 'student visa' was not used, that it includes visas other than student visas. To satisfy this requirement, the decision-maker will need to consider the visa history of the applicant during the period the relevant courses were undertaken and determine whether the visas held may be described as visas 'authorising study'.

For example, if the applicant held a student visa, but then held a bridging visa for a period while applying for further student visa, the decision-maker would need to consider the conditions attached to the bridging visa. A visa with a condition which permits a limited amount of study, such as 8201 (while in Australia the holder must not engage in studies or training for more than 3 months), could properly be described as a visa 'authorising the applicant to study' for the purposes of r.1.15F(1)(e); but it would not authorise the applicant to study in excess of the specified period. Thus, an applicant who has engaged in study or training for the specified period would not be able to rely on any further study to satisfy the Australian study requirement, as the visa would not then be authorising the applicant to study.

Study 'closely related' to nominated occupation

Linked to the study requirement itself is the additional requirement that each degree, diploma or trade qualification used to satisfy the requirement must be closely related to the applicant's nominated 'skilled occupation'.[113] The words 'closely related' are not defined in the legislation but they require and call attention to the connection between two things. They do not require an exact correspondence.[114] However, the relationship must be more than merely complementary.[115]

[111] LIN 19/085 s 2 and Sch 1 s 1.
[112] Explanatory Statements to IMMI 09/040 and LIN 19/085 at [4] and [3] respectively.
[113] This is a separate criterion – see e.g. cl 485.222 of Sch 2.
[114] *MIBP v Dhillon* (2014) 227 FCR 525 at [20]; see also *Constantino v MIBP* [2013] FCA 1301 (Jacobson J, 4 December 2013) at [33] quoting with approval *Prasad v MIAC* [2012] FCA 591 (Logan J, 17 May 2012) at [33].
[115] *Uddin v MIAC* [2010] FCA 1281 (North J, 8 November 2010) at [10]-[12] where North J rejected the argument that the Tribunal misunderstood the term 'closely related' by departing from what was then set out in PAM3. The Tribunal in that case found that the language of the regulation required a closer relationship than that suggested by the words 'complementary' or 'useful' as used in PAM3 at that time. This approach was followed in *Prasad v MIAC* [2012] FCA 591 (Logan J, 17 May 2012) (special leave refused: *Prasad v MIAC* [2013] HCASL 34) and approved in *Constantino v MIBP* [2013] FCA 1301 and *MIBP v Dhillon* (2014) 227 FCR 525 at [20]. See also *Shafiuzzaman v MIAC* [2011] FMCA 874 (Nicholls FM, 15 November 2011) at

In making the assessment it is necessary to focus on the nominated occupation rather than on an applicant's claimed or proposed occupation or career path. It has been held in this context that the decision maker is entitled to give substantial weight to the contents of the ANZSCO descriptions.[116] More recent authority suggests that the nature of the nominated occupation *must* be determined by reference to ANZSCO,[117] and further, that the ANZSCO Code needs to be read as a whole with a view to identifying and applying information which is relevant to an understanding of the whole of the nominated occupation.[118] That is, it is necessary to have regard to all information that is potentially relevant, including not only the statement of tasks specified in the relevant unit group or at the lower level of the occupation itself, but also relevant information in the higher groupings into which the nominated occupation falls.[119]

It is also appropriate to objectively consider the relationship of the applicant's qualification to the ANZSCO definition of the occupation rather than relying on the applicant's own description of what the occupation entails or the applicant's own view of the proximity of the qualifications to the nominated occupation.[120]

Where more than one qualification is being relied on to meet the study requirement, all the courses must be closely related to the nominated skilled occupation. This requires a comparison between each qualification and the skilled occupation, not a comparison between the two or more qualifications.[121]

It is ultimately a matter for the decision-maker to decide whether an applicant's Australian studies are 'closely related' to the nominated skilled occupation.[122] In carrying out the evaluative exercise it is critical that the whole of the Australian studies be compared with the whole of the nominated occupation.[123] The wording of that the criteria does not permit the relationship to be satisfied by asking whether some of the subjects studied are closely related to the nominated skilled occupation, or some part of it.[124]

The Federal Circuit Court in *Tobon v MIBP* appears to have taken a somewhat different approach, holding that for a qualification to be closely related to an applicant's nominated skilled occupation, the decision maker must be satisfied that the study or training for which the qualification was granted conferred on an applicant skills, all, or a substantial proportion of which, fall or falls within the set of

[37]-[38] and *Manik v MIAC* [2012] FMCA 149 (Smith FM, 28 February 2012) at [13], upheld on appeal *Manik v MIAC* [2012] FCA 619 (Cowdroy J, 15 June 2012) at [19]-[20].

[116] *Manik v MIAC* [2012] FMCA 149 (Smith FM, 28 February 2012) citing Shukla v MIAC [2010] FMCA 625 (Smith FM, 16 August 2010), *Kabir v MIAC* [2010] FMCA 577 (Scarlett FM, 3 September 2010) and *Chawdhury v MIAC* [2010] FMCA 275 (Raphael FM, 23 April 2010).

[117] See *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ, 25 August 2015). The central question in this case was not whether the nominated occupation must necessarily be determined by reference to ANZSCO, but rather whether the Tribunal had incorrectly confined its consideration to the relevant ANZSCO occupation. However the central significance of the ANZSCO Code is implicit in the Court's reasoning. See also *Wang v MIMIA* [2005] FCA 843 (Madgwick J, 8 June 2005), *MIAC v Kamruzzaman* [2009] FCA 1562 (Greenwood J, 23 December 2009) and *Seema v MIAC* (2012) 203 FCR 537 where the relevance of ASCO/ANZSCO was considered in the analogous context of whether the applicant's employment is closely related to the nominated occupation.

[118] *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ) at [56].

[119] *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ) at [52]. The judgment examines the structure of the ANZSCO code in detail (at [17]-[23]).

[120] *Chawdhury v MIAC* [2010] FMCA 275 (Raphael FM, 23 April 2010) at [12]. See also *Kabir v MIAC* [2010] FMCA 577 (Scarlett FM, 2 August 2010) at [70], *Shafiuzzaman v MIAC* [2011] FMCA 874 (Nicholls FM, 15 November 2011) at [48] – [67] where the Court held that the Tribunal was correct in applying an objective test instead of a subjective test by the applicant that the term 'closely related' should be read as 'complementary' or 'useful' to his nominated occupation; and *Manik v MIAC* [2012] FMCA 149 (Smith FM, 28 February 2012) at [14], upheld on appeal in *Manik v MIAC* [2012] FCA 619 (Cowdroy J, 15 June 2012).

[121] *Manik v MIAC* [2012] FMCA 149 (Smith FM, 28 February 2012) at [23]-[24], upheld on appeal in *Manik v MIAC* [2012] FCA 619 (Cowdroy J, 15 June 2012).

[122] *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ, 25 August 2015) at [53].

[123] *Talha v MIBP* [2015] FCAFC 115 (Griffiths, Mortimer and Beach JJ, 25 August 2015) at [53], endorsing *MIBP v Dhillon* (2014) 227 FCR 525 at [20] and *Constantino v MIBP* [2013] FCA 1301 (Jacobson J, 4 December 2013) at [26].

[124] *Constantino v MIBP* [2013] FCA 1301 (Jacobson J, 4 December 2013) at [27].

skills associated with the carrying on of the occupation.[125] The Court held further that in order to determine in any given case whether a qualification (a diploma in that case) is closely related to an applicant's nominated skilled occupation, the decision maker must undertake the following steps:

- First, they must identify the study or training for which the diploma was granted, and the skills acquired as a result of such study or training ('acquired skills');
- Second, they must identify the set of skills that are associated with carrying on the nominated skilled occupation ('nominated skills');
- Third, they must determine whether all or a substantial proportion of the acquired skills are nominated skills. If the decision maker so determines, the diploma is closely related to the nominated skilled occupation.[126]

However, the Full Court in *Talha* expressed reservation as to whether the 3rd step specified is a necessary part of the evaluative exercise in every case, and cautioned against attempting to be too prescriptive by substituting a formula for the terms of the provision. The Court also clarified that the findings in *Tobon* ought not to be read as derogating from the fundamental requirement that in conducting the evaluative exercise required by the criterion, consideration must be given to the whole of the Australian studies and the whole of the nominated skilled occupation.[127]

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2007 (No.1)	SLI 2007 No.69	No.1/2007
Migration Amendment Regulations 2007 (No.7)	SLI 2007, No.257	No.9/2007
Migration Amendment Regulations 2009 (No.15)	SLI 2009, No.375	No.19/2009
Migration Amendment Regulations 2010 (No.6)	SLI 2010, No.133	No.7/2010
Migration Amendment Regulations 2011 (No.3)	SLI 2011, No.74	No.2/2011
Migration Amendment Regulation 2012 (No.2)	SLI 2012, No.82	No.4/2012
Migration Legislation Amendment Regulation 2013 (No.1)	SLI 2013, No.33	No.2/2013
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No.146	No.10/2013
Migration Amendment (Skills Assessment) Regulation 2013	SLI 2013, No.233	No.15/2013
Migration Legislation Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No.82	No.5/2014
Migration Amendment (Temporary Graduate Visas) Regulation 2014	SLI 2014, No.145	No.7/2014

[125] *Tobon v MIBP* [2014] FCCA 2208 (Judge Manousaridis, 26 September 2014) at [25].
[126] *Tobon v MIBP* [2014] FCCA 2208 (Judge Manousaridis, 26 September 2014) at [25].
[127] In *Walia v MIBP* [2015] FCCA 1949 (Judge Emmett, 20 July 2015) the applicant argued unsuccessfully, with reference to *Tobon*, that the Tribunal had applied the wrong test in regard to whether her qualification (Diploma of Business Management) was 'closely related' to her nominated skilled occupation (pastry cook). It was submitted that the correct test was as stated in *Tobon*. The Court did not express any view as to the correctness or otherwise of *Tobon*, but in rejecting the applicant's contention, it referred to *Dhillon* as the leading authority on the issue.

Relevant case law

Akbar v MIBP [2019] FCA 515	
Berenguel v MIAC [2010] HCA 8	Summary
Bhagat v MIBP [2014] FCCA 2198	
Bhatt v MIAC [2012] FCA 918	Summary
Bhatt v MIAC [2012] FMCA 317	Summary
Brar v MIBP [2016] FCCA 951	
Chawdhury v MIAC [2010] FMCA 275	Summary
Chen v MIAC [2011] FMCA 859	Summary
Constantino v MIMAC [2013] FCCA 1178	Summary
Constantino v MIBP [2013] FCA 1301	Summary
MIBP v Dhillon (2014) 227 FCR 525	Summary
Hemlata v MIBP [2014] FCCA 968	
Kabir v MIAC [2010] FMCA 577	Summary
KC v MIAC [2013] FCCA 296	Summary
Manik v MIAC [2012] FCA 619	
Manik v MIAC [2012] FMCA 149	
Nayeem v MIAC [2010] FMCA 980	Summary
Parekh v MIAC [2007] FMCA 633	Summary
Patel v MIAC [2011] FMCA 399	Summary
Patel v MIAC (2011) 198 FCR 62	Summary
Pavuluri v MIBP [2014] FCA 502	Summary
Perumal v MIBP [2014] FCA 555	Summary
Prasad v MIAC [2012] FCA 591	Summary
Rai v MIAC [2010] FCA 1289	
Rai v MIAC [2010] FMCA 472	Summary
Riaz v MIBP [2013] FCCA 2244	Summary
Sapkota v MIAC [2012] FCA 981	Summary
Sapkota v MIAC [2012] FMCA 137	Summary
Seema v MIAC (2012) 203 FCR 537	Summary
Shafiuzzaman v MIAC [2011] FMCA 874	Summary
Shukla v MIAC [2010] FMCA 625	Summary
Singh v MIBP [2014] FCCA 1666	Summary
Singh v MIBP (2015) 233 FCR 34	Summary
Singh v MIBP [2015] FCCA 2499	
Talha v MIBP (2015) 235 FCR 100	Summary
Tobon v MIBP [2014] FCCA 2208	Summary

Uddin v MIAC [2010] FCA 1281	
Venkatesan v MIAC [2008] FMCA 409	Summary
Walia v MIBP [2015] FCCA 1949	Summary

Last updated/reviewed: 2 July 2019

Quick Guide to Specification of Occupations for Business visas

This table summarises the instruments under which specifications of occupations for certain business related nominations and visas are made under the following provisions, by reference to nomination application date and/or visa application date as relevant. Note that r.2.72 and r.5.19 were repealed and substituted with new versions on 18 March 2018, introduced by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018, and the applicable version will depend on the date of the nomination application:

- r.2.72(10)(aa) (pre-18 March 2018 version) – nomination of occupation for Subclass 457 visa
- cl.457.223(4)(aa) – Subclass 457 visa criterion requiring specification of nominated occupation under r.2.72(10)(aa)
- r.2.72(9) (post-18 March 2018 version) – nomination of occupation for Subclass 482 visa
- item 1240(3)(g) – occupations requiring skills assessment for Subclass 482 visa
- cl.482.224 and cl.482.233 – occupations exempt from the requirement to be employed in the nominated occupation and in the sponsor's business
- r.5.19(4)(h)(i)(A) (pre-18 March 2018 version) – nomination of position for Subclass 186 visa (Direct Entry Stream)
- r.5.19(8) (post-18 March 2018 version) – nomination of occupation in the Temporary Residence Transition stream
- r.5.19(11) (post-18 March 2018 version) – nomination of occupation for the Subclass 186 visa in the Direct Entry stream
- r.5.19(13) (post-18 March 2018 version) – nomination of occupation for the Subclass 187 visa in the Direct Entry stream
- cl.186.234(2)(a) – occupations requiring skills assessment for Subclass 186 visa application in the Direct Entry stream
- cl.187.234(a) – occupations exempt from seeking skills assessment for Subclass 187 application
- cl.187.234(b) – occupations requiring skills assessment for Subclass 187 application if qualification obtained overseas
- r.2.72B(3)(b) – nomination of occupational training for Subclass 407 visa, seeking to nominate training to enhance skills, must relate to specified occupation
- r.2.72I(5)(ba) – nomination of occupational training for Subclass 442 or Subclass 402 visa, seeking to nominate training to enhance skills, must related to specified occupation

PLEASE NOTE: This table is a summary only, full details of all instruments and copies of accompanying Explanatory Statements are set out in the Register of Instruments: Business visas (see 'Occ 186/442/457&Noms' tab; 'Occ482noms' tab; '482SkillsAss' tab; 'ExemptOccs' tab; 'Occ187' tab; 'ExmtSkillsAgeEng186&187' tab and 'ExmtSkills' tab).

***Last updated / reviewed*: 6 August 2019**

Provision	Nomination app date	Visa application date	Instrument reference	Item number
r.2.72(10)(aa)	17 January 2018 to 17 March 2018	n/a	IMMI 18/004	Item 6
	1 July 2010 to 16 January 2018	n/a	IMMI 17/060	Item 5
	1 July 2010 to 30 June 2012	n/a	IMMI 17/060 AND IMMI 12/022	Item 5; Item 2
cl.457.223(4)(aa)[1]	17 January 2018 to 17 March 2018	n/a	IMMI 18/004	Item 6
	1 July 2010 to 16 January 2018	n/a	IMMI 17/060	Item 5
	1 July 2010 to 30 June 2012	n/a	IMMI 17/060 AND IMMI 12/022	Item 5; Item 2
r.2.72(9)	11 March 2019 to present	n/a	LIN 19/048[2]	Part 2
	18 March 2018 to 10 March 2019	n/a	IMMI 18/048	Part 2
Item 1240(3)(g)	n/a	18 March 2018 to present	IMMI 18/039	Part 2
cl.482.224 for Short-term stream and cl.482.233 for Medium-term stream	18 March 2018 to present	n/a	IMMI 18/035	Item 6
r.5.19(4)(h)(i)(A)	17 January 2018 to 17 March 2018	n/a	IMMI 18/005	Item 6(1)
	1 July 2017 to 16 January 2018	n/a	IMMI 17/080	Item 5(1)
	19 April 2017 to 30 June 2017	n/a	IMMI 16/059 as amended by 17/040 – see this compilation instrument	Item 6
	1 July 2016 to 18 April 2017	n/a	IMMI 16/059	Item 6
	1 July 2015 to 30 June 2016	n/a	IMMI 16/060	Item 4
	1 July 2014 to 30 June 2015	n/a	IMMI 15/091	Item 4

[1] Note that the specification is actually made under r.2.72(10)(aa) (or r.2.72(10)(a) for pre July 2010 applications).

[2] This instrument is a compilation taking into account the amendment made by Migration (LIN 19/048: Specification of Occupations – Subclass 482 Visa) Amendment Instrument 2019 (F2019L00316) from 21 March 2019.

Provision	Nomination app date	Visa application date	Instrument reference	Item number
	1 July 2013 to 30 June 2014	n/a	IMMI 14/049	Item 4
	23 March 2013 to 30 June 2013	n/a	IMMI 13/064	Item 6
	1 July 2012 to 22 March 2013	n/a	IMMI 13/065	Item 6
r.5.19(8)	11 March 2019 to present	n/a	LIN 19/047 (SC187) AND LIN 19/049 (SC186)	Item 6(1); Item 6(1)
	18 March 2018 to 10 March 2019	n/a	IMMI 18/043 (SC187) AND IMMI 18/049 (SC 186)	Item 5(1); Item 6(1)
r.5.19(11)	11 March 2019 to present	n/a	LIN 19/049	Item 6(2)
	18 March 2018 to 10 March 2019	n/a	IMMI 18/049	Item 6(2)
r.5.19(13)	11 March 2019 to present	n/a	LIN 19/047	Item 6(2)
	18 March 2018 to 10 March 2019	n/a	IMMI 18/043	Item 5(2)
cl.186.234(2)(a)[3]	11 March 2019 to present	11 March 2019 to present (if the related *nomination* application was made on or after 18 March 2018 but before 11 March 2019, IMMI 18/049 will continue to apply – see item 11(b))	IMMI 19/049	Item 6(4)
	18 March 2018 to 10 March 2019	18 March 2018 to 10 March 2019	IMMI 18/049	Item 6(3)
	17 January 2018 to 17 March 2018	17 January 2018 to 17 March 2018	IMMI 18/005	Item 6(2)
	Any date prior to 17 January 2018	1 July 2017 to present	IMMI 17/080	Item 5(2)
	n/a	19 April 2017 to 30 June 2017	IMMI 16/059 as amended by 17/040 – see this compilation instrument	Item 7
	n/a	1 July 2016 to 18 April 2017	IMMI 16/059	Item 7

[3] Although arguably it is the instrument in force at time of application which should be applied for this provision, rather than by the terms of the instruments as reflected in this table, in practice the specifications are the same. See Subclass 186 commentary for further discussion.

Provision	Nomination app date	Visa application date	Instrument reference	Item number
	n/a	1 July 2015 to 30 June 2016	IMMI 16/060	Item 5
	n/a	1 July 2014 to 30 June 2015	IMMI 15/091	Item 5
	n/a	1 July 2013 to 30 June 2014	IMMI 14/049	Item 5
	n/a	23 March 2013 to 30 June 2013	IMMI 13/064	Item 7
	n/a	1 July 2012 to 22 March 2013	IMMI 13/065	Item 7
cl.187.234(a)[4]	n/a	18 March 2018 to present (if the related *nomination* application was made before 18 March 2018, IMMI 17/058 will continue to apply – see Part 2 of Schedule 1, Item 1(1)(c))	IMMI 18/045	Item 7
	n/a	1 July 2017 to 17 March 2018	IMMI 17/058	Item 9
	n/a	1 July 2015 to 30 June 2017	IMMI 15/083	Items 2 & 3
	n/a	1 July 2012 to 30 June 2015	IMMI 12/060	Item 2
cl.187.234(b)	n/a	1 October 2012 to present	IMMI 12/096	Item 2
	n/a	1 July 2012 to 30 September 2012	IMMI 12/061	Item 1
r.2.72B(3)(b)	11 March 2019 to present	n/a	LIN 19/050	Item 6
	18 March 2018 to 10 March 2019	n/a	IMMI 18/050	Item 6
	17 January 2018 to 17 March 2018	n/a	IMMI 18/006	Item 6
	1 July 2017 to 16 January 2018	n/a	IMMI 17/071	Item 5
	n/a	19 April 2017 to 30 June 2017 (end date is nominal, if *nomination* date is on or after 1 July 2017 IMMI 17/071 will apply)	IMMI 16/059 as amended by 17/040 – see this compilation instrument	Item 8

[4] Although the instrument in force from 1 July 2017 to 17 March 2018, IMMI17/058, purported to apply to all live applications, it has since been repealed and given the exemption is to be considered at the time of application, it appears that the applicable instrument is the one which is in force at the time of application. See Subclass 187 commentary for further discussion.

Provision	Nomination app date	Visa application date	Instrument reference	Item number
	n/a	19 November 2016 to 18 April 2017	IMMI 16/059 as amended by IMMI 16/118 – see this compilation instrument	Item 8
r.2.72I(5)(ba)	n/a	1 July 2016 to 18 November 2016	IMMI 16/059 (pre-amendment)	Item 8
	n/a	1 July 2015 to 30 June 2016	IMMI 16/060	Item 6
	n/a	1 July 2014 to 30 June 2015	IMMI 15/091	Item 6
	n/a	1 July 2013 to 30 June 2014	IMMI 14/049	Item 6
	n/a	23 March 2013 to 30 June 2013	IMMI 13/064	Item 8
	n/a	1 July 2012 to 22 March 2013	IMMI 13/065	Item 8
	n/a	1 July 2010 to 30 June 2012	IMMI 12/022	Item 3

SKILLED VISAS - REGISTER OF INSTRUMENTS		
No.	**Tab name**	**Instrument Description**
1	SOL-SSL	Skilled Occupations and Assessing Authorities (rr.1.03, 1.15I, 2.26B, Sch 1, Sch 2, Sch 6A, Sch 6B)
2	MODL	Migration cccupations in demand (r.1.15H)
3	PoolPassMark	Pool Marks (s.96(1)) and Pass Marks (s.96(2)) for Visa Class SI, SN, SP, VB, VC, VE and VF
4	PoolPassMarkHistorical	Pool Marks (s.96(1)) and Pass Marks (s.96(2)) for Visa Class AT, AJ, BN, BQ, DB, DD, DE and UX
5	DesgnSec	Designated Securities (r.2.26C)
6	DesgnLang	Designated Languages (r.1.03, Sch 6A, Sch 6B)
7	DesgAreas	Designated Areas (Sch 2, Sch 6, Item 6701, r.1.03)
8	Reg&LowPop	Regional and low population growth metropolitan areas (Schedule 6A, Items 6A1001, 6A1002; Schedule 6D Item 6D101)
9	state-terr(Eng)	Specification of a State or Territory for English Language Training - Subclass 134, 139, 496, 863, 882, Sch 6B
10	EngTests	English language tests, Scores and Passports - r.1.15B, 1.15C, 1.15D, 1.15EA and cl.485.215 and 487.215
11	Eng476485	English language tests, Scores and Passports (cl.476.213 and 485.212)
12	FunctionalEng	Evidence of English Language Proficiency r.5.17
13	476Inst	Institutions and Disciplines (cl.476.212)
14	485Inst	Educational Institutions (cl.485.231(2))
15	485Qual	Qualifications (cl.485.231(1))
16	SkillsAss	Skilled occupations for skills assessments - Subclass 175, 176, 475
17	TEOL	Technical Equivalent Occupations (r.2.26(5), Sch 6)
18	PEOL	Professional Equivalent Occupations
19	VisaApp	Skilled visa applications – form, manner and place (Sch 1, Sch 2)
20	ProfYear	Professional Year Programs - r.2.26AA(6), 2.26AA(9), 2.26AB(7), 2.26AC(6)
21	AcadYear	Definition of Academic Year (r.1.03)
22	Cap	Determination of the Fixed Maximum Number of Specified Skilled Visas that may be Granted
23	Sch6B, 6C classes	Specification of persons/class of persons for r.2.26AA(2)(a) (Sch 6B) and 2.26AB(2)(a) (Sch 6C)
24	ORE	Occupations requiring English (r.1.19, Sch 6)
25	CommLang	Credentialled community language qualifcations (Schedule 6C and 6D)
26	EdQual 6C&6D	Recognition of Education Qualifications (Paragraph 6C.76(b), r.2.26AC(5)(b))
27	SpecEdQual6D	Specialist Educational Qualifications (r.2.26AC(5A)(b), r.2.26AC(5B), Item 6D7A1)
28	Forms	Visa application forms for Temporary Graduate (Subclass 485) visa - Subitem 1229(1) - before 18/4/15
29	189NZStream	Specification of Income Threshold and Exemptions for Subclass 189 Skilled - Independent Visa (New Zealand Stream)

Notes

1. All references to regulations are to the Migration Regulations 1994 unless otherwise stated.

2. References to a Gazette Notice are to that term as defined in r.1.03 before 22/3/14. '*Gazette Notice*' was relevantly defined in r.1.03 of the Regulations to mean a notice under r.1.17, which permitted the Minister to specify certain matters by notice published in the *Gazette*. Since 1/1/05, legislative instruments made after that day are registered on the Federal Register of Legislation (formerly, the Federal Register of Legislative Instruments) (FRL) established and maintained under s.15A of the Legislation Act 2003 (formerly under s.20 of the *Legislative Instruments Act 2003)*, and are generally not required to be published in the Gazette: s.56 of the Legislation Act. The definition of 'gazette notice' was repealed with effect on and from 22/3/14: SLI 2014, No. 30.

Last updated: 08/04/2019

Specification of Occupations and Assessing Authorities (rr.1.03, 1.15I, 2.26B)

Title	Gazette ref	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Migration (LIN 19/051: Specification of Occupations and Assessing Authorities) Instrument 2019		19/051	F2019L00278	11/03/2019	Current	18/051	yes	Registered 10/03/19, commences 11/03/19. Applies to invitations issued to Subclass 189, 190 and 489 applicants on or after 11/03/19; and applications for a Subclass 485 visa made on or after 11/03/19.
Legislative instrument IMMI 18/051 'Specification of Occupations and Assessing Authorities' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), subitem 1137(4C), Item 4 of the table in subitem 1138(4) and Item 4 of the table in subitem 1230(4), and paragraph 1129(3)(k)).	-	18/051	F2018L00299	18/03/2018	10/03/2019 (still current for relevant period)	18/007	yes	Registered 17/03/2018, commences 18/03/18. This instrument was repealed by LIN 19/051. However, it continues to apply to invitations issued to Subclass 189, 190 and 489 applicants on or after 18/03/18 but before 11/03/19; and applications for Subclass 485 visas made on or after 18/03/18 but before 11/03/19.
Legislative instrument IMMI 18/007 'Specification of Occupations and Assessing Authorities' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), subitem 1137(4C), Item 4 of the table in subitem 1138(4) and Item 4 of the table in subitem 1230(4), and paragraph 1129(3)(k)).	-	18/007	F2018L00046	17/01/2018	17/03/2018 (still current for relevant period)	17/072	yes	Dated 15/01/2018, commences 17 January 2018.
Legislative instrument IMMI 17/072 'Specification of Occupations and Assessing Authorities' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), subitem 1137(4C), Item 4 of the table in subitem 1138(4) and Item 4 of the table in subitem 1230(4), and paragraph 1129(3)(k)).	-	17/072	F2017L00850	1/07/2017	16/01/2018 (still current for relevant period)	-	yes	This instrument was repealed by IMMI 18/007. However, it continues to apply to invitations issued to subclass 189, 190 and 489 applicants between 1 July 2017 and before 17 January 2018; and applications for subclass 485 visas made between 1 July 2017 and 17 January 2018.

Legislative instrument IMMI 16/059 'Specification of Occupations, a Person or Body, a Country or Countries 2016/059' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	16/059*	F2017L00840 (repealing instrument - IMMI 17/081)	1/07/2017	30/06/2017 (still current for relevant period)	16/059	yes	This instrument was repealed by IMMI 17/081 for invitations issued to subclass 189, 190 and 489 applicants from 1 July 2017, and for subclass 485 visa applications made from 1 July 2017. This instrument continues to apply to cases concerning invitations invitations issued to applicants for subclass 189, 190 and 489 visas between 19 April 2017 and 30 June 2017, and applications for subclass 485 visas made between 19 April 2017 and 30 June 2017.
			F2017C00352	19/04/17		*N/A compilation	n/a	Compilation dated 19 April 2017, incorporating amendments made by IMMI 17/040.
		16/059*	F2017L00450 (amending instrument - IMMI 17/040)	19/04/17		amends 16/059	yes	IMMI 17/040, dated 18/04/2017, commenced 19/04/2017. It replaces Schedules 1 and 2 to IMMI 16/059 for cases concerning invitations issued to applicants for subclass 189, 190 and 489 visas on or after 19 April 2017, and applications for subclass 485 visas made on or after 19 April 2017.
			F2016C01004	19/11/16		*N/A compilation	n/a	Compilation dated 19 November 2016, including amendments made by IMMI 16/118 to cease specifying skilled occupations in respect of nominations for subclass 402 visas and replace with skilled occupations in respect of nominations for subclass 407 visa applications.
		16/059	F2016L00800	1/07/16		15/092 and 15/108	yes	Dated 6/5/2016, commences 1/7/16 [Note: this is the instrument as originally made] This instrument continues to apply to cases concerning invitations issued to applicants for subclass 189, 190 and 489 visas between 1 July 2016 and 18 April 2017, and applications for subclass 485 visas made between 1 July 2016 and 18 April 2017.

Legislative instrument IMMI 16/060 'Specification of Occupations, a Person or Body, a Country or Countries 2016/060' (Regulation 1.03, subregulations 1.151(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	16/060	F2016L00801	1/07/16	current	-	yes	Dated 6/5/2016, commences 1/7/16
Legislative instrument IMMI 15/108 'Specification of Occupations, a Person or Body, a Country or Countries 2015' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	15/108	F2015L01147	1/07/15	30/06/16	-	yes	Dated 6/7/15, commences 1/7/15, [supplementary to IMMI 15/092]
Legislative instrument IMMI 15/092 'Specification of Occupations, a Person or Body, a Country or Countries 2015' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	15/092	F2015L01059	1/07/15	30/06/16	14/048	yes	Dated 25/6/15, commences 1/7/15, revokes IMMI 14/048
Legislative instrument IMMI 15/091 'Specification of Occupations, a Person or Body, a Country or Countries 2015' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	15/091	F2015L01057	1/07/15	current	-	yes	Dated 25/6/15, commences 1/7/15
Legislative instrument IMMI 14/049 'Specification of Occupations, a Person or Body, a Country or Countries' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	14/049	F2014L00753	1/07/14	current	-	yes	Dated 14/6/14, commences 1/7/14

Legislative instrumnet IMMI 14/048 'Specification of Occupations, a Person or Body, a Country or Countries' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	14/048	F2014L00749	1/07/14	30/06/15	13/066	yes	Dated 14/6/14, commences 1/7/14, revokes IMMI 13/066
Legislative instrument IMMI 13/065 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	-	13/065	F2013L01238	1/07/13	current	13/041	yes	Dated 28/6/13, commences 1/7/2013, revokes IMMI 13/041
Legislative instrument IMMI 13/064 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(3)(e)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	-	13/064	F2013L01272	1/07/13	current	13/020	yes	Dated 28/6/13, commences 1/7/2013, revokes IMMI 13/020
Legislative Instrument IMMI 12/065 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and certain Other Visas (Regulation 1.15I, Subregulations 2.26AA(2), 2.26AB(2) and 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'	-	12/065	F2012L01322	1/07/12	current	nil	yes	Dated 12/6/12, commences 1/7/2012.
Legislative Instrument IMMI 12/023 'Skilled Occupations, Relevant Assessing Authorities and Countries for General Skilled Migration Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'	-	12/023	F2012L01320	1/07/12	current	11/069	yes	Dated 12/6/12, commences 1/7/2012, revokes IMMI 11/069

Legislative Instrument IMMI 12/068 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	12/068	F2012L01314	1/07/12	current	11/068	yes	Dated 12/6/12, commences 1/7/2012, revokes IMMI 11/068
Legislative instrument IMMI 13/066 'Specification of Occupations, a Person or Body, a Country or Countries' (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	-	13/066	F2013L01240	1/07/13	30/06/14	nil	yes	Dated 28/6/13, commences 1/7/13, immediately after commencement of Migration Legislation Amendment Regulation 2013 (No.3)
Legislative instrument IMMI 13/020 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), and sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraphs 1229(3)(e) and 1229(3)(k), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	-	13/020	F2013L00546	23/03/13	30/06/13	nil	yes	Dated 19/3/13, commences 23/3/13 immediately after commencement of Migration Legislation Amendment Regulation 2013 (No.1)
Legislative instrument IMMI 13/041 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), and sub-subparagraph 5.19(4)(h)(i)(A), item 4(a) of the table in subitem 1137(4), item 4(a) of the table in 1138(4) and item 4(a) of the table in subitem 1230(4) and subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a) of the Regulations)	-	13/041	F2013L00547	23/03/13	30/06/13	12/039	yes	Dated 19/3/13, commences 23/3/13 immediately after commencement of Migration Legislation Amendment Regulation 2013 (No.1), revokes immi12/039
Legislative Instrument IMMI12/039 'Specification of Occupations, a Person or Body, a Country or Countries' (Subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba) and sub-subparagraph 5.19(4)(h)(i)(A) and item 4(a) of the table in subitem 1137(4), item 4(a) of the table in 1138(4) and item 4(a) of the table in subitem 1230(4) and subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	-	12/039	F2012L01451	1/07/12	22/03/13	nil	yes	Dated 28/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulation 2012 (No.2)

Legislative Instrument IMMI 11/069 'Skilled Occupations, Relevant Assessing Authorities and Countries for General Skilled Migration Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'	-	11/069	F2011L02010	1/10/11	30/06/12	11/035	yes	Signed 28/9/11, commences 1/10/11, revokes IMMI 11/035.
Legislative Instrument IMMI 11/068 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	11/068	F2011L02011	1/10/11	30/06/12	11/034	yes	Signed 28/9/11, commences 1/10/11, revokes IMMI 11/034.
Legislative Instrument IMMI 11/035 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migrations Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'	-	11/035	F2011L01242	1/07/11	30/09/11	n/a	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).
Legislative Instrument IMMI 11/034 'Skilled Occupations, Relevant Assessing Authorities and Countries for General Skilled Migrations Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	11/034	F2011L01227	1/07/11	30/09/11	10/079	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).
Legislative Instrument IMMI 10/079 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migrations Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	10/079	F2010L03154	05/12/10	30/06/11	10/026	yes	Signed 2/12/10, commences 05/12/10, revokes IMMI 10/026; Different schedules apply to different classes of persons depending on date of visa application, visa status and visa sought.

Legislative Instrument IMMI 10/026 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migrations Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'	-	10/026	F2010LO1318	01/07/10	4/12/10	09/031	yes	Signed 17/05/10, commences 01/07/10, revokes IMMI 09/031; Different schedules apply to different classes of persons depending on date of visa application, visa status and visa sought.
Legislative Instrument IMMI 09/031 'Skilled Occupations, Relevant Assessing Authorities and Points for General Skilled Migration (regulation 1.03, subregulation 2.26B(1), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii), 1229(7)(b)(ii), items 6A11, 6A12 and 6A13))'	-	09/031	F2009L01446	15/05/09	30/06/10	08/004	yes	Signed 09/04/09, commences 15/05/09, revokes IMMI 08/004
Legislative Instrument IMMI 08/004 'Skilled Occupations, Relevant Assessing Authorities and Points for General Skilled Migration (regulation 1.03, subregulation 2.26B(1), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii), 1229(7)(b)(ii), items 6A11, 6A12 and 6A13))'	-	08/004	F2008L01127	26/04/08	14/05/09	07/058	yes	Signed 16/04/08, commences 26/04/08, revokes IMMI 07/058
Legislative Instrument IMMI07/058 'Skilled Occupations, Relevant Assessing Authorities and Points for General Skilled Migration (regulation 1.03, subregulation 2.26B(1), subparagraghs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii), 1229(7)(b)(ii) and items 6A11, 6A12, 6A13, 6B11, 6B12, 6B13))'	-	07/058	F2007L02690	01/09/07	25/04/08	06/090	yes	Signed 28/08/07, commences 01/09/07, revokes IMMI 06/090
Legislative Instrument IMMI06/090 'Residential Postcodes, Skilled Occupations, Relevant Assessing Authorities and Points (regulations 1.03 and 2.26B)'	-	06/090	F2007L01687	12/06/07	31/08/07	06/063	yes	Signed 7/6/07; commences 12/06/07; revokes IMMI 06/063. Explanatory statement available

Legislative Instrument IMMI06/063 'Residential Postcodes, Skilled Occupations, Relevant Assessing Authorities and Points (regulations 1.03 and 2.26B)'	-	06/063	F2006L03923	06/12/06	11/06/07	06/062	yes	Signed 30/11/06; Commences day after registeration on FRLI. Registered 5/12/06; Revokes IMMI 06/062; Explanatory statement available
Legislative Instrument IMMI 06/062, 'Residential Postcodes, Skilled Occupations, Relevant Assessing Authorities and Points (regulations 1.03 and 2.26B)'	-	06/062	F2006L03359	01/11/06	05/12/06	GN25	yes	Signed 25/10/06; effective 1/11/06; revokes IMMI 06/035 (ie GN25); Explanatory statement available
Legislative Instrument IMMI 06/035 (GN 25 of 28 June 2006), 'Residential Postcodes, Skilled Occupations, Relevant Assessing Authorities and Points (regulations 1.03 and 2.26B)'	GN 25	06/035		01/07/06	31/10/06	GN 55	no	Signed 19/06/06; revokes GN signed 30/11/05 (GN55, IMMI 05/095) effective 1 July 2006
Legislative Instrument IMMI 05/095 (GN 49 of 14 December 2005), 'Skilled Australian Sponsored (Migrant) visa: Residential Postcodes, "Skilled occupations" and points (regulations 1.03 and 2.26B)'	GN 49	05/095		15/12/05	30/06/06	S 190	no	Signed 30/11/05; effective 15/12/05; revokes GN signed 26/10/05 (S 190)
Legislative Instrument IMMI 05/067 (S190 of 1 November 2005) 'Skilled Australian Sponsored (Migrant) visa: Residential Postcodes, "Skilled occupations" and points (regulations 1.03 and 2.26B)'	S 190	05/067		01/11/05	14/12/05	GN 55, GN 36?	no	Signed 26/10/05, effective 1/11/05; Revokes GN signed on 31/8/04 and 29/03/05

S55 of 1 April 2005, 'Specification of skilled occupations for the purposes of the definition of "skilled occupation" in regulation 1.03 and the Relevant Assessing Authorities for the purposes of regulation 2.26B of the Migration Regulations 1994'	S 55	-		02/04/05	31/10/05	GN 36	no	Signed 29/3/05, effective 2/4/05. Revokes GN "signed 8/9/04" (GN36)
GN36 of 8 September 2004, 'Specification of Skilled Occupation and Relevant Assessing Authorities for the purposes of regulation 1.03 and regulation 2.26B of the Migration Regulations 1994'	GN 36	-		08/09/04	01/04/05	S 170	no	Signed 31/08/04, effective 08/09/04; revokes Gn signed 14/5/04 (S 170);**WARNING - paragragh 4 and Sch B (applicable to Class Bq visa applcaitions lodged on or after 1/9/04 was held to be invalid (Twinn v MIMIA [2005] FCAFC 242) and should not be relied upon.**
S170 of 20 May 2004, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B of the Migration Regulations 1994'	S 170	-		20/05/04	07/09/04	GN 38	no	Signed 14/5/04; Revokes Gazetted Notice of 10/9/03 (GN 38)
GN 38 of 24 September 2003, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B of the Migration Regulations 1994'	GN 38	-		24/09/03	19/05/04	GN 15	no	Signed 10/09/03, effective 24/9/03; revokes GN signed 26/3/02 (GN 15)
GN 15 of 17 April 2002, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 And 2.26B(1)'	GN 15	-		17/04/02	23/09/03	GN 31	no	Signed 26/3/02, effective 17/4/02; revokes GN signed on 21/7/01 (GN 31)

GN 31 of 8 August 2001, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 31	-		08/08/01	16/04/02	GN 10	no	Signed 21/7/01, effective 8/8/01; revokes GN 10
GN 10 of 14 March 2001, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 10	-		01/03/01	07/08/01	GN 41	no	Signed 27/2/01, effective 1/3/01; revokes GN signed 19/8/00 (GN 41)
GN 41 of 18 October 2000, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 41	-		01/11/00	28/02/01	GN 22	no	signed 19/8/00, effective 1/11/00; revokes GN signed 17/5/00 (GN 22)
GN 22 of 7 June 2000, 'Specification Of Skilled Occupations And Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 22	-		01/07/00	31/10/00	GN 512	no	signed 17/5/00, effective 1/7/00; revokes GN signed 20/10/99 (GN 512)
S 512 of 28 October 1999, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	S 512	-		01/11/99	30/06/00	GN 26	no	signed 20/10/99, effective 1/11/99; revokes GN signed 23/6/99 (GN 26)

GN 26 of 30 June 1999, 'Specification of Skilled Occupations and Relevant Assessing Authorities for the purposes of regulations 1.03 and 2.26B(1)'	GN 26	-		01/07/99	31/10/99	n/a	no	Signed 23/6/99; effective 1/7/99

Notes

1. r.1.03 defines **'skilled occupation'** prior to 1/7/10 as 'an occupation that is specified by Gazette Notice as a skilled occupation for which a number of points specified in the Notice are available' and from 1/7/10 as having the meaning given by r.1.15I. r.1.03 defines **'ANZSCO'**, for visa applications made on or after 1/7/13, as having 'the meaning specified by the Minister in an instrument in writing for this definition'; and **'relevant assessing authority'** to mean a person or body specified under r.2.26B.

2. r.1.15I defines 'skilled occupation'. **r.1.15I(1)** provides that a *skilled occupation* , in relation to a person, means an occupation of a kind that is specified by the Minister in an instrument in writing to be a skilled occupation, for which a number of points specified in the instrument are available, and is applicable to the person in accordance with the specification of the occupation. **r.1.15I(2)** provides that, without limiting subregulation 1.15I(1) the Minister may specify in the instrument any matter in relation to an occupation, or to a class of persons to which the instrument relates, including that an occupation is a skilled occupation for a class of persons, and that an occupation is a skilled occupation for a person who is nominated by a State or Territory government agency.

3. r.2.26AA applies to an applicant for a points tested General Skilled Migration visa if the application is made on or after 1/7/11 but before 1/1/13 and the applicant is a person, or a person in a class of persons specified in an instrument in writing made by the Minister for r.2.26AA(2)(a). Regulation 2.26AA was omitted with effect from 1 July 2013 (SLI 2012, No.82).

4. r.2.26AB applies to an applicant for a points tested General Skilled Migration visa if the applicant is a person in a class of persons specified by the Minister in an instrument in writing for r.2.26AB(2) and the application is made on or after 1/7/11 but before 1/1/13 and the applicant's score is assessed in accordance with Schedule 6B and that score is less than the applicable pass mark at the time the score is assessed. r.2.26AB also applies to an applicant if the application is made on or after 1/7/11 and r.2.26AA(2) does not apply. Regulation 2.26AB and Schedule 6B were omitted with effect from 1/7/13 (SLI 2012, No.82).

5. r.2.26B(1) provides that the Minister may, by written instrument, specify a person or body as the **relevant assessing authority** for a skilled occupation (if the person or body is approved in writing by the Education Minister or the Employment Minister as the relevant assessing authority for the occupation) and one or more countries, for the purposes of a skills assessment application made by a resident of one of those countries. Under r.2.26B(1A) the Minister must not make such an instrument unless the person or body has been approved in writing as the relevant assessing authority for the occupation by the Education Minister or Employment Minister. The relevant assessing authority is specified in the same instrument as the skilled occupation list. ***Education Minister*** and ***Employment Minister*** are defined in r.1.03.

6. Items 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) of Schedule 1 enable a skilled occupation to be specified by the Minister in an instrument in writing.

7. Items 6A11, 6A12 and 6A13 of Schedule 6A awarded points where the skilled occupation nominated by the applicant in his or her application was specified by an instrument in writing for the item as a skilled occupation for which at least 60, 50 and 40 points respectively were available. Schedule 6A was omitted with effect from 1/7/12 (SLI 2012, No. 82) in respect of applications made on and after that date.

8. The requirement to nominate a skilled occupation is a Schedule 2 'time of application' criterion (or for (skilled student) Class DD and, DE (skilled overseas student) and UQ (skilled graduate) visas, a Schedule 1 requirement). For guidance as to the relevant instrument, see the MRD Legal Services commentary 'Skilled Occupation', and the 'Skilled Occupation List Instruments – Quick guide'.

9. The Skilled Occupations / Assessing authorities List (SOL) is also relevant to an assessment of the applicant under the 'points test' as provided for in Subdivision B of Division 3 of Part 2 of the Act and Part 2 Division 2.6 of the Regulations: 'Prescribed qualifications – application of points system' as in force at the relevant time. For guidance on how the points system operates, see MRD Legal Services 'General Points Test' commentaries: Schedule 6A, 6B, 6C and 6D.

Migration Occupations in Demand (r.1.15H)

Title	Gazette	IMMI ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI/033, 'Migration Occupation in Demand (regulation 1.15H)'		11/033	F2011L01229	1/07/11	current	10/025	yes	Made 16/6/11, registered 24/6/11, revokes IMMI 10/025 signed 17/6/10, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).
Legislative Instrument IMMI/025, 'Migration Occupation in Demand (regulation 1.15H)'	-	10/025	F2010L01308	01/07/10	30/06/11	10/001	yes	Signed 17/06/10, effective 1/07/10, revokes IMMI10/001 signed 04/02/10 Note - only applies to specific classes of persons. ie. (a) person who had an unresolved Subclass 861, 862, 880, 881, 495, 175, 176, 475, 487, 885, 886 application as at 08/02/10; or (b) person who held a Subclass 485 visa, or had an unresolved Subclass 485 application as at 08/02/10 AND who makes a Subclass 885, 886, 487 application before 01/01/13
Legislative Instrument IMMI 10/001, 'Migration Occupation in Demand (regulation 1.03)'	-	10/001	F2010L00297	08/02/10	30/06/10	08/034	yes	Signed 04/02/10, effective 08/02/10 revokes instrument signed 07/05/08 (08/034)
Legislative Instrument IMMI 08/034, 'Migration Occupations in Demand (regulation 1.03)'	-	08/034	F2008L01524	17/05/08	07/02/10	07/008	yes	Signed 07/05/08, effective 17/05/08 revokes instrument signed 27/07/07 (07/008)
Legislative Instrument IMMI 07/008, 'Migration Occupations in Demand (reguulation 1.03)'	-	07/008	F2007L02388	30/07/07	16/05/08	06/066	yes	Signed 27/07/07, effective 30/07/07 revokes GN signed 7/9/06 (GN 37)
Legislative Instrument IMMI 06/066 (GN 37 of 20 September 2006), 'Migration Occupations in Demand'	GN37	06/066		20/09/06	29/07/07	06/017	yes	Signed 7/9/06, effective 20/9/06 (day of registration of FRLI). Revokes GN signed 27/3/06 (GN13) Explanatory Statement available.

Legislative Instrument IMMI 06/017 (GN 13 of 5 April 2006), 'Migration Occupations in Demand'	GN13	06/017		28/03/06	19/09/06	05/094	no	Signed 27/3/96; effective 28/3/06 (day of registration of FRLI)
Legislative Instrument IMMI 05/094 (GN 49 of 14 December 2005) 'Migration Occupations in Demand'	GN 49	05/094		15/12/05	27/03/06	S 186	no	Signed 30/11/05; effective 15/12/05; revokes GN signed 21/10/05 (S 186)
S186 of 1 November 2005, 'Migration Occupations in Demand'	S 186	-		01/11/05	14/12/05	GN 17	no	Signed 21/10/05; effective 1/11/05; revokes GN signed 27/4/05 (GN 17)
GN 17 of 4 May 2005, 'Specification of a Migration Occupation in Demand for the purposes of regulation 1.03 of the Migration Regulations 1994'	GN 17	-		04/05/05	31/10/05	GN 36	no	Signed 27/04/05; revokes GN signed 31/8/04 (GN 36)
GN 36, 8 September 2004, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 36	-		08/09/04	03/05/05	S 171	no	Signed 31/8/04, effective 8/9/04; Revokes GN signed 14/5/04 (S 171)
S171 of 20 May 2004, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	S 171	-		20/05/04	07/09/04	S 481	no	Signed 14/5/04, effective 20/5/04. Revokes GN signed 9/12/03 (S 481)
S481 of 17 December 2003, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	S 481	-		17/12/03	19/05/04	GN 10	no	Signed 9/12/03, effective 17/12/03; Revokes Gnu signed 7/3/03 (GN 10)
GN 10 of 12 March 2003, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 10	-		12/03/03	16/12/03	S 364	no	signed 7/03/03; effective 12/3/03. Revokes GN signed 25/9/02 (S 364)
S364 of 2 October 2002, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	S 364	-		02/10/02	11/03/03	GN 15	no	signed 25/9/02, effective 2/10/02; Revokes GN signed 26/3/02 (GN15)

GN 15 of 17 April 2002, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 15	-		19/04/02	01/10/02	GN 25	no	signed 26/3/02, effective 19/4/02, Revokes GN signed 28/4/01 (GN 25)
GN 18 of 9 May 2001, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 18	-		09/05/01	18/04/00	GN 15	no	Signed 28/4/01, effective 9/5/01; Revokes GN signed 5/4/00
GN 15 of 19 April 2000, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 15	-		19/04/00	08/05/01	GN 26	no	signed 5/4/00, effective 19/4/00; revokes GN signed 23/6/99 (GN 26)
GN 26 of 30 June 1999, 'Specification of Migration Occupations in Demand for the purposes of Regulation 1.03'	GN 26	-		01/07/99	18/04/00	nil	no	signed 23/6/99; effective 1 July 1999; revokes GN signed

Notes

1. r.1.03 and r.1.15H defined migration occupation in demand. Prior to 1/7/10, r.1.03 defined migration occupation in demand prior to 1/7/10 to mean a skilled occupation specified by the Minister in a written instrument as a migration occupation in demand (including an occupation that may be described by reference to characteristics in the instrument) and from 1/7/10 to have the meaning given by r.1.15H. From 1/7/10, r,1,15H defines **'Migration occupation in demand'**, in relation to a person to mean a skilled occupation of a kind that is (a) specified by written instrument to be a migration occupation in demand and (b) is applicable to the person in accordance with the specification. This instrument is commonly referred to as the MODL. The definition was omitted with effect on and from 1/7/13 (SLI2012, No.82).

2. The MODL is relevant to Schedules 6A, Part 7 (Skills targeting qualifications) and 6B, Part 7 (Occupation in demand qualifications). Points are available in specified circumstances where an applicant has nominated a MOD in his/her application.

3. For visa **applications lodged prior to 1/7/06**, the relevant MODL to apply is the instrument in force at time of application (See *Aomatsu v MIMIA* [2005] FCAFC 139).

4. For visa **applications lodged on or after 1/7/06**, the relevant MODL to apply is the more favourable of either (a) the instrument in force at time of application; or (b) the instrument in force at the time of the s.93(1) points assessment (ie on review, time of Tribunal's decision): r.2.26A(5AA) as in force before 1/7/12. Regulation 2.26A was omitted with effect on and from 1/7/12 (SLI 2012, No. 82), and applicable to visa applications made on or after that date.

Pool Marks (s.96(1)) and Pass Marks (s.96(2)) for Visa Class SI, SN, SP, VB, VC, VE and VF

Visa Class	Visa Subclass	Title	IMMI ref	Explanatory Statement	FRLI ref	Registered	In force		Revokes	Notes
							from	until		
SI, SN, SP	189, 190, 489	Migration (IMMI 18/067: Pool and Pass Marks for General Skilled Migration Visas) Instrument 2018	18/067	yes	F2018L00920	28/06/2018	01/07/18	current	12/017	Made 25/06/18; commenced 01/07/18. Applies in relation to GSM (Class SI/SN/SP) visa applications made in response to an invitation given on or after 1 July 2018: s.10.
	189, 190, 489	Pass Marks And Pool Marks in Relation to Applications for General Skilled Migration Visas (Classes VE, VC, VF, VB, SI, SN and SP) (Subsections 96(1) and 96(2))	12/017	yes	F2012L01317	25/06/2012	01/07/12	30/06/18	11/027	Made 12/06/12; commenced 01/07/12 immediately after commencement of Migration Amendment Regulation 2012 (No. 2).
VB, VC, VE, VF	175, 176, 475, 487, 885, 886	Migration (IMMI 18/067: Pool and Pass Marks for General Skilled Migration Visas) Instrument 2018	18/067	yes	F2018L00920	28/06/2018	01/07/18	current	12/017	Made 25/06/18; commenced 01/07/18. Applies in relation to former GSM (Subclass 175/176/475/487/885/886) visa applications if r.2.26AA as in force immediately before 1 July 2013 applies to the applicant: s.11.
	175, 176, 475, 487, 885, 886	Pass Marks And Pool Marks in Relation to Applications for General Skilled Migration Visas (Classes VE, VC, VF, VB, SI, SN and SP) (Subsections 96(1) and 96(2))	12/017	yes	F2012L01317	25/06/2012	01/07/12	30/06/18	11/027	Made 12/06/12; commenced 01/07/12 immediately after commencement of Migration Amendment Regulation 2012 (No. 2).
	175, 176, 475, 487, 885, 886	Pass Marks And Pool Marks in Relation to Applications for General Skilled Migration Visas (Classes VE, VC, VF and VB) (Subsections 96(1) and 96(2))	11/027	yes	F2011L01218	23/06/2011	01/07/11	30/06/12	07/056	Made 15/06/11; commenced 01/07/11.
	175, 176, 475, 487, 885, 886	Pass Marks And Pool Marks in Relation to Applications for GSM Skilled Visas (Classes VE, VC, VF and VB) (Subsections 96(1) and 96(2))	07/056	yes	F2007L02689	30/08/2007	01/09/07	30/06/11	n/a	Made 28/08/07; commenced 01/09/07.

Notes

1. Under s.96(1) the Minister may, by written instrument, specify, in relation to a class of visa, the relevant pool mark for the purposes of the points test as provided for in Subdivision B of Division 3 of Part 2 of the Act and Part 2 Division 2.6 of the Regulations: 'Prescribed qualifications – application of points system' as in force at the relevant time. For guidance on how the points system operates, see MRD Legal Services 'General Points Test' commentaries: Schedule 6A, 6B, 6C and 6D.

2.Under s.96(2), the Minister may, by written instrument, specify in relation to a class of persons, the pass mark for the purposes of the Act and Regulations. The pass park is the number of points needed to qualify for the visa. The points tests are set out in Scheudle 6A, 6B, 6C and 6D. For guidance on how the points system operates, see MRD Legal Services Points Test commentaries: Schedule 6A, 6B, 6C and 6D.

Pool Marks (s.96(1)) for Visa Class AT, AJ, BN, BQ, DB, DD, DE and UX

Visa Class	Subclass	Title	Gazette No	In force		Expressly applies to	Revokes	Notes
				from	until			
AT	126, 135	S 90 of 4 March 1998: Specification of pool mark in relation to applications for Independent (Migrant) (Class AT) Visas	S 90	4/03/1998	current		s 456	Signed 27/2/98; effective 4/3/98
	126, 135	S 456 of 1 December 1995: Specification of pool mark in relation to applications for Independent (Migrant) (Class AT) Visas	S456	1/12/1995	3/03/1998		GN 34	Signed 28/11/05; effective 1/12/95.
	126, 135	GN 34 of 31 August 1994: Specification of Pool Mark in Relation to Independent (Migrant) (Class AT) Visas	GN 34	1/09/1994	30/11/1995		-	Signed 22/8/94; effective 1/9/04
AJ	105,106	GN 25 of 25 June 1997: Specification of pool mark in relation to applications for Class AJ Visas (Skilled - Australian Linked (Migrant))	GN 25	1/07/1997	current		GN 31	Signed 16/06/97; effective 01/07/97; published in GN 25 of 25/06/97
	105	GN 31 of 7 August 1996: Specification of pool mark in relation to applications for Concessional Family (Migrant)(Class AJ) Visas	GN 31	1/11/1996	30/06/1997		GN 34	Signed 26/07/96; effective 01/11/96
	105	GN 34 of 31 August 1994: Specification of Pool Mark in Relation to Independent (Migrant) (Class AT) Visas	GN 34	1/09/1994	31/10/1996		-	Signed 22/08/94; effective 01/09/94
BN	136, 137	GN 26 of 30 June 1999: Specification of pool mark in relation to applications for Skilled - Independent (Migrant) Class BN visas	GN 26	1/07/1999	current		n/a	Signed 23/6/99; effective 1/7/99
BQ	138, 139	GN 26 of 30 June 1999: Specification of pool mark in relation to applications for Skilled - Australian -sponsored (Migrant) Class BQ visas	GN 26	1/07/1999	current		n/a	Signed 23/6/99; effective 1/7/99
DB	861 862	GN 15 of 14 April 2004: Specification of pool mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 15	14/04/04*	current	861 Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/4/04; (c) on or after 14/04/04; and 862 visa applications made on or after 14/4/04	GN 18	Signed 1/4/04; effective 14/4/04; does not expressly revoke GN 18 of 2002 but supersedes specifications for 861 visas. In respect of 862 visa specification, this notice does not appear to supersede GN 18, but operates only from 14/4/04.
	861 862	GN 18 of 8 May 2002: Specification of pool mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 18	8/05/2002	13/04/2004	Specification re 861 visa Superseded by GN 15 which applies to pre 8/5/02 applications. However still applicable for 862 visas lodged	GN 10	Signed 2/5/02; effective 8/5/02
	861 862	GN 10 of 14 March 2001: Specification of pool mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 10	14/03/2001	7/05/2002		-	Signed 27/2/01; effective 14/3/01
DD	880	GN 15 of 14 April 2004: Specification of pool mark in relation to applications for Skilled - Independent Overseas Student (Residence) (Class DD) visas	GN 15	14/04/04*	current	Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/3/05; (c) on or after 1/4/05	GN 18	Signed 1/4/04; effective 14/4/04; supersedes GN 18 in relation to applications it deals with (ie pre 14/04/04 applications)
	880	GN 18 of 8 May 2002: Specification of pool mark in relation to applications for Skilled - Independent Overseas Student (Residence) (Class DD) visas	GN 18	8/05/2002	13/04/2004	Superseded by GN 15 which applies to pre 8/5/02 applications	S 250	Signed 2/5/02; effective 8/5/02; No longer operative, even in relation to pre 14/4/04 applications
	880	S 250 of 29 June 2001: Specification Of Pool Mark In Relation To Applications For Skilled – Independent Overseas Students (Residence) (Class DD) Subclass 880 Visas	S 250	29/06/2001	7/05/2002		-	Signed 28/6/01; effective 29/06/01
DE	881	S 249 of 29 June 2001: Specification of pool mark in relation to applications for Skilled - Australian-Sponsored Overseas Students (Residence) (Class DE) subclass 881 visas	S 249	29/06/2001	current		n/a	Signed 28/6/01; effective 29/6/01
UX	495	GN 26 of 30 June 2004: Specification of pool mark in relation to applications for Skilled - Independent Regional (Provisional)(Class UX) visas	GN 26	1/07/2004	1/07/2004		n/a	Signed 17 June 2004; effective 1/7/04

Pass Marks (s.96(2)) for Visa Class AT, AJ, BN, BQ, DB, DD, DE and UX

Visa Class	Visa Subclass	Title	Gazette No	In force		Expressly applies to	Revokes	Notes
				to	from			
AT	126	GN 17 of 28 April 1999: Specification of pass mark in relation to applications for Subclass 126 (Independent) Visas	GN 17	28/04/1999	current		S 91	Signed 16/4/99; effective 28/4/99
	126, 135	S 91 of 4 March 1998: Specification Of Pool Mark In Relation To Applications For Independent (Migrant) (Class AT) Visas	S 91	04/03/98	27/04/1999		S 288	Signed 27/2/98, effective 4/3/98; revokes GN in effect from 1/12/95
	126, 135	S 288 of 1 August 1996: Specification of pass mark in relation to applications for Independent (Migrant) (Class AT) Visa	S288	1/08/1996	3/03/1998		S456	Signed 26/7/96; effective 1/8/96
	126, 135	S 456 of 1 December 1995: Specification of pool mark in relation to applications for Independent (Migrant) (Class AT) Visa	S456	1/12/1995	31/07/1996		GN 34	Signed 28/11/95; effective 1/12/95
	126, 135	GN 34 of 31 August 1994: Specification of pool mark in relation to applications for Independent (Migrant) (Class AT) Visa	GN 34	1/09/1994	30/11/1995			Signed 22/8/04; effective 1/9/94
AJ	105, 106	GN 25 of 25 June 1997: Specification of pass mark in relation to applications for Class AJ Visas (Skilled - Australian Linked (Migrant))	GN 25	1/07/1997	current		GN 31	Signed 16/6/97; effective 1/7/97
	105	GN 31 of 7 August 1996: Specification of pass mark in relation to applications for Concessional Family (Migrant) (Class AJ) Visas	GN 31	1/11/1996	30/06/1997		GN 34	Signed 26/07/96; effective 1/7/96
	105	GN 34 of 31 August 1994: Specification of pass mark in relation to applications for Concessional Family (Migrant) (Class AJ) Visas	GN 34	1/09/1994	31/10/1996			Signed 22/08/94; effective 1/9/94
BN	136, 137	GN 15 of 14 April 2004: Specification of pass mark in relation to applications for Skilled - Independent (Migrant) (Class BN) visas	GN 15	14/04/2004	current	Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/3/05; (c) on or after 1/4/05	GN 18	Signed 17/6/04; effective 1/7/04
	136, 137	GN 18 of 8 May 2002: Specification of pass mark in relation to applications for Skilled - Independent (Migrant) (Class BN) visas	GN 18	8/05/2002	13/04/2004	Superseded by GN 15 which applies to pre 8/5/02 applications	GN 26	Signed 2/5/02; effective 8/5/02
	136, 137	GN 26 of 30 June 1999: Specification of Pass Mark in relation to applications for Skilled-Independent (Migrant) (Class BN) visas	GN 26	1/07/1999	7/05/2002			Signed 23/6/99; effective 1/7/99
BQ	138, 139	GN 26 of 30 June 1999: Specification of pass mark in relation to applications for Skilled - Australian -sponsored (Migrant) Class BQ visas	GN 26	1/07/1999	current			Signed 23/6/99; effective 1/7/99
DB	861, 862	GN 15 of 14 April 2004: Specification of pass mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 15	14/04/2004	1/10/2015	Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/3/05; (c) on or after 1/4/05; and 862 visa applications made on or after	GN18	Signed 1/4/04; effective 14/4/04
	861, 862	GN 18 of 8 May 2002: Specification of pass mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 18	8/05/2002	13/04/2004	Specification re 861 visa superseded by GN 15 which applies to pre 8/5/02 applications. However still applicable for 862 visas lodged	GN 10	Signed 3/5/02; effective 8/5/02
	861, 862	GN 10 of 14 March 2001: Specification of pass mark in relation to applications for Skilled - New Zealand Citizen (Residence) (Class DB) visas	GN 10	14/03/2001	7/05/2002			Signed 27/2/01; effective 14/3/01
DD	880	GN 15 of 14 April 2004: Specification of pass mark in relation to applications for Skilled - Independent Overseas Student (Residence) (Class DD) visas	GN 15	14/04/2004	current	Visa applications made (a) prior to 8/5/02; (b) between 8/5/02 - 31/3/05; (c) on or after 1/4/05	GN 18	Signed 1/4/04; effective 14/4/04
	880	GN 18 of 8 May 2002: Specification of pass mark in relation to applications for Skilled - Independent Overseas Student (Residence) (Class DD) visas	GN 18	8/05/2002	13/04/2004	Superseded by GN 15 which applies to pre 8/5/02 applications	S 247	Signed 2/5/02; effective 8/5/02
	880	S 247 of 29 June 2001: Specification of Pass Mark in Relation to Applications for Skilled – Independent Overseas Students (Residence) (Class DD) Subclass 880 Visas	S 247	29/06/2001	7/05/2002			Signed 28/6/01; effective 29/6/01
DE	881	S 248 of 29 June 2001: Specification of pass mark in relation to applications for Skilled - Australian-Sponsored Overseas Students (Residence) (Class DE) subclass 881 visas	S 248	29/06/2001	current			Signed 28/06/01; effective 29/06/01
UX	495	GN 26 of 30 June 2004: Specification of pass mark in relation to applications for Skilled - Independent Regional (Provisional)(Class UX) visas	GN 26	1/07/2004	current			Signed 17/6/04; effective 1/7/04

Notes

***** Note that these notices marked with a (*) are retrospective and specify a pool mark for visa applications lodged prior to this date.

1. Under s.96(1) the Minister may, by written instrument, specify, in relation to a class of visa, the relevant pool mark for the purposes of the points test as provided for in Subdivision B of Division 3 of Part 2 of the Act and Part 2 Division 2.6 of the Regulations: 'Prescribed qualifications – application of points system' as in force at the relevant time. For guidance on how the points system operates, see MRD Legal Services 'General Points Test' commentaries: Schedule 6A, 6B, 6C and 6D.

2.Under s.96(2), the Minister may, by written instrument, specify in relation to a class of persons, the pass mark for the purposes of the Act and Regulations. The pass park is the number of points needed to qualify for the visa. The points tests are set out in Scheudle 6A, 6B, 6C and 6D. For guidance on how the points system operates, see MRD Legal Services Points Test commentaries: Schedule 6A, 6B, 6C and 6D.

Designated Securities

Title	Gazette	immi ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI07/065, 'Desginated Securities (subregualtion 2.26C(1))'	-	07/065	F2007L02651	01/09/07	current	S258	yes	signed 28/08/07; effective 01/09/07; revokes instrument signed 19/06/01
S 258 of 29 June 2001, 'Specification of Designated Securities for the purposes of r.2.26C'	S 258			29/06/01	31/08/07	GN 26	-	Signed 19/06/01; effective 29/06/01; revokes GN 26
GN 26, 30 June 1999, 'Specification of Designated Securities for the purposes of r.2.26C'	GN 26			01/07/99	28/06/01	n/a	-	Signed 23/06/99; effective 1/7/99

Notes

1. r.2.26C provided that the Minister may, by written instrument, specify a security issued by an Australian State or Territory government authority as a security in which an investment is a designated security for the purposes of Part 8 of Schedule 6A.

2. Item 6A81 of Part 8 of Schedule 6A gave 'bonus points' to applicants for a Class BQ, DB, DD and DE visa if they had deposited at least AUD100,000 in a designated security for a term of not less than 12 months. Schedule 6A, and the visa classes to which it applied, were omitted on 1/7/12 (SLI 2012, No. 82).

Designated Languages (r.1.03; Schedules 6A & 6B)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
GN 34 of 28 August 2002, 'Specification of Designated Languages for the purposes of regulation 1.03 of the Migration Regulations'	GN 34	-		28/08/02	current	GN 26	No	Signed 27/06/02; effective 28/08/02; revokes GN signed 23/6/99
GN 26 of 30 June 1999, 'Specification of Designated Languages for the purposes of regulation 1.03'	GN 26	-		01/07/99	27/08/02	n/a	No	Signed 23/06/99; effective 1/7/99

Notes

1. Regulation 1.03 defined 'designated language' to mean 'a language that is specified by Gazette Notice as a designated language'. Definition omitted with effect from 1/7/2013 (SLI 2012, No. 82)

2. 'Designated language' is relevant to the Schedules 6A and 6B General Points Tests. Item 6A81 of Schedule 6A gives 'bonus points' to applicants for a Class BQ, DB, DD and DE visa, and item 6B81 of Schedule 6B gives points to applicants to which Schedule 6B applies, if they hold a qualification (equivalent to an Australian tertiary degree) the tuition for which was conducted in a designated language; or are accredited as a professional interpreter or translator (level 3) in a designated language by NAATI. Schedules 6A and 6B were omitted with effect from 1/7/2013 (SLI 2012, No. 82).

Designated Areas (Schedule 6, Item 6701, r.1.03)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI12/021, 'Designated Areas (r.1.03)'		12/021	F2012L01305	1/07/12	current	11/063	yes	Made 12/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (no.2)
Legislative Instrument IMMI11/063, 'Designated Areas (item 6701 of Schedule 6)'	-	11/063	F2011L01886	12/09/11	30/06/12	07/060	yes	Signed 29/08/11, effective 12/09/11, revokes IMMI 07/060
Legislative Instrument IMMI07/060, 'Designated Areas (item 6701 of Schedule 6)'	-	07/060	F2007L02654	01/09/07	11/09/11	GN 34	yes	Signed 28/08/07, effective 01/09/07; revokes GN 34
GN 34 of 29 August 2001, 'Designated Areas for the purpose of Item 6701, Schedule 6'	GN 34	-	F2006B00554	29/08/01	31/08/07	S 601	-	Signed 23/08/01 effective 29/8/01; revokes S 601
S 601 of 21 December 1998, 'Designated Areas for the purpose of Item 6701, Schedule 6'	S 601	-		01/01/99	28/08/01	S 426	-	Signed 10/12/98; effective 1/1/99; revokes S 426
S 426 of 28 August 1998, 'Designated Areas for the purpose of Item 6701, Schedule 6'	S 426	-		01/09/98	31/12/98	GN 34	-	Signed 10/08/98; effective 1/9/98; revokes GN 34
GN 34 of 31 August 1994, 'Designated Areas for the purpose of Item 6701, Schedule 6'	GN 34	-		01/09/94	31/08/98	n/a	-	Signed 22/8/94; effective 1/9/94

Notes

1. Schedule 6 item 6701 provided that the sponsor must be resident in one or more of the designated areas specified in an instrument for this item. Schedule 6 set out the General Points Test for visa classes AT (Subclasses 126 and 135) and AJ (Subclasses 105 and 106). Those visa classes were closed to new applications on 1 July 1999. Schedule 6 and the visa classes to which it applied were omitted on 1/7/12 (SLI 2012, No. 82).

2. Regulation1.03 defines 'designated area' as 'an area specified as a designated area by the Minister in an instrument in writing for this definition', applicable to visa applications made on or after 1/7/12.

Regional and Low Population Growth Metropolitan Areas (Schedule 6A, Items 6A1001, 6A1002 and Schedule 6D Item 6D101)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explantory Statement	Notes
				from	until			
Location of Campuses and Postcodes (Schedules 6D101(b) and 6D101(c))		12/015	F2012L01444	1/07/2012	current	05/077	yes	Made 28/6/12, commences 1/7/12 immediately after Migration Amendment Regulation 2012 (No.2)
S185 of 1 November 2005, 'Educational Institutions in Regional and Low Population Growth Metropolitan Areas (Regulations 6A1001 and 6A1002)'	S 185	05/077		01/11/05	30/06/12	GN 28		Signed 21/10/05; effective 1/11/05; revokes GN signed 6/7/05
GN 28 of 20 July 2005, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	GN 28			20/07/05	31/10/05	GN 14		Signed 6/7/05; effective 20/7/05; revokes GN signed 31/3/05
GN 14 of 13 April 2005, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	GN 14			13/04/05	19/07/05	GN 28		Signed 31/3/05; effective 13/4/05; revokes GN signed 29/6/04
GN 28 of 14 July 2004, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	GN 28			14/07/04	12/04/05	GN 26		Signed 29/6/04; effective on gazettal - 14/7/04; revokes GN signed 17/6/04
GN 26 of 30 June 2004, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	GN 26			01/07/04	13/07/04	S 237		Signed 17/6/04; effective 1/7/04; revokes GN signed 26/6/03
S237 of 27 June 2003, 'Specification of Regional and Low Population Growth Metropolitan Areas for the Purposes of Items 6A1001 and 6A1002 of Schedule 6A of the Migration Regulations 1994'	S 237			01/07/03	30/06/04	n/a		Signed 26/06/03; effective 1/7/03

Notes

1. Items 6A1001 and 6A1002 of Schedule 6A provided that an applicant be awarded points under the General Points Test for study and residence in regional and low population growth metropolitan areas specified in an instrument for those items. Schedule 6A was repealed on 1/7/12 (SLI 2012, No. 82).

2. Item 6D101 provides for points where, at time of invitation to apply for the visa, the applicant (a) met the Australian study requirement; (b) the location of the campus/es at which that study was undertaken is specified by the Minister in an instrument in writing;(c) while undertaking the course of study the applicant lived in a part of Australia the postcode of which is specified by the Minister in an instrument in writing; and (d) none of the study constituted distance education.

Specification of as State or Territory - English Language Training

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI 09/124, 'English Language Training arrangements (paragraphs 134.222C(2)(a), 139.226(b), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and subparagraphs 6B103(g)(ii) and (iii))'	-	09/124	F2009L04517	01/01/10	current	09/078	yes	Signed 15/12/09; effective 01/01/10; revokes IMMI 09/078 signed 25/06/09.
Legislative Instrument IMMI09/078, 'English Language Training arrangements (paragraphs 134.222C(2)(a), 139.226(b), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and 6B101(f) and subparagraphs 475.214(b)(i) and (c)(i), 487.215(b)(i) and (c)(i) and 487.224(b)(i) and (c)(i))'	-	09/078	F2009L02546	01/07/09	31/12/09	n/a	yes	Signed 25/06/09; effective 01/07/09. This instrument applied in relation to visa applications made on or after 1 July 2009.
Legislative Instrument IMMI09/072, 'States and Territories with English Language Training arrangements (paragraphs 134.222C(2)(a), 139.226(b), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and 6B101(f) and subparagraphs 475.214(b)(i) and (c)(i), 487.215(b)(i) and (c)(i) and 487.224(b)(i) and (c)(i))'	-	09/072	F2009L02537	11:59pm 30/06/09	-	-	yes	Signed 25/06/09; effective 30/06/09 at 23.59; revokes IMMI 07/054 signed 28/08/07. This instument does not apply in relation to a visa application made on or before 23.59 on 30/6/09. Note this instrument only revokes the previous instrument - it does not specify any matters for the purpose of the regulations - see instead 09/078.
Legislative Instrument IMMI07/054, 'States and Territories with English Language Training arrangements (paragraphs 134.222C(2)(a), 139.226(b), 475.214(b)(i) and (c)(i), 487.215(b)(i) and (c)(i), 487.224(b)(i) and (c)(i), 496.226(b), 863.226(b), 882.225(b), 6B34(a) and (b) and 6B101(f)))'	-	07/054	F2007L02670	01/09/07	30/06/09	06/048	yes	Signed 28/08/07; effective 1/9/07; revokes IMMI 06/048 (GN S121) signed 29/06/06
S121 of 3 July 2006 (Legislative Instrument IMMI06/048), 'States and Territories with English Language Training arrangements (regulations 134.222C(2)(a), 139.226(b), 863.226(b) and 882.225(b))'	S 121	06/048	F2006L01865	01/07/06	31/08/07	S 237	yes	Signed 29/06/06; effective 1/7/06; revokes GN signed 15/12/05 (S237 - IMMI 05/098)
S237 of 21 December 2005, 'States and Territories with English Language Training arrangements (regulations 134.222C(2)(a), 139.226(b), 863.226(b) and 882.225(b))'	S 237	05/098		21/12/05	30/06/06	GN 49		Signed 15/120/05; effective 21/12/05; revokes GN signed 23/11/05
GN 49 of 8 December 2004, 'Specification of a State or Territory for the purposes of paragraphs 134.22C(2)(a), 139.226(b), 863.226(b) and 882.225(b) of the Migration Regulations 1994'	GN 49	-		08/12/04	20/12/05	GN 50		Signed 23/11/04; effective on gazettal - 8/12/04; revokes GN signed 10/12/02
GN 50 of 18 December 2002, 'Specification of a State or Territory for the purposes of paragraphs 134.22C(2)(a), 139.226(b), 863.226(b) and 882.225(b) of the Migration Regulations 1994'	GN 50	-		18/12/02	07/12/04	GN 15		Signed 10/12/02; effective 18/12/02; revokes GN signed 5/4/02

GN 15 of 17 April 2002, 'Specification of a State or Territory for the purposes of paragraphs 139.226(b), 863.226(b) and 882.225(b) of the Migration Regulations 1994'	GN 15	-		17/04/02	17/12/02	GN 34		Signed 5/4/02; effective on gazettal - 17/4/02; revokes GN signed 8/08/01
GN 34 of 29 August 2001, 'Specification of a State or Territory for the purposes of paragraph 139.226(b) of the Migration Regulations 1994'	GN 34	-		29/08/01	16/04/02	GN 41		Signed 8/08/01; effective on gazettal - 29/08/01; NB GN states that it revokes GN signed 27/2/01but GN was not signed on that date - rather signed 7/10/00
GN 41 of 18 October 2000, 'Specification of a State or Territory for the purposes of paragraph 139.226(b) of the Migration Regulations 1994'	GN 41	-		18/10/00	28/08/01	GN 35		Signed 7/10/00; revokes GN signed 7/8/00
GN 33 of 23 August 2000, 'Specification of a State or Territory for the purposes of paragraph 139.226(b) of the Migration Regulations 1994'	GN 33	-		23/08/00	17/10/00	GN 27		Signed 7/8/00; effective on gazettal - 23/8/00; revokes GN signed 28/6/99
GN 27 of 7 July 1999, 'Specification of a State or Territory for the purposes of paragraph 139.226(b) of the Migration Regulations 1994'	GN 27	-		01/07/99	22/08/00	n/a		Signed 28/6/99; effective 1/7/99

Notes

1. Clauses 134.222C(2)(a), 139.226(b), 475.214(b)(i), 475.214(c)(i), 487.215(b)(i), 487.215(c)(i),487.224(b)(i), 487.224(c)(i), 496.226(b), 863.226(b), 882.225(b) of Schedule 2 as in force at the relevant times, and items 6B34(a)(i), 6B34(b)(i), 6B101(f), 6B103(g)(ii) and 6B103(g)(iii) of Schedule 6B as in force at the relevant times, enabled a State or Territory to be specified by the Minister as one in which arrangements were established for suitable English language training. Subclasses 134, 139, 496, 863, 882 were omitted with effect from 1/7/12 and Subclasses 475 and 487 and Schedule 6B with effect from 1/7/13 (SLI 2012, No. 82).

2. IMMI 09/124, which commenced on 1/1/10, has no operation in relation to item 6B34, as this provision was omitted on that date (SLI 2009, No. 144).

English Language Tests, Score and Passports (r.1.15B, 1.15C, 1.15D, 1.15E, 1.15EA, cl.485.215, 487.215)

Title	Gazette	Immi	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI 15/005, 'Language Tests, Score and Passports 2015 (Regulations 1.15B, 1.15C, 1.15D and 1.15EA)'	-	15/005	F2014L01666	11/12/14	current	14/076	yes	Made 3/12/14, commences 11/12/14
Legislative Instrument IMMI 14/076, 'Language Tests, Score and Passports (Regulations 1.15B, 1.15C, 1.15D and 1.15EA)'	-	14/076	F2014L01538	23/11/14	10/12/14	12/018	yes	Made 12/11/14, commences 23/11/14
Legislative Instrument IMMI 12/018, 'Language Tests, Score and Passports (Regulations 1.15B, 1.15C, 1.15D, 1.15E and 1.15EA)'	-	12/018	F2012L01287	1/07/12	22/11/14	11/036	yes	Made 12/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (No.2)
Legislative Instrument IMMI 11/036, 'Language Tests, Score and Passports for General Skilled Migration (Regulations 1.15C, 1.15D, 1.15E and 1.15EA and cl.487.215)'	-	11/036	F2011L01233	1/07/11	30/06/12	09/073	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).
Legislative Instrument IMMI 09/073, 'English Language Tests for General Skilled Migration (Regulations 1.15C, 1.15D and Schedule 2, clauses 485.215 and 487.215)'	-	09/073	F2009L02575	1/07/09	30/06/11	08/084	yes	Signed 25/06/09, commences 01/07/09. Applies to GSM (post 1 September 2007)
Legislative Instrument IMMI 08/084, 'English Language Tests and Level Of English Ability for General Skilled Migration (Regulations 1.15C, 1.15D and clauses 485.215 and 487.215)'	-	08/084	F2008L03768	27/10/08	30/06/09	07/055	yes	Signed 10/10/08, commences 27/10/08. Applies to GSM (post 1 September 2007)
Legislative Instrument IMMI 07/055, 'English Language Tests and Level Of English Ability for General Skilled Migration (Regulations 1.15C, 1.15D and clauses 485.215 and 487.215)'	-	07/055	F2007L02688	1/09/07	26/10/08	n/a	yes	Signed 28/08/07, commences 01/09/07. New provisions operative 1/9/07 - no previous instruments

Notes

1. Templates referring to instruments: 485 English proficiency 1/9/07-30/6/11 - ref to IMMI in relevant law. Post 1/7/11 references to contents of IMMI incorporated into relevant law and findings and reasons; 487 English proficiency post 1/7/11 references to contents of IMMI incorporated into relevant law and findings and reasons; 885/886 English proficiency post 1/7/11 references to contents of IMMI incorporated into relevant law and findings and reasons.

2. r.1.15B sets out the definition of Vocational English. For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'.

3. r.1.15C sets out the definition of 'competent English'. For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'.

4. r.1.15D sets out the definition of 'proficient English'. For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'.

5. r.1.15E sets out the definition of 'concessional competent English'. This definition was omitted with effect from 1/7/13 (SLI 2012 No. 82). For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'.

6. r.1.15EA defines 'superior English'. For guidance as to the relevant definition and relevant instrument at different points in time see MRD Legal Services Commentary 'English Language ability – Skilled/Business visas'

7. cl.485.215 and 487.215 required evidence of arrangements to undergo a language test specified by the Minister in an instrument in writing for the paragraph: cl.485.215(c), applicable to visa applications made before 27/10/08, was omitted with effect from that date (SLI 2011 No. 74); cl.487.215(e) for visa applications made before 1/1/10 and 487.215(b) for visa applications made on or after that date and before 1/7/11, omitted with effect from 1/7/11 (SLI 2011 No. 74). For further guidance, see MRD Legal Services Commentary 'Subclass 485 & 487 – Skilled Temporary Onshore Visas (Class VC)' and 'English Language ability – Skilled/Business Visas'.

English Language Tests, Scores and Passports (cl. 476.213 and 485.212)

Title	Gazette	Immi	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI 15/062, 'English Language Tests, Scores and Passports 2015 (Clauses 476.213 and 485.212)'	-	15/062	F2015L00564	18/04/15	current	n/a	yes	Made 16/4/2015, commences 18/4/2015

Notes

1. For visa applications made on or after 18/4/2015, cl.476.213 and 485.212 specify that the language test, test scores, the period in which the scores must be achieved and the passport type, are specified by the Minister in a legislative instrument in writing.

Evidence of Functional English Language Proficiency (r.5.17)

Title	Immi	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Legislative Instrument IMMI15/004, 'Evidence of Functional English Language Proficiency 2015 (Regulation 5.17)'	15/004	F2014L01668	1/01/15	current	14/055	yes	Made 3/12/14, commences 1/1/15
Legislative Instrument IMMI14/055, 'Evidence of Functional English Language Proficiency (Regulation 5.17)'	14/055	F2014L01551	23/11/14	31/12/14	12/073	yes	Made 12/11/14, commences 23/11/14
Legislative Instrument IMMI12/073, 'Evidence of Functional English Language Proficiency (Regulation 5.17)'	12/073	F2012L01447	1/07/12	22/11/14	nil	yes	Made 28/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (no.3)

Notes

1. r. 5.17(a) (as substituted on 1/7/12: SLI 2012, No. 105) provides that, for the purposes of s.5(2)(b) of the Act, evidence specified by the Minister in an instrument in writing is prescribed evidence of the English language proficiency of a person.

2. s.5(2)(b) of the Act provides that, for the purposes of the Act, a person has functional English at a particular time if the person provides the Minister with prescribed evidence of the person's English language proficiency.

Institutions and Disciplines (cl.476.212)

Title	Gazette ref	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI14/010, 'Institutions and Disciplines for Subclass 476 (Skilled-Recognised Graduate) Visas (Clause 476.212)'	-	14/010	F2014L00130	14/02/14	currrent	12/105	yes	Dated 04/02/14, commences 14/02/14.
Legislative Instrument IMMI12/105, 'Institutions and Disciplines for Subclass 476 (Skilled-Recognised Graduate) Visas (Clause 476.212)'	-	12/105	F2012L01948	01/10/12	13/02/2014	10/053	yes	Dated 21/09/12, commences 1/10/12.
Legislative Instrument IMMI10/053, 'Institutions and Disciplines for Subclass 476 (Skilled-Recognised Graduate) Visas (Clause 476.212)'	-	10/053	F2010L02496	30/10/10	30/09/12	08/059	yes	Dated 17/09/10, commences 30/10/10.
Legislative Instrument IMMI07/062, 'Institutions and Disciplines Clause 476.212)'	-	08/059	F2008L03008	09/08/08	29/10/10	07/062	yes	Dated 5/08/08, commences 09/08/08.
Legislative Instrument IMMI07/062, 'Institutions and Disciplines (Regulation 476.212)'	-	07/062	F2007L02652	01/09/07	08/08/08	n/a	yes	Signed 28/08/07, commences 01/09/07. New provisions operative 1/9/07 - no previous instruments

Notes

1. Clause 476.212(b) requires the applicant for a Subclass 476 visa to have completed a course at institution specified by the Minister in an instrument in writing, for the ward of a degree or higher qualification in a discipline specified in an instrument in writing. At present, the institution and discipline are specified in the same instrument.

Educational Institutions (cl.485.231)								
Title	Gazette	Immi ref	FRLI Ref	in force		revokes	Explanatory statement	Notes
				from	to			
Legislative Instrument IMMI 13/031, 'Educational Institutions (Clause 485.231)'	-	13/031	F2013L00529	23/03/13	current	-	yes	Dated 19/03/13, commences 23/03/13 immediately after commencement of Migration Legislation Amendment Regulations 2013 (No.1)

Notes

1. **Subclause 485.231(2)** (for the Post-Study Work stream) requires each qualification that the applicant must hold under 485.231(1) was conferred or awarded by an educational institution specified by the Minister in an instrument in writing for the subclause.

Qualifications (cl.485.231)								
Title	Gazette	Immi ref	FRLI Ref	in force		revokes	Explanatory statement	Notes
				from	to			
Legislative Instrument IMMI 13/013, 'Qualifications (Clause 485.231)'	-	13/013	F2013L00528	23/03/13	current	-	yes	Dated 19/03/13, commences 23/03/13 immediately after commencement of Migration Legislation Amendment Regulations 2013 (No.1)

Notes

1.Subclause 485.231(1) (for the Post-Study Work stream) requires that the applicant holds a qualification or qualifications of a kind specified by the Minister in an instrument in writing for the subclause.

Skilled Occupations for Skilled Assessments								
Title	Gazette ref	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI 10/027, Skilled Occupations for Skills Assessments (Subclause 175.211(1), subclause 176.211(1) and subclause 475.211(1))	-	10/027	F2010L01326	01/07/10	current	10/012	yes	Signed 17/06/10. Commences 01/07/10. Revokes IMMI 10/012.
Legislative Instrument IMMI 10/012, Skilled Occupations for Skills Assessments	-	10/012	F2010L00657	12/03/10	30/06/10	09/143	yes	Signed 09/03/10. Commences 12/03/10. Revokes IMMI 09/0143.
Legislative Instrument IMMI 09/143, Skilled Occupations for Skills Assessments, (subparagraph 1136(3)(bb)(ii), 1229(3)(ab)(ii) and subclauses 175.211(1), 176.211(1) and 475.211(1))	-	09/143	F2009L04521	01/01/10	11/03/10	n/a	yes	Signed 15/12/09. This applies in relation to application for visas made on or after 1 January 2010.

Notes

1. Items 1136 and 1229 of Schedule 1 set out the visa application requirements for Class VB (subclasses 885, 886 and 887) and VC (subclasses 485 and 487) respectively. **Paragraphs 1136(3)(bb) and 1229(3)(ab)** (applicable to visa applications made on or after 1/1/2010) provide that, if the applicant is not seeking to satisfy the criteria for the grant of a subclass 887 or 485 visa respectively, and has nominated a skilled occupation specified by the Minister in an instrument in writing for the purposes of this paragraph, then the applicant's skills must have been assessed by the relevant assessing authority, on or after 1 January 2010, as suitable for the applicant's nominated skilled occupation.

2. Subclauses 175.211(1), 176.211(1) and 475.211(1) (applicable to visa applications made on or after 1/1/2010) provide that, if an applicant has nominated a skilled occupation, which is specified by the Minister in an instrument in writing for these subclauses, the applicant must have been employed in the skilled occupation for at least 12 months in the period of 24 months ending immediately before the day on which the application was made.

Technical Equivalent Occupations (r.2.26(5), Sch 6)

Title	Gazette	immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
GN 1 of 7 January 1998, 'Specification of technical equivalent occupations under subregulation 2.26(5)'	GN 1		F2006B00551	07/01/98	current	GN 34		Signed 12/12/97; effective on Gazettal, 7/1/98
GN 34 of 31 August 1994, 'Specification of technical equivalent occupations under subregulation 2.26(5)'	GN 34			01/09/94	06/01/98	-		Signed 22/8/94; effective 1/9/94

Notes

1. The Technical Equivalent Occupation list (TEOL) is relevant to the Employment Qualification assessment in Part 1 of Schedule 6 to the Regulations which set out the General Points Test for Visa Classes AT (Subclasses 126 and 135) and AG (Subclasses 105 and 106). These visas were closed to new applications in 1999 and Schedule 6 was omitted with effect from 1/7/12 (SLI 2012, No. 82).

2. Regulation 2.26C(5) defined 'technical equivalent **occupation**' to mean an occupation specified by written instrument for this definition as a technical-equivalent occupation. This provision was omitted with effect from 1/7/12 (SLI 2012, No. 82).

Professional Equivalent Occupations (r.2.26(5), Sch 6)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explantory Statement	Notes
				from	until			
GN 1 of 7 January 1998, 'Specification of professional-equivalent occupations under subregulation 2.26(5)'	GN 1			07/01/98	current	GN 34	-	Signed 5/12/97, effective on gazettal, 7/1/98; revokes GN 34
GN 34 of 31 August 1994, 'Specification of professional-equivalent occupations under subregulation 2.26(5)'	GN 34			01/09/94	06/01/98	-	-	Signed 22/8/94; effective 1/9/94

Notes

1. The Professional Equivalent Occupation list (PEOL) is relevant to the Employment Qualification assessment in Part 1 of Schedule 6 to the Regulations which set out the General Points Test for Visa Classes AT (Subclasses 126 and 135) and AG (Subclasses 105 and 106). These visas were closed to new applications in 1999 and Schedule 6 was omitted with effect from 1/7/12 (SLI 2012, No. 82).

2. r.2.26C(5) defined 'professional equivalent **occupation**' to mean an occupation specified by written instrument for this definition as a professional-equivalent occupation. This provision was omitted with effect from 1/7/12 (SLI 2012, No. 82).

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Skilled visa applications – form, manner and place (specifications under various items of Schedules 1 and 2)

Visa Class	Title	Gazette ref	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
					from	until			
VB, VC, VF, SI, SN, SP	Legislative Instrument IMMI15/035, 'Arrangements for Skilled and Temporary Graduate Visa Applications 2015 (Items 1136, 1137, 1138, 1228, 1229 and 1230)'	-	15/035	F2015L00556	18/04/15	current	14/071 and 13/014 (see 'Forms' tab)	yes	Dated 16/04/15, commences 18/04/15; revokes IMMI14/071 and IMMI13/014
VC, VF	Legislative Instrument IMMI14/071, 'Post Office Box and Courier Addresses (Paragraphs 1228(3)(a) and 1229(3)(c))'	-	14/071	F2014L01031	28/07/14	17/04/15	13/144	yes	Dated 18/07/14; commences 28/07/14; revokes IMMI13/144
VB, VC, VE, VF	Legislative Instrument IMMI13/144, 'Post Office Box and Courier Addresses (various provisions of Schedules 1 and 2 to the Regulations)'	-	13/144	F2013L02046	01/01/14	27/07/14	13/034	yes	Dated 28/11/13; commences 01/01/14; revokes IMMI13/034
VB, VC, VE, VF	Legislative Instrument IMMI13/034, 'Post Office Box and Courier Addresses (various provisions of Schedules 1 and 2 to the Regulations)'	-	13/034	F2013L00532	23/03/13	31/12/13	07/057	yes	Signed 19/03/13; commences 23/03/13, immediately after commencement of Migration Legislation Amendment Regulation 2013 (No.1); revokes IMMI07/057
BN, BR, BQ, CC, DD, DE, UQ, UX, UZ, VB, VC, VE, VF	Legislative Instrument IMMI07/057, 'Post Office Box and Courier Addresses (various provisions of Schedule 1 and 2 to the Regulations)'	-	07/057	F2007L02691	01/09/07	22/03/13	06/040	yes	Signed 28/08/07; effective 01/09/07; revokes IMMI06/040
BN, BR, BQ, CC, DD, DE, UQ, UX	Legislative Instrument IMMI06/040, 'Post Office Box and Courier Addresses (various provisions of Schedule 1 and 2 to the Regulations)'	-	06/040	F2006L01836	01/07/06	31/08/07	05/078	yes	Signed 22/06/06; Effective 1/7/06; revokes IMMI 05/078
	Legislative Instrument IMMI05/078, 'Specification Of Post Office Box Address And Address For Courier Delivery Under Various Provisions Of Schedule 1 To The Migration Regulations 1994'	-	05/078	-	22/10/05	30/06/06	GN26 (see line 8); GN26 (line 7) and GN43 (line 9)	yes	Signed 10/10/05; effective 22/10/05; revokes instrument signed 17/06/04
UX	GN26 of 2004, 'Specification for the purposes of subparagraphs 1218A(3)(b)(i) and 1218A(3)(b)(ii) of Schedule 1 - Post Office Box Address and Address for Courier Delivery'	GN26	-	-	01/07/04	21/10/05	-		Signed 17/06/04; effective 1/7/04
UQ	GN26 of 2004, 'Specification of Post Office Box Addresses for Courier Delivery for the purpoSes of paragragh 1212A(3)(j) of Schedule 1 to the Migration Regulations'	GN26	-	-	30/06/04	21/10/05	all existing re 1212A(3)(j)	-	Signed 17/06/04; effective on publication; revokes all previous

	GN43 of 2001, 'Approval for the purposes of Schedule 1 subparagraphs 1128AA(3)(aa), 1128B(3)(aa), 1128BA(3)(h), 1128C(3)(aa), 1128CA(3)(c) and 1128D(3)(aa) - of Post Office Box and Courier Delivery Address'	GN43	-		16/10/01	21/10/05	-		Signed 16/10/01; published 31/10/01

Notes

1. For instruments and Gazette Notices in force before 18/4/2015, they specify post office box and courier addresses for various items of Schedule 1 and Schedule 2 each of which provides that an application for a Skilled visa class to which it applies, or a sponsorship associated with an application for the Skilled visa subclass to which it applies, must be made by posting the application, or sponsorship, to the post office box address specified by the Minister, or by having the application delivered to the address specified by the Minister.

2. IMMI 15/035 specifies approved forms, and the place and manner for making Subclass 189, 190, 476, 485, 489 and 887 visa applications.

Professional Year Programs(Specification under r.2.26AA(6), 2.26AA(9), 2.26AB(7), 2.26AC(6))								
Title	Gazette / Registered	Ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Migration (LIN 18/170: Professional Year Programs) Instrument 2018	14/12/2018	LIN 18/170	F2018L01758	15/12/2018	current	12/029	yes	Made 06/12/2018, commences 15/12/2018.
Legislative Instrument IMMI 12/029, 'Professional Year Programs (subregulations 2.26AA(9), 2.26AB(7) and 2.26AC(6)'		IMMI 12/029	F2012L01290	1/07/12	14/12/2018	08/074	yes	Made 12/06/12, commences 01/07/12 immediately after commencement of Migration Amendment Regulations 2012 (No.2).
Legislative Instrument IMMI 08/074, 'Professional Year Programs (subregulation 2.26AA(6) definition of "Professional Year")'	-	IMMI 08/074	F2008L03767	27/10/08	30/06/12	08/011	yes	Made 01/10/08, commences 27/10/08.
Legislative Instrument IMMI 08/011, 'Professional Year Programs (subregulation 2.26AA(6) definition of "Professional Year")'	-	IMMI 08/011	F2008L01012	4/04/08	26/10/08	08/002	yes	Made 01/04/2008, commences 04/04/2008.
Legislative Instrument IMMI 08/002, 'Professional Year Programs (subregulation 2.26AA(6) definition of "Professional Year")'	-	IMMI 08/002	F2008L00487	15/02/08	03/04/08	-	yes	Made 14/02/2008, commences 15/02/2008.

Notes

1. r.2.26AA(6) for pre 1/7/12 visa applications and r.2.26AA(9), 2.26AB(7) and 2.26AC(6) for post 1/7/12 visa applications, provide that 'professional year' in Schedule 6B, 6C and 6D respectively means a course specified by the Minister in an instrument in writing for this definition.

2. Schedules 6B, 6C and 6D set out the Points Test for certain General Skilled Migration visas. Parts 6B.5, 6C.6 and 6D.6 award points where an applicant has completed a 'professional year' in Australia. Schedules 6B and 6C were omitted with effect from 1/7/13 (SLI 2012, No. 82).

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Definition of Academic Year (r.1.03)								
Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory statement	Notes
				from	until			
Migration (LIN 19/085: Academic Year) Instrument 2019		LIN19/085	F2019L00508	3/04/2019	current	09/040	yes	Signed 26/03/2019, registered 02/04/2019, commences 03/04/2019
Legislative Instrument IMMI 09/040, 'Definition of "Academic Year" (regulation1.03)'	-	09/040	F2009L01654	15/05/09	2/04/2019	-	yes	Signed 14/05/09, commences 15/05/09.

Notes

1. r.1.03 defines 'academic year' to mean a period that is specified by the Minister as an academic year in an instrument in writing for the definition. The definition applies only to visa applications made on or after 15/5/09 (SLI 2009, No.84).

Determination of the Fixed Maximum Number of Specified Skilled Visas that may be Granted / Maximum Number of Visas that may be Granted (s.39; cl.134.228(b), 136.231(b), 137.230(b), 138.233(b), and 139.234(b))								
Title	Gazette	Immi ref	FRLI ref	in force		revokes	Explanatory statement	
				from	to			
Legislative Instrument IMMI 15/112, Determination of the Fixed Maximum Number of Specified Skilled Visas that may be granted in the 2015-2016 Financial Year.	-	15/112	F2015L01455	22/09/15	current	10/023	yes	Signed 14/09/15, registered 18/09/15; commences 22/09/15.
Legislative Instrument IMMI 10/023, Determination of the Maximum Number of Certain Skilled Visas that may be granted in the 2009-10 Financial Year.	-	10/023	F2010L01599	25/06/10	21/09/15	-	yes	Signed 23/06/10, registered 24/06/10; commences 25/06/10.

Notes

1. Paragraphs 175.228(a), 176.229(a) and 475.229(a) of Schedule 2 (referred to in IMMI 15/112) provided that the approval of the application must not result in the number of visas of particular classes (including the relevant subclass) granted in a financial year exceeding the maximum number of visas of those classes, as determined by an instrument in writing for the relevant paragraph, that may be granted in that financial year. Parts 175, 176 and 475 were omitted with effect from 1/7/13 (SLI 2012, No. 82).

2. Paragraphs 134.228(b), 136.231(b), 137.230(b), 138.233(b) and 139.234(b) of Schedule 2 (referred to in IMMI 10/023) provided that the approval of the application must not result in the number of visas of particular classes (including the relevant subclass) granted in a financial year exceeding the maximum number of visas of those classes, as determined by an instrument in writing for the relevant paragraph, that may be granted in that financial year. Parts 134, 136, 137, 138 and 139 were omitted with effect from 1/7/12 (SLI 2012, No. 82).

3. The power to cap the number of visas that may be granted in a financial year is conferred by s.85 of the Act; in addition, s.39(1) confers power to prescribe by regulation a criterion for visas, other than protection visas, which operates by reference to a legislative instrument made under s.85: see *Plaintiff S297/2013 v MIBP* [2014] HCA 24 and *Plaintiff M150 of 2013 v MIBP* [2014] HCA 24. Under s.39(2), when a criterion allowed by subsection (1) prevents the grant in a financial year of any more visas of a particular class, any outstanding applications for the grant in that year of visas of that class are taken not to have been made.

Class of Persons for r.2.26AA(2) and r.2.26AB(2)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
Legislative Instrument IMMI 12/068 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'		12/068	F2012L01314	1/07/12	current	11/068	yes	Dated 12/6/12, commences 1/7/2012, revokes IMMI11/068
Legislative Instrument IMMI 12/065 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and certain Other Visas (Regulation 1.15I, Subregulations 2.26AA(2), 2.26AB(2) and 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii))'		12/065	F2012L01322	1/07/12	current		yes	Dated 12/6/12, commences 1/7/2012.
Legislative Instrument IMMI 11/068 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migration Visas and Certain Other Visas (Regulation 1.15I, Subregulation 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'		11/068	F2011L02011	1/10/11	30/06/12	11/034	yes	Signed 28/9/11, commences 1/10/11, revokes IMMI11/034.
Legislative Instrument IMMI 11/034 'Skilled Occupations, Relevant Assessing Authorities, Countries and Points for General Skilled Migrations Visas and Certain Other Visas (Regulation 1.15I, Subregulations 2.26AA(2), r.2.26AB(2) and 2.26B(1), Subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii), items 6A11, 6A12, 6A13)'		11/034	F2011L01227	01/07/11	30/09/11	n/a	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).

Notes

1. r.1.15I defines 'skilled occupation'. **r.1.15I(1)** provides that a *skilled occupation* , in relation to a person, means an occupation of a kind that is specified by the Minister in an instrument in writing to be a skilled occupation, for which a number of points specified in the instrument are available, and is applicable to the person in accordance with the specification of the occupation. **r.1.15I(2)** provides that, without limiting subregulation 1.15I(1) the Minister may specify in the instrument any matter in relation to an occupation, or to a class of persons to which the instrument relates, including that an occupation is a skilled occupation for a class of persons, and that an occupation is a skilled occupation for a person who is nominated by a State or Territory government agency.

2. Regulation 2.26AA applies to an applicant for a points tested General Skilled Migration visa if the application is made on or after 1/7/11 but before 1/1/13 and the applicant is a person, or a person in a class of persons specified in an instrument in writing made by the Minister for r.2.26AA(2)(a). Regulation 2.26AA was omitted with effect from 1/7/13 (SLI 2012, No.82).

3. Regulation 2.26AB applies to an applicant for a points tested General Skilled Migration visa if the applicant is a person in a class of persons specified by the Minister in an instrument in writing for r.2.26AB(2) and the application is made on or after 1/7/11 but before 1/1/13 and the applicant's score is assessed in accordance with Schedule 6B and that assessed score is less than the applicable pass mark at the time the score is assessed. r.2.26AB also applies to an applicant if the application is made on or after 1/7/11 and r.2.26AA(2) does not apply. Regulation 2.26AB and Schedule 6B were omitted with effect from 1/7/13 (SLI 2012, No.82).

4. r. 2.26B(1) provides that the Minister may, by an instrument in writing, specify a person or body as the relevant assessing authority for a skilled occupation (if the person or body is approved in writing by the Education Minister or the Employment Minister as the relevant assessing authority for the occupation) and one or more countries, for the purposes of an application for a skills assessment made by a resident of one of those countries. ***Education Minister*** and ***Employment Minister*** are defined in r.1.03.

5. Items 1128BA(3)(j)(ii), 1136(3)(bb)(ii), 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1218A(5)(g)(ii), 1218A(5)(g)(iii), 1229(3)(ab)(ii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) of Schedule 1 enable a skilled occupation to be specified by the Minister in an instrument in writing.

6. Items 6A11, 6A12 and 6A13 of Schedule 6A awarded points where the skilled occupation nominated by the applicant in his or her application was specified by an instrument in writing for the item as a skilled occupation for which at least 60, 50 and 40 points respectively were available. Schedule 6A was omitted with effect from 1/7/12 (SLI 2012, No. 82) in respect of applications made on and after that date.

Occupations Requiring English (r.1.19, Schedule 6)

Title	Gazette	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
				from	until			
GN 6 of 11 Fedbruary 1998, 'List of Occupations Requiring English - regulation 1.19'	GN 6			11/02/98	current	GN 50		Signed 2/2/98; effective 11/2/98; revokes all earlier notices made under r.1.19.
GN 50 of 18 December 1996, 'List of Occupations Requiring English - regulation 1.19'	GN 50			01/07/97	10/02/98	GN 34		Signed 12/12/96; effective 1/7/97; revokes all earlier notices made under r.1.19.
GN 34 of 31 August 1994, 'Occupations requiring English List - regulation 1.19'	GN 34			01/09/94	30/06/97	N/A		Signed 22/8/94; effective 1/9/94.

Notes

1. Regulation 1.19 provides that the Minister may publish by Gazette notice, a list of occupations requiring proficiency in English of at least the standard required for the award of 15 points under Part 3 of Schedule 6 (the Occupations Requiring English (ORE) List). r.1.19 was omitted on 1/7/12 (SLI 2012, No. 82).

2. Schedule 6 set out the General Points Test for visa Classes AT (Subclasses 126 and 135) and AJ (Subclasses 105 and 106). Part 3 of Schedule 6 dealt with the award of points on the basis of an applicant's language skills Visa classes AT and AJ were closed to new applications on 1 July 1999. Schedule 6 and the visa classes to which it applied were omitted on 1/7/12 (SLI2012, No. 82).

Credentialled Community Language Qualifications (Items 6C91(a),(b), 6D91(a), (b))

Title	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Credentialled Community Language Qualifications (Paragraphs 6C91(a) and (b) and 6D91(1) and (b))	12/020	F2012L01285	1/07/12	current	11/038	yes	Made 12/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (no.2)
Credentialled Community Language Qualifications (Subitems 6C91(a) and (b))	11/038	F2011L01225	01/07/11	30/06/12	n/a	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).

Notes

1. Items 6C91 and 6D91 in Schedules 6C and 6D to the Regulations provide that the applicant has a qualification in a particular language awarded or accredited by a body specified by the Minister in an instrument in writing and at a standard for the language specified in the instrument. Schedule 6C was omitted with effect from 1/7/13 (SLI 2012, No. 82).

2. Schedule 6C is the General Points Test specified in r.2.26AB for certain General Skilled Migration visas for applications made on or after 1/7/11 and other specified applications. Schedule 6C and r.2.26AB were omitted with effect from 1/7/13 (SLI 2012, No.82).

3. Schedule 6D is the General Points Test specified in r.2.26AC for General Skilled Migration visa classes SI, SN and SP, Subclasses 189, 190 and 489 respectively.

Educational Qualifications (Item 6C.76(b), r.2.26AC(5)(b))

Title	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Specification of Assessing Body for Certain Educational Qualifications (paragraph 6C76(b) and r.2.26AC(5)(b))	12/019	F2012L01282	1/07/12	current	11/037	yes	Made 12/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulations 2012 (no.2)
Educational Qualifications (paragraph 6C.76(b))	11/037	F2011L01239	01/07/11	30/06/12	n/a	yes	Made 16/6/11, registered 24/6/11, commences 1/7/11 immediately after commencement of Migration Amendment Regulations 2011 (No.3).

Notes

1. Paragraph 6C76(b) in Schedule 6C to the Regulations provides that, for items 6C71 and 6C72, for the purpose of being satisfied that a qualification is of a recognised standard, the Minister must have regard to whether the qualification has been recognised by another body, specified by the Minister in an instrument in writing. Schedule 6C was the General Points Test specified in r.2.26AB for certain General Skilled Migration visas for applications made on or after 1/7/11 and other specified applications. Schedule 6C and r.2.26AB were omitted with effect from 1/7/13 (SLI2012, No. 82).

2. r.2.26AC(5)(b) provides that for Schedule 6D items 6D71 and 6D72, in determining whether an educational qualification is of a recognised standard, the Minister must have regard to whether the educational qualification is recognised by a body specified in an instrument in writing. r.2.26AC specifies Schedule 6D as the General points Test for General Skilled visa classes SI, SN and SP, subclasses 189, 190 and 489 respectively.

Specialist Educational Qualifications (r.2.26AC(5A)(b), r.2.26AC(5B), Item 6D7A1)

Title	Immi ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Specification of Fields of Education 2016/076 (Subregulation 2.26AC(5B))	16/076	F2016L01412	10/09/16	current	n/a	yes	Dated 7/9/16, registered 9/9/16, commences 10/9/16 immediately after commencement of Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016.

Notes

1. r.2.26AC(5A) defines 'specialist educational qualification' for Schedule 6D item 6D7A1 as a person satisfying the Minister that they have met the requirements for the award, by an Australian educational institution, of a masters degree by research or a doctoral degree, which included study for at least 2 academic years at the institution in a field of education specified in an instrument under **r.2.26AC(5B)**. r.2.26AC specifies Schedule 6D as the General points Test for General Skilled visa classes SI, SN and SP, subclasses 189, 190 and 489 respectively.

Visa Application Forms for Temporary Graduate (Subclass 485) Visa (item 1229(1)) - before 18 April 2015

Title	Gazette	Immi ref	FRLI Ref	in force		revokes	Explanatory statement	Notes
				from	to			
Legislative Instrument IMMI 13/014, 'Forms for the Temporary Graduate (Subclass 485) Visa (Subitem 1229(1))'	-	13/014	F2013L00533	23/03/13	17/04/2015	-	yes	Dated 19/03/13, commences 23/03/13 immediately after commencement of Migration Legislation Amendment Regulations 2013 (No.1). Revoked by IMMI15/035 (see 'VisaApp' tab).

Notes

1. Subitem 1229(1) as substituted on 23/3/13 provides that the form or forms for Skilled (Provisional) (Class VC) visa are the form or forms specified by the Minister in an instrument in writing for the subitem. Applies to visa applications made on or after 23/3/13 (SLI 2013, No. 33).

2. From 18/4/15, item 1229 as further amended provides that the approved form, the place and the manner for making a visa application are specified by the Minister in an instrument in writing. Applies to visa applications made on or after 18/4/15 (SLI2015, No.34). For relevant instrument, see 'VisaApp' tab.

Specification of Income Threshold and Exemptions for Subclass 189 Skilled - Independent Visa (New Zealand Stream) (cl.189.233)

Title	Ref	FRLI Ref	in force		revokes	Registered	Explanatory statement	Notes
			from	to				
Migration (LIN 18/138: Specification of Income Threshold and Exemptions for Subclass 189 (Skilled - Inependent) Visa (New Zealand Stream)) Instrument 2018	LIN 18/138	F2018L01738	12/12/2018	current	IMMI 17/035	12/12/2018	yes	Dated 06/12/2018, commences 12/12/2018. Applies to all applications for a Subclass 189 (Skilled - Independent) visa (New Zealand Stream) made but not finally determined.
Migration (IMMI 17/035: Specification of Income Threshold and Exemptions for Subclass 189 Skilled - Independent Visa (New Zealand Stream)) Instrument 2017	IMMI 17/035	F2017L00723	01/07/17	11/12/2018	-	22/06/2017	yes	Dated 21/06/2017, commences 01/07/17.

Notes

1 Cl.189.233(1)(a) provides the minimum amount of taxable income for the income year

2 Cl.189.233(1)(b) provides the classes of exempt applicants and evidence required for exempt applicants

BUSINESS VISAS - REGISTER OF GAZETTE NOTICES / WRITTEN INSTRUMENTS

No.	Tab name	Instrument type
1	**Index**	
2	Occ186/442/457&Noms	Specification of Occupations, a Person or Body, a Country or Countries - Subclass 186, 402, 407, 442, 457 and Nominations under r.2.72, r.2.72I, r.2.72B and r.5.19 (r.1.03, r.1.15I(1) and 2.26B(1), r.2.72(10)(aa), 2.72I(5)(ba) and 2.72B(3)(b), r.5.19(4)(h)(i)(A), and cl.186.234(2)(a))
3	Occ187	Subclass 187 Occupations and assessing authorities - cl.187.234(b), r.5.19(8)(a), r.5.19(8)(c),r.5.19(13)
4	MSL for 457	Minimum Salary Levels for the Subclass 457 - r.2.79(2A)(c)(ii), 2.79(3A), 2.82(2)(aa)
5	T&C	Method for determining terms and conditions of employment provided to Australian citizen/PR (r.2.72(10AA))
6	Occ-Ex	Occupations in related entities for r.2.72(10)(d)(ii)(B) & (iii)(B), 2.72(10)(e)(ii)(B) & (iii)(B), r.2.86(2B) and cl.457.223(4)(ba)(iv)
7	457Eng	Tests, scores, period, level of salary and exemptions to the English requirement for Subclass 457 visas (cl.457.223(4)(eb), 457.223(6)(a), r.2.72(10)(q)(iv), 457.223(11))
8	TSMIT	Temporary skilled migration income threshold and Annual Market Salary Rate (rr.2.72(10)(cc), 2.72(10AB), r.2.72(15)(b), r.2.72(15)(d), r.2.72(17), r.2.79(1A)(b))
9	Training	Training benchmarks and requirements (rr.2.59(d), 2.68(e), 2.87B(2), 2.87B(3), 5.19(4)(h)(i)(B)(II)) and r.5.19(10)(c)(i)
10	ARA	Appropriate Regional Authority
11	OLS r5.19	Occupations, locations, salaries and relevant assessing authorities for the ENS (r.5.19(2)(h),(i); cl.121.211(b); and cl.856.213)
12	Securities	Securities in which an investment is a 'designated investment' for Subclasses 131, 162, 165, 405, 844, 888, 891 & 893 (r.5.19A)
13	RegAustpre010712	Regional certifying bodies and post codes (rr.5.19(4)(e) and (5), 1.20GA(1)(e), 2.43(1)(la) and cl.471.229G) - pre 1 July 2012
14	RegAustpost010712	Regional certifying bodies and post codes (rr.5.19(4)(h)(ii)(F) and r.5.19(7)) - post 1 July 2012
15	RegAustpost180318	Regional certifying bodies and post codes (rr.5.19(12)(q)(i) and 5.19(16))) - post 18 March 2018
16	PointsScores	Business skills points test Scores (cl.127.222(1), 128.222(1), 129.222(1), 130.222(1), 131.223(1), 840.222(1), 841.222(1), 842.222(1), 843.222(1), 844.223(1), 845.222(1) and 846.222(1))
17	PointsBusStreams	Points for Business Innovation and Investment (Provisional) visa (cl.188.222(1) and 188.242(1))
18	Design Area	Designated areas (Schedule 6, Item 6701)
19	StateTerr Area	Areas for Subclass 888 and 892 visas (cl.888.226(2)(c)(i) and 892.213(3)(b))
20	1223A(2)(a)(ix)	Classes of persons for item 1223A(2)(a)(ix)
21	APEC	Designated APEC economies
22	Health Waiver	Health waiver - participating Sates and Territories (cl.846.111, 855.111, 856.111, 857.111)
23	Sponsor-add	Addresses for sponsors providing monitoring information (r.2.84(2)(b)(i))
24	Form&Fees	Forms, fees, circumstances and different way of making an application (rr.2.61(3A)(b), 2.61(3A)(c), 2.61(3B), 2.66(3), 2.66(4), 2.66(5), 2.73(3), 2.73(4), 2.73(5), 2.73(7), 2.73(9) and 2.73A(2) and items 1223A(1)(bb), 1223A(1)(b), 1223A(1)(ba) and 1223A(1
25	403&406Agree	Non relevant agreements/arrangements for Subclass 403 and 406 visas
26	Superyacht	Definition of superyacht
27	EA&URaddress	Business Skills addresses (items 1104AA(3)(a) and 1202A(3)(a))
28	442AppAddress	Occupational Trainee addresses (item 1208A(3)(bd))
29	ExmtSkillsAgeEng186&187	Specification of exempt classes of person for 186 and 187 / occupations for regional nominations - cl.186.234(3) and cll.186.221(b), 186.222(b), 186.231(b), 186.232(b), 187.221(b), 187.222(b), 187.231(b), 187.232(b), 187.234(a) and r.5.19(4)(h)(ii)(D))
30	EngLangExempt186&187	Persons exempt from the English language criteria (cl.186.222(b), 186.232(b), 187.222(b), 187.232(b))
31	ExmtSkills	Subclass 186 and 187 - persons exempt from skill criteria (cl.186.234(3) and 187.234(a))
32	ExmtAge	Subclass 186 and 187 - persons exempt from age criteria (cl.186.221(b), 186.231(b), 187.221(b) and 187.231(b))
33	CompInvests5.19C&D	Complying Investments (r.5.19C and 5.19D)
34	IndAssoc132	Business Talent visa Venture Capital stream industry associations and membership levels (cl.132.232(3)(a) & (b))
35	TempWorkVAC	Temporary Work (International Relations) VAC class of persons (Sub-subparagraph 1234(2)(a)(v)(A))
36	5.19B	Eligible managed fund investments (r.5.19B)
37	NilVAC	Persons prescribed a nil VAC for a Subclass 400 (item 1231(2)(a) - item 4 of table)
38	1231(1)(a)	Persons eligible to make an internet Subclass 400 visa application using form 1400 ((item 1231(1)(a))
39	ExmptCont	Occupations not requiring a written contract of employment (r.2.72(10)(h) and r.2.72(10)(e)(iii)(B))
40	LMT PeriodMannerEvidence	Labour Market Testing period, manner and evidence (s.140GBA(4), 140GBA(5) and 140GBA(6A))
41	LMTExmptOcc	Occupations exempt from 'Labour Market Testing' (s.140GBC)
42	LMT&ObligExmpt	International trade obligations relating to 'Labour Market Testing' (s.140GBA(2))
43	LMT&Evid	nil
44	NilNom&VAC	Persons prescribed nil VAC and nomination fee for a Subclass 401 visa (Item 1232(2)(a)(ii)(A), Item 1 of the table in r.2.73A(4))
45	BusSkillsApps	Arrangements for Business Skills Visas Applications 2015 (Items 1104AA, 1104BA, 1104B, 1112, 1113, 1202A, 1202B)
46	ENS&RENS_Apps	Arrangements for Employer Nomination and Regional Employer Nomination Skilled Visas 2015 (Items 1114B and 1114C)
47	SuperyachtApps	Arrangements for Maritime Crew and Superyacht Visa Applications 2015 (Schedule 1, part 2, Items 1227 and 1227A)
48	TempWorkApps	Arrangements for Temporary Work Visa Applications 2015 (Items 1205, 1212B, 1217, 1231, 1232, 1233, 1234, 1235, 1237 and 1238)
49	ExclCompEntrActvs	Specification of Entities and Excluded Complying Entrepreneur Activities - r.5.19E(6)
50	407Noms&OccTraining	Approval of Nomination and Occupational Training - Subclass 407 (Subregulation 2.72A(12))
51	408Events&Classes	Class of Persons and Events, and reduced VAC - Subclass 408 (subitem 1237(2), paragraphs 408.229(b) and 408.229(c))
52	Occ482noms	Specification of Occupations for nominations associated with 482 visas - r.2.72(9)
53	482English	English language test requirements for Subclass 482 visas - cl.482.223(1) and 482.232(1)
54	482SkillsAss	Mandatory skills assessment for 482 application - specification of occupation, classes of person, assessing authorities and time period - item 1240(3)(q)
55	482Forms	Form and manner for making Subclass 482 visa application - item 1240 and r.2.07(5)
56	ExemptOccs	Specification of exempt occupations under r.2.72(13) - as relevant to rr.2.72(11)(c), r.2.72(12)(c), 2.73(13), 2.73(14)(c), 2.86(2A)(b), 2.86(2AA), 5.19(5)(g), 5.19(7), cl.482.224, cl.482.223, clause 8607(3)(a)
57	TransitionalTRT	Transitional operation of r.5.19 for certain 457 holders - r.5.19(5)(a)(iii), 5.19(6), 5.19(8)
	Specifications which have ceased	
46	SponShortStay	Specification under paragraph 459.214(c) of organisations that may Sponsor Short Stay Business Visitors
47	MSLO	Minimum Salaries and Occupations - Business Long Stay visas (rr.1.20B, 1.20G(2), 1.20GA)
48	470 Address	470 address (r.1.20N(4), Item 1220B(3)(b))
49	DistTal&SpecEligAddress	Distinguished Talent and Special Eligibility visa addresses (items 1112(3)(a), 1113(3)(aa) and 1116A(3)(aa))
50	App Address	Specification of addresses - Temporary Business visa, sponsor approval, variation of terms and nomination applications; and Special Program, Entertainment and Training and Research visas

Last updated: 24 September 2019

ABRIDGED INDEX BY KEY VISA / NOMINATION TYPE

(N.B. This is **NOT** a complete index, please see 'INDEX' tab for full listing)

Index tab reference	Instrument type
	INSTRUMENTS RELEVANT TO r.2.72 nominations (pre 18 March 2018)
Occ186/442/457&Noms	Specification of Occupations, a Person or Body, a Country or Countries - Subclass 186, 402, 407, 442, 457 and Nominations under r.2.72, r.2.72I, r.2.72B and r.5.19 (r.1.03, r.1.15I(1) and 2.26B(1), r.2.72(10)(aa), 2.72I(5)(ba) and 2.72B(3)(b), r.5.19(4)(h)(i)(A), and cl.186.234(2)(a))
TSMIT	Temporary skilled migration income threshold (rr.2.72(10)(cc), 2.72(10AB), r.2.79(1A)(b))
T&C	Method for determining terms and conditions of employment provided to Australian citizen/PR (r.2.72(10AA))
Occ-Ex	Occupations in related entities for r.2.72(10)(d)(ii)(B) & (iii)(B), 2.72(10)(e)(ii)(B) & (iii)(B), r.2.86(2B) and cl.457.223(4)(ba)(iv)
LMT Period	Labour Market Testing period (s.140GBA(4))
LMTExmptOcc	Occupations exempt from 'Labour Market Testing' (s.140GBC)
LMT&ObligExmpt	International trade obligations relating to 'Labour Market Testing' (s.140GBA(2))
Form&Fees	Forms, fees, circumstances and different way of making an application (rr.2.61(3A)(b), 2.61(3A)(c), 2.61(3B), 2.66(3), 2.66(4), 2.66(5), 2.73(3), 2.73(5), 2.73(9) and 2.73A(2) and items 1223A(1)(bb), 1223A(1)(b), 1223A(1)(ba) and 1223A(1)(bc))
LMT&Evid	nil
ExmptCont	Occupations not requring a written contract of employment (r.2.72(10)(h) and r.2.72(10)(e)(iii)(B))
	INSTRUMENTS RELEVANT TO 457 visas
Occ186/442/457&Noms	Specification of Occupations, a Person or Body, a Country or Countries - Subclass 186, 402, 407, 442, 457 and Nominations under r.2.72, r.2.72I, r.2.72B and r.5.19 (r.1.03, r.1.15I(1) and 2.26B(1), r.2.72(10)(aa), 2.72I(5)(ba) and 2.72B(3)(b), r.5.19(4)(h)(i)(A), and cl.186.234(2)(a))
457Eng	Tests, scores, period, level of salary and exemptions to the English requirement for Subclass 457 visas (cl.457.223(4)(eb), 457.223(6)(a), r.2.72(10)(g)(iv), 457.223(11))
MSL for 457	Minimum Salary Levels for the Subclass 457
Occ-Ex	Occupations in related entities for r.2.72(10)(d)(ii)(B) & (iii)(B), 2.72(10)(e)(ii)(B) & (iii)(B), r.2.86(2B) and cl.457.223(4)(ba)(iv)
	INSTRUMENTS RELEVANT TO r.5.19 nominations (1 July 2012 - 17 March 2018)
Occ186/442/457&Noms	Specification of Occupations, a Person or Body, a Country or Countries - Subclass 186, 402, 407, 442, 457 and Nominations under r.2.72, r.2.72I, r.2.72B and r.5.19 (r.1.03, r.1.15I(1) and 2.26B(1), r.2.72(10)(aa), 2.72I(5)(ba) and 2.72B(3)(b), r.5.19(4)(h)(i)(A), and cl.186.234(2)(a))
RegAustpost010712	Regional certifying bodies and post codes (rr.5.19(4)(h)(ii)(F) and r.5.19(7)) - post 1 July 2012
Training	Training benchmarks and requirements (rr.2.59(d), 2.68(e), 2.87B(2), 2.87B(3) and 5.19(4)(h)(i)(B)(I))
ExmtSkillsAgeEng186&187 *(post 1 July 2015 apps)*	Specification of exempt classes of person for 186 and 187 / occupations for regional nominations - cl.186.234(3) and cll.186.221(b), 186.222(b), 186.231(b), 186.232(b), 187.221(b), 187.222(b), 187.231(b), 187.232(b), 187.234(a) and r.5.19(4)(h)(ii)(D))
	INSTRUMENTS RELEVANT TO 186 visas
Occ186/442/457&Noms	Specification of Occupations, a Person or Body, a Country or Countries - Subclass 186, 402, 407, 442, 457 and Nominations under r.2.72, r.2.72I, r.2.72B and r.5.19 (r.1.03, r.1.15I(1) and 2.26B(1), r.2.72(10)(aa), 2.72I(5)(ba) and 2.72B(3)(b), r.5.19(4)(h)(i)(A), and cl.186.234(2)(a))
ExmtSkillsAgeEng186&187 *(post 1 July 2015 apps)*	Specification of exempt classes of person for 186 and 187 / occupations for regional nominations - cl.186.234(3) and cll.186.221(b), 186.222(b), 186.231(b), 186.232(b), 187.221(b), 187.222(b), 187.231(b), 187.232(b), 187.234(a) and r.5.19(4)(h)(ii)(D))
EngLangExempt186&187 *(pre 1 July 2015 apps)*	Persons exempt from the English laguage criteria (cl.186.222(b), 186.232(b), 187.222(b), 187.232(b))
ExmtSkills *(pre 1 July 2015 apps)*	Subclass 186 and 187 - persons exempt from skill criteria (cl.186.234(3) and 187.234(a))
ExmtAge *(pre 1 July 2015 apps)*	Subclass 186 and 187 - persons exempt from age criteria (cl.186.221(b), 186.231(b), 187.221(b) and 187.231(b))
ENS&RENS_Apps	Arrangements for Employer Nomination and Regional Employer Nomination Skilled Visas 2015 (Items 1114B and 1114C)
	INSTRUMENTS RELEVANT TO 187 visas
Occ187	Subclass 187 Occupations and assessing authorities (cl.187.234(b))
ExmtSkillsAgeEng186&187 *(post 1 July 2015 apps)*	Specification of exempt classes of person for 186 and 187 / occupations for regional nominations - cl.186.234(3) and cll.186.221(b), 186.222(b), 186.231(b), 186.232(b), 187.221(b), 187.222(b), 187.231(b), 187.232(b), 187.234(a) and r.5.19(4)(h)(ii)(D))
EngLangExempt186&187 *(pre 1 July 2015 apps)*	Persons exempt from the English laguage criteria (cl.186.222(b), 186.232(b), 187.222(b), 187.232(b))
ExmtSkills *(pre 1 July 2015 apps)*	Subclass 186 and 187 - persons exempt from skill criteria (cl.186.234(3) and 187.234(a))
ExmtAge *(pre 1 July 2015 apps)*	Subclass 186 and 187 - persons exempt from age criteria (cl.186.221(b), 186.231(b), 187.221(b) and 187.231(b))
ENS&RENS_Apps	Arrangements for Employer Nomination and Regional Employer Nomination Skilled Visas 2015 (Items 1114B and 1114C)
	INSTRUMENTS RELEVANT TO 482 visas
Occ482noms	Specification of Occupations for nominations associated with 482 visas - r.2.72(9)
482English	English language test requirements for Subclass 482 visas - cl.482.223(1) and 482.232(1)
482SkillsAss	Mandatory skills assessment for 482 application - specification of occupation, classes of person, assessing authorities and time period - item 1240(3)(g)
482Forms	Form and manner for making Subclass 482 visa application - item 1240 and r.2.07(5)
ExemptOccs	Specification of exempt occupations under r.2.72(13) - as relevant to rr.2.72(11)(c), r.2.72(12)(c), 2.73(13), 2.73(14)(c), 2.86(2A)(b), 2.86(2AA), 5.19(5)(g), 5.19(7), cl.482.224, cl.482.223, clause 8607(3)(a)

Specification of Occupations, a Person or Body, a Country or Countries
Subclass 186, 402, 407, 442, 457 and Nominations under r.2.72, r.2.72I, r.2.72B and r.5.19
(r.1.03, r.1.15I(1) and 2.26B(1), r.2.72(10)(aa), 2.72I(5)(ba) and 2.72B(3)(b), r.5.19(4)(h)(i)(A), and cl.186.234(2)(a))

Please also see: Quick Guide to Specification of Occupations for Business visas

	Immi ref	FRLI ref	In force		Applies to	Revokes	Explanatory statement	Notes
			from	until				
Migration (LIN 19/050: Specification of Occupations - Subclass 407 Visa) Instrument 2019	19/050	F2019L00277	11/03/19	current	Nominations under r.2.72B made on or after 11 March 2019	18/050 (with exceptions for nominations made before 11/03/19)	yes	This instrument makes specifications under r.2.72B(3)(b). It commences on 11 March 2019. It repeals IMMI 18/050, but provides for its continued application in relation to applications for approval of a nomination made before 11 March 2019.
Migration (LIN 19/049: Specification of Occupations and Assessing Authorities - Subclass 186 Visa) Instrument 2019	19/049	F2019L00275	11/03/19	current	Reg 5.19 nominations made on or after 11 March 2019, subclass 186 visa applications in the Direct Entry stream where visa application and associated nomination application made on or after 11 March 2019.	18/049 (with exceptions for certain applications made before 11/03/19)	yes	This instrument makes specifications under r.5.19(8), r.5.19(11) and cl.186.234(2)(a). It applies to nominations made on or after 11 March 2019 and visa applications in the Direct Entry stream where visa application and associated nomination application are made on or after 11 March 2019 (see section 10). It repeals IMMI 18/049 but provides for its continued operation in respect of nomination applications made before 11 March 2019 and Direct Entry 186 visa applications made before, on or after 11 March 2019 if the related nomination application was made on or after 18 March 2018 but before 11 March 2019 (see section 11).
Migration (IMMI 18/050: Specification of Occupations - Subclass 407 Visa) Instrument 2018	18/050	F2018L00300	18/03/18	10/03/19 (continues to apply in relation to certain nominations)	Nominations under r.2.72B made on or after 18 March 2018	18/006 (with exceptions for nominations made before 18/03/18)	yes	This instrument makes specifications under r.2.72B(3)(b). It commences on 18 March 2018. It repeals the instrument in force immediately prior, IMMI 18/006, but states that that instrument continues to apply in relation to nominations made before 18 March 2018. Accordingly, this instrument apears to apply only to nominations applications made on or after 18 March 2018.
Migration (IMMI 18/049: Specification of Occupations and Assesing Authorities - Subclass 186 Visa) Instrument 2018	18/049	F2018L00298	18/03/18	10/03/19 (continues to apply in relation to certain nominations/visa applications)	Reg 5.19 nominations made on or after 18 March 2018, subclass 186 visa applications in the Direct Entry stream where visa application and associated nomination application made on or afer 18 March 2018.	18/005 (with exceptions for applications made before 18/03/18)	yes	This instrument makes specifications under r.5.19(8), r.5.19(11) and cl.186.234(2)(a). It is expressed to apply to nominations made on or after 18 March 2018 and visa applications in the Direct Entry stream where visa application and associated nomination application made on or after 18 March 2018 (see section 10). It repeals IMMI 18/005, but provides for its continued operation in respect of some existing nomination and visa applications (see section 11).
Migration (IMMI 18/004: Specification of Occupations - Subclass 457 Visa) Instrument 2018	18/004	F2018L00044	17/01/18	current	Reg 2.72 nominations made on or after 17 January 2018	17/060 (except if nomination made prior to 17/01/18)	yes	This instrument makes specifications under r.2.72(10)(aa). It expressed to apply in relation to a nomination of an occupation made on or after 17 January 2018 (see item 10). It repeals IMMI 17/060, the instrument in force immediately prior to this one commencing, but provides that IMMI 17/060 continues to apply in relation to a nomination of an occupation if the nomination is made before 17 January 2018. The Explanatory Statement summarises the changes made to the occupations by the introduction of this instrument.
Migration (IMMI 18/005: Specification of Occupations and Assessing Authorities - Subclass 186 Visa) Instrument 2018	18/005	F2018L00045	17/01/18	17/03/18 (continues to apply in relation to certain nominations/visa applications)	Reg 5.19 nominations made on or after 17 January 2018 and before 18 March 2018, subclass 186 applications where visa application and associated nomination application is made on or after 17 January 2018, and nomination made before 18 March 2018.	17/080 (except if r.5.19 nomination made on after 1 July 2017 and before 17/01/18).	yes	This instrument makes specifications under r.5.19(4)(h)(i)(A) and cl.186.234(2)(a). It applies in relation to r.5.19 nominations made on or after 17 January 2018 but before 18 March 2018, and to suclass 186 applications made on or after 17 January if the associated nomination is also made on or after 17 January 2018 but before 18 March 2018 (see repeal by IMMI 18/049). It repeals IMMI 17/080, the instrument in force immediately in place prior to this one commencing, but provides that IMMI 17/080 continues to apply to r.5.19 nominations and suclass 186 applications made on or after 1 July 2017 where the r.5.19 nomination is made before 17 January 2018, and (for cl.186.234(2)(a)) where the nomination associated with the Subclass 186 applications is made before 17 January 2018 - regardless of when the visa application is made. The Explanatory Statement summarises the changes made to the occupations by the introduction of this instrument.
Migration (IMMI 18/006: Specification of Occupations - Subclass 407 Visa) Instrument 2018	18/006	F2018L00047	17/01/18	17/03/18 (continues to apply in relation to certain nominations)	Reg 2.72B nominations made on or after 17 January 2018 and before 18 March 2018.	17/071 (except if r.2.72B nomination made before 17/01/08)	yes	This instrument makes specifications under r.2.72B(3)(b). It applies in relation to r.2.72B nominations made on or after 17 January 2018 and before 18 March 2018. It repeals IMMI 17/071. the instrument in force immediately prior, but provides that IMMI 17/071 continues to apply to nominations made before 17 January 2018. The Explanatory Statement summaries the changes made to the occupations by the introduction of this instrument.
Migration (IMMI 17/060: Specification of Occupations - Subclass 457 Visa) Instrument 2017	17/060	F2017L00848	1/07/17	16/01/18 (continues to apply in relation to nominations made before 17/01/18).	Reg 2.72 nominations made before 17 January 2018.	n/a	yes	This instrument makes specifications under r.2.72(10)(aa). It is expressed to apply to all nominations made on or after 1 July 2017 and all nominations made before that date which are not finally determined before 1 July 2017. However, note that for nominations made on or after 17 January 2018, IMMI 18/004 will apply. Note that for r.2.72 nominations made between 1 July 2010 and 30 June 2012, by their terms, it appears both IMMI 17/060 and IMMI 12/022 apply. The instrument was made on 28 June 2017, registered on 30 June 2017 and commenced on 1 July 2017. It was repealed by IMMI 18/004, however that instrument provides that IMMI 17/060 continues to apply where the nomination was made prior to 17 January 2018.
Migration (IMMI 17/080: Specification of Occupations and Assessing Authorities - Subclass 186 Visa) Instrument 2017	17/080	F2017L00851	1/07/17	16/01/18 (continues to apply where nomination application made between 01/07/17 and 17/01/18)	Reg 5.19 nominations made on or after 1 July 2017 and before 17 January 2018; subclasss 186 applications where visa application made on or after 1 July 2017 and associated nomination made prior to 17 January 2018.	n/a	yes	This instrument makes specifications under r.5.19(4)(h)(i)(A) (Direct Entry stream, for subclass 186 visa) and cl.186.234(2)(a) for nominations and visa applications made on or after 1 July 2017. However, note that for nominations made on or after 17 January 2018 and for visa applications where the associated nomination is made on or after 17 January 2018, IMMI 18/005 will be the applicable instrument. The instrument was made on 28 June 2017, registered on 30 June 2017 and commenced 1 July 2017. It was repealed on 17 January 2018 by IMMI 18/005, however that instrument provides IMMI 17/080 continues to apply to nominations made on or after 1 July 2017 and before 17 January 2018, and to Subclass 186 applications where the visa application is made on or after 1 July 2017 and the nomination is made prior to 17 January 2018.
Migration (IMMI 17/071: Specification of Occupations - Subclass 407 Visa) Instrument 2017	17/071	F2017L00834	1/07/17	16/01/2018 (continues to apply where nomination made prior to 17/01/18)	Nominations under r.2.72B made on or after 1 July 2017 and before 17 January 2018.	n/a	yes	This instrument makes specifications under r.2.72B(3)(b), for nominations made on or after 1 July 2017. For nominations made prior to that date, IMMI16/059 is the applicable instrument (though note that two versions of that instrument may apply, depending on whether nomination was made before or adter 19 April 2017). The instrument was made on 28 June 2017, registered 30 June 2017 and commenced on 1 July 2017.
Migration (IMMI 17/081: Specification of Occupations, a Person or Body, a Country or Countries) Repeal Instrument 2017	17/081	F2017L00840	1/07/17	2/07/17		16/059	yes	This instrument repeals IMMI 16/059 in respect of specifications made for 2.72(10)(aa), r.2.73B(3)(b), r.5.19(4)(h)(i)(A) and cl.186.234(2)(a). It doesn't make any specifications.
Specification of Occupations, a Person or Body, a Country or Countries 2016/059 (made under regulation 1.03, subregulation 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.73B(3)(b), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	16/059	F2017C00352	01/07/16	current	N/A - Compilation - see notes below and Schedule 3 of compilation	N/A - compilation	no	This instrument is a compilation of IMMI 16/059, taking into account the amendments made by IMMI 16/118 (from 19 November 2016) and the changes made by IMMI 17/040 (from 19 April 2017).
Specification of Occupations, a Person or Body, a Country or Countries 2016/059 (made under regulation 1.03, subregulation 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72B(3)(b), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	16/059	F2017L00450 (amending instrument)	01/07/16	current	IMMI 16/059 as amended by IMMI 17/040 applies to r.5.19 nominations made on or after 19 April 2017 and before 1 July 2017; and to r.2.72B nominations where the associated Subclass 407 visa application is made on or after 19 April 2017 and before 1 July 2017.	N/A - compilation	yes	Amending instrument IMMI 17/040 replaced the SOL and CSOL (Schedules 1 & 2) with the Medium and Long-term Strategic Skills List (MLTSSL) and the Short-term Skilled Occupation List (STSOL). It also replaced all existing notes with a new set of notes which place more extensive qualifications on certain occupations. Item 3 sets out details of the application of the instrument. The instrument was made and registed on 18 April 2017 and commenced on 19 April 2017.
		F2016C01004			N/A - compilation (see below item)		no	This instrument is a compilation of IMMI 16/059, taking into account the amendments made by IMMI 16/118 (from 19 November 2016). It does not incorporate the changes made by IMMI 17/040 (from 19 April 2017).
Specification of Occupations, a Person or Body, a Country or Countries 2016/059 (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba),sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	16/059	F2016L01787 (amending instrument)	01/07/16	current	Regulation 5.19 nominations and Subclass 186 visa applications made on or after 1 July 2016 but before 1 July 2017, and r.2.72B(3) nominations (occupational training to enhance skills) made on or after 19 November 2016 but before 1 July 2017.	15/092 and 15/108	yes	Amending instrument IMMI 16/118 amends item 8 of IMMI 16/059 from 19 November 2016 by repealing nominations in respect of Subclass 402 visas (r.2.72I(5)) and replacing with nominations in respect of Subclass 407 visas (r.2.72B(3) - occupational training to enhance skills) applied for on or after 19 November 2016. All other parts of IMMI 16/059 remain unchanged. Made 16/11/16, registered 18/11/16, commences 19/11/16***
		F2016L00800			Regulation r.2.72I nominations made on or after 1 July 2016 and before 19 November 2016; r.5.19 nominations, and Subclass 186 visa applications made on or after 1 July 2016.		yes	Made 06/05/16, registered 16/05/16.
Specification of Occupations, a Person or Body, a Country or Countries 2016/060 (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	16/060	F2016L00801	01/07/16	current	Regulation 5.19 nominations, r.2.72I nominations and Subclass 186 visa applications made on or after 1 July 2015 but before 1 July 2016.	–	yes	Made 06/05/16, registered 16/05/16.
Specification of Occupations, a Person or Body, a Country or Countries 2015 (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	15/108	F2015L01147	01/07/15	30/06/16	-	–	yes	Made 6/07/15, registered 14/7/15. Note, this instrument is intended to run parallel and as a supplement to IMMI 15/092. It contains only one occupation
Specification of Occupations, a Person or Body, a Country or Countries 2015 (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba),sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	15/092	F2015L01059	01/07/15	30/06/16	-	14/048	yes	Made 25/06/15, registered 30/6/15.
Specification of Occupations, a Person or Body, a Country or Countries 2015 (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	15/091	F2015L01057	01/07/15	current	Regulation 5.19 nominations, r.2.72I nominations and Subclass 186 visa applications^^ made on or after 1 July 2014, but before 1 July 2015.	-	yes	Made 25/06/15, registered 30/6/15.

Specification of Occupations, a Person or Body, a Country or Countries (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraph 2.72(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	14/049	F2014L00753	01/07/14	current	Regulation 5.19 nominations, r.2.72I nominations and Subclass 186 visa applications^ made on or after 1 July 2013 but before 1 July 2014	-	yes	Dated 14/06/14 commences 01/07/14
Specification of Occupations, a Person or Body, a Country or Countries (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), item 4(a) of the table in subitem 1137(4), item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	14/048	F2014L00749	01/07/14	30/06/15	-	13/066	yes	Dated 14/06/14 commences 01/07/14. Explanatory statement sets out changes made to the lists in Schedule 1 & 2
Specification of Occupations, a Person of Body, a Country or Countries (Subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(3)(e)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a)	13/064	F2013L01272	01/07/13	current	Regulation 5.19 nominations, 2.72I nominations and Subclass 186 visa applications* made on or after 23 March 2013 but before 1 July 2013	13/020	yes	Dated 28/06/13, commences 01/07/13
Specification of Occupations, a Person of Body, a Country or Countries (Subregulations 1.15I(1) and 2.26B(1), paragraph 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), Item 4(a) of the table in subitem 1137(4), Item 4(a) of the table in subitem 1138(4) and Item 4(a) of the table in subitem 1230(4), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a)	13/065	F2013L01238	01/07/13	current	Regulation 5.19 nominations, r.2.72I nominations and Subclass 186 visa applications** made on or after 1 July 2012 but before 23 March 2013	13/041	yes	Dated 28/06/13, commences 01/07/13
Specification of Occupations, a Person or Body, a Country or Countries (Regulation 1.03, subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), sub-subparagraph 5.19(4)(h)(i)(A), item 4(a) of the table in subitem 1137(4), item 4(a) of the table in subitem 1138(4) and item 4(a) of the table in subitem 1230(4), paragraph 1229(3)(k) and paragraph 186.234(2)(a))	13/066	F2013L01240	01/07/13	30/06/14	-	-	yes	Dated 28/07/13; commences 01/07/13 immediately after the commencement of Migration Legislation Amendment Regulation 2013 (No.3)
Specification of Occupations, a Person or Body, a Country or Countries (Subregulation 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba), and sub-subparagraph 5.19(4)(h)(i)(A), item 4(a) of the table in subitem 1137(4), item 4(a)of the table in 1138(4) and item 4(a) of the table in subitem 1230(4), paragraphs 1229(3)(e) and 1229(3)(k), subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1336(6)(b)(iii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	13/020	F2013L00546	23/03/13	1/07/13	-	-	yes	Dated 19/03/13; commences 23/03/13 immediately after the commencement of Migration Legislation Amendment Regulation 2013 (No.1)
Specification of Occupations, a Person or Body, a Country or Countries (Subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba) and sub-subparagraph 5.19(4)(h)(i)(A), item 4(a) of the table in subitem 1137(4), item 4(a) of the table in 1138(4) and item 4(a) of the table in subitem 1230(4) and subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a)	13/041	F2013L00547	23/03/13	1/07/13	-	12/039	yes	Dated 19/03/13; commences 23/03/13 immediately after the commencement of Migration Legislation Amendment Regulation 2013 (No.1)
Specification of Occupations, a Person or Body, a Country or Countries (Subregulations 1.15I(1) and 2.26B(1), paragraphs 2.72(10)(aa) and 2.72I(5)(ba) and sub-subparagraph 5.19(4)(h)(i)(A) and item 4(a) of the table in subitem 1137(4), item 4(a) of the table in 1138(4) and item 4(a) of the table in subitem 1230(4) and subparagraphs 1136(4)(b)(ii), 1136(5)(b)(ii), 1136(6)(b)(iii), 1229(4)(b)(ii), 1229(5)(b)(ii), 1229(6)(b)(iii) and 1229(7)(b)(ii) and paragraph 186.234(2)(a))	12/039	F2012L01451	01/07/12	22/03/13	-	-	yes	Dated 28/6/12, commences 1/7/12 immediately after commencement of Migration Amendment Regulation 2012 (No.2)
Specification under paragraphs 2.72(10)(aa) and 2.72I(5)(ba) of Division 2.17 of Part 2A - Specification of Occupations for Nominations in Relation to Subclass 457 (Business (Long Stay)) and Subclass 442 (Occupational Trainee) Visas	12/022	F2012L01312	01/07/12	current	Regulation 2.72 and 2.72I nomination applications made between 01/07/10 and 30/06/12*	10/085	yes	Dated 12/06/12; commences 01/07/12; registered 22/06/12
Specification of Occupations for Nominations in relation to Subclass 457 (Business (Long Stay)) and Subclass 442 (Occupational Trainee) visas (Paragraphs 2.72(10)(aa) and 2.72I(5)(ba))	10/085	F2011L00246	15/02/11	01/07/12	-	10/032	yes	Made 18/01/11 (signed but undated), commences 15/2/11, published 14/2/11 - Applies to nominations made on or after 1/7/10
Specification of Occupations for Nominations in relation to Subclass 457 (Business (Long Stay)) and Subclass 442 (Occupational Trainee) visas (Paragraphs 2.72(10)(aa) and 2.72I(5)(ba))	10/032	F2010L01414	01/07/10	14/02/11	-	-	yes	Dated 17/6/10; commences 1/7/10, registered 22/6/10 - Applies to nominations made on or after 1/7/10
Specification of Occupations (subparagraphs 2.72(10)(a) and 2.72I(5)(b))	09/125	F2009L03970	27/10/09	current	Regulation 2.72 and 2.72I nomination applications made before 01/07/2010	09/094	yes	Dated 22/10/09; commences 27/10/09, registered 26/10/09 - Applies to nominations made before 1/7/10 (r.2.72(10)(a) and 2.72I(5)(b) only relevant to nominations made before that date).
Specification of Occupations (subparagraphs 2.72(10)(a) and 2.72I(5)(b))	09/094	F2009L03513	14/09/09	26/10/09	-	-	yes	Signed 10/09/09; Commences 14/09/09, registered 11/9/09

Notes

1. r.2.72(10)(a) provides that for standard business sponsors who made a nomination before 1 July 2007, the Minister must be satisfied that the nominated occupation corresponds to an occupation specified by the Minister in an instrument in writing for that paragraph.

2. r.2.72(10)(aa) provides that for standard business sponsors who made a nomination on or after 1 July 2007, the Minister must be satisfied that the nominated occupation and its corresponding 6-digit code correspond to an occupation and its corresponding 6-digit code specified by the Minister in an instrument in writing for that paragraph.

3. r.2.72I(5)(b) provides that, if the nomination was made before 1 July 2010, the nominated occupational training is in relation to an occupation specified by the Minister in an instrument in writing for that paragraph.

4. r.2.72I(5)(ba) provides that if the nomination was made on or after 1 July 2010, the nominated occupational training is in relation to an occupation specified, with its corresponding 6 digit code, by the Minister in an instrument in writing for that paragraph.

5. r.2.72(8)(b) provides that, if the nomination by a standard business sponsor was made before 1 July 2010 and there is a no 6-digit ASCO code for the nominated occupation, the person has provided the name of the occupation as it appears in the instrument made for the purposes of paragraph (10)(a).

6. r.2.72(8A)(b) provides that, if the nomination by a standard business sponsor was made on or after 1 July 2010 and there is a no 6-digit ANZSCO code for the nominated occupation, the person has provided the name of the occupation and corresponding 6-digit code as it appears in the instrument made for paragraph (10)(aa).

7. r.5.19(4)(h)(i)(A) provides that, for approval of nominations in the Direct Entry Stream, the tasks to be performed in the position will correspond to the tasks of an occupation specified by the Minister in an instrument for that sub-subparagraph.

8. cl.186.234(2)(a) provides that, for visa applications in the Direct Entry stream, an assessing authority specified by the Minister in an instrument in writing for this subclause, as the assessing authority for the occupation, has assessed the applicant's skills as suitable for the occupation.

* Note that for 2.72 nominations made between 1 July 2010 and 30 June 2012, by their terms, it appears both IMMI 17/060 and IMMI 12/022 apply.

^ Note cl.186.234(2)(a) is a requirement which must be satisfied at the time of application. Accordingly, it's arguable that the instrument in force (IMMI 13/066) during this period (1 July 2013 to 1 July 2014) is the relevant instrument. However, IMMI 14/049 does not differ in substance (as relevant to cl.186.234(2)(a)) to IMMI 13/066. See MRD Legal Services Commentary Subclass 186 - Employer Nomination (Permanent) (Class EN) for further discussion.

^^ Note cl.186.234(2)(a) is a requirement which must be satisfied at the time of application. Accordingly, it's arguable that the instrument in force (14/049) during this period (1 July 2014 to 1 July 2015) is the relevant instrument. However, IMMI 15/091 does not differ in substance (as relevant to cl.186.234(2)(a)) to IMMI 14/049. See MRD Legal Services Commentary Subclass 186 - Employer Nomination (Permanent) (Class EN) for further discussion.

Note that cl.186.234(2)(a) is a requirement which must be satisfied at the time of application. Accordingly, it's arguable that the instrument in force during this period (IMMI 13/041 & 13/020 were both in force during this period) is the relevant instrument. However, IMMI 13/064 does not differ in substance (as relevant to cl.186.234(2)(a)) to IMMI 13/041 and 13/020. See MRD Legal Services Commentary Subclass 186 - Employer Nomination (Permanent) (Class EN) for further discuss

** Note that cl.186.234(2)(a) is a requirement which must be satisfied at the time of application. Accordingly, it's arguable that the instrument in force during this period (IMMI 12/039) is the relevant instrument. However, IMMI 13/065 does not differ in substance (as relevant to cl.186.234(2)(a)) to IMMI 13/065. See MRD Legal Services Commentary Subclass 186 - Employer Nomination (Permanent) (Class EN) for further discussion.

*** IMMI 16/118 commences immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016*

Subclass 187 Occupations and Assessing Authorities - cl.187.234(b), r.5.19(8)(a), r.5.19(8)(c), r.5.19(13)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (LIN19/047: Specification of Occupations - Subclass 187 Visa) Instrument 2019	19/047	F2019L00276	11/03/19	current	18/043	yes	This instrument applies in relation to applications for approval of a r.5.19 nomination made on or after 11 March 2019. IMMI 18/043 continues to apply in relation to applications for approval of a nomination made before 11 March 2019.
Migration (IMMI 18/043: Specification of Occupations - Subclass 187 Visa) Instrument 2018	18/043	F2018L00295	18/03/18	10/03/19 (continues to apply in relation to nomination applications made before 11 March 2019)	12/096	yes	Made 16/03/18, registered 17/03/18, commences 18/03/18.
Specfication of Occupations and Assessing Authorities (Paragraph 187.234(b))	12/096	F2012L01949	01/10/12	current	12/061	yes	This instrument applies to Subclass 187 visa applications in the Direct Entry stream.
Specfication of Occupations and Assessing Authorities (Paragraph 187.234(b))	12/061	F2012L01281	01/07/12	30/09/12	-	yes	Made 12/06/12, commences 1/07/12.

Minimum Salary Levels for the Subclass 457 visa - r.2.79(2A)(c)(ii), 2.79(3A), 2.82(2)(aa)							
Title	**Immi ref**	**FRLI ref**	**In force**		**Revokes**	**Explanatory statement**	**Notes**
			from	**until**			
Migration (IMMI 18/041: Minimum Salary Levels for the Subclass 457 - Temporary Business (Long Stay) Visa) Repeal Instrument	18/041	F2018L00304	18/03/18	current	09/109	yes	This instrument repeals IMMI 09/109, it does not make any new specifications
Minimum Salary Levels for the Subclass 457 - Temporary Business (Long Stay) visa - (subparagraph 2.79(2A)(c)(ii), subregulation 2.79(3A) and subparagraph 2.82(2)(aa))	09/109	F2009L03516	14/09/09	17/03/18	-	yes	Signed 10/09/09; Commences 14/09/09, registered 11/9/09

NOTES

1. r.2.79(3A) of the Regulations provides that, for the purposes of terms and conditions set out in a work agreement, the Minister may specify that a minimum salary level is to be worked out in the way specified in writing for the purposes of that subregulation.

2. r.2.79(2A)(c)(ii) of the Regulations provides a limited exception to subregulation 2.79(2) where the relevant Subclass 457 visa was granted in relation to a nomination that was approved prior to 14 September 2009. The exception provides that from 14 September 2009 until immediately prior to 1 January 2010, the person must ensure that the primary sponsored person's salary is not less than the minimum salary level worked out and paid in the way specified by the Minister in an instrument in writing.

3. r.2.82(2)(aa) of the Regulations provides that all classes of sponsor and parties to a work agreement must keep records of a kind specified by the Minister in an instrument in writing made for this paragraph.

Method for determining terms and conditions of employment provided to Australian Citizen/PR (r.2.72(10AA))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Specification of method for determining terms and conditions of employment that would be provided to an Australian Citizen or a Permanent resident to perform equivalent work in the same workplace at the same location (subregulation 2.72(10AA))	09/113	F2009L03515	14/09/09	current	-	yes	Signed 10/09/09; Commences 14/09/09, registered 11/9/09

1. Subregulation 2.72(10AA) of the Regulations provides that for paragraphs 2.72(10)(c) and 2.72(10)(cc) of the Regulations, if there is no Australian citizen or Australian permanent resident who performs equivalent work in the person's workplace at the same location, the person must determine, using the method specified by the Minister in an instrument in writing, the terms and conditions of employment (and the base rate of pay under the terms and conditions of employment) that would be provided to an Australian citizen or an Australian permanent resident to perform equivalent work in the person's workplace at the same location.

Occupations in related entities for r.2.72(10)(d)(ii)(B) & (iii)(B), 2.72(10)(e)(ii)(B) & (iii)(B), r.2.86(2B) and cl.457.223(4)(ba)(iv)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Specification of Occupations for Nominations in relation to Subclass 457 (Temporary Work (Skilled)) for Positions other than in the Business of the Nominator (made under regulation 1.03, sub-subparagraphs 2.72(10)(d)(ii)(B), 2.72(10)(d)(iii)(B), 2.72(10)(e)(ii)(B), 2.72(10)(e)(iii)(B), subregulation 2.86(2B) and subparagraph 457.223(4)(ba)(i) of the *Migration Regulations 1994*)	13/067	F2018C00236	18/03/18	current	n/a	n/a	This is a **compilation instrument** incorporating the changes to IMMI 13/067 made by amending instrument 18/065.
Migration (IMMI 18/065: Amendment of IMMI 13/067) Instrument 2018	18/065	F2018L00296	18/03/18	current	-	yes	This instrument amends 13/067, only by removing the definition of ANZSCO (s.6) from that instrument. It does not affect the substantive specifications.
Specification of Occupations for Nominations in relation to Subclass 457 (Temporary Work (Skilled)) for Positions other than in the Business of the Nominator (Regulation 1.03, sub-subparagraphs 2.72(10)(d)(ii)(B), 2.72(10)(d)(iii)(B), 2.72(10)(e)(ii)(B), 2.72(10)(e)(iii)(B), subregulation 2.86(2B) and subparagraph 457.223(4)(ba)(i))	13/067	F2013L01244	01/07/13	current	10/090	yes	Dated 28/06/13, Registered 28/06/13, commences 1/7/2013
Specification of Occupations for Nominations in relation to Subclass 457 (Business (Long Stay)) for Positions Other than in the Business of the Nominator (Sub-subparagraphs 2.72(10)(d)(ii)(B), 2.72(10)(d)(iii)(B), 2.72(10)(e)(ii)(B), 2.72(10)(e)(iii)(B), r.2.86(2B) and subparagraph 457.223(4)(ba)(iv))	10/030	F2010L01412	01/07/10	30/06/13	09/106	yes	Dated 17/6/10, Registered 22/6/10, commences 1/7/10.
Specification of Occupations for Sub-subparagraphs 2.72(10)(d)(ii)(B) and 2.72(10)(d)(ii)(B) and para 2.86(2B) and subparagraph 457.223(4)(ba)(iv)	09/106	F2009L03499	14/09/09	30/06/10	-	yes	Dated 7/09/09, Registered 11/09/09, commences 14/09/09

NOTES

(1) Regulation 2.72(10)(d)(ii) provides that, for a nomination made by a standard business sponsor before 1 July 2010, a person lawfully operating a business outside, but not inside, Australia, must have certified that the nominated occupation is a position in the standard business sponsor's business or is an occupation specified in an instrument for this sub-paragraph: 2.72(10)(d)(ii)(B). Regulation 2.72(10)(d)(iii) mirrors this requirement for a business operating in Australia.

(2) Regulation 2.72(10)(e)(ii) provides that, for a nomination made by a standard business sponsor on or after 1 July 2010, a person lawfully operating a business outside, but not inside, Australia, must have certified that the nominated occupation is a position in the standard business sponsor's business or is an occupation specified in an instrument for this sub-subparagraph: 2.72(10)(e)(ii)(B). Regulation 2.72(10)(e)(iii) mirrors this requirement for a business operating in Australia.

(3) Regulation 2.86(2B) provides that for sub-regulation (2A), if the Minister specifies an occupation in writing, a primary sponsored person may be engaged in that occupation as an independent contractor by the person or an associated entity of the person.

(4) Sub-clause 457.223(4)(ba)(iv) may be met where the business activities of the person who made the approved nomination include activities relating to either recruitment of labour for supply to other unrelated businesses and/or the hiring of labour to other unrelated businesses and the occupation is specified by the Minister in an instrument for this subparagraph.

Tests, scores, period, level of salary and exemptions to the English requirement for Subclass 457 visas (cl.457.223(4)(eb), 457.223(6)(a), r.2.72(10)(g)(iv), 457.223(11))

Title	IMMI ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Migration (IMMI 17/057: English Language Requirements for Subclass 457 visas) Instrument 2017	17/057	F2017L00835	01/07/17	current	n/a	yes	This instrument applies to all live Subclass 457 visa applications, with the exception of those applications to which paragraph 7(d) or 7(e) of IMMI 15/028 applies (which relate to visa applications made prior to 1 July 2013). The instrument states that those paragraphs continute to apply to any remaining visa applications lodged before that date. Made 28 June 2017, registered 20 June 2017. **N.B.** this instrument needs to be read with Clause 6702(3) of Schedule 13 to the Regulations **which provides that the total band scoe for the TOEFL iBT Egnlish test is 35.**
Migration (IMMI 17/078: Time period fo English language requirements for Subclass 457 nominations) Instrument 2017	17/078	F2017L00849	01/07/17	current	n/a	yes	This instrument makes a specification under r.2.72(10)(g)(iv). It replicates the specification previously made in IMMI 15/028, and has been separated into it's own instrument, rather than being included in IMMI 17/057 (which otherwise replaces IMMI 15/028). Made on 23 June 2017, registered 30 June 2017.
Migration (IMMI 17/079: Repeal of Tests, Scores, Period, Level of Salary and Exemptions to the Enlighs Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 (*IMMI 15/028*)) Instrument 2017	17/079	F2017L00846	01/07/17	current	15/028	yes	This instrument revokes IMMI 15/028 only.
Tests, scores, period, level of salary and exemptions to the English language requirement for Subclass 457 (Temporary Work (Skilled)) visas 2015 (subparagraph 2.72(10)(g)(iv), paragraphs 457.223(4)(eb) and 457.223(6)(a), and subclause 457.223(11))	15/028	F2016C00510	18/04/15	30/06/17	N/A - compilation	no	This instrument is a compilation of IMMI 15/028, taking into account the amendment made by IMMI 16/026 (from 19 April 2016).

Tests, scores, period, level of salary and exemptions to the English language requirement for Subclass 457 (Temporary Work (Skilled)) visas 2015 (subparagraph 2.72(10)(g)(iv), Subparagraphs 457.223(4)(eb) and 457.223(6)(a), and subclause 457.223(11))	15/028	F2016L00537 (amending instrument)	18/04/15	current*	14/009	yes	Amending instrument IMMI 16/026 amends IMMI 15/028 from 19 April 2016 by adding a class of applicants who are exempt for the purposes of cl.457.223(4). Made on 15 April 2016; registered on 19 April 2016.
		F2015L00563				yes	Made on 16 April 2015; registered on 17 April 2015; commences on 18 April 2015. Applies to all live applications as at 18 April 2015.
Tests, scores, period, level of salary and exemptions to the English language requirement Subclass 457 (Temporary Work (Skilled)) visas (Paragraphs 457.223(4)(eb) and 457.223(6)(a), subparagraph 2.72(10)(g)(iv) and subclause 457.223(11))	14/009	F2014L00327	22/03/14	17/04/15	13/099	yes	Made on 19 March 2014; registered on 21 March 2014; commences on 22 March 2014 immediately after the commencement of the Migration Amendment (Redundant and Other Provisions) Regulation 2014.
Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) visas (Paragraph 457.223(6)(a) and subclause 457.223(11))	13/099	F2013L01462	01/08/13	21/03/14	13/029	yes	Made 25/07/13, registered 30/07/13, commences 1/08/13
Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) visas (Paragraph 457.223(6)(a) and subclause 457.223(11))	13/029	F2013L01237	01/07/13	31/07/13	12/048	yes	Made 28/06/13, registered 28 June 2013, commences 1/07/13
Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Business (Long Stay)) visas (Paragraph 457.223(6)(a) and subclause 457.223(11))	12/048	F2012L01275	01/07/12	30/06/13	11/042	yes	Made 12/06/12, commences 1/07/12
Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Business (Long Stay)) visas (Paragraph 457.223(6)(a) and subclause 457.223(11))	11/042	F2011L01131	01/07/11	30/06/12	10/086	yes	Made 6/06/11, registered 22/06/11, commences 1/07/11
Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Business (Long Stay)) visas (Paragraph 457.223(6)(a) and subclause 457.223(11))	10/086	F2011L00249	15/02/11	30/06/11	10/029	yes	Signed 18/01/11 (signed but undated), registered 14/02/11, commences 15/02/11

Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Business (Long Stay)) visas (Paragraph 457.223(6)(a) and subclause 457.223(11))	10/029	F2010L01409	01/07/10	14/02/11	09/118	yes	Made 17/6/10, Registered 22/6/10, commences 1/7/10
Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa (Schedule 2, Paragraph 457.223(6)(a) and Subclause 457.223(11))	09/118	F2009L03973	09/11/09	30/06/10	09/067	yes	Made 10/10/09, Registered 4/11/09, commences 9/11/09
Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa (Schedule 2, Paragraph 457.223(6)(a) and Subclause 457.223(11))	09/067	F2009L02465	01/07/09	08/11/09	09/057	yes	Signed 16/6/09, Registered 24/6/09, commences 1/7/09
Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa (Schedule 2, Paragraph 457.223(6)(a) and Subclause 457.223(11))	09/057	F2009L02130	02/06/09	30/06/09	09/033	yes	Signed 27/05/09, Registered 01/06/09, commences day after registration (02/06/09)
Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa	09/033	F2009L01243	14/04/09	01/06/09	08/063	yes	Signed 2/4/09; Effective 14/4/09. Registered 8/4/09.
Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa	08/063	F2008L02836	01/08/08	13/04/09	07/079	yes	Signed 25/7/08; Effective 1/8/08. Registered 31/7/08.
Specification under paragraph 457.223(6)(a) and subclause 457.223(11) of Schedule 2 - Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa	07/079	F2007L04068	11/10/07	31/07/08	07/069	yes	Signed 8/10/07; Effective day after registration. Registered 10/10/07.
Specification under paragraph 457.223(6)(a) and subclause 457.223(11) of Schedule 2 - Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa	07/069	F2007L03570	10/09/07	10/10/07	07/044	yes	Signed 7/9/07; Effective 10/9/07. Registered 10/9/07

Specification under clause 457.223 of Schedule 2 - Exemptions to the English Language Requirement for the Temporary Business (Long Stay) Visa	07/044	F2007L02077	01/07/07	09/09/07	None	yes	Signed 28/6/07; Effective 1/7/07. Registered 29/6/07

NOTES

(1) Clause 457.223(6)(a) applies to an applicant for a Subclass 457 visa who will be paid, in connection with the occupation nominated in relation to the applicant, a level of salary that is at least the level of salary worked out in a way specified by the Minister in an instrument in writing for this paragraph.

(2) Clause 457.223(11) provides that in cl.457.223(4), *exempt applicant* means an applicant who is in a class of applicants specified by the Minister in an instrument in writing for this subclause.

(3) Regulations 1.20D and 1.20DA provide that the Minister must approve an application for approval as a standard business sponsor where certain criteria are met. These provisions were repealed on 14/09/09.

Temporary Skilled Migration Income Threshold and Annual Market Salary rate (rr.2.72(10)(cc), 2.72(10AB), r.2.72(15)(b), r.2.72(15)(d), r.2.79(1A)(b))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Migration (IMMI 18/082: Specification of Income Threshold and Annual Earnings) Repeal Instrument 2018	18/082	F2018L01109	14/08/18	current	13/028	yes	Repeals IMMI 13/028. From 18 March 2018, the annual earnings for the purposes of r.2.79(1A)(b) are specified in IMMI 18/033. Despite this repeal, specifications made by IMMI 13/028 under rr.2.72(10AB) and (10)(cc) would appear to still be in effect under that instrument (see notes to IMMI 13/028).
Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018	18/033	F2018L00284	18/03/18	current	n/a	yes	Specification of TSMIT made by this instrument is made under r.2.72(15)(d), and annual earnings speciation is made under r.2.72(15)(b) - these apply in relation to nominations **made on or after 18 March 2018**. Specification under r.2.79(1A)(b) commences 18 March 2018 (but specifies same amount as 13/028). Specification of method to determine annual market salary rate is made by r.2.72(17), and is relevant to r.2.72 and r.5.19 nominations made on or after 18 March 2018.
Specification of Income Threshold and Annual Earnings (Paragraphs 2.72(10)(cc) and 2.79(1A)(b) and subregulation 2.72(10AB))	13/028	F2013L01231	15/06/15[5.] 7:14pm	13/08/18	_	yes	This instrument is relevant to live nominations made **before 18 March 2018**. Made 28/06/13, commenced 1/7/13, registered 28/6/13, revoked 18/04/15, recommenced following disallowance of 15/050 by the Senate on 16 June 2015 at 7:13pm. While this instrument was subsequently revoked on 14/8/18, it would continue to have operation for nominations made before 18/3/18 which relate to 457 visa holders, and 457 applicants/proposed applicants who applied for a visa before 18/3/18: 6704(6) of Sch 1 of the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018.
Specification of Income Threshold and Annual Earnings (Paragraphs 2.72(10)(cc) and 2.79(1A)(b) and subregulation 2.72(10AB))	15/050	F2015L00569	18/04/15	15/06/15[4.] 7:13pm	13/028	yes	Made 17/04/15, registered 17/4/15, commenced 18/04/15. Applied to all live nomination applications live at 18/4/15 until 15/6/15. Note: disallowed by the Senate on 16 June 2015 at 7:13pm.
Specification of Income Threshold and Annual Earnings (Paragraphs 2.72(10)(cc) and 2.79(1A)(b) and subregulation 2.72(10AB))	13/028	F2013L01231	1/07/13	17/04/15	12/047	yes	Made 28/06/13, commences 1/7/13, registered 28/6/13
Specification under paragraphs 2.72(10)(cc) and 2.79(1A)(b) and subregulation 2.72(10AB) - Specification of Income Threshold and Annual Earnings	12/047	F2012L01294	1/07/12	30/06/13	11/041	yes	Made 12/06/12, commences 1/7/12, registered 22/6/12
Specification of Income Threshold and Annual Earnings (paragraph 2.72(10)(cc), sub-regulations 2.72(10AB) and 2.79(1A)(b))	11/041	F2011L01137	01/07/11	01/07/12	10/037	yes	Made 6/6/11, commences 1/7/11, registered 22/6/11
Specification of Income Threshold and Annual Earnings (paragraph 2.72(10)(cc), sub-regulations 2.72(10AB) and 2.79(1A)(b))	10/037	F2010L01486	01/07/10	30/06/11	09/112	yes	Made 17/6/10, commences 1/7/10, registered 23/6/10
Specification of the Temporary Skilled Migration Income Threshold and the salary above which paragraphs 2.72(10)(c) and 2.72(10)(cc) and r.2.79 do not apply	09/112	F2009L03514	14/09/09	30/06/10	-	yes	Signed 10/09/09; Commences 14/09/09, registered 11/9/09

NOTES

1. r.2.72(10)(cc) of the Regulations provides that the Minister must be satisfied that the base rate of pay (under the terms and conditions of employment mentioned in paragraph 2.72(10)(c)) that is provided, or would be provided, to an Australian citizen or an Australian permanent resident, will be greater than the temporary skilled migration income threshold specified by the Minister in an instrument in writing for this paragraph.

2. r.2.72(10AB) provides that paragraphs 2.72(10)(c) and 2.72(10)(cc) do not apply if the annual earnings of the person identified in the nomination are equal to or greater than the amount specified by the Minister in an instrument in writing for this subregulation.

3. r.2.79(1A)(b) of the Regulations provides that r. 2.79 does not apply to a standard business sponsor of a primary sponsored person if the primary sponsored person holds a Subclass 457 or their last substantive visa was a Subclass 457 and the annual earnings of the primary sponsored person are equal to or greater than the amount specified by the Minister in an instrument in writing.

4. IMMI 15/050 was disallowed by the Senate on 16 June 2014 at 7:13pm.

5. IMMI 13/028 was revoked by 15/050 on 17 April 15. As IMMI 15/050 was disallowed by the Senate on 16 June 2015 at 7:13pm, IMMI 13/028 is no longer revoked from that date and is the current instrument from that date and time.

Training Benchmarks and Requirements (rr.2.59(d), 2.68(e), 2.87B(2), 2.87B(3), 5.19(4)(h)(i)(B)(I)) and r.5.19(10)(c)(i)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Migration (IMMI 18/047: Specficiation of Training Requirements for Regulation 5.19) Instrument 2018	18/047	F2018L00305	18/03/18	current	n/a	yes	Instrument is made under **r.5.19(10)(c)(i)** only, in respect of nominations made on or after 18 March 2018.
Migration (IMMI 18/017: Specification of Training Requirements for Regulation 2.87B) Instrument 2018	18/017	F2018L00280	18/03/18	current	17/045	yes	Instrument is made under **r.2.87B(2) & (3)** only, noting that r.2.59(d) and r.2.68(e) were repealed and ceased to apply to live applications from 18 March 2018. **The obligations it specifies only apply from 18 March 2018.**
Migration (IMMI 17/045: Specification of Training Benchmarks and Training Requirements) Instrument 2017	17/045	F2017L00796	01/07/17	17/03/18	n/a	yes	**Applies to sponsorship applications made on or after 1 July 2017 and approved sponsorships where the application was made on or after that date.** Makes specifications under rr.2.59(d), r.2.68(e), **2.87B(2) and 2.87B(3).** Dated 23/06/17, Commences 01/07/17, Registered 29/06/17.
Migration (IMMI 17/074: Specific of Training Requirements) Instrument 2017	17/074	F2017L00789	01/07/17	current	n/a	yes	**Applies to nominations made on or after 1 July 2017. Makes specification under r.5.19(4)(h)(i)(B)(I).** Dated 23 June 2017, Commences 01/07/17, Registered 29/06/17.
Migration (IMMI 17/075: Repeal of Training Benchmarks and Training Requirements) Instrument 2017	17/075	F2017L00795	01/07/17	current	13/030	yes	Revokes IMMI 13/030 only, does not make specifications.
Specification of Training Benchmarks and Training Requirements (Paragraphs 2.59(d), 2.68(e), subregulations 2.87B(2) and 2.87B(3) and sub-sub-subparagraph 5.19(4)(h)(i)(B)(I))	13/030	F2013L01236	01/07/13	30/06/17	12/062	yes	**Applies to sponsorship applications and nominations made before 1 July 2017.** Makes specifications under rr.2.59(d), 2.68(e), 2.87B(2), 2.87B(3) and **5.19(4)(h)(i)(B)(I).** Dated 28/06/13; Commences 01/07/13; Registered 28/06/13.
Specification under regulations 2.59, 2.68 and 5.19 - Specification of Training Benchmarks	12/062	F2012L01311	01/07/12	30/06/13	09/107	yes	Dated 12/06/12; Commences 01/07/12; Registered 22/06/12
Specification of Training Benchmarks (Subregulations 2.59(d) and 2.68(e))	09/107	F2009L03512	14/09/09	30/06/12	-	yes	Signed 10/09/09; Commences 14/09/09, registered 11/9/09

NOTES

1. rr.2.59(d) and 2.68(e) provide that a person who is applying for approval as a standard business sponsor or who is applying to vary their terms of approval as a standard business sponsor and who has been operating a business for 12 months or more needs to demonstrate that they have a record of training that meets the benchmarks described in an Instrument in writing.

2.rr.2.59(e) and 2.68(f) provide that a person who is applying for approval as a standard business sponsor or who is applying to vary their terms of approval as a standard business sponsor and who has been operating a business for less than 12 months needs to demonstrate an auditable plan to meet the training benchmarks described in an Instrument in writing.

3.rr2.87B(2) and (3) provide that a person must complywith requirements relating to training, specified by the Minister in an instrument in writing, for the relevant 12 month period.

Appropriate Regional Authority

Title	immi ref	GN No.	FRLI ref	In force		Revokes	Explanatory statement	Notes
				from	until			
Appropriate Regional Authority (Regulation 1.03)	10/041		F2010L01487	01/07/10	current	09/061	yes	Signed 24/05/10, Registered 3/6/10, commences 1/7/10
Appropriate Regional Authority (Regulation 1.03)	09/061	-	F2009L02147	01/07/09	30/06/10	05/048	yes	Signed 14/6/09, Registered 23/6/09, Commences 1/7/09
Specification of State and Territory departments and authorities for the purposes of the definition of “Appropriate Regional Authority” in regulation 1.03 of the Migration Regulations 1994	05/048	GN 25	F2005L01630	01/07/05	30/6/09	GN 8	yes	Signed 23/06/05. Registered and GN published 29/06/05; revokes GN signed 6/2/03.
Specification of State and Territory departments and authorities for the purposes of the definition of “Appropriate Regional Authority” in regulation 1.03 of the Migration Regulations 1994	-	GN 8	-	01/03/03	30/06/05	GN 35	no	Signed 6/2/03. GN published 26/2/03. Effective 1/3/03.
Specification of Appropriate Regional Authorities for the purposes of the definition of “Appropriate Regional Authority” in regulation 1.03 of the Migration Regulations 1994	-	GN 35	-	01/09/99	28/02/03	GN 26	no	Signed 23/8/99. GN published 1/9/99. Date of effect not specified.
Specification of Appropriate Regional Authorities for the purposes of regulation 1.03	-	GN 26	-	02/07/97	31/08/99	GN 1	no	Signed 20/6/97. GN published 2/7/97. Date of effect not specified.
Specification of "Appropriate Regional Authorities" under regulation 1.03	-	GN 1	-	10/01/96	01/07/97	GN 34	no	Signed 13/12/95. GN published 10/1/96. Date of effect not specified.
Specification of "Appropriate Regional Authorities" under regulation 1.03	-	GN 34	-	01/09/94	09/01/96	-	no	Signed 22/8/94. GN published 31/8/94. Date of effect 1/9/94.

Notes

Occupations, Locations, Salaries and Relevant Asssessing Authorities for the ENS (r.5.19(2)(h),(i); cl.121.211(b); and cl.856.213)

Title	Immi ref	GN No.	FRLI ref	In force		Revokes	Explanatory Statement	Notes
				from	until			
Employer Nomination Scheme - Occupations, locations, salaries and relevant assessing authorities (subparagraph 5.19(2)(h)(i), subparagraph 5.19(2)(h)(ii), paragraph 5.19(2)(i), subparagraph 121.211(b)(i)(A), subparagraph 121.211(b)(ii), subparagraph 856.213(b)(i)(A) and subparagraph 856.213(b)(ii))	11/021		F2011L01228	01/07/11	current	10/089	yes	Made 22/06/11, registered 24/06/11, commences 1/07/11.
Employer Nomination Scheme - Occupations, locations, salaries, and relevant assessing authorities (paragraphs 5.19(2)(h)(i), (2)(h)(ii) and (2)(i), 121.211(b), AND 856.213(b))	10/089		F2010L03158	05/12/10	30/06/11	10/028	yes	Made 2/12/10, registered 3/12/10, commences 5/12/10.
Employer Nomination Scheme - Occupations, locations, salaries, and relevant assessing authorities (paragraphs 5.19(2)(h)(i), (2)(h)(ii) and (2)(i), 121.211(b), and 856.213(b))	10/028		F2010L01327	01/07/10	04/12/10	09/066	yes	Made 21/6/10, registered 28/6/10, commences 1/7/10
Employer Nomination Scheme - Occupations, locations, salaries, and relevant assessing authorities (paragraphs 5.19(2)(h) and (i), 121.211(b), and 856.213(b))	09/066	-	F2009L02482	01/07/09	30/06/10	08/062	yes	signed 17/6/09, Registered 24/6/09, commenced 1/7/09
Occupations, locations, salaries, and relevant assessing authorities for the Employer Nomination Scheme	08/062	-	F2008L02847	01/08/08	30/6/09	06/078	yes	Signed 25/7/08; Effective 1/8/08. Registered 31/7/08
Specification under paragraph 5.19(2)(h) and (i), 121.211(b) and 856.213(b) - Occupations, locations, salaries, and relevant assessing authorities for the Employer Nomination Scheme	06/078	-	F2006L03925	06/12/06	31/07/08	06/077	yes	Signed 30/11/06; Effective day after registration. Registered 5/12/06; Revokes Immi 06/077
Occupations, locations, salaries, and relevant assessing authorities for the employer nomination scheme (regulations 5.19(2)(h) and (i), 121.211(b), and 856.213(b))	06/077	-	F2006L03554	01/11/06	05/12/06	06/027	yes	Signed 25/10/06; Effective day of registration; registered 1/11/06

Occupations, locations, salaries, and relevant assessing authorities for the employer nomination scheme (regulations 5.19(2)(h) and (i), 121.211(b), and 856.213(b))	06/027	-	F2006L01225	03/05/06	31/10/06	05/007	yes	Signed 24/04/06; Effective day after registration; Registered 02/05/06
Specification of occupations and locations for the purposes of paragraph 5.19(2)(h), salaries for the purposes of paragraph 5.19(2)(i), subparagraphs 121.211(b)(ii) and 856.213(b)(ii), and relevant assessing authorities for the purposes of sub-subparagraphs 121.211(b)(i)(A) and 856.213(b)(i)(A) of the Migration Regulations 1994	05/007	S 50	F2005L00806	02/04/05	02/05/06	-	yes	Signed 17/03/05; Effective 2/4/05; GN Published 1/4/05

NOTES

(1) Regulation 5.19 deals with approval of nominated positions (employer nominations). Subparagraph 5.19(2)(h)(i) relevantly provides that the tasks to be performed in the nominated position must correspond to the tasks of an occupation specified in a Gazette Notice in force for this subparagraph at the time at which the application for approval of the nominated position is made.

(2) Regulation 5.19(2)(h)(ii) provides that the tasks to be performed in the nominated position will be carried out in a location specified, for the relevant occupation, in a Gazette Notice in force for this subparagraph at the time at which the application for approval of the nominated position is made.

(3) Regulation 5.19(2)(i) provides that the employee will be paid a salary in the nominated position that is at least the salary specified, for the relevant occupation and location, in a Gazette Notice in force for this paragraph at the time at which the application for approval of the nominated position is made.

(4) Clauses 121.211(b)(ii) and 856.213(b)(ii) provide the applicant will be paid a salary in the nominated position that is at least the amount of salary specified in a Gazette Notice for these clauses

(5) Clauses 121.211(b)(i)(A) and 856.213(b)(ii) provide an assessing authority specified by the Minister in a Gazette Notice for these sub-subparagraphs as the assessing authority for the occupation to which the appointment relates has assessed the applicant's skills as suitable.

Securities in which an investment is a 'designated investment' for Subclasses 131, 162, 165, 405, 844, 888, 891 & 893 (r.5.19A)

Title	Immi ref	GN No.	FRLI ref	In force		Revokes	Explantory Statement	Notes
				from	until			
Specification under regulation 5.19A - Securities in which an investment is a Designated Investment for the purposes of Subclasses 162, 165, 188, 405, 888, 891 and 893	12/106	-	F2012L02220	24/11/12	current	12/064	yes	Made 09/11/12; registered 22/11/12; effective 24/11/12revokes 12/064
Specification under regulation 5.19A - Securities in Which an Investment is a Designated Investment for the purposes of Subclasses 131, 162, 165, 188, 405, 844, 888, 891 and 893	12/064	-	F2012L01310	01/07/12	23/12/12	05/044	yes	Made 12/06/12; registered 22/06/12; effective 1/07/12; revokes GN 05/044
Specification for the Purposes of Regulation 5.19A of the Migration Regulations 1994 of Securities in which an Investment is a Designated Investment for the Purposes of Visa Subclasses 131, 162, 165, 844, 891 and 893	05/044	GN 25	F2005L01631	01/07/05	30/06/12	GN 9	yes	Signed 23/06/05; effective 1/07/05; GN published 29/06/05; revokes GN signed 25/02/03
Specification for the purposes of regulation 5.19A of the Migration Regulations 1994 of securities in which an investment is a Designated Investment for the purposes of visa Subclasses 131, 162, 165, 844, 891 and 893 (GN 9 of 2003)	-	GN 9	-	01/03/03	30/06/05	GN 8	-	Signed 25/02/03; effective 1/3/03; Published 5/3/03; revokes GN signed 11/02/97
Designated investments - visa Subclasses 131 and 844 (GN 8 of 1997)	-	GN 8	-	26/02/97	28/02/03	GN 47	-	Signed 11/02/97; published 26/02/97; revokes GN signed 20/11/96
Designated investments - visa subclasses 131 and 844 (GN 47 of 1996)	-	GN 47	-	27/11/96	25/02/97	GN 32	-	Signed 20/11/96; published 27/11/96
Designated investments - visa Subclasses 131 and 844 (GN 32 of 1995)	-	GN 32	-	16/08/95	26/11/96	S 115	-	Signed 8/08/95; revokes GN SIGNED 31/3/95

Designated investments - visa Subclasses 131 and 844 (S 115 of 1995)	-	S 115	-	31/03/95	15/08/95	-	-	Signed 29/03/95; published 31/03/95

Regional certifying bodies and post codes (rr.5.19(4)(e) and (5), 1.20GA(1)(e), 2.43(1)(la) and cl.471.229G) - pre 1 July 2012

Title	Immi ref	GN No.	FRLI ref	In force		Revokes	Explanatory Statement	Notes
				from	until			
Regional certifying bodies and egional postcodes (paragraph 5.19(4)(e), subregulation 5.19(5) and paragraph 2.43(1)(la)"	11/058		F2011L01887	12/09/11	current	10/051	yes	Made 29/08/11, registered 09/09/11, commenced 12/09/11
Regional certifying bodies and regional postcodes (paragraphs 5.19(4)(e), 5.19(5) and 2.43(1)(la)	10/051		F2010L02725	19/11/10	11/09/11	09/120	yes	Made 15/11/10, registered 18/11/10, commenced 19/11/10
Regional certifying bodies and regional postcodes (paragraphs 5.19(4)(e), 5.19(5) and 2.43(1)(la)	09/120		F2009L03976	9/11/09	18/11/10	08/020	yes	Made 22/10/09, registered 5/11/09, commenced 9/11/09
Regional certifying bodies and post codes defining regional Australia for certain visas (paragraph 5.19(4)(e), subregulation 5.19(5), paragraphs 1.20GA(1)(e) and 2.43(1)(la))	08/020		F2008L01641	21/05/08	08/11/09	07/075	yes	Signed 12/5/08; Effective day after registration. Registered 20/5/08.
Regional certifying bodies and post codes defining regional Australia for certain visas (regulations 5.19(4)(e)and (5), 1.20GA(1)(e) and 2.43(1)(la))	07/075		F2007L03884	04/10/07	20/05/08	06/086	yes	Signed 19/9/07; Effective day after registration. Registered 3/10/07.
Regional certifying bodies and post codes defining regional Australia for certain visas (regulations 5.19(4)(e)and (5), 1.20GA(1)(e), 2.43(1)(la) and 471.229G)	06/086		F2006L04047	22/12/06	03/10/07	06/010	yes	Signed 15/12/06; Effective date of registration. Registered 22/12/06.
Regional certifying bodies and post codes defining regional Australia for certain visas (regulations 5.19(4)(e)and (5), 1.20GA(1)(e), 2.43(1)(la) and 471.229G)	06/010		F2006L00987	12/04/06	21/12/06	05/060	yes	Signed 28/2/06. Date of effect not specified. Effective date of registration. Registered 12/4/06.

Specification of bodies for the purposes of paragraghs 5.19(4)(e) and 1.20GA(1)(e), parts of Australia for the purposes of subregulation 5.19(5) and areas for the purposes of paragraph 2.43(1)(la) of the Migration Regulations 1994	05/060	GN 28	F2005L01614	19/07/05	11/04/06	S 407	yes	Signed 6 July 2005; Date of effect not specified. Explanatory Statement states instrument commences day after registration. Registered 19/7/05. Gazette published 20/7/05.
Specification of bodies for paragraphs 5.19(4)(e), 1.20GA(1)(e) and areas for paragraph 2.43(1)(la)of the Migration Regulations 1994 (S407 of 2002)		S 407		01/11/02	18/07/05	GN 31	No	Signed 22/10/02; Effective 1/11/02. Gazette published 30/10/02.
Specification of bodies for the purposes of paragraph 5.19(4)(e) of the Migration Regulations 1994 (GN 31 of 2000)		GN 31		09/08/00	31/10/02	GN 19	No	Signed 1/8/00; Effective date of publication in Gazette. Gazette published 9/8/00.
Specification of bodies for the purposes of paragraph 5.19(4)(e) of the Migration Regulations 1994 (GN 19 of 2000)		GN 19		17/05/00	08/08/00	GN 51	No	Signed 2000 (date not readily available); Effective date of publication in Gazette. Gazette published 17/5/00.
Specification of bodies for the purposes of paragraph 5.19(4)(e) of the Migration Regulations 1994 (GN 51 of 1999)		GN 51		22/12/99	16/05/00	GN 26	No	Signed 23/11/99; Effective date of publication in Gazette. Published in Gazette 22/12/99.
Specification of bodies for the purposes of paragraph 5.19(4)(e) of the Migration Regulations 1994 (GN26 of 1999)		GN 26		30/06/99	21/12/99	GN 8	No	Signed 29/5/99. Effective date of publication in Gazette. Published in Gazette 30/6/99.
Specification of bodies for the purposes of paragragh 5.19(4)(e) of the Migration Regulations 1994 (S345 of 1998)		GN 8		24/02/99	29/06/99	S 34	No	Signed 3/2/99. Effective date of publication in Gazette. Published in Gazette 24/2/99.
Specification of bodies for the purposes of paragragh 5.19(4)(e) of the Migration Regulations 1994 (S345 of 1998)		S 345		08/07/98	23/02/99	GN6	No	Signed 1/7/98. Effective date of publication in Gazette. Published in Gazette 8/7/98.
Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 5 of 1998)		GN 6		11/02/98	07/07/98	GN43	No	Signed 28/1/98. Effective date of publication in Gazette. Published in Gazette 11/2/98.
Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 43 of 1997)		GN 43		29/10/97	10/02/98	GN26	No	Signed 15/10/97. Effective date of publication in Gazette. Published in Gazette 29/10/97.
Specification of bodies for the purposes of r.5.19(4)(e) (GN 26 of 1997)		GN 26		02/07/97	28/10/97	GN22	No	Signed 24/6/97. Effective date of publication in Gazette. Published in Gazette 2/7/97.

Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 22 of 1997)		GN 22		26/05/97	01/07/97	GN15	No	Signed 26/5/97. Effective date of publication in Gazette. Published in Gazette 4/6/97.
Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 15 of 1997)		GN 15		16/04/97	25/05/97	GN6	No	Signed 7/4/97. Effective date of publication in Gazette. Published in Gazette 16/4/97.
Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 6 of 1997)		GN 6		12/02/97	15/04/97	GN31	No	Signed 28/1/97. Effective date of publication in Gazette. Published in Gazette 12/2/97.
Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 31 of 1996)		GN 31		07/08/96	11/02/97	GN24	No	Signed 31/7/96. Effective date of publication in Gazette. Published in Gazette 7/8/96.
Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 24 of 1996)		GN 24		30/05/96	06/08/96	GN20	No	Signed 30/5/96. Effective date of publication in Gazette. Published in Gazette 19/6/96.
Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 20 of 1996)		GN 20		22/05/96	29/05/96	GN43	No	Signed 6/5/96. Effective date of publication in Gazette. Published in Gazette 22/5/96.
Specification of bodies for the purposes of paragragh 5.19(4)(e) (GN 43 of 1995)		GN 43		01/11/95	21/05/96	None	No	Signed 24/10/95. Effective 1/11/95. Published in Gazette 1/11/95.

NOTES

(1) Regulation 1.17 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 these provisions. Section 56 of the *Legislation Act 2003* (formerly the *Legislative Instruments Act 2003*) states that If a primary law requires a legislative instrument made under that law or other enabling legislation, or particulars of the making of the instrument, to be published or notified in the Gazette, the requirement is taken to be satisfied if the instrument is registered as a legislative instrument.

(2) Paragraph 5.19(4)(e) provides that only a body that has been specified for the purposes of that paragraph may certify that an employer nomination meets the requirements of rr.5.19(a), (b) and (c).

(3) Paragraph 1.20GA(1)(e) provides that only a body that has been specified for the purposes of that paragraph may certify that a nomination meets the requirements of rr.1.20GA(1)(a), (b), (c) and (d).

(4) Subregulation 5.19(5) provides that ***regional Australia*** means a part of Australia specified by Gazette Notice for this definition.

(5) Paragraph 2.43(1)(la) sets out a prescribed ground fro cancelling a visa under s.116 of the *Migration Act 1958* and relevantly provides that in the case of the holder of a Subclass 457 (Business (Long Stay)) visa who was granted the visa on the basis of being employed in Australia by a business sponsor, and in respect of whom there is a nomination of an activity under r.1.20GA, that the visa holder is living or working within an area specified in a Gazette Notice for that paragraph.

Regional certifying bodies and post codes (rr.5.19(4)(h)(ii)(F) and r.5.19(7)) - post 1 July 2012

Title	Immi ref	FRLI Reference	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 17/059: Regional Certifying Bodies and Regional Postcodes) Instrument 2017	17/059	F2017L01460	17/11/17	17/03/18	16/045	yes	Made 05/11/17, registered 13/11/17, commences 17/11/17. Repealed by IMMI 18/037 (see 'RegAustpost180318' tab)
Regional certifying bodies and regional postcodes (sub-paragraph 5.19(4)(h)(ii)(F), subregulation 5.19(7))	16/045	F2016L00778	01/07/16	16/11/17	13/049	yes	Made 05/05/16, registered 12/05/16, commences 1/07/16
Regional certifying bodies and regional postcodes (sub-paragraph 5.19(4)(h)(ii)(F), subregulation 5.19(7))	13/049	F2013L01107	01/07/13	30/06/16	12/095	yes	Made 17/06/13, registered 21/06/13, commences 1/07/13
Regional certifying bodies and regional postcodes (sub-paragraph 5.19(4)(h)(ii)(F), subregulation 5.19(7))	12/095	F2012L01946	01/10/12	30/06/13	12/066	yes	Made 17/09/12, registered 27/09/12, commences 1/10/12
Regional certifying bodies and regional postcodes (sub-paragraph 5.19(4)(h)(ii)(F), subregulation 5.19(7))	12/066	F2012L01270	01/07/12	30/09/12	-	yes	Made 12/06/12

Regional certifying bodies and post codes (rr.5.19(12)(g)(i) and r.5.19(16)) - post 18 March 2018							
Title	Immi ref	FRLI Reference	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 18/037: Regional Certifying Bodies and Regional Postcodes Instrument) 2018	18/037	F2018L00291	18/03/18	current	17/059	yes	Expressed to apply to nominations made on or after 18 March 2018, and in relation to Subclass 187 visa applications made on or after 18 March 2018 if the associated nomination application was also made on or after that date (see Schedule 3).

Business skills points test scores (cl.127.222(1), 128.222(1), 129.222(1), 130.222(1), 131.223(1), 840.222(1), 841.222(1), 842.222(1), 843.222(1), 844.223(1), 845.222(1) and 846.222(1))

Title	Immi ref	GN No.	FRLI ref	In force		Revokes	Explantory Statement	Notes
				from	until			
Points Scores - Business Skills Test	-	S238	F2006B00542	01/07/97	current	S114	No	Signed 20/6/97; Effective 1/7/97; Gazetted 27/6/97; Registered 14/3/06
Points Score - Business Skills Test (S114 of 1995)	-	S114		31/03/95	30/06/97	-	No	Signed 29/3/95; Gazetted 31/3/95; date of effect not specified in instrument.

NOTES

(1) Visa sublcassess 127, 128, 129, 130, 131, 840, 841, 842, 843, 844, 845 and 846 require the applicant to achieve a score on the business points test that is not less than the number of points speficied by Gazette Notice - see cl.127.222(1), 128.222(1), 129.222(1), 130.222(1), 131.223(1), 840.222(1), 841.222(1), 842.222(1), 843.222(1), 844.223(1), 845.222(1) and 846.222(1)

(2) Gazette Notice S114 does not apply to sub-class 846 as this sub-class was inserted from 1 July 1997

Points for Business Innovation and Investment (Provisional) Visa (cl.188.222(1) and 188.242(1))

Title	Immi ref	FRLI ref	In force		Revokes	Explantory Statement	Notes
			from	until			
Points for Business Innovation Stream and Investor Stream of Business Innovation and Investment (Provisional) Visa (subclauses 188.222(1) and 188.242(1))	12/041	F2012L01313	01/07/12	current	-	yes	Made 12/06/12; Commences 01/07/12; Registered 22/06/12

NOTES

(1) Subclause 188.222(1) provides that the applicant's score on the business innovation and investment points test is not less than the number of points specified by the Minister in an instrument in writing for that subclause

(2) Subclause 188.242(1) provides that the applicant's score on the business innovation and investment points test is not less than the number of points specified by the Minister in an instrument in writing for that subclause

Designated Areas (Schedule 6, Item 6701)

Title	Immi ref	GN No.	FRLI ref	In force		Revokes	Explanatory Statement	Notes
				from	until			
Designated areas (Item 6701 of Schedule 6)	07/060		F2007L02654	01/09/07	current	GN34	yes	Signed 28/9/07; Effective 1/9/07; Registered 30/8/07
Designated areas for the purpose of item 6701 of Schedule 6 (GN 34 of 2001)		GN34	F2006B00554	29/08/01	31/08/07	S601	no	Signed 23/8/01; Effective 29/8/01; Registered 16/3/06; Gazette published 29/8/01
Designated areas for the purpose of item 6701 of Schedule 6 (S601 of 1999)		S601		01/01/99	28/08/07	S426	no	Signed 10/12/98; Effective 1/1/99; Gazette published 21/12/98
Designated areas for the purpose of item 6701 of Schedule 6 (S426 of 1998)		S426		01/09/98	31/12/99	GN34	no	Signed 10/8/98; Effective 1/9/89; Gazette published 28/8/98
Designated areas for the purpose of item 6701 of Schedule 6 (GN 34 of 1994)		GN34		01/09/94	31/08/98	None	no	Signed 22/8/94; Effective 1/9/94; Gazetted 31/8/94

NOTES

(1) References in Part 846 to "designated area" means "an area specified by Gazette Notice as a designated area for the purposes of item 6701 in Schedule 6" (cl.846.111)

(2) Item 6701 of Schedule 6 provides that a sponsor must be resident in one or more of the designated areas specified in an instrument in writing for the purpose of that item.

(3) GN 34, S601 and S426 purport to revoke all existing instruments specifying designated areas for item 6701 of Schedule 6, which in practice is the previous Gazette notice as stated.

Areas for Subclass 888 and 892 visas (cl.888.226(2)(c)(i) and 892.213(3)(b))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Areas for Business Innovation and Investment (Permanent) visa and State and Territory Sponsored Business Owner visa (subparagraph 888.226(2)(c)(i) and paragraph 892.213(3)(b)	12/118	F2012L02239	24/11/12	current	12/032	yes	Made 22/11/12; Registered 23/11/12; commences 24/11/12
Areas for Business Innovation and Investment (Permanent) visa and State and Territory Sponsored Business Owner visa (regulation 888.226(2)(c)(i) and 892.213(3)(b))	12/032	F2012L01308	01/07/12	23/11/12	06/026	yes	Made 12/06/2012; Registered 22/06/12; Commences 01/07/12
Areas for State and Territory Sponsored Business Owner visa (regulation 892.213(3)(b))	06/026	F2006L01845	16/11/06	30/06/12	-	yes	Signed 27/10/06; Effective day of registration. Registered 16/11/06.

NOTES

(1) cl.892.213(3)(b) provides that an applicant must reside in, and operate the applicant's main business or businesses in Australia in, an area specified by the Minister in an instrument in writing for that paragraph.

(2) Regulation 1.17 provides that the Minister may, by notice published in the *Gazette* , specify matters required by individual provisions of the Regulations to be specified for the purposes of those provisions. The *Legislation Act 2003 (formerly the Legislative Instruments Act 2003)* provides that, in certain circumstance, registration of a legislative instrument on the Federal Register of Legislative Instruments replaces the requirement that notice be published in the Gazette.

Class of persons for item 1223A(2)(a)(ix)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Class of Persons (sub-subparagraph 1223A(2)(a)(ix))	12/080	F2012L02213	24/11/12	current	12/112	yes	Made 09/11/12; registered 22/11/12; commences 24/11/12
Class of Persons (sub-subparagraph 1223A(2)(a)(ix))	12/112	F2012L02005	12/10/10	23/11/12		yes	Made 02/10/12; registered 09/10/12; commences 10/10/12
Class of Persons (sub-subparagraph 1223A(2)(a)(ix))	08/058	F2008L03131	22/08/08	09/10/12	07/035	yes	Signed 28/7/08; Commences day after registration. Registered 21/08/08
Class of Persons (regulation 1223A(2)(a)(ix))	07/035	F2007L01933	01/07/07	21/08/08	-	yes	Signed 24/6/07; Commences immediately after the commencement of the Migration Amendment Regulations 2007 (No. 4) on 01/07/07.

NOTES

1. Item 1223A(2)(a)(ix) provides that the Class UC visa application charge (first instalment) "In the case of an applicant who is in a class of persons specified in an instrument in writing for this subparagraph: Nil"

Designated APEC economies

Title	Immi ref	GN No.	FRLI Reference	In force		Revokes	Explanatory Statement	Notes
				from	until			
Designated APEC Economies (regulation 1.03 definition of "designated APEC economy")	08/096	-	F2009L00290	15/02/09	current	05/047	yes	Signed 2/2/09; Effective 15/2/09. Registered 13/2/09
Specification of designated APEC economies for the purposes of the definition of "designated APEC economy" in regulation 1.03 of the Migration Regulations 1994	05/047	GN35	F2005L02408	06/09/05	14/02/09	GN 1	yes	Signed 26/07/05; Date of effect not specified. Registered 06/09/05.
Designated APEC Economy		GN01	F2005B02786	08/01/03	05/09/05	GN 7	no	Signed 10/02/02; Effective upon publication; gazetted 08/01/03
Designated APEC Economy		GN 7		21/02/01	07/01/03	GN 12	no	Signed 31/01/01; Effective upon publication; gazetted 21/02/01
Designated APEC Economy		GN12		27/03/97	20/02/01	-	no	Signed 19/03/97; Effective upon publication; GN Published 26/03/97

NOTES

(1) The definition of "designated APEC economy" in r.1.03 provides that a designated APEC economy means an APEC economy specified by GN for the purposes of the definition

(2) "APEC economy" is defined in r.1.03.

Health Waiver - Participating States and Territories (cl.846.111, 855.111, 856.111, 857.111)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Health Waiver - Participating States and Territories (Clauses 846.111, 855.111, 856.111, 857.111)	10/064	F2010L02478	22/09/10	current	09/131	yes	Dated 10/09/10, registered 21/09/10, commences day after registration, 22/09/10.
Health Waiver - Participating States and Territories (regulations 846.111, 855.111, 856.111, 857.111)	09/131	F2009L04254	18/11/09	21/09/10	09/102	yes	Dated 11/09/09, registered 17/11/09, commences day after registration, 18/11/09.
Health Waiver - Participating States and Territories (regulations 846.111, 855.111, 856.111, 857.111)	09/102	F2009L03162	14/09/09	17/11/09	08/113, 09/36 and 09/74	yes	Dated 3/08/09, registered 17/8/09, commences 14/09/09.
Health Waiver - Participating States and Territories (regulations 846.111, 855.111, 856.111, 857.111)	09/074	F2009L02506	1/07/09	13/09/09	-	yes	Dated 23/6/09, registered 30/6/09, commences 1/7/09. The previous instruments IMMI09/036 and IMMI08/113 were not revoked and appear to operate concurrently with IMMI09/074
Health Waiver - Participating States and Territories (regulations 846.111, 855.111, 856.111, 857.111)	09/036	F2009L01449	15/05/09	13/09/09	-	yes	Signed 16/04/2009; Commences 15/05/2009; Registered 06/05/2009. The previous instrument IMMI08/113 was not revoked and appears to operate concurrently with IMMI09/036
Health Waiver - Participating States and Territories (regulations 846.111, 855.111, 856.111, 857.111)	08/113	F2009L01182	28/03/09	13/09/09	-	yes	Signed 22/3/09; Commences 28/3/09; Registered 25/03/09

NOTES

1. This Instrument operates to specify states and/or territories which have agreed to participate in the health waiver.
2. IMMI 09/036 did not revoke IMMI 08/113 and they appear to operate concurrently after 15 May 2009
3. IMMI 09/074 did not revoke IMMI 09/036 or IMMI 08/113 and all three instruments appear to operate concurrently after 1 July 2009.
4. IMMI 09/102 revokes IMMI 08/113, IMMI 09/036 and IMMI 09/074. All states and/or territories which have agreed to participate in the health waiver are now specified in one Instrument.

Addresses for Sponsors providing monitoring information (r.2.84(2)(b)(i))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Migration (IMMI 18/040: Manner for Providing Details of an Event to Immigration) Instrument 2018	18/040	F2018L00303	18/03/18	current	15/138 & 16/005	yes	Applies from 18 March 2018 whether the event occurs before, on or after commencement.
Specification of addresses (subregulation 2.84(2)(b)(i))	16/005	F2015L02133	01/01/16	17/03/18	-	yes	
Specification of addresses (subregulation 2.84(2)(b)(i))	15/138	F2009L03498	01/01/16	17/03/18	09/104	yes	Signed 4/12/15; Commences on 1/1/16. Registered 11/12/15.
Specification of addresses (subregulation 2.84(2)(b)(i))	09/104	F2009L03498	14/09/09	31/12/15	-	yes	Signed 7/9/09; Commences on 14/9/09. Registered 11/9/09.

NOTES

1. This instrument specifies the relevant addresses for a sponsor providing information to Immigration when certain events occur for r.2.84(2)(b)(i)

Forms, fees, circumstances and different way of making an application (rr.2.61(3A)(b), 2.61(3A)(c), 2.61(3B), 2.66(3), 2.66(4), 2.66(5), 2.73(3), r.2.73(4), 2.73(5), 2.73(7), 2.73(9) and 2.73A(2) and items 1223A(1)(bb), 1223A(1)(b), 1223A(1)(ba) and 1223A(1)(bc))							
Title	**Immi ref**	**FRLI ref**	**In force**		**Revokes**	**Explanatory statement**	**Notes**
			from	**until**			
Migration (IMMI 18/038: Sponsorship Applications and Nominations for Subclasses 407, 457 and 482 visas) Instrument 2018	18/038	F2018L00290	18/03/18	current	13/063	yes	This instrument applies to nominations and visa applications made on or after 18 March 2018.
Forms, Fees, Circumstances and Different Way of Making an Application (made under paragraphs 2.61(3A)(b) and 2.61(3A)(c), subregulations 2.61(3A), 2.61(3B), 2.66(3), 2.66(4), 2.66(5), 2.73(3), 2.73(5), 2.73(9) and 2.73A(2), and paragraphs 1223A(1)(bb), 1223A(1)(b), 1223A(1)(ba) and 1223A(1)(bc) of Schedule 1)	13/063	F2016C01005	01/07/13	17/03/18*	N/A - compilation	no	This instrument is a compilation of IMMI 13/028, taking into account the amendments made by IMMI 16/107 (from 19 November 2016).
Forms, fees, circumstances and different way of making an application (paragraphs 2.61(3A)(b), 2.61(3A)(c), 2.61(3B), subregulations 2.66(3), 2.66(4), 2.66(5), 2.73(3), 2.73(5) and 2.73(9), and paragraphs 1223A(1)(bb), 1223A(1)(b), 1223A(1)(ba) and 1223A(1)(bc))	13/063	F2016L01776 (amending instrument)	01/07/13	current	-	yes	Amending instrument IMMI 16/107 amends IMMI 13/063 from 19 November 2016. Dated 16/11/16, commences 19/11/16*, registered 18/11/16
		F2013L01242				yes	Dated 28/06/13, commences 1/07/13, registered 28/06/13

NOTES

*IMMI 16/107 commenced immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016* .

Non relevant agreements/arrangements for Subclass 403 and 406 visas

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Migration (IMMI 18/086: Agreements or Arrangements which are not Relevant Agreements for the purposes of the Government Agreement Stream of the Subclass 403 (Temporary Work (International Relations) visa)) Instrument 2018	18/086	F2018L00861	01/07/18	current	12/084	yes	Made18/06/2018, registered 25/06/18, commenced 1/07/18.*
Specifying agreements or arrangements which are not relevant agreements for the purposes of Government Agreement Stream of the International Relations visa (clause 403.111)	12/084	F2012L02215	24/11/12	30/06/18	09/103	yes	Made 09/11/12, commences 24/11/12
Specifying agreements or arrangements which are not relevant agreements for the purpose of Government Agreement Visa (paragraph 406.111(d))	09/103	F2009L03500	14/09/09	23/11/12	-	yes	Signed 28/7/08; Commences day after registration. Registered 21/08/08

NOTES

1. Clause 406.111(d) of Schedule 2 of the Regulations provides that the Minister may specify in an instrument in writing that an agreement or arrangement, or a type of agreement or arrangement, is not a relevant agreement

2. Clause 403.111(d) of Schedule 2 of the Regulations provides that the Minister may specify in an instrument in writing that an agreement or arrangement, or a type of agreement or arrangement, is not a relevant agreement.

3. Subclass 403 replaced Subclass 406 from 24 November 2012.

*IMMI 18/086 commenced immediately after the commencement of the *Migration Amendment (Pacific Labour Scheme) Regulations 2018*

Definition of Superyacht							
Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Definition of "superyacht" (regulations 1.03 and 1.15G)	09/019	F2009L01302	15/05/09	current	08/090	yes	Dated 22/03/09; commences 15/05/09, registered 26/10/09
Definition of superyacht (regulations 1.03 and 1.15G)	08/090	F2008L03773	27/10/08	14/05/09	nil	no	Signed 15/10/08; Commences 27/10/09, registered 24/10/08

NOTES

1. r.1.03, definition of "superyacht", provides that superyacht means a sailing ship or motor vessel of a kind that is specified by the Minister under r.1.15G to be a superyacht.

2. r.1.15G provides that the Minister may, by instrument in writing, specify that (a) a sailing ship of a particular kind is a superyacht for the purposes of the Regulations; or (b) a motor vessel of a particular kind is a superyacht for the purposes of these Regulations.

Business Skills addresses (items 1104AA(3)(a) and 1202A(3)(a))

Title	Immi ref	GN	FRLI ref	In force		Revokes	Explanatory statement	Notes
				from	until			
Specification of addresses (paragraph 1202A(3)(a))	14/065	-	F2014L01029	28/07/14	17/04/15[2]	13/038	yes	Dated 18/07/14, commences 28 July 2014, Revoked 17/04/15.[2]
Specification of addresses (paragraph 1202A(3)(a))	13/038	-	F2013L00633	13/04/13	27/07/14	11/006	yes	Dated 28/03/2013, commences 13/04/13, registered 09/04/2013
Specification of addresses (paragraphs 1104AA(3)(a) and 1202A(3)(a))	11/006	-	F2011L01321	01/07/11	12/04/13	09/049	yes	Dated 20/6/11, commences 1/7/11 (immediately after the commencement of Migration Legislation Amendment Regulations 2011 (No. 1), registered 29/6/11, revoked by 13/038.
Specification of addresses (paragraphs 1104AA(3)(a) and 1202A(3)(a))	09/049	-	F2009L02056	25/05/09	01/07/11	07/006	yes	Commences 25/5/09, registered 22/5/09. Revoked by IMMI11/006 from 1/7/11.
Specification of addresses (paragraphs 1104AA(3)(a) and 1202A(3)(a))	07/006	-	F2007L00870	31/03/07	24/5/09	GN8	yes	Dated 6/2/03; commences on 31/3/07 (the day after registration). Registered 30/3/07. Revoked by IMMI09/049 from 25/5/09.
Specification of addresses (paragraphs 1104AA(3)(a) and 1202A(3)(a))		GN8	F2006B00168	01/03/03	30/3/07	-	-	Dated 20/3/07; commences on 1/3/03. Registered 19/1/06. Revoked by IMMI07/006 from 31/3/07.

NOTES

1. This instrument specifies the relevant addresses for processing Class EA visa and Class UR applications.

2. For instruments in force or after 18/04/2015, see the BusSkillsApps tab.

Occupational Trainee addresses (item 1208A(3)(bd))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Specification of addresses (paragraph 1208A(3)(bd))	09/097	F2009L03977	09/11/09	current	-	yes	Commences 9/11/09, registered 4/11/09.

NOTES

1. This instrument specifies the relevant addresses for making Subclass 442 (Class TH) visas for visa applications made on or after 9 November 2009.

Specification of exempt classes of person for 186 and 187 / occupations for regional nominations (cl.186.234(3), 186.221(b), 186.222(b), 186.231(b), 186.232(b), 187.221(b), 187.222(b), 187.231(b), 187.232(b), 187.234(a) and r.5.19(4)(h)(ii)(D))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Migration (IMMI 18/045: Exemptions to Skill, Age and English Language Requirements for Subclass 186 and Subclass 187 visas) Instrument 2018	18/045	F2018L00301	18/03/18	current	17/058 & 15/109	yes	Applies only to visa applications made on or after 18 March 2018. Expressly provides that the repeal of IMMI 17/058 & IMMI 15/109 does not affect nomination or visa applications made before 18 March 2018, or visa applications made after 18 March 2018 where the associated nomination was made prior to that date.
Migration (IMMI 17/058: Occupations for Subclass 187 visas; Skill, Age and English language requirements for Subclass 186 and Subclass 187 visas) Instrument 2017	17/058	F2017L00847	01/07/17	17/03/18	15/083	yes	Made 23/06/17; registered 30/06/17; commences 01/07/17. Note that the repeal of this instrument by IMMI 18/045 does not affect nomination or visa applications made before 18 March 2018, or visa applications made after 18 March 2018 where the associated nomination application was made prior to that date.
Specification of Class of Persons 2015 (Subclause 186.234(3) and Sub-subparagraph 5.19(4)(h)(ii)(D))	15/109	F2015L01148	01/07/15	17/03/18	–	yes	Made 6/7/15; registered 14/7/15; commences 1/7/15. Note, this instrument was intended to run parallel and as a supplement to IMMI 15/083. It contains only one occupation and one exemption. Note that the repeal of this instrument by IMMI 18/045 does not affect nomination or visa applications made before 18 March 2018, or visa applications made after 18 March 2018 where the associated nomination application was made prior to that date.
Specification of Class of Persons 2015 (Subclause 186.234(3) and Paragraphs 186.221(b), 186.222(b), 186.231(b), 186.232(b), 187.221(b), 187.222(b), 187.231(b), 187.232(b), 187.234(a) and Sub-subparagraph 5.19(4)(h)(ii)(D))	15/083	F2015L01018	01/07/15	30/06/17	IMMI 12/059 IMMI 12/060 IMMI 13/059*	yes	Made 25/6/15; registered 30/6/15; commences 1/7/15

NOTES

* IMMI 15/083 revokes IMMI 12/059, IMMI 12/060 and IMMI 13/050. The purpose of the Instrument was to combine the contents of those three separate Instruments (which specify Age, Skills and English exemptions) into one. While not specified in the instrument or the explanatory statement, it appears that this combined instrument is only intended to apply to visa applications made on or after 1 July 2015.

* From 18 March 2018 specification of occupations for regional nominations are made under r.5.19(13), see Occ187 tab for details

Persons exempt from the English language criteria (cl.186.222(b), 186.232(b), 187.222(b), 187.232(b))

Title	immi ref	FRLI ref	In force		Revokes	explanatory statement	Notes
			from	until			
Classes of persons (Exempt from the English language criteria) (cl.186.222(b), 186.232(b), 187.222(b), 187.232(b))	12/059	F2012L01275	1/07/12	30/06/15*	11/042	yes	Made 12/06/12, commences 1/07/211

NOTES

* IMMI 12/059 was revoked by IMMI 15/083 on 1 July 2015. The specification of English language, Skills and Age ranges for 186 and 187 visas was combined into one Instrument from 1 July 2015. While not specified in the instrument or the explanatory statement, it appears that 15/083 is only intended to apply to visa applications made on or after 1 July 2015, therefore IMMI 12/059 continues to be the applicable instrument up until 30/6/15.

See the 'ExmtSkillsAgeEng 186&187' tab for the applicable instrument from that date.

ExmtSkillsAgeEng 186&187

Subclass 186 and 187 - persons exempt from skill criteria (cl.186.234(3) and 187.234(a))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Classes of persons (exempt from the skill Criteria) (subclause 186.234(3) and paragraph 187.234(a))	12/060	F2012L01283	01/07/12	30/06/15*	-	yes	Made 12/06/12, commenced 1/07/12; Revoked from 1/07/15

NOTES

* IMMI 12/060 was revoked by IMMI 15/083 on 1 July 2015. The specification of English language, Skills and Age ranges for 186 and 187 visas was combined into one Instrument from 1 July 2015. While not specified in the instrument or the explanatory statement, it appears that 15/083 is only intended to apply to visa applications made on or after 1 July 2015, therefore IMMI 12/060 continues to be the applicable instrument up until 30/6/15.

See the 'ExmtSkillsAgeEng 186&187' tab for the applicable instrument for applications made on or after 1 July 2015

ExmtSkillsAgeEng 186&187

Subclass 186 and 187 - persons exempt from age criteria (cl.186.221(b), 186.231(b), 187.221(b) and 187.231(b))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Classes of persons (exempt from the age criteria) (paragraphs 186.221(b), 186.231(b), 187.221(b) and 187.231(b))	13/059	F2013L01147	25/06/13	30/6/15*	12/058	yes	Made 21/06/13, registered 25/06/13, commenced 25/06/13.
Classes of persons (exempt from the age criteria) (paragraphs 186.221(b), 186.231(b), 187.221(b) and 187.231(b))	12/058	F2012L01284	01/07/12	24/06/13	-	yes	Made 12/06/12, commenced 1/07/12.

NOTES

* IMMI 13/059 was revoked by IMMI 15/083 on 1 July 2015. The specification of English language, Skills and Age ranges for 186 and 187 visas was combined into one Instrument from 1 July 2015. While not specified in the instrument or the explanatory statement, it appears that 15/083 is only intended to apply to visa applications made on or after 1 July 2015, therefore IMMI 13/059 continues to be the applicable instrument for applications made between 25/6/2013 and 30/6/15.

See the 'ExmtSkillsAgeEng 186&187' tab for the applicable instrument for applications made on or after 1 July 2015

ExmtSkillsAgeEng 186&187

Complying Investments (r.5.19C and 5.19D)							
Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 15/100: Complying Investments) Instrument 2015	15/100	F2015L01012	01/07/15	current	_	yes	Made 25/06/2015, registered 30/06/15, commenced 1/7/15.

Notes

1. Regualtions 5.19C and 5.19D specify the requirments for a *complying signficant investment* and a *complying premium investment* . The scope of these investments is specified by instrument (rr.5.19C(6) and 5.19D(8).

Business Talent Visa Venture Capital Stream Industry Associations and Membership Levels (cl.132.232(3)(a), (b))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Industry sssociations and membership levels (paragraphs 132.232(3)(a) and (b))	12/052	F2012L01309	01/07/12	current	-	yes	Made 12/06/12, commences 1/07/12

Temporary Work (International Relations) VAC class of persons

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Class of Persons for Temporary Work (International Relations) (Class GD) Visa 2016/110 (subparagraph 1234(2)(a)(i))	16/110	F2016L01780	19/11/16*	current	16/032	yes	Made 16 November 2016, registered 18/11/2016, commences 19/11/16*
Class of Persons (Sub-subparagraph 1234(2)(a)(v)(A))	16/032	F2016L00576	01/05/16	18/11/2016*	13/080	yes	Made 26/04/16, commences 01/05/16
Class of Persons (Sub-subparagraph 1234(2)(a)(v)(A))	13/080	F2013L01232	01/07/13	30/04/16	12/087	yes	Made 28/06/13, commences 01/07/13
Class of Persons (Item 3 of the table in paragraph 1234(2)(a))	12/087	F2012L02215	24/11/12	30/06/13	11/074*	yes	Made 09/11/12, commences 24/11/12

Notes

(1) IMMI 11/074 was made for the now repealed item 1208 (Educational Class TH)

(2) IMMI 16/110 commenced immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016*

Eligible managed fund investments (r.5.19B)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Eligible managed fund investments (regulation 5.19B)	13/092	F2013L01571	23/11/13	current	12/117	yes	Made 25/07/13; registered 13/08/13; commences 23/11/13
Eligible managed fund investments (regulation 5.19B)	12/117	F2012L02238	24/11/12	22/11/13	-	yes	Made 22/11/12; registered 23/11/12; commences 24/11/12

Notes:

Subregulation 5.19B(1) of the Regulations provides that an investment by a person (the investor) is a complying investment if all of the requirements in the regulation are met.

Paragraph 5.19B(2)(c) of the Regulations provides that an investment in a managed fund (directly or through an investor directed portfolio service) is for a purpose specified by the Minister by Instrument in writing.

Persons prescribed a nil VAC for a Subclass 400 (item 1231(2)(a) - item 4 of table)

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Class of Persons (Emergency Services) 2016/114 (Sub-subparagraph 1231(2)(a)(iv)(A))	16/114	F2016L01785	19/11/15*	current	15/081	yes	Made 16/11/16, commences 19/11/16*, registered 18/11/16
Class of persons (Emergency Services) (Sub-subparagraph 1231(2)(a)(iv)(A))	15/081	F2015L00698	19/05/15	18/11/16*	_	yes	Made 11/05/15, commences 19/05/15, Registered 18/05/15
Class of persons (Netball World Cup) (Sub-subparagraph 1231(2)(a)(iv)(A))	15/027	F2015L00696	19/05/15	current	14/019	yes	Made 11/05/15, commences 19/05/15, Registered 18/05/15
Class of persons (Sub-subparagraph 1231(2)(a)(iv)(A))	14/019	F2014L00212	04/03/14	18/05/15	13/073	yes	Made 27/02/14, commences 04/03/14, Registered 3/03/14
Class of persons (Sub-subparagraph 1231(2)(a)(iv)(A))	13/073	F2013L01234	01/07/13	3/03/14	13/010	yes	Made 28/06/13, commences 01/07/13, Registered 28/06/13
Class of persons (Item 4 of the table in paragraph 1231(2)(a))	13/010	F2013L00508	23/03/13	30/06/13	12/074 and 12/080	yes	Made 18/03/13, commences 23/03/13 immediately after commencment of Migration Amendment Regulation 2013 (No.1)

NOTES

1. This series of instruments revokes the previous instruments IMMI 12/074 and 12/080 which were made under subparagraph 1223A(2)(a)(ix) and which prescribed the classess of person who were entitled to a nil VAC when applying for a Subclass 456.

2. IMMI 16/114 commenced immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016*

Persons eligible to make an internet Subclass 400 visa application using form 1400 (item 1231(1)(a))

Title	Immi Ref	FRLI Ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Arrangements for Temporary Work (Short Stay Activity) (Subclass 400) Visa Applications 2015	15/121	F2015L01447	1/10/2015	18/11/2015*	15/036	yes	Made 15/9/15, registered 17/9/15, commenced 1/10/15.
Arrangements for Temporary Work (Short Stay Activity) (Subclass 400) Visa Applications 2015	15/036	F2015L00565	18/04/2015	30/09/2015	14/100	yes	Made 16/4/15, registered 17/5/15, commenced 18/4/15.
Class of persons (Paragraph 1231(1)(a))	14/100	F2014L01558	23/11/14	17/04/2015	13/012	yes	Made 14/11/14, registered 19/11/14, commenced 23/11/14
Class of persons (Paragraph 1231(1)(a))	13/012	F2013L01073	1/07/13	22/11/14	-	yes	Made 18/06/13, registered 20/06/13, commences 01/07/13

NOTES

*See 'TempWorkApp' tab for the applicable instrument for applications made on or after 19 November 2016

Occupations not requiring a written contract of employment (r.2.72(10)(h) and r.2.72(10)(e)(iii)(B))							
Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Refer to 'Occ-Ex' tab. (Reguation 2.72(10)(h) refers to occupations specified in an instument made under r.2.72(10)(e)(iii)(B).)							

Labour Market Testing period, manner and evidence (s. 140GBA(4), 140GBA(5), 140GBA(6A))

Title	Immi/LIN ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (LIN 18/036: Period, manner and evidence of labour market testing) Instrument 2018	18/036	F2018L01108	12/08/18	current	18/059	yes	Made 9/8/18, registered 10/8/18, commences 12/8/18. The instrument operates to determine the period, manner and kinds of evidence in relation to labour market testing that must accompany a nomination and which select positions/occupations are exempt from these requirements. By it's terms, this instrument only applies to nominations made on or after 11 August 2018 (Schedule 2). The instrument also expressly preserves IMMI 18/059 for nominations made before 12/8/18.
Migration (IMMI 18/059: Period within which labour market testing is required to be undertaken) Instrument 2018	18/059	F2018L00293	18/03/18	11/08/18	13/136	yes	By it's terms, this instrument only applies to nomination applications made on or after 18 March 2018 (s.6). The instrument still applies for nominations made before 12/8/18.
Specified period in which labour market testing must be undertaken (Section 140GBA(4))	13/136	F2013L01953	23/11/13	17/03/18	-	yes	Made 18/11/13, registered 20/11/13, commences 23/11/13. Although repealed on 18 March 2018, it appears to be relevant instrument for nomination applications made before that date.

Occupations Exempt from Labour Market Testing (s.140GBC)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 18/058: Specification of occupations exempt from labour market testing) Repeal Instrument 2018	18/058	F2018L00297	18/03/18	current	13/137	yes	This instrument repeals IMMI 13/137. It is intended only to affect nomination applications made on or after 18 March 2018, such that from that date there will be no occupation based exclusions from Labour Market Testing requirements (see p.3 of Explanatory Statement).
Specification of occupations exempt from labour market testing (made under section 140GBC of the *Migration Act 1958*)	13/137	F2018C00235	18/03/18	current	-	-	This is a **compilation** instrument, incorporating the amendment to IMMI 13/137 made by IMMI 18/062.
Migration (IMMI 18/062: Amendment of IMMI 13/137) Instrument 2018	18/062	F2018L00292	18/03/18	current	-	yes	This instrument amends IMMI 13/037 by removing the definition of ANZSCO from that instrument, and instead inserting a definition by reference to IMMI 18/051. It does not affect the substantive specifications made by IMMI 13/137.
Specification of occupations exempt from labour market testing (Section 140GBC)	13/137	F2013L01952	23/11/13	17/03/18	-	yes	Made 18/11/13, registered 20/11/13, commences 23/11/13

International trade obligations relating to 'Labour Market Testing' (s.140GBA(2))

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (LIN 18/183: Determination of International Trade Obligations Relating to Labour Market Testing) Instrument 2018	18/183	F2018L01479	30/12/18	current	17/109	yes	Instrument is dated 25 October 2018, but commenced immediately following the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Implementation entering into force on 30 December 2018 (see F2018N00168).
Migration (IMMI 17/109: Determination of International Trade Obligations Relating to Labour Market Testing) Instrument 2017	17/109	F2017L01533	01/12/17	29/12/18	14/107 14/113 15/149	yes	Instrument is dated 22 November 2017, but commenced immediately following the Amending Agreement to the Singapore-Australia Free Trade Agreement entering into force on 01/12/17 (see F2017N00093). Revoked 29/12/18.
Determination of International Trade Obligations Relating to Labour Market Testing 2015 (Subsection 140GBA(2))	15/149	F2015L01940	20/12/2015	30/11/17	15/133	yes	Instrument is dated 4 December 2015, commenced immediately after the China-Australia Free Trade Agreement entered into force on 20/12/15. Reovked 01/12/17.
Determination of International Trade Obligations Relating to Labour Market Testing 2015 (Subsection 140GBA(2))	15/133	F2015L01850	20/12/2015	3/12/2015	-	yes	Instrument is dated 23 November 2015, was to commence immediately after the China-Australia Free Trade Agreement entered into force on 20/12/15. Revoked on 4/12/15.
Japan Australia Economic Partnership Agreement Determination 2014	14/113	F2014L01676	15/01/15	30/11/17	-	yes	Instrument is dated 3 December 2014, commenced immediately after the Japan-Australia Economic Partnership Agreement entered into force on 15/01/15. Revoked 01/12/17.
Determination of international trade obligations relating to Labour Market Testing (Section 140GBA(2))	14/107	F2014L01510	12/12/14	30/11/17	13/138	yes	Instrument is dated 6 November 2014, commenced immediately after the Korea-Australia Free Trade Agreement entered into force on 12/12/14. Revoked 01/12/17.
Determination of international trade obligations relating to Labour Market Testing (Section 140GBA(2))	13/138	F2013L01954	23/11/13	11/12/14	-	yes	Made 18/11/13, registered 20/11/13, commences 23/11/13

There are currently no instruments made for s.140GBA(5)(b) and (6)(b).

Persons prescribed nil VAC and nomination fee for a Subclass 401 visa (Item 1232(2)(a)(ii)(A), r.2.73A(4) - item 4 of table)

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Class of Persons	14/020	F2014L00214	04/03/14	01/07/15	-	yes	Made 27/02/2014, commences 04/03/2014, Registered 3/03/2014, ceases 1/07/2015

Arrangements for Business Skills Visas Applications 2015 (Items 1104AA, 1104BA, 1104B, 1112, 1113, 1202A, 1202B)

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Migration (LIN 19/189: Arrangements for certain Business Skills Visas) Instrument 2019	19/189	F2019L01230	21/09/2019	current	16/106	yes	Made 19/09/2019, registered 20/09/2019, commenced 21/09/2019
Arrangements for Business Skills Visa Applications 2016/106 (Items 1104AA, 1104BA, 1104B, 1112, 1113, 1202A, 1202B).	16/106	F2016L01764	19/11/2016	20/09/2019	16/077	yes	Made 14/11/2016, registered 16/11/2016, commenced 19/11/2016
Arrangements for Business Skills Visa Applications 2016/077 (Items 1104AA, 1104BA, 1104B, 1112, 1113, 1202A, 1202B).	16/077	F2016L01419	10/09/16	18/11/16	15/029	yes	Made 07/09/2016, registered 09/09/2016, commenced 10/09/2016.
Arrangements for Business Skills Visa Applications 2015 (Items 1104AA, 1104BA, 1104B, 1112, 1113, 1202A, 1202B).	15/029	F2015L00546	18/04/15	09/09/16	14/065 14/066	yes	Made 16/04/2015, registered 17/04/2015, commenced 18/04/2015.

Arrangements for Employer Nomination and Regional Employer Nomination Skilled Visas 2015 (Items 1114B and 1114C)

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Arrangements for Employer Nomination and Regional Emlpoyer Nomination Skilled visas 2015 (items 1114B and 1114C)	15/032	F2015L00549	18/04/15	current	-	yes	Made 16/04/2015, registered 17/04/2015, commenced 18/04/2015.

Arrangements for Maritime Crew and Superyacht Visa Applications 2015 (Schedule 1, part 2, Items 1227 and 1227A)

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Arrangements for Maritime Crew Visa Applications 2016/115 (Item 1227)	16/115	F2016L01786	19/11/16*	current	15/126	yes	Made 16/11/2016, registered 18/11/2016, commenced 19/11/2016*
Arrangements for Maritime Crew and Superyacht Visa Applications 2015 (Schedule 1, part 2, Items 1227 and 1227A)	15/126	F2015L01765	21/11/15	18/11/16*	15/041	yes	Made 2/11/2015, registered 9/11/2015, commenced 21/11/2015.
Arrangements for Maritime Crew and Superyacht Visa Applications 2015 (Schedule 1, part 2, Items 1227 and 1227A)	15/041	F2015L00554	18/04/15	20/11/2015	07/032 12/049	yes	Made 16/04/2015, registered 17/04/2015, commenced 18/04/2015.

NOTES

*IMMI 16/115 commenced immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016*

Arrangements for Temporary Work Visa Applications
(Items 1205, 1212B, 1217, 1231, 1232, 1233, 1234, 1235, 1237 and 1238)

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 18/085: Arrangements for Temporary Work and Temporary Activity Visa Applications) Instrument 2018	18/085	F2018L00863	1/07/2018	current	17/127	yes	Made 21/06/18, registered 25/06/18, commenced 1/07/18.**
Migration (IMMI 17/127: Arrangments for Temporary Work and Temporary Activity Visa Applications) Instrument 2017	17/127	F2017L01480	18/11/2017	30/06/2018	17/039	yes	Made 14/11/17, registered 16/11/17, commenced 18 November 2017.
Migration (IMMI 17/039: Arrangements for Temporary Work and Temporary Activity Visa Applications) Instrument 2017	17/039	F2017L00538	18/05/2017	17/11/2017	17/019	yes	Made 11/05/17, registered 17/05/17, commenced on 18/05/17.
Migration (IMMI 17/019: Arrangements for Temporary Work and Temporary Activity Visa Applications) Instrument 2017	17/019	F2017L00131	21/02/17	17/05/2017	16/112	yes	Made 15/02/17, registered 20/02/17, commenced 21/02/17.
Arrangements for Temporary Work and Temporary Activity Visa Applications 2016/112 (Items 1212B, 1217, 1231, 1234, 1237 and 1238)	16/112	F2016L01782	19/11/16*	20/02/17	15/042 15/121	yes	Made 16/11/2016, registered 18/11/2016, commenced 19/11/2015*
Arrangements for Temporary Work Visa Applications 2015 (Items 1205, 1212B, 1217, 1232, 1233, 1234 and 1235)	15/042	F2015L00555	18/04/15	18/11/16*	14/068 14/069 14/084	yes	Made 16/04/2015, registered 17/04/2015, commenced 18/04/2015.

NOTES

*IMMI 16/112 commenced immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016*

**IMMI 18/085 commenced immediately after the commencement of the *Migration Amendment (Pacific Labour Scheme) Regulations 2018*

Specification of Entities and Excluded Complying Entrepreneur Activities - r.5.19E(6)

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Specification of Activities 2016/075 (Paragraph 5.19E(6)(a))	16/075	F2016L01417	10/09/2016	current	-	yes	Made 07/09/2016, registered 09/09/2016, commenced 10/09/2016
Specification of Entities 2016/074 (Paragraph 5.19E(6)(b))	16/074	F2016L01415	10/09/2016	current	-	yes	Made 07/09/2016, registered 09/09/2016, commenced 10/09/2016

NOTES

Under r.5.19E(6) the Minister may, by legislative instrument, specify (a) activities for the purposes of r.5.19E(2)(b) and entities for the purposes of r.5.19E(5)(b).

Approval of Nomination and Occupational Training - Subclass 407 (Subregulation 2.72A(12))

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Criteria for Approval of Nomination and Occupational Training for the Purposes of Subclass 407 (Training) Visa 2016/108 (Subregulation 2.72A(12))	16/108	F2016L01777	19/11/16*	current	-	yes	Made 16/11/2016, registered 18/11/2016, commenced 19/11/2016*

NOTES

*IMMI 16/108 commenced immediately after the commencement of the *Migration Amendment (Temporary Activity Visas) Regulation 2016*

Class of Persons and Events, and reduced VAC - Subclass 408 (subitem 1237(2), paragraphs 408.229(b) and 408.229(c))

Title	Immi Ref	FRLI ref	In force		revokes	Explanatory Statement	Notes
			from	until			
Migration (Class of Persons for Class GG visa and Subclass 408 (Temporary Activity) Visa) Instrument 2019/193	19/193	F2019L01207	18/09/2019	current	18/215	yes	Made 12/09/19, registered 17/09/19, commenced 18/09/19. Introduces VAC nil charge specifications relating to the Mona Foma, and removes reference to the Arafura Games.
Migration (Classes of persons and Specified Events for Class GG visa and Subclass 408 (Temporary Activity) visa) Instrument 2019/231	19/231	F2019L01180	13/09/2019	current	19/035	yes	Made 4/09/19, registered 12/09/19, commenced 13/09/19. Introduces specifications for the ICC Women's and Men's T20 World Cup.
Migration (LIN 19/035: Class of Persons and Specified Events for Class GG visa and Subclass 408 (Temporary Activity) visa) Instrument 2019	19/035	F2019L00526	5/04/2019	12/09/2019	n/a	yes	Made 04/04/2019, registered 04/04/2019, commenced 05/04/2019. Introduced specifications relating to the INAS 2019 Global Games and its accredited participants.
Migration (LIN 18/215: Class of persons eligible for a nil visa application charge for Class GG visa and Subclass 408 (Temporary Activity) visa) Instrument 2018	18/215	F2018L01786	19/12/18	17/09/19	18/030	yes	Made 14/12/2018, registered 18/12/2018, commenced 19/12/2018. Introduced specifications for a class of persons who are participants in the Arufa Games in the Northern Territory.
Migration (LIN 18/077): Supporting Innovation in South Australia Event for Class GG, Subclass 408 (Temporary Activity) Visa) Instrument 2018	18/077	F2018L01581	21/11/18	current	n/a	yes	Made 19/11/18, registered 20/11/2018, commenced 21/11/18. Introduced specifications relating to the Supporting Innovation in South Australia event which will run for three years from 21/11/18 to the end of Nov 2021.
Migration (IMMI 18/030: Class of Persons and Specified Events for Class GG visa and Subclass 408 (Temporary Activity) visa) Instrument 2018	18/030	F2018L00568	02/05/18	18/12/18	17/130	yes	Made 30/04/18, registered 01/05/18, commenced 02/05/18.
Migration (IMMI 17/130: Class of Persons and Specified Events for Class GG Visa and Subclass 408 (Temporary Activity) Visa) Instrument 2017	17/130	F2018L00004	03/01/18	1/05/18	17/096	yes	Made 19/12/17, registered 02/01/18, commenced 03/01/18. Introduced specifications relating to Invictus Games 2018.
Migration (IMMI 17/096: Class of Persons and Specified Events for Class GG Visa and Subclass 408 (Temporary Activity) Visa) Instrument 2017	17/096	F2017L01234	22/09/17	2/01/18	17/007	yes	Made 18/09/17, registered 21/09/17, commenced 22/09/17
Migration (IMMI 17/007: Class of Persons and Specified Events for Class GG Visa and Subclass 408 (Temporary Activity) Visa) Instrument 2017	17/007	F2017L00130	21/02/17	21/9/17	16/105	yes	Made 15/02/17, registered 20/02/17, commenced 21/02/17
Class of Persons for Temporary Activity (Class GG) Visa and Events and Class of Persons for Subclass 408 (Temporary Activity) Visa 2016/105 (subitem 1237(2), and paragraphs 408.229(b) and 408.229(c))	16/105	F2016L01781	19/11/16*	20/02/17	n/a	yes	Made 16/11/2016, registered 18/11/2016, commenced 19/11/2016 (immediately after the commencement of the Migration Amendment (Temporary Activity Visas) Regulation 2016)
Class of Persons for Reduced Visa Application Charge for Temporary Activtity (Class GG) Visa 2016/117 (Subitem 1237(2))	16/117	F2016L01792	19/11/16*	current	n/a	yes	Made 22/11/2016, registered 23/11/2016, commenced 19/11/2016 (immediately after the commencement of the Migration Amendment (Temporary Activity Visas) Regulation 2016)

Specification of Occupations under r.2.72(9) for Subclass 482 visas

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (LIN 19/048: Specification of Occupations—Subclass 482 Visa) Instrument 2019	19/048	F2019C00265	21/03/19	current	N/A - compliation	no	This instrument is a compilation of LIN 19/048, taking into account the amendment made by F2019L00316 (from 21 March 2019).
Migration (LIN 19/048: Specification of Occupations - Subclass 482 Visa) Amendment Instrument 2019	19/048	F2019L00316	21/03/19	current	-	yes	This instrument amends 19/048 by repealing and substituting section 4 subparagraph (c)(i) of the definition of 'health workforce certificate' (see item 1 of Schedule 1) and omitting '23' from subsection 8(3) table item 12 column 3 (see item 2 of Schedule 1).
Migration (LIN 19/048: Specification of Occupations - Subclass 482 Visa) Instrument 2019	19/048	F2019L00274	11/03/19	current	18/048	yes	This instrument makes specifications under r.2.72(9). It commences on 11 March 2019 and repeals IMMI 18/048, but provides for its continued application in relation to applications for approval of a nomination made before 11 March 2019.
Migration (IMMI 18/048: Specification of Occupations - Subclass 482 Visa) Instrument 2018	18/048	F2018L00302	18/03/18	10/03/2019 (continues to apply in relation to certain nominations)	-	yes	This instrument is repealed by 19/048 but continues to apply in relation to applications for approval of a nomination made between 18/3/2018 and 10/03/2019.

English language test requirements for Subclass 482 visas - cl.482.223(1) and 482.232(1)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 18/032: Language Test Requirements - Subclass 482 Visa Instrument) 2018	18/032	F2018L00283	18/03/18	current	-	yes	

Mandatory skills assessment for 482 application - specification of occupation, classes of person, assessing authorities & time period - item 1240(3)(g)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 18/039): Mandatory Skills Assessment - Subclass 482 Visa) Instrument 2018	18/039	F2018L00294	18/03/18	current	-	yes	

Form and manner for making Subclass 482 visa application - item 1240 and r.2.07(5)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 18/018: Visa Applications - Temporary Skill Shortage (Class GK)) Instrument 2018	18/018	F2018L00279	18/03/18	current	-	yes	

Specification of exempt occupations under r.2.72(13) - as relevant to rr.2.72(11)(c), r.2.72(12)(c), 2.73(13), 2.73(14)(c), 2.86(2A)(b), 2.86(2AA), 5.19(5)(g), 5.19(7), cl.482.224, cl.482.223, clause 8607(3)(a)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 18/035: Specification of Exempt Occuations) Instrument 2018	18/035	F2018L00287	18/03/18	current	-	yes	

Transitional operation of r.5.19 for certain 457 holders - r.5.19(5)(a)(iii), 5.19(6), 5.19(8)

Title	Immi ref	FRLI ref	In force		Revokes	Explanatory Statement	Notes
			from	until			
Migration (IMMI 18/052: Transitional operation of regulation 5.19 for certain 457 visa holders) Instrument 2018	18/052	F2018L00285	18/03/18	current	n/a	yes	This instrument applies to nomination applications made on or after 18 March 2018 (s.5) and will be revoked at the start of 18 March 2022 (s.9).

Specification under cl.459.214(c) of organisations that may Sponsor Short Stay Business Visitors

Title	Immi Ref	In force		revokes	Explanatory Statement	Notes
		from	until			
Legislative Instrument IMMI 10/092 Specification under paragraph 459.214(c) - Organisations that may Sponsor short Staty Business Visitors	10/092	15/02/11	22/03/13	08/037	yes	Dated 01/02/11, commences 15/02/11
Legislative Instrument IMMI 08/037 Specification under paragraph 459.214(c) - Organisations that may Sponsor Short Stay Business Visitors	08/037	9/08/08	14/02/11	07/051	yes	Dated 21/07/08, commences 09/08/08
Legislative Instrument IMMI 07/051 Specification under paragraph 459.214(c) - Organisations that may Sponsor Short Stay Business Visitors	07/051	3/08/07	8/08/08	07/019	yes	Dated 23/07/08. Commences day after registration. Registered 02/08/07

Notes

1. IMMI 10/092 revoked by IMMI 13/035 which commences on 23/03/13 immediately after the commencment of the Migration Amendment Regulations (No.1).

2. For Legislative Insruments in force prior to 03/08/07, please consult MRD Legal Services

Minimum Salaries and Occupations - Business Long Stay visas (rr.1.20B, 1.20G(2), 1.20GA - repealed 14/9/09)

Title	Immi ref	GN No.	FRLI ref	In force		Revokes	Explanatory statement	Notes
				from	until			
Legislative Instrument IMMI 09/048 "Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2009/2	09/048	-	F2009L02150	01/01/09	13/09/09	09/032	Yes	Signed 16/6/09, Registered 24/6/09, commenced 1/7/09, revoked by IMMI09/105, dated 7/09/09, commences 13/09/09 at 23:59
Legisative instrument IMMI 09/032, "Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2009"	09/032	-	F2009LO1242	15/05/09	30/06/09	08/066	Yes	Signed 6/5/09, Effective 15 May 09, Registered 14/5/09
Legislative Instrument IMMI 08/066, "Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa Notice 2008"	08/066	-	F2008L02846	01/08/08	14/05/09	08/021	Yes	Signed 25/7/08; Effective 1/8/08. Registered 31/7/08
Legislative Instrument IMMI 08/021, "Specification under rr.1.20B, 1.20G(2)and 1.20GA(1)(a)(i) - Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa"	08/021	-	F2008L02274	01/07/08	31/7/08	07/078	Yes	Signed 23/6/08; Effective 1/7/08. Registered 26/6/08
Legislative Instrument IMMI 07/078, "Specification under rr.1.20B, 1.20G(2)and 1.20GA(1)(a)(i) - Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa"	07/078	-	F2007L04062	11/10/07	30/6/08	07/007	Yes	Signed 8/10/07; Effective day after registration. Registered 10/10/07
Legislative Instrument IMMI 07/007, "Specification under rr.1.20B, 1.20G(2)and 1.20GA(1)(a)(i) - Minimum Salary Levels and Occupations for the Temporary Business Long Stay Visa"	07/007	-	F2007L03586	10/09/07	10/10/07	06/036	Yes	Signed 7/9/07; Effective 10/9/07. Registered 10/9/07
Legislative Instrument IMMI 06/036, "Specification under rr.1.20B, 1.20G(2)and 1.20GA(1)(a)(i) - Minimum Salary Levels and Occupations for the Business Long Stay Visa"	06/036	-	F2006L01855	01/07/06	09/09/07	06/028	Yes	Signed 15/6/06; Effective 1/7/06. Registered 23/6/06
Legislative Instrument IMMI 06/028, "Specification under rr.1.20B, 1.20G(2)and 1.20GA(1)(a)(i) - Minimum Salary Levels and Occupations for the Business Long Stay Visa"	06/028	-	F2006L01226	03/05/06	30/06/06	05/041	Yes	Signed 24/4/06; Effective day after registration. Registered 2/5/06

Legislative Instrument IMMI 05/041, "Specification of Minimum Salary Level for the Purposes of rr.1.20B, and 1.20G(2) and r.1.20GA(1)(a)(i) - Minimum Salary Level and Occupations"	05/041	S105	F2005L01491	09/04/05	02/05/06	S61	Yes	Signed 8/6/05; Effective 9/4/05 . Registered & Gazette published 15/6/05. Retrospectively rectified S61 . See Note (6) below.
S 61 OF 2005, "Specification of Minimum Salary Level for the Purposes of rr.1.20B, and 1.20G(2) and r.1.20GA(1)(a)(i) - Minimum Salary Level and Occupations"	-	S61	F2005L00657	07/04/05	08/04/05	GN 6	Yes	Signed 17/3/05; Date of effect not specified. Registered & Gazette published 7/4/05. Retrospectively revoked due to omission of occupations . See Note (6) below.
GN 6 OF 2004, "Specification of Minimum Salary Level for the Purposes of r.1.20B, and Occupations for the Purposes of rr.1.20G(2) and 1.20GA(1)(a)(i) of the Migration Regulations 1994"	-	GN6		11/02/04	06/04/05	S 406	No	Signed 20/1/04; Effective on publication . Gazette published 11/2/04.
S406 of 2002, "Specification of Minimum Salary Level for the Purposes of r.1.20B, and Occupations for the Purposes of rr.1.20G(2) and 1.20GA(1)(a)(i) of the Migration Regulations 1994"	-	S 406		01/11/02	10/02/04	S263	No	Signed 22/10/02; Effective 1/11/02. Gazette published 30/10/02.
S263 of 2001, "Specification of Minimum Salary Level for the Purposes of r.1.20B & Specification of Minimum Skills Threshold for the Purposes of rr.1.20G(2) and 1.20GA(1)(a)(i) of the Migration Regulations 1994"	-	S263		01/07/01	31/10/02	None	No	Signed 29/6/01; Effective 1/7/01. Gazetted 1/7/01.

NOTES

(1) Regulation 1.20B defines the *minimium salary level* to be paid to certain persons who are granted a Subclass 457 (Business (Long Stay)) visa as that specified in a Gazette Notice.

(2) Regulations 1.20G(2) and 1.20GA(1)(a)(i) of the Regulations provide that the tasks of positions for which applicants for Subclass 457 visas are nominated by employers must correspond to the tasks of an occupation specified in a Gazette Notice for the relevant provision.

(3) Regulation 1.20G(1) provides which persons may nominate to the Minister an activity in which an individual is proposed to be employed by the person in Australia.

(4) Regulation 1.20G(2) relevantly provides if a person is mentioned in r. 1.20G(1)(b), (c), (d) or (e), the tasks of the nominated activity must correspond to the tasks of an occupation specified in a Gazette Notice for the purposes of r.1.20G(1)(b), (c), (d) or (e), the tasks of the nominated activity must correspond to the tasks of an occupation specified in a Gazette Notice for the purposes of r.1.20G(2).

(5) Regulation 1.20GA(1) relevantly provides that ba person mentioned in r.1.20GA(2) may nominate to the Minister an activity in which an individual is proposed to be employed by the person in Australia, if the tasks of the nominated activity correspond to the tasks of an occupation specified in a Gazette Notice for the purposes of r.1.20GA(1)(a)(i).

(6) S105 rectified S61, in which some occupations were inadvertently omitted. It commenced on 9 April 2005, being the day after S61 commenced. The Explanatory Statement to S105 states that this retrospective commencement does not infringe s.12(2) of the *Legislative Instruments Act 2003* (now entitled the *Legislation Act 2003*) as it will operate beneficially in respect of all affected persons by including occupations previously omitted. No date of effect is specified in the Gazette Notice or Instrument for S61, but the Explanatory Statement states that it commences the day after registration.

Specification of addresses (r.1.20N(4) and Item 1220B(3)(b)								
Title	Immi/GN ref	GN	FRLI ref	In force		Revokes	Explanatory statement	Notes
				from	until			
Specification of addresses (sub-regulation 1.20N(4) and paragraph 1220B(3)(b)	09/016		F2009L01301	15/05/09	13/09/09	GN26	yes	Signed 15/3/09; Commences on 15/5/09. Registered 17/4/09. Revoked by IMMI09/105, dated 10/9/09, Registered 11/9/09, commences 13/09/09 at 23:59.
Specification of post office box address, address for courier delivery and facsimile details for the purposes of sub-regulation 1.20N(4) and paragraph 1220B(3)(b) of Item 1220B of Schedule 1 to the Migration Regulations 1994		GN26	F2006B00087	01/07/04	14/05/09	SGN239	No	Signed 17/6/04; Commences 1/7/04. Gazetted 30/6/04
Specification of post office box address, address for courier delivery and facsimile details for the purposes of 1220B(3)(b) of the Migration Regulations 1994		SGN239	-	01/07/03	30/06/04	n/a	No	Signed 24/6/03; Commences 1/7/03. Gazetted 27/6/03

NOTES

1. This instrument specifies the relevant addresses for processing Subclass 470 visa applications.

Distinguished Talent and Special Eligibility visa addresses (items 1112(3)(a), 1113(3)(aa) and 1118A(3)(a))							
Title	Immi ref	FRLI ref	In force		Revokes	Explanatory statement	Notes
			from	until			
Postal and courier delivery addresses for Distinguished Talent visas and Special Eligibility visa (paragraphs 1112(3)(a), 1113(3)(aa) and 1118A(3)(a))	14/066	F2014L01030	28/07/14	17/04/15	13/042	yes	Dated 18/07/14, commences 28/07/14, revoked 17/04/15 by 15/029.[2]
Postal and delivery addresses for Distinguished Talent and Special Eligibility visas (paragraphs 1112(3)(a), 1113(3)(aa) and 1118A(3)(a))	13/042	F2013L00552	13/04/13	27/07/14	11/015	yes	Dated19/03/13, commences 13/04/13
Postal and delivery addresses for Distinguished Talent and Special Eligibility visas (regulations 1112(3)(a), 1113(3)(aa) and 1118A(3)(a))	11/015	F2011L00462	02/04/11	12/04/13	05/082	yes	Dated 07/03/11, commences 02/04/11
Postal and delivery addresses for Distinguished Talent and Special Eligibility visas (Regulations 1112(3)(a), 1113(3)(aa) and 1118A(3)(a))	05/082	F2005L03345	01/11/05	01/04/11	GN signed 20/04/05	yes	Dated 26/10/05, commences 01/11/05

Notes

1. For specifications made prior to 01/11/05 please consult MRD Legal Services
2. For instruments in force or after 18/04/2015, see the BusSkillsApp tab.

Specification of Addresses - Temporary Business Visa, sponsor approval, variation of terms and nomination applications; and Special Program, Entertainment and Training and Research visas							
Title	**Immi ref**	**FRLI Reference**	**In force**		**Revokes**	**Explanatory statement**	**Notes**
			from	**until**			
Classes of persons and addresses (Paragraphs 1205(3)(a), 1233(3)(a) and 1235(3)(a))	14/084	F2014L01284	06/10/14	17/04/15	14/064	yes	Dated 10/09/14, commences 06/10/14, revoked 17/4/15 by 15/042.[3]
Classes of persons and addresses (paragraph 1205(3)(a), paragraph 1233(3)(a) and paragraph 1235(3)(a))	14/064	F2014L01027	28/07/14	5/10/14	12/085	yes	Dated 18/07/14, commences 28/07/14
Specification of classes of persons and addresses (paragraph 1205(3)(a), paragraph1233(3)(a) and paragraph1235(3)(a)	12/085	F2012L02216	24/11/12	27/07/14	10/010 & 09/097	yes	Date made 09/11/12; commences 24/11/12; registered 22/11/12. This instrument is concurrent with 10/009.
Specification of addresses	10/010	F2010L00590	04/03/10	23/11/12	08/101	yes	Date made 3/3/10, commences on 4/3/10. Registered 3/3/10 and amended on 5/3/10. This instrument is concurrent with 10/009.
Specification of addresses	10/009	F2010L00591	04/03/10	current	09/121	yes	Date made 26/2/10; Commences on 4/3/10. Registered 3/3/10
Specification of addresses (subregulations 2.61(4), 2.61(5), 2.61(6), 2.66A(2), 2.66A(6), 2.73A(5), 2.73B(6), 2.73C(6) and paragraphs 1205(3)(c), 1220B(3)(b) of Schedule 1)	09/121	F2009L03971	09/11/09	03/03/10	09/091	yes	Date made 28/10/09; Commences on 9/11/09. Registered 5/11/09
Specification of addresses (subregulations 2.61(4), 2.61(5), 2.61(6), 2.66A(2), 2.66A(6), 2.73A(5), 2.73B(6), 2.73C(6) and paragraphs 1205(3)(c), 1220B(3)(b))	09/091	F2009L03497	14/09/09	08/11/09	None	yes	Signed 7/9/09; Commences on 14/9/09. Registered 11/9/09.

NOTES

1. rr.2.61(4), 2.61(5), 2.61(6), 2.66A(2), 2.66A(6), 2.73A(5), 2.73B(6), 2.73C(6) and items 1205(3)(c) and 1220B(3)(b) of Schedule 1 of the Regulations provide that applications relating to an approval as a sponsor, a variation of a term of an approval as a sponsor, the process for nomination of various visas and an application for certain visas are to an address specified by the Minister either by mail or by courier or transmitted by facsimile.

2. Items 1205(3)(ba), 1205(3)(ca) and 1220B(3)(b) of Schedule 1 of the Regulations provide that applications for certain visas (Subclasses 416, 420 and 470 respectively) are to be made to an address specified by the Minister either by mail or by courier or transmitted by facsimile.

3. For instruments in force or after 18/04/2015, see the TempWorkApps tab.