Migration and Refugee Division Commentary

Business Visas

Current as at 17 December 2021

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Overview[1]

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.[2]

For the purposes of this commentary, **temporary business visas** comprise of Subclass 457 visa and Subclass 482 visa. While Subclass 457 visa was moved from the temporary business framework to the temporary work framework from 24 November 2012,[3] 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 On 18 March 2018, Subclass 457 was repealed and replaced by Subclass 482. Subclass 482 visa maintains a similar framework to Subclass 457 visa. The sponsorship and nomination framework for these visas under Division 3A of Part 2 of the *Migration Act 1958* (Cth) (the Act) 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'.[4] This category also includes the Subclass 494 visa, which was introduced on 16 November 2019. While it was designed to replace the Subclass 187 visa, it is not a permanent visa, and instead is in effect for 5 years from the date of grant.

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 reg 5.19 of the *Migration Regulations 1994* (Cth) (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 Subclass 188 (which replaced Subclasses 160-165) and Subclass 888 (which replaced Subclasses 845, 846, and 890-893), and Subclass 132 (which was repealed from 1 July 2021). Subclasses 890-893 continue to be available for holders of certain provisional business skills visas.

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] For further information in relation to temporary work visas, please see Overview - Temporary Work Visas.
[3] *Migration Amendment Regulations 2012 (No 4)* (Cth) (SLI 2012, No 238). The effect of SLI 2012, No 238 is summarised in Legislation Bulletin No 9/2012.
[4] See the *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018) and the *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551). The effect of the amending Act and the amending Regulations are summarised in Legislation Bulletin No 1/2019 for No 162, 2018 and Legislation Bulletin No 3/2019 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.

Temporary business visas

Temporary business scheme

The Temporary Business Scheme was established in 1995 to enable employers to sponsor overseas workers to work in Australia on a temporary basis, to fill shortages that cannot be met from the local labour market.[5] It currently requires the visa applicant to be the subject of an approved nomination by an 'approved work sponsor'[6] (a standard business sponsor or party to a work agreement). There are three relevant visa classes: the Temporary Business Entry (Class UC) visa, the Temporary Skill Shortage (Class GK) visa, and the Skilled Employer Sponsored Regional (Class PE) visa.

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

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. 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'.[7] 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;[8] and
- sponsorship for employment by a standard business sponsor.[9]

The most common stream in the Tribunal's caseload is sponsorship by a standard business sponsor.[10]

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

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.[11] Subclass 482 visa replaces the Subclass 457 visa,

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[5] The business sponsorship scheme was first introduced in 1996 and underwent major changes in 2003 and 2009. Changes were also made in 2012 by SLI 2012, No 238. The changes in 2009 were introduced by the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) (No 159, 2008) and the *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115) amended by *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth) (SLI 2009, No 203).
[6] As introduced by No 162, 2018 and F2019L00551 as a distinct class of sponsor from the new 'family sponsor', with effect from 17 April 2019.
[7] cl 457.223.
[8] cl 457.223(2).
[9] cl 457.223(4).
[10] 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 the *Migration Amendment Regulation 2013 (No 1)* (Cth) (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.
[11] Introduced by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262).

and is designed to enable employers to access a temporary skilled overseas worker if an appropriately skilled Australian worker is unavailable.[12]

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);
- 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.[13]

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

Skilled Employer Sponsored Regional (Provisional) (Class PE) (Subclass 494) visa

The Skilled Employer Sponsored Regional (Class PE) visa was introduced on 16 November 2019 and contains one subclass: Subclass 494.[14] Subclass 494 visa is an employer-sponsored visa to assist regional Australia.[15] It was designed to supersede the Subclass 187 visa except for certain transitional cohorts.[16] Subclass 494 includes two streams for skilled workers:

- the Employer Sponsored stream, which allows employers to source foreign workers in specified occupations; and
- the Labour Agreement stream, which caters for applicants nominated by a party to a work agreement.

For detailed commentary on Subclass 494 visas, see Subclass 494 visa.

Business sponsorship and nomination – regs 2.59, 2.72 and 2.72C

The 'standard business sponsorship stream' of the Subclass 457 visa, the 'Short-term' and 'Medium-term' streams of the Subclass 482 visa, and the 'Employer Sponsored' stream of the Subclass 494 visa involve 3 distinct stages. Firstly, a 'person' (the business) seeks approval as a Standard Business Sponsor (SBS) under regs 2.59 and 2.60S of the Regulations.[17] Secondly, the approved work sponsor (which includes an SBS) must nominate an occupation for approval under reg 2.72 or 2.72C and a person (a Subclass 457 visa holder, a Subclass 482 visa holder, a Subclass 494 visa holder, an applicant for a

[12] Explanatory Statement to F2018L00262, p.1.
[13] Explanatory Statement to F2018L00262, p.1–2.
[14] It was introduced by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).
[15] Explanatory Statement to F2019L00578, p.1.
[16] 'Transitional 457' and 'transitional 482' workers (defined in reg 1.03) are still able to apply for Subclass 187 visas after 16 November 2019. See the Subclass 187 commentary for details.
[17] Note that regs 2.59 and 2.60S have been subject to amendments over time. Please see Approval as standard business sponsor for more detail.

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Subclass 457, Subclass 482 or Subclass 494 visa, or a proposed applicant for a Subclass 482 or Subclass 494 visa) to perform the nominated occupation.[18] Lastly, the visa applicant must apply for a Subclass 457 (before 18 March 2018), a Subclass 482 or a Subclass 494 visa in respect of the nominated occupation.

To gain approval as an SBS, *all* requirements under regs 2.59 and 2.60S 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 reg 2.59 and these requirements are specified not to apply to live applications for approval as a SBS from that date.[19]

For further detailed commentary on reg 2.59, standard business sponsorship and each of the requirements, see Approval as standard business sponsor.

Once a person has approval as an SBS under reg 2.59, or has applied for approval as an SBS (or is established as a party to, or is a party to negotiations for a work agreement),[20] the second stage involves nominating an occupation to be undertaken in Australia by an identified visa applicant or holder under reg 2.72, or for Subclass 494, reg 2.72C.

The purposes of the nomination stage are:[21]

- to ensure that the approved sponsor agrees to be the sponsor for the particular visa applicant;
- 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.[22] The requirements of reg 2.72 for nomination applications made on or after that date are

[18] Note that the terms of reg 2.72 were subject to significant amendment on 18 March 2018. Please see Legislation Bulletin No 1/2018 for more detail. Regulation 2.72C was introduced by F2019L00578.
[19] Clause 6704(2) of sch 13 to the Regulations, as inserted by item 178, sch 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* (Cth) (No 38, 2018) and *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (F2018L01093).
[20] Section 140GB(1) and reg 2.72(1)(a) were amended by No 38, 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 sch 2 to No 38, 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.
[21] Explanatory Statement to SLI 2009, No 115.

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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* (Cth) and the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth), effective from 12 August 2018, introduced a 'nomination training contribution charge',[23] as well as changes to the labour market testing requirements.[24] 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 Regulations 2.72 and 2.73 - nomination and approval of an occupation for Subclass 457 and Subclass 482.

Regulation 2.72C provides the criteria for approval of a nomination of an occupation for a Subclass 494 visa. It is similar to reg 2.72, with the most significant difference being a requirement that the position is located in a part of Australia that was a designated regional area when the nomination was made and that the position is likely to exist for at least 5 years.[25] For further detailed commentary on nomination of an occupation for a Subclass 494 visa, see Regulation 2.72C – nomination of an occupation for a Subclass 494 visa.

Variation of terms of approval of sponsorship – reg 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.[26] The process for approving a variation of a term of approval as a sponsor was introduced on 14 September 2009[27] 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.[28] From 18 March 2018 the duration of the term of an SBS approval is fixed by reg 2.63A, and applications for variation of an approval as an SBS can no longer be made.[29] Sponsors will be required to make a new application for approval and the Regulations have been amended to enable this 'renewal' process.

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[22] F2018L00262.
[23] Section 140GB(2)(aa) inserted by item 3 of sch 2 to No 38, 2018; and reg 2.73(5A) inserted by item 16 of sch 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 stream 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 reg 5 of the *Migration (Skilling Australians Fund) Charges Regulations 2018* (Cth) (F2018L01092).
[24] Section 140GBA as amended by No 38, 2018. The new ss 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.
[25] regs 2.72C(6), (12)(c).
[26] 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.
[27] No 159, 2008; SLI 2009, No 115 as amended by SLI 2009, No 203; and *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 230).
[28] reg 2.67.
[29] F2018L00262.

The process and criteria for variation of terms of approval for an SBS are set out in regs 2.66, 2.68 and 2.68J as in force up until 18 March 2018.[30] The requirements for notifying the decision in relation to an application for variation of terms of approval are contained in reg 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, Subclass 482 and Subclass 494

The Tribunal has jurisdiction to review decisions to refuse the grant of a Subclass 457, Subclass 482 or Subclass 494 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, Subclass 482 visa and Subclass 494 visa commentaries.

Decisions not to approve business sponsorship / nomination of occupation

A decision not to approve an application for approval as an SBS under reg 2.59 is a reviewable decision,[31] except in limited circumstances. For guidance, see Approval as standard business sponsor commentary.

A decision not to approve a nomination under reg 2.72 or 2.72C is also a reviewable decision,[32] except in limited circumstances. See Regulations 2.72 and 2.73 - nomination and approval of an occupation for Subclass 457 and Subclass 482 and Regulation 2.72C – nomination of an occupation for a Subclass 494 visa.

Decisions not to approve variation of sponsorship

A decision not to vary a term specified in an SBS approval is a reviewable decision,[33] 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:

[30] reg 2.68J was inserted by *Migration Amendment Regulation 2013 (No 5)* (Cth) (SLI 2013, No 145), 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.
[31] s 338(9); and reg 4.02(4)(a) of the Regulations as amended by SLI 2009, No 115.
[32] s 338(9); and reg 4.02(4)(d) of the Regulations as amended by SLI 2009, No 115.
[33] s 338(9) and reg 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.

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- the employer seeks approval of a nominated position in which an individual is proposed to be employed in Australia under reg 5.19 of the Regulations; and
- the non-citizen applies for a permanent visa (currently Subclass 186 and, for transitional Subclass 457 and 482 workers, Subclass 187) on the basis of the employer nomination.

Significant changes were made to the scheme on 1 July 2012, when reg 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.[34] On 18 March 2018, reg 5.19 was again repealed and substituted,[35] and a number of changes were made to 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 reg 5.19 – Temporary Residence Transition nomination and Direct Entry nomination. The relevant subclasses for these nominations are Subclass 186 visa and Subclass 187 visa.[36]

For applications made on or after 18 March 2018, there are three different streams under reg 5.19 – Temporary Residence Transition stream, Direct Entry stream, and Labour Agreement stream. Subclass 186 and, until 16 November 2019, Subclass 187 are the relevant subclasses. The pre-18 March 2018 version of reg 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.

Regulation 5.19 nominations identifying Subclass 187 visas closed from 16 November 2019, except for Temporary Residence Transition stream nominations relating to certain transitional workers, and Subclass 187 visa applications also closed to new applications at this time except for these transitional workers.[37]

Employer nominations – reg 5.19

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

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 at least two of the preceding three year period;

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[34] *Migration Amendment Regulation 2012 (No 2)* (Cth) (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 regs 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: sch 13 to the Regulations, items 101(2) and 102(2) inserted by SLI 2012, No 82.
[35] Item 129, sch 1 of F2018L00262.
[36] SLI 2012, No 82.
[37] F2019L00578.

- 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.[38] 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.[39]

The relevant criteria for the Temporary Residence Transition nomination is set out in reg 5.19(3)[40] and the criteria for Direct Entry nomination is set out in reg 5.19(4),[41] as in force prior to 18 March 2018.

Nominations made on or after 18 March 2018

New reg 5.19 added an additional Labour Agreement stream to the already existing Temporary Residence Transition and Direct Entry streams.[42] Previously, a nomination was not required under reg 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.[43]

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.[44] 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.[45]

For further detailed commentary on nominations under reg 5.19, including the closure of nominations identifying Subclass 187 visa holders from 16 November 2019, see Regulation 5.19 - approval of nominated positions (employer nomination).

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:

[38] See the Explanatory Statement to SLI 2012, No 82 at p.30.
[39] See the Explanatory Statement to SLI2012, No 82 at p.30.
[40] As inserted by SLI 2012, No 82.
[41] Inserted by SLI 2012, No 82.
[42] Inserted by F2018L00262.
[43] Explanatory Statement to F2018L00262, Attachment C, Item 129.
[44] regs 5.19(2)(fa), (fb) as inserted by F2018L01093.
[45] regs 5.19(5)(i), (10)(c) were repealed by F2018L01093.

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- **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.[46]
- In respect of regional appointments, **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.[47]

Applications made on or after 18 March 2018

A number of changes were made to Subclass 186 and 187 visas from 18 March 2018.[48] The 'Agreement' stream of the Subclass 186 visa was renamed the 'Labour Agreement stream', and was removed entirely from Subclass 187 visa. The maximum age for visa applicants in the 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.

Subclass 187 visa closed to new applications from 16 November 2019 except for certain transitional cohorts.[49]

Merits Review

Decisions relating to employer nominations under reg 5.19

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

Subclass 186 and 187 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 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. 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

[46] Part 186 inserted by SLI 2012, No 82.
[47] New pt 187 inserted by SLI 2012, No 82.
[48] F2018L00262.
[49] See Subclass 187 commentary for details.

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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 incorporated 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[50] applied and comprised of: Subclasses 160–165 (four year provisional residence visas) and Subclasses 890–893, 845 and 846 (permanent residence visas).[51] These visas replaced Subclasses 127–131 and 840–844.[52] In addition, the permanent Subclass 132 (Business Talent) visa was also introduced.

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 Business Skills - Business Talent (Permanent) visa and the criteria for a Subclass 132 visa were substituted for visa applications made on or after 1 July 2012. Additionally, new temporary (Subclass 188) and permanent (Subclass 888) visas were introduced to attract business people to assist in the economic development of Australia.[53] On 1 July 2012, Subclasses 160–165, 845 and 846 were closed to new primary visa applications.[54] Subclasses 845 and 846 were removed entirely from the Regulations from 1 July 2013, closing these subclasses to all applications from that date.[55]

Subclass 188 (Business Innovation and Investment (Provisional) (Class EB)) visa is designed to replace Subclasses 160, 161, 162, 163, 164 and 165,[56] and currently contains six separate streams[57], while Subclass 888 (Business Innovation and Investment (Permanent) (Class EC)) is a permanent visa replacing Subclasses 845, 846, 890, 891, 892, and 893, and currently contains five separate streams.[58] 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. Subclass 890–893 visas remain available to certain holders of certain pre 1 July 2012 provisional business skills visas. For commentary on Subclasses 890–893, including merits review of these decisions, see Subclasses 890–893 Business Skills (Residence) (Class DF).

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[50] The Business Talent Subclass 132 visa was not subject to the two stage processing structure.
[51] *Migration Amendment Regulations 2002 (No 10)* (Cth) (SR 2002, No 348). These Regulations inserted the new visa subclasses and omitted former Subclasses 127 to 131 and 840 to 844.
[52] SR 2002, No 348.
[53] Items 1202B and 1104BA of sch 1 and new pts 188 and 888 of sch 2 to the Regulations, inserted by SLI 2012, No 82.
[54] Items 1202A(3)(aa) and 1104A(3)(aa) of sch 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 by SLI 2012, No 82.
[55] SLI 2012, No 82.
[56] Item 1202B and pt 188 inserted by SLI 2012, No 82. See Explanatory Statement to SLI 2012, No 82 at p.55.
[57] From 1 July 2015 to 30 June 2021, Subclass 188 also included the Premium Investor stream, which was closed to new applications from 1 July 2021: *Home Affairs Legislation Amendment (2021 Measures No 1) Regulations 2021* (Cth) (F2021L00852).
[58] Item 1104BA and pt 888 inserted by SLI 2012, No 82. See Explanatory Statement to SLI 2012, No 82 at p.72.

On 1 July 2021, key changes to the Business Innovation and Investment program were implemented to sharpen the focus on measurable returns to the Australian economy and to support Australia's post-COVID-19 economic recovery by maximising the impact of high value investors, business owners and entrepreneurs.[59] These included closing the underperforming Premium Investor stream of the Subclass 188 visa and the Subclass 132 (Business Talent) visa to new applications from 1 July 2021; aligning the periods of the provisional Subclass 188 visa for consistency across streams and reducing the provisional residence and visa held period requirements for the grant of the permanent Subclass 888 visa; and amending the requirements for the Business Innovation, the Investor and the Entrepreneur streams of the Subclass 188 visa to attract business migrants with more financial capital and start-up/early stage entrepreneurs to Australia.[60] The closure of permanent Subclass 132 (Business Talent) visa means that from 1 July 2021 there is no direct pathway to a permanent visa in the Business Skills visa program and all business and investment visa applicants must undergo a mandatory provisional period.

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. Particularly high calibre applicants could apply for the Business Skills – Business Talent (Permanent) (Class EA) (Subclass 132) visa until its repeal on 1 July 2021.[61]

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

Subclass 188 - Business Innovation and Investment (Provisional) (Class EB)

The Business Skills (Provisional) (Class EB) is a temporary visa containing only one subclass – Subclass 188 (Business Innovation and Investment (Provisional)) visa.[62] It replaces Subclasses 160, 161, 162, 163, 164 and 165[63] and is designed for persons intending to establish a new, or manage an existing, business in Australia or make a specified investment with a State/Territory government.

Subclass 188 has seven 'streams':

- the Business Innovation stream;
- the Business Innovation Extension stream;[64]
- the Investor stream;
- the Significant Investor stream;

[59] Explanatory Statement to F2021L00852, pp.9–10.
[60] F2021L00852.
[61] F2021L00852.
[62] Item 1202B and pt 188 inserted by SLI 2012, No 82, with effect from 1 July 2012, and as amended by F2021L00852 for visa applications made on or after 1 July 2021.
[63] Explanatory Statement to SLI 2012, No 82 at p.55.
[64] 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)* (Cth) (SLI 2012, No 255).

Released by the AAT on 25 February 2022

- the Significant Investor Extension stream;[65]
- the Premium Investor stream (closed to new applications from 1 July 2021);[66]
- the Entrepreneur stream.[67]

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.[68] 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.[69] For the Premium Investor stream, the applicant must be nominated by the CEO of Austrade.[70] For the Business Innovation, Investor and Significant Investor streams, 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 Subclass 188 visa in the Business Innovation stream.[71] Further, for applications made on or after 19 September 2020, if the applicant was granted a Subclass 188 visa in the Business Innovation stream before 1 July 2019 and held that visa during a concession period (as defined under reg 1.15N), the application for the Subclass 188 visa in the Business Innovation Extension stream must be made no more than 3 months after the end of the concession period; or if the applicant held a Subclass 188 visa in the Business Innovation Extension stream during a concession period and a Sublass 188 visa in the Business Innovation stream granted before 1 July 2019, the application for the second Subclass 188 visa in the Business Innovation Extension stream must be made no more than 3 months after the end of the concession period.[72] If the applicant holds or has held a Subclass 188 visa in the Business Innovation Extension stream at the time of application, the applicant must not have held more than one Subclass 188 visa in the Business Innovation Extension stream.[73]

A valid application for the Significant Investor Extension stream requires the applicant to hold a Subclass 188 visa in the Significant Investor stream for at least 3 years, or if at the time of application, the applicant holds a Subclass 188 visa in the Significant Investor Extension stream, they must not have held more than one in that stream.[74]

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[65] The Significant Investor stream and Significant Investor Extension stream were inserted for new applications made on or after 24 November 2012: SLI 2012, No 255.
[66] The Premium Investor stream was inserted for new applications made on or after 1 July 2015: *Migration Amendment (Investor Visas) Regulation 2015* (Cth) (SLI 2015, No 102). It has been repealed by F2021L00852 and is closed to new applications from 1 July 2021.
[67] 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* (Cth) (F2016L01391).
[68] Items 1202B(4)–(6), (6D) of sch 1 to the Regulations.
[69] Items 1202B(6A), (6B).
[70] Item 1202B(6C); note that item 1202B(6C) was repealed by F2021L00852 on 1 July 2021.
[71] Table items 1 and 2 in item 1202B(5) as in force before 19 September 2020; table items 1(a) and 2 in item 1202B(5), as amended by *Migration Amendment (COVID-19 Concessions) Regulations 2020* (Cth) (F2020L01181).
[72] Item 1202B(5) as amended by F2020L01181 for applications made on or after 19 September 2020. 'Concession period' is defined in reg 1.15N as the period commencing on 1 February 2020 and ending on a day specified by the Minister in an instrument (*'initial concession period'*), as well as a period determined by the Minister under an instrument for the purposes of a specified provision of the Regulations in which the expression 'concession period' is used, beginning not before the initial concession period ends: inserted by F2020L01181. No end date is currently specified.
[73] Table item 5 of item 1202B(5) as amended by F2020L01181 for applications made on or after 19 September 2020.
[74] Item 1202B(6B).

While all primary applicants must meet the 'common criteria',[75] the criteria for a Subclass 188 visa also differ for each of the seven streams. In particular, the Significant Investor stream requires the applicant to have made a *complying significant investment* (defined in reg 5.19C) of at least AUD 5,000,000, the Premium Investor stream requires the applicant to have made a *complying premium investment* (defined in reg 5.19D) of at least AUD 15,000,000, the Business Innovation and Investor streams require the applicant to meet a new Business visa Points Test contained in Schedule 7A to the Regulations,[76] and the Entrepreneur stream requires the applicant to undertake a *complying entrepreneur activity* (defined in reg 5.19E) 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.

Changes introduced on 1 July 2021 significantly increased the investment, net personal and business assets and business turnover amounts for the Business Innovation and Investor streams, as well as the monetary values in the relevant items of the Business Innovation and Investment Points Test.[77] In relation to the Investor stream, new criteria requiring an applicant to have made a *complying significant investment* (within the meaning of reg 5.19C) of at least AUD 2,500,000 replaced the requirement for an applicant to have a *designated investment* (defined in reg 5.19A).[78] For the Entrepreneur stream, the requirement to secure a funding of at least $200,000 under one or more legally enforceable agreements in relation to the proposed entrepreneurial activity has been removed.[79] These changes apply only in respect of applicants who are invited to apply for the visa on or after 1 July 2021.

For further details, see Subclass 188 (Business Innovation and Investment) Business Skills (Provisional) (Class EB) 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 – Subclass 888 (Business Innovation and Investment (Permanent)) visa.[80] It replaces Subclasses 845, 846, 890, 891, 892, and 893.[81]

Unlike the seven streams in the temporary Subclass 188, 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;

[75] The Common criteria are at sub-div 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; and that the public interest criteria, special return criteria and passport requirements are met. For applications made on or after 16 November 2019, if the applicant, at the time of application, held a Subclass 491 or 494 visa, or the last substantive visa held was one of those, the applicant must have held that visa for at least 3 years at the time of application unless circumstances specified in an instrument exist: cl 188.212A, inserted by F2019L00578.
[76] Inserted by SLI 2012, No 82.
[77] F2021L00852.
[78] cl 188.246A inserted by F2021L00852. The requirement to have made a *designated investment* of at least AUD 1,500,000 under cl 188.246 continues to apply for applicants whose invitation to apply for the visa was before 1 July 2021: cl 188.246(1A), inserted by F2021L00852.
[79] reg 5.19E and cl 188.282 as amended by F2021L00852.
[80] Item 1104BA of sch 1 and pt 888 of sch 2 inserted by SLI 2012, No 82.
[81] Explanatory Statement to SLI 2012, No 82 at p.72.

Released by the AAT on 28 February 2022

- the Premium Investor stream; and,
- the Entrepreneur stream.[82]

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 and secondary applicants may 'switch' who will meet the primary criteria from who were the primary and secondary applicants for the Subclass 188 visa in the respective stream. In effect, the primary applicant for the Subclass 188 visa becomes the secondary applicant for the Subclass 888 visa.[83]

The Schedule 2 requirements differ depending upon the visa 'stream' the applicant is seeking to satisfy. 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* (for applicants who were invited to apply for their provisional Subclass 188 visa before 1 July 2021) or a *complying significant investment* (for applicants who were invited to apply for their provisional Subclass 188 visa on or after 1 July 2021). 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.[84] The Premium Investor stream criteria relate to the period of time for which the applicant has held a qualifying visa and a *complying premium investment*.[85] 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 Business Skills - Business

[82] For applications made before 24 November 2012, applicants could only be granted a visa 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.
[83] Table item 2 of item 1104BA(4) and table item 2 of item 1104BA(5) of sch 1, inserted by SLI 2015, No 102; table item 2A of item 1104BA(4) and table item 4 of item 1104BA(5), inserted by F2020L01181.
[84] 'Complying investment' is defined in reg 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 reg 5.19C in respect of applications made on or after 1 July 2015: SLI 2015, No 102.
[85] 'Complying premium investment' is defined in reg 5.19D, inserted by SLI 2015, No 102. There is no residency requirement for the Premium Investor stream.

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Talent (Migrant) visa to Business Skills - Business Talent (Permanent) visa and the criteria contained within it were substantially revised post 1 July 2012.

Subclass 132 visa closed to new applications on 1 July 2021.[86] This visa was the only permanent visa under the business skills category that did 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. As such, from 1 July 2021 there is no direct pathway to a permanent visa in the Business Skills visa program and all business and investment visa applicants must undergo a mandatory provisional period.

Applicants may have been inside or outside Australia to make the visa application, and the application must have been made at the place and in the manner specified.[87]

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.[88] 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.[89] 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.[90] Only the visa applicant has standing to apply for review.[91]

Released by the AAT on 28 February 2022

[86] F2021L00852.
[87] Item 1104AA(3).
[88] The common criteria (sub-div 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. For applications made on or after 16 November 2019, if the applicant, at the time of application, held a Subclass 491 or 494 visa, or the last substantive visa held was one of those, the applicant must have held that visa for at least 3 years at the time of application unless circumstances specified in an instrument exist: cl 132.212A, inserted by F2019L00578. The criteria for the Significant Business History stream are contained in sub-div 132.22, and relate to the requirement to be invited to apply, the applicant's age, overall success of their business career, ownership interest in a qualifying business, business turnover, value of personal and business assets, and commitment to and involvement in the business. The criteria for the Venture Capital Entrepreneur stream are in sub-div 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.
[89] s 338(2) (if onshore) or 338(7A) (if offshore).
[90] s 347(3A).
[91] s 347(2)(a).

Subclass 188

A decision to refuse an *onshore* Subclass 188 visa is reviewable.[92] Applications for review of these decisions must be made by the visa applicant while in the migration zone.[93]

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.[94] In both instances, the visa applicant has standing to apply for review.[95] The visa applicant must be in the migration zone at the time of the application for review.[96] 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.[97]

Relevant legislative amendments

Title	Reference number	Legislation bulletin
Migration Amendment Regulations 2002 (No 10) (Cth)	SR 2002, No 348	
Migration Amendment Regulations 2005 (No 1) (Cth)	SLI 2005, No 54	May 2005
Migration Legislation Amendment (Worker Protection) Act 2008 (Cth)	No 159, 2008	No 2/2009
Migration Amendment Regulations 2009 (No 5) (Cth)	SLI 2009, No 115	No 11/2009
Migration Amendment Regulation 2009 (No 9) (Cth)	SLI 2009, No 202	No 13/2009
Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1) (Cth)	SLI 2009, No 203	No 11/2009
Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 230	No 11/2009
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Amendment Regulations 2012 (No 4) (Cth)	SLI 2012, No 238	No 9/2012
Migration Amendment Regulation 2012 (No 7) (Cth)	SLI 2012, No 255	No 11/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No 3/2013

[92] Under s 338(2), if the application was made in the migration zone.
[93] ss 347(2)(a), 347(3).
[94] ss 338(2), (7A).
[95] s 347(2)(a).
[96] 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.
[97] s 347(3A)(a).

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Migration Amendment Regulation 2013 (No 5) (Cth)	SLI 2013, No 145	No 10/2013
Migration Amendment (Investor Visas) Regulation 2015 (Cth)	SLI 2015, No 102	No 6/2015
Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016 (Cth)	F2016L01391	No 2/2016
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018
Migration Amendment (Skilling Australians Fund) Act 2018 (Cth)	No 38, 2018	No 2/2018
Migration (Skilling Australians Fund) Charges Act 2018 (Cth)	No 39, 2018	No 2/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 2/2018
Migration (Skilling Australians Fund) Charges Regulations 2018 (Cth)	F2018L01092	No 2/2018
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (Cth)	No 90, 2018	No 3/2018
Migration Amendment (Enhanced Integrity) Regulations 2018 (Cth)	F2018L01707	No 5/2018
Migration Amendment (Family Violence and Other Measures) Act 2018 (Cth)	No 162, 2018	No 1/2019
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 3/2019
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Migration Amendment (COVID-19 Concessions) Regulations 2020 (Cth)	F2020L01181	No 2/2020
Home Affairs Legislation Amendment (2021 Measures No 1) Regulations 2021 (Cth)	F2021L00852	No 5/2021

Last updated/reviewed: 11 August 2021

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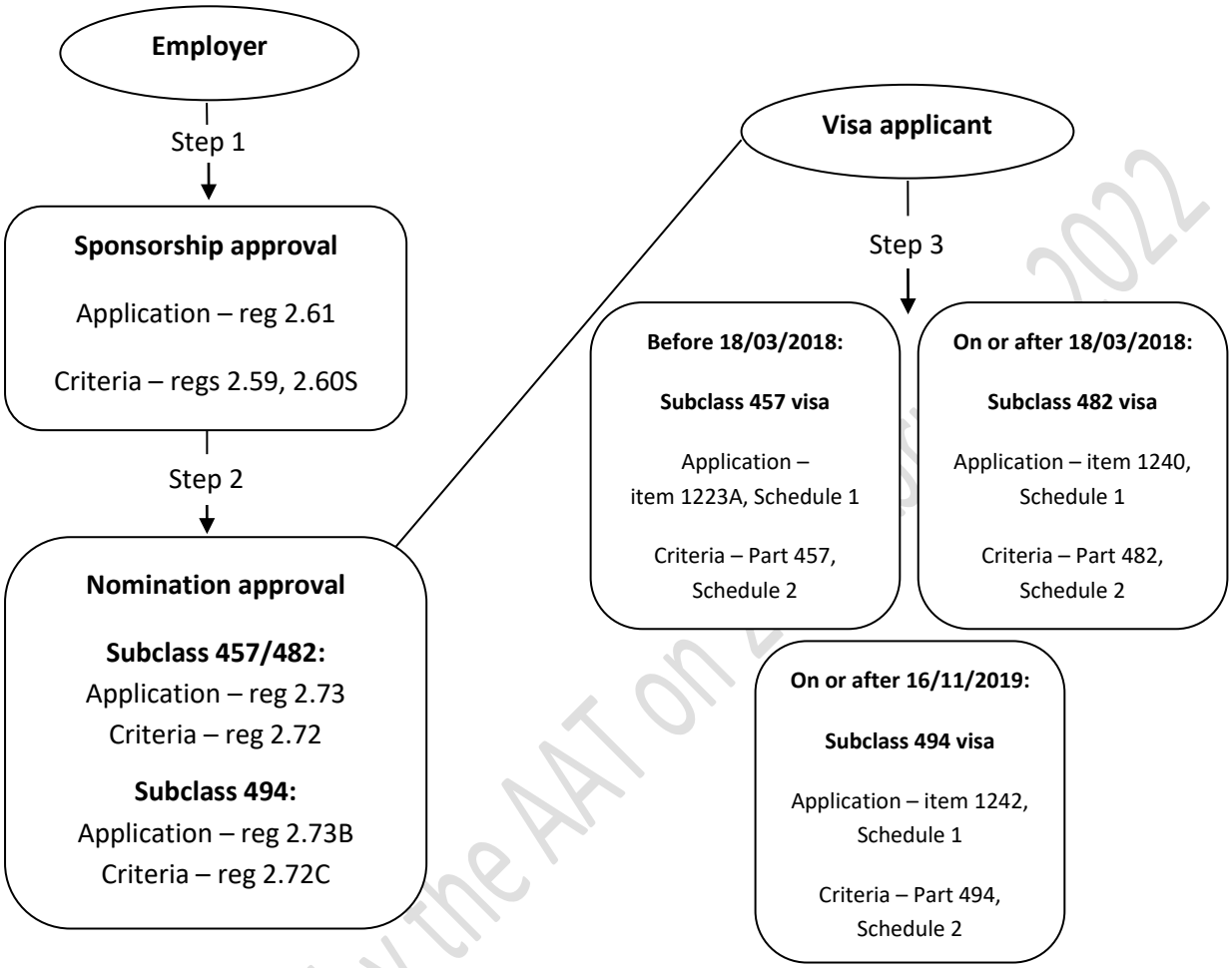
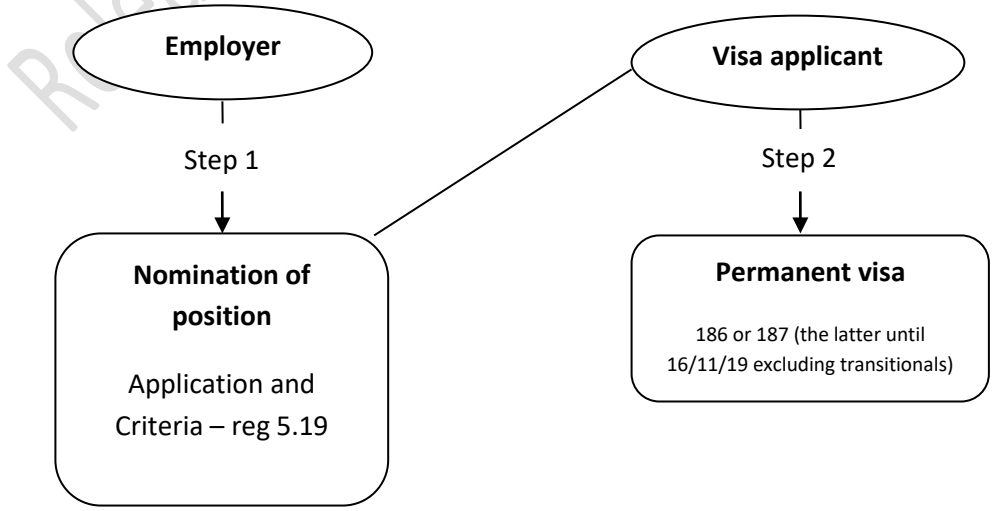
Appendix 1: Temporary business scheme and Employer nomination scheme

Temporary business scheme – three stage process (Subclasses 457, 482 and 494)



Employer nomination scheme – two stage process



Released by the AAT on 2 August 2022

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>127
840</td><td>Business Owner (offshore/onshore)</td></tr>
<tr><td>128
841</td><td>Senior Executive (offshore/onshore)</td></tr>
<tr><td>129
842</td><td>State/Territory Sponsored Business Owner (offshore/onshore)</td></tr>
<tr><td>130
843</td><td>State/Territory Sponsored Senior Executive (offshore/onshore)</td></tr>
<tr><td>845</td><td>Established Business in Australia</td></tr>
<tr><td>846</td><td>State/Territory Sponsored Regional Established Business in Australia</td></tr>
<tr><th colspan="2">from 1 March 2003</th></tr>
<tr><th>Provisional</th><th>Permanent</th></tr>
<tr><td>Business Skills (Provisional)(Class UR)
160 Business Owner (Provisional)
161 Senior Executive (Provisional)
162 Investor (Provisional)
163 State/Territory Sponsored Business Owner (Provisional)
164 State/Territory Sponsored Senior Executive (Provisional)
165 State/Territory Sponsored Investor (Provisional)</td><td>Business Skills (Residence)(Class DF)
890 Business Owner
891 Investor
892 State/Territory Sponsored Business Owner
893 State/Territory Sponsored Investor</td></tr>
<tr><td></td><td>Business Skills Established Business (Residence) (Class BH)
845 Established Business in Australia
846 State/Territory Sponsored Regional Established Business in Australia</td></tr>
<tr><td></td><td>Business Skills – Business Talent (Migrant) (Class EA)
132 Business Talent</td></tr>
<tr><th colspan="2">from 1 July 2012</th></tr>
<tr><th>Provisional</th><th>Permanent</th></tr>
<tr><td rowspan="2">Business Skills (Provisional)(Class EB)
188 Business Innovation and Investment (Provisional)</td><td>Business Innovation and Investment (Permanent) (Class EC)
888 Business Skills (Permanent)</td></tr>
<tr><td>Business Skills – Business Talent (Permanent) (Class EA)
132 Business Talent</td></tr>
<tr><th colspan="2">from 1 July 2021</th></tr>
<tr><th>Provisional</th><th>Permanent</th></tr>
<tr><td>Business Skills (Provisional)(Class EB)
188 Business Innovation and Investment (Provisional)</td><td>Business Innovation and Investment (Permanent) (Class EC)
888 Business Skills (Permanent)</td></tr>
</table>

Released by the AAT on 28 February 2022

BUSINESS REVIEW APPLICANTS:

FREQUENTLY ASKED QUESTIONS

Released by the AAT on 28 February 2022

Business concepts

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

    What is a business?

    What is an employer?

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

2. Who is a person who can apply for review?
3. Can a sole trader apply for review?

    What is a sole trader?

    Who can act on behalf of a sole trader?

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

4. Can a partnership apply for review?

    What is a partnership?

    Who can act on behalf of a partnership?

    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?

5. Can a company apply for review?

    What is a company?

    Who can act on behalf of a company?

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

6. Can a trust apply for review?

What is a trust?

Who can act on behalf of a trust?

7. Can an unincorporated association apply for review?

What is an unincorporated association?

Who can act on behalf of an unincorporated association?

Conduct of review

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

What is the role of representatives in the review?

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

Released by the AAT on 28 February 2022

Business concepts[1]

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

Businesses and employers are different concepts appearing throughout the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) and while they sometimes overlap, the concepts are distinct. For example, in the context of a reg 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.[2] 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 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',[3] 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.[4] 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 reg 1.11 of the Regulations as, amongst other things, a 'qualifying business' which in turn is defined in reg 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.[5]

As a result, it is not a necessary characteristic for the business to be carried on only by a single entity.[6] 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'.[7] In those

Released by the AAT on 26 February 2021

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] See regs 5.19(3)(b)(ii), 5.19(4)(b)(i) before 18 March 2018; also regs 5.19(5)(h)(ii) and 5.19(9)(a) post 18 March 2018.
[3] *Macquarie Dictionary* (online at 22 January 2021) 'business' (def 3).
[4] *Lu v MIAC* [2009] FMCA 891 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.
[5] *Ibrahim v MIAC* [2009] FCA 1328 at [30].
[6] *Nassif v MIMIA* (2003) 129 FCR 448 at [35]. See also *Lu v MIAC* [2009] FMCA 891 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).
[7] *Ibrahim v MIAC* [2009] FCA 1328 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

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,[8] and it may be concluded that an entity is not a business if the evidence points to the business not being engaged in ongoing trading.[9] 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.[10] 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.

A company or other entity is not limited to carrying on a single business.[11] 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.[12] 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 at ASIC Connect. 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* (Cth) (Corporations Act) defines a franchise as:

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they were the same business. The Court held these factors were not irrelevant considerations to determining whether multiple entities were the same 'business'.

[8] *Kushner v MIAC* [2009] FMCA 390 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'.

[9] *Kushner v MIAC* [2009] FMCA 390 at [47]. The Court upheld a decision of the Tribunal 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 at [53], upheld on appeal by the Federal Court in *Cheng v MIAC* [2013] FCA 405.

[10] *Kushner v MIAC* [2009] FMCA 390 at [48].

[11] *MIBP v Snyman* [2016] FCA 242.

[12] *Business Names Registration Act* 2011 (Cth) s 18.

> '[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.'[13]

A franchise is a contractual arrangement governed by the terms of a franchise agreement which sets out the rights and obligations of the franchisor and franchisee.[14] Under a franchise agreement, the relationship between a franchisee and franchisor can take one of the following forms:

- 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).[15]

The system or business format franchising is the most commonly seen form before the Tribunal, 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 franchise agreement in return for an up-front franchise 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,[16] 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.

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[13] *Corporations Act* 2001 (Cth) (Corporations Act) s 9 Dictionary.
[14] See cl 5 'Meaning of *franchise agreement*' in sch 1 – Franchising Code of Conduct, *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (Cth).
[15] See *Halsbury's Laws of Australia* at [420–4505] (accessed via LexisNexis 14 September 2017).
[16] See, for example, *Khan v MIBP* [2016] FCCA 333 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.

What is an employer?

Similarly, the term 'employer' 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.

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 reg 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 reg 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]

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[17] *Macquarie Dictionary* (online at 22 January 2021) 'employer'.
[18] The mandatory sponsorship obligations on standard business sponsors imposed by regs 2.78–2.87C include obligations that clearly contemplate an employment relationship, for example, in the obligations to ensure equivalent terms and conditions of employment in reg 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: reg 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: reg 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 reg 2.86(2C).
[19] reg 5.19(4)(a) (for pre-18/3/2018 applications) and reg 5.19(9)(c) (for post-18/3/2018 applications) state 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] *Li Tian v MIAC* [2009] FMCA 930, upheld on appeal in *Li Tian v MIAC* [2009] FCA 1406.
[21] *Li Tian v MIAC* [2009] FMCA 930 at [30], upheld on appeal in *Li Tian v MIAC* [2009] FCA 1406 at [24]–[26]. See also *Kim v MIMIA* [2005] FMCA 1699. 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

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 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 div 3A, sub-div G of the Act and s 2C(1) of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act). Specifically, ss 140ZB and 140ZE of the Act provide that regulations made under provisions of the Act that relate to div 3A or the regulations apply to a partnership or an unincorporated association as if it were a person, subject to certain changes made by the Act. In addition, s 2C(1) of the Acts Interpretation Act 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]

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with cl 856.213) was that an approved nomination at the time of making 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 work sponsor (or from 12/08/2018, the person who made the nomination) who has standing to apply for review: s 347(2)(d) and reg 4.02(5)(c). An 'approved work sponsor' is defined in s 5(1) of the Act (as amended by the *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018)) as either a person approved as a work sponsor under s 140E of the Act in relation to a class of prescribed sponsor (under reg 2.58, for example, a standard business sponsor) or a person (other than the Minister) who is a party to a work agreement.

[23] The definition of 'person' in cl 457.111 for pt 1 div.1.4A was omitted by the *Migration Amendment Regulations 2009 (No 9)* (Cth) (SLI 2009, No 202).

[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.

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 reg 4.02(5)(a) (sponsorship) or 4.02(5)(c) (nomination) 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 reg 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.

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.

[25] See *MIAC v Wainwright* [2010] FMCA 29 at [35], [36]. See also *Moller v MIAC* [2007] FMCA 168 at [22].
[26] *V120/00A v MIMA* (2002) 116 FCR 576 at [53].

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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 that 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 ss 140ZC and 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.

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[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 17.01; *Rules of the Supreme Court 1971* (WA), ord 71 r 9.
[34] *Moller v MIAC* [2007] FMCA 168 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 reg 4.02(5)(a) (sponsorship) or 4.02(5)(c) (nomination). 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

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[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, see 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), ord 71 r 1.
[39] See s 140ZD of the Act.

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]
- 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.

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[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.
[42] *Partnership Act 1963* (ACT), ss 37(1)(a), (b); *Partnership Act 1892* (NSW), ss 32(a), (b); *Partnership Act 1997* (NT), s 36(1); *Partnership Act 1891* (Qld), s 35(1); *Partnership Act 1891* (SA), ss 32(a), (b); *Partnership Act 1891* (Tas), ss 37(a), (b); *Partnership Act 1958* (Vic), ss 36(a), (b); *Partnership Act 1895* (WA), ss 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 is 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; [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.
[49] *Everingham v Everingham* (1911) 12 SR (NSW) 5.
[50] *Davies v Barlow* (1881) 2 LR (NSW) 66 (FC).

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. It is a legal device by which legal rights, powers, privileges, immunities, 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?

A company, not being natural persons, 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

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[51] *Ford, Austin and Ramsay's Principles of Corporations Law* at [1.180] (accessed via LexisNexis 14 September 2017).
[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 Procedural Law Guide Chapter 14 - 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 at 60 (CLR).
[57] Under s 198A of the Corporations Act, the directors are charged with the management of 'the business of the company', which includes the authority to subject the company to binding obligations. However, this is a replaceable rule and may not in fact be applicable to a particular company if it has been so replaced.

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 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 3]*[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 ss 128 and 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.

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[58] See *The Laws of Australia,* Thompson Reuters at [4.1.570] (accessed via WestLaw 14 September 2017).
[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] *Re Qintex Ltd [No 3]* (1990) 2 ACSR 479.
[61] *Re Qintex Ltd [No 3]* (1990) 2 ACSR 479 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 at [156]–[386].
[63] *Brick & Pipe Industries Ltd v Occidental Life Nominees Pty Ltd* [1992] 2 VR 279.

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, administrators of deeds of company arrangement, and 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]

If a company is deregistered, then generally speaking, it ceases to exist as a legal entity: s 601AD(1) of the Corporations Act. As a result, if a company is the review applicant, deregistration will mean there is no person who has standing to apply for (or continue with) an application for review.

6. Can a trust apply for review?

No, a trust cannot apply for review. However, a natural person or company which is a trustee of a trust can apply for review 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 is 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.

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

[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) at 383–386 (ACSR).
[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.

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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 ss 140ZF and 140ZG.' In addition, members 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.

[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).
[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.

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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, 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?

A business review applicant may appoint an agent to represent it while the application for review is before the Tribunal. If the applicant has 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 receiving documents in connection with the review, the Tribunal must give any document including the invitation to provide information or appear before it 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 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]

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[72] ss 379G [pt 5 - Migration] and 441G [pt 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.
[74] See *Trustees of the Franciscan Missionaries of Mary v Weir* (2000) 176 ALR 501 at [6] and the cases cited.
[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.

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 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.

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[77] In *SZPZH v MIAC & Anor* [2011] FMCA 407 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 div 5 of pt 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. This issue only arises where the visa applicant and the review applicant are not the same person.
[78] s 366A.

OVERVIEW – TEMPORARY WORK VISAS

Overview

Application process – sponsorship and nominations

Current visa classes

- Class GF – Subclass 407 (Training) visa
- Class GG – Subclass 408 (Temporary Activity) visa
- Class GD – Subclass 403 (Temporary Work (International Relations)) visa
- Class GA – Subclass 400 (Temporary Work (Short Stay Specialist)) visa
- Class TZ – Subclass 417 (Working Holiday) visa
- Class US – Subclass 462 (Work and Holiday) visa

Repealed visa classes

- Class GB – Subclass 401 (Temporary Work (Long Stay Activity)) visa
- Class GC – Subclass 402 (Training and Research) visa
- Class GE – Subclass 420 (Temporary Work (Entertainment)) visa
- Class UW – Subclass 488 (Superyacht Crew) visa

Relevant legislative amendments

Decision precedents

Appendix 1: Table of temporary work visas pre and post 19 November 2016

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Overview[1]

This commentary provides an overview of a range of current and repealed temporary work visas.[2] 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[3] and employer related visas[4] which are granted for skilled workers or business owners 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 most common temporary work visas reviewed by the Tribunal include Subclasses 407 and 408, which replaced five other temporary work visa subclasses on 19 November 2016.[5] Applicants for these visas must (with limited exceptions) be sponsored by a 'temporary activities sponsor'.[6] A table at Appendix 1 provides a comparison of the visa subclasses in place before and after 19 November 2016.

Separate detailed commentaries are available in respect of Subclass 408 (Temporary Activity) and Subclass 407 (Training) visas and Subclass 417 Working Holiday visa. In relation to Subclass 457 visas, which were from 24 November 2012 rebranded as a temporary work visa,[7] and Subclass 482 visas, the following commentaries are available: Approval as standard business sponsor, Regulations 2.72 and 2.73 - nomination and approval of an occupation for Subclass 457 and Subclass 482, Subclass 457 visa, and Subclass 482 Temporary Skill Shortage visa. 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 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;

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] 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.
[3] For example, Subclasses 890-893.
[4] For example, Subclasses 186, 187.
[5] *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (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.
[6] This class of sponsor replaced the following classes of sponsors from 19 November 2016: professional development sponsor, special program sponsor, superyacht crew sponsor, long stay activity sponsor, training and research sponsor, and entertainment sponsor. See F2016L01743. Applications before 18 May 2017 can be sponsored by relevant legacy sponsors.
[7] *Migration Legislation Amendment Regulation 2012 (No 4)* (Cth) (SLI 2012, No 238).

- an 'approved work sponsor'[8] 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 Subclass 402 (Training and Research) in the Research and Professional development streams have sponsorship but no nomination requirements. Subclasses 417, 462, 400 and 403 have no sponsorship or nomination requirements.

For more information regarding sponsorships and nominations, see Approval as a temporary activities sponsor and Temporary work nominations.

Current visa classes

There are currently six visa classes and subclasses (excluding Subclasses 457 and 482) in the temporary work visa program.

Class GF – Subclass 407 (Training) visa

The Class GF (Training) visa was introduced on 19 November 2016 and replaced the Subclass 402 (Training and Research) (Class GF visa).[9] It is a temporary visa allowing for stays of up to two years,[10] and contains only one visa subclass: Subclass 407 (Training).[11]

Applicants seeking to satisfy the primary criteria for the grant of a Subclass 407 visa are required to meet criteria relating to age,[12] functional English,[13] no adverse consequences for employment or training of Australians,[14] health insurance,[15] genuine intention to stay temporarily,[16] eligible visas,[17] adequate means of support,[18] public interest and special return criteria,[19] and conduct relating to charging for migration outcomes.[20]

Unless the approved work sponsor is a Commonwealth agency, the grant of a Subclass 407 visa involves the three-stage application process of sponsorship, nomination under s 140GB and application for a visa. The sponsor must be a temporary activities sponsor or, for visa applications lodged until 18 May 2017, a training and research sponsor or a professional

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[8] 'Approved work sponsor' is defined in s 5(1) of the Act as either a person approved as a work sponsor under s 140E of the Act in relation to a class of sponsor prescribed by the Regulations (reg 2.58), or a person (other than the Minister) who is a party to a work agreement. 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* (Cth) (No 162, 2018) and *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551).
[9] Item 1238 of sch 1 to the Regulations and pt 407 of sch 2 to the Regulations as inserted by F2016L01743.
[10] cl 407.511.
[11] Item 1238(5) of sch 1 to the Regulations.
[12] cl 407.211.
[13] cl 407.212.
[14] cl 407.215.
[15] cl 407.216.
[16] cl 407.217.
[17] cl 407.218.
[18] cl 407.219.
[19] cls 407.219A, 407.219B.
[20] cl 407.219C.

development sponsor.[21] For information relating to sponsorship and nomination requirements, see Approval as a temporary activities sponsor and Temporary work nominations.

A decision to refuse a Subclass 407 visa is a decision reviewable under Part 5 of the *Migration Act 1958* (Cth) (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;[22] 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.[23]

Applications for review in the former circumstances must be made by the visa applicant,[24] and in the latter the sponsor or nominator.[25]

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;[26] or

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[21] cl 407.213.
[22] s 338(2)(d) and reg 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 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 Subclass 457 visa.
[23] s 338(9) and reg 4.02(4)(o) as inserted by F2016L07143. See Subclass 457 visa for discussion of the identically worded reg 4.02(4)(l).
[24] s 347(2)(a).
[25] s 347(2)(d) and reg 4.02(5)(n) as inserted by F2016L01743.
[26] s 338(2)(d) as inserted by *Migration and Other Legislation Amendment (Enhanced integrity) Act 2018* (Cth) (No 90, 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).

- the applicant is a secondary applicant.[27]

- 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 reg 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 reg 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 reg 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.[28]

Applications for review in the former circumstances must be made by the visa applicant[29] and in the latter the person who applied to become the sponsor or who nominated the applicant.[30] For applications made in the migration zone by secondary applicants, the person with standing is 'a person to whose application the decision relates'.[31]

Class GG – Subclass 408 (Temporary Activity) visa

The Class GG (Temporary Activity) visa was introduced on 19 November 2016,[32] 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;

[27] s 338(9) and reg 4.02(4)(q) (inserted by *Migration Amendment (Enhanced Integrity) Regulations 2018* (Cth) (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 ss 338(2)(a)–(c) are met.
[28] s 338(9) and reg 4.02(4)(o) as inserted by 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. Note that a State or Territory government agency was added to this list of sponsor/nominator from 16 November 2019: reg 4.02(4AA)(g) inserted by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).
[29] s 347(2)(a).
[30] s 347(2)(d) and reg 4.02(5)(n) as amended by F2018L01707.
[31] s 338(9) and reg 4.02(5)(p) inserted by F2018L01707.
[32] Item 1237 of sch 1 to the Regulations and pt 408 of sch 2 to the Regulations as inserted by F2016L01743.

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- 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' criterion (four years),[33] and contains only one visa subclass: Subclass 408 (Temporary Activity).[34] 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;[35]
- *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;[36]
- *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;[37]
- *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;[38]
- *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;[39]
- *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;[40]
- *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

[33] cl 408.511.
[34] Item 1237(7) of sch 1 to the Regulations.
[35] cl 408.221.
[36] cl 408.222.
[37] cl 408.223.
[38] cl 408.224.
[39] cl 408.225.
[40] cl 408.226.

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the repealed Exchange stream of the Subclass 401 visa and related nomination criteria;[41]

- *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;[42]

- *Australian Government endorsed event* – this is a new visa pathway for applicants seeking to undertake work directly associated with an Australian Government endorsed event;[43]

- *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.[44]

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;[45] health insurance;[46] genuine intention to stay temporarily;[47] eligible visas;[48] adequate means of support;[49] public interest and special return criteria;[50] conduct relating to charging for migration outcomes;[51] 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).[52]

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'[53] in relation to the visa applicant.[54] 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

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[41] cl 408.227.
[42] cl 408.228.
[43] 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.
[44] cl 408.229A.
[45] cl 480.211.
[46] cl 408.212.
[47] cl 408.213.
[48] cl 408.214.
[49] cl 408.215.
[50] cls 408.216, 408.217.
[51] cl 408.218.
[52] cl 408.219.
[53] 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 was made on or before 18 May 2017.
[54] 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).

'passes the support test'[55] in relation to the applicant.[56] For information relating to the sponsorship requirements, see Approval as a temporary activities sponsor.

A decision to refuse a Subclass 408 visa is a decision reviewable under Part 5 of the Act:

- if the visa applicant made the applicant whilst in the migration zone;[57] 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* in cl 408.111,[58] 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.[59]

Applications for review in the former circumstances must be made by the visa applicant,[60] and in the latter the sponsor.[61]

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 reg 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.[62] It contains one visa subclass: Subclass 403 (Temporary Work (International Relations)). It has six streams under which the visa may be granted:

- *Government Agreement stream* – for persons entering under a bilateral agreement between Australia and another country;[63]

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[55] Defined in cl 408.111.
[56] 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).
[57] s 338(2)(d). Subclass 408 is not prescribed for the purposes of s 338(2)(d) so only ss 338(2)(a), (b) and (c) need to be satisfied.
[58] 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.
[59] s 338(9) and reg 4.02(4)(p) as inserted by F2016L01743. For decisions made on or after 13 December 2018, reg 4.02(4)(p) requires that it must be made by a person, company or partnership as referred to in reg 4.02(4AA) (as inserted by F2018L01707), which, in addition to an Australian citizen etc., includes a Commonwealth agency. Note that a State or Territory government agency was also added to this list from 16 November 2019: reg 4.02(4AA)(g) inserted by F2019L00578.
[60] s 347(2)(a).
[61] s 347(2)(d) and reg 4.02(5)(p) as inserted by F2016L01743.
[62] Item 1234 of sch 1 to the Regulations and pt 403 of sch 2 to the Regulations as inserted by SLI 2012, No 238.
[63] cl 403.22.

- *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;[64]

- *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;[65]

- *Privileges and Immunities stream* – for persons accorded privileges and immunities under either the *International Organisations (Privileges and Immunities) Act 1963* (Cth) or the *Overseas Missions (Privileges and Immunities) Act 1995* (Cth);[66]

- *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 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;[67] and

- *Pacific Labour Scheme stream* – for low and semi-skilled workers from certain Pacific Island Countries seeking to enter Australia to undertake non-seasonal work in rural and regional Australia for up to three years.[68] This stream is open to applications from 1 July 2018.[69]

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 they are seeking, as well as common criteria relating to health insurance,[70] genuine intention to stay temporarily in Australia for the purpose for which the visa is granted,[71] adequate means of support,[72] public interest and special return criteria.[73] 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;[74] 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).[75]

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;[76] or

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[64] cl 403.23.
[65] cl 403.24.
[66] cl 403.25.
[67] cl 403.26 inserted for applications made on or after 19 November 2016 by F2016L07143.
[68] Explanatory Statement to the *Migration Amendment (Pacific Labour Scheme) Regulations 2018* (Cth) (F2018L00829), p.4.
[69] cl 403.27 inserted for applications made on or after 1 July 2018 by F2018L00829.
[70] cl 403.211.
[71] cl 403.212.
[72] cl 403.213.
[73] cls 403.214, 403.215.
[74] 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.
[75] cl 403.271(b).
[76] s 338(2). Subclass 403 is not prescribed for the purposes of s 338(2)(d) so only ss 338(2)(a), (b) and (c) need to be satisfied.

- *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;[77] 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;[78] 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.[79]

If the visa applicant made the visa application while onshore the review application must be made by the visa applicant,[80] and if the visa applicant was offshore when the visa application was made then the review application must be made by the sponsor.[81]

Class GA – Subclass 400 (Temporary Work (Short Stay Specialist)) visa

The Class GA Temporary Work (Short Stay Specialist)[82] visa was introduced from 23 March 2013 and contains one visa subclass: Subclass 400.[83] It has two streams under which a visa may be granted:

- *Highly Specialised Work stream* – for persons seeking short-term entry to undertake non-ongoing highly specialised work;[84] and

- *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.[85]

Before 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.[86] This stream was repealed from 19 November 2016 and moved into the 'invited participant in an event' criterion in the Class GG – Subclass 408 (Temporary Activity) visa.

Decisions to refuse Subclass 400 visa applications are not decisions reviewable under Part 5 of the Act.

Released by the AAT on 28 February 2022

[77] s 338(5).
[78] s 338(5).
[79] s 338(2); cl 403.411(2A).
[80] s 347(2)(a).
[81] s 347(2)(b).
[82] Prior to 19 November 2016, this visa was named the Temporary Work (Short Stay Activity): amended by F2016L07143.
[83] Item 1231 of sch 1 to the Regulations and pt 400 of sch 2 to the Regulations.
[84] cl 400.22.
[85] cl 400.24.
[86] cl 400.23.

Class TZ – Subclass 417 (Working Holiday) visa

The Class TZ Working Holiday (Temporary) visa contains one visa subclass: Subclass 417 (Working Holiday).[87]

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[88] from specific countries[89] 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 three Working Holiday visas in their lifetime.[90] It is not subject to sponsorship or nomination requirements.

For more information on Subclass 417 visas, see Subclass 417 – Working Holiday visa.

Class US – Subclass 462 (Work and Holiday) visa

The Class US Work and Holiday (Temporary) visa contains one visa subclass: Subclass 462 (Work and Holiday).[91]

Subclass 462 is only available to citizens of countries with which Australia has a work and holiday arrangement.[92] It enables young people aged 18 to 31 to holiday and work in Australia for up to 12 months.[93] 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.[94] Applications for review must be made by the visa applicant while in the migration zone.[95]

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[87] Item 1225 of sch 1 to the Regulations and pt 417 of sch 2 to the Regulations.
[88] cl 417.211(2)(b).
[89] 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.
[90] On 1 July 2019, the maximum number of these visas increased from two to three: see the *Migration Amendment (Working Holiday Maker) Regulations 2019* (Cth) (F2019L00196).
[91] Item 1224A of sch 1 to the Regulations and pt 462 of sch 2 to the Regulations, inserted by SR 2002, No 230.
[92] See cls 462.211 and 462.216, and instrument in writing made under item 1224A(3)(a) of sch 1. For applicable instrument see the Register of Instruments – Miscellaneous and other visa classes.
[93] cls 462.212, 462.511.
[94] s 338(2).
[95] ss 347(2)(a), 347(3).

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.[96] Class GB was repealed on 19 November 2016 and replaced by the Class GG – Subclass 408 (Temporary Activity) visa.[97] 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,[98] 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:

- *Exchange stream* – for the entry of skilled persons under exchange arrangements giving Australian residents reciprocal opportunities to work with overseas organisations;[99]
- *Sport stream* – for the entry of sportspersons to participate in sporting activities and/or to engage in competition with Australian residents;[100]
- *Religious Worker stream* – for the entry of persons who will be full-time religious workers in Australia;[101] and
- *Domestic Worker (Executive) stream* – for the entry of persons to be employed as domestic workers for certain executives who hold temporary visas.[102]

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 they are seeking, as well as common criteria relating to eligible visas,[103] nominations,[104] adverse information,[105] conduct relating to charging for migration outcomes,[106] health insurance,[107] genuine intention to carry out the occupation or activity,[108] adequate means of support,[109] public interest and special return criteria.[110]

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[96] Item 1232 of sch 1 to the Regulations and pt 401 of sch 2 of the Regulations, as inserted by SLI 2012, No 238.
[97] F2016L01743.
[98] cl 401.511.
[99] cl 401.22.
[100] cl 401.23.
[101] cl 401.24.
[102] cl 401.25.
[103] cl 401.211.
[104] cls 401.212(1)–(3).
[105] cl 401.212(4).
[106] cl 401.212A.
[107] cl 401.213.
[108] cl 401.214.
[109] cl 401.215.
[110] cls 401.216, 401.217.

The grant of a Subclass 401 visa involves the three-stage application process involving sponsorship, nomination and an application for a visa.[111]

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;[112] *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,[113] or the applicant is a secondary applicant.[114]

Offshore visa applications

- if the visa applicant made the application while outside the migration zone, the visa applicant 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,[115] and in the latter the sponsor.[116] For applications made in the migration zone by secondary applicants, the person with standing is 'a person to whose application the decision relates'.[117]

For more information on sponsorship, nomination and visa application for Subclass 401 visas, please contact MRD Legal Services.

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 replaced by the Class GF (Training visa) and the Class GG (Temporary Activities) visa.[118] Any applications for this visa subclass made before 19 November 2016 must be considered against the relevant criteria as previously in force.

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[111] cls 401.221, 403.231, 401.241, 401.251(1)–(2).
[112] s 338(2)(d) and reg 4.02(1A)(a) as substituted by SLI 2012, No 238.
[113] 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).
[114] s 338(9) and reg 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 ss 338(2)(a)–(c) are met.
[115] s 347(2)(a).
[116] s 347(2)(b).
[117] s 338(9) and reg 4.02(5)(p) inserted by F2018L01707.
[118] F2016L01743.

Class GC contains one visa subclass: Subclass 402 (Training and Research).[119] It has three streams under which the visa may be granted:

- *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;[120]

- *Research stream* – for academics invited to participate in collaborative research in Australia by an Australian tertiary or research institution;[121]

- *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.[122]

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 they are seeking, as well as common criteria relating to eligible visas,[123] age of the visa applicant,[124] health insurance,[125] genuine intention to carry out the occupation or activity,[126] adequate means of support,[127] conduct relating to charging for migration outcomes,[128] public interest and special return criteria.[129]

The grant of a Subclass 402 involves sponsorship[130] 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.[131]

A decision to refuse a Subclass 402 visa application is a decision reviewable under Part 5 of the Act in circumstances where:

<u>For decisions made before 13 December 2018</u>

- the visa applicant made the application in relation to the Occupational stream or the Research stream while in the migration zone,[132] and at the time the review application is made the applicant 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;[133] *or*

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[119] Item 1233 of sch 1 to the Regulations and pt 402 of sch 2 to the Regulations.
[120] cl 402.22.
[121] cl 402.23.
[122] cl 402.24.
[123] cl 402.211.
[124] cl 402.212.
[125] cl 402.213.
[126] cl 402.214.
[127] cl 402.215.
[128] cl 402.231A.
[129] cls 402.216, 402.217.
[130] cls 402.221, 402.231, 402.241.
[131] 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.
[132] s 338(2).
[133] s 338(2)(d) and reg 4.02(1A)(a) as substituted by SLI 2012, No 238.

- 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).[134]

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;[135] *or*

- the applicant is a secondary applicant;[136] *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).

Applications for review in the s 338(2) related circumstances must be made by the visa applicant,[137]and in the case of s 338(5) matters, the sponsor.[138]

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'.[139]

For more information on sponsorship, nomination and visa application for Subclass 402 visas, please contact MRD Legal Services.

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 Class GG – Subclass 408 (Temporary Activity) visa.[140] Any visa applications for this visa made before 19 November 2016 must be considered against the relevant criteria as previously in force.

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[134] s 338(5) and cl 402.411.
[135] s 338(2)(d) as inserted by No 90, 2018. The final option (s 338(2)(d)(iv)) 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 (cls 402.221(b), 402.231 and 402.241).
[136] s 338(9) and reg 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 ss 338(2)(a)–(c) are met.
[137] s 347(2)(a).
[138] s 347(2)(b).
[139]s 338(9) and reg 4.02(5)(p) inserted by F2018L01707.
[140] F2016L01743.

Class GE contains one visa subclass: Subclass 420 (Temporary Work (Entertainment).[141] From 24 November 2012, the term 'Subclass 420 (Entertainment) visa' is defined in reg 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.[142]

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.[143] The main criteria primary applicants must meet relate to holding a qualifying visa,[144] nomination,[145] genuineness,[146] adequate means of support,[147] conduct relating to charging for migration outcomes,[148] health insurance,[149] public interest and special return criteria.[150]

The grant of a Subclass 420 visa involves the three-stage application process.[151]

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 applicant 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;[152] *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;[153] *or* the applicant is a secondary applicant.[154]

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).[155]

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[141] Item 1235 of sch 1 to the Regulations and pt 420 of sch 2 to the Regulations as inserted and substituted by SLI 2012, No 238.
[142] See Explanatory Statement to SLI 2012, No 238 for item [13].
[143] cl 420.21.
[144] cl 420.211.
[145] cl 420.212.
[146] cl 420.214.
[147] cl 420.215.
[148] cl 420.212A.
[149] cl 420.213.
[150] cls.420.216, 420.217.
[151] cl 420.212.
[152] s 338(2)(d) and reg 4.02(1A)(e).
[153] s 338(2)(d) as inserted by No 90, 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).
[154] s 338(9) and reg 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 ss 338(2)(a)–(c) are met.
[155] s 338(5).

Applications for review in the former circumstances must be made by the visa applicant,[156] and in the latter, the sponsor.[157] 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'.[158]

Class UW – Subclass 488 (Superyacht Crew) visa

The Class UW Superyacht Crew (Temporary) visa was introduced on 27 October 2008.[159] It was repealed from 19 November 2016 and replaced by the Class GG – Subclass 408 (Temporary Activity) visa.[160] 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).[161] 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.[162]

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.

A decision to refuse a Subclass 488 visa, where the visa application was made between 14 September 2009[163] 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.[164] The application for review must be made by the visa applicant while in the migration zone.[165]

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.[166] The application for review must be made by the visa applicant while in the migration zone.[167] Decisions made on or after 13 December 2018 relating to secondary onshore applicants are

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[156] s 347(2)(a).
[157] s 347(2)(b).
[158] s 338(9) and reg 4.02(5)(p) inserted by F2018L01707.
[159] *Migration Amendment Regulations 2008 (No 6)* (Cth) (SLI 2008, No 189).
[160] F2016L01743.
[161] Item 1227A of sch 1 to the Regulations and pt 488 of sch 2 to the Regulations inserted by SLI 2008, No 189.
[162] reg 1.03. For the relevant instrument see 'Superyacht' tab of the Register of Instruments – Business visas.
[163] For visa applications made prior to 14 September 2009, a Subclass 488 visa refusal decision will be a decision reviewable under pt 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)).
[164] s 338(2)(d) and reg 4.02(1A)(l).
[165] ss 347(2)(a), 347(3).
[166] s 338(2)(d) as amended by No 90, 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.
[167] ss 347(2)(a), 347(3).

also reviewable,[168] and the person with standing is 'a person to whose application the decision relates'.[169]

Relevant legislative amendments

Title	Reference number	Legislation bulletin
Migration Amendment Regulations 2005 (No 9) (Cth)	SLI 2005, No 240	No 05/2005
Migration Amendment Regulations 2007 (No 8) (Cth)	SLI 2007, No 272	No 10/2007
Migration Amendment Regulations 2008 (No 6) (Cth)	SLI 2008, No 189	No 06/2008
Migration Amendment Regulations 2009 (No 9) (Cth)	SLI 2009, No 202	No 13/2009
Migration Legislation Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 117	No 06/2010
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 09/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No 03/2013
Migration Amendment (Temporary Activity Visas) Regulation 2016 (Cth)	F2016L01743	No 06/2016
Migration Amendment (Pacific Labour Scheme) Regulations 2018 (Cth)	F2018L00829	-
Migration Amendment (Enhanced Integrity) Regulations 2018 (Cth)	F2018L01707	No 05/2018
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (Cth)	No 90, 2018	No 03/2018
Migration Amendment (Family Violence and Other Measures) Act 2018 (Cth)	No 162 of 2018	No 01/2019
Migration Amendment (Working Holiday Maker) Regulations 2019 (Cth)	F2019L00196	No 02/2019

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[168] s 338(9) and reg 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 ss 338(2)(a)–(c) are met.
[169] s 338(9) and reg 4.02(5)(p) inserted by F2018L01707.

Decision precedents

The following decision precedent for temporary work visa is available:

- **Subclass 408 visa refusal** – for applications made on or after 19 November 2016. It asks the user to select from 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.

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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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BUSINESS SPONSORSHIP BARS AND CANCELLATION

Overview

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development agreement – reg 2.94A

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

Contravention of law relating to licensing, registration or membership

Unapproved change to professional development program or special program

Failure to pay additional security

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

Period of bar

Relevant case law

Relevant legislative amendments

Available decision template/precedent

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Overview[1]

A person who is or was approved as a work sponsor[2] in relation to the standard business sponsor,[3] professional development sponsor,[4] temporary work sponsor,[5] or temporary activities sponsor[6] classes 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.[7] Additional action can also be taken against sponsors such as the imposition of civil penalties and the issuing of infringement notices.

The actions which can be taken against sponsors are outlined in ss 140K and 140M of the *Migration Act 1958* (Cth) (the Act). Section 140L of the Act and regs 2.88–2.94A of the *Migration Regulations 1994* (Cth) (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 regs 2.95–2.98.

While actions may also be taken against family sponsors under ss 140K and 140M, this commentary is concerned only with work sponsors.

Tribunal's jurisdiction and power

Tribunal's jurisdiction

Under Part 5 of the Act, the Tribunal has jurisdiction to review a decision under s 140M to take one or more actions to cancel a sponsor's approval or bar a sponsor from doing certain things.[8] The person whose approval has been cancelled or barred has standing to apply for review.[9]

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] The 'work sponsor' was introduced on 17 April 2019 as a type of' 'approved sponsor'. This was a technical amendment consequential to the introduction of an 'approved family sponsor' as a type of 'approved sponsor' for the purposes of certain family visas by the *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018) and *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551). An 'approved sponsor' is defined in s 5(1) as an approved work sponsor or approved family sponsor, and an 'approved work sponsor' is defined in s 5(1) as either a person approved as a work sponsor under s 140E of the Act in relation to a class of prescribed sponsor (that is, under reg 2.58, for example a standard business sponsor) or a person (other than a Minister) who is a party to a work agreement.
[3] A 'standard business sponsor' is defined in reg 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(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 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,Subclass 482 and Subclass 494 visas.
[4] A 'professional development sponsor' is defined in reg 1.03 as a person who is an approved work sponsor and is approved as a work 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.
[5] A 'temporary work sponsor' is defined in reg 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 reg 1.03.
[6] A 'temporary activities sponsor' is defined in reg 1.03 as a person who is an approved work sponsor and is approved as a work sponsor in relation to the temporary activities sponsor class by the Minister under s 140E(1) of the Act. For details see Approval as a Temporary Activities Sponsor.
[7] s 140M of the Act as amended by the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) (No 159, 2008).
[8] s 338(9); reg 4.02(4)(h).
[9] s 347(2)(d); reg 4.02(5)(g).

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

- in making the decision whether to approve the person as a standard business sponsor, the Minister did not consider the criteria in regs 2.59(d) and (e) (if the decision was made *before* 18 March 2018),[10] or reg 2.59(f) (if the decision was made *on or after* 18 March 2018);[11] or

- in making a decision whether to vary a sponsorship approval, the Minister did not consider regs 2.68(e) and (f) (if the decision was made *before* 18 March 2018),[12] or reg 2.68(g) (if the decision was made *on or after* 18 March 2018).[13]

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.[14]

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,[15] to impose civil penalties[16] and issue infringement notices.[17]

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).

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[10] reg 4.02(4B) as in force before 18 March 2018.
[11] reg 4.02(4B) as repealed and substituted by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262), which commenced on 18 March 2018.
[12] reg 4.02(4B) as in force before 18 March 2018.
[13] reg 4.02(4B) as repealed and substituted by F2018L00262, which commenced on 18 March 2018.
[14] Explanatory Statement to the *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115) at p.67. Note that in *Auservices Pty Ltd v MICMSMA* [2020] FCCA 1250, the Court considered the similar requirement in reg 4.02(4A) (relevant to decisions to refuse an approval of a standard business sponsorship) to mean that the Tribunal will have jurisdiction if the business is based in Australia, notwithstanding that the matter was determined on a discrete issue in reg 2.59 and the delegate had not directly said they had considered regs 2.59(d) and (e) (or reg 2.59(f) for post 18 March 2018 decisions) in the decision (at [59]–[63]). This interpretation would be equally applicable to the similarly worded reg 4.02(4B).
[15] s 140O.
[16] s 140Q.
[17] s 140R, which was repealed with effect from 1 June 2013: *Migration Amendment (Reform of Employer Sanctions) Act 2013* (Cth) (No 10, 2013).

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).

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 regs 2.95–2.98. It applies to a person who is or was an approved sponsor (other than a party to a work agreement).[18]

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 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);[19]
- 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;[20]
- giving written notice of the decision.[21] If the decision is to bar/cancel, the Minister must notify the person in writing of the following matters:

[18] reg 2.95(1). 'Approved sponsor' is defined in s 5(1) as an approved work sponsor or approved family sponsor, and relevantly, an 'approved work sponsor' is defined in s 5(1) as including a person approved as a work sponsor under s 140E of the Act in relation to a class of prescribed sponsor.
[19] reg 2.96.
[20] reg 2.97.
[21] reg 2.98.

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- 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.[22]

While there is no judicial authority considering these provisions, s 140N does not appear to establish the process in regs 2.95–2.98 as an essential precondition to the exercise of the power to cancel in s 140M.[23] 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.[24]

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;[25]

[22] reg 2.98(1).
[23] 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.
[24] *Zubair v MIMIA* (2004) 139 FCR 344 at [28], [32]; *Krummrey v MIMIA* (2005) 147 FCR 557 at [3]; *Alam v MIMIA* (2004) 187 FLR 120 at [42] referring to *Zubair*.
[25] If regulations are prescribed under s 140L: s 140K(1)(a)(i) for approved sponsors, and s 140K(2)(a)(i) for former approved sponsors. The regulations that are prescribed under s 140L are those in regs 2.88–2.94B.

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- cancelling the person's approval as a sponsor under s 140M (not applicable in relation to a former approved sponsor);[26]
- applying for a civil penalty order;[27]
- accepting an undertaking under s 114 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act) from the sponsor;[28]
- apply for an order under s 115 of the Regulatory Powers Act if the Minister considers that the sponsor has breached such an undertaking;[29]
- issuing an infringement notice as an alternative to proceedings for a civil penalty order;[30] and
- requiring and taking a security under s 269 of the Act, or enforcing a security already taken.[31]

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.[32] 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 failure to satisfy an applicable sponsorship 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.[33] 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

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[26] If regulations are prescribed under s 140L: s 140K(1)(a)(ii). The regulations that are prescribed under s 140L are those in regs 2.88–2.94B.
[27] s 140K(1)(a)(iii) for approved sponsors, s 140K(2)(a)(ii) for former approved sponsors: as amended by 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 reg 5.20A. See *MIAC v Sahan Enterprises Pty Ltd* (2012) 266 FLR 111.
[28] 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* (Cth) (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 (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act) was changed to s 114 by pt 4 of the *Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018* (Cth) (No 90, 2018).
[29] s 140K(1)(a)(v) for approved sponsors, s 140K(2)(a)(iv) for former approved sponsors as inserted by 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 pt 4 of No 90, 2018.
[30] 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 divs 5.4 and 5.5 of pt 5 of the Regulations.
[31] s 140K(1)(c) for approved sponsors, s 140K(2)(c) for former approved sponsors.
[32] Explanatory Statement to Migration Legislation Amendment (Worker Protection) Bill 2008 (Cth), 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.
[33] s 140K(3).

taken under s 140K in relation to an approved or former sponsor who fails to satisfy an applicable sponsorship obligation.[34] When doing so, the Minister is not required to observe any requirements of the natural justice hearing rule. Regulation 2.87D 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.[35]

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.[36] The actions that can be taken in s 140M in relation to current approved sponsors are:

- cancelling the approval of a person as a work sponsor in relation to a class to which the sponsor belongs;
- cancelling the approval of a person as a work sponsor for all classes to which the sponsor belongs;
- 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 work sponsor in relation to one or more classes prescribed by the regulations for the purpose of s 140E(2).[37]

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.

[34] s 140K(4), as inserted by pt 1 of sch 1 of No 90, 2018. These amendments apply in relation to actions taken under s 140K on or after 18 March 2015. The Explanatory Memorandum (p.4 at [8]) states the purpose of publishing information about actions taken under s 140K is to deter businesses from breaching their sponsorship obligations, and to allow Australian 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.
[35] Regulation 2.87D was inserted by the *Migration Amendment (Enhanced Integrity) Regulations 2018* (Cth) (F2018L01707).
[36] s 338(9); reg 4.02(4)(h).
[37] s 140M(1) as amended by No 162, 2018.

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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 relation to *former* approved sponsors.[38]

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 work 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 work sponsor' (and 'approved sponsor'),[39] 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.[40]

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 regs 2.88–2.94A.[41] 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;[42]
- provision of false or misleading information to Immigration or the Tribunal;[43]
- the criteria for approval as sponsor or terms of approval as varied, are no longer met;[44]

[38] s 140M(2) as amended by No 162, 2018.
[39] As defined in s 5(1) as amended by No 162, 2018 and F2019L00551.
[40] Note to reg 2.88.
[41] Previously, reg 2.94B also prescribed failure by a standard business sponsor to pay medical or hospital expenses of a sponsored person arising from treatment in a public hospital as a circumstance for sponsorship bar or cancellation. However, reg 2.94B was repealed on 18 March 2018 by F2018L00262.
[42] reg 2.89.

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- contravention of a Commonwealth, State or Territory law;[45]
- the sponsor made an unapproved change to certain programs, including professional development, special and youth exchange programs;[46]
- failure by a professional development sponsor to pay an additional security;[47] and
- failure by a special program sponsor, temporary activities sponsor[48] or professional development sponsor[49] to comply with a term or condition of a special program agreement or professional development agreement.[50]

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 – reg 2.89

Under s 140L(1)(a)(i) and reg 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,[51] subject to a series of sponsorship obligations, although not all obligations apply to all types of sponsors. The sponsorship obligations are listed in regs 2.78–2.87C and cover such matters as the obligation to:

- co-operate with inspectors;[52]
- ensure equivalent terms and conditions of employment;[53]
- pay travel costs;[54]
- pay certain costs incurred by the Commonwealth;[55]
- keep records, provide records and information to the Minister, and provide information to Immigration when certain events occur;[56]

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[43] reg 2.90.
[44] reg 2.91.
[45] reg 2.92.
[46] reg 2.93. Regulation 2.93 was amended by *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (F2016L01743) for sponsorship and variation applications made on or after 19 November 2016 to refer to temporary activities sponsors conducting programs referred to in cl 408.228(2) (youth exchange program) or cl 408.228(5) (other program).
[47] reg 2.94.
[48] Reference to 'temporary activities sponsor' was added to reg 2.94A by F2016L01743, for sponsorship applications and applications for variation of a term of approval made on or after 19 November 2016.
[49] Reference to professional development sponsors and agreements was added to reg 2.94A by *Migration Legislation Amendment Regulation 2012 (No 4)* (Cth) (SLI 2012, No 238), for applications made on or after 24 November 2012.
[50] reg 2.94A.
[51] No 159, 2008.
[52] reg 2.78.
[53] regs 2.79–2.79A.
[54] regs 2.80–2.80A.
[55] reg 2.81.
[56] regs 2.82–2.84. Regulation 2.82(3)(f) was inserted by *Migration Amendment Regulations 2013 (No 5)* (Cth) (SLI 2013, No 145) and applies in relation to a standard business sponsor on and after 1 July 2013. Regulation 2.82(3)(g) was inserted by

- secure an offer of a reasonable standard of accommodation;[57]
- ensure work or participation in nominated occupation, program or activity, or in activity in relation to which the visa was granted;[58]
- 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);[59]
- make the same or equivalent position available to Australian exchange participants;[60]
- provide training;[61] and
- not to engage in 'discriminatory recruitment practices'.[62]

These obligations are discussed in detail in Subdivision 2.19.1 - Sponsorship obligations of approved work sponsors.

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.[63]

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Migration Legislation Amendment Regulation 2013 (No 3) (Cth) (SLI 2013, No 146), in relation to a person who is or was a standard business sponsor on or after 1 July 2013.

[57] reg 2.85.

[58] regs 2.86–2.86A.

[59] reg 2.87, as amended by F2018L00262 (with effect from 18 March 2018), the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (F2018L01093) (with effect from 12 August 2018) and the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578) (with effect from 16 November 2019). These amendments ensure that the obligation is extended to cover fees and nomination training contribution charge applicable to nominations for Subclass 457, 482 and 494 visas.

[60] reg 2.87A. Note reg 2.87A was repealed from 19 November 2016 by F2016L01743.

[61] reg 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. Note reg 2.87B was repealed on 12 August 2018 by F2018L01093.

[62] reg 2.87C inserted by the *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (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 sch 13 to the Regulations. 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: reg 2.57(1). The obligation in reg 2.87C is complemented by reg 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 existed in relation to an applicant seeking a variation of terms of approval as a sponsor: reg 2.68(g)(ii) (note that reg 2.68 was repealed from 18 March 2018 by F2018L00262). 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 sch 13 to the Regulations.

The terms 'primary sponsored person' and 'secondary sponsored person' are defined in reg 2.57(1). Essentially, a 'primary sponsored person' is a person who was last identified in an 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 an 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.[64]

The objective of reg 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.[65] 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 or permanent resident,[66] 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 or permanent resident performing work in an equivalent position in the sponsored person's workplace. This will require consideration of the relevant instrument that provides the method for determining the terms and conditions of employment and the base rate of pay, or the annual earnings and the annual market salary rate, as applicable.[67] 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 investigating whether a sponsorship obligation is being, or has been, complied with.[68]

Released by the AAT on 25 February 2022

[63] reg 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 activities sponsor' are defined in reg 1.03 of the Regulations.
[64] Explanatory Statement to SLI 2009, No 115, p.13.
[65] Explanatory Statement to SLI 2009, No 115, p.50.
[66] reg 2.79.
[67] reg 2.79(3), as amended by F2018L00262, broadly provides that the primary sponsored person's terms and conditions of employment (for pre-18/3/2018 nomination) or the annual earnings (for post-18/3/2018 nomination) will be considered no less favourable if they are not less than the terms and conditions or the annual earnings that are, or would be, provided to an Australian citizen or permanent resident performing equivalent work in the same workplace at the same location. The process for determining the terms and conditions of employment or the annual market salary rate is set out in an instrument made under reg 2.72(10AA) for pre-18/3/2018 nomination and reg 2.72(17) for post-18/3/2018 nomination.
[68] The powers of an inspector include a power to require a person, by written notice, to produce a document or record to the inspector and the powers may be exercised for the purpose of investigating compliance with a sponsorship obligation: s 140X; s 140XF.

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 – reg 2.90

Under s 140L(1)(a)(ii) and reg 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[69] 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.[70]

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 information given to Immigration or the Tribunal in relation to those matters. Although it is not expressed in the terms of reg 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:

- 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.[71]

Released by the AAT on 28 February 2022

[69] Immigration is defined in reg 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: *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30).
[70] reg 2.90(1). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications made on or after 19 November 2016.
[71] See also e.g. Policy – Migration Regulations – Divisions – [Div2.11-Div2.23] Sponsorship compliance framework: circumstances to bar or cancel – 3 Procedural Instruction – 3.6 Provision of false or misleading information – 3.6.1 Circumstance which exists to bar or cancel (latest changes 19/09/2020). The Tribunal may have regard to Department policy but should always ensure that it considers the individual circumstances of the case.

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 – reg 2.91

Under s 140L(1)(a)(ii) and reg 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)[72] 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.[73]

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 reg 2.59, if the applicant was approved on the basis of reg 2.59(d),[74] as a person lawfully operating a business in Australia and trading for 12 months or more who meets the benchmarks for training of Australian citizens and 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 reg 2.59(d), not whether the sponsor could now satisfy the criterion in reg 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 – reg 2.92

Under s 140L(1)(a)(ii) and reg 2.92, the action to bar or cancel the approval as a sponsor on the basis of contravention of law applies to current or former standard business sponsors, temporary work sponsors, professional development sponsors, and temporary activities sponsors.[75]

Released by the AAT on 20 February 2022

[72] reg 2.91(1). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications lodged on or after 19 November 2016.
[73] Criteria for approval of variation of a term of approval are specified in reg 2.68 (standard business sponsor) and reg 2.68A (temporary activities sponsor). Regulation 2.68 was repealed by F2018L00262 on 18 March 2018. Prior to 19 November 2016, the criteria for variation of terms of approval for a temporary work sponsor were contained in reg 2.68A, however these applications were closed from 19 November 2016 by F2016L01743.
[74] As in force before 18 March 2018.
[75] reg 2.92(1). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications made on or after 19 November 2016.

Contravention of a Commonwealth, State or Territory Law

Under s 140L(1)(a)(ii) and reg 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.[76]

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.[77]

A 'competent authority' is defined in reg 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 reg 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 reg 2.92:

- being found guilty by a court of an offence under Commonwealth, State or Territory law;[78] and
- has, to the satisfaction of a competent authority, acted in contravention of a Commonwealth, State or Territory law.[79]

The definition of 'adverse information' also specified in reg 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 reg 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.[80] 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.

Released by the AAT on 28 February 2022

[76] s 140L(1)(a)(ii); reg 2.92(2).
[77] reg 2.92(1). The reference to 'temporary activities sponsor' was inserted by F2016L01743, for applications made on or after 19 November 2016.
[78] reg 1.13A(1)(d).
[79] reg 1.13A(1)(e).
[80] Explanatory Statement to SLI 2009, No 115, p.15.

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,[81] may also be barred, or have their sponsorship cancelled if the Minister, 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, temporary activities sponsor or temporary work sponsor and approved by the Minister.[82]

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 – reg 2.93

Under s 140L(1)(a)(ii) and reg 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[83] has made a change to that program without approval.[84]

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

Released by the AAT on 28 February 2022

[81] 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 appears to only have relevance to new applications in respect of standard business sponsors and temporary activities sponsors made on or after 19 November 2016.
[82] s 140L(1)(a)(ii) and reg 2.92(4), as amended by F2016L01743.
[83] Referred to in cl 408.228(2) or (5) of sch 2 to the Regulations.
[84] s 140L(1)(a)(ii) and reg 2.93(2), as amended by F2016L01743.

to ensure that the professional development program or special program being provided is the one that has been approved.[85]

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 – reg 2.94

Under s 140L(1)(a)(ii) and reg 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.[86]

A professional development sponsor may be requested to pay an additional security where a security previously provided has been enforced.[87] The Tribunal itself is not an authorised officer for the purposes of requesting a security under s 269.[88] 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 been paid within the relevant period.

Current or former professional development sponsors only may be barred or their sponsorship cancelled on this ground.[89]

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 – reg 2.94A

Under s 140L(1)(a)(ii) and reg 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

[85] Explanatory Statement to *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth) (SLI 2009, No 203), p.78.
[86] reg 2.94(3).
[87] Explanatory Statement to SLI 2009, No 115, p.55.
[88] 'Authorised officer' is 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.
[89] reg 2.94(1).

Released by the AAT on 28 February 2022

- the special program agreement[90] in relation to the youth exchange or other program that a temporary activities sponsor is conducting, or has conducted.[91]

A current or former special program sponsor, professional development sponsor or temporary activity sponsor that is conducting or has conducted a youth exchange program or other program for the purposes of a Subclass 408 (Temporary Activities) visa can be barred or have their sponsorship cancelled on this ground.[92]

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.

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 the sanction. For further guidance in relation to determining the length of any bar, see Period of bar below.

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 the programs do not permit exploitation of workers from overseas, include equitable remuneration arrangements and that Australian workers are not disadvantaged.[93]

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,[94] the prescribed criteria that must be taken into account are:

- the past and present conduct of the sponsor in relation to Immigration;

[90] Referred to in cl 408.228(2)(c) or (5)(c) of sch 2 to the Regulations.
[91] reg 2.94A(2).
[92] reg 2.94A(2), as amended by SLI 2012, No 238 (with effect from 24 November 2012) and F2016L01743 (with effect from 19 November 2016).
[93] Explanatory Statement to SLI 2009, No 115, p.2.
[94] s 140L(1)(a)(i); reg 2.89(2).

Released by the AAT on 25 February 2022

- 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;
- 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.[95]

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,[96] 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;

[95] reg 2.89(3).
[96] s 140L(1)(a)(ii); reg 2.90(2).

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- 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.[97]

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 or the criteria for approval of a variation of terms of sponsorship approval[98] 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;
- 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.[99]

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,[100] 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.[101]

[97] reg 2.90(3).
[98] s 140L(1)(a)(ii); reg 2.91(2).
[99] reg 2.91(3).
[100] s 140L(1)(a)(ii); reg 2.92(2).
[101] reg 2.92(3).

Released by the AAT on 28 February 2022

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 licensing, registration or membership with which they were required to comply in order to work in the approved occupation,[102] 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;
- 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;
- 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; and
- any other relevant factors.[103]

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 program, or a special program sponsor has made a change to the special program, or a temporary activities sponsor has made a change to a youth exchange or other program, without written approval from the Secretary,[104] 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.[105]

[102] s 140L(1)(a)(ii); reg 2.92(4).
[103] reg 2.92(5).
[104] s 140L(1)(a)(ii); reg 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.
[105] reg 2.93(3).

Released by the AAT on 28 February 2022

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,[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 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,[108] the criteria that must be taken into account are:

- the past and current conduct of the sponsor in relation to Immigration;
- the extent to which the sponsor has not complied with the special program agreement or professional development agreement;
- the number of occasions on which the person has failed to comply with the special program agreement or professional development agreement; and
- any other relevant factors.[109]

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.

[106] s 140L(1)(a)(ii) and reg 2.94(2).
[107] reg 2.94(4).
[108] s 140L(1)(a)(ii); reg 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 2016.

Released by the AAT on 28 February 2022

The types of bars that may be imposed are:

- barring the sponsor, for a specified period, from sponsoring more people under the terms of existing approval/s;[110] 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.[111]

The type of bar will be determined having regard to the criteria relating to the relevant circumstance (i.e. regs 2.88–2.94A) and the individual 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 policy provides 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.[112]

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

Judgment	Judgment summary
Alam v MIMIA [2004] FMCA 583; (2004) 187 FLR 120	Summary 1 Summary 2
Auservices Pty Ltd v MICMSMA [2020] FCCA 1250	Summary
Krummrey v MIMIA [2005] FCAFC 258; (2005) 147 FCR 557	Summary

[109] reg 2.94A(3).
[110] s 140M(1)(c).
[111] s 140M(1)(d). Classes of sponsor are prescribed in reg 2.58 for the purposes of s 140E(2).
[112] Policy – Migration Regulations – Divisions – [Div2.11–Div2.23] Sponsorship compliance framework: Penalties, sanctions and enforcement – 3. Procedural Instruction – 3.4 Enforcement actions – 3.4.6 Decision to bar an approved sponsor subsection 140M(1) of the Migration Act (reissued 19/09/2020).

Released by the AAT on 28 February 2022

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	Legislation Bulletin
Migration Legislation Amendment (Worker Protection) Act 2008 (Cth)	No 159, 2008	No 02/2009
Migration Amendment Regulations 2009 (No 5) (Cth) (as amended)	SLI 2009, No 115	No 11/2009
Migration Amendment Regulations 2009 (No 9) (Cth)	SLI 2009, No 202	No 13/2009
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 09/2012
Migration Amendment (Reform of Employer Sanctions) Act 2013 (Cth)	No 10, 2013	No 04/2013
Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth)	No 122, 2013	No 12/2013
Migration Amendment Regulation 2013 (No 5) (Cth)	SLI 2013, No 145	No 10/2013
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 02/2014
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523	No 01/2016
Migration Amendment (Temporary Activity Visas) Regulation 2016 (Cth)	F2016L01743	No 06/2016
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 01/2018

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Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 02/2018
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (Cth)	No 90, 2018	No 03/2018
Migration Amendment (Enhanced Integrity) Regulations 2018 (Cth)	F2018L01707	No 05/2018
Migration Amendment (Family Violence and Other Measures) Act 2018 (Cth)	No 162, 2018	No 01/2019
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 03/2019
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019

Available decision template/precedent

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

- **Sponsorship bars/cancellation (post 14 September 2009 decision and breach)** – for use in a review of a decision made after 14 September 2009 to cancel/bar an approval of a work sponsor (including standard business sponsor and temporary activities sponsor) under s 140M of the Act.

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REGULATION 5.19 – APPROVAL OF NOMINATED POSITIONS (EMPLOYER NOMINATION)

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Overview[1]

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.[2] Accordingly, it is necessary to focus on the *position* and not the attributes of the visa applicant. The separate question of 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* (Cth) (the Regulations).

The nomination scheme in reg 5.19 was originally introduced in 1994, and it was subject to significant reform in 2005,[3] 2012,[4] and on 18 March 2018.[5] The applicable version of reg 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 Transition' 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 reg 5.19 will satisfy certain criteria for the grant of an Employer Nomination (Permanent) (Class EN) Subclass 186 visa or Regional Employer Nomination (Permanent) (Class RN) Subclass 187 visa.[6] Regulation 5.19 nominations identifying Subclass 187 visas closed from 16 November 2019, except for Temporary Residence Transition stream nominations where the identified person in relation to the nominated position is a 'transitional 457 worker' or 'transitional 482 worker'

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Thuy Tien Hair Designs v MIBP* [2014] FCCA 2582 at [41]–[43]. Although this judgment considered reg 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 reg 5.19.
[3] *Migration Amendment Regulation 2005 (No 1)* (Cth) (SLI 2005, No 54).
[4] *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82).
[5] *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262).
[6] For further information about these visas, see Subclass 186 – Employer Nomination (Permanent) (Class EN) and Subclass 187 – Regional Employer Nomination (Permanent) (Class RN).

at the time of the application.[7] Subclass 187 visa applications also closed to new applications at this time except for these transitional workers.[8]

Merits review

Tribunal's jurisdiction

A decision under reg 5.19 to refuse approval of the nomination of a position is a reviewable decision under Part 5 of the *Migration Act 1958* (Cth) (the Act).[9] It is the person to whose nomination the decision relates who has standing to apply for review.[10]

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.[11]

For discussion of issues which commonly arise in relation to review applicants in this context, see 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 reg 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 reg 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 reg 5.19 are met, as this is not a direction permitted by the Regulations.[12]

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.

Released by the AAT on 25 February 2022

[7] regs 5.19(2)(aa) and 5.19(2A), as inserted by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578). A 'transitional 457 worker' is a person who held a Subclass 457 visa at any time occurring on or after 18 April 2017, and a 'transitional 482 worker' is a person who on 20 March 2019 held a Subclass 482 visa in the Medium-term stream or was an applicant for a Subclass 482 visa in the Medium-term stream that was subsequently granted: reg 1.03 as amended by F2019L00578 and the *Home Affairs Legislation Amendment (2019 Measures No 1) Regulations 2019* (Cth) (F2019L01423). For further details see Legislation Bulletin No 4/2019.
[8] Items 1114C(3)(aa) and 1114C(3A) of sch 1 to the Regulations, as inserted by F2019L00578.
[9] s 338(9) and reg 4.02(4)(e), as amended by SLI 2012, No 82.
[10] s 347(2)(d) and reg 4.02(5)(d).
[11] reg 4.12. See also *Thuy Tien Hair Designs v MIBP* [2014] FCCA 2582.
[12] 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 reg 5.19 is so permitted.

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.

If the applicable requirements are met, then the nomination must be approved, and if not, it must be refused.[13]

Application requirements

The application requirements for a nomination application are set out in reg 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.[14] If the nomination identifies a Subclass 187 visa, it must be made before 16 November 2019, unless it is in the Temporary Residence Transition stream and the identified person in relation to the nominated position is a 'transitional 457 worker' or 'transitional 482 worker' at the time of the application.[15] A 'transitional 457 worker' is a person who held a Subclass 457 visa at any time occurring on or after 18 April 2017,[16] and a 'transitional 482 worker' is a person who on 20 March 2019 held a Subclass 482 visa in the Medium-term stream or was an applicant for a Subclass 482 visa in the Medium-term stream that was subsequently granted.[17] Other nominations (i.e. Direct Entry stream nominations or Temporary Residence Transition streams which did not relate to nominees who are transitional 457 or 482 workers on 16 November 2019), where the person identified in the nomination did not apply for a Subclass 187 visa before 16 November 2019, were deemed to be withdrawn on 16 November 2019 if the Minister did not approve nor refuse to approve the nomination before 15 November 2019 and the nomination was not withdrawn on or before 15 November 2019.[18]

The nomination is only assessed against the stream that has been selected.[19]

The application must 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

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[13] reg 5.19(3).
[14] reg 5.19(2)(e).
[15] regs 5.19(2)(aa) and 5.19(2A), as inserted by items 54 and 55 of sch 2 to F2019L00578. This reflects the closure of the Subclass 187 visa from 16 November 2019, with the exception of applicants who are either a 'transitional 457 worker' or a 'transitional 482 worker'.
[16] reg 1.03, as inserted by item 1 of sch 2 to F2019L00578 and amended by item 1 of pt 1, sch 3 to F2019L01423.
[17] reg 1.03, as inserted by item 1 of sch 2 to F2019L00578.
[18] Clause 8101 of sch 13 to the Regulations, as inserted by item 76 of sch 2 to F2019L00578.
[19] Item 129, Attachment C of Explanatory Statement to F2018L00262.

contravention of s 245AR(1).[20] This certification must be provided at the time of making the application, and not at a later time.[21]

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* (Cth)) for the nomination.[22] 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 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 reg 5.19.[23] 'Nomination training contribution charge' is defined in s 5(1) of the Act as charge imposed by s 7 of the *Migration (Skilling Australians Fund) Charges Act 2018* (Cth), which imposes the charge payable under s 140ZM. The *Migration (Skilling Australians Fund) Charges Regulations 2018* (Cth) prescribes the charge applicable as $3,000 for annual turnovers of less than $10 million, or otherwise $5,000. 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 reg 5.19(2);[24]
- **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;[25]
- **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 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;[26]
- **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

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[20] 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 Subclass 186 and Subclass 187 visas are defined as 'sponsored visas' under s 245AQ of the Act and reg 5.19M of the Regulations.
[21] *Eugene Cho Pty Ltd v MICMSMA* [2021] FCCA 2020 at [59]-[65]. In this case, the Court held that the pre 18 March 2018 version of this criterion (reg 5.19(2)(aa)) was a time of application criterion, and held that the word 'include' was narrower in scope than the words 'accompanied by'.
[22] regs 5.19(2)(fa)–(fb).
[23] Section 140ZM was inserted by the *Migration Amendment (Skilling Australians Fund) Act 2018* (Cth) (No 38, 2018) for nominations made on or after 12 August 2018: see item 16(3) of sch 1.
[24] reg 5.19(4)(a).
[25] reg 5.19(4)(b).
[26] reg 5.19(4)(c). This is a new requirement applying to nomination applications made on or after 18 March 2018.

operates a business and employs employees in the business, in relation to employment;[27]

- **payment of debts** (post 12 August 2018 nominations only) – any debt due by the nominator mentioned in s 140ZO has been paid in full.[28] 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 reg 5.19(5) for the Temporary Residence Transition stream, the requirements in reg 5.19(9) for the Direct Entry stream, or the requirements in reg 5.19(14) for the Labour Agreement stream.[29]

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 reg 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 reg 5.19(5)(a)(iii));[30] 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;[31]
- **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;[32]
  - an occupation specified in an instrument made under reg 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 reg 5.19(8) exempts the identified person;[33]

[27] reg 5.19(4)(d).
[28] reg 5.19(2)(da), inserted by the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (F2018L01093).
[29] regs 5.19(4)(e)–(g).
[30] 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.
[31] See reg 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 reg 5.19(5)(a)(iii), i.e. Subclass 457 holders or applicants as at 18 April 2017.
[32] reg 5.19(5)(b).
[33] reg 5.19(5)(c). See the 'Occ186/407/457&Noms' or 'Occ187' tab of the Register of Instruments - Business Visas for the relevant instrument.

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- **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;[34]
- **employment of Subclass 457 or 482 visa holder and time period for which visa has been held (not including specified persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 that was subsequently granted)[35]** – during 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 or a Subclass 482 visa in the Medium-term stream for a total period of at least 3 years;[36]
  - 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 reg 5.19(5)(g) applies, and subject to COVID-19 concessions where applicable;[37]
  - if reg 5.19(5)(g) applies, i.e. the visas were granted in relation to an occupation specified in an instrument under reg 2.72(13), the identified person was employed in the occupation for a total of at least 3 years (not including unpaid leave periods), subject to COVID-19 concessions where applicable;[38]
- **employment of Subclass 457 or 482 visa holder and time period for which visa has been held for specified persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 that was subsequently granted[39]** – during the 3 years immediately before the application was made:
  - the identified person held one or more Subclass 482 visa in the Short-term stream, for at least 2 years;[40]
  - 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 reg 5.19(5)(g) applies, and subject to COVID-19 concessions where applicable;[41]
  - if reg 5.19(5)(g) applies, i.e. the visas were granted in relation to an occupation specified in an instrument under reg 2.72(13), the identified

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[34] reg 5.19(5)(d).
[35] 'Specified person' is defined in ss 4 and 6 of IMMI 18/052. Under reg 5.19(6), these persons are specified for regs 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.
[36] reg 5.19(5)(e).
[37] reg 5.19(5)(f).
[38] reg 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.
[39] See IMMI 18/052, made under reg 5.19(6). 'Specified person' is defined in ss 4 and 6 of IMMI 18/052. The qualifying period for these specified persons (2 years out of the previous 3) reflects the Temporary Residence Transition stream arrangements before 18 March 2018.
[40] reg 5.19(5)(e) and s 7 of IMMI 18/052.
[41] reg 5.19(5)(f) and s 7 of IMMI 18/052.

person was employed in the occupation for a total of at least 2 years (not including unpaid leave periods), subject to COVID-19 concessions where applicable;[42]

- ***for applications made on or after 1 February 2020 but not finally determined before 24 November 2020 or applications made on or after 24 November 2020,*** **employment of Subclass 457 or 482 visa holder affected by the COVID-19 work disruptions** – in the 4 years (or 3 years for a specified person[43]) immediately before the application was made:
  - if during the 'concession period' (within the meaning given by reg 1.15N(1))[44] the identified person's employment was not on a full-time basis but would have been were it not for COVID-19 or the person was on unpaid leave due to COVID-19, the 'total period of at least 3 years' (or 2 years for a specified person) for which the person must be employed for the purposes of reg 5.19(5)(f) is to be applied as 3 (or 2) years less the total length of the 'coronavirus reduced work periods' in relation to the person;[45]
  - if reg 5.19(5)(g) applies and the identified person was on unpaid leave from the employment of the occupation during the concession period due to COVID-19, the 'total period of at least 3 years' (or 2 years for a specified person) for which the person must be employed for the purposes of reg 5.19(5)(g) is to be applied as 3 (or 2) years less the total length of the 'coronavirus unpaid leave period' in relation to the person;[46]
- **nominator's requirements** – the nominator:[47]
  - was the standard business sponsor who last identified the identified person in an approved nomination; and
  - 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

[42] reg 5.19(5)(g) and s 7 of IMMI 18/052. See the 'ExemptOccs' tab of the Register of Instruments - Business Visas for the relevant instrument made under reg 2.72(13). 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.
[43] 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: ss 4 and 6 of IMMI 18/052 (see the 'TransitionalTRT' tab of the Register of Instruments - Business Visas for the relevant instrument).
[44] 'concession period' means the concession period mentioned in reg 1.15N(1) (s 4 of IMMI 18/052, inserted by LIN 20/190) which is a period that commenced on 1 February 2020 and ending on a date specified by the Minister in a legislative instrument. Regulation 1.15N was inserted by *Migration Amendment (COVID-19 Concessions) Regulations 2020* (Cth) (F2020L01181).
[45] s 7A of IMMI 18/052 (inserted by LIN 20/190): see the 'TransitionalTRT' tab of the Register of Instruments - Business Visas for these instruments. 'Coronavirus reduced work periods' is a period occurring during the concession period and the period of 4 years (or 3 years for a specified person) immediately before the nomination application is made, throughout which the person was employed in the position in relation to which their 457 or 482 visa(s) were granted and that employment was not on a full-time basis but would have been were it not for COVID-19 or the person was on unpaid leave from that employment due to COVID-19: s 7A(3) of IMMI 18/052, inserted by LIN 20/190.
[46] s 7B of IMMI 18/052 (inserted by LIN 20/190): see the 'TransitionalTRT' tab of the Register of Instruments - Business Visas for these instruments. 'Coronavirus unpaid leave period' is a period occurring during the concession period and the period of 4 years (or 3 years for a specified person) immediately before the nomination application is made, throughout which the person was employed in the occupation in relation to which their 457 or 482 visa(s) were granted and the person was on unpaid leave from that employment due to COVID-19: s 7B(3) of IMMI 18/052, inserted by LIN 20/190.
[47] reg 5.19(5)(h).

Released by the AAT on 25 February 2022

with sponsorship obligations relating to training as a standard business sponsor, unless it is reasonable to disregard those requirements;[48]

- **genuine need** – unless the occupation is exempt,[49] 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 (unless the occupation is exempt)[51] and the terms and conditions will not expressly exclude the possibility of extending the employment;[52]
  - 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;[53]
  - the nominator has provided information required by the Minister for the purposes of the requirements in regs 5.19(5)(k)–(n) i.e. each of the above two requirements, as well as the genuine need for the position;[54]
  - 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;[55] and
  - the requirements in reg 2.72(15) are met.[56] 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),[57] including that the annual market salary rate is not less than the temporary skilled migration income threshold.

Disposed by the AAT on 28 February 2022

[48] reg 5.19(5)(i). This requirement was repealed for nominations made on or after 12 August 2018 by F2018L01093. Clause 7602(6) inserted by item 43 of sch 1 of F2018L01093 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 reg 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 reg 5.19(5)(i) must be assessed against, due to the criteria under regs 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.

[49] reg 5.19(7) provides this does not apply if the occupation is specified in an instrument under reg 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.

[50] regs 5.19(5)(j), (k).

[51] reg 5.19(7) provides this does not apply if the occupation is specified in an instrument under reg 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.

[52] regs 5.19(5)(l), (m).

[53] reg 5.19(5)(n).

[54] reg 5.19(5)(q).

[55] reg 5.19(5)(p).

[56] reg 5.19(5)(o).

[57] 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. In addition to the general requirements in reg 5.19(4), all nominations in this stream must meet the requirements in reg 5.19(9). Those which are nominations for Subclass 186 visas must also meet reg 5.19(10), while those which are nominations for Subclass 187 visas must also meet reg 5.19(12).

The reg 5.19(9) requirements are:

- **actively and lawfully operating** – the nominator's business must be both actively and lawfully operating in Australia;[58]
- **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,[59]
- **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,[60]
- **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;[61]
  - 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;[62]
  - 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;[63]
  - the requirements in reg 2.72(15) are met.[64] 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),[65] including that the annual market salary rate is not less than the temporary skilled migration income threshold; and

[58] reg 5.19(9)(a).
[59] reg 5.19(9)(b).
[60] regs 5.19(9)(c)–(d).
[61] regs 5.19(9)(e)–(f).
[62] regs 5.19(9)(g)–(h).
[63] reg 5.19(9)(i).
[64] reg 5.19(5)(o).
[65] See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instrument.

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- the requirements relating to the occupation set out in reg 5.19(10) or reg 5.19(12) are met.[66]

Nominations which relate to a Subclass 186 visa must also meet reg 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 reg 5.19(11) and in force at the time the application is made, and the occupation applies to the identified person in accordance with the instrument;[67] and
- **training requirements (for pre 12 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.[68]

Nominations which relate to a Subclass 187 visa must meet reg 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.[69] Regional Australia is a part of Australia specified in a legislative instrument;[70]
- **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 reg 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;[71]
- **advice 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 advised the Minister relating to a number of matters.[72]

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.[73] Nominations in relation to a Subclass 186 visa in the Labour Agreement Stream

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[66] reg 5.19(9)(j).
[67] regs 5.19(10)(a)–(b). See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business Visas for the relevant instrument.
[68] reg 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 sch 1 of these regulations preserved the need to comply with them for nominations made before this time.
[69] regs 5.19(12)(a)–(c).
[70] reg 5.19(16). See the 'RegAustpost180318' and 'RegAustpost161119' tabs of the Register of Instruments - Business Visas for the relevant instrument.
[71] regs 5.19(12)(d)–(e). See the 'Occ187' tab of the Register of Instruments - Business Visas for the relevant instrument.
[72] reg 5.19(12)(f).
[73] Explanatory Statement to F2018L00262, p.1.

must, in addition to meeting the requirements in reg 5.19(4), meet a number of requirements in reg 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[74] and must be accompanied by the relevant fee.[75] 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 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.[76]

Temporary Residence Transition nomination stream – reg 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.[77] The employment must be with the nominator's businesses unless the Subclass 457 visa was granted under special provisions which allowed the holder to work as an independent contractor.[78] 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 reg 5.19(3).[79]

These requirements are:

- **form, fee and declaration** – the nomination is made using the approved form and accompanied by the prescribed fee,[80] 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.[81] This certification must be provided at the time of making the application, and not at a later time;[82]

[74] The approved form is Form 1395, see reg 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.
[75] The fee is set out in reg 5.37. See reg 5.19(2)(b) inserted by SLI 2012, No 82.
[76] reg 5.19(5) inserted by SLI 2012, No 82.
[77] See the Explanatory Statement to SLI 2012, No 82 at p.30 and the Explanatory Statement to SLI 2013, No 146 at p.20.
[78] See the Explanatory Statement to SLI 2012, No 82 at p.30.
[79] Inserted by SLI 2012, No 82.
[80] regs 5.19(3)(a)(i), 5.19(2)(a)–(b). These requirements must be satisfied at the time of application: *Eugene Cho Pty Ltd v MICMSMA* [2021] FCCA 2020 at [29] and [51]-[52].
[81] regs 5.19(3)(a)(i), 5.19(2)(aa), inserted by *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* (Cth) (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 Subclass 186 and Subclass 187 visas are defined as 'sponsored visas' under s 245AQ of the Act and reg 5.19M of the Regulations.
[82] *Eugene Cho Pty Ltd v MICMSMA* [2021] FCCA 2020 at [59]-[65]. The Court held that this criterion was a time of application criterion and held that the word 'include' was narrower in scope than the words 'accompanied by'.

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- **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);[83]
- **nominator's requirements** – the nominator:
  - is, or was, the standard business sponsor who last nominated the Subclass 457 visa holder in a nomination;[84]
  - is actively and lawfully operating a business in Australia (see discussion below);[85] 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;[86]
- **employment of Subclass 457 visa holder** – either:
  - 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;[87] 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;[88] 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;[89]

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

[83] regs 5.19(3)(a)(ii)–(iii).
[84] reg 5.19(3)(b)(i). This must be in a nomination that was made under s 140GB of the Act, or reg 1.20G or 1.20GA as in force immediately before 14 September 2009, see reg 5.19(3)(b)(i) as inserted by SLI 2012, No 82.
[85] reg 5.19(3)(b)(ii).
[86] reg 5.19(3)(b)(iii) as inserted by *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146). Regulation 5.19(3)(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 reg 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 p.68).
[87] regs 5.19(3)(c)(i)(A)–(B). This does not include any period of unpaid leave.
[88] reg 5.19(3)(c)(i)(A)(I), inserted by *Migration Legislation Amendment Regulation 2012 (No 5)* (Cth) (SLI 2012, No 256).
[89] reg 5.19(3)(d) applies to an applicant to whom reg 5.19(3)(c)(i) applies, inserted by SLI 2012, No 82.

Released by DHA on 28 February 2022

been employed in that occupation for a total of at least two years in the three years immediately before the nominator made the application;[90]

- **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;[91]
- **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;[92]
- **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);[93]
- **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);[94]
- **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.[95]

Direct Entry nomination stream – reg 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.[96] 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

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[90] regs 5.19(3)(c)(ii)(A), (B), (C). See the 'Occ-Ex' tab of the Register of Instruments - Business Visas for the relevant instrument.
[91] reg 5.19(3)(e).
[92] reg 5.19(3)(f). Note however that for nominators whose most recent standard business sponsorship under reg 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 reg 5.19(3)(f) must be assessed against, due to the criteria in regs 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.
[93] reg 5.19(3)(g). For the purpose of this provision the terms 'adverse information' and 'associated with' are defined in regs 1.13A and 1.13B (previously regs 2.57(3) and 2.57(2)). See also Regulations 2.72 and 2.73 - Nomination and Approval of an Occupation for Subclass 457 and Subclass 482 for further discussion on no adverse information requirement.
[94] reg 5.19(3)(h).
[95] regs 5.19(3)(a)(iv), 5.19(3)(i), inserted by *Migration Legislation Amendment (2017 Measures No 3) Regulations 2017* (Cth) (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 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.
[96] See the Explanatory Statement to SLI 2012, No 82 at p.30.

an Australian living in the same local area.[97] The requirements for approval in the Direct Entry nomination stream are set out in reg 5.19(4).[98] It requires:

- **form and fee** – the nomination is made using the approved form and accompanied by the prescribed fee;[99] 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.[100] This certification must be provided at the time of making the application, and not at a later time;[101]
- **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);[102]
- **actively and lawfully operating** – the nominator is actively and lawfully operating a business in Australia and directly operates the business (see discussion below);[103]
- **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;[104]
- **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;[105]
- **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;[106]
- **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);[107]

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[97] See the Explanatory Statement to SLI 2012, No 82 at p.30.
[98] As inserted by SLI 2012, No 82.
[99] regs 5.19(4)(a)(i), 5.19(2)(a)–(b). These requirements must be satisfied at the time of application: *Eugene Cho Pty Ltd v MICMSMA* [2021] FCCA 2020 at [29] and [51]-[52].
[100] regs 5.19(4)(a)(i), 5.19(2)(aa), inserted by 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 Subclass 186 and Subclass 187 visas are defined as 'sponsored visas' under s 245AQ of the Act and reg 5.19M of the Regulations.
[101] *Eugene Cho Pty Ltd v MICMSMA* [2021] FCCA 2020 at [59]-[65]. The Court held that this criterion was a time of application criterion and held that the word 'include' was narrower in scope than the words 'accompanied by'.
[102] reg 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 reg 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.
[103] reg 5.19(4)(b).
[104] reg 5.19(4)(c).
[105] reg 5.19(4)(d).
[106] reg 5.19(4)(e).
[107] reg 5.19(4)(f).

- **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);[108]
- **tasks, training requirements, location and position** – either:
  - *for non-regional applicants*:[109]
    - » the tasks to be performed will be performed in Australia, correspond to those of an occupation specified in the relevant instrument,[110] and the occupation is applicable to the nominee in accordance with the specification of the occupation;[111] 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;[112] 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 reg 5.19(4)(a)(ii)) as a paid employee, to work in the position under the nominator's direct control;[113]

  or

  - *for regional applicants*[114] 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;[115]

[108] reg 5.19(4)(g).
[109] Although regs 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 reg 5.37(3) will be able to satisfy reg 5.19(4)(h)(i) and only applications in respect of positions located in regional Australia will be able to satisfy reg 5.19(4)(h)(ii). For further discussion, see 'Direct Entry nomination (pre 18 March 2018)' below. Note that, as a result of an apparent drafting oversight, reg 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 regs 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 reg 5.19(4)(h)(i) should be read as requiring nomination applications lodged before 1 July 2017 to satisfy 'all' of the criteria in regs 5.19(4)(h)(i)(A), (AAA) and (B) in order to meet this first alternative, by operation of the common law 'slip rule'.
[110] reg 5.19(4)(h)(i)(A). For the relevant instrument specified for the purpose of reg 5.19(4)(h)(i)(A), see the 'Occ186/407/457&Noms' tab in the Register of Instruments - Business Visas.
[111] reg 5.19(4)(h)(i)(AAA), inserted by the *Migration Amendment (Specification of Occupation) Regulations 2017* (Cth) (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 reg 5.19(4A), also inserted by F2017L00818.
[112] reg 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.
[113] reg 5.19(4)(h)(i)(AA), inserted by F2017L00816 for applications for approval of nominations made on or after 1 July 2017.
[114] Although regs 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 reg 5.37(3) will be able to satisfy reg 5.19(4)(h)(i) and only applications in respect of positions located in regional Australia will be able to satisfy reg 5.19(4)(h)(ii). For further discussion, see 'Direct Entry nomination (pre 18 March 2018)' below.
[115] regs 5.19(4)(h)(ii)(A) and (E). 'Regional Australia' is defined to mean a part of Australia specified in an instrument: reg 5.19(7). For the relevant instrument, see the 'RegAustpost010712' tab in the Register of Instruments - Business Visas.

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- 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;[116]
- the position cannot be filled by an Australian citizen or permanent resident living in the same local area;[117]
- 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),[118] 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;[119] and
- a specified Regional Certifying Body located in the same State or Territory as the position has advised 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
  - the position cannot be filled by an Australian citizen or permanent resident living in the same area.[120]

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[116] reg 5.19(4)(h)(ii)(B), amended by F2017L00816 for nomination applications made on or after 1 July 2017. This requirement, along with an amendment to reg 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.
[117] reg 5.19(4)(h)(ii)(C).
[118] reg 5.19(4)(h)(ii)(D). Note that for nominations made prior to 1 July 2015, reg 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 reg 5.19(4)(h)(ii)(D) will have no effect in these cases.
[119] reg 5.19(4)(h)(ii)(D) as amended by *Migration Legislation Amendment (2015 Measures No 2) Regulation 2015* (Cth) (SLI 2015, No 103) and applying to applications for approval of a nomination made on or after 1 July 2015 (see the transitional provision under cl 4302 of sch 13, inserted by SLI 2015, No 103). For the instrument specifying relevant occupations see the 'ExmtSkillsAgeEng186&187' tab in the Register of Instruments - Business Visas. Regulation 5.19(4)(h)(ii)(DA) was added by F2017L00818. It, read together with reg 5.19(4A), requires the occupation to be performed in the position to also meet any additional specifications made in the relevant instrument. The specifications could be, for example, related to the circumstances in which the occupation is undertaken. There were no transitional arrangements included in F2017L00818, 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 in pre-1/7/2015 version of reg 5.19(4)(h)(ii)(D) was for the occupation to be of a particular skill level as specified in ANZSCO, rather than an instrument, and did not provide for any specification of occupations.
[120] reg 5.19(4)(h)(ii)(F). For the instrument specifying relevant bodies see the 'RegAustpost010712' tab in the Register of Instruments - Business Visas.

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 a genuine need for the position.[121] 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 reg 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.[122]

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 reg 5.19(4)(h)(i) or reg 5.19(4)(h)(ii), again relating to whether the position is in regional Australia.[123] 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 reg 5.37', as required by reg 5.19(2). For example, where a nomination in the Direct Entry stream is made initially on the basis reg 5.19(4)(h)(ii) is met, for which no fee is payable, if it is found instead that the terms of reg 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 reg 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.[124]

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

[121] reg 5.19(4)(h)(ii)(B) before 18 March 2018, regs 5.19(3)(i) and 5.19(4)(h)(i)(AA) after 1 July 2017 and before 18 March 2018, and regs 5.19(5)(k) and (9)(d) after 18 March 2018.
[122] Contrast, for example, with the requirements for a nomination made on or after 18 March 2018 which expressly rule out the ability to change streams after lodgement (see discussion below).
[123] reg 5.37.
[124] 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 reg 5.19(3) when it was more likely that the requirements of reg 5.19(4) would have been met, or vice versa: reg 2.12F(3B) inserted by F2017L00816.

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Minister, or the Tribunal on review, must refuse a nomination if neither set of stream requirements are met.[125]

Nominations made on or after 18 March 2018

For these nominations, reg 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.[126] 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.[127]

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 regs 5.19(3) and (4), is fixed to the position specified in the application made under reg 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.[128]

At a broad level, reg 5.19(1) provides that a nominator may apply for approval of the nomination of 'a' position. Each other relevant subregulation in regs 5.19(2) and (3) refers to 'the' position. This suggests that the position is the one 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 of the same position. In addition, for regional Direct Entry stream applicants, it is difficult to reconcile the presence of a criterion requiring a regional certifying body to advise the Minister of a number of matters relevant to the position (reg 5.19(4)(h)(ii)(F)) if this position could be changed. In *Harinsco Pty Ltd v MICMSMA*, the Court agreed with this analysis in the Tribunal's reasons and held that a nominated position in relation to a regional nomination is fixed to the position nominated at the time of application.[129] 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 reg 5.19 (items 1114B(3)(d) and 1114C(3)(d) of Schedule 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).

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[125] reg 5.19(5), inserted by SLI 2012, No 82.
[126] reg 5.19(2)(e).
[127] Item 129, Attachment C of Explanatory Statement to F2018L00262.
[128] *Singh v MIBP* [2017] FCAFC 105 at [7]. The Court in *obiter* at [88]–[90] further commented that in the context of a reg 5.19 nomination, the position referred to 'a particular job with a particular employer that exists at a particular point in time, and in a particular set of factual circumstances' where the relevant point in time is the 'point at which the employer nomination is submitted for approval under reg 5.19(1)'.
[129] *Harinsco Pty Ltd v MICMSMA* [2021] FCCA 528, the Court at [14] held that as the position the subject of the nomination application was geographically specific and the certification by the regional certifying body was in respect of that specific location, a nominated position is fixed to the position nominated at the time of application in relation to regional nominations.

While there have been a number of structural changes to reg 5.19 following the 18 March 2018 amendments, reg 5.19(1) remains unchanged. Similarly, the application requirements in reg 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 are 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.

Identification of need for an employee

For nominations in the Direct Entry Stream made on or after 1 July 2017 and before 18 March 2018, reg 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'.[130] Similarly, for nominations in the Temporary Residence Transition stream made on or after 1 July 2017 and before 18 March 2018, reg 5.19(3)(a)(iv) requires 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'.[131] This means, the employer nomination must identify a specific person, the nominee, to work in the nominated position and not just 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.[132] Similar requirements continue to apply to nominations made on or after 18 March 2018 in both the Temporary Residence Transition and Direct Entry steams,[133] subject to an exception for the former.[134]

For Direct Entry nominations made before 1 July 2017, reg 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. A dictionary definition of the word 'identify', for example, means 'to recognise or establish as being a particular person or thing; attest or prove to be as claimed or asserted.'[135] This view, which is

[130] Inserted by F2017L00816 and applying to an application for a nomination made after commencement (1 July 2017).
[131] Inserted by F2017L00816 and applying to an application for a nomination made after commencement (1 July 2017). 'The person' in this context refers to the person referred to in reg 5.19(3)(a)(ii), the nominee named in the nomination application, who holds a Subclass 457 visa granted on the basis of a standard business sponsorship.
[132] reg 5.19(3)(i) (for Temporary Residence Transition stream), reg 5.19(4)(h)(i)(AA) (for non-regional positions in Direct Entry stream) and reg 5.19(4)(h)(ii)(B) (for regional positions in Direct Entry stream), as inserted and amended by F2017L00816 and applying to an application for a nomination made after commencement (1 July 2017).
[133] regs 5.19(9)(c) and 5.19(9)(d), inserted by F2018L00262 and applying to an application for a nomination made on or after 18 March 2018.
[134] reg 5.19(7) provides this does not apply if the occupation is specified in an instrument under reg 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.
[135] *Macquarie Dictionary* (online at 30 March 2021) 'identify'.

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consistent with Departmental policy,[136] means that 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.[137] An alternative argument, however, is that reg 5.19(4)(a) as a whole is directed towards requirements for the application form/process of a more administrative nature. On this view, reg 5.19(4)(a)(ii) could be met by a simple statement or certification of need. There is some support for this view in the contrast between reg 5.19(4)(a)(ii) and, for example, reg 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 reg 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 reg 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 reg 5.19(4)(h)(ii)(B) (if applicable)[138] or reg 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 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.[139] 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

For nominations made before 18 March 2018, there is a requirement for applications under both the Direct Entry[140] and Temporary Residence Transition streams[141] that the person/visa holder 'will be employed on a full-time basis in the position for at least two years'. 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

[136] 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).
[137] In *Bharaj Construction Pty Ltd v MIBP* [2016] FCCA 902, 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 reg 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 regs 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.
[138] Note that for post 1 July 2017 nominations, an equivalent requirement has also been inserted into the non-regional criteria, at reg 5.19(4)(h)(i)(AA).
[139] Departmental policy states that, based on regs 5.19(4)(a)(ii) and 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) – Regulation 5.19 > 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 18/11/17). As reg 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.
[140] reg 5.19(4)(d)(i).
[141] reg 5.19(3)(d)(i).

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financial resources to meet the wages costs for the proposed employment over the relevant period.[142]

This requirement continues to apply to nominations made on or after 18 March 2018.[143] 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.[144] 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: reg 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, regs 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
- 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.[145]

Whether the application for approval identifies a relevant visa holder and 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 applications made on or after 1 July 2017, there is an additional requirement in reg 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.[146] 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

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[142] See for example *MIBP v Jayshree Enterprises Pty Ltd* [2017] FCA 264 where the Court found no error in the Tribunal's assessment of the appellant's financial circumstances. Also in *Pexbury Pty Ltd v MICMSMA* [2020] FCCA 3074 the Court rejected the applicant's claim, said to be based on 'a well-established principle of economics', that the Tribunal erred by failing to take into account the positive impact on revenue that arises from employing the nominee in the business, on the basis that there was no expert evidence put before the Tribunal which would have enabled it to consider any such submission which in the Court's view was speculative in nature (at [5(d)]).
[143] reg 5.19(5)(l) for Temporary Residence Transition stream and reg 5.19(9)(e) for Direct Entry stream.
[144] regs 5.19(5)(n), (9)(g).
[145] '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 reg 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.
[146] Inserted by F2017L00816.

order to satisfy new reg 5.19(3)(i),[147] 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, reg 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);[148]
- a Subclass 482 visa in the Medium term stream,[149] or the Short term stream where the person is specified in a legislative instrument;[150] or
- in limited circumstances, a bridging visa.[151]

The occupation must be listed in ANZSCO[152] 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.[153] The occupation must also be specified in an instrument made under reg 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.[154]

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'[155] and 'identify an occupation' in relation to the identified position.[156] 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 reg 5.19(3)(a) and the application requirements in reg 5.19(2),[157] 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,[158] 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 reg 5.19(3)(a) which expressly prevents the visa holder or

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[147] 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.
[148] reg 5.19(5)(a)(i).
[149] reg 5.19(5)(a)(ii).
[150] reg 5.19(5)(a)(iii).
[151] regs 5.19(5)(a)(iv)–(vi).
[152] reg 5.19(5)(b)(i).
[153] reg 5.19(5)(b)(ii).
[154] reg 5.19(5)(c). See the 'Occ186/407/457&Noms' or '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.
[155] reg 5.19(2)(c).
[156] reg 5.19(2)(d).
[157] Regulation 5.19(3)(a)(i) links the 'application for approval' in regs 5.19(3)(a)(ii) & (iii) with the application referred to in reg 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 reg 5.19(3)(a).
[158] Clauses 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 item 1114B/C(3)(d) of sch 1 was made in the application for the grant of the visa.

occupation being changed during the processing of the nomination application, provided that the other requirements of reg 5.19(3) are met.[159]

For nomination applications made on or after 1 July 2017 the position is less clear, as from that date onwards reg 5.19(3)(a)(iv) requires an application to identify a need to employ *a specific* person in the position.[160]

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, reg 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, reg 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 reg 5.19(3)(a)(iii)(B) is not simply a process of matching the occupation unit group codes between the occupation identified in the reg 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 reg 5.19 against the occupation that was *actually* carried out by the Subclass 457 holder,[161] regardless of whether it was 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,[162] 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.

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[159] 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 27/07/17); and Policy - Migration Regulations – Divisions – Div 5.3 – General > Approval of nominated positions (employer nomination) – Regulation 5.19 > 8. Part B - Criteria applicable to Temporary Residence Transition stream nominations – 8.1.4 The nomination identifies an occupation (reissued 18/11/17).
[160] reg 5.19(3)(a)(iv) inserted by F2017L00816.
[161] *Nauru Air Corporation v MIBP* [2016] FCCA 13 at [35].
[162] The Court in *Nauru Air Corporation* did not consider the relationship between the reg 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.

Identification of occupation – Direct Entry stream (non-regional)

Nominations made before 18 March 2018

For nominations in the Direct Entry stream which do not relate to employment in regional Australia, reg 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. This requires a qualitative analysis taking into account what the position actually is in a practical sense, which is more than a line by line comparison of the tasks in the employment contract and the tasks of ANZSCO description.[163] The analysis involves a question of fact and the weight given to various considerations and evidence is a matter for the decision maker.[164]

Regulation 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.[165] When considering whether the requirements of reg 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 reg 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 reg 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.

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[163] *Vishvam Pty Ltd as Trustee for the Vishvam Unit Trust v MICMSMA* [2021] FCCA 758 at [34]–[37]. The Court accepted that the qualitative and comparative analysis required for reg 2.72(10)(f) (whether the position associated with the nominated occupation is genuine) endorsed in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091 was applicable to reg 5.19(4)(h)(ii)(D) assessment of whether the tasks to be performed in the position correspond to the tasks of an occupation specified by the Minister in an instrument. Given similar wording, this is equally applicable to reg 5.19(4)(h)(i)(A).

[164] In *Kartar Investments Pty Ltd v MICMSMA* [2020] FCCA 5, the Court found that for the purposes of reg 5.19(4)(h)(ii)(D) assessment (which is similarly worded to reg 5.19(4)(h)(i)(A)), it was open for the Tribunal to consider not only the documentary material but the oral evidence at hearing concerning the nominee's role, and the Tribunal was not bound to treat the description in the contract as definitive but was open to take preference for one evidence over another (at [66]-[69]). The Court also held that it was open for the Tribunal to use the occupation of Retail Supervisor as a point of contrast to demonstrate that the tasks to be performed by the nominee in the proposed position of Post Office Manager did not correspond with the tasks of an occupation specified in the relevant instrument (at [72]).

[165] reg 5.19(4)(h)(i)(AAA), inserted by F2017L00818. The same amending regulations inserted reg 5.19(4A) to put beyond doubt the Minister's power to make such specifications.

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.[166] See the Register of Instruments - Business visas ('Occ186/407/457&Noms' tab) for the relevant instruments.

Nominations made on or after 18 March 2018

For Subclass 186 visas in the Direct Entry Stream, reg 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 reg 5.19(11) and in force at the time the nomination is made.[167] 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.[168] See the Register of Instruments - Business visas ('Occ186/407/457&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 reg 5.19(10)(b).

Identification of occupation – Direct Entry stream (regional)

Nominations made before 18 March 2018

For nominations made on or after 1 July 2015 in the Direct Entry stream in regional Australia, reg 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.[169] This requires a qualitative analysis of whether the position is what it really purports to be in a practical sense, which is more than a line by line comparison of the tasks in the employment contract

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[166] Department policy prior to November 2017 was consistent with the relevant instrument being the one in force at time of decision (see, for example, historical stack: 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 Approvable occupations specified in the latest legislative instrument (reissued 27/07/17)). From 18 November 2017, Department policy was re-issued to provide that, if the Direct Entry nomination application was made before a new instrument with an updated occupation list came into effect, the application will be considered against the list that was current at the time the nomination was lodged: 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 Approvable occupations specified in the latest legislative instrument (reissued 18/11/2017). Despite this policy change, practically there is no change in the application of the relevant instrument as the instruments made for the purpose of reg 5.19(4)(h)(i)(A) all specify the nomination applications (with reference to their time of application) to which they apply. To the extent Department policy suggests application of an instrument that would not be consistent with the express terms of the applicable instrument, it should not be followed.

[167] reg 5.19(10)(a). The assessment of whether the tasks to be performed in the position correspond to the tasks of an occupation specified in an instrument is a qualitative analysis akin to that required for pre-18/3/2018 reg 2.72(10)(f) genuine position assessment, endorsed in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091, and it requires more than a line by line comparison between the tasks in the employment contract and the ANZSCO description: *Vishvam Pty Ltd v MICMSMA* [2021] FCCA 758 at [34]–[37]. The assessment is also a question of fact for the Tribunal and the weight it gives to various considerations is a matter for itself: *Kartar Investments Pty Ltd v MICMSMA* [2020] FCCA 5 at [68]. Although *Vishvam* and *Kartar* were in the context of pre-18/3/2018 reg 5.19(4)(h)(ii)(D), they are equally applicable here given similar wording.

[168] Item 129, Attachment C of Explanatory Statement to F2018L00262.

[169] reg 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.

and the tasks of ANZSCO description.[170] It is a question of fact and the weight the decision maker gives to various considerations and evidence is a matter for it.[171] In addition, from 1 July 2017, any additional specifications as to the applicability of the occupation to the nominee must be met: reg 5.19(4)(h)(ii)(DA).[172]

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 cl 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 reg 5.19. Further, for regional applications in particular, reg 5.19(4)(h)(ii)(F) contemplates advice being given to the Minister by a regional certified body about certain aspects of the nomination criteria, specifically reg 5.19(4)(e), and regs 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 regional 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.[173]

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 Register of Instruments - Business visas ('ExmtSkillsAgeEng186&187' tab) for the relevant instruments.

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: reg 5.19(12)(d).[174] This criterion provides that the applicable instrument is the

[170] *Vishvam Pty Ltd as Trustee for the Vishvam Unit Trust v MICMSMA* [2021] FCCA 758 at [34]–[37]. The Court accepted that the qualitative analysis required for reg 2.72(10)(f) (whether the position associated with the nominated occupation is genuine) endorsed in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091 was applicable to reg 5.19(4)(h)(ii)(D) assessment of whether the tasks to be performed in the position correspond to the tasks of an occupation specified by the Minister in an instrument.

[171] In *Kartar Investments Pty Ltd v MICMSMA* [2020] FCCA 5, the Court found that it was open for the Tribunal to consider not only the documentary material but the oral evidence at hearing concerning the nominee's role, and the Tribunal was not bound to treat the description in the contract as definitive but was open to take preference for one evidence over another (at [66]-[69]). The Court also held that it was open for the Tribunal to use the occupation of Retail Supervisor as a point of contrast to demonstrate that the tasks to be performed by the nominee in the proposed position of Post Office Manager did not correspond with the tasks of an occupation specified in the relevant instrument (at [72]).

[172] Inserted by F2017L00818.

[173] In *Harinsco Pty Ltd v MICMSMA* [2021] FCCA 528, the Court at [14] held that as the position the subject of the nomination application was geographically specific and the certification by the regional certifying body was in respect of that specific location, a nominated position is fixed to the position nominated at the time of application in relation to regional nominations.

[174] The assessment of whether the tasks to be performed in the position correspond to the tasks of an occupation specified in an instrument is a qualitative analysis similar to that required for pre-18/3/2018 reg 2.72(10)(f) genuine position assessment, endorsed in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091, and it requires more than a line by line comparison between the tasks in the employment contract and the ANZSCO description: *Vishvam Pty Ltd v MICMSMA* [2021] FCCA 758 at [34]–[37]. The assessment is also a question of fact for the Tribunal and the weight it gives to various considerations is a matter for itself:

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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 reg 5.19(12)(e).

Actively and lawfully operating a business in Australia

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.[175] Following the 18 March 2018 amendments, these requirements remain unchanged.[176] 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.[177] 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 defined in the Act or the Regulations for the purpose of reg 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'.[178] Departmental policy does refer to not-for-profit organisations as one of the 'common' business structures for nominators under reg 5.19.[179]

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 1919* (NSW) 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]):

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Kartar Investments Pty Ltd v MICMSMA [2020] FCCA 5 at [68]. Although *Vishvam* and *Kartar* were in the context of pre-18/3/2018 reg 5.19(4)(h)(ii)(D), they are equally applicable here given the similar wording of the provisions.
[175] regs 5.19(3)(b)(ii), 5.19(4)(b)(i).
[176] The requirement that a business is actively and lawfully operating in Australia is now contained in reg 5.19(5)(h)(ii) in the Temporary Residence Transition stream, and in reg 5.19(9)(a) for the Direct Entry stream.
[177] Item 34, Attachment C of Explanatory Statement to F2018L00262.
[178] *Macquarie Dictionary* (online at 30 March 2021) 'business'.
[179] 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).

> *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), 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 regs 5.19(3)(b)(ii) and 5.19(4)(b)(i) for applications made before 18 March 2018, and reg 5.19(5)(h)(ii) or reg 5.19(9)(a) for applications made on or after 18 March 2018.

Is the business operating lawfully?

Departmental policy suggests 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.[180] 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 be lawfully, but not actively, operating. 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 states 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.

[180] 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).

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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;
- 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.[181]

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

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.[182]

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 restructure 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.[183] 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'[184] suggests a relationship between

[181] 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).
[182] reg 5.19(3)(c)(i)(A)(II).
[183] Policy – Migration Regulations – Division 5.3 – General > Approval of nominated positions (employer nomination) – Regulation 5.19 > 8. Part B - Criteria applicable to Temporary Residence Transition stream nominations > 8.1.12 Employment with the same employer - 8.1.12.4 Scenario 3 – more than one standard business sponsor (reissued 18/11/17).
[184] For applications made before 18 March 2018, reg 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 reg 5.19(5)(f). However, note the changes to qualifying periods: regs 5.19(5)(e)–(g).

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a particular employer and employee, which will necessarily change in the case of a business restructure or sale.

Additionally, the alternative criterion in reg 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.[185] The different choice in language arguably suggests the drafting intent was for reg 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/restructure) it seems arguable that they have worked in the same 'position' at all relevant times, though this factual situation may not often arise as 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 reg 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 reg 5.19(3)(c)(i)(A)(II) (as it then was) is not met.[186] That approach would reflect the nomination process for Subclass 457 visas, which requires the identification of a specific occupation[187] which an applicant is then required to work in for the duration of their visa,[188] 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.[189] 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.[190] 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 reg 5.19(5)(a)(iii),[191] a Subclass 482 visa in the Short-term stream.

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[185] 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) – Regulation 5.19 > 9.1.3 Independent contractors (reissued 18/11/17).
[186] See MRD decisions in 1310006 and 1418488 for alternate approaches. For applications made on or after 18 March 2018, the applicable equivalent provision is reg 5.19(5)(f), however, note the changes to the qualifying periods in regs 5.19(5)(e)–(g).
[187] regs 2.72(8), (8A), (10)(a), (aa).
[188] See condition 8107.
[189] reg 5.19(5)(e).
[190] Item 129, Attachment C of Explanatory Statement to F2018L00262.
[191] That is, persons who, on 18 April 2017, held a Subclass 457 visa or was an applicant for a Subclass 457 visa which was subsequently granted. See the 'TransitionalTRT' tab of the Register of Instruments - Business Visas for the relevant instrument, IMMI 18/052.

The transitional cohort is persons who, on 18 April 2017, held a Subclass 457 visa or were an applicant for a Subclass 457 visa that was subsequently granted.[192] The qualifying period for this cohort is two years out of the previous three years, ensuring there is no disadvantage to these persons.[193]

In either case, where the Subclass 457 or 482 visa was granted in relation to an occupation specified under reg 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: reg 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.

For applications made on or after 1 February 2020 but not finally determined before 24 November 2020, or applications made on or after 24 November 2020, IMMI 18/052 as amended by LIN 20/190[194] provides concessions to the qualifying employment periods to ensure that persons identified in nomination applications who, due to the COVID-19 pandemic, were temporarily stood down, had their hours reduced or have been required to take unpaid leave from their employment in respect of which they hold the Subclass 457 or 482 visa, are not disadvantaged in satisfying this requirement.[195] Essentially the concessions recognise these 'coronavirus reduced work periods' or 'coronavirus unpaid leave periods'[196] as time the identified person was still employed (and for the purposes of reg 5.19(5)(f) on a full-time basis) that can be counted toward the qualifying employment period, if they occur during the concession period (within the meaning given by reg 1.15N(1))[197] and in the 4 years (or 3 for the transitional cohort) immediately before the application was made. For details on the terms of these concessions, see the relevant instruments under the 'TransitionalTRT' tab of the Register of Instruments - Business visas and discussion above.

No adverse information known to Immigration

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, which can 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 regs 1.13A and 1.13B, respectively.[198] Please refer to Regulations 2.72 and 2.73 - Nomination and Approval of an

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[192] See reg 5.19(6), which allows the Minister to vary the time period for specified persons. IMMI 18/052, made under reg 5.19(6), specifies this transitional cohort.
[193] Item 129, Attachment C of Explanatory Statement to F2018L00262.
[194] These instruments are made under reg 5.19(6). The application provision in s 8A of IMMI 18/052, inserted by LIN 20/190, expressly provides that the amendments relating to the different employment periods for the purposes of regs 5.19(5)(f) and (g) apply to an application made on or after 1 February 2020 but not finally determined before the commencement of the amendments (24 November 2020), or an application made on or after that commencement.
[195] Explanatory Statement to LIN 20/190 at [9].
[196] defined respectively in ss 7A(3) and 7B(3) of IMMI 18/052, inserted by LIN 20/190.
[197] That is, a period commencing on 1 February 2020 and ending on a date specified by the Minister in a legislative instrument.
[198] These definitions were previously found in regs 2.57(3) and 2.57(2) and referred to in reg 5.19(7). The definitions were repealed and replaced by new definitions in regs 1.13A and 1.13B through SLI 2015, No 242.

Occupation for Subclass 457 and Subclass 482 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 reg 2.72 for temporary work nominations. The Explanatory Statement to the regulations introducing the then reg 2.72(1)(i) (now reg 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.[199] It may also be relevant to consider other adverse information not known to Immigration in considering whether it is reasonable to disregard the adverse information that is known to Immigration.[200] In such cases, it may be necessary to first clearly identify the adverse information known to Immigration, then consider whether it is reasonable to disregard that information, having regard to all other relevant matters including any adverse information not known to Immigration.

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,[201] or, that it is reasonable to disregard any adverse information known about the nominator or persons associated with the nominator.[202] However, there are new definitions of 'adverse information' and 'associated with' in regs 1.13A and 1.13B respectively. The Explanatory Statement notes that the previous definitions were rigid and inadequate to deal with a range of potential abuses.[203] The new definitions are more flexible and are aimed at addressing instances of phoenixing and businesses operating through multiple corporate entities.[204] Please refer to Regulations 2.72 and 2.73 - Nomination and Approval of an Occupation for Subclass 457 and Subclass 482 for further discussion on the meaning of these terms.

Policy guidance

Departmental policy on assessing adverse information provisions states:

> *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*

[199] Explanatory Statement to SLI 2009, No 115, p.28.
[200] *Oakwood Sydney Pty Ltd v MICMSMA* [2020] FCCA 2354 at [38].
[201] reg 5.19(4)(b)(i).
[202] reg 5.19(4)(b)(ii).
[203] Item 15, Attachment C of Explanatory Statement to F2018L00262.
[204] Item 15, Attachment C of Explanatory Statement to F2018L00262.

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- *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*
- *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.*[205]

These factors are not exhaustive and the determination of whether it is reasonable to disregard the information is a question for the 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 as well.

Record of compliance with workplace relations/employment laws of the Commonwealth and States and Territories

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 (reg 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[206]

[205] 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).

[206] 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

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- 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 states 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.[207] The policy notes that the Department of Jobs and Small Business (DJSB) and Fair Work Ombudsman regularly provide the Department with a list of employers who 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.[208] 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 policy suggests 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.[209]

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),[210] or investigations and legal proceedings commenced by the Fair Work Ombudsman.[211] In the State and Territory context, there are a number of bodies that investigate, arbitrate or prosecute employers for breaches of workplace relations laws.[212] Examples include decisions of the NSW Industrial Relations Commission relating to wages (including unpaid super) and unfair dismissal[213] and

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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 30/3/2021).

[207] 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 18/08/19).

[208] Policy – Migration Regulations – Divisions > Div 5.3 - General > Approval of nominated positions (employer nomination) – Regulation 5.19 > 7. Part A - Common criteria – 7.7 Compliance with workplace relations laws – 7.7.2 Assessment (reissued 18/11/17); 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 18/08/19).

[209] 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 18/08/19).

[210] 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 30/3/2021).

[211] 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 (under 'litigation outcomes) for the relevant year) (last accessed 30/3/2021).

[212] 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.

[213] 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: https://www.irc.nsw.gov.au/irc/decisions.html (last accessed 30/3/2021).

investigations and prosecutions undertaken by bodies such as Worksafe Victoria into breaches of Workplace Health and Safety laws.[214]

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'.[215] 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 reg 1.20D(2)(c)(ii).[216] 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 reg 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.[217] 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.[218]

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.[219]

There is also some support in Departmental policy for such an approach. While the policy is 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.[220] 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

[214] 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 30/3/2021).
[215] The Macquarie Dictionary (online at 30 March 2021) 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'.
[216] *Nice Shoes Pty Ltd v MIMIA* [2004] FCA 252.
[217] *Nice Shoes Pty Ltd v MIMIA* [2004] FCA 252 at [16]–[17].
[218] *Nice Shoes Pty Ltd v MIMIA* [2004] FCA 252 at [19]. See also *Total Eye Care Australia v MIMA* [2007] FMCA 281 and *Daiwa Food Co Pty Ltd v MIMIA* [2005] FMCA 1651.
[219] See for example *Jai Babaji Di Pty Ltd v MICMSMA* [2020] FCCA 2018 where the Court in *obiter* commented that the relevant question is what, if any, non-compliance by the applicant less than absolute compliance would have justified a refusal of the nomination application pursuant to reg 5.19(4)(g) (at [18]).
[220] 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'.

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reasonable period.[221] The policy suggests 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.[222] 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, reg 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 reg 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 regs 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, reg 5.19(2) requires that an application for approval of a nomination must be accompanied by the fee mentioned in reg 5.37. Regulation 5.37 prescribes different fees depending upon which limb of reg 5.19(4)(h) an application is seeking to satisfy. For an application seeking to meet reg 5.19(4)(h)(i) (non-regional), the fee is $540[223] whereas there is no fee payable for an application seeking approval in accordance with reg 5.19(4)(h)(ii) (regional).[224]

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 reg 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 reg 5.19(4)(h) for which they have paid the corresponding fee under reg 5.37.

Training requirements

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.

[221] Policy – Migration Regulations – Schedules > Sch2 Visa 888 - Business Innovation and Investment (Permanent) > 3.9.4 Compliance with Australian laws > 3.9.4.2 Assessment (reissued 01/07/20).
[222] Policy – Migration Regulations – Schedules > Sch2 Visa 888 - Business Innovation and Investment (Permanent) > 3.9.4 Compliance with Australian laws > 3.9.4.2 Assessment (reissued 01/07/20).
[223] reg 5.37(3). The existing fee structure has been maintained following the commencement of F2018L00262.The new Labour Agreement stream follows the same fee structure as the Temporary Residence Transition stream.
[224] reg 5.37(4).

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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 reg 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.[225] 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 reg 2.87B provide that certain standard business sponsors must comply with training obligations for a 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.[226] While the obligation commences on the day of approval,[227] 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.[228]

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

[225] Policy – Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) – Regulation 5.19 > 9.2 The nominator has met the training requirement – 9.2.2 Assessment of training –9.2.2.2 The training benchmarks (reissued 18/11/17).
[226] Policy – Migration Regulations – Divisions > Div 2.11-2.13 Sponsorship compliance framework: Sponsorship obligations > Assessment of regulation 2.87B (reissued 13 April 2018).
[227] reg 2.87B(4).
[228] See the 'Training' tab of the Register of Instruments - Business Visas for the relevant instruments.

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or made after that date, the criteria in regs 2.59(d) and (e) (which required businesses operating in Australia to either meet the training benchmarks for training Australian 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.[229] 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.[230]

Where the most recent standard business sponsorship period commenced before 18 March 2018 and extends past 12 August 2018, the training obligations under reg 2.87B only apply in relation to full periods of 12 months that end before 12 August 2018.[231]

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 but before 18 March 2018, the sponsor would have satisfied one of the two training benchmarks identified in the instrument[232] for the purposes of regs 2.59(d)–(e) or regs 2.68(e)–(f), or to have provided an auditable plan 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.[233]

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.'[234] 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

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[229] These requirements for training were repealed by 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.
[230] See for example in *Ozzy Fortune Group Pty Ltd (Migration)* [2019] AATA 735 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 reg 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]).
[231] This is because from 12 August 2018, the training requirements in both streams were repealed by F2018L01093 and were replaced by the requirement to pay a 'nomination training contribution charge' (See discussion above under Application requirements). While a transitional provision in cl 7602(6) of Schedule 13 to the Regulations expressly preserves the need to comply with the reg 2.87B training obligation for reg 5.19 nominations made before 12 August 2018, cl 7602(5) exempts such requirement in relation to a period of 12 months ending on or after 12 August 2018. See further discussions below.
[232] See the 'Training' tab of the Register of Instruments - Business Visas for the relevant instrument.
[233] Policy – Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) – Regulation 5.19 > 9.2 The nominator has met the training requirement – 9.2.2 Assessment of training – 9.2.2.2 The training benchmarks (reissued 18/11/17).
[234] Policy – Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination)) – Regulation 5.19 > 9.2 The nominator has met the training requirement – 9.2.2 Assessment of training –9.2.2.2 The training benchmarks (reissued 18/11/17).

Australia have a measurable commitment to training Australian citizens and permanent residents before being granted access to the pool of overseas labour.[235]

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 regs 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.[236] 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 regs 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 reg 2.87B(2) must be kept in accordance with a separate record keeping obligation.[237]

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.*[238]

[235] Explanatory Statement to SLI 2009, No 115, p.17.
[236] 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'.
[237] reg 2.82.
[238] Explanatory Statement to SLI 2013, No 146, p.36.

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For further information on compliance with this obligation see 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;[239] 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.[240]

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'.[241]

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 reg 5.19(4)(h)(i)(B)(I).

Nominations made on or after 18 March 2018 but 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 reg 5.19(5)(i), and for the Direct Entry stream (in relation to Subclass 186 visas) at reg 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* (Cth). 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.

[239] reg 5.19(4)(h)(i)(B)(I).
[240] reg 5.19(4)(h)(i)(B)(II).
[241] Policy – Migration Regulations – Division 5.3 - General > Approval of nominated positions (employer nomination) – Regulation 5.19 > 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 18/11/17).

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If considering a Temporary Residence Transition stream nomination made before 12 August 2018 and the question of whether the nominator has complied with its obligations during the most recent sponsorship approval, note that there is a transitional provision exempting a sponsor from complying with training obligations under reg 2.87B in relation to a period of 12 months ending on or after 12 August 2018.[242] In other words, the obligation only applies in relation to full periods of 12 months that end before that date. As reg 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 would have been unfair to employers.[243]

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 reg 2.59.[244] While unclear, in such cases, it may be open to find that the nominator satisfies reg 5.19(5)(i) without any evidence of meeting the training requirements because there are no such requirements.[245] Alternatively, the requirements could be disregarded.

Regional Australia and Regional Certifying Body – Direct Entry stream

Direct Entry nominations which are intended to support Subclass 187 visas must satisfy a number of specified criteria. For nominations made before 18 March 2018, reg 5.19(4)(h)(ii) includes the requirements that the position is located in 'regional Australia',[246] that there is a genuine need for the position and 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 advised the Minister about certain criteria, including the genuine need for the position and inability to fill it with an Australian citizen or permanent resident.[247]

For Direct Entry nominations relating to Subclass 187 visas made on or after 18 March 2018, reg 5.19(12) contains similar requirements, except that position must also not be able to be filled by an Australian citizen or permanent resident who would move to the local area.[248]

Both the areas that constitute 'regional Australia'[249] and the 'regional certifying bodies' who can provide the required advice are specified by legislative instrument.

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[242] Clause 7602(5) inserted by item 43 of sch 1 to F2018L01093.
[243] Explanatory Statement to F2018L01093 at p.23.
[244] This is because from 18 March 2018 the requirements for training under regs 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.
[245] See for example *Ozzy Fortune Group Pty Ltd (Migration)* [2019] AATA 735 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 reg 5.19(3)(f) (pre-18/3/2018 version of reg 5.19(5)(i)) and given that the sponsorship obligation to provide training no longer applied, the training requirement was considered to have been met (at [32]).
[246] For applications made before 18 March 2018, this requirement is contained in reg 5.19(4)(h)(ii)(A).
[247] For applications made before 18 March 2018, this requirement is contained in reg 5.19(4)(h)(ii)(F). For applications made on or after 18 March 2018, this requirement is contained in reg 5.19(12)(f).
[248] reg 5.19(12)(f)(iii)
[249] For applications made before 18 Mach 2018 the definition of 'regional Australia' is contained in reg 5.19(7). For applications made on or after 18 March 2018, the definition is contained in reg 5.19(16).

What is the relevant instrument?

Nominations made 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'[250] and the regional certifying body[251] 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 last 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,[252] 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,[253] and no further instrument under reg 5.19(7) has been made,[254] meaning it's unclear which instrument, if any, applies to outstanding nomination applications.

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

- 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 reg 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).

It is arguable to interpret these 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 reg 5.19, consistent with the Department's view on this issue. For further advice on this issue, please contact MRD Legal Services.[255]

Nominations made on or after 18 March 2018

See the 'RegAustpost180318' and 'RegAustpost161119' tabs of the Register of Instruments - Business Visas for the relevant instrument. IMMI 18/037 is expressed to apply to

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[250] For applications made before 18 March 2018, reg 5.19(4)(h)(ii)(A) requires that a position is located in 'regional Australia' which is defined in reg 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 regs 5.19(12)(a) and 5.19(16) respectively.
[251] For applications made before 18 March 2018, reg 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 reg 5.19(12)(g)(i).
[252] 'Skilled Visa E news November 2017' publication (last accessed on 12 February 2018 at the Department of Home Affairs website - Skilled migration program – Skilled migration newsletter).
[253] IMMI 18/037.
[254] The specification of regional Australia made by IMMI 18/037 is expressly made under reg 5.19(12)(g)(i) and reg 5.19(16), reflecting significant amendments made to reg 5.19 by F2018L00262. Further, IMMI 18/037 is itself expressed to apply only to nominations made on or after 18 March 2018.
[255] See also Long Form Advice Ref 2018_3 which provides the view that it is open to apply the instrument in force at *time of application* in relation to nomination applications made between 1/7/2016 and 17/3/2018.

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. LIN 19/217 applies to applications for approval of a nomination made on or after 16 November 2019, and LIN 20/292 applies to applications made on or after 20 January 2021.

Is the advice of a regional certifying body conclusive?

Advice from a regional certifying body is required (reg 5.19(4)(h)(ii)(F) for nominations made before 18 March 2018 and reg 5.19(12)(f) for nominations made after 18 March 2018), but it is not conclusive of the matters for which it is given. For example, reg 5.19(4)(h)(ii)(F) requires advice to be given in relation to regs 5.19(4)(e) (relating to terms and conditions of employment) and 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). While the giving of an advice from a regional certifying body about those matters is itself enough to satisfy reg 5.19(4)(h)(ii)(F), the Tribunal must separately consider and be satisfied about each of those matters that the advice deals with. 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 reg 5.19(4), and commented in *obiter* that the use of the word 'advice' undoubtedly puts beyond doubt the construction of reg 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.[256] 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 reg 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.[257] This is also the position reflected in Departmental policy.[258]

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 reg 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.

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 (reg 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

[256] *Bharaj Construction Pty Ltd v MIBP* [2016] FCCA 902 at [81].
[257] *Bharaj Construction Pty Ltd v MIBP (No 3)* [2019] FCCA 31 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)*.
[258] 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).

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renumerated by the employer for the work performed. However, there are other indicia of an employer-employee 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.[259] 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 regs 5.19(3)(b)(ii) and 5.19(4)(b)(ii) (which apply to applications made before 18 March 2018) or regs 5.19(5)(h)(ii) and 5.19(9)(a) (which apply 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.[260] 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).[261]

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.[262] The occupation (such as Minister for Religion) may also not be specified in the relevant legislative instrument.[263] It is therefore expected 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 reg 2.72(15) relating to the identified person's annual earnings must be met.[264] Regulation 2.72(15) applies to nominations for Subclass 482 visas and apply in the reg 5.19 context as though references to 'nominee' were references to the 'identified person' and references to the 'person' were references to the 'nominator': regs 5.19(5)(o) and 5.19(9)(h).

In brief, reg 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),[265] including that the annual market salary rate is not less than the temporary skilled migration income threshold. See Regulations 2.72 and 2.73 - Nomination and Approval of an Occupation for Subclass 457 and Subclass 482 (Additional requirements in

[259] 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).
[260] For applications made before 18 March 2018, see regs 5.19(3)(f) and 5.19(4)(h)(i)(B) and instruments made under regs 2.59(d) and 5.19(4)(h)(i)(B). For applications made on or after 18 March 2018, see regs 5.19(5)(i) and 5.19(10)(c) and instrument made under reg 5.19(10)(c)(i) (see the 'Training' tab in the Register of Instruments - Business Visas).
[261] Departmental policy prior to 1 July 2015 indicated 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 reg 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.
[262] 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 18/11/17).
[263] For example, IMMI 16/059 (accessible under the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business Visas) which applies to certain Direct Entry nominations, specifies that this occupation is not specified in relation to any subclasses apart from Subclass 402 or Subclass 407.
[264] regs 5.19(5)(o) and 5.19(9)(h) respectively.
[265] See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instrument.

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relation to Short-term stream and Medium-term stream (post 18/3/18 only) > Annual earnings) for discussion about this criterion.

Relevant case law

Judgment	Judgment summary
Bharaj Construction Pty Ltd v MIBP [2016] FCCA 902	Summary
Bharaj Construction Pty Ltd v MIBP (No 3) [2019] FCCA 31	Summary
Eugene Cho Pty Ltd v MICMSMA [2021] FCCA 2020	Summary
Harinsco Pty Ltd v MICMSMA [2021] FCCA 528	Summary
Hope v The Council of the City of Bathurst (1980) 144 CLR 1; [1980] HCA 16	
Jai Babaji Di Pty Ltd v MICMSMA [2020] FCCA 2018	Summary
Jayshree Enterprises Pty Ltd v MIBP and Gohil v MIBP [2016] FCCA 2825	Summary
Kartar Investments Pty Ltd v MICMSMA [2020] FCCA 5	
MIBP v Jayshree Enterprises Pty Ltd [2017] FCA 264	Summary
Nauru Air Corporation v MIBP [2016] FCCA 13	Summary
Nice Shoes Pty Ltd v MIMIA [2014] FCA 252	Summary
Oakwood Sydney Pty Ltd v MICMSMA [2020] FCCA 2354	Summary
Pexbury Pty Ltd v MIBP [2020] FCCA 3074	
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
Vishvam Pty Ltd v MICMSMA [2021] FCCA 758	Summary

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Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 1999 (No 6) (Cth)	SR 1999, No 81	-
Migration Amendment Regulations 2005 (No 1) (Cth)	SLI 2005, No 54	No 1/2005
Migration Amendment Regulations 2009 (No 5) (Cth)	SLI 2009, No 115	No 11/2009
Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1) (Cth)	SLI 2009, No 203	No 11/2009
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No 1/2010
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Amendment Regulation 2012 (No 3) (Cth)	SLI 2012, No 105	No 4/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No 3/2013
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Legislation Amendment (2015 Measures No 2) Regulation 2015 (Cth)	SLI 2015, No 103	No 7/2015
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Legislation Amendment (2017 Measures No 3) Regulations 2017 (Cth)	F2017L00816	No 4/2017
Migration Amendment (Specification of Occupations) Regulations 2017 (Cth)	F2017L00818	No 03/2017
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018
Migration Amendment (Skilling Australians Fund) Act 2018 (Cth)	No 38, 2018	No 2/2018

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Migration (Skilling Australians Fund) Charges Act 2018 (Cth)	No 39, 2018	No 2/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 2/2018
Migration (Skilling Australians Fund) Charges Regulations 2018 (Cth)	F2018L01092	No 2/2018
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Home Affairs Legislation Amendment (2019 Measures No 1) Regulations 2019 (Cth)	F2019L01423	No 4/2019
Migration Amendment (COVID-19 Concessions) Regulations 2020 (Cth)	F2020L01181	No 2/2020

Available decision templates/precedents

The following decision precedents are designed specifically for review of decisions on approval of nominated positions under reg 5.19:

- **Business Nominated Position – reg 5.19 (post 1 July 2012 and pre 18 March 2018)** for use in review of a decision to refuse an application for approval of a nominated position under reg 5.19 made on or after 1 July 2012 and before 18 March 2018. It requires users to identify whether reg 5.19(3) (Temporary Residence Nomination Stream) or reg 5.19(4) (Direct Entry Nomination Stream) is relevant.
- **Business Nominated Position – reg 5.19 (post 18 March 2018)** for use in review of a decision to refuse an application for approval of a nominated position under reg 5.19 made on or after 18 March 2018. It requires the user to select the relevant stream (Temporary Residence Transition, Direct Entry or Labour Agreement) and the relevant criteria in issue under the selected stream.

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FINANCIAL REPORTS

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Overview[1]

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.[2] All companies registered under the *Corporations Act 2001* (Cth) (the Corporations Act) must keep written financial records.[3] 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,[4] certain NSW businesses must provide financial information in payroll tax returns[5]).

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

1. **balance sheet**, which measures a company's financial position at a point in time;
2. **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. **statement of cash flow**, which details the company's cash flows from operating, financing and investing activities over a period of time.[6]

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

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Accounting Standard AASB 101, *Presentation of Financial Statements* (compilation no 4, 30 June 2021) (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://aasb.gov.au/admin/file/content105/c9/AASB101_07-15_COMPmar20_07-21.pdf, accessed 10 December 2021).
[3] s 286. In addition, some companies must prepare annual financial reports and directors' reports: s 292.
[4] *A New Tax System (Goods and Services Tax) Act 1999* (Cth), ss 31-5, 31-15.
[5] *Payroll Tax Act 2007* (NSW), s 87.
[6] A complete set of financial statements comprises: statement of financial position at the end of the period; statement of profit or loss and other comprehensive income for the period; statement of changes in equity for the period; statement of cash flows for the period; notes comprising 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, para 10).

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 policy state that where there are serious and specific concerns about the information provided in financial statements, officers may consider requesting statements addressing the specific concerns with a greater level of assurance such as review or audited statements.[7] Other financial documentation may be useful to assist in corroborating information contained in the financial statements, 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.[8] 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 veracity of the financial statements provided.[9]

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* (Cth). Since 1 January 2005, Australia has adopted International Financial Reporting Standards developed by the International Accounting Standards Board.[10]

The areas covered by accounting standards include changes in accounting estimates and errors, leases, intangible assets and presentation of financial statements. Some of the

[7] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.8 Assessing applications – 3.8.1 Schedule 2 – General requirements – If documentation is insufficient (reissued 1/7/2020).
[8] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.8 Assessing applications – 3.8.1 Schedule 2 – General requirements – Other financial documentation (reissued 1/7/2020).
[9] 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 and related procedures – 3.8 Assessing applications – 3.8.1 Schedule 2 – General requirements – Review or limited audit, and Audited statements (reissued 1/7/2020)).
[10] See AASB website http://www.aasb.gov.au/Pronouncements.aspx (accessed 10 December 2021).

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standards (e.g. the valuation of goodwill) are discussed briefly below. The complete set of standards can be found on the AASB website.

Who is bound by the Australian Accounting Standards?

Accounting standards regarding 'Presentation of Financial Statements' (AASB 101) applies to:[11]

> *(a) each not-for-profit 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 not-for-profit entity that is a reporting entity; and*
>
> *(c) each entity that elects to prepare financial statements that are, or are held out to be, general purpose financial statements;*
>
> *(d) for-profit private sector entities that are required by legislation to prepare financial statements that comply with either Australian Accounting Standards or accounting standards; and*
>
> *(e) other for-profit private sector entities that are required only by their constituting document or another document to prepare financial statements that comply with Australian Accounting Standards, provided that the relevant document was created or amended on or after 1 July 2021..*

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.[12] 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.'[13]

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)[14] 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.[15] Note, however, that people who are not members of those professional bodies

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[11] AASB 1057, *Application of Australian Accounting Standards* (compilation no 4, 30 June 2021), para 7. (AASB1057_07-15_COMPmar20_07-21.pdf, accessed on 10 December 2021).
[12] *Corporations Act 2001* (Cth) (Corporations Act) ss 292, 296.
[13] 'Reporting entity' as defined in AASB 1057 (compilation no 4, 30 June 2021).
[14] 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.
[15] 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 10 December 2021). See also https://www.charteredaccountantsanz.com/member-services/member-obligations/codes-and-standards, https://www.publicaccountants.org.au/about/iparulesandstandards and http://www.cpaaustralia.com.au/about-us/member-conduct-and-discipline (accessed 10 December 2021). See also APES 205 Revised 2015, *Conformity with Accounting Standards* (effective 1 January 2020) and APES 110, *Code of Ethics for Professional Accountants* (effective 1 January 2020), available at: http://www.apesb.org.au/page.php?id=12 (accessed 10 December 2021).

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.[16] 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 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**.[17] 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[18] and the latter does not.[19] In some statements, liabilities are represented with

[16] 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 J R Haber, *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 J R Haber, *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.

[17] See D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), pp.18–19 for further discussion.

[18] 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;

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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 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.

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.*[20]

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.[21] 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

(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.'

[19] 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 (paras 63, 64).

[20] See AASB 'Glossary of Defined Terms': https://www.aasb.gov.au/admin/file/content102/c3/AASB_Glossary_30_September_2015.pdf (accessed 17 December 2021).

[21] See AASB, 'Glossary of Defined Terms': http://www.aasb.gov.au/Pronouncements/Glossary-of-defined-terms.aspx (accessed 17 December 2021).

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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 reg 1.03 of the *Migration Regulations 1994* (Cth) (the Regulations).

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.[22]

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.

[22] See also the definition of 'inventories' in the AASB 'Glossary of Defined Terms': https://www.aasb.gov.au/Pronouncements/Glossary-of-defined-terms.aspx (accessed 17 December 2021).

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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 for 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,[23] 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.'[24]

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)…*

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[23] Accounting Standard AASB 138, 'Intangible Assets' (compiled version, 30 June 2021) (AASB 138), para 9 . However, note 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.' (https://www.aasb.gov.au/admin/file/content105/c9/AASB138_08-15_COMPmar20_07-21.pdf, accessed 17 December 2021).
[24] D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), p.114.

> *Not all [these] items … meet the definition of an intangible asset, i.e.* ***identifiability, control over a resource and existence of future economic benefits.***[25] *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.*[26] [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.[27]
- 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.[28]
- 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.[29] 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.[30]
- 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.[31]

Goodwill

By accounting convention/definition, 'goodwill' is calculated as the difference between the

[25] 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.
[26] AASB 138, 'Intangible Assets' (compiled version, 30 June 2021), paras 9–10.
[27] AASB 138, paras 48–49. Paragraph 12 states that an 'asset is identifiable if it either:
(a) is separable, i.e. 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.'
[28] AASB 138, paras 63–64.
[29] AASB 138, paras 54–55.
[30] AASB 138, para 57.
[31] AASB 138, paras 15–16.

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purchase price of an entity/business and the fair value of the assets and liabilities acquired.[32] That is, when an 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.[33] 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.[34] It cannot be revalued upward.[35]

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 balance sheet

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.'[36]

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').[37] These are liabilities that can cause an entity's

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[32] D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), p.115.
[33] 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.' The effect of probability is reflected in the fair value measurement of the intangible assessment.
[34] 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.'
[35] D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), p.117.
[36] D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), p.127.
[37] 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

insolvency if cash is inadequate. All other liabilities are non-current.

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.[38]

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

(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.

[38] D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), p.133.

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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 sometime 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.[39]

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 does not exist.[40]

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'.[41]

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.[42] Owners' equity also equals assets minus liabilities from the accounting equation (see above). See 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.

[39] D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), p.151.
[40] D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), pp.147–148.
[41] AASB, *Framework for the Preparation and Presentation of Financial Statements* (compiled version, October 2021), para 49 (https://www.aasb.gov.au/admin/file/content105/c9/Framework_07-04_COMPmar20_07-21.pdf, accessed 17 December 2021).
[42] See D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), p.153.

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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 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.[43]

An income statement is also useful in providing the business entity's annual turnover figure as required in Subclasses 132, 890, 892, 188 and 888 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.[44] 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*[45] 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

[43] See for example reg 2.59(g) for standard business sponsors, and regs 5.19(3)(g), 5.19(4)(f) for employer nominations (made before 18 March 2018). Adverse information as defined in reg 1.13A includes information that a person has become insolvent within the meaning of s 95A of the Corporations Act.
[44] Policy – Migration Regulations – Other – GenGuideM – Business Visas – Visa application and related procedures – 3.9 Business ownership and assets – 3.9.4 Turnover – What is turnover (reissued on 1 July 2020).
[45] *Cheng v MIAC* [2012] FMCA 911. This finding was upheld on appeal by the Federal Court in *Cheng v MIAC* [2013] FCA 405.

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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 flow 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.[46]

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);

[46] For further discussion see J R Haber, *Accounting Demystified* (AMACOM, 2004), pp.136–138, and D Hey-Cunningham, *Financial Statements Demystified* (Allen & Unwin, 4th ed, 2006), pp.214–229.

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- 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.[47] Information of serious financial difficulties may also constitute adverse information about the business for the purposes of certain sponsorship or nomination approvals.[48] 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.

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[47] See for example reg 2.59(c) for standard business sponsors; regs 5.19(3)(b)(ii), 5.19(4)(b) for employer nominations made before 18 March 2018.
[48] See for example reg 2.59(g) for standard business sponsors; regs 5.19(3)(g), 5.19(4)(f) for employer nominations made before 18 March 2018.

Further reading

Jeffry R Haber, *Accounting Demystified* (AMACOM, 2004). Available in Library – 657.405 HAB

David Hey-Cunningham, *Financial statements demystified* (Allen & Unwin, 4th ed, 2006). Available in Library – 657.3 HEY

Relevant case law

Judgment	Judgment summary
Cheng v MIAC [2012] FMCA 911	Summary
Cheng v MIAC [2013] FCA 405	Summary

Last updated/reviewed: 17 December 2021

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MAIN BUSINESS (REG 1.11)

Overview

Key Issues

- What is a 'main business'?
- 'Qualifying business' – reg 1.11(1)(d)
  - 'operated … making profit through the provision of goods and services to the public'
- Ownership interest – reg 1.11(1)(a)
  - Evidence of an 'ownership interest'
  - Beneficial ownership
- Direct and continuous involvement in management – reg 1.11(1)(b)
- Value of the ownership interest – reg 1.11(1)(c)
- Ownership interest in more than one business – reg 1.11(2)

Relevant case law

Relevant legislative amendments

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Overview[1]

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) (Provisional) and Subclass 163 (State/Territory Sponsored Business Owner) (Provisional);[2]
- Business Skills (Residence) (Class DF) visas, Subclass 890 (Business Owner) and Subclass 892 (State/Territory Sponsored Business Owner);[3] 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);[4] and
- Business Skills – Business Talent (Migrant) (Class EA) visa, Subclass 132 (Business Talent).

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;[5]
- Business Skills (Permanent) (Class EC), Subclass 888 visa;[6] and
- Business Skills - Business Talent (Permanent) (Class EA), Subclass 132 visa.[7]

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 of the main business;[8]
- ownership interest in one or more established main businesses;[9]

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[1]Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Primary visa applications for Class UR visas were closed from 1 July 2012 (*Migration Amendment Regulations 2012 (No 2)* (Cth), SLI 2012, No 82).
[3] From 1 July 2012, applicants seeking to satisfy the primary criteria for Subclass 890 and Subclass 892 visas must hold a visa of a subclass included in the Business Skills (Provisional) (Class UR) class (ie Subclass 160 or Subclass 163) that was granted on the basis that the applicant, or their current or former spouse or de facto partner (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).
[4] Primary visa applications for Class BH visas closed from 1 July 2012, and these visa subclasses were removed from the *Migration Regulations 1994* (Cth) entirely from 1 July 2013 (SLI 2012, No 82).
[5] The Business Skills (Provisional) (Class EB) Subclass 188 visa was inserted in the Regulations by *Migration Amendment Regulations 2012 (No 2)* (Cth) (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).
[6] Subclass 888 was inserted into the Regulations by SLI 2012, No 82. The relevant stream is the 'Business Innovation' stream.
[7] As amended by SLI 2012, No 82. The relevant stream is the 'Significant Business History' stream. Subclass 132 was closed to new visa applications from 1 July 2021 (items 10 and 22 of sch 1 to the *Home Affairs Legislation Amendment (2021 Measures No.1) Regulations 2021* (Cth)).
[8] Significant Business History Stream for Subclass 132; Subclasses 890, 892; and the Business Innovation Streams for both the Subclass 188 and 888 visas.

- ownership interest in one or more main businesses actively operating[10] in Australia;[11]
- the applicant's and the applicant's spouse or de facto partner's 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]
- operating the main business in Australia in anarea specified in a written instrument;[14]
- submission of Australian Business Number and Business Activity Statements to the Australian Taxation Office;[15]
- employment of Australian citizens or permanent residents or New Zealand passport holders.[16]

Key Issues

What is a 'main business'?

'Main Business' is defined in reg 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).[17] 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;[18] 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;[19] 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;[20] 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;[21] or

[9] For example, cl 188.225 of the Business Innovation Stream criteria for the Subclass 188 visa.
[10] 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).
[11] Subclases 890 and 892; the Business Innovation Extension Stream for Subclass 188; and the Business Innovation Stream for Subclass 888.
[12] Subclasses 890, 892, and the Business Innovation Stream for Subclass 888.
[13] The Business Innovation and Business Innovation Extension Streams of the Subclass 188 visa.
[14] Subclass 892 and the Business Innovation Stream for Subclass 888.
[15] Subclasses 888, 890, and 892.
[16] Subclasses 890, 892, and the Business Innovation Stream of the Subclass 888 visa.
[17] See item [1] of sch 1 and regs 2–3 to the *Migration Amendment Regulations 2010 (No 3)* (Cth) (SLI 2010, No 70).
[18] reg 1.11(1)(a).
[19] reg 1.11(1)(b).
[20] reg 1.11(1)(c)(i).
[21] reg 1.11(1)(c)(ii).

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  - 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;[22] and

- the business is a qualifying business.[23]

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.[24]

'Qualifying business' – reg 1.11(1)(d)

To be a 'main business', the business must be a 'qualifying business'. 'Qualifying business' is defined in reg 1.03 of the Regulations to mean 'an enterprise that is operated for the purpose of making profit through the provision of goods, services or goods and 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.'

The word 'business' is not defined in the *Migration Act 1958* (Cth) (the Act) or Regulations. It is a word which takes its content from its context.[25] In *Nassif v MIMIA,* Branson J considered it significant that a 'qualifying business' is defined to mean an *enterprise* of a particular kind; and enterprise is a word of general meaning that is broadly synonymous with an undertaking.[26] Her Honour concluded that it is not a necessary characteristic of a 'main business' that the business be carried on by a single entity.[27] 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'.[28]

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.[29] It is open to the decision-maker to conclude that an entity is not a 'business' if the

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[22] reg 1.11(1)(c)(iii).
[23] reg 1.11(1)(d).
[24] *Rahbarinejad v MIBP* [2018] FCCA 2293. The Court held, in the context of cl 892.211(1) (which requires 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 visa application is 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].
[25] *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.
[26] *Nassif v MIMIA* (2003) 129 FCR 448 at [33]. Her Honour was of the view that, had it been intended that an 'enterprise' within the meaning of reg 1.03 was to be limited to the activities of a single legal entity, whether a natural person, a partnership or a company, it would be expected that the regulation would say so.
[27] *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).
[28] *Ibrahim v MIAC* [2009] FCA 1328 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'.
[29] *Kushner v MIAC* [2009] FMCA 390 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'.

evidence points to the business being a sham and not engaged in ongoing trading.[30] 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.[31] However, any assessment of the elements of a 'qualifying business' should always be brought back to the definition contained in reg 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/or 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/or services to the public.[32] The filing of annual returns alone, does not bring it within this description.[33]

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:[34]

- customer base of the business is limited to family members
- 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, on an equal footing and dealing with each other on a commercial basis) that does not restrict or limit the business operations.[35]

Ownership interest – reg 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 reg 1.11(1)(a).[36] Regulation 1.03 provides that 'ownership interest' has the meaning given to it in s 134(10) of the Act. In s 134(10), 'ownership interest' in relation to a business means an interest in the business as:

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[30] *Kushner v MIAC* [2009] FMCA 390 at [47]. The Court upheld a decision of the Tribunal 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.
[31] *Kushner v MIAC* [2009] FMCA 390 at [48].
[32] *Zhou v MIMI*A [2003] FMCA 169 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.
[33] *Zhou v MIMI*A [2003] FMCA 169 at [34].
[34] Policy - Migration Regulations – Other – GenGuide M – Business Visas – Visa application and related procedures – Business ownership and assets – Qualifying Business – Goods and services to the public (reissued 1 July 2020).
[35] This was the case in *Teng v MIBP* [2015] FCCA 1197 which involved 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'.
[36] *Ibrahim v MIAC* [2009] FCA 1328 at [32].

- 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)* (Cth) (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.[37]

The definition of ownership interest in s 134(10) reflects a deliberate modification of the meaning of ownership interest which exists under general law.[38] 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.[39] 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 reg 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.[40]

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 reg 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.[41] 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.[42]

The applicant's ownership interest does not need to be continuous for the business to be a main business.[43] Regulation 1.11(1)(a) only requires that the applicant has, or has had, an

[37] 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.

[38] *MIAC v Hart* (2009) 179 FCR 212 at [30], [66], [104]–[105].
[39] *MIAC v Hart* (2009) 179 FCR 212 at [28], [65], [104].
[40] *MIAC v Hart* (2009) 179 FCR 212 at [15].
[41] *Zhou v MIMIA* [2003] FMCA 169 at [31], [33].
[42] *Zhou v MIMIA* [2003] FMCA 169 at [33].
[43] *Ibrahim v MIAC* (2009) 111 ALD 148 at [28]. See also *Ibrahim v MIAC* [2009] FCA 1328 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.

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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.[44] 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 reg 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.[45]

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.[46]

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 (federal/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,[47] 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.

<u>Satisfactory evidence of a shareholding in an Australian company</u>

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. Under s 337, a company includes any body or association (whether or not it is incorporated), but does not include a partnership.

A company is a legal entity separate from its owners (the shareholders) and those who manage the affairs of the company (the directors). The term company has no strict legal meaning.[48] Section 9 of the *Corporations Act 2001* (Cth) (the Corporations Act) defines 'company' to mean a company registered under the Corporations Act. For companies registered under the Corporations Act, whether a person is, and under what circumstances

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[44] *Ibrahim v MIAC* [2009] FCA 1328 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.
[45] For example, cl 845.213 and cl 845.221 as considered by the Court in *Ibrahim v MIAC* [2009] FCA 1328. 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.
[46] A non-exhaustive list of evidence in support of an applicant's ownership/share of a business can also be found in Policy - Migration Regulations – Other – GenGuide M – Business Visas – Visa application and related procedures – 3.9 Business Ownership and Assets – 3.9.15 Evidentiary requirements (reissued 1 July 2020).
[47] For example, s 20 of the *Partnership Act 1892* (NSW), and ss 5 and 24 of the *Partnership Act 1958* (Vic).
[48] See, for example, *Re Stanley* [1906] 1 Ch 131.

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,[49] 1070A, and 1072F.

Shareholder is not defined in the Corporations Act or the *Corporations Regulations 2001* (Cth). Paragraph 6.1 of the Small Business Guide in Part 1.5 of the Corporations Act sets out some of the ways in which a person may become a shareholder of a company. These include:

- 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.

Paragraph 6.1 of the Small Business Guide in Part 1.5 of the Corporations Act also sets 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,
- 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 the amount paid on the shares; whether or not the shares are fully paid; and the amount unpaid on the shares (if any). A member may hold shares beneficially or non-beneficially (see, for example, ss 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.[50] Section 1072H sets out requirements for certain notices relating to beneficial or non-beneficial ownership of shares.

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 of ownership interest in s 134(10) of the Migration Act, i.e. legal

[49] The definition of 'security' in s 761A includes a share in a body.
[50] 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.

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ownership of shares alone is sufficient to establish an ownership interest as a shareholder in the company.[51] 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 reg 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.[52] 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 they hold 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, NSW Land Registry Services);
- 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 – reg 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 to include beneficial ownership, except in certain cases where a dependent child of the applicant has legal ownership.[53]

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.[54] In the context of a company, the concept of a beneficial owner applies to the person whom equity

[51] *MIAC v Hart* (2009) 179 FCR 212 at [15], [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. 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.
[52] *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd* [1976] AC 167, cited in G E Dal Pont, *Equity and Trusts in Australia*, 7th ed, Lawbook Co 2019, at [1.10].
[53] reg 1.11A(4).
[54] *Yu v MIMIA* (2004) FCR 126 at [32], citing BA Garner, A Dictionary of Modern Legal Usage, 2nd edn, Oxford University Press, New York, 1995.

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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.[55] Regulation 1.11A refers to beneficial ownership in these senses.[56] Claims to beneficial ownership can be easily made. The effect of reg 1.11A is to exclude claims to ownership which cannot be substantially proven by reference to authenticated documents.[57] The kinds of documents which are specified in reg 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*[58] 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.[59] The Court held there is no exception to reg 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.[60] The Tribunal made no error by applying reg 1.11A and finding that the materials submitted did not meet the evidentiary requirements for beneficial ownership.[61]

A relevant document for the purposes of reg 1.11A(2) does not evidence beneficial ownership for any period earlier than the date of registration or stamping by the appropriate authority.[62] 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) displaces general law concepts of ownership in relation to shareholders of a company,[63] therefore, it is important to focus on the meaning of ownership

[55] *Yu v MIMIA* (2004) FCR 126 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.
[56] *Yu v MIMIA* (2004) FCR 126 at [32].
[57] *Yu v MIMIA* (2004) FCR 126 at [35].
[58] *Yu v MIMIA* (2004) FCR 126.
[59] *Yu v MIMIA* (2004) FCR 126 at [33].
[60] *Yu v MIMIA* (2004) FCR 126 at [36].
[61] *Yu v MIMIA* (2004) FCR 126 at [38].
[62] reg 1.11A(3).
[63] *MIAC v Hart* (2009) 179 FCR 212 at [30], [66], [104]–[105] (Logan J dissenting on the issue of relevance of ownership of assets). The Court in *Hart* was specifically considering s 134(10)(a).

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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.[64]

Shareholder in a company – s .134(10)

The relevant question for the purposes of establishing an ownership interest as a shareholder in a company for s 134(10) 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.[65] 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.[66]

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) if the trustee company is carrying on the relevant business. However, the definition in s 134(10) 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.[67]

Partner in a partnership – s 134(10)

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).[68] 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.[69]

Sole proprietor of the business – s 134(10)

The terms of s 134(10) 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

[64] See, for example, cl 888.225(2) of the Business Innovation stream for the Subclass 888 visa.
[65] *MIAC v Hart* (2009) 179 FCR 212, per Spender J at [22]–[23], agreeing with Jarratt FM at first instance: *MIAC v Hart* [2008] at [20], [72], Logan J dissenting.
[66] *MIAC v Hart* (2009) 179 FCR 212 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.'
[67] *Muhammad v MIBP* [2016] FCCA 414 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]).
[68] *Campbell v MIAC* [2011] FMCA 61 at [43]–[46]. Undisturbed on appeal: *Campbell v MIAC* (2011) 122 ALD 560.
[69] *Campbell v MIAC* [2011] FMCA 61 at [44]. Undisturbed on appeal: *Campbell v MIAC* (2011) 122 ALD 560.

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co-trustee from being capable of satisfying s 134(10) 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.[70] 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.[71] In that case, the Court held that the fact that the first applicant was co-trustee and also the appointor under the trust deed, which carried with it the ability to run the affairs of the company, meant that in the context of the relationships established by that trust deed, it was at least arguable that the first applicant was within the definition in s 134(10) as the 'sole proprietor'.[72]

Direct and continuous involvement in management – reg 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 reg 1.11(1)(b), nor would a silent partner in a partnership that carries on the business.[73] 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 an applicant is required to have been directly involved in managing the business, and that direct involvement requires an applicant to be in charge of managing the whole or part of the business according to the size of the business.[74] Department policy further states that an applicant is expected to to consistently spend a significant portion of their time managing the business on an ongoing basis from day to

[70] *Campbell v MIAC* [2011] FMCA 61 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.

[71] *Sefat v MIBP* [2016] FCCA 2501 at [36]. In this case, the Tribunal applied *Campbell v MIAC* (2011) 122 ALD 560 (*Campbell*) and 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* 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*. See also *Sefat v MIBP (No.2)* [2020] FCCA 456.

[72] *Sefat v MIBP* [2016] FCCA 2501 at [36], and *Sefat v MIBP (No.2)* [2020] FCCA 456 at [44].

[73] *MIAC v Hart* (2009) 179 FCR 212 at [17].

[74] Policy – GenGuide M – Business visas – Visa application and related procedures – 3.10. Other business-related requirements – 3.10.1. Direct and continuous management involvement – 3.10.1.1. Direct involvement in management (reissued 1 July 2020). In relation to the size of the business, policy states that if the main business is a small business with no or few employees, it is expected that the applicant has a dominant role and responsibility for managing the business. For a larger business, the applicant may not hold responsibility for a principal or dominant role, but it is necessary that they have been directly involved in managing at least one facet of a main business.

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day.[75] Management involves planning, organising, directing and controlling the resources of the business, and Departmental policy provides further details as to what is meant by those terms.[76] It also provides various examples of the types of decisions that may affect the overall direction and performance of the business.[77]

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 reg 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 reg 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]

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[75] Policy – GenGuide M – Business Skills visas – Visa application and related procedures – 3.10. Other business-related requirements – 3.10.1. Direct and continuous management involvement – 3.10.1.2. Continuous involvement from day-to-day (reissued 1 July 2020).
[76] Policy – GenGuide M – Business Skills visas – Visa application and related procedures – 3.10. Other business-related requirements – 3.10.1. Direct and continuous management involvement – 3.10.1.1. Direct involvement in management (reissued 1 July 2020).
[77] Policy – GenGuide M – Business Skills visas – Visa application and related procedures – 3.10. Other business-related requirements – 3.10.1. Direct and continuous management involvement – 3.10.1.3 Decisions affecting the overall direction and performance of the business (reissued 1 July 2020).
[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, 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. For example, establishing the company's goals of the business, position in the market, commercial viability and competitive edge; performance measurement such as setting sales targets, pricing structure and profit margun; 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 – 3.10. Other business-related requirements – 3.10.1 Direct and continuous management involvement – 3.10.1.3. Decisions affecting the overall direction and performance of the business (reissued 1 July 2020)).
[80] *Lobo v MIMIA* [2005] FMCA 1024 at [25]–[26]. For example, in *Sun v MIBP* [2015] FCCA 1266 the Court held that on a plain reading of reg 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 (at [34]).
[81] *Lobo v MIMIA* [2005] FMCA 1024 at [24].
[82] *Lobo v MIMIA* [2005] FMCA 1024 at [25]–[27].

Value of the ownership interest – reg 1.11(1)(c)

The required value of the ownership interest for the business to be a main business within reg 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*, reg 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:

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

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[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 reg 1.15A as it stood prior to 1 July 2009 (i.e. 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 Act and regs 1.09A and 2.03A of the Regulations.
[84] reg 1.11(1)(c)(i) as amended by SLI 2010, No 70, commencing 19 April 2010: reg 2. The amendment does not apply to an application for a visa in the circumstances specified in reg 3(3).
[85] reg 1.11(1)(c)(ii) as amended by SLI 2010, No 70, commencing 19 April 2010: reg 2. The amendment does not apply to an application for a visa in the circumstances specified in reg 3(3).
[86] reg 1.11(1)(c)(iii) as amended by SLI 2010, No 70, commencing 19 April 2010: reg 2. The amendment does not apply to an application for a visa in the circumstances specified in reg 3(3).
[87] Explanatory Statement to SLI 2010, 70, p.2.
[88] Departmental policy also provides examples of what revenue consists if, and what is excluded. See Policy – GenGuide M – Business Skills visas – Visa application and related procedures – 3.9. Business Ownership and Assets – 3.9.4. Turnover (reissued 1 July 2020).
[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.

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
- 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 reg 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 the 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 reg 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 reg 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 reg 1.11(1)(c).[95]

Ownership interest in more than one business – reg 1.11(2)

Regulation 1.11(2) provides that an applicant must not nominate more than 2 qualifying businesses as main businesses.

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[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.
[92] reg 3(3), SLI 2010, No 70.
[93] *MIAC v Hart* (2009) 179 FCR 212 at [31], [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 at [31], [73].
[95] *MIAC v Hart* (2009) 179 FCR 212 at [16].

The term 'nominate' is not defined in the Act, the Regulations or departmental policy. The current online *Macquarie Dictionary* defines the verb '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 reg 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 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]

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[96] The limitation in reg 1.11(2) seldom arises as an issue. Nonetheless, 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, 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 reg 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), 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 reg 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]).
[97] *Liang v MIAC* (2009) FCA 184 at [55].
[98] *Liang v MIAC* (2009) FCA 184 at [55].

Relevant case law

Judgment	Judgment summary
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
Sefat v MIBP (No.2) [2020] FCCA 456	Summary
Snyman v MIBP [2015] FCCA 2791	Summary
MIBP v Snyman [2016] FCA 242	Summary

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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) 140 FCR 126	
Zhang v MIMA [2006] FMCA 1345	
Zhou v MIMA [2003] FMCA 169	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Act 1992 (No 2) (Cth)	No 84, 1992	
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2010 (No 3) (Cth)	SLI 2010, No 70	No 3/2010
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012

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NET PERSONAL AND BUSINESS ASSETS CALCULATION

Overview

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Overview[1]

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 owned by the applicant, the applicant's spouse or de facto partner,[2] or 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, 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 of the applicant, the applicant's spouse or de facto partner, or the applicant and the applicant's spouse or de facto partner together, that can be applied to the establishment or conduct of a business in Australia;[5]
- the net value of business and personal assets of the applicant, the applicant's spouse or de facto partner, or 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 policy states the 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 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 (Residence) (Class DF) Subclass 890 Business

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] 'Spouse' is defined in s 5F of 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 regs 1.09A and 2.03A of the Regulations and includes both opposite and same sex de facto relationships.
[3] cls 890.212, 892.212(c), 888.225(2) of sch 2 to the Regulations.
[4] cl 132.224(a).
[5] cl 188.226.
[6] cls 132.226, 890.215, 892.212(b), 188.245, 888.225(4) of sch 2 to the Regulations; pt 7A.7 of sch 7A to the Regulations.
[7] cl 405.227(2)(a).
[8] Policy – Migration Regulations – Other – GenGuide M - Business visas - Visa application and related procedures – 3.9. Business ownership and assets – 3.9.5. Net business assets – 3.9.5.2. Policy intention (reissued 1/7/2020).
[9] See, e.g. cl 188.227 of sch 2 to the Regulations.
[10] reg 1.11(1)(c).

Owner and Subclass 892 State/Territory Sponsored Business Owner visas. Such decisions are reviewable by the Tribunal under Part 5 of the *Migration Act 1958* (Cth) (the Act).

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 are 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 the *Migration Regulations 1994* (Cth) (the Regulations), and there is only limited judicial interpretation of the terms in the context of the Act and the Regulations.[12] Therefore, in determining their meaning, regard should be had to the ordinary meaning of those words and, to some extent, Departmental policy.

Net assets

The net assets of a business can be defined as the amount attributable to the owners/shareholders of the business 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 (also 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.

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]

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[11] See 'Accounting Standards' on Australian Accounting Standards Board (AASB) website: https://www.aasb.gov.au/pronouncements/accounting-standards/ (accessed 22 July 2021).
[12] For example, the meaning of 'turnover' was considered in *Cheng v MIAC* [2012] FMCA 911 where the Court found the term 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, in which the Court held (at [26]) that the Tribunal was correct to have regard to the policy 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. Policy – Migration Regulations – Other – GenGuide M - Business visas - Visa application and related procedures – 3.9. Business Ownership and Assets – 3.9.5. Net business assets – 3.9.5.3. Net business assets (reissued 1/7/2020).
[14] See, e.g. *Conceptual Framework for Financial Reporting* (AASB CF, [4.63]) and *Framework for the Preparation and Presentation of Financial Statements* (AASB FPP, [49(c)]), which defines equity as the 'residual interest of the assets of the entity after deducting all its liabilities': https://www.aasb.gov.au/pronouncements/conceptual-framework/ (accessed 22 July 2021).
[15] 'Compiled AASB Standard 138 Intangible Assets', *Australian Accounting Standards Board* (Web Document, 2 March 2020) [8] 'asset' <https://www.aasb.gov.au/admin/file/content105/c9/AASB138_08-15_COMPmay19_01-20.pdf>. See Financial Reports for a discussion of the Accounting Standards and their application. Similar definitions can be found in Policy – Migration Regulations –

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 Act in relation to an interest in a 'main business',[22] 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.

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Other – GenGuide M - Business visas – Visa application and related procedures – Attachment A - Definitions 'assets' (reissued 1/7/2020).

[16] 'Compiled AASB Standard 137 Provisions, Contingent Liabilities and Contingent Assets', *Australian Accounting Standards Board* (Web Document, 2 March 2020) [10] 'liability' <https://www.aasb.gov.au/admin/file/content105/c9/AASB137_08-15_COMPmay19_01-20.pdf>. Similar definitions can be found at Policy – Migration Regulations – Other – GenGuide M - Business visas – Visa application and related procedures – Attachment A - Definitions 'liabilities' (reissued 1/7/2020).

[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 (assuming that a reliable estimate can be made) because they are present obligations and it is probable that an outflow of resources embodying economic benefits will be required to settle the obligations. In contrast, contingent assets or liabilities are not recognised. Where the possibility of any inflow or outflow in settlement is remote, that possibility is not to be recognised as an asset or liability: 'Compiled AASB Standard 137 Provisions, Contingent Liabilities and Contingent Assets', *Australian Accounting Standards Board* (Web Document, 2 March 2020) [10]–[14], [27], [31], [86], [89], Appendix A <https://www.aasb.gov.au/admin/file/content105/c9/AASB137_08-15_COMPmay19_01-20.pdf>. Appendix C of AASB 137 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, 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: 'Compiled AASB Standard 137 Provisions, Contingent Liabilities and Contingent Assets', *Australian Accounting Standards Board* (Web Document, 2 March 2020) [33], [89] <https://www.aasb.gov.au/admin/file/content105/c9/AASB137_08-15_COMPmay19_01-20.pdf>.

[20] See for example *Su v MIMIA* [2005] FMCA 616. 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 (reg 1.03), but such assets may be included in calculations as business assets when held by a qualifying or main business.

[22] For the purposes of the definition in reg 1.11 of the Regulations.

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', 'an item of property' or 'an economic resource'.[23] 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.[24] 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').[25] Another example is in the *Corporations Act 2001* (Cth), 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).[26]

Departmental policy 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).*[27]

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[23] *Macquarie Dictionary* (online at 22 July 2021) 'asset'.
[24] *Income Tax Assessment Act 1997* (Cth) (Income Tax Assessment Act) s 108-5.
[25] Income Tax Assessment Act ss 108-5, 108-10, 108-20.
[26] 'Asset' is defined in s 601WAA of the *Corporations Act 2001* (Cth) (Corporations Act), for the purposes of pt 5D.6 ASIC-approved transfers of estate assets and liabilities.
[27] Policy – Migration Regulations – Other – GenGuide M - Business visas – Visa application and related procedures – Business ownership and assets – 3.9.21 Personal items (reissued 1/7/2020). The policy should not be applied rigidly as though it is a legal requirement, but the assessment of the evidence and findings of fact based on the weight given to evidence are matters for the decision maker. In *Nguyen v MIBP* [2015] FCCA 1351, the applicant sought to include an unsecured personal loan to his nephew and his wife's wedding jewellery in the net value calculation of their combined business and personal assets for the purposes of cl 892.212(b). The delegate, referring to the policy, didn't accept the private loan as without a formal legal loan/repayment agreement the applicant couldn't demonstrate his legal right to the funds, the value of the funds or that he could readily recover the funds, and also didn't accept the jewellery as there was no evidence of ownership or a fair market valuation. On review, the applicant provided a loan agreement purportedly made at the time of the loan and further undated table of assets listing various cash funds transferred from Vietnam to Australia by him, his family and friends. The Tribunal found that based on the applicant's inconsistent and vague evidence, the loan agreement was not a genuine contemporaneous document but was created in response to the delegate's concern. Further, in the absence of any independent supporting evidence, it found the source of the cash funds lacking in credibility. Based on its credibility finding, it also found for the purposes of cl 892.212(c) the alleged goodwill value of the business to be of no substance. The Court held there was no error in the Tribunal's approach.

Policy appears to impose a requirement beyond that required by criteria such as cls 188.245, 888.225(4), 890.215 and 892.212(b),[28] 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 405.227(2)(a) which requires the net assets be 'available for transfer and capable of being transferred to Australia'; cls 188.228(b) and 188.247 which require the assets be 'available for transfer to Australia within 2 years after the grant of a Subclass 188 visa'; cl 188.227 which requires that assets are 'sufficient to allow the applicant and the spouse or de facto partner to settle in Australia'; and cl 188.226 which requires that assets be of a specified value[29] that 'can be applied to the establishment or conduct of a business in Australia.' The extract from Departmental policy 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.[30] 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.[31]

Personal assets do not usually include intangible assets but may be included 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,

[28] cl 188.245 requires that for the 2 fiscal years immediately before the time of invitation to apply for the visa, the business and personal assets of the applicant, the applicant's spouse/de facto partner, or the applicant and his/her spouse/de facto partner together, had a net value of at least AUD2 250 000; cl 888.225(4) requires that 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, had in the period of 12 months immediately ending before the application was made, and continue to have, a net value of at least AUD600 000, and were lawfully acquired'; cls 890.215 and 892.212(b) require that the net value of 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, is, and has been throughout the 12 months immediately before the application is made, at least AUD250 000'.

[29] cl 188.226. For visa applications where the time of invitation to apply for the visa was before 1 July 2021, the net value of the personal and business assets of the relevant persons must be at least AUD 800,000, and for visa applications where the time of invitation was on or after 1 July 2021, 'at least AUD 1,250,000': *Home Affairs Legislation Amendment (2021 Measures No 1) Regulations 2021* (Cth) (F2021L00852).

[30] 'Compiled AASB Standard 138 Intangible Assets', *Australian Accounting Standards Board* (Web Document, 2 March 2020) [8] 'intangible asset' <https://www.aasb.gov.au/admin/file/content105/c9/AASB138_08-15_COMPmay19_01-20.pdf>. For a more detailed discussion of intangible assets, see Financial reports.

[31] 'Compiled AASB Standard 138 Intangible Assets', *Australian Accounting Standards Board* (Web Document, 2 March 2020) [21] <https://www.aasb.gov.au/admin/file/content105/c9/AASB138_08-15_COMPmay19_01-20.pdf>.

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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.'[32]

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 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 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.[33] 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.'[34] Thus, a person may have legal title to an asset, but the asset may be owned by someone else, who is the beneficial owner.[35]

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[32] 'Compiled AASB Standard 138 Intangible Assets', *Australian Accounting Standards Board* (Web Document, 2 March 2020) [11] <https://www.aasb.gov.au/admin/file/content105/c9/AASB138_08-15_COMPmay19_01-20.pdf>.
[33] See *Zhang v MIMA* [2006] FMCA 1345 at [33]. The Court found that the Tribunal was correct in considering that, for the purposes of cl 845.215 (which broadly requires the assets owned by the applicant or together with their spouse/de facto partner in the main business(es) have and had a requisite net value for the requisite period), ownership of an asset requires a beneficial or equitable interest in the asset.
[34] 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'.
[35] 'Beneficial ownership', from the perspective of business skills visa applications, is 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: Policy – Migration Regulations – Other – GenGuide M - Business visas – Visa application and related procedures – Appendix A - Definitions 'beneficial ownership' (reissued 1/7/2020).

Regulation 1.11A (*'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 reg 1.11A(2).[36] Regulation 1.11A(2) provides:

> *(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 reg 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*

[36] reg 1.11A(1). Note that reg 1.11A only applies to the pts of sch 2 it mentions (i.e. pts 188, 888, 890, 891, 892 and 893). It sets out the circumstances in which beneficial ownership is to be recognised, where beneficial ownership is claimed or 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).

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> *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.*[37]

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),[38] 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). However, when considering such questions, 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.[39]

The source of funds used to acquire an asset is also relevant where there is a requirement that assets have been lawfully acquired.[40]

General business assets

Financial statements

The three basic financial statements are usually sufficient to evidence general business assets (e.g. trading stock, revenue[41]). These are:

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[37] *Yu v MIMIA* (2004) 140 FCR 126, [32], [35].

[38] See, e.g., *MIAC v Yong Zhao* [2008] FMCA 1683 at [26]: 'The crucial matter to be established was whether those funds did in fact belong to the first and second respondents, 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'.

[39] See *Ibrahim v MIAC* [2008] FCA 503 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 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 where the Court found no error in the delegate requiring the applicant in that case to provide proof of the source of the funds. 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, but rather in the particular circumstances of that case it was appropriate to seek that information (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]). Also in *Jiang v MICMSMA* [2020] FCCA 1490, the Court found in the circumstances of the case the delegate did not misconstrue or misapply cl 188.245 by not including in the net asset calculation the applicant's cash funds which it wasn't able to ascertain the source as claimed, because reading the reasons as a whole, the delegate was not reasonably satisfied those assets were 'lawfully acquired' for the purposes of cl 188.247(a) and if they were included in the applicant's net assets, he would necessarily fail to meet cl 188.247 (see [46]–[52]).

[40] For e.g., cls 188.228, 188.247, 888.225(2), 888.225(4), 890.212 and 892.212(b).

[41] 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, the Court upheld the Tribunal's finding that a business acting as an intermediary between two other

- a statement of financial position (also known as a balance sheet);
- a statement of financial performance (also known as a profit and loss report or income statement); and
- a statement of cash flow.

Departmental policy does not set out binding evidentiary requirements but does provide guidance on the types of evidence which may be useful in satisfying a decision maker of an applicant's financial position.

Policy also relevantly provides that the purpose of financial statements is to show the financial position and performance of an entity, and that it provides 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.[42] The statement of financial position (also known as balance sheet) provides the position of the entity at a fixed point in time and the income (or profit and loss) statement presents a summary of revenues and expenses of the entity for a specific 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/documents. For more information regarding financial statements, please see Financial reports.

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).[43]

Applicants may be required to submit financial statements addressing specific 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 (e.g. patents) can be shown by the patent, trademark or copyright registration, permissions agreement and receipts.

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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) 213 FCR 362.

[42] Policy – Migration Regulations – Other – GenGuideM – Business visas – Visa application and related procedures – Business visa applications – 3.8. Assessing applications – 3.8.1.1. Requesting financial statements (reissued 1/7/2020).

[43] Policy – Migration Regulations – Other – GenGuideM – Business visas – Visa application and related procedures – Business visa applications – 3.8. Assessing applications – 3.8.1.3. If documentation is insufficient (reissued 1/7/2020).

Policy 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:[44]

- 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, policy 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.[45]

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 pay as you go (PAYG) amounts withheld, PAYG instalments and fringe benefits tax.[46] Some businesses will receive a quarterly GST and/or PAYG instalment notice instead of a BAS if they report and pay GST and/or PAYG instalments quarterly, use the instalment amounts advised by the ATO, and have no other reporting requirements.[47] Hence, quarterly GST and PAYG notices may also be useful financial evidence.

Policy 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.[48]

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.[49]

[44] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – Business visa applications – 3.8. Assessing applications – 3.8.1.7. Other Financial Documentation (reissued 1/7/2020).
[45] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – Business visa applications – 3.8. Assessing applications – 3.8.1.7. Other Financial Documentation (reissued 1/7/2020).
[46] 'Business Activity Statements (BAS)', *Australian Taxation Office* (Web Page) <https://www.ato.gov.au/Business/Business-activity-statements-(BAS)/>.
[47] 'Instalment notices for GST and PAYG instalments', *Australian Taxation Office* (Web Page) <https://www.ato.gov.au/Business/Business-activity-statements-(BAS)/Instalment-notices-for-GST-and-PAYG-instalments/>.
[48] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – Business visa applications – 3.8. Assessing applications – 3.8.1.7. Other financial documentation (reissued 1/7/2020).
[49] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – Business visa applications – 3.8. Assessing applications – 3.8.1.7. Other financial documentation (reissued 1/7/2020).

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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.[50]

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. [51]

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.

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.

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[50] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – Business visa applications – 3.8. Assessing applications – 3.8.1.7. Other financial documentation (reissued 1/7/2020).
[51] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – Business visa applications – 3.8. Assessing applications – 3.8.1.7. Other financial documentation (reissued 1/7/2020).

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. Policy provides that loans made to incorporated businesses by independent parties, including financial institutions, are liabilities of the business and cannot 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.[52] 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.[53] Furthermore, a loan made by an applicant to a business can still constitute an asset of that applicant in that business[54] 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.[55]

According to policy, 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.

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

[52] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.9. Business ownership and assets – 3.9.6. Loans - Source of funds and collateral – 3.9.6.1. Loans to the business (reissued 1/7/2020).
[53] *Yao v MIBP* [2016] FCCA 3164, [47].
[54] E.g. for the purposes of satisfying cl 890.212 of sch 2 to the Regulations.
[55] *Yao v MIBP* [2016] FCCA 3164, [44], [47]–[48]. See also *He v MIBP* [2015] FCCA 2915 in which the Court found (at [16], [31]–[34]) that the Departmental policy stating 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.

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premise that the applicant's asset (money) is directly used by the business and is a personal liability which is exposed to risk.[56]

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.[57] 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.[58] Though the Standards do not provide binding definitions for the Act and the 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.

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.[59] For example, where property of an applicant's spouse is used to secure an overdraft for a business operated by the applicant, letters of credit and other banking facilities for the applicant's trading activities, it is arguable that the property is

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[56] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.9. Business ownership and assets – 3.9.6. Loans - Source of funds and collateral – 3.9.6.2. Encumbered loans based on collateral (reissued 1/7/2020).
[57] See *Su v MIMIA* [2005] FMCA 616. 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.
[58] 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: 'Compiled AASB Standard 137 Provisions, Contingent Liabilities and Contingent Assets', *Australian Accounting Standards Board* (Web Document, 2 March 2020) [10]–[14], [27], [31], [86], [89], Appendix A <https://www.aasb.gov.au/admin/file/content105/c9/AASB137_08-15_COMPmay19_01-20.pdf>.
[59] *Cheung v MIMIA* (2005) 143 FCR 117.

used in the business.[60] 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.

Departmental policy 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…*[61]

[60] *Cheung v MIMIA* (2005) 143 FCR 117, [34]. Compare *Yen v MIMIA* [2003] FCA 705. 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*.

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While the policy reflects a definition of 'assets in a business' which is consistent with the approach taken in *Cheung v MIMIA,*[62] the Tribunal should be careful not to treat the policy as a legislative requirement.

Policy 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.
- 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.[63]

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.[64] A person's share of assets and liabilities held in a partnership agreement will also be determined by the terms of that agreement.[65]

A person's share of assets held under a partnership agreement may be set out in the partnership accounts. Policy 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*

[61] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.9. Business ownership and assets – 3.9.5.3. Net business assets (reissued 1/7/2020). In *Wang v MICMSMA* [2020] FCCA 1252, the delegate in calculating the net value of assets for the purpose of cl 132.224 (which requires that for at least 2 of the 4 fiscal years immediately before the time of invitation to apply for the visa, the net value assets of the applicant, his/her spouse/de facto partner, or together, in their qualifying business/es was at least AUD400,000) did not accept the applicants' additional capital investment sourced from personal loans because there was no evidence to substantiate the claimed loans and subsequent repayments. The Court found no error and held that for the purpose of determining the applicants' net asset value in the business, one has to look at the net value of the applicants' interest in the assets after liabilities had been taken into account. This may require the applicants to satisfy that their liability accrued to inject the capital into the business had been extinguished (at [26]–[31]).
[62] *Cheung v MIMIA* (2005) 143 FCR 117.
[63] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.9. Business ownership and assets – 3.9.8. Incorporated businesses (public and private companies) (reissued 1/7/2020).
[64] E.g., *Partnership Act 1892* (NSW) ss 1, 9, 20A, *Partnership Act 1958* (Vic) ss 5, 13, 24.
[65] See for example *Perpetual Executors & Trustees Association of Australia Ltd v Federal Commissioner of Taxation* [1955] HCA 66 at [13].

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plus

- *the individual partner's share of income*

minus

- *drawings / borrowings on the account.*[66]

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.

Policy 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 is 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.[67]

The Tribunal may have regard to the policy but is not bound by them. In particular, uncritical adherence to this policy 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.

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[66] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.9. Business ownership and assets – 3.9.7. Unincorporated businesses (sole proprietors and partnerships) – 3.9.7.3. Partnerships (reissued 1/7/2020).
[67] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.9. Business ownership and assets – 3.9.7. Unincorporated businesses (sole proprietors and partnerships) – 3.9.7.2. Sole proprietorships (reissued 1/7/2020).

Evidentiary and procedural issues

Valuations

The weight to be given to asset valuations is a matter for the Tribunal.[68] It may reject an expert opinion if not satisfied as to how or why the conclusions expressed in that opinion were reached.[69]

In general, the Tribunal is not obliged to substitute its own valuation where it is not satisfied that an applicant's is correct.[70]

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, policy instructs officers to ask applicants to demonstrate the net value of their personal and business assets on any one date in the 3 month period immediately before the visa application was made. By asking that the same date be used, the possibility of double counting of assets is eliminated.[71]

Again, the Tribunal may have regard to policy 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.

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[68] *Tran v MIAC* [2008] FCA 1826. 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. 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 such a conclusion was a finding of fact, and that it was open to the Tribunal to find that it was not satisfied the applicant met the requirements of cl 845.215 for the reasons given (see [27]). See also *Xin v MIAC* [2007] FCA 703 at [17], [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'.

[69] *Phua v MIAC* [2008] FMCA 1737. 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, 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.

[70] See for example *Phua v MIAC* [2008] FMCA 1737 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.'

[71] Policy – Migration Regulations – Other – GenGuide M – Business visas – Visa application and related procedures – 3.9. Business ownership and assets – 3.9.20. Net business and personal assets - Overview – 3.9.20.2. Avoiding double counting (reissued 1/7/2020).

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.[72] It is, however, necessary that the assets be available.[73] 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 not those resources were adequate to conduct the particular business having regard to the nature of the particular business.[74]

Relevant case law

Judgment	Judgment summary
Bodenstein v MIAC [2009] FCA 50	Summary
Cheng v MIAC [2012] FMCA 911	Summary
Cheng v MIAC (2013) 213 FCR 362; [2013] FCA 405	Summary
Cheung v MRT (2004) 141 FCR 243; [2004] FCA 1725	
Cheung v MIMIA (2005) 143 FCR 117; [2005] FCAFC 122	Summary
He v MIBP [2015] FCCA 2915	Summary
Ibrahim v MIAC [2008] FCA 503	Summary
Jiang v MICMSMA [2020] FCCA 1490	
Loessi v MIMIA [2007] FCA 1891	
Lukac v MIMIA [2004] FCA 1641	Summary
Nassif v MIMA [2003] FCA 481	Summary

[72] *Wyse v MIAC* [2006] FMCA 1362, [61].
[73] *Bodenstein v MIAC* [2009] FCA 50, [23]–[26].
[74] *Parisi v MIAC* [2005] FMCA 218, [36], *Lukac v MIMIA* [2004] FCA 1641, [13]–[21].

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Nguyen v MIBP [2015] FCCA 1351	
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	
Wang v MICMSMA [2020] FCCA 1252	
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) 140 FCR 126; [2004] FCA 1477	
Zhang v MIMA [2006] FMCA 1345	

Relevant amending legislation

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2008 (No 3) (Cth)	SLI 2008, No 166	No 5/2008
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2010 (No 3) (Cth)	SLI 2010, No 70	No 3/2010
Migration Amendment Regulations 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Home Affairs Legislation Amendment (2021 Measures	F2021L00852	No 5/2021

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No 1) Regulations 2021 (Cth)		

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REGULATIONS 2.72 AND 2.73 – NOMINATION AND APPROVAL OF AN OCCUPATION FOR SUBCLASS 457 AND SUBCLASS 482

Overview

Tribunal's jurisdiction and powers

Process for nomination of an occupation

- Regulation 2.73 for nomination applications made before 18 March 2018
- Regulation 2.73 for nomination applications made on or after 18 March 2018

Criteria for approval of a nomination – reg 2.72

- Nomination applications made before 18 March 2018
- Nomination applications on or after 18 March 2018
- Nomination in accordance with prescribed process – reg 2.72(3)
- Standard business sponsor or party to a work agreement – reg 2.72(4) (pre 18/03/18) or reg 2.72(5) (post 18/03/18)
- Identification of visa holder who will work in the nominated occupation – reg 2.72(5) (pre 18/03/18) or reg 2.73(8) (post 18/03/18)
  - Can the identified person change?
- Family members and skills requirement – regs 2.72(6), (7)
  - Inclusion of family members
  - Demonstration of skills – reg 2.72(6)(b) (pre 18/03/18)
- Equivalent undertaking to that provided by current sponsor for PIC 4006A – reg 2.72(7A) (pre 18/03/18)
- Identification of occupation and proposed employee – reg 2.72(8A) (post 1/7/10 and pre 18/03/18) or reg 2.72(8) (post 18/03/18)
  - Can the nominated occupation change?

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What is the relevant instrument?

Certification relating to 'payment for visa' conduct – reg 2.72(8B) (post 14/12/15 and pre 18/3/18) or reg 2.73(12) (post 18/03/18)

No adverse information known about the person or an associated person – reg 2.72(9) (pre 18/3/18) or reg 2.72(4) (post 18/03/18)

Pre 18 March 2018 definitions

Post 18 March 2018 definitions

Occupational, certification, English, employment terms & conditions requirements for standard business sponsors – reg 2.72(10) (pre 18/03/18 only)

Occupation in written instrument

Support of a specified organisation

Terms and conditions of employment and base rate of pay

Requisite certification

Position associated with nominated occupation is genuine – reg 2.72(10)(f) (pre 18/3/18) or reg 2.72(10)(a) (post 18/3/18)

English language proficiency of certain visa holders identified in nomination

Employee engaged under contract

Full-time position – reg 2.72(10)(b) (post 18/3/18 only)

Additional requirements in relation to Short-term stream and Medium-term stream (post 18/3/18 only)

English language proficiency

Annual earnings

No less favourable terms and conditions and discriminatory recruitment practices

Contract of employment

Requirements specified in work agreement – reg 2.72(11) (pre 18/03/18) or reg 2.73(15) (post 18/03/18)

Nomination Training Contribution Charge

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The Labour Market Testing Condition

Does the labour market testing condition apply? – s 140GBA(1)

Does an exemption apply? – ss 140GBC and 140GBB

Skill and occupational exemptions

Major disaster exemption

Requirements of the labour market testing condition – s 140GBA(3)

Labour market testing has been conducted over prescribed period

Evidentiary requirements and, for post 12/8/2018 nominations, the manner of LMT

No suitably qualified and experienced Australian / temporary visa holder available

Notice of primary decision

Period of approval of nomination

Nominations made before 18 March 2018

Nominations made on or after 18 March 2018

Relevant case law

Relevant legislative amendments

Available decision templates/precedents

Attachment A: Assessing the terms and conditions of employment & base rate of pay for nominations pre 18 March 2018

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Overview[1]

Nomination is the process through which a person who is, or has applied to be, an approved standard business sponsor,[2] or who is a non-Ministerial party to negotiations for a work agreement,[3] nominates for approval an occupation which a visa holder, visa applicant, or proposed visa applicant will undertake.[4] 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.[5]

In the standard business sponsor context, the nomination is the second stage of a three-stage business sponsorship scheme under the *Migration Act 1958* (Cth) (the Act) and the *Migration Regulations 1994* (Cth) (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[6] underwent major revision as a result of the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) and the *Migration Amendment Regulations 2009 (No 5)* (Cth),[7] effective 14 September 2009.[8] 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)*

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] From 17 April 2019, a 'standard business sponsor' is defined in reg 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 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* (Cth) (No 162, 2018) and *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551).
[3] A 'work agreement' for the purposes of a Subclass 457 or Subclass 482 visa is defined in s 5 of the Act and reg 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.
[4] *Migration Amendment (Skilling Australians Fund) Act 2018* (Cth) (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.
[5] Explanatory Statement to *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115), p.25.
[6] Note the Subclass 457 visa was moved to the temporary work framework from 24 November 2012: *Migration Amendment Regulation 2012 (No 4)* (Cth) (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: reg 1.03.
[7] SLI 2009, No 115 as amended by *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth) (SLI 2009, No 203).
[8] See Legislation Bulletin No 11/2009 for further details.

(Cth).[9] Amendments introducing labour market testing requirements applied to certain nominations made by standard business sponsors on or after 23 November 2013.[10]

Major reforms again occurred on 18 March 2018, introduced by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (TSS Regulations). The TSS Regulations repealed the Class UC Subclass 457 (Temporary Work (Skilled)) visa and 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 regs 2.72 and 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.[11] 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* (Cth) and the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth), 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 reg 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

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[9] *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146). For further details on the effect of SLI 2013, No 146, see Legislation Bulletin No 10/2013,

[10] *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) (No 122, 2013) and Migration Amendment (Temporary Sponsored Visas) Commencement Proclamation 2013.

[11] 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 new version of reg 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 sch 11 to the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (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 Act 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.

condition, unless certain exemptions apply, that condition is satisfied.[12] 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.[13] The process for nomination is outlined in reg 2.73.

Other commentaries relating to the temporary business scheme includes Approval as standard business sponsor, Subclass 457 visa and Subclass 482 visa.

Tribunal's jurisdiction and powers

A decision to refuse to approve a nomination under s 140GB(2) and reg 2.72 is a reviewable decision under Part 5 of the Act.[14]

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 regs 2.59 and 2.68 that apply only to businesses lawfully operating in Australia.[15] This in practical terms means that the Tribunal has jurisdiction in relation to decisions where the affected business is based in Australia.[16] The person who made the nomination has standing to apply for review.[17]

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.[18]

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.[19] The definition of 'approved work sponsor' in this context means either an approved standard business

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[12] s 140GB(2) as amended by No 122, 2013.
[13] s 140GB(2) as amended by No 38, 2018.
[14] s 338(9), reg 4.02(4)(d).
[15] For decisions made on standard business sponsorship approval or variation of standard business sponsorship approval made before 18 March 2018, these are regs 2.59(d) and (e) and .2.68(e) and (f) respectively; see reg 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 regs 2.59(f) and .2.68(g): see reg 4.02(4B) and clause 6704(16) of sch 13 as amended by F2018L00262.
[16] In *Auservices Pty Ltd v MICMSMA* [2020] FCCA 1250, the Court considered the similar requirement in reg 4.02(4A) (relevant to decisions to refuse an approval of a standard business sponsorship) to mean that the Tribunal will have jurisdiction if the business is based in Australia, notwithstanding that the matter was determined on a discrete issue in reg 2.59 and the delegate had not directly said they had considered regs 2.59(d) and (e) (or reg 2.59(f) for post 18 March 2018 decisions) in the decision (at [59]–[63]). This interpretation would be equally applicable to the similarly worded reg 4.02(4B).
[17] s 347(2)(d) and reg 4.02(5)(c) as amended by the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (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.
[18] ss 140GB(2), 349(2).
[19] s 140GB(1) of the Act as amended by No 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 No 2/2018 for further details.

sponsor whose approval has not ceased or been cancelled, or a party to a work agreement (other than a Minister).[20]

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.[21]

Regulation 2.73 sets out the requirements for the process of nomination of an occupation.

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;[22]
  - *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;[23]
- the approved sponsor must provide, as part of the nomination:[24]
  - the identity of the visa holder, or proposed visa holder who will work in the nominated occupation;[25]
  - 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);[26]
    - » *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

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[20] s 5(1) of the Act as amended by No 162, 2018.
[21] s 140GB(1)(b) and reg 2.73(1A) (before 18 March 2018); reg 2.73(1) (after 18 March 2018).
[22] reg 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: reg 2.73(3).
[23] regs 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.
[24] reg 2.73(4) for nominations made before 1/7/10 and reg 2.73(4A) for nominations made on or after 1/7/10.
[25] By reference to reg 2.72(5).
[26] reg 2.72(8) as amended by *Migration Amendment Regulations 2010 (No 6)* (Cth) (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: reg 1.03. See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas for relevant instrument.

sponsor is a standard business sponsor) or in the work agreement (if the approved sponsor is a party to a work agreement);[27]

- » the location(s) of the nominated occupation;[28] 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);[29] and
  - » 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;[30]
  - » 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;[31] 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.[32]
- 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.[33]

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[27] reg 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: reg 1.03. For applications made on or after 1 July 2013 'ANZSCO' has the meaning specified by the Minister in an instrument in writing: reg 1.03. See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas for relevant instrument for reg 2.72(8A) and the definition of ANZSCO.
[28] By reference to regs 2.72(8)(d) and 2.72(8A)(d).
[29] reg 2.73(4)(b) for standard business sponsor, reg 2.73(4)(c) for work agreement. See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas for the relevant instrument.
[30] By reference to reg 2.72(10)(d)(iii). See the 'Occ-Ex' tab of the Register of Instruments - Business visas.
[31] By reference to reg 2.72(10)(d)(ii). See the 'Occ-Ex' tab of the Register of Instruments - Business visas.
[32] By reference to regs 2.72(10)(d)(iv) and 2.72(10)(e)(iv). See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas for the relevant instrument.
[33] By reference to regs 2.72(11)(b) and 2.72(11)(c).

- *for applications made on or after 14 December 2015*, the approved sponsor must provide the written certification in reg 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: reg 2.73(4B).[34]
- the application is accompanied by the prescribed or specified fee.[35] The fee may be refunded in certain circumstances.[36]

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.[37] 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:

- the applicant make the nomination using the internet and an approved form specified in the relevant written instrument;[38] and
- the application is accompanied by the prescribed or specified fee and any applicable nomination training contribution charge the applicant is liable to pay;[39] 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 reg 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 reg 2.72(9) at the time of the nomination);[40] and
- the following information is provided in the nomination application:
  - the identity of the nominee in the nomination;[41]
  - the name of the occupation and the corresponding 6-digit code (if any);[42]
  - the location(s) at which the nominated occupation will be carried out;[43]
  - the proposed period of stay for a visa granted on the basis of the nomination;[44]

[34] reg 2.73(4B) as inserted by *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* (Cth) (SLI 2015, No 242) and applying to applications for approval of a nomination made after 14 December 2015.
[35] reg 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.
[36] See reg 2.73(6).
[37] reg 2.73(1) of the Regulations, as amended by F201800262.
[38] regs 2.73(3), (4), as amended by F201800262. See the 'Form&Fees' tab of the Register of instruments - Business Visas.
[39] regs 2.73(5), (5A) as amended by F2018L01093.
[40] reg 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.
[41] reg 2.73(8) as amended by F2018L01093.
[42] regs 2.73(9)(a), (b) as amended by F201800262.
[43] reg 2.73(9)(c) as amended by F201800262.

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  - the annual turnover of the nominating business;[45]
  - any other information specified in an instrument for reg 2.73(9)(e);[46]
  - written certification as to whether or not the person has engaged in conduct that contravenes s 245AR(1) of the Act;[47]
  - written certification that the employment contract with the nominee complies or will comply with Commonwealth, State or Territory employment laws (unless exempt).[48]

- if the nomination is in relation to the Short-term stream or Medium-term stream, written certification that:[49]
  - 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;[50]
  - 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;[51]
  - 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);[52]
- if the nomination is in relation to the Labour Agreement stream, written certification that:[53]
  - 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 – reg 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 reg 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.

[44] reg 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, 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.
[45] reg 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.
[46] reg 2.73(9)(e) as amended by F201800262. There were no specifications at the time of writing.
[47] reg 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.
[48] reg 2.73(13) as amended by F201800262. See the 'ExemptOccs' tab of the Register of Instruments - Business Visas.
[49] reg 2.73(14) as substituted by F201800262.
[50] See the 'Occ482noms' tab of the Register of Instruments - Business Visas.
[51] See the 'Occ482noms' tab of the Register of Instruments - Business Visas.
[52] See the 'ExemptOccs' tab of the Register of Instruments - Business Visas.
[53] reg 2.73(15) as substituted by F201800262.

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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.[54] 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).[55]

Nomination applications made before 18 March 2018

The criteria in reg 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 reg 2.73;[56]
- the approved sponsor is a standard business sponsor or party to a work agreement;[57]
- the approved sponsor has identified in the nomination the visa holder, or applicant or proposed applicant, who will work in the nominated occupation;[58]
- 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,[59] 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 undertaking to that provided in relation to the Subclass 457 visa holder by their current sponsor under PIC 4006A(2) (health criterion);[60]
- the approved sponsor has included the requisite information in the nomination regarding the description and location of occupation;[61]
- 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;[62]
- *if the approved sponsor is a standard business sponsor*:[63]
  - the nominated occupation corresponds to an occupation specified in the relevant written instrument, and the occupation is applicable to the person identified in the nomination in accordance with any specifications (or

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[54] s 140GB(2) as amended by No 122, 2013.
[55] Items 16(2) and (3) of sch 1 to No 38, 2018.
[56] reg 2.72(3).
[57] reg 2.72(4).
[58] reg 2.72(5).
[59] regs 2.72(6), (7).
[60] reg 2.72(7A).
[61] reg 2.72(8) for nominations made before 1/7/10, reg 2.72(8A) for nominations made on or after 1/7/10.
[62] reg 2.72(9).
[63] reg 2.72(10).

'caveats') made in that instrument (See 'Occ186/407/457&Noms' tab of Register of instruments - Business visas);[64]

- 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'[65] 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;[66]
- the approved sponsor has provided the requisite written certification in the nomination;
- the position associated with the nominated occupation is genuine;[67]
- 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);[68] 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 employment and give a copy of that contract to the Minister, or the nomination is an occupation specified in the relevant instrument.[69]

- *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;[70]

[64] reg 2.72(10)(aa) as amended by the *Migration Amendment (Specification of Occupations) Regulations 2017* (Cth) (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.
[65] This term is defined in reg 2.57(3A).
[66] For the relevant instrument, see the 'TSMIT' tab of the Register of Instruments - Business visas.
[67] reg 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.
[68] 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* (Cth) (SLI 2013, No 253) were replaced by *Migration Amendment (2014 Measures No 1) Regulation 2014* (Cth) (SLI 2014, No 32) for all nominations made but not finally determined as at 22 March 2014 or made on or after that date.
[69] reg 2.72(10)(h), inserted by *Migration Amendment Regulation 2013 (No 5)* (Cth) (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.
[70] reg 2.72(8B), as inserted by SLI 2015, No 242 and applying to applications for approval of a nomination made after 14 December 2015.

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- *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;[71]
- *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.[72]

Nomination applications on or after 18 March 2018

The criteria in reg 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;[73]
- the nomination was made in accordance with the prescribed process in reg 2.73;[74]
- 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;[75]
- the applicant is a standard business sponsor or a party to a work agreement;[76]
- the applicant has paid in full any debt mentioned in s 140ZO of the Act;[77]
- 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;[78]
- 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;[79]
- the position associated with the nominated occupation is genuine and a full-time position (unless it is reasonable to disregard this full-time requirement);[80]
- *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

[71] reg 2.72(11).
[72] reg 2.72(12).
[73] Note inserted after reg 2.72(2) by F2018L01093. The nomination training contribution charge liability only applies to nomination applications made on or after 12 August 2018.
[74] reg 2.72(3) as substituted by F2018L00262.
[75] reg 2.72(4) as substituted by F2018L00262.
[76] reg 2.72(5) as substituted by F2018L00262.
[77] reg 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.
[78] regs 2.72(6) and (7) as substituted by F2018L00262.
[79] reg 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 reg 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.
[80] reg 2.72(10) as substituted by F2018L00262. Regulation 2.72(10A) as inserted by F2018L01093 for all not finally determined applications allows for the requirement in reg 2.72(10)(b) that the nominated position to be full time to be disregarded if it is reasonable in the circumstances.

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specified in the instrument.[81] 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);[82]

- if the nominee's annual earnings in relation to the nominated occupation will *not* be at least the amount specified in an instrument,[83] 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;[84]

- *if the nomination is for the Labour Agreement stream:*[85]
  - 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 – reg 2.72(3)

Under reg 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 reg 2.73. For further information on this process see above.

Standard business sponsor or party to a work agreement – reg 2.72(4) (pre 18/03/18) or reg 2.72(5) (post 18/03/18)

Regulation 2.72(4) for nominations made before 18 March 2018 or reg 2.72(5) for nominations made on or after 18 March 2018, provides that the decision maker must be

[81] regs 2.72(11), (12), (13) as substituted by F2018L00262. See the 'ExemptOccs' tab of the Register of Instruments - Business Visas.
[82] reg 2.72(14) as inserted by F2018L00262. See the '482English' tab of the Register of Instruments - Business Visas.
[83] regs 2.72(15), (16), (17) as inserted by F2018L00262. See the 'TSMIT' tab of the Register of Instruments - Business Visas.
[84] reg 2.72(18) as inserted by F2018L00262.
[85] reg 2.72(19) as inserted by F2018L00262.

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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.[86] 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 reg 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 an 'approved work sponsor'. This was a technical amendment consequential to the introduction of an 'approved family sponsor' for the purposes of certain family visas.[87]

A 'work agreement' for the purposes of a Subclass 457 or Subclass 482 visa is defined in s 5 of the Act and reg 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[88] 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 – reg 2.72(5) (pre 18/03/18) or reg 2.73(8) (post 18/03/18)

For nominations made before 18 March 2018, reg 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.[89] 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,[90] 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 reg 2.73(8), identify the nominee.

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[86] Explanatory Statement to SLI 2009, No 115, p.26.
[87] No 162, 2018 and F2019L00551. See Legislation Bulletin No 1/2019 and Legislation Bulletin No 3/2019 for more information.
[88] A 'labour agreement' is defined in reg 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.
[89] Explanatory Statement to SLI 2009, No 203, pp.33-34.
[90] This is in practice unlikely given the use of an internet form to seek approval of a nomination, which requires 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 reg 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 reg 2.73,[91] suggests reg 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,[92] and in the absence of judicial authority may be the preferable one. However, nominations under reg 2.73 and 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 reg 2.72(5), which falls to be considered at the time of decision (along with reg 2.72(3) which requires satisfaction that the nomination is made in accordance with the process in reg 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.[93]

For nominations under reg 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 reg 2.72(8) for the nominated occupation and any specifications for the nomination to apply to the nominee in accordance with the instrument in force at the time of nomination.

Family members and skills requirement – regs 2.72(6), (7)

Inclusion of family members

Regulation 2.72(6)(a) (for nominations made before 18 March 2018) and reg 2.72(6) (for nominations made on or after 18 March 2018) require that the decision maker must be satisfied that, if the approved sponsor identifies a Subclass 457 or Subclass 482 visa holder

[91] For example, the requirement in reg 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 reg 2.73(4A)(a) which refers to 'the information mentioned in subregulations reg 2.72(5)', suggesting that the information (i.e. identity 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 reg 2.72.

[92] 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: Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.5.3] Nominee must be identified (reissued 01/10/2017).

[93] 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).

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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.[94] An example of a circumstance in which it may be reasonable to approve the nomination where all family members are not included, is where the relevant family member has left Australia and does not intend to return, but their visa is still in effect.[95]

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.[96]

Demonstration of skills – reg 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, reg 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.[97] 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. Policy refers to requiring the visa holder to undergo a skills assessment, providing evidence of qualifications, a CV or employment references.[98] 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.

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[94] reg 2.72(7).
[95] Explanatory Statement to SLI 2009, No 115, p.28.
[96] Explanatory Statement to SLI 2009, No 115, pp.26–27.
[97] 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 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 Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.5.4.2] Skills necessary to perform the occupation (reissued 01/10/2017).
[98] See Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.5.4.2] Skills necessary to perform the occupation (reissued 01/10/2017).

Equivalent undertaking to that provided by current sponsor for PIC 4006A – reg 2.72(7A) (pre 18/03/18)

If reg 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 PIC 4006A(2) (health criterion). Under cl 4006A(2) the requirements of cl 4006A(1)(c)[99] may be waived if the relevant nominator[100] 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 reg 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,[101] 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.[102]

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.[103] For further information on PIC 4006A see Health Criteria.

Identification of occupation and proposed employee – reg 2.72(8A) (post 1/7/10 and pre 18/03/18) or reg 2.72(8) (post 18/03/18)

For nominations made before 18 March 2018, reg 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;[104]
- 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.

[99] Clause 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.
[100] 'Relevant nominator' is defined in cl 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.
[101] reg 2.72(7A)(a).
[102] reg 2.72(7A)(b).
[103] Explanatory Statement to SLI 2009, No 289, p.7.
[104] See 'Occ186/407/457&Noms' tab of Register of Instruments - Business visas for the relevant instrument.

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Regulation 2.72(8) applies if the nomination is made on or after 18 March 2018.[105] It requires that the nominated occupation and its 6-digit code correspond to an occupation and the 6-digit code specified in the instrument in force at the time the nomination is made (where the occupation is in the Short-term or Medium-term streams) or in the work agreement (where the occupation is in the Labour Agreement Stream).[106] 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.

This also appears to be the case for nominations made before this time. This criterion (and others in reg 2.72) requires the provision of information, such as the ANZSCO 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 reg 2.72.[107] 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,[108] and reg 2.72(8A) refers to '*the* nominated occupation' (emphasis added). This language suggests that what must be considered in relation to reg 2.72 is the occupation that was nominated as part of the process in reg 2.73, i.e. at the time the nomination application was initially made. This reasoning appears equally applicable to other criteria in reg 2.72 which refer to 'the nominated occupation' (see regs 2.72(5),(8),(10) and (11)).

In addition, the provision in reg 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,[109] for those made before this time, reg 2.72(8A)(b) requires that if there is no ANZSCO code for the nominated

[105] reg 2.72(8) as substituted by F2018L00262.
[106] reg 2.72(9) as substituted by F2018L00262.
[107] That is the position adopted in Departmental policy, see Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.5.5] Specification of occupation code or name and location (reissued 01/10/2017).
[108] Form 1196 (Internet) as generated 3 April 2017.
[109] See the instrument in force at the time of the nomination application in the 'Occ482noms' tab of the Register of Instruments - Business Visas.

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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 reg 2.72(10)(aa) which is a time of decision criterion[110] (see the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas). Accordingly, the relevant instrument for the purposes of reg 2.72(8A) appears to be the one in effect at time of decision.[111]

Certification relating to 'payment for visa' conduct – reg 2.72(8B) (post 14/12/15 and pre 18/3/18) or reg 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.[112] 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 on or after 18 March 2018, there is an equivalent requirement attached to the process of lodging a nomination in reg 2.73(12) (and the decision maker must be satisfied that the nomination was made in accordance with reg 2.73: reg 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.[113]

The provisions in reg 2.73(4B) require that the certification in reg 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.

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[110] *W&Y Property Management Pty Ltd v MHA* [2020] FCCA 883. The Court at [18] accepted the Minister's submissions that reg 2.72(10)(aa) imposed a time of decision criterion as the legislature could not be considered to have intended that the Minister was in any way fettered in terms of the identification of those occupations which from time to time might relevantly be the subject of Subclass 457 visa applications. It also considered that other parts of the Regulations clearly recognised that nominated/qualifying occupations might change from time to time by the making of a Ministerial Instrument, such as reg 2.73(6) providing for a refund of the application fee in circumstances where the nominated occupation is no longer listed in the relevant instrument and the nomination is withdrawn.
[111] In *W&Y Property Management Pty Ltd v MHA* [2020] FCCA 883, the Court construed the instrument in place at the time of decision to be the correct instrument based on its time of decision construction of reg 2.72(10)(aa).
[112] As inserted by SLI 2015, No 242 and as amended by F201800262.
[113] Explanatory Statement to SLI 2015, No 242.

No adverse information known about the person or an associated person – reg 2.72(9) (pre 18/3/18) or reg 2.72(4) (post 18/03/18)

Regulation 2.72(9) (for nominations before 18 March 2018) or reg 2.72(4) (for nominations made on or after 18 March 2018) requires 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.[114] The objective of reg 2.72(9) or 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 application.[115] 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 reg 1.13A (previously reg 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',[116] 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 ss 5(2) and (3) of the *Bankruptcy Act 1966* (Cth) and s 95A of the *Corporations Act 2001* (Cth).[117]

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.[118] In addition, the conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[119]

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[114] regs 1.13A and 1.13B as amended by SLI 2015, No 242. This definition was previously found in reg 2.57(3), prior to its repeal.
[115] Explanatory Statement to SLI 2009, No 115, p.28 (but in relation to reg 2.72(1)(i) prior to amendment).
[116] 'Competent Authority' is defined as a Department or regulatory authority that administers or enforces a law that is alleged to have been contravened: reg 2.57(1) as inserted by SLI 2009, No 115.
[117] reg 1.13A(1).
[118] reg 1.13A(2).
[119] reg 1.13A(3).

Note that the word 'includes' as used in reg 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 reg 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* – if the associated person 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.[120]

As drafted, reg 2.72(9) or 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 that information.

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 amending 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.[121] This assessment is a question for the relevant decision maker, having regard to all relevant circumstances of the case.[122]

Post 18 March 2018 definitions

The amendments in 18 March 2018 inserted new definitions of 'adverse information' (reg 1.13A) and 'associated with' (reg 1.13B) to replace the previous definitions which were considered to be inadequate to deal with some abuses.[123] The new definitions only apply to applications made on or after 18 March 2018.[124]

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[120] reg 1.13B(5). The terms 'officer', 'related body corporate' and 'entity' are defined in reg 1.13B(5) (previously reg 2.57(3)). The term 'officer' for a corporation, or an entity that is not a corporation or an individual, has the same meaning in s 9 of the *Corporations Act 2001* (Cth). The term 'related body corporate' has the same meaning as in s 50 of the Corporations Act. The term 'associated entity' is further defined in reg 1.03 as having the same meaning in s 50AAA of the Corporations Act.
[121] Explanatory Statement to SLI 2009, No 115, p.28 (but in relation to regs 2.72(1)(i) and (ii) prior to amendment).
[122] For example, in *Oakwood Sydney Pty Ltd v MICMSMA* [2020] FCCA 2354, the Tribunal took into account other adverse information not known to Immigration to find that it was not reasonable to disregard the adverse information known to Immigration, under the similarly worded reg 5.19(3)(g). The Court held that the Tribunal was entitled to have regard to that information in circumstances where it had first clearly identified the adverse information known to Immigration and then went on to consider other relevant matters for its determination of whether it was reasonable to disregard (see [38]).
[123] Explanatory Statement to F201800262, item 15.
[124] Part 6703 application provisions of F201800262.

The meaning of 'adverse information' in reg 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.[125] The definition makes it clear that the examples of adverse information in reg 1.13A(2) are a non-exhaustive list.

The meaning of 'associated with' in reg 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.[126] The amended definition states that it is not an exhaustive definition.

Occupational, certification, English, employment terms & conditions requirements for standard business sponsors – reg 2.72(10) (pre 18/03/18 only)

For nominations made before 18 March 2018 by standard business sponsors, reg 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);[127] and
- 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;[128] and
- except in certain circumstances:
  - the terms and conditions of proposed employment will be 'no less favourable'[129] 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;[130] and
  - the 'base rate of pay'[131] 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);[132] 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

[125] reg 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.
[126] reg 1.13B as substituted by F201800262.
[127] regs 2.72(10)(a), (aa). Note that reg 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 paragraph. The amendment applies to all applications not yet finalised as at 1 July 2017, and nomination applications made on or after that date.
[128] regs 2.72(10)(a), (aa), (b).
[129] As defined in reg 2.57(3A).
[130] reg 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.
[131] As defined in reg 2.57(1).
[132] reg 2.72(10)(cc).

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refer to the ASCO,[133] while for nominations made on or after 1 July 2010, the relevant provisions refer to ANZSCO.[134] 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;[135]
- 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;[136]
- 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;[137]
- 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; [138] and

- the position associated with the nominated occupation is genuine;[139]
- 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 nominee continues to meet the requirements in cl 457.223(6), or
  - the nominee 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 licence/membership or registration the nominee would have to demonstrate that s/he achieved a better score than that specified in the relevant instrument, then s/he has English language proficiency of at least the standard required for the grant of the licence, or
  - the nominee undertakes a specified test and achieves a specified score in a single attempt and within a specified period;[140] and

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[133] reg 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: reg 1.03 as inserted by SLI 2010 No 133.
[134] reg 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.
[135] regs 2.72(10)(d)(i), (10)(e)(i). See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas for the relevant instrument.
[136] regs 2.72(10)(d)(ii), (10)(e)(ii). See the 'Occ-Ex' tab of the Register of Instruments - Business visas.
[137] regs 2.72(10)(d)(iii), (10)(e)(iii). See the 'Occ-Ex' tab of the Register of Instruments - Business visas.
[138] regs 2.72(10)(d)(iv), (10)(e)(iv). See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas.
[139] reg 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.
[140] 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.

- 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.[141]

The discussion in this part of the commentary relates to nominations made before 18 March 2018 only unless otherwise indicated.

Occupation in written instrument

Regulations 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, reg 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.[142] This requires consideration of whether any additional specifications or conditions made in the applicable instrument in relation to the occupation are satisfied.[143] 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.[144]

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 reg 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.[145] 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 policy indicates delegates can simply rely on the certification made under reg 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.[146] Given the uncertainty, should there be concern as to the nature and content of the position, the issue may be better considered under reg 2.72(10)(f), as discussed below.

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[141] reg 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.
[142] reg 2.72(10)(aa) as amended on 1 July 2017 by F2017L00818, with effect from 1 July 2017.
[143] See reg 2.72(10AAA) as inserted by F2017L00818, with effect from 1 July 2017.
[144] 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 reg 2.72(10)(aa). Note that policy does include some guidance on these additional requirements (referred to as 'inapplicability conditions' in the latest instrument, but as 'caveats' in the policy). See Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.8] Advice on occupations with a caveat (reissued 01/10/2017).
[145] *Nguyen v MIBP* [2013] FCCA 1697 at [37]–[40]. In that case, the Tribunal found that the tasks of the nominated position (Project/program Administrator) aligned more closely to another occupation (Accounts Clerk).
[146] Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – 4.6.1. Occupation specified in the latest legislative instrument (reissued 01/10/2017), 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.

The relevant instrument

The instrument under reg 2.72(10)(a) applies to nominations made before 1 July 2010 and specifies occupations by reference to ASCO. The instrument under reg 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 'Occ186/407/457&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.[147]

Given the clear intention in the Explanatory Statement that the occupations will change from time to time, and the general legislative context, the relevant instrument for the purposes of assessing whether reg 2.72(10)(a) or 2.72(10)(aa) is met is the instrument in effect for the relevant subclause at the time of decision[148] (see 'Occ186/407/457&Noms' tab of Register of Instruments - Business visas). This view is reflected in policy,[149] 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.[150] For instruments made on or after 1 July 2017, there is express provision in the Regulations for instruments made under reg 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.[151]

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. IMMI 17/060 applies to all live applications made before 17 January 2018.

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.

Terms and conditions of employment and base rate of pay

The requirements in regs 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 regs 2.72(15), (16) and (17)

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[147] Explanatory Statement to SLI 2009, No 115, p.26 (but in relation to reg 2.72(1)(c)(i)).
[148] *W&Y Property Management Pty Ltd v MHA* [2020] FCCA 883. The Court agreed with the Minister's submissions that reg 2.72(10)(aa) imposed a time of decision criterion, having regard to the legislative intention that the list of occupation which may be the subject of a nomination or visa application may change from time to time by making of a Ministerial Instrument; that other parts of the Regulations, such as reg 2.73(6), recognised this possibility; and the clear wording in cl 6601 of sch 13 to the Regulations that an instrument made for the purposes of reg 2.72(10)(aa) after 1 July 2017 may be expressed to apply to nominations made and not finally determined before the commencement of the instrument (at [18]–[19]). The Court construed the instrument in place at the time of decision to be the correct instrument based on this construction of reg 2.72(10)(aa).
[149] Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – 4.6.1. Occupation specified in the latest legislative instrument (reissued 01/10/2017).
[150] reg 2.73(6)(a).
[151] Part 66, clause 6601 inserted by F2017L00818.

for the nominee's annual earnings: see below.[152] However, regs 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.[153] The relevant instrument appears to be the one in effect at the time of decision, as the requirements of reg 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'[154] 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, reg 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* (Cth) (Fair Work Act).[155]

Previously, reg 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),[156] with the intention that this would allow consideration of a broader range of information.[157] Regulation 2.72(10AA) provides that, for regs 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 reg 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 regs 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 reg 2.72(10)(c),[158] and because reg 2.72(10AA) operates to qualify that provision, it appears that the retention of the words 'in the person's workplace' in reg 2.72(10AA) may have been a drafting oversight. Therefore, the preferable interpretation is that reg 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'[159] in those terms and conditions be greater than a specified temporary skilled migration income threshold. This requirement may be waived in certain circumstances (see reg 2.72(10A)). Together, regs 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

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[152] As inserted by F201800262.
[153] reg 2.72(10AB). For example, the current specification for the purposes of reg 2.72(10AB) is annual earnings of AUD 250,000. See IMMI 13/028.
[154] As defined in reg 2.57(3A).
[155] reg 2.72(10)(c) as amended by *Migration Amendment (Clarifying Subclass 457 Requirements) Regulation 2015* (Cth) (SLI 2015, No 185).
[156] SLI 2013, No 146.
[157] Explanatory Statement to SLI 2013, No 146, p.49.
[158] 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).
[159] As defined in reg 2.57(1).

fact that the terms and conditions are no less favourable than terms and conditions that are/would be provided to an Australian citizen or permanent resident.[160] 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.[161] The two requirements are mirrored by equivalent sponsorship obligations in reg 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 regs 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 reg 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'.[162]

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).[163] It also does not include reimbursements or certain employer superannuation contributions specified in reg 2.57A(4). This definition of 'earnings' is based on the definition in s 332 of the Fair Work Act and it is intended that interpretations of this section will apply to this definition.[164]

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 reg 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

[160] Explanatory Statement to *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 230), p.7.
[161] Explanatory Statement to SLI 2009, No 230, p.7.
[162] For definition of 'non-monetary benefits' see reg 2.57A(3).
[163] reg 2.57A(2)(a) and Note to reg 2.57A(2).
[164] Explanatory Statement to SLI 2009, No 230, p.7 and Note to reg 2.57A.

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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 reg 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'.[165]

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).[166] It also does not include reimbursements or certain employer superannuation contributions specified in reg 2.57A(4). This definition of 'earnings' is based on the definition in s 332 of the Fair Work Act and it is intended that interpretations of this section will apply to this definition.[167]

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.[168]

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.[169] Formerly, reg 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.[170] 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).[171] The terms of reg 2.72(10AA) still appear to require that the procedure it specifies must be followed if no Australian citizen or Australian permanent resident performs

[165] For definition of 'non-monetary benefits' see reg 2.57A(3).
[166] reg 2.57A(2)(a) and Note to reg 2.57A(2).
[167] Explanatory Statement to SLI 2009, No 230, p.7 and Note to reg 2.57A.
[168] Explanatory Statement to SLI 2009, No 230, pp.6 and 9.
[169] reg 2.72(10AA). See the 'T&C' tab of the Register of Instruments - Business visas for the relevant instrument.
[170] 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.
[171] Explanatory Statement to SLI 2013, No 146, p.49.

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equivalent work *in the person's workplace* at the same location. However, given the purpose of the amendment to reg 2.72(10)(c), and because reg 2.72(10AA) qualifies reg 2.72(10)(c), it appears that the retention of words 'in the person's workplace' in reg 2.72(10AA) was a drafting oversight. Therefore, the preferable interpretation is that reg 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 reg 2.72(10)(c).

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.[172] This requirement may be disregarded in certain circumstances (see below).

'Base rate of pay' is defined in reg 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 and it is intended that interpretations of this section will apply to this definition.[173]

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 reg 2.57A) are equal to or greater than the temporary skilled migration income threshold; and
- it is reasonable to do so.[174]

Consideration of when it will be reasonable to disregard this requirement may be guided by the purpose of the provisions in regs 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.[175] 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

[172] reg 2.72(10)(cc).
[173] Explanatory Statement to SLI 2009, No 230, p.5 and Note to definition of 'base rate of pay' in reg 2.57(1).
[174] reg 2.72(10A).
[175] Explanatory Statement to SLI 2009, No 230, p.7.

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in such a way that the base rate of pay would be greater than the temporary skilled migration income threshold.[176]

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;[177]
- 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;[178]
- 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;[179]
- 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.[180]

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.[181]

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.[182] 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).[183]

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[176] Explanatory Statement to SLI 2009, No 230, p.9.
[177] regs 2.72(10)(d)(i), 2.72(10)(e)(i). See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas.
[178] See the 'Occ-Ex' tab of the Register of Instruments - Business visas for the relevant instrument.
[179] See the 'Occ-Ex' tab of the Register of Instruments - Business visas for the relevant instrument.
[180] See the 'Occ186/407/457&Noms' tab of the Register of Instruments - Business visas for the relevant instrument.
[181] Explanatory Statement to SLI 2009, No 115, p.27 (but in relation to reg 2.72(1)(g) prior to amendment).
[182] Explanatory Statement to SLI 2009, No 203, p.35.
[183] See Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.6.9] Occupations exempt from the direct employer requirement (reissued 01/10/2017).

Position associated with nominated occupation is genuine – reg 2.72(10)(f) (pre 18/3/18) or reg 2.72(10)(a) (post 18/3/18)

Regulation 2.72(10)(f) (for nominations before 18 March 2018) and reg 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.[184]

Regulation 2.72(10)(f) or reg 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.[185]

In *Cargo First Pty Ltd v MIBP*, it was settled that reg 2.72(10)(f) requires a qualitative analysis of the position that is the subject of the nomination to determine whether it is 'genuine'.[186] 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 reg 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 ANZSCO, and the 'tasks' required to be undertaken included a significant majority of the tasks set forth in ANZSCO.[187] In conducting this analysis, the decision maker must have regard to the correct version of ANZSCO.[188]

Thus, to the extent that policy suggests that in most cases, officers may consider this requirement met on the basis of the certifications at reg 2.72(10)(d) or (e), or reg 2.73(14), that guidance should be treated with caution. However, policy also suggests that if there is any doubt as to the veracity of the certifications, further assessment should be undertaken.[189]

In that regard, policy includes detailed 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

[184] Explanatory Statement to SLI 2013, No 146, Attachment B, p.34.
[185] *Cargo First Pty Ltd v MIBP* [2016] FCA 30 at [34].
[186] *Cargo First Pty Ltd v MIBP* [2016] FCA 30.
[187] *Cargo First Pty Ltd v MIBP* [2016] FCA 30 at [34]. The Court upheld the decision of the Federal Circuit Court in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091 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.
[188] *Mora v MIBP* [2018] FCA 1819. The Court followed the reasoning in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091 that the word 'position' in reg 2.72(10)(f) is qualified by the phrase 'associated with the nominated occupation', and found that as the character of the 'nominated occupation' was informed by the ANZSCO description, it was necessary for the Tribunal to have regard to the correct version of ANZSCO (at [47]).
[189] Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.6.11] Genuine Position (reissued 01/10/2017).

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(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).[190]

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.[191]

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 in connection with the nominated occupation, and the decision maker considers that granting the visa would be in the interests of Australia.

If reg 2.72(10)(g) applies, it requires that one of the following must be met:

- the visa holder continues to meet the requirements in cl 457.223(6),
- the visa holder is an exempt applicant within the meaning of cl 457.223(4),[192]
- 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.[193]

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

[190] Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.6.11] Genuine Position (reissued 01/10/2017).
[191] reg 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.
[192] 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 '457Eng' tab of Register of Instruments - Business visas.
[193] 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. Regulations 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.

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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).[194]

Employee engaged under contract

Regulation 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 reg 2.72(10)(h) where the nominated occupation is an occupation specified by the Minister in relevant legislative instrument.[195] 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.[196]

Full-time position – reg 2.72(10)(b) (post 18/3/18 only)

For nominations made on or after 18 March 2018, reg 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.[197] 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.[198]

Additional requirements in relation to Short-term stream and Medium-term stream (post 18/3/18 only)

There are additional requirements for nominations made on or 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

[194] Explanatory Statement to SLI 2013, No 146, p.50.
[195] reg 2.72(10)(g) was inserted by 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 sch 1. See 'Occ-Ex' tab of Register of Instruments - Business visas for the relevant instrument.
[196] Explanatory Statement to SLI 2013, No 145, p.7.
[197] reg 2.72(10A) was inserted by F2018L01093. The exception in reg 2.72(10A) applied to any applications made on or after 18 March 2018 which were not finally determined.
[198] Explanatory Statement to F2018L01093, p.12.

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- 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 reg 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 cls 482.223 and 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.[199] 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.[200] 'Annual market salary rate' is defined in reg 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.

Next, the annual market salary rate, excluding non-monetary benefits (as defined in reg 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.[201] 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.[202]

In addition:

[199] See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instrument.
[200] See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instrument.
[201] reg 2.72(15)(d) as inserted by F201800262. See the 'TSMIT' tab of the Register of Instruments - Business Visas.
[202] regs 2.72(15)(d) and 2.72(16)(a) as inserted by F201800262.

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- 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.[203] This requirement may be disregarded if it is reasonable to do so and where the requirement for a full-time position in reg 2.72(10)(b) is disregarded under reg 2.72(10A).[204] The term 'earnings' is defined in reg 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;[205] 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.[206]

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 reg 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 reg 2.57(1).[207] 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 employ the nominee. Unless the occupation is exempt,[208] 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.

The employer can only be the sponsor where the applicant is an overseas business sponsor,[209] and can be either the sponsor or an associated entity where the applicant is not an overseas business sponsor.[210] 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: reg 1.03.

[203] reg 2.72(15)(e) as inserted by F201800262.
[204] reg 2.72(16)(aa) as inserted by F201800262.
[205] regs 2.72(15)(f) and 2.72(16)(b) as inserted by F201800262.
[206] reg 2.72(15)(g) as inserted by F201800262.
[207] reg 2.72(18)(b) as inserted by F201800262.
[208] See the 'ExemptOccs' tab of the Register of Instruments - Business Visas.
[209] reg 2.72(11) as inserted by F201800262.
[210] reg 2.72(12).

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Requirements specified in work agreement – reg 2.72(11) (pre 18/03/18) or reg 2.73(15) (post 18/03/18)

Regulation 2.72(11) for applications before 18 March 2018 or reg 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.[211] 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.[212]

Released by the AAT on 28 February 2022

[211] Work agreement is defined in reg 2.76(2).
[212] Explanatory Statement to SLI 2009, No 203, p.35.

Nomination Training Contribution Charge

On 12 August 2018, the *Migration Amendment (Skilling Australians Fund) Act 2018* (Cth) 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.[213]

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.[214]

'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* (Cth), which imposes the charge payable under s 140ZM, sets a charge limit for the charge and provides for the indexation of the charge limit.[215] It also provides that the amount of the nomination training contribution charge is to be prescribed by the regulations, and that the regulations may prescribe different charges for different kinds of visas or persons.[216]

The *Migration (Skilling Australians Fund) Charges Regulations 2018* (Cth) prescribes the amount of charges applicable for Subclass 457 and 482 visas, and is currently as follows:[217]

- 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 and 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[218] but there are no provisions for the Tribunal to review decisions regarding refunds or refusals of refunds.

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[213] Item 37 of sch 2 and Item 16(3) of sch 1 to No 38, 2018.
[214] reg 5.42(1) as inserted by F2018L01093.
[215] *Migration (Skilling Australians Fund) Charges Act 2018* (Cth) (No 39, 2018) ss 7, 9.
[216] No 39, 2018, s 8.
[217] reg 5 of *Migration (Skilling Australians Fund) Charges Regulations 2018* (Cth) (F2018L01092). '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 meaning of the *Income Tax Assessment Act 1997* (Cth)) 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 F2018L01092).
[218] reg 2.73AA as substituted by F2018L01093.

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.[219] 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.[220]

Changes to the labour market testing requirements to specify how the testing should be conducted were introduced on 12 August 2018.[221] The amended labour market testing requirements only apply to nomination applications made or after 12 August 2018.

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;[222]
- 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;[223] 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.[224]

The only prescribed class of sponsors prescribed are standard business sponsors.[225]

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

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[219] s 140GB(2) as amended by No 122, 2013, and the *Migration Amendment (Temporary Sponsored Visas) Commencement Proclamation 2013* (Cth).
[220] reg 2.76A. This requirement was inserted by 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.
[221] No 38, 2018; F2018L01093.
[222] s 140GBA(1)(a) as amended by No 38, 2018.
[223] 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.
[224] s 140GBA(1)(c).
[225] reg 2.72AA inserted by No 122, 2013.

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 ss 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.[226] See the Register of Instruments – Business visas (LMT&ObligExmpt tab) for the relevant instruments.[227]

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 are 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? – ss 140GBC and 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.[228] There are two exemptions:

- **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;[229] 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.[230]

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;[231]

[226] Explanatory Statement to No 122, 2013, p.10
[227] 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/. See Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – nominations – [4.6.13.7] International trade obligations and LMT (reissued 01/01/2018).
[228] s 140GB(2) as amended by No 122, 2013.
[229] s 140GBC.
[230] s 140GBB.
[231] s 140GBC(1)(a) as amended by No 38, 2018.

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- 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;[232] and
- either of the two skill and occupation exemptions described below are met.[233]

The skill and occupation exemptions are set out in ss 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:[234]
    - » 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(3) – lesser qualification/experience exemption** – met if:
  - either or both of the following are required for the nominated position, in relation to the nominated occupation:[235]
    - » a relevant associate degree, advanced diploma or diploma covered by the AQF,[236] 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 to exempt occupations at that higher skill level from the labour market testing requirement.[237] 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,[238] no occupations are specified for these purposes and so no skill/qualification based exemptions can apply. For nominations made prior to that date, the range of exempt occupations was quite broad and

[232] s 140GBC(1)(b) as amended by the No 38, 2018.
[233] ss 140GBC(2), (3).
[234] s 140GBC(2)(a).
[235] s 140GBC(3)(a).
[236] 'AQF' means the Australian Qualifications Framework within the meaning of the *Higher Education Support Act 2003* (Cth): s 140GBC(6) as inserted by No 122, 2013.
[237] Explanatory Memorandum, Migration Amendment (Temporary Sponsored Visas) Bill 2013 (Cth), pp.11–13.
[238] 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 policy 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.

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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.

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.[239] 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.[240]

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;[241]
- the nomination is accompanied by specific evidence in relation to that testing;[242]
- if applicable, information is provided about recent redundancies and retrenchments from positions in the nominated occupation;[243]
- having regard to that evidence and information (if any), the Minister is satisfied a suitably qualified and experienced Australian citizen, permanent resident or eligible temporary visa holder is not readily available to fill the nominated position;[244] 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.[245]

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[239] s 140GBC(6) as inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth).
[240] Explanatory Memorandum, Migration Amendment (Temporary Sponsored Visas) Bill 2013 (Cth), p.10.
[241] ss 140GBA(3)(a), (4), (4A).
[242] ss 140GBA(3)(b)(i), (5)–(6).
[243] s 140GBA(3)(b)(ii).
[244] s 140GBA(3)(d).
[245] The manner in which the labour market testing is determined under s 140GBA(5). Sections 140GBA(5) and 140GBA(3)(aa) as inserted by No 38, 2018.

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.[246] For the period in which the testing must be undertaken see the 'LMTPeriodMannerEvidence' tab of the Register of Instruments – Business visas for the relevant instrument. For nomination applications made before 18 March 2018, and for those lodged on or after 18 March 2018 but before 18 June 2018, the period specified by the relevant instruments is 12 months.[247] For applications lodged on or after 18 June 2018, the relevant period is 6 months immediately before the nomination application form is lodged.[248] For nomination applications made on or after 12 August 2018, the period within which labour market testing is required is 4 months ending on the day on which the nomination form in relation to the nominated application is lodged.[249]

This provision requires a decision maker to be satisfied that labour market testing has been undertaken in relation to the nominated position at some point within the specified period; it does not require continuous testing throughout that period.

For applications made before 12 August 2018, 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*. However, 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. For applications made on or after 12 August 2018, s 140GBA(4) was amended to provide that the specified period must not start earlier than 4 months before the nomination is received by the Minister.[250]

However, if any Australian citizens or Australian permanent residents were, in the previous 4 months, made redundant or retrenched from positions in the nominated occupation in a business of, or an associated entity of,[251] the approved sponsor, the labour market testing must have been undertaken after those redundancies and retrenchments.[252] 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.

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[246] s 140GBA(7) as inserted by No 122, 2013.
[247] IMMI 13/136 (for applications made before 18 March 2018). Note that the *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) 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. For applications made on or after 18 March 2018 and before 18 June 2018, s 6(a) in pt 2 of IMMI 18/059 specifies the period of 12 months immediately before the nomination application form is lodged.
[248] IMMI 18/059, s 6(b). IMMI 18/059 was repealed by IMMI 18/036 on 12 August 2018 but continues to apply to nominations mentioned in IMMI 18/059 if that nomination was made before 12 August 2018 (see pt 2 of IMMI 18/036).
[249] IMMI 18/036, s 6(1).
[250] amended by item 14A of sch 1 to No 38, 2018.
[251] 'Associated entity' has the same meaning as in pt 2A of the Regulations: s 140GBA(7) as inserted by No 122, 2013. Regulation 1.03 provides that associated entity has the same meaning as in s 50AAA of the *Corporations Act 2001* (Cth).
[252] s 140GBA(4A).

Evidentiary requirements and, for post 12/8/2018 nominations, the manner of LMT

Section 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 ss 140GBA(5) and (6), while for those after this date, they are set out in a legislative instrument made under s 140GBA(6A).

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;[253]
    - 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;[254]
    - 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 (or payable) for any recruitment attempts, or details of the results of such recruitment attempts, including the details of any positions filled as a result;[255] 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.[256]

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.[257] 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 ss 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.[258] Current authority on a similarly

[253] s 140GBA(5)(a).
[254] ss 140GBA(6)(a)(i), (ii).
[255] ss 140GBA(6)(b)(i), (ii).
[256] ss 140GBA(5)(b)(i)–(iii). No instruments have been made under s 140GBA(5)(b)(iii).
[257] Explanatory Memorandum, Migration Amendment (Temporary Sponsored Visas) Bill 2013 (Cth), p.9.
[258] 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

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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.[259]

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 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.[260] The labour market testing condition will only be met where the labour market testing is undertaken in the manner determined under s 140GBA(5).[261]

This may include:[262]

- 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.[263]

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.[264]

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.[265] The relevant instrument is in the 'LMTPeriodMannerEvidence' tab of the Register of Instruments – Business Visas.

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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 (Cth)).

[259] *Anand v MIAC* [2013] FCA 1050, considering cl 487.216, in relation to visa applications made before 23 March 2013.

[260] s 140GBA(5) as amended by No 38, 2018. See the 'LMTPeriodMannerEvidence' tab of the Register of Instruments - Business Visas.

[261] s 140GBA(3)(aa) as inserted by No 38, 2018.

[262] s 140GBA(6) as amended by No 38, 2018.

[263] s 140GBA(6AB) as inserted by No 38, 2018.

[264] s 140GBA(6AA) as inserted by No 38, 2018.

[265] ss 140GBA(6B), 140GBA(6C) as inserted by No 38, 2018.

Additional requirement if recent redundancies / retrenchments

If any Australian citizens or Australian permanent residents[266] were, in the previous 4 months, made redundant or retrenched from positions in the nominated occupation in a business of, or an associated entity of,[267] the approved sponsor, there is an additional requirement that information about those redundancies and/or retrenchments is provided with the nomination.[268] 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[269] is not readily available to fill the nomination position;[270] and
- a suitably qualified and experienced eligible temporary visa holder is not readily available to fill the nominated position.[271]

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).[272] A 'reasonable period' is not defined in the Regulations. However, a

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[266] 'Australian permanent resident' means an Australian permanent resident within the meaning of the Regulations: s 140GBA(7) as inserted by No 122, 2013. Australian permanent resident is relevantly defined by reg 1.03 as a non-citizen who, being usually resident in Australia, is the holder of a permanent visa.
[267] 'Associated entity' has the same meaning as in pt 2A of the Regulations: s 140GBA(7) as inserted by No 122, 2013. Regulation 2.57 (in pt 2A of the Regulations) provides that associated entity has the same meaning as in s 50AAA of the *Corporations Act 2001* (Cth).
[268] s 140GBA(3)(b)(ii).
[269] 'Australian permanent resident' means an Australian permanent resident within the meaning of the Regulations: s 140GBA(7) as inserted by No 122, 2013. Australian permanent resident is relevantly defined by reg 1.03 as a non-citizen who, being usually resident in Australia, is the holder of a permanent visa.
[270] s 140GBA(3)(d)(i).
[271] s 140GBA(3)(d)(ii).
[272] reg 2.74.

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.[273]

If the application was made using approved form 1196 (Internet), the Minister may provide the notification to the applicant in an electronic form.[274]

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;[275]
- 12 months after the nomination is approved (subject to one exception, discussed below);[276]
- the day on which the related Subclass 457 visa is granted;[277]
- 3 months after the approved sponsor's approval as a standard business sponsor ceases;[278]
- the day on which the approved sponsor's approval as a standard business sponsor is cancelled;[279]
- 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.[280]

As the Regulations set the term of approval, it is not necessary to specify the term in the nomination approval.

Note that reg 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.[281] This is a 'savings' provision introduced as part of reforms to the temporary sponsored work visa program, intended to extend the validity of a nomination which would otherwise cease 12 months after approval, to avoid situations where a visa applicant 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.[282] However, this savings provision does not operate retrospectively and has no relevance to

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[273] Explanatory Statement to SLI 2009, No 115, p.29.
[274] reg 2.74(2).
[275] reg 2.75(2)(a).
[276] reg 2.75(2)(b).
[277] reg 2.75(2)(c).
[278] reg 2.75(2)(d).
[279] reg 2.75(2)(e).
[280] reg 2.75(2)(f).
[281] Clause 6704(15) of sch 13 to the Regulations, inserted by F2018L00262. The requirements in cl 6704(15) are cumulative; both paras (a) and (b) must be met for reg 2.75(2)(b) to not apply: *Poudel v MICMSMA* [2020] FCCA 3261 at [46]–[47].
[282] Explanatory Statement to F2018L00262, Attachment C item 178.

nominations that had already ceased in accordance with reg 2.75(2)(b) before 18 March 2018.[283]

Nominations made on or after 18 March 2018

An approval of a nomination made after 18 March 2018 ceases on the earliest of:[284]

- 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,[285] 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, regs 2.75(2)(b) and (ba) prevent the 12-month cessation rule from operating where there is an unfinalised Subclass 482 application.

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[283] *Mangat v MHA* [2019] FCCA 2227.
[284] reg 2.75 as amended by F2018L00262.
[285] 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: reg 2.75(3) as inserted by F2018L00262. Regulation 2.75(3) was repealed and the definitions of 'nomination end day' and 'sponsorship end day' moved to reg 1.03 by *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).

Relevant case law

Judgment	Judgment summary
Auservices Pty Ltd v MICMSMA [2020] FCCA 1250	Summary
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
Mangat v MHA [2019] FCCA 2227	Summary
Mora v MIBP [2018] FCA 1819	Summary
Nguyen v MIBP [2013] FCCA 1697	Summary
Oakwood Sydney Pty Ltd v MICMSMA; Goo v MICMSMA [2020] FCCA 2354	Summary
Poudel v MICMSMA [2020] FCCA 3261	
W&Y Property Management Pty Ltd as trustee for W&Y Family Trust v MHA [2020] FCCA 883	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2009 (No 5) (Cth)	SLI 2009, No 115	No 11/2009
Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1) (Cth)	SLI 2009, No 203	No 11/2009
Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 230	No 11/2009
Migration Amendment Regulations 2009 (No 13) (Cth)	SLI 2009, No 289	No 17/2019
Migration Amendment Regulations 2010 (No 6) (Cth)	SLI 2010, No 133	No 07/2010
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 09/2012

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Migration Amendment Regulation 2013 (No 5) (Cth)	SLI 2013, No 145	No 10/2013
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth)	No 122, 2013	No 12/2013
Migration Amendment (Visa Application Charge and Related Matters No 2) Regulation 2013 (Cth)	SLI 2013, No 253	
Migration Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 32	No 01/2014
Migration Amendment (Clarifying Subclass 457 Requirements) Regulation 2015 (Cth)	SLI 2015, No 185	No 11/2015
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Amendment (Specification of Occupations) Regulations 2017 (Cth)	F2017L00818	No 03/2017
Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F201800262	No 01/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 02/2018
Migration Amendment (Skilling Australians Fund) Act 2018 (Cth)	C2018A00038	No 02/2018

Available decision templates/precedents

The following decision precedents are available for use:

- **Nomination of an Occupation (reg 2.72) (before 18 March 2018)** – 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 and before 18 March 2018.
- **Nomination of an Occupation (reg 2.72) (on or after 18 March 2018)** – for use in review of decisions to refuse approval of nomination of an occupation (in relation to a Subclass 482 visa in the Short-term or Medium-term streams) made on or after 18 March 2018.

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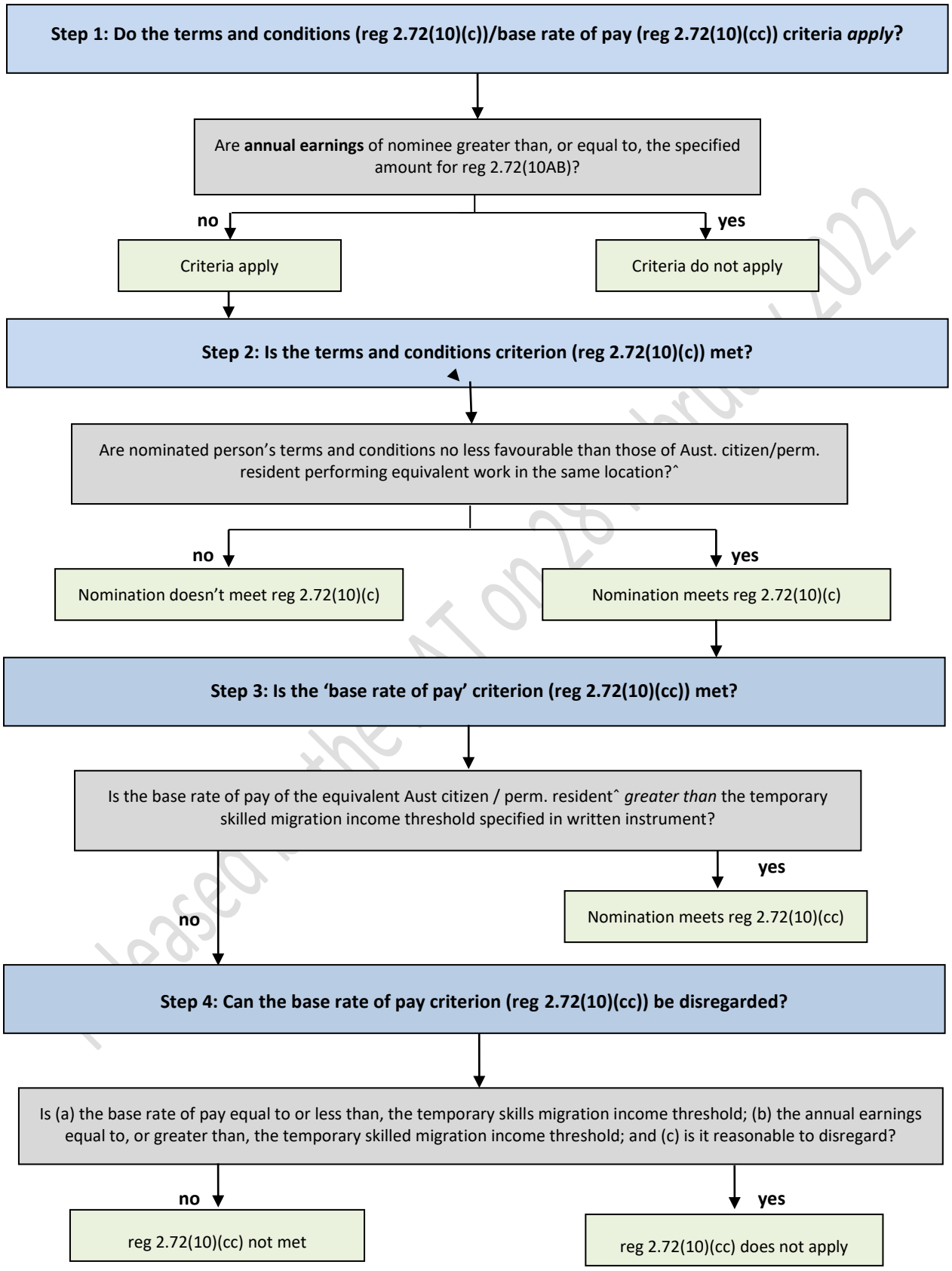
Attachment A: Assessing the terms and conditions of employment & base rate of pay for nominations pre 18 March 2018



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: reg 2.72(10AA).

REGULATION 2.72C – NOMINATION OF AN OCCUPATION FOR A SUBCLASS 494 VISA

Overview

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The Labour Market Testing Condition

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Does the labour market testing condition apply? – s 140GBA(1)

Does an exemption apply? – ss 140GBC and 140GBB

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Nomination Training Contribution Charge

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Period of approval of nomination

Relevant case law

Relevant legislative amendments

Available decision templates/precedents

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Overview[1]

This commentary addresses nominations made in relation to a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) (Class PE) visa which was introduced on 16 November 2019 to replace the permanent Subclass 187 (Regional Sponsored Migration Scheme) visa.[2]

Nomination, in the context of the standard business sponsorship scheme under the *Migration Act 1958* (Cth) (the Act) and the *Migration Regulations 1994* (Cth) (the Regulations), is the second stage of a three-stage process, where a person who is, or has applied to be, an approved standard business sponsor,[3] or who is a non-Ministerial party to negotiations for a work agreement,[4] nominates for approval of an occupation in relation to a visa holder, visa applicant, or proposed visa applicant.[5] The first stage involves the person (employer) seeking approval as a standard business sponsor (see Approval as standard business sponsor for further details), and the third stage involves a person to be employed in a nominated occupation by the approved business sponsor, applying for a temporary visa (e.g. a Subclass 494 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 process for nomination and the prescribed criteria for approval of the nomination in relation to a Subclass 494 visa are respectively set out in regs 2.73B and 2.72C and are, in substance, largely consistent with regs 2.73 and 2.72 (post-18 March 2018 version) applicable to a nomination in relation to a Subclass 482 visa (see Regulations 2.72 and 2.73 - Nomination and Approval of an Occupation for Subclass 457 and Subclass 482 for further details). In addition to the prescribed criteria in reg 2.72C, if the nomination is subject to a labour market testing condition, that condition must be satisfied unless certain exemptions apply.[6] The labour market testing condition and exemptions are set out in ss 140GBA–GBC of the Act. Further, if the applicant is liable to pay the nomination training contribution charge, it must be paid.[7]

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (F2019L00578).
[3] A 'standard business sponsor' is defined in reg 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 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.
[4] A 'work agreement' for the purposes of nominations made by approved work sponsors under s 140GB is defined in s 5 of the Act and reg 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 482 or 494 visa holder.
[5] s 140GB(1).
[6] s 140GB(2)(a).
[7] s 140GB(2)(aa).

Tribunal's jurisdiction and powers

A decision to refuse to approve a nomination under s 140GB(2) is a reviewable decision under Part 5 of the Act.[8]

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 regs 2.59 and 2.68 that apply only to businesses lawfully operating in Australia.[9] This in practical terms means that the Tribunal has jurisdiction in relation to decisions where the affected business is based in Australia,[10] which will always be the case in relation to a nomination under reg 2.72C, as overseas businesses cannot nominate an occupation for the Subclass 494 visa.[11] The person who made the nomination has standing to apply for review.[12]

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.[13]

Process for nomination of an occupation – reg 2.73B

Regulation 2.73B sets out the requirements for the process of nomination of a proposed occupation under reg 140GB(1)(b) in relation to a holder of, or an applicant or proposed applicant for, a Subclass 494 visa.[14] The person who is the subject of the nomination does not have to make a visa application at the same time as the application for the nomination.

The requirements are:

- the nomination is made using the internet and an approved form specified in the relevant written instrument;[15] and
- the nomination is accompanied by the fee specified in the relevant instrument and any nomination training contribution charge the applicant is liable to pay;[16] and
- the following information is provided in the nomination application:

[8] s 338(9), reg 4.02(4)(d).
[9] For decisions made on standard business sponsorship approval or variation of standard business sponsorship approval made before 18 March 2018, these are regs 2.59(d) and (e) and regs 2.68(e) and (f) respectively: see reg 4.02(4B). For decisions made on either of these approvals made *after* 18 March 2018, the relevant provisions will be regs 2.59(f) and 2.68(g): see reg 4.02(4B) and clause 6704(16) of sch 13 to the Regulations.
[10] In *Auservices Pty Ltd v MICMSMA* [2020] FCCA 1250, the Court considered the similar requirement in reg 4.02(4A) (relevant to decisions to refuse an approval of a standard business sponsorship) to mean that the Tribunal will have jurisdiction if the business is based in Australia, notwithstanding that the matter was determined on a discrete issue in reg 2.59 and the delegate had not directly said they had considered regs 2.59(d) and (e) (or reg 2.59(f) for post 18 March 2018 decisions) (at [59]–[63]). This interpretation would be equally applicable to the similarly worded reg 4.02(4B).
[11] See reg 2.72C(5).
[12] s 347(2)(d) and reg 4.02(5)(c).
[13] ss 140GB(2), 349(2).
[14] reg 2.73B(1).
[15] regs 2.73B(3) and (4). For the relevant instrument, see the 'Form&Fees' tab of the Register of instruments - Business Visas.
[16] regs 2.73B(5) and (6). For the relevant instrument, see the 'Form&Fees' tab of the Register of instruments - Business Visas.

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  - the identity of the nominee;[17]
  - if the nomination is in relation to the Employer Sponsored stream, the name of the occupation and the corresponding 6-digit code as specified in the relevant instrument in force at the time the nomination is made;[18]
  - if the nomination is in relation to the Labour Agreement stream, the name of the occupation and the corresponding 6-digit code (if any) as specified in the work agreement;[19]
  - the location(s) at which the nominated occupation will be carried out;[20]
  - the annual turnover (within the meaning of the *Migration (Skilling Australians Fund) Charges Regulations 2018*) of the nominating business;[21]
  - if the nominee holds a Subclass 494 visa, the date of grant of the visa;[22] and
  - any other information specified in an instrument for reg 2.73B(14)(d);[23]
- written certification as to whether or not the applicant has engaged in conduct that contravenes s 245AR(1) of the Act;[24]
- written certification that the employment contract with the nominee complies or will comply with Commonwealth, State or Territory employment laws (unless exempt);[25]
- if the nomination is in the Employer Sponsored stream, written certification that:[26]
  - 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;[27] and
  - 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;[28] and
  - the occupation is a position in the business of the applicant or an associated entity (unless the occupation is exempt);[29]
- if the nomination is in the Labour Agreement stream, written certification that:[30]

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[17] reg 2.73B(8).
[18] reg 2.73B(9)(a). See the 'Occ494noms' tab of the Register of instruments - Business Visas.
[19] reg 2.73B(9)(b).
[20] reg 2.73B(9)(c).
[21] reg 2.73B(9)(d). The annual turnover is required to calculate the nomination training contribution charge the nominator is liable to pay, and is defined in s 4 of the *Migration (Skilling Australians Fund) Charges Regulations 2018* (Cth) (F2019C00838) as the total ordinary income (within the meaning of the *Income Tax Assessment Act 1997* (Cth)) the person derived in the most recent income year (within the meaning of that Act) ending before the nomination day.
[22] reg 2.73B(9)(e).
[23] reg 2.73B(9)(f). There were no specifications at the time of writing.
[24] reg 2.73B(10). 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. 'Sponsorship-related event' is defined in s 245AQ and relevantly includes a person making a nomination under s 140GB of the Act in relation to an applicant for a Subclass 494 visa.
[25] reg 2.73B(11). For exempt occupations, see the 'ExemptOccs' tab of the Register of Instruments - Business Visas.
[26] reg 2.73B(12).
[27] See the 'Occ494noms' tab of the Register of Instruments - Business Visas.
[28] See the 'Occ494noms' tab of the Register of Instruments - Business Visas.
[29] See the 'ExemptOccs' tab of the Register of Instruments - Business Visas.
[30] reg 2.73B(13).

- 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 – reg 2.72C

Section 140GB(2) provides that the Minister must approve a person's nomination if the person is an approved work sponsor, the labour market testing conditions are met if applicable and not exempt, the nomination training contribution charge is paid if liable, and the prescribed criteria are satisfied. The prescribed criteria for a nomination of an occupation in relation to a Subclass 494 visa are set out in reg 2.72C of the Regulations. These criteria require that the Minister (or the Tribunal on review) is satisfied that:

- the applicant is an approved work sponsor and has paid any nomination training contribution charge in relation to the nomination;[31]
- the nomination was made in accordance with the prescribed process in reg 2.73B;[32]
- 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;[33]
- if the nomination is in the Employer Sponsored stream, the applicant is a standard business sponsor other than an overseas business sponsor; or if it is in the Labour Agreement stream, the applicant is a party to a non-Ministerial work agreement which authorises the recruitment, employment or engagement of services of a person who is intended to be employed or engaged as a Subclass 494 visa holder;[34]
- the nominated position is located at a place in a part of Australia that was a designated regional area when the nomination was made;[35]
- the applicant has paid in full any debt mentioned in s 140ZO of the Act;[36]
- if the nominee holds a Subclass 494 visa, the applicant has listed on the nomination each person granted a Subclass 494 visa as a family member of the nominee, unless it is reasonable in the circumstances not to do so;[37]
- the nominated occupation and its 6-digit code correspond to an occupation specified in the relevant instrument in force at the time of the nomination application if the nomination is in the Employer Sponsored stream, or the work agreement if it is in the

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[31] Note to reg 2.72C(2) and ss 140GB(2)(aa) and (ab).
[32] reg 2.72C(3).
[33] reg 2.72C(4).
[34] reg 2.72C(5).
[35] reg 2.72C(6). 'Designated regional area' is defined in regs 1.03 and 1.15M as a part of Australia specified in a written instrument. For the relevant instrument, see 'RegAustpost161119' tab of the Register of Instruments - Business Visas.
[36] reg 2.72C(7). 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.
[37] regs 2.72C(8) and (9).

Labour Agreement stream, and the occupation applies to the nominee in accordance with the instrument or work agreement;[38]

- the position associated with the nominated occupation is genuine, full-time and likely to exist for at least 5 years;[39]
- *if the nomination is in relation to the Employer Sponsored stream:*
  - unless the nominated occupation is specified in the instrument for reg 2.72C(14), the nominee will be engaged only as an employee under a written contract of employment by the applicant or an associated entity; the applicant will give to the Minister a copy of the contract signed by the employer and nominee; and the terms and conditions of the employment will not include an express exclusion of the possibility of extending the period of employment;[40]
  - if the nominee's annual earnings in relation to the nominated occupation will not be at least the amount specified in an instrument made for reg 2.72(15)(b),[41]
    - the annual market salary rate for the occupation has been determined in accordance with an instrument made for reg 2.72(17), and unless it is reasonable to disregard, the rate excluding any non-monetary benefit is not less than the temporary skilled migration income threshold (TSMIT) specified by the Minister in an instrument;[42] and
    - the nominee's annual earnings in relation to the occupation will not be less than the above determined annual market salary rate, and unless it is reasonable to disregard, the nominee's earnings excluding any non-monetary benefits will not be less than the TSMIT; and
    - there is no information known to Immigration that indicates that the annual market salary rate for the occupation is inconsistent with Australian labour market conditions relevant to the occupation unless it is reasonable to disregard such information;
  - there is no information known to Immigration that indicates that the employment conditions (other than in relation to earnings) 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, or it is reasonable to disregard such information, and the applicant has not engaged in discriminatory recruitment practices;[43]
  - the Minister has been advised by a body specified in an instrument, located in the same State or Territory as the nominated position and have

[38] reg 2.72C(10). For the relevant instrument in relation to the Employer Sponsored stream, see the 'Occ494noms' tab of the Register of Instruments - Business Visas.
[39] reg 2.72C(12).
[40] regs 2.72C(13). See the 'ExemptOccs' tab of the Register of Instruments - Business Visas.
[41] regs 2.72C(15) and (16). For the relevant instrument, see the 'TSMIT' tab of the Register of Instruments - Business Visas. As at time of writing, the specified amount of annual earnings for this purpose is AUD 250,000.
[42] See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instruments. As at time of writing, the TSMIT is AUD 53,900.
[43] reg 2.72C(17).

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responsibility for the relevant designated regional area in which the position is located, about whether the nominee would be paid at least the annual market salary rate for the occupation;[44]

- *if the nomination is in relation to the Labour Agreement stream:*[45]
  - 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 in relation to Subclass 494 visas made by the applicant and approved under s 140GB of the Act is less than the number of approved nominations in relation to visas of that type permitted under the work agreement for the year.

Nomination in accordance with prescribed process – reg 2.72C(3)

Under reg 2.72C(3), the approved sponsor must have made the nomination in accordance with the process set out in reg 2.73B. For further information on this process see above.

No adverse information known about the person or an associated person – reg 2.72C(4)

Regulation 2.72C(4) requires 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' and 'associated with' are defined in regs 1.13A and 1.13B respectively for these purposes.[46]

Adverse information as defined in reg 1.13A is any adverse information relevant to the person's suitability as an approved sponsor or a nominator,[47] and includes information that the person:

- has contravened a law of the Commonwealth, 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 a 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* (Cth); or

[44] regs 2.72C(18)–(20). For the instrument specifying the relevant regional certifying body, see the '494RCB' tab of the Register of Instruments - Business Visas.
[45] reg 2.72C(21).
[46] Note that the definitions in regs 1.13A and 1.13B were significantly expanded by the *Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F201800262) on 18 March 2018. For the purposes of reg 2.72C and the Schedule 2 visa criteria for Subclass 494 (i.e. cl 494.214), these new definitions apply as the Subclass 494 visa was introduced after these amendments. For information on pre-18 March 2018 version of the definition, see Regulations 2.72 and 2.73 - Nomination and Approval of an Occupation for Subclass 457 and Subclass 482.
[47] reg 1.13A(1).

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- 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.[48]

Note that the above list is not exhaustive and 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 reg 2.72C(4).

Regulation 1.13B provides a non-exhaustive list of circumstances in which a person is 'associated with' another, including where:

- the persons are or were spouses/de facto partners, or member 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 association or other body of persons; or have or had common friends or acquaintances;
- one is or was a consultant, adviser, partner, representative on retainer, officer, employer, employee or member of the other, or any corporation or other body in which the other is or was involved (including as an officer, employee or member);
- a third person is or was a consultant, adviser, partner, representative on retainer, officer, employer, employee or member of both persons;
- the persons are or were related bodies corporate within the meaning of the *Corporations Act 2001* (Cth);
- one is or was able to exercise influence or control over the other; or
- a third person is or was able to exercise influence or control over both of them.[49]

The definition further states that for the purposes of the range of relationships listed in reg 1.13B(1), it does not matter if a person has ceased to exist.[50]

Regulation 2.72C(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 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 it is reasonable to do so. The Regulations do not further define 'reasonable' in this context but determining whether it is reasonable to disregard the information is a question for the decision maker, having regard to all relevant circumstances of the case. The relevant factors may include 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

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[48] reg 1.13A(2). 'False or misleading information in a material particular' is defined in reg 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 as 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. These have been the subject of judicial consideration in the context of PIC 4020, discussed in detail in PIC 4020, Bogus Documents, False or Misleading Information.
[49] reg 1.13B(1). The term 'officer' is defined in reg 1.13B(4) as having the same meaning given by s 9 of the *Corporations Act 2001* (Cth). The term 'related body corporate' is defined in s 50 of the *Corporations Act 2001* (Cth).
[50] reg 1.13B(2).

adverse information did not recur).[51] 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.[52] It may also be relevant to consider other adverse information not known to Immigration.[53] In such cases, it may be necessary to first clearly identify the adverse information known to Immigration, then consider whether it is reasonable to disregard that information, having regard to all other relevant matters including the adverse information not known to Immigration.

Standard business sponsor or party to a work agreement – reg 2.72C(5)

Regulation 2.72C(5) provides that if the nomination is in relation to the Employer Sponsored stream, the applicant must be a standard business sponsor other than an overseas business sponsor, or if the nomination is in relation to the Labour Agreement stream, the applicant must be a non-Ministerial party to a work agreement which authorises the recruitment, employment or engagement of a person who is intended to be employed or engaged as a Subclass 494 visa holder. The exclusion of overseas business sponsors is because the Subclass 494 visa is restricted to Australian businesses, and overseas businesses seeking to nominate workers to establish a business in Australia can continue to use the Subclass 482 (Temporary Skill Shortage) visa program. The specification of the work agreement being in relation to a prospective Subclass 494 visa holder also ensures that the relevant work agreement authorises nominations for the purpose of the Subclass 494 visa, as opposed to a work agreement that authorises nominations for the purpose of the Subclass 482 visa.

A 'standard business sponsor' is defined in reg 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.

A 'work agreement' for the purposes of a Subclass 482 or a Subclass 494 visa is defined in s 5 of the Act and reg 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[54] that authorises the recruitment, employment, or engagement of services of a prospective Subclass 482 or Subclass 494 visa holder.

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[51] Policy – Migration Regulations – Divisions – [Div1.2/reg1.13A] Adverse information and skilled visas (regulations 1.13A and 1.13B) – [4.4.2] Disregarding Adverse Information (reissued 5 August 2018).
[52] Explanatory Statement to *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115) (in relation to regs 2.72(1)(i) and (ii) which preceded the definitions in regs 1.13A and 1.13B); Policy – Migration Regulations – Divisions – [Div1.2/reg1.13A] Adverse information and skilled visas (regulations 1.13A and 1.13B) – [4.4.2] Disregarding Adverse Information (issued 18 March 2018).
[53] *Oakwood Sydney Pty Ltd v MICMSMA* [2020] FCCA 2354 at [38], considering the similarly worded reg 5.19(3)(g).
[54] A 'labour agreement' is defined in reg 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.

Position located in designated regional area – reg 2.72C(6)

Regulation 2.72C(6) requires the position associated with the nominated occupation is located at a place in a part of Australia that was a 'designated regional area' at the time of the nomination application. This reflects the purpose of the Subclass 494 visa, which is to provide skilled workers in regional Australia by enabling Australian employers in designated regional areas to employ skilled foreign workers.[55]

Areas that constitute 'designated regional area' is specified in a legislative instrument made under reg 1.15M,[56] and the relevant instrument is the one in force at the time of the nomination application: see the 'RegAustpost161119' tab of the Register of Instruments - Business Visas for the relevant instrument.

Identification of occupation and genuine, full-time position for at least 5 years – regs 2.72C(10)–(12)

Regulation 2.72C(10) requires the Minister to be satisfied that the nominated occupation and its 6-digit code correspond to an occupation and the 6-digit code specified in the instrument in force at the time the nomination is made (where the occupation is nominated in the Employer Sponsored stream) or in the work agreement (where the occupation is nominated in the Labour Agreement Stream). The occupation must also apply to the nominee in accordance with the instrument including any applicability conditions specified in the instrument,[57] or the work agreement. Given the requirement to nominate occupations by reference to the time of application instrument, the nominated occupation cannot change. According to the Explanatory Statement to the amending regulations that introduced the Subclass 494 visa, the online nomination system will only allow nominations to be made in relation to occupations that are specified in the legislative instrument so as to prevent employers from inadvertently nominating an occupation that is not eligible.[58]

The position associated with the nominated occupation must also be genuine, a full-time position and likely to exist for at least 5 years.[59]

Position associated with occupation is genuine – reg 2.72C(12)(a)

The requirement for the position associated with the nominated occupation to be genuine is consistent across all employer sponsored nomination schemes as the intention is to ensure that positions nominated under these schemes are in skilled occupations and are genuinely needed by the nominating employer.[60] As such, case law and policy considerations in relation to the equivalent genuine position requirement in reg 2.72(10)(f) would be applicable in the context of reg 2.72C(12)(a).

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[55] Explanatory Statement to F2019L00578, at pp.7–8.
[56] regs 1.03 and 1.15M. Regulations 1.03 and 1.15M were amended by the *Migration Amendment (Temporary Graduate Visas) Regulations 2020* (Cth) (F2020L01639) to divide 'designated regional area' into two sub-categories: (a) designated city or major regional centre, or (b) regional centre or other regional area. The new definitions apply to applications made on or after 20 January 2021. As both of these sub-category areas will be specified by a legislative instrument made under reg 1.15M and the applicable instrument in determining 'designated regional area' is the one in force at the time of the nomination application, there is no change in practice.
[57] For the relevant instrument, see the 'Occ494Noms' tab of the Register of Instruments - Business Visas.
[58] Explanatory Statement to F2019L00578, at p.38.
[59] reg 2.72C(12).
[60] See for example, reg 2.72(10)(f) (pre-18/3/2018 version) and the Explanatory Statement to the *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146) at p.34.

The determination of whether a position is 'genuine' requires an assessment of not only whether the position exists, but also whether that position really is what it purports to be. In *Cargo First Pty Ltd v MIBP*, considering reg 2.72(10)(f), the Court confirmed that this necessarily requires a qualitative analysis of the position that is the subject of the nomination and a comparison to the occupation which has been nominated by the proposed sponsor.[61] That is, 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 reg 2.72(10)(e)[62] 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 ANZSCO, and the 'tasks' required to be undertaken included a significant majority of the tasks set forth in ANZSCO.[63] In conducting this analysis, the decision maker must have regard to the correct version of ANZSCO.[64]

Department policy provides detailed guidance in relation to particular fact scenarios where further assessment on whether the position is genuine may be appropriate:

- 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 or personal associate of an officer of the sponsoring business, or is a director or owner of the sponsoring business; the business has been in existence for a very short period of time; proposed salary is significantly higher or lower than industry standards and does not appear to be consistent with labour market conditions; the business has a relatively small turnover that could indicate that it would be difficult to support the number of proposed employees at the business at the nominated salary);
- the information provided suggests that the tasks of the position do not align with the tasks of the occupation as described in ANZSCO (having regard to the business context including the location where the nominee will be working, the nominee's position in the organisational structure of the business, the tasks that the nominee will be performing, and the tasks performed by current employees); 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).[65]

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[61] *Cargo First Pty Ltd v MIBP* [2016] FCA 30 at [34].
[62] Regulation 2.72(10)(e) requires the applicant to provide written certification as part of the nomination regarding, among other things, that the tasks of the position include a significant majority of the tasks of the nominated occupation listed in ANZSCO. The relevant similarly worded provisions in the context of reg 2.72C nomination are reg 2.73B(12) for Employer Sponsored stream and reg 2.73B(13) for Labour Agreement stream.
[63] *Cargo First Pty Ltd v MIBP* [2016] FCA 30 at [34]. The Court upheld the decision of the Federal Circuit Court in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091 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.
[64] *Mora v MIBP* [2018] FCA 1819. The Court followed the reasoning in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091 that the word 'position' in reg 2.72(10)(f) is qualified by the phrase 'associated with the nominated occupation', and found that as the character of the 'nominated occupation' was informed by the ANZSCO description, it was necessary for the Tribunal to have regard to the correct version of ANZSCO (at [47]).
[65] Policy – Migration Regulations – Divisions – Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) nominations – 4.4.8. Genuine Position (issued 16/11/2019).

The policy further suggests that when comparing the proposed tasks to be performed by the nominee against the task description in ANZSCO, the decision maker should take into account that not every item on the list of tasks for a unit group will apply to each occupation in that group as positions are likely to specialise in particular tasks depending on the business and the specialisation of the nominee, and it may also be necessary to take into account how particular occupations operate in a digital age, where this is not reflected in ANZSCO but the position is clearly highly skilled.[66]

Full-time position, likely to exist for at least 5 years – regs 2.72C(12)(b) and (c)

The requirement for the position to be full-time is consistent with the Subclass 187 visa which the Subclass 494 visa is replacing, and the requirement for the position to be available for at least five years reflects the visa grant period of the Subclass 494 visa (i.e. cl 494.511, which provides that the visa permits the holder to travel to, enter and remain in Australia for 5 years from the date of grant).

Department policy suggests that positions should generally be considered full time where the employee works 38 hours per week, or a period between 32 and 45 hours that is specified under an industry award or agreement and is consistent with the National Employment Standards (NES). However, it notes that decision makers should be aware that there are a variety of prevailing work arrangements in the Australian labour market that do not adhere to a standard work week, for example, primary and secondary school teachers.[67]

Additional requirements in relation to Employer Sponsored stream

There are additional requirements for nominations in the Employer Sponsored stream, relating to:

- engagement under a written contract of employment (reg 2.72C(13));
- the nominee's annual earnings (reg 2.72C(15));
- employment conditions being no less favourable than those of an equivalent Australian citizen or permanent resident, and not engaging in discriminatory recruitment practices (reg 2.72C(17)); and
- an advice by a regional certifying body about a specific matter (reg 2.72C(18)).

Nominee engaged under written employment contract

Regulation 2.72C(13) requires that the nominee will be engaged only as an employee under a written contract of employment by the applicant or an associated entity of the applicant, a copy of that contract signed by the nominee and the employer is given to the Minister, and the terms and conditions of that employment will not include an express exclusion of the possibility of extending the period of employment. These requirements do not apply if the nominated occupation is specified in an instrument made under reg 2.72C(14), which

[66] Policy – Migration Regulations – Divisions – Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) nominations – 4.4.8. Genuine Position – 4.4.8.5. Tasks of the position do not align with nominated occupation (issued 16/11/2019).
[67] Policy – Migration Regulations – Divisions – Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) nominations – 4.4.9. Full-time position (issued 16/11/2019).

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broadly include Chief Executive or Managing Director, Corporate General Manager, General Medical Practitioner and specialist medical occupations.[68] The exclusion of these occupations is consistent with current practice for other sponsored work visas and is intended to accommodate their typical work arrangements often involving more than one employer and as an independent contractor.[69]

For other occupations, the nominee must be employed under a written employment contract. The employer can be either the standard business sponsor who has applied for the nomination or an associated entity of the sponsor.[70]

Annual earnings

Regulation 2.72C(15) contains several requirements which must be met for nominations in the Employer Sponsored 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.[71] 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.

The term 'earnings' is defined in reg 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'.[72]

However, the concept of earnings does not include any payments the amount of which cannot be determined in advance, such as commissions, incentive-based payments, bonuses and overtime (unless the overtime is guaranteed).[73] It also does not include reimbursements or certain employer superannuation contributions specified in reg 2.57A(4). This definition of 'earnings' is based on the definition in s 332 of the *Fair Work Act 2009* (Cth) and it is intended that interpretations of this section will apply to this definition.[74]

If the nominee's annual earnings are less than the amount specified in the instrument, the decision maker must be satisfied that the 'annual market salary rate' for the occupation has been determined by the applicant in accordance with the legislative instrument.[75] 'Annual market salary rate' is defined in reg 1.03 and represents what an Australian citizen or permanent resident earns, or would earn (where there is no equivalent Australian worker), for performing the occupation in the same location on a full-time basis for a year. It is the benchmark for requiring 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 in the same workplace at the same location on a full-time basis.

[68] See the 'ExemptOccs' tab of the Register of Instruments - Business Visas.
[69] Explanatory Statement to F2019L00578, at p.39.
[70] 'Associated entity' has the same meaning as in s 50AAA of the *Corporations Act (2001)* (Cth): reg 1.03.
[71] See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instrument.
[72] For definition of 'non-monetary benefits' see reg 2.57A(3).
[73] reg 2.57A(2)(a) and Note to reg 2.57A(2).
[74] Explanatory Statement to the *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 230), p.7 and Note to reg 2.57A.
[75] reg 2.72C(15)(c). See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instrument.

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The instrument specifies the different methods and evidence to consider in determining the annual market salary rate where there is, or is not, an Australian worker performing equivalent work.

The annual market salary rate, excluding non-monetary benefits (as defined in reg 2.57A(3); e.g. accommodation, meals, clothing, travel), must be equal to or greater than the temporary skilled migration income threshold (TSMIT) as specified in the legislative instrument.[76] If this is not satisfied, the nomination cannot be approved. However, this requirement may be disregarded if the determined annual market salary rate for the occupation (i.e. the complete salary package inclusive of the non-monetary benefit) is not less than the TSMIT, and it is reasonable in the circumstances to disregard.[77] For example, it may be reasonable to disregard where the occupation involves a significant accommodation component due to the remoteness of the work location, which can be evidenced by an equivalent Australian worker's employment arrangement or an industry enterprise agreement, and this together with the monetary value of the earnings exceeds the TSMIT.[78]

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 determined annual market salary rate for that occupation;[79]
- the nominee's annual earnings, excluding any non-monetary benefits, will not be less than the TSMIT, unless it is reasonable in the circumstances to disregard this criterion;[80] and
- 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.[81]

No less favourable employment conditions and discriminatory recruitment practices

Regulation 2.72C(17)(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 reg 2.72C(17)(b), the applicant must not have engaged in discriminatory recruitment practices, as defined in reg 2.57(1).[82] 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.

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[76] reg 2.72C(15)(d). See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instrument. As at time of writing, the TSMIT is $53,900.
[77] regs 2.72C(15)(d) and 2.72C(16)(a).
[78] Explanatory Statement to F2019L00578 at p.40, and Policy – Migration Regulations – Divisions – Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) nominations – 4.5.2.4 Monetary benefits for the equivalent Australian worker must be at least TSMIT (issued 16/11/2019).
[79] reg 2.72C(15)(e).
[80] regs 2.72C(15)(f) and 2.72C(16)(b).
[81] reg 2.72C(15)(g).
[82] 'discriminatory recruitment practice' means 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: reg 2.57(1).

Regional Certifying Body advice

It is a requirement for approval of a nomination of an occupation for the Subclass 494 visa in the Employer Sponsored stream that the Minister has been advised by a regional certifying body (RCB) about whether the nominee would be paid at least the annual market salary rate for the occupation.[83] This is consistent with the criteria for nomination of positions in regional Australia made for the purpose of the Direct Entry stream in the Subclass 187 visa under reg 5.19. The RCB must be specified in an instrument, located in the State or Territory in which the position is located and have responsibility for the designated regional area where the position is located.[84]

Department policy notes that some RCBs have established processes specific to their organisation for managing requests for assessment in relation to the reg 2.72C nominations, and while they are not required to assess the regulatory criteria and there is no legislative requirement to provide the advice on the Departmental form (i.e. Form 1404), the advice will generally include the following information:

- details of the nomination: registered name and ABN of the sponsor, ANZSCO code relating to the nominated occupation, position title of the nominated position, and nominated salary;
- information regarding the RCB: the name of RCB and the name of the representative of the RCB providing the advice; and
- statement regarding the assessment, indicating that the RCB has considered the annual market salary rate for the nominated occupation, and the advice on whether the nominee will be paid at least that amount.[85]

Although the RCB advice itself will satisfy the requirement in reg 2.72C(18), it is not conclusive or determinative of the question on whether the nominee would be paid at least the annual market salary rate for the occupation as required under reg 2.72C(15)(e). Therefore, the Tribunal must independently consider the evidence before it, including the RCB advice, and make a separate finding on whether reg 2.72C(15)(e) is satisfied.

In this regard, case law in the context of the similarly worded provision in reg 5.19(4) in relation to a nomination of a position for a Subclass 187 visa in the Direct Entry stream would be applicable. In *Bharaj Construction Pty Ltd v MIBP (No 3)* [2019] FCCA 31 (considering the pre-July 2012 version of reg 5.19(4)), the Court confirmed that there was nothing in the language, text or structure of reg 5.19(4) to support the view that the advice given by a RCB is conclusive evidence that the matters in the criteria which it advised about have been met.[86] This is consistent with the Departmental policy.[87]

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[83] reg 2.72C(18).
[84] reg 2.72C(19). For the relevant instrument specifying the RCBs for the purpose of Subclass 494 visa, see the '494RCB' tab of the Register of Instruments - Business Visas.
[85] Policy – Migration Regulations – Divisions – Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) nominations – 4.5.5. Regional Certifying Body advice (issued 16/11/2019).
[86] *Bharaj Construction Pty Ltd v MIBP (No 3)* [2019] FCCA 31 at [63]–[72].
[87] Policy – Migration Regulations – Divisions – Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) nominations – 4.5.5. Regional Certifying Body advice – 4.5.5.6. Consideration of the advice provided by the RCB (issued 16/11/2019).

Additional requirements in relation to Labour Agreement stream

Regulation 2.72C(21) applies only to approved sponsors who are non-Ministerial parties to a work agreement.[88] 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. Further, the number of nominations in relation to Subclass 494 visas made by the sponsor and approved by the Minister must be less than the number of approved nominations under the labour agreement in that year. These requirements ensure that the nomination is consistent with the terms of the relevant labour agreement.

The Labour Market Testing Condition

In addition to satisfying the criteria for approval, nominations made by standard business sponsors must also meet the labour market testing condition, where applicable, unless an exemption applies.[89] This requires the decision makers 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.

For a nomination made by a party to a work agreement, while there are similar requirements for labour market testing under reg 2.76A of the Regulations, these are considerations that arise outside the nomination process.[90]

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;[91]
- 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;[92] 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.[93]

The only prescribed class of sponsors prescribed are standard business sponsors.[94]

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[88] Work agreement is defined in reg 2.76(2).
[89] ss 140GB(2)(a) and 140GBA(1).
[90] reg 2.76A. This requirement provides that, with limited exceptions, the Commonwealth must not enter into 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.
[91] s 140GBA(1)(a).
[92] s 140GBA(1)(b).
[93] s 140GBA(1)(c).
[94] reg 2.72AA.

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.[95] Having regard to the terms of ss 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. Department policy indicates that there are currently no international trade obligations applicable in relation to the Subclass 494 visa as they are discharged via the Subclass 482 visa program.[96] This in practice would mean that the LMT conditions will always apply in relation to a nomination for a Subclass 494 visa in the Employer Sponsored stream, unless an exemption applies.

Does an exemption apply? – ss 140GBC and 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. There are two exemptions:

- **skill and occupational exemptions** –if a person has nominated an occupation and position requiring a particular level of qualification/relevant experience and the occupation is specified an instrument;[97] and
- **major disaster exemption** – 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.[98]

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;[99]
- 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;[100] and
- either of the two skill and occupation exemptions described below are met.[101]

[95] See the 'LMT&ObligExmpt' tab in the Register of Instruments – Business visas for the relevant instrument. 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/. The list of Australia's current international trade obligations can also be found in the Department of Home Affairs' website at https://immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/nominating-a-position/labour-market-testing.
[96] Policy – Migration Regulations – Divisions – Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) nominations – 4.5.5. Regional Certifying Body advice – 4.5.5.6. Consideration of the advice provided by the RCB (issued 16/11/2019).
[97] s 140GBC.
[98] s 140GBB.
[99] s 140GBC(1)(a).
[100] s 140GBC(1)(b).

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The skill and occupation exemptions are set out in ss 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:[102]
    - » 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(3) – lesser qualification/experience exemption** – met if:
  - either or both of the following are required for the nominated position, in relation to the nominated occupation:[103]
    - » a relevant associate degree, advanced diploma or diploma covered by the AQF,[104] 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 to exempt occupations at higher skill levels from the labour market testing requirement. However, currently no occupations are specified in the applicable instrument and therefore no skill/qualification-based exemptions can apply.[105]

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.[106] 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.

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[101] ss 140GBC(2), (3).
[102] s 140GBC(2)(a).
[103] s 140GBC(3)(a).
[104] 'AQF' means the Australian Qualifications Framework within the meaning of the *Higher Education Support Act 2003* (Cth): s 140GBC(6).
[105] See the 'LMTExemptOcc' tab in the Register of Instruments – Business visas for the relevant instrument.
[106] s 140GBC(6).

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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.

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;[107]
- the labour market testing in relation to the nominated position was undertaken in the specified manner;[108]
- the nomination is accompanied by specific evidence in relation to that testing;[109]
- if applicable, information is provided about recent redundancies and retrenchments from positions in the nominated occupation;[110] and
- having regard to that evidence and information (if any), the Minister is satisfied a suitably qualified and experienced Australian citizen, permanent resident or eligible temporary visa holder is not readily available to fill the nominated position.[111]

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.[112] For the period in which the testing must be undertaken see the 'LMTPeriodMannerEvidence' tab of the Register of Instruments – Business visas for the relevant instrument. Currently, the relevant period is 4 months ending on the day on which the nomination form in relation to the nominated application is lodged but it must not start earlier than 4 months before the nomination is received by the Minister.[113]

This provision requires a decision maker to be satisfied that labour market testing has been undertaken in relation to the nominated position at some point within the specified period; it does not require continuous testing throughout that period.

However, if any Australian citizens or Australian permanent residents were, in the previous 4 months, made redundant or retrenched from positions in the nominated occupation in a

[107] ss 140GBA(3)(a), (4), (4A).
[108] ss 140GBA(3)(aa), (5)– (6AB).
[109] s 140GBA(3)(b)(i).
[110] s 140GBA(3)(b)(ii).
[111] s 140GBA(3)(d).
[112] s 140GBA(7).
[113] IMMI 18/036, s 6(1), and s 140GBA(4).

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business of, or an associated entity of,[114] the approved sponsor, the labour market testing must have been undertaken after those redundancies and retrenchments.[115] 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.

Manner of LMT and evidentiary requirements

Sections 140GBA(3)(aa) and (b)(i) require that the labour market testing was undertaken in the specified manner and the nomination is accompanied by evidence in relation to the labour market testing.

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.[116] The labour market testing condition will only be met where the labour market testing was undertaken in the manner determined under s 140GBA(5).[117]

This may include:[118]

- 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.[119]

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.[120]

The kinds of evidence of labour market testing that must accompany a nomination are specified in an instrument under s 140GBA(6A), which may include a copy of the advertisement, but there may also be different requirements for different nominated positions or classes of nominated positions prescribed by the Minister.[121] The relevant instrument is in the 'LMTPeriodMannerEvidence' tab of the Register of Instruments – Business Visas.

For the evidentiary requirements to be met, it appears that only evidence provided at the same time, or around the same time, the nomination is made can satisfy this requirement.[122] 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

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[114] 'Associated entity' has the same meaning as in pt 2A of the Regulations: s 140GBA(7) as inserted by No 122, 2013. Regulation 1.03 provides that associated entity has the same meaning as in s 50AAA of the *Corporations Act 2001* (Cth).
[115] s 140GBA(4A).
[116] See the 'LMTPeriodMannerEvidence' tab of the Register of Instruments - Business Visas for the relevant instrument.
[117] s 140GBA(3)(aa).
[118] s 140GBA(6).
[119] s 140GBA(6AB).
[120] s 140GBA(6AA).
[121] ss 140GBA(6B), 140GBA(6C).
[122] 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 the provision of evidence about labour market testing which was conducted before the nomination application is made (e.g. 'in the previous 4 months' in s 140GBA(3)(b)(ii) and s 140GBA(4)).

provided other than at the same time the application is lodged, but that there must be a close temporal connection with the application.[123]

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 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).

Additional requirement if recent redundancies/retrenchments

If any Australian citizens or Australian permanent residents[124] were, in the previous 4 months, made redundant or retrenched from positions in the nominated occupation in a business of, or an associated entity of,[125] the approved sponsor, there is an additional requirement that information about those redundancies and/or retrenchments is provided with the nomination.[126] 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[127] is not readily available to fill the nomination position;[128] and
- a suitably qualified and experienced eligible temporary visa holder is not readily available to fill the nominated position.[129]

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 of a 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

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[123] *Anand v MIAC* [2013] FCA 1050, considering cl 487.216, in relation to visa applications made before 23 March 2013.
[124] 'Australian permanent resident' means an Australian permanent resident within the meaning of the Regulations: s 140GBA(7) as inserted by No 122, 2013. Australian permanent resident is relevantly defined by reg 1.03 as a non-citizen who, being usually resident in Australia, is the holder of a permanent visa.
[125] 'Associated entity' has the same meaning as in pt 2A of the Regulations: s 140GBA(7) as inserted by No 122, 2013. Regulation 2.57 (in pt 2A of the Regulations) provides that associated entity has the same meaning as in s 50AAA of the *Corporations Act 2001* (Cth).
[126] s 140GBA(3)(b)(ii).
[127] 'Australian permanent resident' means an Australian permanent resident within the meaning of the Regulations: s 140GBA(7). Australian permanent resident is relevantly defined by reg 1.03 as a non-citizen who, being usually resident in Australia, is the holder of a permanent visa.
[128] s 140GBA(3)(d)(i).
[129] s 140GBA(3)(d)(ii).

expressly preclude consideration of other relevant evidence including, for example, evidence which did not accompany the nomination but was provided at a later date.

Nomination Training Contribution Charge

Section 140GB(2)(aa) requires 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 labour marketing test condition.

Section 140ZM imposes a liability on a person to pay the nomination training 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, an applicant or proposed applicant for a Subclass 494 visa.[130]

'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* (Cth), which imposes the charge payable under s 140ZM, sets a charge limit for the charge and provides for the indexation of the charge limit.[131] It also provides that the amount of the nomination training contribution charge is to be prescribed by the regulations, and that the regulations may prescribe different charges for different kinds of visas or persons.[132]

The *Migration (Skilling Australians Fund) Charges Regulations 2018* (Cth) prescribes the amount of charges applicable for Subclass 494 visa currently as follows:[133]

- where the nominee is an applicant or a proposed applicant for a Subclass 494 visa:
    - if the annual turnover for the nomination is less than $10 million – $3,000;
    - in any other case – $5,000;
- where the nominee is a holder of a Subclass 494 visa:[134]
    - if the annual turnover for the nomination is less than $10 million – $3,000 as the base amount, reduced on a pro rata basis, depending on the number of whole years that have elapsed since the visa was granted;
    - in any other case – $5,000 as the base amount, reduced on a pro rata basis, depending on the number of whole years that have elapsed since the visa was granted;
- if the nomination is in the Labour Agreement stream and the nominated occupation is a minister of religion or religious assistant – nil charge.

[130] regs 5.42(1)(d) and (e).
[131] *Migration (Skilling Australians Fund) Charges Act 2018* (Cth) (No 39, 2018) ss 7, 9.
[132] No 39, 2018 s 8.
[133] reg 5A of F2019C00838. '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 meaning of the *Income Tax Assessment Act 1997* (Cth)) 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, F2019C00838).
[134] See reg 5A(2) of F2019C00838 for the formula.

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The Regulations allow for the Minister to refund the nomination training contribution charge, and the nomination fee, in certain cases[135] but there are no provisions for the Tribunal to review decisions regarding refunds or refusals of refunds.

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).[136] 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.[137]

Period of approval of nomination

An approval of a nomination in relation to a Subclass 494 visa ceases on the earliest of:[138]

- 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 494 visa is granted;
- if the nomination is of an occupation for a Subclass 494 visa in the Employer Sponsored stream – the nomination end day,[139] 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 sponsorship application is refused;
- if the nomination is of an occupation for a Subclass 494 visa in the Employer Sponsored 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 494 visa in the Labour Agreement stream – the day on which the work agreement ceases.

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[135] reg 2.73C.
[136] reg 2.74.
[137] Explanatory Statement to the *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115), p.29.
[138] reg 2.75B.
[139] 'nomination end day' is the day 3 months after the sponsorship end day in relation to the nomination, and 'sponsorship end day' in relation to a nomination is the day on which the nominator's approval as a standard business sponsorship ceases: reg 1.03.

Relevant case law

Judgment	Judgment summary
Auservices Pty Ltd v MICMSMA [2020] FCCA 1250	Summary
Bharaj Construction Pty Ltd v MIBP (No.3) [2019] FCCA 31	Summary
Cargo First Pty Ltd v MIBP [2015] FCCA 2091	Summary
Cargo First Pty Ltd v MIBP [2016] FCA 30	Summary
Mora v MIBP [2018] FCA 1819	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration (Skilling Australians Fund) Charges Act 2018 (Cth)	C2018A00039	No 02/2018
Migration (Skilling Australians Fund) Charges Regulations 2018 (Cth) (as amended by *Migration (Skilling Australians Fund) Charges Amendment (Subclass 494 visa) Regulations 2019* (Cth))	F2019C00838	
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 04/2019
Migration Amendment (Temporary Graduate Visas) Regulations 2020 (Cth)	F2020L01639	No 01/2021

Available decision templates/precedents

There is currently no available precedent for a review of a reg 2.72C nomination refusal, and the Generic Template may be used.

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SUBDIVISION 2.19.1 – SPONSORSHIP OBLIGATIONS OF APPROVED WORK SPONSORS

Overview

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To whom does the obligation apply?

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Nature of obligation

To whom does the obligation apply?

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Nature of obligation

To whom does the obligation apply?

When does the obligation apply?

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Nature of obligation

To whom does the obligation apply?

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Nature of obligation

To whom does the obligation apply?

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Obligation to secure an offer of a reasonable standard of accommodation – reg 2.85

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To whom does the obligation apply?

When does the obligation apply?

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Nature of obligation

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To whom does the obligation apply?

When does the obligation apply?

Obligation to ensure primary sponsored person works or participates in activity in relation to which the visa is granted – reg 2.86A

Nature of obligation

To whom does the obligation apply?

When does the obligation apply?

Obligation not to recover, transfer or take actions that would result in another person paying for certain costs – reg 2.87

Nature of obligation

To whom does the obligation apply?

When does the obligation apply?

Obligation to make same or equivalent position available to Australian participants – reg 2.87A

Nature of obligation

To whom does the obligation apply?

When does the obligation apply?

Obligation to provide training – reg 2.87B

Nature of obligation

To whom does the obligation apply?

When does the obligation apply?

Obligation not to engage in discriminatory recruitment practices – reg 2.87C

Nature of obligation

To whom does the obligation apply?

When does this obligation apply?

Relevant case law

Relevant legislative amendments

Available decision precedent/template

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Overview[1]

As of 14 September 2009, standard business sponsors and other temporary business and work sponsors approved under s 140E of the *Migration Act 1958* (Cth) (the Act) are subject to the obligations set out in Division 2.19 of Part 2A of the *Migration Regulations 1994* (Cth) (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.

From 17 April 2019, there has been a general change to the sponsorship framework under Division 3A of Part 2 of the Act with the introduction of the sponsored family visa program and the concept of an 'approved family sponsor' under the class of 'approved sponsors'.[2] There have been various consequential amendments to the Act and the Regulations to ensure that certain provisions only apply to *approved work sponsors*, such as changing references from 'approved sponsor' to 'approved work sponsor'. In relation to sponsorship obligations that are only applicable to work sponsors, the amending regulations specify a new sub-div 2.19.1,[3] separating the relevant existing provisions from the new sub-div 2.19.2[4] that sets out the obligations of an approved family sponsor.

The imposition of obligations on work 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.[5] 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.[6] 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;*

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Introduced by the *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018) and the *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551). The effect of the amending act and regulations are summarised in Legislation Bulletin No 1/2019 and Legislation Bulletin No 3/2019. These amendments, while expanding the scope of relevant current sponsorship framework provisions to include family sponsors and introducing new provisions in respect of the family sponsor, do not make substantive changes to the temporary work sponsorship scheme.
[3] Inserted by item 62 of sch 1 to F2019L00551. Items 63 to 96 make amendments to the existing provisions to ensure that these only apply to 'approved work sponsors'.
[4] Inserted by item 97 of sch 1 to F2019L00551.
[5] s 140AA(d) inserted by *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) (No 122, 2013) with effect from 30 June 2013.
[6] Explanatory Memorandum to *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) (No 159, 2008).

- *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.[7]

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).[8]

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[9]);

- those ensuring work sponsors bear certain costs (e.g. the obligation to pay travel costs to enable sponsored persons to leave Australia[10]);

- those aimed at protecting sponsored work visa holders and protecting the integrity of the labour market (e.g. the obligation to ensure equivalent terms and conditions of employment[11]).

Some obligations apply to all types of approved work sponsors (e.g. the obligation to inform Immigration when certain events occur[12]) and some apply only to specified types of work sponsors (e.g. the obligation to secure an offer of a reasonable standard of accommodation[13]). A work sponsor may be required to fulfil the prescribed obligation generally (e.g. the obligation to keep records[14]) or in respect of each primary (and secondary) sponsored person[15] (e.g. the obligation to ensure a sponsored person works or participates in the nominated occupation, program or activity[16]).[17]

A range of sanction and enforcement tools may be applied to current and former work sponsors who fail to fulfil an obligation. They include:

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[7] Senator Chris Evans, Minister for Immigration and Citizenship, Second Reading Speech, *Migration Legislation Amendment (Worker Protection) Bill*, 24 September 2008.
[8] s 140HA(1) inserted by No 122, 2013 with effect from 30 June 2013.
[9] reg 2.78.
[10] reg 2.80.
[11] reg 2.79.
[12] reg 2.84.
[13] reg 2.85.
[14] reg 2.82.
[15] 'Primary sponsored person' is defined in reg 2.57(1). See 'Application and period of effect of sponsorship obligations' below for discussion of this definition.
[16] reg 2.86 and, from 19 November 2016, reg 2.86A.
[17] s 140H(4).

- barring the sponsor from doing certain things;[18]
- cancelling the person's approval as a sponsor;[19]
- applying for a civil penalty order;[20]
- accepting an undertaking from the sponsor;[21]
- apply for an order to enforce undertakings;[22]
- issuing an infringement notice as an alternative to proceedings for a civil penalty order;[23] and
- requiring and taking a security, or enforcing a security already taken.[24]

For more information about sanctions, see Business sponsorship bars and cancellation.

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 reg 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 business sponsor in order to have their application for variation of the terms of their sponsorship approved.[25]

From 12 August 2018, the introduction of a nomination training contribution charge[26] has repealed requirements in relation to a standard business sponsor's training obligations under reg 2.87B.[27] A transitional provision for the application of these amendments provides that a standard business sponsor is not required to comply with the repealed training obligations in relation to a period of 12 months ending on or after 12 August 2018, ensuring there is no overlap between the new and old training obligation and charge schemes.[28]

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[18] ss 140K(1)(a)(i), (2)(a)(i), 140M(1)(c)–(d).
[19] ss 140K(1)(a)(ii), 140M(1)(a)–(b).
[20] ss 140K(1)(a)(iii) and (2)(a)(ii) as amended by *Migration Amendment (Reform of Employer Sanctions) Act 2013* (Cth) (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 reg 5.20A. See *MIAC v Sahan Enterprises Pty Ltd* (2012) 266 FLR 111.
[21] ss 140K(1)(a)(iv), (2)(a)(iii) as inserted by No 122, 2013 and applying to a sponsorship obligation regardless of when it arose.
[22] ss 140K(1)(a)(v), (2)(a)(iv) as inserted by No 122, 2013 and applying to a sponsorship obligation regardless of when it arose.
[23] ss 140K(1)(b), (2)(b). Infringement notices were previously provided for in s 140R (repealed from 1 June 2013) and divs 5.4 and 5.5 of pt 5 of the Regulations.
[24] ss 140K(1)(c), (2)(c).
[25] reg 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 Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262).
[26] Introduced by the *Migration Amendment (Skilling Australians Fund) Act 2018* (Cth) (No 38, 2018) and the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (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 stream of Subclass 186 visa. Section 140ZM imposes a liability on a person to pay the nomination training 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 reg 5 of the *Migration (Skilling Australians Fund) Charges Regulations 2018* (Cth) (F2018L01092).
[27] Item 33 of sch 1 to F2018L01093 repealed reg 2.87B which prescribed a standard business sponsor's obligation to provide training and meet certain training benchmarks.
[28] Clause 7602(5) as inserted by item 43 of sch 1 to F2018L01093. See the Explanatory Statement at p.23.

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 an approved family sponsor or an approved work sponsor.[29] An approved work 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.[30]

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.[31]

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.[32] 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.

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.[33] Sponsored visa holders would include the 'primary sponsored person' and any 'secondary sponsored person', in relation to a current or former approved work sponsor or party to a work agreement, as defined in the Regulations.[34]

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 work sponsor or party to a work agreement **or** who satisfied the primary visa criteria on the basis of the approved work sponsor's agreement to

[29] s 5(1), as repealed and substituted by item 2 of sch 1 to No 162, 2018.
[30] s 5(1).
[31] Explanatory Memorandum to *Migration Legislation Amendment (Worker Protection) Bill 2008*, p.21, [114].
[32] s 140H(2).
[33] s 140H(4).
[34] reg 2.57(1), as amended by F2019L00551.

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sponsor the person is a 'primary sponsored person' in relation to that work sponsor or work agreement party.[35]

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 work sponsor or work agreement party, **or** who satisfied the primary visa criteria on the basis of the approved work sponsor's agreement to sponsor the person, is a 'primary sponsored person' in relation to the work sponsor or party.[36]

An important feature of this definition is that once a person is granted a new visa (of a specified kind)[37] based on a nomination or sponsorship by a new work sponsor or work agreement party, that person ceases to be a sponsored person in relation to the former work 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 work sponsor ceases to have obligations in relation to that person. The former work sponsor may, however, continue to be liable for obligations in effect when the person was a sponsored person in relation to the former work 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 work sponsor, until the term of the sponsorship approval expires or the approval is cancelled.[38] Where a person has been sponsored by one or more persons, then, the definitions of 'primary sponsored person' and 'approved work 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.*[39]

In general terms, a person is a 'secondary sponsored person' in relation to a former work sponsor or work agreement party, if the person holds a specified visa granted on the basis of the work sponsor or party having agreed to sponsor them on the basis of satisfying secondary criteria, or they were last identified in an approved nomination by the work sponsor.[40] 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.

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[35] reg 2.57(1), as amended by F2019L00551.
[36] reg 2.57(1), as amended by F2019L00551.
[37] See reg 2.56 for the prescribed kinds of visa.
[38] See definition of 'approved work sponsor' in s 5(1) as inserted by No 162, 2018, and definition of 'primary sponsored person' in reg 2.57(1) as amended by F2019L00551.
[39] Explanatory Statement to SLI 2009, No 115, p.13.
[40] reg 2.57(1).

The prescribed sponsorship obligations

The sponsorship obligations prescribed for the purposes of temporary work and business visas are contained in sub-div 2.19.1 of Part 2A of the Regulations.[41]

Obligation to cooperate with inspectors – reg 2.78

Nature of obligation

Under reg 2.78 of the Regulations, current and former approved work sponsors have an obligation to co-operate with inspectors appointed under the Act who are exercising powers under the Act.[42]

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 work sponsor may be barred or have their approval cancelled;
- investigate if a circumstance exists or existed to assist in determining what action to take.[43]

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.[44] 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).[45]

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[41] Prior to the distinction between 'approved work sponsor' and 'approved family sponsor' under the class of 'approved sponsor' and the corresponding amendments by F2019L00551 in force from 17 April 2019, these obligations were contained in div 2.19 of the Regulations and were only applicable to work sponsors.
[42] reg 2.78(2). Specifically powers under sub-div F of div 3A of pt 2 of the Act.
[43] ss 140V, 140X; reg 2.102C.
[44] reg 2.78(3).
[45] reg 2.78(3).

To whom does the obligation apply?

The obligation to cooperate with inspectors applies to a person who is or was an 'approved work sponsor'.[46] 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.[47]

When does the obligation apply?

The obligation commences on the day on which the person is approved as a work sponsor (or the work agreement commences) and ends 5 years after the day on which the person ceases to be a work sponsor (or on which the work agreement ceases).[48]

Obligation to ensure equivalent terms and conditions of employment – regs 2.79 and 2.79A

Nature of obligation

Under regs 2.79 and 2.79A[49], certain current and former approved work 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.[50] 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 regs 2.79 and 2.79A apply are:

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[46] reg 2.78(1). An 'approved work sponsor' includes a party to a work agreement (other than a Minister): s 5.
[47] reg 2.78(1).
[48] regs 2.78(4)–2.78(5).
[49] Regulation 2.79A was inserted by *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578) with effect from 16 November 2019 and applies only to current and former standard business sponsor of a primary sponsored person who holds or last held a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. Note that Subclass 494 is a new visa subclass which commenced on 16 November 2019.
[50] reg 2.79 was amended by F2018L00262 to remove redundant material relating to the pre-14 September 2009 scheme and to include reference to 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. Regulation 2.79A was inserted by F2019L00578 (see above footnote), and the obligations contained in this provision applicable to sponsors of Subclass 494 visa holders are equivalent to those applicable to sponsors of Subclass 457/482 visa holders identified in nominations made on or after 18 March 2018 (see the Explanatory Statement to F2019L00578 at pp.45–46).

- 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;[51]

- 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;[52]

- persons sponsored by standard business sponsors who hold (or whose last substantive visa was) a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa;[53]

- persons sponsored by a non-Ministerial party to a work agreement.[54]

However, the obligations in regs 2.79 and 2.79A 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, Subclass 482 or Subclass 494 visa and whose annual earnings are at least a specified amount.[55]

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

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;[56] and

- 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.[57]

Released by the AAT on 28 February 2022

[51] See regs 2.79(1)(a), 2.79(3)(a).
[52] See regs 2.79(1)(a), 2.79(3)(b).
[53] See reg 2.79A(1)(a).
[54] See regs 2.79(1)(b), 2.79A(1)(b).
[55] See regs 2.79(1A), 2.79A(2). See the 'TSMIT' tab of the Register of Instruments - Business Visas for the relevant instrument.
[56] reg 2.79(3)(a)(iii). According to the Explanatory Statement accompanying the *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No.2)* (Cth) (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).
[57] reg 2.79(3)(a)(iv). Note that while the criterion for approval of a nomination in reg 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.

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.[58]

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.*[59]

'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.[60] It does not include payments the amount of which cannot be determined in advance, reimbursements or certain contributions to a superannuation fund.[61] 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.*[62]

Released by the AAT on 28 February 2022

[58] reg 2.57(3A).
[59] Explanatory Statement to SLI 2009, No 230, p.6.
[60] reg 2.57A(1). 'Non-monetary benefits' are identified in reg 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.
[61] reg 2.57A(2). Regulation 2.57A(4) applies to employer superannuation fund contributions in specified circumstances.
[62] 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, or who hold or last held a Subclass 494 visa on or after 16 November 2019

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; or
- holds, or last held a Subclass 494 visa (from 16 November 2019),

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;[63]
- 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;[64] 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.[65]

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.[66]

Released by the AAT on 28 February 2022

[63] regs 2.79(3)(b)(i), 2.79A(3)(a)(i).
[64] regs 2.79(3)(b)(ii), 2.79A(3)(a)(ii). According to the Explanatory Statements to F2018L00262 and F2019L00578, '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'.
[65] regs 2.79(3)(b)(iii), 2.79A(3)(a)(iii). Note that the definition of 'less favourable' in reg 2.57(3A) does not apply to this obligation. According to the Explanatory Statement to F2018L00262 which amended reg 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 reg 2.79(3)(b)(iii) which relates to terms and conditions of employment other than earnings. Regulation 2.57(3A) was further amended by F2019L00578 with effect from 16 November 2019 to include reg 2.79A(3)(a)(iii) in respect of Subclass 494 visa.
[66] regs 2.79(3)(e), 2.79A(3)(b).

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, a Subclass 482[67] or a Subclass 494[68] visa. It also applies to non-Ministerial parties to a work agreement who are former or current approved work sponsors of primary sponsored persons if they hold or have held a Subclass 457, a Subclass 482[69] or a Subclass 494[70] visa. However, the obligation does not apply in relation to standard business sponsors of current or former subclass 457, 482 or 494 visa holders whose annual earnings are at least a specified amount.[71]

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, Subclass 482 or Subclass 494 visa on the day the nomination is approved.[72] It ends on the earlier of the day when the sponsored person is granted a further visa (other than a Subclass 457, Subclass 482 or Subclass 494 visa) or when he or she ceases employment with the sponsor.[73]

Standard business sponsors: Sponsored person's earning above a specified amount

The 'terms and conditions' obligation in regs 2.79 and 2.79A does *not* apply to a standard business sponsor of a primary sponsored person who holds or last held a subclass 457/482/494 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.[74] The instrument which specifies the income threshold can be found in the Register of Instruments - Business Visas under the 'TSMIT' tab.

The policy behind this exception to the general obligation was set out in Departmental policy 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.*[75]

Released by the AAT on 28 February 2022

[67] reg 2.79(1)(a) as amended by F2018L00262 to include reference to subclass 482 visa holders from 18 March 2018.
[68] reg 2.79A(1)(a) as inserted by F2019L00578 to include reference to subclass 494 visa holders from 16 November 2019.
[69] reg 2.79(1)(b) as amended by F2018L00262 to include reference to subclass 482 visa holders from 18 March 2018.
[70] reg 2.79A(1)(b) as inserted by F2019L00578 to include reference to subclass 494 visa holders from 16 November 2019.
[71] reg 2.79(1A) and reg 2.79A(2). The instrument which specifies the income threshold can be found in the Register of Instruments - Business Visas under the 'TSMIT' tab.
[72] regs 2.79(4)(a), 2.79A(4)(a).
[73] regs 2.79(4)(b), 2.79A(4)(b).
[74] regs 2.79(1A), 2.79A(2).
[75] Policy - Sponsorship applicable to div 3A of pt 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).

Obligation to pay travel costs to enable sponsored persons to leave Australia – reg 2.80

Nature of obligation

Under reg 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.[76]

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.[77]

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
- be made while the person held a Subclass 416,[78] 428,[79] 457 or 482[80] visa or, from 24 November 2012, a Subclass 401 or 402 visa,[81] or, from 19 November 2016 a Subclass 408 visa,[82] or, from 16 November 2019 a Subclass 494 visa.[83]

Released by the AAT on 28 February 2022

[76] reg 2.80(2).
[77] reg 2.80(4).
[78] However, 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 sch 2 or whose last substantive visa was granted on that basis: *Migration Amendment Regulations 2012 (No 3)* (Cth) (SLI 2012, No 106).
[79] Note that Subclass 428 was closed to new applications from 24 November 2012, and references to this visa type were removed from reg 2.80 for applications made from 19 November 2016 (see F2016L01743).
[80] reg 2.80(3) as amended by F2018L00262, which commenced on 18 March 2018.
[81] reg 2.80(3) as amended by *Migration Legislation Amendment Regulation 2012 (No 4)* (Cth) (SLI 2012, No 238) to include reference to 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 sch 4 to SLI 2012, No 238). The transitional provisions introducing this amendment provide that the

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.*[84]

Departmental policy 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 persons*
> - *pay costs associated with relocation of personal effects (beyond any included airline baggage allowance)*
> - *pay costs for excess luggage*
> - *pay for rental property expenses (for example, costs of breaking a lease)*
> - *provide for personal choices (for example, particular 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 (for example, passport).*[85]

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

Released by the AAT on 28 February 2022

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 sch 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, for example, the visa application date, to be effective.

[82] reg 2.80(3)(d) as amended by F2016L01743, in respect of sponsorship applications made on or after 19 November 2016.

[83] reg 2.80(3)(d) as amended by F2019L00578, which commenced on 16 November 2019 to include reference to Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

[84] Explanatory Statement to SLI 2009, No 115, p.34.

necessary, having regard to all the circumstances of the particular case. Note that reg 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,[86] Subclass 482 visa holders,[87] Subclass 494 visa holders,[88] Subclass 416 (Special Program) visa holders,[89] and Subclass 428 (Religious Worker) visa holders.[90] 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)[91] and Subclass 402 visa holders in the Professional Development stream (including any former visa holders).[92] 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).[93]

When does the obligation apply?

For visa / sponsorship applications made on or after 9 November 2009, it commences:

- in relation to primary or secondary Subclass 416 visa holders,[94] on the date of visa grant;[95]

Released by the AAT on 28 February 2022

[85] Policy - Migration Regulations – Divisions – [Div.2.11-2.23] Sponsorship compliance framework: Sponsorship obligations – 3.8 Regulation 2.80 - Obligation to pay travel costs to enable sponsored persons to leave Australia – 3.8.1. Reasonable and necessary costs (reissued 15/10/2020).
[86] regs 2.80(1)(d) and (e).
[87] regs 2.80(1)(d) and (e), as amended by F2018L00262, which commenced on 18 March 2018.
[88] regs 2.80(1)(d) and (e), as amended by F2019L00578, which commenced on 16 November 2019.
[89] 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 holds a Subclass 416 (Special Program) visa granted on the basis that the person satisfied the criterion in cl 416.222(a) of sch 2 or whose last substantive visa was granted on that basis: SLI 2012, No 106, sch 1 item [6]. A technical amendment was made to reg 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 sch 2: see item [147] of sch 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 sch 4 to SLI 2012, No 238).
[90] 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 reg 2.80(1) for applications made from 19 November 2016 (F2016L01743), reflecting the closure of that visa subclass and those sponsorship classes.
[91] regs 2.80(1)(a)(i)(A), (ii)(A) prior to amendment by F2016L01743; reg 2.80(1)(aa) for sponsorship applications made on or after 19 November 2016.
[92] reg 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 sch 4 to SLI 2012, No 238). Note that the obligation in reg 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: reg 2.80(1)(b) as amended by SLI 2012, No 238, commencing 24 November 2012.
[93] reg 2.80(1)(a) as substituted by, and reg 2.80(1)(ca) as inserted by, F2016L01743 for sponsorship applications made on or after 19 November 2016.
[94] 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 sch 2 or whose last substantive visa was granted on that basis: SLI 2012, No 106, sch 1 item [6]. A technical amendment was made to reg 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 sch 2: see item [147] of sch 1 to SLI 2012, No 238

- 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.[96]

Additionally, from 24 November 2012, the obligation commences:

- in relation to primary Subclass 402 visa holders, on the date of the visa grant;[97]
- 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.[98]

From 19 November 2016, the obligation commences in relation to Subclass 408 visa holders from the date of visa grant.[99]

In relation to Subclass 482 and Subclass 494 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.[100]

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);[101] or
- they have left Australia and their relevant visa has ceased.[102]

The obligation relating to a secondary sponsored person ceases on the earliest of:

- the day that the primary sponsored person's nomination by another work sponsor is approved;

Released by the AAT on 28 February 2022

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 sch 4 to SLI 2012, No 238).

[95] reg 2.80(5)(a)(ia).

[96] reg 2.80(5)(a), as amended by *Migration Amendment Regulations 2009 (No 12)* (Cth) (SLI 2009, No 273), which commenced 9 November 2009: regs 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 visa subclasses that were introduced on that date. The arrangements for 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.

[97] reg 2.80(5)(a)(i).

[98] reg 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 sch 4 to SLI 2012, No 238).

[99] reg 2.80(5)(ia) as amended by F2016L01743.

[100] reg 2.80(5)(a)(ii) as amended by F2018L00262, which commenced on 18 March 2018 in relation to Subclass 482 visa holders; and as further amended by F2019L00578, which commenced on 16 November 2019 in relation to Subclass 494 visa holders.

[101] reg 2.80(5)(b)(ii) as amended by F2018L00262 from 18 March 2018, in relation to Subclass 457 visa holders.

[102] reg 2.80(5)(b). This provision was amended by SLI 2012, No 238 to insert references to 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 sch 4 to SLI 2012, No 238). References to Subclass 428 visa were removed from reg 2.80(5)(b) by F2016L01743 for applications made from 19 November 2016.

- 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);[103] or

- they have left Australia and their relevant visa has ceased.[104]

Obligation to pay travel costs (domestic workers) – reg 2.80A

Nature of obligation

Sponsors of Subclass 408 holders in the Domestic Worker stream,[105] Subclass 401 visa holders in the Domestic Worker (Executive) stream[106] or Subclass 427 visa holders,[107] are obliged to pay the travel costs of such visa holders, including any secondary sponsored persons.[108] 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.[109]

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.[110]

This obligation differs from the obligation in reg 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

Released by the AAT on 28 February 2022

[103] reg 2.80(5)(c)(ii) as amended by F2018L00262 from 18 March 2018, in relation to Subclass 457 visa holders.
[104] reg 2.80(5)(c). This provision was amended by SLI 2012, No 238 to insert reference to 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 sch 4 to SLI 2012, No 238). Note that the provision does not refer to Subclass 402 visa as secondary applicants are not eligible to be granted a visa in association with the Professional Development stream of this visa. References to Subclass 428 visa were removed from reg 2.80(5)(c) by F2016L01743 for applications made from 19 November 2016.
[105] reg 2.80(1) as substituted by F2016L01743 for sponsorship applications made on or after 19 November 2016.
[106] reg 2.80A(1A) was inserted by the *Migration Legislation Amendment Regulation 2013 (No 1)* (Cth) (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.
[107] reg 2.80A(1) prior to repeal and substitution by F2016L01743. References to 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.
[108] regs 2.80A(1), (1A).
[109] reg 2.80A(2).
[110] reg 2.80A(3).

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.[111]

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;[112]
- a long stay activity sponsor where the primary sponsored person holds or last held a Subclass 401 visa in the Domestic Worker (Executive) stream;[113] 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.[114]

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.[115] 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.[116]

The obligation relating to a primary sponsored person ceases on the earliest of the day on which their nomination by another work 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.[117] The obligation relating to a secondary sponsored person ceases on the earliest of the day the primary sponsored person's nomination by another work 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.[118]

Released by the AAT on 25 February 2022

[111] Policy - 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 – 3.9. Regulation 2.80A Obligation to pay travel costs - Domestic Worker (Executive) (reissued 15/10/2020).
[112] reg 2.80A(1). Note that references to Subclass 427 were removed from reg 2.80A by F2016L01743 for applications made from 19 November 2016, reflecting the closure of this visa and sponsorship class in 2012.
[113] reg 2.80A(1A), inserted by SLI 2013, No 32 for visa application made on or after 23 March 2013.
[114] reg 2.80A(1) as substituted by F2016L01743 for sponsorship applications made on or after 19 November 2016.
[115] reg 2.80A(4)(aa) as inserted by F2016L01743 for sponsorship applications made on or after 19 November 2016.
[116] reg 2.80A(4)(a). Note that references to Subclass 427 were removed from this provision by F2016L01743 from 19 November 2016.
[117] reg 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.
[118] reg 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.

Obligation to pay costs incurred to locate / remove unlawful non-citizens – reg 2.81

Nature of obligation

Under reg 2.81, current and former approved work 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.[119]

The obligation is not enlivened unless the notice requirements are met.[120] 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.[121]

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.[122]

'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.[123]

To whom does the obligation apply?

The obligation applies to a person who is or was an approved work 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.

Released by the AAT on 28 February 2022

[119] regs 2.81(1), (2).
[120] regs 2.81(2)(b), (5).
[121] regs 2.81(2)(c), 2.81(6).
[122] regs 2.81(3), (4).
[123] reg 2.81(8); s 207.

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.[124]

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.[125]

Obligation to keep records – reg 2.82

Nature of obligation

Under reg 2.82, current and former approved work 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 work sponsor in reg 2.82 as well as records of a kind specified by instrument.[126]

The obligation requires that:

- the records must be in a reproducible format;[127]
- the records are kept for a particular period (see below for the particular period being no more than 5 years);[128] and
- either, the records must be kept in a manner specified by written instrument,[129] 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);[130]
  - other money paid to, applied or dealt with on a primary sponsored person's behalf or as directed by them (see below);[131] and
  - if the standard business sponsor was approved before 12 August 2018, compliance with requirements relating to training specified by instrument (see below).[132]

[124] reg 2.81(7).
[125] reg 2.81(6).
[126] reg 2.82(2)(aa).
[127] reg 2.82(2)(b).
[128] reg 2.82(2)(d) when read with regs 2.82(4)–(6).
[129] reg 2.82(2)(c)(i). There is currently no instrument for reg 2.82(2)(c)(i).
[130] regs 2.82(2)(c)(ii), 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.
[131] regs 2.82(2)(c)(ii), 2.82(3)(e)(i)–(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.
[132] regs 2.82(2)(c)(ii), 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. Regulation 2.82(3)(g) was repealed and substituted by F2018L01093 which commenced on 12 August 2018 to reflect the legislative change from an annual obligation to meet training benchmark to the new nomination

Released by the AAT on 28 February 2022

Standard business sponsor

A current or former standard business sponsor has an obligation under reg 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 work sponsor and there is no sponsored person in relation to the employer:[133]

- a record of a written request by a sponsored person for the payment of return travel costs;[134]
- a record of when that request was received by the sponsor;[135]
- a record of compliance with the request, including costs paid, who costs were paid for, and the date paid;[136]
- if a notifiable event of the kind specified in reg 2.84[137] occurs, a record of the particulars of the notification of event, including date, method and where it was provided;[138]
- 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, a Subclass 482 or a Subclass 494 visa);[139]
- a record of the location(s) at which these tasks were performed;[140]
- in relation to primary sponsored persons earning below a specified income threshold:[141]
  - 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;[142]
  - 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;[143]

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training contribution charge scheme. The new substituted provision continues the obligation to retain records of compliance with training obligations in force prior to 12 August 2018.
[133] reg 2.82(2)(d) when read with regs 2.82(4) and (6).
[134] reg 2.82(3)(a)(i).
[135] reg 2.82(3)(a)(ii).
[136] reg 2.82(3)(a)(iii).
[137] reg 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 – reg 2.84 below for further details.
[138] reg 2.82(3)(b).
[139] reg 2.82(3)(c) as amended by F2018L00262, which commenced on 18 March 2018, in relation to Subclass 482 visa holder; and as further amended by F2019L00578, which commenced on 16 November 2019, in relation to Subclass 494 visa holder.
[140] reg 2.82(3)(d).
[141] reg 2.82(3)(e). The threshold is specified under regs 2.79(1) and (1A) in relation to Subclass 457 or 482 visa holders, and under regs 2.79A(1) and (2) in relation to Subclass 494 visa holders. See Obligation to ensure equivalent terms and conditions of employment – regs 2.79 and 2.79A above for further detail. The instrument which specifies the income threshold for the purposes of reg 2.79(1A) can be found in the Register of Instruments - Business Visas under the 'TSMIT' tab.
[142] regs 2.82(3)(e)(i)–(ii).
[143] reg 2.82(3)(e)(iii).

  - 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;[144]

- a copy of the written contract of employment under which the primary sponsored person is employed;[145]

- if the standard business sponsor was approved before 12 August 2018, all records showing that the sponsor has complied with training requirements relating to training specified in an instrument as in force before 12 August 2018 (see below).[146] 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; and

- if the standard business sponsor was approved on or after 12 August 2018, records to substantiate the annual turnover for nominations in relation to which the person is liable for nomination training contribution charge.[147]

Party to a work agreement

A current or former non-Ministerial party to a work agreement has an obligation under reg 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.[148]

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.[149]

Temporary activities sponsor, temporary work sponsor or professional development sponsor

A current or former temporary activities sponsor,[150] temporary work sponsor or professional development sponsor has an obligation under reg 2.82 to keep the following records, if the

[144] reg 2.82(3)(e)(iv).
[145] reg 2.82(3)(f) inserted by *Migration Amendment Regulation 2013 (No 5)* (Cth) (SLI 2013, No 145) in relation to a standard business sponsor on and after 1 July 2013.
[146] reg 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.
[147] reg 2.82(3)(h) inserted by F2018L01093 which commenced on 12 August 2018 to reflect the legislative change repealing the annual obligation to meet the training benchmark and introducing the new nomination training contribution charge scheme. Annual turnover of the business, as provided for the purpose of assessment of the applicable nomination contribution training charge is defined under s 4 of F2018L01092, and means: (a) if the person liable to pay the charge in relation to the nomination operates a business in Australia, the total ordinary income (within the meaning of the *Income Tax Assessment Act 1997* (Cth)) the person derived in the most recent income year (within the meaning of that Act) ending before the nomination day; or (b) in any other case, the total income the person liable to pay the charge in relation to the nomination derived in the ordinary course of the business in the most recent financial year.
[148] regs 2.82(1), (2), (3), (3A).
[149] regs 2.82(5), (6).
[150] The obligations in relation to temporary activities sponsors were added by F2016L01743 for sponsorship applications made on or after 19 November 2016.

Released by the AAT on 28 February 2022

sponsor also has an obligation under reg 2.80 (payment of travel costs),[151] from the day of sponsorship approval until two years after the first day on which the employer ceases to be an approved work sponsor and there is no sponsored person in relation to the employer:[152]

- a record of a written request by a sponsored person for the payment of return travel costs;[153]
- a record of when the written request for the payment of return travel costs was received by the sponsor;[154] 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.[155]

In addition, if a notifiable event of the kind specified in reg 2.84[156] occurs, a record of the particulars of the notification of event, including date, method and where it was provided must be kept.[157]

To whom does the obligation apply?

The obligation to keep specified records applies to a person who is or was an approved work sponsor, namely current and former standard business sponsors, temporary activities sponsors, professional development sponsors, temporary work sponsors and non-Ministerial parties to work agreements.[158]

When does the obligation apply?

The obligation commences on the day a person is approved as a work 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 work sponsor or party to a work agreement and on which there ceases to be any sponsored person in relation to the person.[159]

However, under this obligation, no record need be kept for more than five years.[160]

Released by the AAT on 23 February 2022

[151] reg 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 – reg 2.80 above for further details.
[152] regs 2.82(2)(a)(iii),(d), 2.82(3), (4), (6).
[153] reg 2.82(3)(a)(i).
[154] reg 2.82(3)(a)(ii).
[155] reg 2.82(3)(a)(iii).
[156] reg 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 – reg 2.84 below for further details.
[157] reg 2.82(3)(b).
[158] reg 2.82(1).
[159] regs 2.82(4), (5).
[160] reg 2.82(6).

Obligation to provide records and information to the Minister – reg 2.83

Nature of obligation

Under this obligation, an approved work 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 reg 2.82, and which relate to the administration of the sponsorship provisions of the Act, or the administration of a work agreement.[161]

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.[162] 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.'[163]

To whom does the obligation apply?

The obligation applies to a person who is or was an approved work sponsor.[164] 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 work sponsor or party to a work agreement and on which there ceases to be any sponsored person in relation to the person.[165]

Released by the AAT on 28 February 2022

[161] regs 2.83(1), (2).
[162] reg 2.83(3).
[163] Explanatory Statement to SLI 2009, No 115, p.1.
[164] reg 2.83(1).
[165] regs 2.83(4), (5).

Obligation to provide information to Immigration when certain events occur – reg 2.84

Nature of obligation

Under reg 2.84, current and former approved work sponsors have an obligation to provide details of a prescribed event to the Department when it occurs.[166] 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
- 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.[167]

Different kinds of events are prescribed for different kinds of work 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

[166] regs 2.84(1), (2). Note that reg 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 (reg 2.84(4D)), sport sponsors (reg 2.84(4F)), domestic worker sponsors (reg 2.84(4G)), religious worker sponsors (reg 2.84(4H)) and occupational trainee sponsors (reg 2.84(4I)). These changes apply to sponsorship applications made on or after 19 November 2016 (so that existing sponsorship obligations are not affected).

[167] regs 2.84(3), (4), (4A), (4B), (4C), (4D), (4E), (4F), (4G), (4H), (4I), (4J) and, from 24 November 2012, (4K) and (4L). Regulations 2.84(4K) and (4L) were inserted by SLI 2012, No 238 to insert reference to the 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 sch 4 to SLI 2012, No 238). Note that regs 2.84(4D) and (4F)–(4I) were repealed by F2016L01743 for sponsorship applications made on or after 19 November 2016.

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change to the work duties carried out by the primary sponsored person.[168] No other types of work 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.[169] 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.[170]

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.*[171]

To whom does the obligation apply?

The obligation applies to a person who is or was an approved work sponsor.[172] 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

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[168] reg 2.84(3)(aa).
[169] reg 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 reg 2.84(2)(b)(i) may be found in the 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.
[170] reg 2.84(6). The timeframes in reg 2.84(6) were increased to 28 days from 10 days by *Migration Amendment (2015 Measures No 1) Regulation 2015* (Cth) (SLI 2015, No 34). The amendments apply in relation to an event mentioned in reg 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.
[171] Explanatory Statement to SLI 2009, No 115, p.44.
[172] reg 2.84(1).

approved work sponsor or party to a work agreement and on which there ceases to be any sponsored person in relation to the person.[173]

Obligation to secure an offer of a reasonable standard of accommodation – reg 2.85

Nature of obligation

Under reg 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.[174]

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.[175]

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.[176]

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

[173] regs 2.84(7), (8).
[174] reg 2.85(2).
[175] See Example at reg 2.85(2).
[176] reg 2.85(3).

Released by the AAT on 28 February 2022

to which it applies, but does explain the purpose in relation to a professional development program:

> *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.*[177]

To whom does the obligation apply?

The obligation applies to current or former:[178]

- approved sponsors of current or former Subclass 470 visa holders;[179]
- 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; [180]
- 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;[181]
- approved sponsors of current or former volunteer Subclass 442 visa holders.[182]

Additionally, for sponsorship applications made on or after 24 November 2012, the obligation applies to current or former:

Released by the AAT on 28 February 2022

[177] Explanatory Statement to SLI 2009, No 115, p.46.
[178] reg 2.85(1).
[179] Note that references to sponsors of Subclass 470 visa holders were removed from reg 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.
[180] 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 sch 4 to SLI 2012, No 238). Note that references to sponsors of Subclass 421 visa holders were removed from reg 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.
[181] 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 sch 4 to SLI 2012, No 238). Note that references to sponsors of Subclass 428 visa holders were removed from reg 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.
[182] Note that references to sponsors of Subclass 442 visa holders were removed from reg 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.

- approved work 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)[183] or the Professional Development stream;

- approved work 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 work sponsors of current or former Subclass 402 visa holders in the Occupational Trainee stream in relation to a volunteer role.[184]

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;[185] and

- approved work 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.[186]

When does the obligation apply?

In relation to primary or secondary sponsored persons who hold a Subclass 408,[187] Subclass 416, Subclass 470 visa,[188] the obligation commences on the day of visa grant.[189] 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)[190] or the Professional Development stream, the obligation commences on the day of visa grant.[191] In relation to a primary or secondary sponsored person who holds a Subclass 401 visa, a Subclass 407 visa,[192] a Subclass 420 visa, a Subclass 421 visa,[193] a Subclass 428 visa,[194] a Subclass 442 visa[195] or a Subclass 402 visa in the Occupational Trainee stream, the obligation commences on the day of approval of the nomination of the primary

[183] Note that the references to the Research stream of a Subclass 402 (Training and Research) visa were omitted by SLI 2013, No 32 for visa applications made on or after 23 March 2013. The effect of the amendments is that reg 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.
[184] regs 2.85(1)(a), (d)–(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 sch 4 to SLI 2012, No 238).
[185] reg 2.85(1)(ba) as inserted by F2016L01743 for applications made on or after 19 November 2016.
[186] regs 2.85(1)(d)(iii), (iv) as inserted by F2016L01743 for applications made on or after 19 November 2016.
[187] reg 2.85(4)(a)(i) as amended by F2016L01743 for applications made on or after 19 November 2016.
[188] Note that references to Subclass 470 visa were removed from reg 2.85 for applications made on or after 19 November 2016.
[189] reg 2.85(4)(a)(i).
[190] 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 reg 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.
[191] reg 2.85(4)(a)(iii).
[192] References to Subclass 407 visa were added by F2016L01743 for applications made on or after 19 November 2016.
[193] Note that references to Subclass 421 visa were removed from reg 2.85 by F2016L01743, for applications made on or after 19 November 2016.
[194] Note that references to Subclass 428 visa were removed from reg 2.85 by F2016L01743, for applications made on or after 19 November 2016.

Released by the AAT on 28 February 2022

sponsored person, or visa grant if they do not hold the visa on the day the nomination is approved.[196]

The obligation relating to a primary sponsored person ceases on the earliest of the day that their nomination by another work 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.[197] The obligation relating to a secondary sponsored person ceases on the earliest of the day the primary sponsored person's nomination by another work 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.[198]

Obligation to ensure primary sponsored person participates in nominated occupation – reg 2.86

Nature of obligation

Under reg 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.[199] The precise nature of the obligation depends on the class of work sponsor to whom it applies and when they were approved as a work sponsor.

Nominated position obligations

For an approved work sponsor, in relation to a person who holds, or whose last substantive visa was, a Subclass 457, a Subclass 482 or a Subclass 494 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 work sponsor for the primary sponsored person under s 140GB(1) and the nomination was approved under s 140GB(2).[200]

Released by the AAT on 25 February 2022

[195] Note that references to Subclass 442 visa were removed from reg 2.85 by F2016L01743, for applications made on or after 19 November 2016.
[196] reg 2.85(4)(a)(ii). Note that this provision was amended by SLI 2012, No 238 to include reference to 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 sch 4 to SLI 2012, No 238).
[197] reg 2.85(4)(b).
[198] reg 2.85(4)(c).
[199] regs 2.86(1), (2), (2A), (2AA), (2AB), (2C).
[200] reg 2.86(2)(a) as amended by F2018L00262, which commenced on 18 March 2018 in relation to a Subclass 482 visa holder; and as further amended by F2019L00578, which commenced on 16 November 2019 in relation to a Subclass 494 visa holder.

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.[201] Departmental policy explains:

> *A new nomination must be approved where a primary sponsored person intends to work in a different occupation from that approved at nomination.*[202]

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 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.*[203]

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 work 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:[204]

- if the sponsor 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;[205]

Released by the AAT on 28 February 2022

[201] regs 2.86(1), 2.86(2C). Note that these provisions were amended by items [165] and [169] of sch 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 sch 4 to SLI 2012, No 238). Regulation 2.86(2C) was amended to reflect the renaming of Subclass 457 (Business (Long Stay)) visa to Subclass 457 (Temporary Work (Skilled)) visa: Explanatory Statement to SLI 2012, No 238. It was also amended by F2018L00262 to include reference to Subclass 482 (Temporary Skill Shortage) visa, and by F2019L00578 to include reference to Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.
[202] Policy - Migration Regulations – Divisions – [Div.2.11-2.23] Sponsorship compliance framework: Sponsorship obligations – 3.15. Regulation 2.86 - Obligation to ensure primary sponsored person works or participates in nominated occupation, program or activity - 3.15.2. Requirements for standard business sponsors or a party to a work agreement (reissued 15/10/2020).
[203] Explanatory Statement to SLI 2009, No 115, p.25.
[204] See reg 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 reg 2.86(1). It was further amended by F2018L00262 to include reference to a Subclass 482 visa.
[205] reg 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 reg 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* (Cth) (Corporations Act) and a body of the Commonwealth, a State or a Territory: reg 1.13B(4). The term 'associated entity' is further defined in reg 1.03 as having the same meaning in s 50AAA of the Corporations Act.

- if the sponsor 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;[206] 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.[207]

However, this obligation will not apply where the nominated occupation is specified by the Minister in an instrument made under reg 2.72(13).[208]

In addition, for most nominated occupations,[209] if a person is or was a standard business sponsor, a further sponsorship obligation is contained in reg 2.86(2AA) to:

- require the sponsor to ensure that the primary sponsored person is employed under a written contract of employment; [210] 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.[211]

In particular, this second limb of the obligation in reg 2.86(2AA) requires the sponsor to ensure:

- 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;[212] 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;[213] and

- the sponsor does not engage in activities that relate to the hire of a visa holder to:

[206] reg 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.
[207] reg 2.86(2A)(e).
[208] reg 2.86(2A)(b). The instrument for reg 2.72(13) may be found in the Register of Instruments - Business Visas on the 'ExemptOccs' tab. The instrument in force at time of writing (LIN 19/212) specifies occupations including General Manager, Chief Executive or Managing Director, and a range of medical occupations.
[209] Occupations not subject to this requirement are those specified by the Minister in an instrument in writing for reg 2.72(13): reg 2.86(2AA) as amended by F2019L00578. The instrument specifying occupations for nominations for the purpose of reg 2.72(13) which can be found in the Register of Instruments - Business Visas, under the 'ExemptOccs' tab.
[210] reg 2.86(2AA)(a) inserted by SLI 2013, No 145 in relation to current and former standard business sponsors from 1 July 2013.
[211] regs 2.86(2AA)(b), (c) inserted by SLI 2013, No 145 in relation to current and former standard business sponsors from 1 July 2013.
[212] reg 2.86(2AA)(c)(i) inserted by SLI 2013, No 145 in relation to current and former standard business sponsors from 1 July 2013.
[213] reg 2.86(2AA)(b)(i) inserted by SLI 2013, No 145 in relation to current and former standard business sponsors from 1 July 2013.

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- any other business - where the sponsor *was not* lawfully operating a business in Australia at the time of the last sponsorship or variation approval;[214] 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.[215]

This additional obligation in reg 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 reg 2.86(2AA) provides that it was not intended for the obligation in reg 2.86(2AA) to apply to a party to a work agreement because work agreements are intended to operate under more flexible arrangements.[216] 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.[217]

The above obligations also arise in relation to a work sponsor where the primary sponsored person holds a Subclass 494 visa or the last substantive visa held was a Subclass 494 visa holder (granted on or after 16 November 2019).[218] That is, if the nominated occupation is not an occupation specified in an instruments made under reg 2.72C(14),[219] the sponsor must ensure that:

- *if the sponsor is or was a standard business sponsor*:

  - the sponsored person is engaged only as an employee of the sponsor or of an associated entity of the sponsor;[220] and

  - the sponsored person is employed under a written contract of employment;[221] and

  - the sponsor does not engage in activities that relate to the recruitment of a visa holder, an applicant for a visa or a proposed applicant for a visa for the purpose of supplying the holder, applicant or proposed applicant to a business not associated with the sponsor;[222] and

[214] reg 2.86(2AA)(c)(ii) inserted by SLI 2013, No 145 in relation to current and former standard business sponsors from 1 July 2013.
[215] reg 2.86(2AA)(b)(ii) inserted by SLI 2013, No 145 in relation to current and former standard business sponsors from 1 July 2013.
[216] Explanatory Statement to SLI 2013, No 145, p.11.
[217] Explanatory Statement to SLI 2013, No 145, p.10.
[218] regs 2.86(2B) and (2BA) inserted by item 47 of sch 2 to F2019L00578.
[219] regs 2.86(2B)(b) and 2.86(2BA)(b). The instrument for reg 2.72C(14) may be found in the Register of Instruments - Business Visas on the 'ExemptOccs' tab. The instrument in force at time of writing (LIN 19/212) specifies occupations including General Manager, Chief Executive or Managing Director, and a range of medical occupations.
[220] reg 2.86(2B)(c).
[221] reg 2.86(2BA)(d).
[222] reg 2.86(2BA)(e).

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  - the sponsor does not engage in activities that relate to the hire of a visa holder to a business that is not associated with the sponsor;[223] **or**

- *if the sponsor is or was a party to a work agreement*, the sponsored person is engaged only as an employee of the sponsor.[224]

To whom does the obligation apply?

The obligations generally apply to certain work sponsors of Subclass 457,[225] Subclass 411, Subclass 419, Subclass 420, Subclass 421, Subclass 423, Subclass 427, Subclass 428, Subclass 442, Subclass 482[226] or Subclass 494[227] 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.[228] From 19 November 2016, the obligation also applies to work sponsors of Subclass 407 visa holders (except Commonwealth agencies).[229] The obligation only applies in respect of primary (not secondary) sponsored persons,[230] except in relation to sponsorship applications made prior to 24 November 2012 in respect of occupational trainee sponsors.[231]

The obligations relating to the employment under a written contract of employment and prohibiting the sponsor from engaging in certain on-hire activities in reg 2.86(2AA) apply only in relation to primary sponsored persons currently or formerly[232] holding Subclass 457 visas granted in the standard business sponsorship stream;[233] or Subclass 482 visas in the Short-term or Medium-term stream.[234] The equivalent obligation under reg 2.86(2BA) apply only in relation to primary sponsored persons currently or formerly holding Subclass 494 visas.[235]

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.[236] The obligation ceases on the earliest day of their nomination by another work sponsor is approved, or they are granted a further visa of a

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[223] reg 2.86(2BA)(f).
[224] reg 2.86(2B)(d).
[225] The reference to a party to a work agreement was omitted from reg 2.86(1) by SLI 2012, No 238, which applies to sponsorship applications made on or after 24 November 2012 (item [1] of sch 4).
[226] The reference to Subclass 482 was inserted by F2018L00262.
[227] The reference to Subclass 494 was inserted by F2019L00578.
[228] reg 2.86(1). Note that this provision was amended by item [165] of sch 1 to SLI 2012, No 238 and the amendment applies to visa / sponsorship applications made on or after 24 November 2012 (item [1] of sch 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 long stay activity and training and research sponsors, created by item [57] of sch 1 to SLI 2012, No 238.
[229] Subclass 407 was 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 reg 2.86(1).
[230] reg 2.86(1)
[231] reg 2.86(1)(h) as in force prior to 24 November 2012.
[232] Formerly being persons whose last substantive visa held was a Subclass 457 (Temporary Work (Skilled)) visa or a Subclass 482 (Temporary Skill Shortage) visa.
[233] reg 2.86(2AB) inserted by item [7] of sch 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.
[234] reg 2.86(2AB) as amended by F2018L00262 to include reference to Subclass 482 visas from 18 March 2018.
[235] reg 2.86(2BA) inserted by F2019L00578 which commenced on 16 November 2019.
[236] reg 2.86(3)(a), as amended by F2019L00578.

different subclass (or for Subclass 457 visa holders, a further visa that is not a Subclass 457 or 482 visa),[237] or they have left Australia and their relevant visa has ceased.[238]

Obligation to ensure primary sponsored person works or participates in activity in relation to which the visa is granted – reg 2.86A

Nature of obligation

Under reg 2.86A, approved work 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.[239] This obligation is intended to mirror reg 2.86, which imposes an equivalent obligation on work sponsors in relation to visa holders who are nominated by a an approved work sponsor (whereas nominations are not required in respect of Subclass 408 visas).[240]

To whom does the obligation apply?

The obligation applies to persons who are or were an approved work sponsor of a primary sponsored person who holds a Subclass 408 visa, or whose last substantive visa was a Subclass 408 visa.[241]

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 work sponsor, or leaving Australia and relevant visas ceasing.[242]

Obligation not to recover, transfer or take actions that would result in another person paying for certain costs – reg 2.87

Nature of obligation

Under reg 2.87 an approved work 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 work sponsor; being a former approved work sponsor; a nomination under s 140GB(1) including a fee mentioned in reg 2.73(5) or (7), or

[237] reg 2.86(3)(b)(ii) as amended by F2018L00262 which commenced on 18 March 2018.
[238] reg 2.86(3)(b).
[239] Regulation 2.68A was inserted by F2016L01743 for applications made on or after 19 November 2016.
[240] Explanatory Statement to F2016L01743, p.46.
[241] reg 2.68A(1).
[242] reg 2.68A(4).

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reg 2.73A(3), or reg 2.73B(5) or (7), or nomination training contribution charge;[243] 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 reg 2.87, current and former approved work sponsors have obligations for certain costs, including migration agent costs, associated with becoming an approved work sponsor or being an approved work sponsor or former approved work sponsor, or a nomination under s 140GB, or that relate specifically to the recruitment of a non-citizen.[244] 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.[245]

The purpose is to ensure that the sponsor is solely responsible for certain costs.[246] Departmental policy states that the costs covered include:

- cost of sponsorship and nomination charges;
- migration agent costs associated with the lodgement of sponsorship and nomination applications;
- the nomination training contribution charge (Skilling Australians Fund Levy);
- migration agent fees or legal fees associated with sponsorship monitoring;
- administrative costs and any sundry costs an employer incurs when they conduct recruitment exercises, including:
  - recruitment agent fees;
  - the cost of job advertising;

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[243] regs 2.87(1A)(a)(iiia), (b)(iiia), (1B)(a)(iiia), (b)(iiia) inserted by F2018L00262 on 18 March 2018. These regulations were amended by F2018L01093 with effect from 12 August 2018, to include the reference to 'nomination training contribution charge'. Further amendments were made by F2019L00578 with effect from 16 November 2019, to include the reference to the nomination procedure under reg 2.73B for a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. These amendments ensure that the obligation is extended to cover fees and nomination training contribution charge applicable to nominations for Subclass 457, 482 and 494 visas.
[244] regs 2.87(1), (1A), (1B).
[245] reg 2.87(1A) as substituted by SLI 2013, No 145.
[246] see Explanatory Statement to SLI 2013, No 145 at p.14.

  - screening of candidates, short listing, conducting interviews and reference checks;
  - salaries of recruitment or human resource staff;
  - the cost of outsourcing background checks, police checks and psychological testing if these relate to an employer determining an applicant's suitability for the position;

- training of new staff;
- pre-agreed costs related to attracting a potential primary sponsored person, such as paying for airfares to Australia, visa application costs and moving assistance;
- 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.[247]

Given the strict wording of the provision, it would seem the obligation under reg 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 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 reg 2.87 in these circumstances.[248]

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.[249] In addition, prior to 24 November 2012, the obligation did not apply to professional development sponsors.[250] However from 24 November 2012, professional development sponsors are subject to this obligation.[251]

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.[252] The affected sponsors include sponsors of:

[247] Policy - Migration Regulations – Divisions – [Div.2.11-2.23] Sponsorship compliance framework: Sponsorship obligations – 3.17. Regulation 2.87 - Obligation not to recover, transfer or take actions that would result in another person paying for certain costs – 3.17.2 Requirements (reissued 15/10/2020).
[248] Policy - Migration Regulations – Divisions – [Div.2.11-2.23] Sponsorship compliance framework: Sponsorship obligations – 3.17. Regulation 2.87 - Obligation not to recover, transfer or take actions that would result in another person paying for certain costs – 3.17.2 Requirements (reissued 15/10/2020).
[249] see reg 2.87(2) as in force prior to 1 July 2013.
[250] see reg 2.87(1) as in force prior to 24 November 2012.
[251] reg 2.87(1) as amended by SLI 2012, No 238.
[252] reg 2.87(2A).

Released by the AAT on 23 February 2022

- sponsored current visa holders and persons whose last substantive visa was Subclass 408 visa in the Religious Worker or Domestic Worker streams;[253]

- sponsored current visa holders and persons whose last substantive visa was a Subclass 427 or 428;[254]

- primary sponsored Subclass 401 visa holders in the Religious Worker stream where the application was lodged on or after 24 November 2012;[255]

- primary sponsored Subclass 401 visa holders in the Domestic Worker stream for applications made on or after 23 March 2013;[256] and

- certain non-Ministerial parties to a work agreements.[257]

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 work sponsor has agreed to be the work sponsor of an applicant for, proposed applicant for or holder of a Subclass 402 (Training and Research), 403 (Temporary Work (International Relations)) visa,[258] Subclass 407 (Training) visa,[259] Subclass 408 (Temporary Activity) visa,[260] 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.[261]

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[253] regs 2.87(2A)(a), (b)(iii)–(iv) as amended by F2016L01743 for applications made on or after 19 November 2016.
[254] regs 2.87(2A)(b)(iii), (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.
[255] regs 2.87(2A)(b)(i), (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: reg 2.87(2A) as substituted by SLI 2013, No 32 for visa applications made on or after 23 March 2013.
[256] regs 2.87(2A)(b)(i), (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 at p.62. The amendment applies to visa applications made on or after 23 March 2013.
[257] The reference to a party to a work agreement was omitted from reg 2.87(2A) by SLI 2012, No 238 for sponsorship applications made on or after 24 November 2012.
[258] 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.
[259] The references to Subclass 407 were inserted by F2016L01743 for applications made on or after 19 November 2016.
[260] The references to Subclass 408 were inserted by F2016L01743 for applications made on or after 19 November 2016.
[261] regs 2.87(1A)(c), (d), 2.87(1B)(c), (d).

To whom does the obligation apply?

The obligation applies to a person who is or was an approved work sponsor (other than a professional development sponsor prior to 24 November 2012).[262]

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 work sponsor or party to a work agreement and on which there ceases to be any sponsored person in relation to the person.[263]

Obligation to make same or equivalent position available to Australian participants – reg 2.87A

Nature of obligation

Under reg 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.[264]

Regulation 2.87A was repealed from 19 November 2016.[265]

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.[266] That is a sponsor in respect of a Subclass 411 visa. For sponsorship applications made on or after 24 November 2012, reg 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.[267]

Released by the AAT on 28 February 2022

[262] reg 2.87(1).
[263] regs 2.87(3), (4).
[264] regs 2.87A(1), (2).
[265] 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.
[266] reg 2.87A(1) as in force prior to 24 November 2012.
[267] reg 2.87A(1) as amended by SLI2012, No 238. The Explanatory Statement to SLI 2012, No 238 relevantly states that the amendment to reg 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. Subclass 401 visa was created by SLI 2012, No 238 and replaces (among other visa subclasses) Subclass 411. 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.

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.[268]

Obligation to provide training – reg 2.87B

Nature of obligation

Under reg 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 primary sponsored person.[269]

The requirements relating to training are specified by the Minister in an instrument in writing,[270] 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 reg 2.59(d) and for variation of terms of approval as a standard business sponsor in reg 2.68(e).

Regulation 2.87B was repealed from 12 August 2018 and the obligation to meet annual training benchmark requirements has been replaced by the new requirement to pay a nomination training contribution charge as part of the nomination process.[271] A transitional provision provides that a standard business sponsor is not required to comply with the repealed training benchmark obligations in relation to a period of 12 months ending on or after 12 August 2018, ensuring there is no overlap between the new charge scheme and the old training obligation.[272]

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;[273] and if during all or part of the period of 12 months commencing on the day of the

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[268] reg 2.87A(3).
[269] reg 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 reg 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 reg 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. Note that primary sponsored person is defined in reg 2.57(1).
[270] regs 2.87B(2), (3). The current instrument can be found in the Register of Instruments - Business Visas, under the 'Training' tab.
[271] F2018L01093.
[272] Clause 7602(5) as inserted by item 43 of sch 1 to F2018L01093. According to the Explanatory Statement at p.23, as reg 2.87B operated by imposing the training benchmark obligation for periods of 12 months starting on the anniversary of the sponsor's approval, the obligation could overlap with the introduction of the nomination training contribution charge. To avoid the unfairness to employers caused by the overlap, the transitional provision in cl 7602(5) of sch 13 to the Regulations removes the old obligation in relation to the period of 12 months that includes 12 August 2018 so that it only applies to full periods of 12 months that end before 12 August 2018.
[273] reg 2.87B(1).

sponsorship or variation approval or the anniversary of that day, the person is a sponsor of at least one primary sponsored person.[274]

When does the obligation apply?

The obligation commences on the day the person is approved as a standard business sponsor.[275] 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.[276]

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.[277]

However, as noted above, the effect of this provision's repeal means that the obligation does not apply in relation to periods of 12 months which includes or ends after 12 August 2018.[278]

Obligation not to engage in discriminatory recruitment practices – reg 2.87C

Nature of obligation

Under reg 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.[279] 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.[280]

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.[281] 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

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[274] regs 2.87B(2), (3).
[275] reg 2.87B(4).
[276] regs 2.87B(2), (3).
[277] regs 2.87B(5), (6).
[278] Clause 7602(5) as inserted by item 43 of sch 1 to F2018L01093.
[279] reg 2.87C(2).
[280] reg 2.57(1).
[281] Explanatory Statement to F2016L00523, p.20.

amount to a practice engaged in to comply with a Commonwealth law and therefore would not amount to a breach of the new obligation.[282]

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.[283]

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.[284] The 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.[285]

Relevant case law

Judgment	Judgment summary
MIAC v Sahan Enterprises Pty Ltd [2012] FMCA 619; (2012) 266 FLR 111	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Legislation Amendment (Worker Protection) Act 2008 (Cth)	No 159, 2008	No 2/2009
Migration Amendment Regulations 2009 (No 5) (Cth) (as amended)	SLI 2009, No 115	No 11/2009
Migration Amendment Regulations 2009 (No 12) (Cth)	SLI 2009, No 273	No 16/2009
Migration Amendment Regulations 2009 (No 14) (Cth)	SLI 2009, No 331	No 18/2009

[282] Explanatory Statement to F2016L00523, p.21.
[283] This obligation is complemented by reg 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: reg 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 sch 13 to F2016L00523.
[284] reg 2.87C(3).
[285] Item 5401(3) of sch 13 to F2016L00523.

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Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No 1/2010
Migration Legislation Amendment Regulation 2012 (No 3) (Cth)	SLI 2012, No 106	No 5/2012
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 9/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No 3/2013
Migration Amendment (Reform of Employer Sanctions) Act 2013 (Cth)	No 10, 2013	No 4/2013
Migration Amendment Regulation 2013 (No 5) (Cth)	SLI 2013, No 145	No 10/2013
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth)	No 122, 2013	No 12/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523	No 1/2016
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018
Migration Amendment (Skilling Australians Fund) Act 2018 (Cth)	No 39, 2018	No 2/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 2/2018
Migration (Skilling Australians Fund) Charges Regulations 2018 (Cth)	F2018L01092	No 2/2018
Migration Amendment (Family Violence and Other	No 162, 2018	No 1/2019

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Measures) Act 2018 (Cth)		
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 3/2019
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019

Available decision precedent/template

The following decision precedent is 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:

- **Sponsorship bars and cancellation (post 14 September 2009)** – 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 Act.

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APPROVAL AS STANDARD BUSINESS SPONSOR

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Overview[1]

The Australian temporary business sponsorship scheme under the *Migration Act 1958* (Cth) (the Act) and the *Migration Regulations 1994* (Cth) (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, 482 or 494 visa.[2]

The business sponsorship scheme was first introduced in 1996 and underwent major changes in 2003 and 2009.[3] 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.[4] The scheme was subject to a number of further amendments in 2013,[5] and again in 2018 as part of major reforms which replaced the Subclass 457 visa with the Subclass 482 (Temporary Skills Shortage) visa.[6] From 17 April 2019, there were changes to the general sponsorship framework under pt 2 div 3A of the Act with the introduction of the sponsored family visa program and the distinction between an 'approved family sponsor' and an 'approved work sponsor' under the umbrella of 'approved sponsors'.[7]

Under the current scheme, a person may apply to the Minister for approval as a work sponsor in accordance with the process set out in reg 2.61.[8] Section 140E(1) of the Act provides that the Minister must approve a person as a work sponsor in relation to one or more classes of sponsor if prescribed criteria are satisfied.[9] Under reg 2.58 of the

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

[2] 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 sch 1 to the *Migration Amendment Regulations 2012 (No 4)* (Cth) (SLI 2012, No 238). The Subclass 482 (Temporary Skills Shortage) visa was introduced by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262) from 18 March 2018 to replace Subclass 457 visas. The Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, which is a temporary regional employer-sponsored visa replacing the Subclass 187 (Regional Sponsored Migration Scheme) visa, was introduced by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578) from 16 November 2019 (see Legislation Bulletin No 4/2019 for more information on the introduction of Subclass 494).

[3] The changes introduced by the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) (No 159, 2008) (Worker Protection Act) and the *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115), as amended by *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth) (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, p.2.

[4] SLI 2012, No 238. The effect of SLI 2012, No 238 is summarised in Legislation Bulletin No 9/2012.

[5] See *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146), *Migration Amendment Regulation 2013 (No 5)* (Cth) (SLI 2013, No 145), and *Migration Amendment (Temporary Sponsored Visas) Act 2013* (Cth) (No 122, 2013).

[6] See F2018L00262.

[7] Introduced by the *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018) and the *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551). The effect of the amending act and regulations is summarised in Legislation Bulletin No 1/2019 and Legislation Bulletin No 3/2019. These amendments, while expanding the scope of the sponsorship framework provisions to include family sponsors and introducing new provisions in respect of the family sponsor, did not make substantive changes to the temporary work sponsorship scheme.

[8] s 140F as amended by No 162, 2018, reg 2.61 as amended by F2019L00551.

[9] s 140E as amended by No 162, 2018. A transitional provision under item 69 of sch 1 pt 2 to No 162, 2018 provides that if a sponsorship was approved under s 140E before 17 April 2019 and the approval is in effect immediately before that date, that existing approval continues to have effect after that date as though it were an approval as a work sponsor under s 140E as amended. While the amending Act does not expressly state how the amendments apply to approval applications lodged but not

Regulations, the current prescribed classes of work sponsors are a standard business sponsor and a temporary activities sponsor.[10]

Since 30 June 2013 the Act has included a provision outlining the purposes of div 3A,[11] 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.[12]

This commentary focuses on standard business sponsorship. A 'standard business sponsor' is defined in reg 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(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 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, Subclass 482 and Subclass 494 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, 482 and 494 visas under s 140GBA.[13]

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,[14] except in limited circumstances set out in reg 4.02(4A). 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 regs 2.59(d) and (e),[15] relating to training benchmarks;
- if the primary decision was made *on or after* 18 March 2018, the relevant criterion is reg 2.59(f),[16] 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.[17] In *Auservices Pty Ltd v MICMSMA*[18] the Court construed

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determined before 17 April 2019, the overall intention of the sponsorship scheme, the intention evinced by the conversion of existing approvals, and the absence of any savings provisions applicable to undetermined applications suggest that any applications approved after 17 April 2019 would also be an approval as a work sponsor under s 140E as amended.

[10] Each of these classes of sponsors is defined in reg 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 reg 2.58 for sponsorship applications made on or after 19 November 2016: *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (F2016L01743). Other categories of sponsor have been added and removed from this definition over time, in accordance with changes to the temporary work visa framework.

[11] s 140AA inserted by SLI 2013, No 122 and as amended by No 162, 2018.

[12] ss 140AA(a) and (b) for pre 17 April 2019; ss 140AA(1)(a) and (b) for post 17 April 2019.

[13] See reg 2.72AA inserted by SLI 2013, No 122.

[14] s 338(9) of the Act and reg 4.02(4)(a) of the Regulations as amended by SLI 2009, No 115.

[15] reg 4.02(4A).

[16] reg 4.02(4A) as repealed and substituted by F2018L00262, commencing 18 March 2018.

[17] See the note to reg 4.02(4A) and the Explanatory Statement to SLI 2009, No 115, p.67.

[18] *Auservices Pty Ltd v MICMSMA* [2020] FCCA 1250.

this to mean that the Tribunal will have jurisdiction if the business is based in Australia, notwithstanding that the matter was determined on a discrete issue in reg 2.59 and the delegate had not directly said they had considered regs 2.59(d) and (e) (or reg 2.59(f) for post 18 March 2018 decisions) in the decision.[19] In all cases, the standard business sponsor has standing to apply for review.[20]

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 work sponsor. The process prescribed for approval as a standard business sponsor is set out in reg 2.61 of the Regulations. This essentially requires that the application be made on the prescribed form and the prescribed fee be paid.[21] For applications made on or after 1 July 2013, the application 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.[22]

Who can apply for approval as a work sponsor?

A 'person' for these purposes, is not defined in the Act or the Regulations. Section 2C of the *Acts Interpretation Act 1901* (Cth) 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 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.[23]

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.[24] 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 Business Review Applicants FAQ.

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.

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[19] *Auservices Pty Ltd v MICMSMA* [2020] FCCA 1250 at [59]–[63]. The Court considered that reg 4.02(4A) (as in force before 18 March 2018) should be interpreted in a way that embodies the legislative intention to give a right to merits review to businesses based in Australia, rather than the literal meaning of the provision, which focuses on how the delegate wrote their decision and can lead to absurd outcomes. It further held that the manner in which reg 4.02(4A) should be construed meant that there had been a consideration of the criteria in regs 2.59(d) and (e) notwithstanding that the delegate had not directly said they had considered those matters in the decision.
[20] s 347(2)(d) and reg 4.02(5)(a).
[21] reg 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 sch 2, and item [2] of sch 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 regs 2.61(3A)(b) and (ba) as inserted by F2018L00262.
[22] See reg 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.
[23] Having regard, for example, to the definition of 'associated with' in reg 1.13B, as in force prior to 18 March 2018.
[24] See *Lee v Lee's Air Farming Ltd* [1961] AC 12.

In *Moller v MIAC*[25] the Court considered 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 reg 1.20D of the Regulations, and 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.[26] However, the sponsorship scheme includes prescribed sponsorship obligations which apply to an approved work sponsor in relation to a visa holder which clearly envisage an employment relationship.[27] 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: reg 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 work sponsor. Regulations 2.59 and 2.60S set out the 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);[28]
- *for applications made before 18 March 2018,* the applicant is not a standard business sponsor;[29]
- the applicant is lawfully operating a business in or outside Australia;[30]
- *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;[31]

[25] *Moller v MIAC* [2007] FMCA 168 at [22].
[26] Explanatory Statement to SLI 2009, No 202, p.13.
[27] s 140H of the Act enables obligations to be prescribed. See for example reg 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.
[28] reg 2.59(a).
[29] reg 2.59(b). A minor technical amendment was made to reg 2.59(b)(ii) to replace 'subclause' with 'subitem', effective from 27 March 2010 (*Migration Amendment Regulations 2010 (No 1)* (Cth) (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 pt 2 of sch 1 to the *Migration Legislation Amendment (Worker Protection) Act 2008* (Cth) (No 159, 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.
[30] reg 2.59(c).
[31] reg 2.59(f).

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- 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;[32] 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 visa holder, or applicant or prospective applicant for a Subclass 482 visa,[33] 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;[34]
- 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 work 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, and for applications made on or after 12 August 2018, the nomination training contribution charge),[35] and that the sponsor has not recovered any such costs from another person.[36]

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 reg 1.03 by reference to the location of the operation of the business at the time an approval as a standard business sponsor was last granted (or time of most recent variation).[37]

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

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[32] reg 2.59(g). The terms 'adverse information' and 'associated with' are defined in regs 1.13A and 1.13B.
[33] These technical amendments were made to reg 2.59(h) to reflect the replacement of the 457 visa with the 482 visa from 18 March 2018: F2018L00262.
[34] reg 2.59(h).
[35] regs 2.60S(2)(ba), (2)(bb), (3)(a)(ia), (3)(b)(ia) as inserted by F2018L00262 for applications made on or after 18 March 2018, and as amended by *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (F2018L01093) for applications made on or after 12 August 2018. The nomination training contribution charge was introduced by the *Migration Amendment (Skilling Australians Fund) Act 2018* (Cth) (No 38, 2018) and F2018L01093, and replaces the Australian training requirements of employers sponsoring a foreign worker under a temporary work visa or nominating a foreign worker under the Direct Entry stream of the Subclass 186 visa. Section 140ZM imposes a liability on a person to pay the nomination training 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 reg 5 of the *Migration (Skilling Australians Fund) Charges Regulations 2018* (Cth) (F2018L01092). Regulations 2.60S(2)(ba), (2)(bb), (3)(a)(ia) and (3)(b)(ia) were further amended by F2019L00578 with effect from 16 November 2019 to cater for the Subclass 494 visa.
[36] reg 2.60S applies to all classes of work sponsor, including standard business sponsor. It was inserted by *Migration Amendment Regulation 2013 (No 5)* (Cth) (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.
[37] Definition inserted into reg 1.03 by F2018L00262.

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:[38]

- *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 (reg 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 (reg 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 (reg 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 (reg 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.[39]

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 – reg 2.59(a)

Under reg 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 reg 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.

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[38] regs 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 cl 6704(2) of sch 13 of the Regulations).

[39] See Explanatory Statement to F2018L00262, item 53, item 56. Note that with the introduction of the nomination training contribution charge from 12 August 2018 by No 38, 2018 and F2018L01093, the employer's Australian training obligation has been replaced with a requirement to contribute to training funds as part of the nomination approval process, rather than a criterion under the standard business sponsorship approval process.

Standard business sponsor – reg 2.59(b)

Regulation 2.59(b) requires that the applicant is not a standard business sponsor.[40] It only applies to applications for approval as a sponsor made before 18 March 2018.[41] The purpose of this criterion was to ensure that a person cannot have two concurrent approvals as a standard business sponsor. Thus, a person approved as a standard business sponsor whose sponsorship is still current would not be able to meet reg 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 regs 2.65–2.69.

From 18 March 2018, the term of an approval of sponsorship is fixed by reg 2.63A (discussed further below), and the operation of that provision prevents any concurrent period of approval.[42] Accordingly, from that date this criterion was not needed and omitted from the Regulations.

Lawfully operating a business in or outside Australia – reg 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.[43] It is appropriate therefore to apply the ordinary meaning of the term having regard to the legislative context.

Departmental policy explains the concept of 'lawfully operating' in terms of being 'legally established'.[44] 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.[45] For a business operating outside Australia, the requirements would be governed by local law in the relevant country.[46] 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 reg 2.59(c). In this respect, Departmental policy should be approached with some caution.

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[40] An alternative way to meet this requirement, that an applicant is a standard business sponsor because of the application of item 45(2) of pt 2 of sch 1 to No 159, 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.
[41] F2018L00262.
[42] See regs 2.63A(2), (4), as inserted by F2018L00262.
[43] A requirement that the business be 'lawfully operating' also applies in relation to Employer Nomination under reg 5.19(3)(b)(ii) (as applicable to applications made before 18 March 2018; for applications made on or after 18 March 2018, the equivalent provision is under reg 5.19(5)(h)(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 sch 2 (Student Guardian visa) and schs 5A and 5B (evidentiary requirements for Student visas) to the Regulations.
[44] Policy – Migration Regulations – Divisions – [Div2.58–2.69] Standard business sponsorship applications – [4.5.2] Lawfully operating a business (reissued 12 August 2018).
[45] Policy – Migration Regulations – Divisions – [Div2.58–2.69] Standard business sponsorship applications – [4.5.2.1] Assessment of 'lawfulness' – Australian business (reissued 12 August 2018).
[46] Policy – Migration Regulations – Divisions – [Div2.58–2.69] Standard business sponsorship applications – [4.5.2.3] Assessment of lawfulness – Overseas business (reissued 12 August 2018).

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.[47] 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 to the criterion in reg 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).

'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 regarding employing local labour and discriminatory recruitment practices – reg 2.59(f)

Under reg 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.[48] A 'discriminatory recruitment practice' is defined in reg 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.[49] 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.[50] While the sponsorship obligation in reg 2.87C seeks to address this problem,[51] 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

[47] See pre 24 November 2012 version of regs 2.60E(b), (c), criteria for approval as a visiting academic sponsor.
[48] As amended with effect to all live applications on 19 April 2016 by the *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (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.
[49] Explanatory Statement to SLI 2009, No 115, p.17.
[50] Explanatory Statement to F2016L00523, p.5.
[51] Explanatory Statement to F2016L00523, p.5.

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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 div 2.19 relating to discriminatory recruitment practices see Subdivision 2.19.1 - Sponsorship Obligations of Approved Work Sponsors.

No adverse information or reasonable to disregard any adverse information – reg 2.59(g)

Under reg 2.59(g) the Minister, or the 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 reg 1.13A (previously reg 2.57(3)) as any adverse information relevant to a person's suitability as a sponsor or nominator.[52] 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).[53] 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.[54] Some of the listed kinds of information require consideration or action by a competent authority (a Department or authority administering or enforcing the law).[55]

The conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[56]

The definition of 'associated with' is found in reg 1.13B (formerly reg 2.57(3)).[57] A person is 'associated with' another person (i.e. the sponsoring or nominating entity) in the circumstances referred to in reg 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).[58]

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[52] reg 1.13A as inserted by SLI 2015, No 242. The definition was previously found in reg 2.57(3), which was repealed by the same amending regulations.
[53] reg 1.13A. The reference to becoming insolvent means insolvent within the meaning of ss 5(2), (3) of the *Bankruptcy Act 1966* (Cth) and s 95A of the *Corporations Act 2001* (Cth) (Corporations Act).
[54] reg 1.13A(2).
[55] 'Competent authority' has the meaning given by reg 2.57(1): reg 1.13A(4).
[56] reg 1.13A(3).
[57] reg 1.13B as inserted by SLI 2015, No 242. The definition was previously found in reg 2.57(3), which was repealed by the same amending regulations.
[58] reg 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 nor a 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; and a body of the Commonwealth, a State or a

'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 reg 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.[59]

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-18 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 reg 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
- 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 PIC 4020, Bogus Documents, False or Misleading Information.

Associated with

'Associated with' has a meaning affected by reg 1.13B.[60] The meaning given in reg 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.[61] It includes, for example, people who are or were

Territory. And the term 'related body corporate' has the same meaning as in s 50 of the Corporations Act. The term 'associated entity' is further defined in reg 1.03 as having the same meaning in s 50AAA of Corporations Act.

[59] reg 1.13A as repealed and substituted by F2018L00262.

[60] See reg 1.03 as amended by F2018L00262.

[61] reg 1.13B(3) and see Explanatory Statement to F2018L00262, item 3.

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spouses or de facto partners, people who are or were members of the same immediate, blended or extended family, or even people who have or had common friends or acquaintances.[62] The definition was drafted with the intention that it encompasses 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.[63]

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).[64] It may also be relevant to consider other adverse information not known to Immigration.[65] In such cases, it may be necessary to first clearly identify the adverse information known to Immigration, then consider whether it is reasonable to disregard that information, having regard to all other relevant matters including the adverse information not known to Immigration.

The objective of reg 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.[66]

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. Policy 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.[67]

Departmental policy 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.

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[62] regs 1.13B(1)(a)(i), (ii), (v), as inserted by F2018L00262.
[63] Explanatory Statement to F2018L00262, item 15.
[64] Policy – Migration Regulations – Divisions – [Div1.2/reg1.13A] Adverse information and skilled visas (regulations 1.13A and 1.13B) – [4.4.2] Disregarding Adverse Information (reissued 5 August 2018).
[65] *Oakwood Sydney Pty Ltd v MICMSMA* [2020] FCCA 2354 at [38], considering the similarly worded reg 5.19(3)(g).
[66] Explanatory Statement to SLI 2009, No 115, p.18; Policy – Migration Regulations – Divisions – [Div1.2/reg1.13A] Adverse information and skilled visas (regulations 1.13A and 1.13B) – [4.4.2] Disregarding Adverse Information (issued 18 March 2018).
[67] Policy – Migration Regulations – Divisions – [Div1.2/reg1.13A] Adverse information and skilled visas (regulations 1.13A and 1.13B) – [4.4.2] Disregarding Adverse Information (reissued 5 August 2018).

Intention relating to establishing business or fulfilling contractual obligations – reg 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').[68]

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.[69]

Departmental policy gives 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.[70] 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.[71] 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 – reg 2.60S

Regulation 2.60S provides criteria additional to those in reg 2.59. In general terms, regs 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 to pay its costs, including migration agent costs, associated with becoming a sponsor or recruiting non-

[68] reg 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.
[69] Explanatory Statement to SLI 2009, No 203 at p.21.
[70] Policy – Migration Regulations – Divisions – [Div2.58–2.69] Standard business sponsorship applications – [4.5.4] Operating a business outside Australia (reissued 12 August 2018).
[71] In *Chengdu Siwa Digital Communication Equipment Co Ltd v MIBP* [2016] FCCA 2497 the Minister was not satisfied reg 2.59(h)(i) 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]).

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citizens, including for the purposes of nomination under s 140GB(1) of the Act.[72] For applications for approval as a sponsor made on or after 18 March 2018, there is the additional requirement that there has been no 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.[73] For applications for approval as a sponsor made on or after 12 August 2018, the costs associated with a nomination that cannot be passed on to another person expressly include the nomination training contribution charge.[74]

This requirement reflects the obligation in reg 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-reg (2) or (3) if the Minister considers it 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 reg 2.60S(2) or (3) is where a sponsor inadvertently has a minor failure that, once identified, is rectified by the sponsor.[75]

While Departmental policy indicates 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',[76] 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 work 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.[77] Regulation 2.63(1), as in force immediately prior to 18 March 2018,[78] 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, reg 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

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[72] Inserted by 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.
[73] See regs 2.60S(2)(ba), (bb) and regs 2.60S(3)(a)(ia), (b)(ia) inserted by F2018L00262 for applications made on or after 18 March 2018. For applications made on or after 16 November 2019, the nomination fee mentioned in these regulations includes the fee in respect of a Subclass 494 visa nomination: see items 20–21 of F2019L00578.
[74] Amendments to regs 2.60S(2)(ba), (bb) and regs 2.60S(3)(a)(ia), (b)(ia) by F2018L01093.
[75] Explanatory Statement to SLI 2013, No 147, Attachment C, p.6.
[76] Policy – Migration Regulations – Divisions – [Div2.58–2.69] Standard business sponsorship applications – [4.5.5] Transfer, recovery and payment of costs (reissued 12 August 2018).
[77] s 140G(2).
[78] reg 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.

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.[79] However, regard should always be had to the individual circumstances of the case. See Variation of terms of approval of sponsorship for further information.

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 reg 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.[80]

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 grant date.[81] This means there can be no advantage gained from 'early' applications for renewal or multiple approvals running 'end to end'.[82]

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.

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[79] Policy – Migration Regulations – Divisions – [Div2.11–Div2.16] Temporary Work (Skilled) visa (subclass 457) - sponsorships – [4.6] Terms of approval of sponsorship (reissued 1 July 2017). 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 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.
[80] regs 2.63A(2)(a), (4)(b).
[81] regs 2.63A(2)(b), (3), (4)(b).
[82] See Explanatory Statement to F2018L00262, items 63–65.

Relevant case law

Judgment	Judgment summary
Auservices Pty Ltd v MICMSMA [2020] FCCA 1250	Summary
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
Oakwood Sydney Pty Ltd v MICMSMA; Goo v MICMSMA [2020] FCCA 2354	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2009 (No 5) (Cth) (as amended)	SLI 2009, No 115	No 11/2009
Migration Amendment Regulations 2009 (No 9) (Cth)	SLI 2009, No 202	No 13/2009
Migration Amendment Regulations 2009 (No 13) (Cth)	SLI 2009, No 289	No 17/2009
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No 1/2010
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 9/2012
Migration Amendment Regulation 2013 (No 5) (Cth)	SLI 2013, No 145	No 10/2013
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Temporary Sponsored Visas) Act 2013 (Cth)	No 122, 2013	No 12/2013
Migration Amendment (Visa Application Charge and Related Matters No 2) Regulation 2013 (Cth)	SLI 2013, No 253	

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Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523	No 1/2016
Migration Amendment (Temporary Activity Visas) Regulation 2016 (Cth)	F2016L01743	No 6/2016
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018
Migration Amendment (Skilling Australians Fund) Act 2018 (Cth)	No 39, 2018	No 2/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 2/2018
Migration (Skilling Australians Fund) Charges Regulations 2018 (Cth)	F2018L01092	No 2/2018
Migration Amendment (Family Violence and Other Measures) Act 2018 (Cth)	No 162, 2018	No 1/2019
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 3/2019
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019

Available decision template/precedent

The following decision precedent is available for use:

- **Standard Business Sponsorship Approval (reg 2.59)** – for use in a review of a decision to not approve an application for approval as a standard business sponsor.

Last updated/ reviewed: 15 December 2020

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APPROVAL AS A TEMPORARY ACTIVITIES SPONSOR

Overview

Tribunal's jurisdiction and powers

Application process

Criteria for approval as a temporary activities sponsor

- Applicant has applied for approval as a temporary activities sponsor – reg 2.60(a)
- Applicant must not already be a sponsor of the same class – reg 2.60(b)
- Required type of entity – reg 2.60(c)
- No adverse information or reasonable to disregard any adverse information – reg 2.60(d)
  - Definitions – applications made before 18 March 2018
  - Definitions – applications made on or after 18 March 2018
  - Reasonable to disregard – all applications
- Applicant has capacity to comply with sponsorship obligations – reg 2.60(e)
- Transfer, recovery and payment of costs – reg 2.60S

Terms of approval

- Terms specified in the approval
- Terms prescribed by the Regulations

Key definitions and concepts

- Australian organisation
- Foreign government agency
- Foreign organisation

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Government agency

Lawfully established

Lawfully operating

Religious institution

Sporting organisation

Relevant case law

Relevant legislative amendments

Available decision precedent

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Overview[1]

The temporary sponsored work visa framework involves a two or three stage process under the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations). Firstly, a person or entity seeks approval as a relevant kind of work sponsor[2] (e.g. temporary activities sponsor), then in some instances the approved work sponsor is 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. At the time a decision is made on a person's nomination application, the person or entity must be an approved work sponsor: s 140GB(2)(ab).

Under the current scheme, a person may apply to the Minister for approval as a work sponsor in accordance with the process set out in reg 2.61.[3] Section 140E(1) of the Act provides that the Minister must approve a person as a work sponsor in relation to one or more classes of sponsor if prescribed criteria are satisfied.[4] Under reg 2.58 of the Regulations, the current prescribed classes of work sponsors are a standard business sponsor and a temporary activities sponsor.[5]

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.[6]

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:

- a special program sponsor;
- an entertainment sponsor;
- a superyacht crew sponsor;
- a long stay activity sponsor; and

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] From 17 April 2019, there were changes to the general sponsorship framework under div 3A of pt 2 of the Act with the introduction of a sponsored family visa program and a distinction between an 'approved family sponsor' and an 'approved work sponsor' under the umbrella of 'approved sponsors'. See the *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018), the *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551), Legislation Bulletin No 1/2019 and Legislation Bulletin No 3/2019. These amendments, while introducing the concept of an 'approved work sponsor', did not make substantive changes to the temporary work sponsorship scheme.
[3] s 140F as amended by No 162, 2018, reg 2.61 as amended by F2019L00551.
[4] s 140E as amended by No 162, 2018. A transitional provision under item 69 of pt 2, sch 1 to the amending Act provides that if a sponsorship was approved under s 140E before 17 April 2019 and the approval is in effect immediately before that date, that existing approval continues to have effect after that date as though it were an approval as a work sponsor under s 140E as amended. While the amending Act does not expressly state how the amendments apply to approval applications lodged but not determined before 17 April 2019, the overall intention of the sponsorship scheme, the intention evinced by the conversion of existing approvals, and the absence of any savings provisions applicable to undetermined applications suggest that any applications approved after 17 April 2019 would also be an approval as a work sponsor under s 140E as amended.
[5] Each of these classes of sponsors is defined in reg 1.03 of the Regulations.
[6] *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (F2016L01743).

- a training and research sponsor.[7]

These five classes of sponsor form a group of sponsors referred to in the Regulations as 'temporary work sponsors'.[8] Applications for approval as a temporary work sponsor or a professional development sponsor must have been made before 19 November 2016.[9]

Transitional arrangements were made to allow the above legacy temporary work sponsors to 'pass the sponsorship test' in relation to Subclass 408 visa applicants if the visa application was lodged on or before 18 May 2017, and professional development and training and research sponsors could sponsor Subclass 407 applicants before this date.[10]

For applications made prior to 19 November 2016, the criteria for approval as a temporary work sponsor were set out in reg 2.60A, with further criteria specific to approval for special program, entertainment, superyacht crew, long stay activity and training and research sponsors specified in regs 2.60D, F, K, L and M.[11] The criteria for approval as a professional development sponsor were contained in reg 2.60 alone.[12] For applications made on or after 19 November 2016, the criteria for approval of a temporary activities sponsor are set out in reg 2.60.

This commentary addresses the approval process for temporary activities sponsors for applications made after 19 November 2016. For information regarding the nomination and visa stages, see Temporary work nominations, and Overview - temporary work visas. For information about sponsorship approval prior to 19 November 2016, please contact MRD Legal Services.

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.[13] A decision to refuse an application for approval as a temporary activities sponsor is a decision under s 140E of the Act.

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[7] 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 reg 2.58 for sponsorship applications made on or after 19 November 2016: see F2016L01743. Previously, six prescribed classes of sponsor (exchange sponsor, foreign government agency sponsor, sport sponsor, domestic worker sponsor, religious worker sponsor and occupational trainee sponsor) were removed for applications made on or after 22 March 2014, as they had effectively been replaced by the long stay activity sponsor and the training and research sponsor classes: *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30).
[8] 'Temporary work sponsor' is defined in reg 1.03 as meaning any of those five classes.
[9] F2016L01743.
[10] cl 408.111, inserted by F2016L01743. See Legislation Bulletin No 6/2016. 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): cls 408.111, 408.228(2)(d)(i), (3)(c)(i), (4)(c)(i) and (5)(d)(i), inserted by F2016L01743. Entertainment sponsors can 'pass the sponsorship test' in relation to Subclass 408 visa applicants applying under cl 408.229A: cls 408.111, 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), inserted by F2016L01743. Superyacht crew sponsors can 'pass the sponsorship test' in relation to Subclass 408 visa applicants applying under cl 408.225 (Superyacht crew): cls 408.111 and 408.225(c)(i), inserted by F2016L01743. 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 408.227 (Staff exchange): 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), inserted by F2016L01743. 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: cls 408.111, 408.226(2)(c)(i), (3)(d)(i), 407.213, inserted by F2016L01743. Professional development sponsors could sponsor Subclass 407 applicants under cl 407.213, inserted by F2016L01743.
[11] As in force immediately before 19 November 2016.
[12] As in force immediately before 19 November 2016.
[13] s 338(9) and reg 4.02(4)(a) as amended by *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115) (as amended).

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.[14] A decision to approve a sponsorship must also specify the duration of that approval.[15]

For applications for approval as a temporary work sponsor made before 19 November 2016, or where the visa application to which the sponsorship relates was made prior to 19 November 2016, please contact MRD Legal Services for assistance.

Application process

An application for approval as a 'temporary activities sponsor' is an application under s 140E(1) of the Act. Section 140F of the Act provides that regulations may establish a process for the Minister to approve a person as a work sponsor or family sponsor[16] 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. Regulation 2.60 requires the Minister to be satisfied that the person has applied for approval as a temporary activities sponsor in accordance with the process prescribed in reg 2.61.[17]

Applications must be made using the internet, using the form specified by the Minister, and accompanied by the fee specified by the Minister.[18] The Minister may also specify a different way of making the application in specified circumstances, including the form and fee applicable.[19]

For the relevant instruments specifying the applicable form and fees, see the 'Form&Fees' tab of the Register of instruments - Business Visas.

Criteria for approval as a temporary activities sponsor

For applications made on or after 19 November 2016, the criteria specified in reg 2.60 and the additional criteria in reg 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 activities sponsor – reg 2.60(a)

Under reg 2.60(a), a mandatory criterion for approval as a temporary activities sponsor is that the applicant has applied for approval as a temporary activities sponsor in accordance with the process set out in reg 2.61. For details, see above.

Applicant must not already be a sponsor of the same class – reg 2.60(b)

An approved sponsor can sponsor any number of visa holders for a particular class. However, reg 2.60(b) requires that the applicant is not already a temporary activities

[14] ss 349(2)(a), (d).
[15] s 140G and reg 2.63.
[16] As amended by No 162, 2018.
[17] reg 2.60(a).
[18] reg 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* (Cth) (F2018L00262).
[19] reg 2.61(3B) as amended by F2016L01743.

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sponsor. This is to prevent a person having two concurrent approvals as the same class of sponsor.[20] If a person has already been approved as a temporary activities sponsor, the sponsorship approval must have ceased before they can meet this criterion.[21] 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 Variation of terms of approval of sponsorship.

Required type of entity – reg 2.60(c)

Under reg 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 – reg 2.60(d)

Under reg 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 reg 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

[20] See Explanatory Statement to *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth) (SLI 2009, No 203) at p.22 in relation to the equivalent requirement in reg 2.60A(b) as it existed prior to 19 November 2016.
[21] 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: reg 2.63(2).

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within the operation of this provision. However, in practice, this issue could be overcome by notifying Immigration of the information.

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 reg 1.13A as any adverse information relevant to a person's suitability as a sponsor or nominator.[22] 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).[23] 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.[24] Some of the listed kinds of information require consideration or action by a competent authority (a Department or authority administering or enforcing the law).[25]

The conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[26]

The definition of 'associated with' is found in reg 1.13B.[27] A person is 'associated with' another person (i.e. the sponsoring or nominating entity) in the circumstances referred to in reg 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).[28]

Definitions – applications made on or after 18 March 2018

For applications made on or after 18 March 2018, 'adverse information' is similarly defined in reg 1.13A as any adverse information relevant to a person's suitability as an approved sponsor or nominator (within the meaning of reg 5.19). However, the non-exhaustive list of examples of what this will include has been amended.[29]

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

[22] reg 1.13A, inserted by *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* (Cth) (SLI 2015, No 242). The definition was previously found in reg 2.57(3), which was repealed by the same amending regulations.
[23] reg 1.13A(1). The reference to becoming insolvent means insolvent within the meaning of ss 5(2) and (3) of the *Bankruptcy Act 1966* (Cth) and s 95A of the *Corporations Act 2001* (Cth) (Corporations Act).
[24] reg 1.13A(2).
[25] 'Competent authority' has the meaning given by reg 2.57(1): reg 1.13A(4).
[26] reg 1.13A(3).
[27] reg 1.13B, inserted by SLI 2015, No 242. The definition was previously found in reg 2.57(3), which was repealed by the same amending regulations.
[28] reg 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 nor a corporation, having the same meaning in s 9 of the Corporations Act. In relation to an 'entity', this is defined as including an entity within the meaning of s 9 of the Corporations Act; 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. The term 'associated entity' is further defined in reg 1.03 as having the same meaning in s 50AAA of Corporations Act.
[29] F2018L00262.

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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* (Cth) (the Corporations Act)); or 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 further defined in reg 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.[30]

'Associated with' has a meaning affected by reg 1.13B.[31] The terms of reg 1.13B make clear that it is not intended to be an exhaustive definition or limit the circumstances in which persons are associated with each other.[32] 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 reg 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 association or other body of persons; or
- have or had common friends or acquaintances; or
- one is or was a consultant, adviser, partner, representative on retainer, 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
- they are or were related bodies corporate (within the meaning of the Corporations Act); 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.

[30] 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 PIC 4020, bogus documents and false or misleading information.
[31] reg 1.03 as amended by F2018L00262.
[32] reg 1.13B(3).

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The amendment of these definitions was aimed at ensuring they are flexible enough to capture abuses conducted through varied business and corporate arrangements.[33]

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 reg 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. Department policy states 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.[34]

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.[35]

The decision maker should ensure that it has taken account of the individual circumstances and all relevant information of the case in deciding whether the criterion in reg 2.60(d) is met.

Applicant has capacity to comply with sponsorship obligations – reg 2.60(e)

Under reg 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.[36]

Department policy refers to reg 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

[33] Explanatory Statement to F2018L00262, item [15].
[34] Policy - Migration Regulations – Divisions - [Div2.11-Div2.23] 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 (reissued 1/1/2017).
[35] Policy - Migration Regulations – Divisions - [Div2.11-Div2.23] 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 (reissued 1/1/2017).
[36] See Explanatory Statement to SLI 2009, No 203 at pp.22–23 in relation to the equivalent requirement in reg 2.60A(d) as it existed prior to 19 November 2016.

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- 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 wages of any sponsored persons.[37]

While the Tribunal may have regard to policy, 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 Subdivision 2.19.1 - sponsorship obligations of approved work sponsors.

Transfer, recovery and payment of costs – reg 2.60S

Applicants must also satisfy the additional criteria in reg 2.60S, which prevent an applicant from taking any action or seeking to take any action that would result in the transfer, recovery or payment of certain costs to or from another person.[38]

Under reg 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 work sponsor,[39] or
  - that relate specifically to the recruitment of a non-citizen for the purposes of a nomination under s 140GB(1) of the Act;[40] 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 reg 2.73(5), (7) or 2.73A(3), or for applications made on or after 16 November 2019, reg 2.73B(5) or (7)).[41]

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[37] Policy - Migration Regulations – Divisions – [Div2.11-Div2.23] Temporary Activities Sponsorship – Part 4 - criteria for the approval as a sponsor – Capacity to comply with obligations – reg 2.60A(e) - Assessing capacity to comply (reissued 1/1/2017).
[38] reg 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 reg 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 the *Migration Amendment Regulation 2013 (No 5)* (Cth) (SLI 2013, No 145) at p.6.
[39] regs 2.60S(2)(a)–(b), 2.60S(3)(a)(i), (b)(i).
[40] regs 2.60S(2)(c)–(d), 2.60S(3)(a)(ii), (b)(ii).
[41] regs 2.60S(2)(ba), (bb), 2.60S(3)(a)(ia), (b)(ia), inserted by F2018L00262 and amended by *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (F2019L00578).

For applications made on or after 12 August 2018, the costs associated with a nomination that cannot be passed on to another person expressly include the nomination training contribution charge.[42]

In addition, for applications in relation to 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.[43]

The kinds of costs contemplated specifically include migration agent costs.

Under reg 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 amending regulation that introduced this provision provides that an example of when it may be reasonable to disregard the criteria in regs 2.60S(2) and (3) under reg 2.60S(4) is where a sponsor inadvertently has a minor failure that, once identified, is rectified by the sponsor.[44]

Terms of approval

Terms specified in the approval

Section 140G(1) of the Act provides that an approval as a work sponsor[45] may be on terms specified *in the approval*. The terms of approval as a sponsor must be of a kind prescribed by the Regulations.[46] 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, reg 2.63(2) provides that the duration of the approval may be specified as either:

- a period of time;
- ending on a particular date; or
- 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. 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

[42] regs 2.60S(2)(ba), (bb), 2.60S(3)(a)(ia) and (b)(ia) amended by *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (F2018L01093). Regulation 2.87 was also amended to include reference to the nomination training contribution charge, meaning that any person who is or was an approved sponsor has an obligation not to take any action to seek to recover the cost of the charge from the visa applicant or any other person.
[43] regs 2.60S(2)(e)–(f), 2.60S(3)(c)–(d), as amended by F2016L01743.
[44] See Explanatory Statement to SLI 2013, No 145, at p.6.
[45] Amended by No 162, 2018.
[46] s 140G(2).

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activities sponsor. 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 Variation of terms of approval of sponsorship for further information on variation of a term of approval.

Terms prescribed by the Regulations

Section 140G(3) of the Act also provides that an actual term may be *prescribed* by the Regulations. There are no prescribed terms for the temporary activities sponsor class, although the special program sponsor[47] class did have terms prescribed by reg 2.64A(1). For further information, please contact MRD Legal Services.

Key definitions and concepts

The Regulations provide a number of definitions which specifically relate to temporary activities sponsors. There are also a number of concepts relevant to the temporary work sponsor scheme which are not defined in the legislation which are referenced below.

Australian organisation

It is an alternative criterion for approval of a temporary activities sponsor[48] that the applicant is an 'Australian organisation' that is lawfully operating in Australia. The term 'Australian organisation' also forms part of the definition of 'sporting organisation' in reg 2.57(1), such that a 'sporting organisation' must be an 'Australian organisation'.

The term 'Australian organisation' is defined in reg 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 reg 2.57(1). This is an alternative criterion for the approval of a temporary activities sponsor.[49] '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 reg 2.57(1) is defined to include:

[47] Closed to new applications from 19 November 2016 by F2016L01743.
[48] reg 2.60(c)(i).
[49] reg 2.60(c)(iii).

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- 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.

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 policy 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'. 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[50] and the International Organisation for Migration (IOM) in Department policy[51] give some guidance as to the nature of the international organisation and recognition that this is intended to cover.

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.[52] '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 policy refers 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 meaning 'a body of persons organised for some end or work', 'any organised whole', 'the administrative

[50] Explanatory Statement to SLI 2009, No 203 at p.13.
[51] Policy - Migration Regulations – Divisions – [Div2.11- Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[52] See reg 2.60(c)(vii).

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personnel or apparatus of a business'.[53] Policy 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:*
>
> *(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*.[54]

However, care should be taken in applying s 9 of the Corporations Act as indicated by policy, 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 that the applicant is a 'government agency'. The term 'government agency' is defined in reg 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 https://www.directory.gov.au/departments-and-agencies.

'Government agency' is also a term contained in the definition of 'sporting organisation'. 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 reg 2.57(1) which is relevant to the temporary activities sponsor. 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 policy suggests that this could include, for example, registration of an Australian Business number (ABN) for tax purposes and registration of a business name.[55]

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[53] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[54] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[55] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).

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.[56] It is 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 policy refers 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.[57] 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. Departmental policy indicates that where warranted, an applicant may be asked to provide evidence that the organisation is involved in ongoing regular activities and has a system of record keeping that substantiates the activities claimed.[58] The Tribunal may have regard to this, but should not raise this to the level of a legislative requirement and must 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 reg 2.60(c)(v), Departmental policy suggests 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.[59] 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 reg 1.13A for the purposes of reg 2.60(d) (see discussion above). See below for information regarding 'religious institution'.

Religious institution

Religious institution is defined in reg 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 the ordinary laws;

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[56] A requirement that a business be 'lawfully operating' is in reg 2.59(c) for standard business sponsors; it also applies in relation to Employer Nomination under regs 5.19(3)(b)(ii) and 5.19(4)(b)(i) (pre-18/3/2018) and regs 5.19(5)(h)(ii) and 5.19(9)(a) (post-18/3/2018). 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.
[57] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[58] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[59] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).

- that meets the requirements of s 50-50 of the *Income Tax Assessment Act 1997* (Cth) (Income 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 policy provides that a body is a religious institution if, among other things, the activities of it reflect that it is a body instituted for the promotion of a religious object. The policy 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.[60]

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.[61]

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.[62]

Departmental policy also identifies 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 reg 1.03 since, under (c) and (d) of that definition, the organisation must meet the requirements of s 50-50 of the Income Tax Act and be an entity that is exempt from income tax under s 50-1 of that Act.[63] 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 Income 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.

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[60] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[61] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[62] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[63] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).

The applicant may still demonstrate that it meets the requirements of the Income Tax Act without an Endorsement for Charity Tax Concessions. The applicant may self-assess that it meets the relevant requirements of the Income Tax Act. In these circumstances the decision maker will need to consider for itself whether the applicant meets ss 50-50 and 50-1 of the Income 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 Income Tax Act is not in itself determinative of the question of whether the applicant meets the definition of 'religious institution' in reg 1.03. The applicant must meet all the requirements of the definition.

Sporting organisation

'Sporting organisation' is defined in reg 2.57(1). For applications made for approval as a temporary activities sponsor, 'sporting organisation' is defined as an Australian organisation, a government agency or a foreign government agency, that administers or promotes sport or sporting events.[64]

Departmental policy notes that a foreign government agency or government agency can be considered a 'sporting organisation' by promoting an interest in sport.[65] 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.[66]

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.

Relevant case law

There is currently no relevant case law in relation to temporary activities/work sponsors.

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2008 (No 3) (Cth)	SLI 2008, No 166	No 5/2008

[64] 'Sporting organisation' in reg 2.57(1) as amended by *Migration Legislation Amendment Regulation 2012 (No 4)* (Cth) (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 reg 2.08.
[65] Policy - Migration Regulations – Divisions – [Div2.11 – Div2.23] Temporary Activities Sponsorship – Applicant to be a certain type of individual or organisation (reissued 1/1/2017).
[66] 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).

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Migration Amendment Regulations 2009 (No 5) (Cth) as amended	SLI 2009, No 115	No 11/2009
Migration Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 13	No 1/2011
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 9/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No 3/2013
Migration Amendment Regulation 2013 (No 5) (Cth)	SLI 2013, No 145	No 10/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Amendment (Temporary Activity Visas) Regulation 2016 (Cth)	F2016L01743	No 6/2016
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 2/2018
Migration Amendment (Family Violence and Other Measures) Act 2018 (Cth)	No 162, 2018	No 1/2019
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 3/2019

Available decision precedent

There are currently no precedents available in relation to review of a temporary activities sponsorship refusal. Members can use the Generic decision template.

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TEMPORARY WORK NOMINATIONS

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Period of approval of nomination: reg 2.75A

Relevant case law

Relevant legislative amendments

Available decision precedent

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Overview[1]

For several current and 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[2] or temporary activities sponsor,
- secondly, an 'approved work sponsor'[3] or person who has applied to be an 'approved work sponsor' or is party to negotiations for a work agreement[4] 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 Subclass 407 (Training) visa. Subclass 401 (Temporary Work (Long Stay Activity)), Subclass 402 (Training and Research) and Subclass 420 (Temporary Work (Entertainment)) visas, which required an approval of nomination by a temporary work sponsor, were repealed on 19 November 2016.[5] For information regarding these repealed subclasses and associated nominations, please contact MRD Legal Services.

For information regarding approval as a temporary activities sponsor, see Approval as a temporary activities sponsor, and for information regarding the grant of a temporary work visa, see 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* (Cth) (the Act),[6] which sets out the prescribed criteria and processes to be satisfied for the approval of an approved work sponsor's nomination of an occupation, program or activity in relation to a visa holder, or an applicant, or a proposed applicant for a visa of a 'prescribed kind'.[7] The 'prescribed kind' of visas are set out in Division 2.17 of Part 2A of the *Migration Regulations 1994* (Cth) (the Regulations); these are currently Subclass 407, 457 and 482 visas, and prior

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] The term 'temporary work sponsor' is currently defined in reg 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.
[3] 'Approved work sponsor' is defined in s 5(1) of the Act as either a person approved as a work sponsor under s 140E of the Act in relation to a class of sponsor prescribed by the Regulations (reg 2.58), or a person (other than the Minister) who is a party to a work agreement. The introduction of 'work sponsor' from 17 April 2019 in place of the former 'approved sponsor' was a technical amendment consequential to the introduction of an 'approved family sponsor' for the purposes of certain family visas: see *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018) and *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551).
[4] *Migration Amendment (Skilling Australians Fund) Act 2018* (Cth) (No 38, 2018) amended s 140GB(1) 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.
[5] These visa subclasses were repealed from 19 November 2016 by the *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (F2016L01743).
[6] 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* (Cth) and the *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115) (as amended by SLI 2009, No 230 and SLI 2009, No 203).
[7] s 140GB.

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to 19 November 2016 included other former temporary work visas.[8] Accordingly, with limited exceptions,[9] a visa application for a Subclass 407 visa 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.[10]

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 reg 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 and Subclass 482 visas, see Approval as standard business sponsor, Regulations 2.72 and 2.73 - nomination and approval of an occupation for Subclass 457 and Subclass 482, and Subclass 457 visa and Subclass 482 visa.

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.[11] The approved work sponsor who made the nomination has standing to apply for review.[12]

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 work sponsor's nomination. The prescribed process for a nomination associated with Subclass 407 visas is set out in reg 2.73A. It is a criterion for approval of a temporary work nomination that the application is made in accordance with the applicable process.[13]

Process for nomination for Subclass 407 visas: reg 2.73A

The process for nomination of a program of occupational training in relation to a Subclass 407 visa is set out in reg 2.73A of the Regulations.[14] 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 Register of instruments - Business visas.

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[8] regs 2.72A–2.72J were repealed and substituted by new regs 2.72A and 2.72B from 19 November 2016 by F2016L01743.
[9] The exceptions are for Subclass 407 visa applicants whose approved sponsor is a Commonwealth agency: cl 407.214.
[10] cl 407.214.
[11] s 338(9) and reg 4.02(4)(d).
[12] s 347(2)(d) and reg 4.02(5)(c).
[13] reg 2.72A(4).
[14] As substituted by F2016L01743.

Criteria for approval of nomination

Under s 140GB(2), the Minister *must* approve an approved work sponsor's nomination if prescribed criteria are satisfied. The prescribed criteria for approval of nomination are set out in the current regs 2.72A and 2.72B in respect of Subclass 407 visas.

Approved work sponsor

At the time a decision is made on a person's nomination application, the person must be an approved work sponsor: s 140GB(2)(ab).[15]

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 of, or proposed applicant for, a Subclass 407 visa.[16] 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.[17]

Nominator must be relevant class of sponsor: reg 2.72A(3)

The Minister, or the Tribunal on review, must be satisfied that the person making the nomination is a temporary activities sponsor,[18] or for nominations made on or before 18 May 2017, a professional development sponsor or a training and research sponsor.[19]

Each of these classes of sponsor are defined in reg 1.03 to mean a person who is an 'approved work sponsor',[20] and is approved as a work 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.[21]

Nomination made in accordance with prescribed process: reg 2.72A(4)

Regulation 2.72A(4) requires that the Minister must be satisfied that the sponsor made the nomination in accordance with reg 2.73A – for details see above.

Nominee will participate in nominated program: reg 2.72A(5)

Under reg 2.72A(5), the Minister must be satisfied that the nominee will participate in the

[15] 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 sch 2 to No 38, 2018.
[16] As substituted by F2016L01743 for applications made on or after 19 November 2016.
[17] cl 407.214 of sch 2 to the Regulations.
[18] reg 2.72A(3).
[19] reg 2.72A(3)(b) as in force before 12 August 2018.
[20] 'Approved work sponsor' is defined in s 5(1) of the Act as either a person approved as a work sponsor under s 140E of the Act in relation to a class of sponsor prescribed by the Regulations (reg 2.58), or a person (other than the Minister) who is a party to a work agreement.
[21] These classes of sponsor were replaced by F2016L01743 which commenced on 19 November 2016.

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nominated program. This will allow the refusal of the nomination if the visa applicant is assessed as not having a genuine intention to participate.[22]

Family members included in nomination unless reasonable to disregard: regs 2.72A(6) and (7)

If the nominee holds a visa, the Minister must be satisfied that the sponsor has listed on the nomination each secondary sponsored person[23] who holds the same visa on the basis of that person's relationship to the nominee. This requirement 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.[24]

Note that 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 reg 2.72A(6). (However, it should be noted that family unit members of both visa applicants and visa holders are required to be 'identified' in reg 2.72A(8)(c)).

The Minister (or the Tribunal on review) may disregard the fact that one or more secondary sponsored persons are not listed on the nomination if satisfied it is reasonable in the circumstances to do so.[25] The Explanatory Statement to the 2009 amending 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.[26]

Details of proposed employers and location of work provided: regs 2.72A(8) and (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 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

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[22] Explanatory Statement to F2016L01743, p.42.
[23] 'Secondary sponsored person' has the meaning given in reg 2.57(1): reg 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 reg 2.57(1): reg 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 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.
[24] See Explanatory Statement to *Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)* (Cth) (SLI 2009, No 203), which introduced this requirement under reg 2.72A(5) as in force before 19 November 2016, p.36.
[25] reg 2.72A(7).
[26] See Explanatory Statement to SLI 2009, No 203, p.36.

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,[27] reg 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 regs 2.72A(6) and 2.72A(8)(c) in terms of identifying family members of visa holders. However, while reg 2.72A(6) only relates to 'listing' visa holders who meet the definition of 'secondary sponsored person', reg 2.72A(8)(c) applies to visa holders, as well as proposed secondary visa applicants.

Certification relating to 'payment for visa' conduct: reg 2.72A(10)

Regulation 2.72A(10) requires that the sponsor 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 reg 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 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: reg 2.72A(11)

Under reg 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

[27] A person is defined as performing a 'volunteer role' under reg 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.

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reasonable to disregard any adverse information known to Immigration about the sponsor or a person associated with the sponsor.

Adverse information

For applications made before 18 March 2018, 'adverse information' is defined in reg 1.13A (previously reg 2.57(3)) as any adverse information relevant to a person's suitability as an approved sponsor or nominator.[28] 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).[29] 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.[30] Some of the listed kinds of information require consideration or action by a competent authority (a Department or authority administering or enforcing the law).[31] The conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[32]

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.[33]

The definition of 'associated with' is found in reg 1.13B (formerly reg 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 reg 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).[34] For applications made on or after 18 March 2018, reg 1.13B provides a non-exhaustive definition of the circumstances in which two persons are associated with each other. It includes a broader

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[28] reg 1.13A as inserted by *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* (Cth) (SLI 2015, No 242). The definition was previously found in reg 2.57(3), which was repealed by the same amending regulations.
[29] reg 1.13A(1). The reference to becoming insolvent means insolvent within the meaning of ss 5(2) and (3) of the *Bankruptcy Act 1966* (Cth) (where the application was made before 18 March 2018) and s 95A of the *Corporations Act 2001* (Cth) (Corporations Act).
[30] reg 1.13A(2).
[31] 'Competent authority' has the meaning given by reg 2.57(1): reg 1.13A(4).
[32] reg 1.13A(3).
[33] reg 1.13A as amended by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262).
[34] reg 1.13B as inserted by SLI 2015, No 242. Regulation 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 nor corporation, having the same meaning in s 9 of the Corporations Act. In relation to an 'entity', this is defined as including an entity within the meaning of s 9 of the Corporations Act; 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. The term 'associated entity' is further defined in reg 1.03 as having the same meaning in s 50AAA of the Corporations Act.

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.[35]

According to the Explanatory Statement to the amending regulation which introduced the new reg 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.[36]

Departmental policy in relation to the former reg 2.72A(9)(a) 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 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.[37]

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.

Department policy in relation to the former reg 2.72A(9) 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.[38] Decision makers must exercise judgement and assess the circumstances of each case on its 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.

[35] reg 1.13B as repealed and substituted by F2018L00262, for applications made on or after 18 March 2018.
[36] Explanatory Statement to F2016L01743, p.43.
[37] 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).
[38] 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).

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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. It may also be relevant to have regard to other adverse information not known to Immigration in considering whether to disregard the information known to Immigration.[39]

Departmental policy also includes some examples of circumstances in which it may be reasonable to disregard adverse information including 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.[40]

The decision maker should ensure that it has taken account of the individual circumstances of the case in deciding whether the criterion in reg 2.72A(11) is met.

Occupational training will be provided directly by the sponsor: reg 2.72A(12)

Under reg 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 the Subclass 407 scheme being used by sponsors who are operating as, in effect, labour hire firms. The improper use of

[39] See for example in *Oakwood Sydney Pty Ltd v MICMSMA* [2020] FCCA 2354 in relation to the similarly worded reg 5.19(3)(g), the Court held that the Tribunal was entitled to take into account other adverse information not known to Immigration in circumstances where it had first clearly identified the adverse information known to Immigration and then went on to consider other relevant matters for its determination of whether it was reasonable to disregard (see [38]).
[40] 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).

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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.[41]

No adverse consequences for Australians: reg 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 reg 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.[42]

Applicant has functional English: reg 2.72A(14)

To satisfy reg 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 English language ability - Skilled/Business visas.

Genuine training opportunity: reg 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 reg 2.72B that applies. See immediately below for discussion of reg 2.72B.

Alternative criteria are met: regs 2.72A(15), 2.72B

Regulation 2.72A(15) merely states that reg 2.72B applies to the nomination. In order to satisfy reg 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: reg 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.[43] 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.[44]

[41] Explanatory Statement to F2016L01743, p.43.
[42] Explanatory Statement to F2016L01743, p.43.
[43] reg 2.72B(2)(a).
[44] reg 2.72B(2)(b).

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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.[45] The occupational training must be workplace based,[46] and the nominee must have appropriate qualifications and experience to undertake the occupational training.[47]

Occupational training to enhance skills: reg 2.72B(3)

Regulation 2.72B(3) applies if the occupational training is a structured workplace training program, specifically tailored to the training needs of the nominee and of a duration that meets the specific training needs of the nominee.[48] The occupational training must be in relation to an occupation specified in a legislative instrument,[49] and the occupation must be applicable to the nominee in accordance with any additional specifications made by that instrument.[50] 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.[51]

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.[52] However, these are not statutory requirements, and consideration should always focus on the terms of reg 2.72B(3).

Occupational training for capacity building overseas: regs 2.72B(4)–(6)

Regulation 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 obtain a qualification from a foreign educational institution,[53] and the occupational training is a structured workplace-based training program, specifically tailored

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[45] reg 2.72B(2)(c).
[46] reg 2.72B(2)(d).
[47] reg 2.72B(2)(e).
[48] reg 2.72B(3)(a).
[49] reg 2.72B(3)(b). For the relevant instrument, see the 'Occ186/407/457&Noms' tab of the Register of instruments - Business visas.
[50] reg 2.72B(3)(ba) inserted by *Migration Amendment (Specification of Occupations) Regulations 2017* (Cth) (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.
[51] reg 2.72B(3)(c).
[52] 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).
[53] reg 2.72B(4)(a).

to the training needs of the nominee.[54]

Regulation 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,[55] 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.[56]

Regulation 2.72B(6)[57] 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,[58] the training is relevant to, and consistent with, the development of the managerial or professional skills of the nominee,[59] the training will provide skills and expertise relevant to, and consistent with, the business of the employer,[60] and the primary form of the training is the provision of face-to-face teaching in a classroom or similar environment.[61]

Notification of nomination decision: reg 2.74

The notification requirements for approval of a nomination for temporary work visas are the same as those applicable to reg 2.72 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).[62]

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.[63]

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.[64]

Period of approval of nomination: reg 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 reg 2.75A'.[65]

Regulation 2.75A sets out the period of approval of nomination for temporary work visas. It

[54] reg 2.72B(4)(b).
[55] reg 2.72B(5)(a).
[56] reg 2.72B(5)(b).
[57] 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.
[58] reg 2.72B(6)(a).
[59] reg 2.72B(6)(b).
[60] reg 2.72B(6)(c).
[61] reg 2.72B(6)(d).
[62] reg 2.74(1).
[63] Explanatory Statement to SLI 2009, No 115, p.29.
[64] reg 2.74(2) as amended by F2016L01743.
[65] See cl 407.214(c) of sch 2 to the Regulations.

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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,[66] 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.

Relevant case law

Judgment	Judgment summary
Oakwood Sydney Pty Ltd v MICMSMA; Goo v MICMSMA [2020] FCCA 2354	Summary
Suh v MIAC [2009] FCAFC 42; 175 FCR 515	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2009 (No 5) (Cth) (as amended)	SLI 2009, No 115	No 11/2009
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No 01/2010
Migration Amendment Regulations 2010 (No 6) (Cth)	SLI 2010, No 133	No 07/2010
Migration Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 13	No 01/2011
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 09/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No 03/2013

[66] reg 2.75A(2)(d) as amended by *Migration Legislation Amendment Regulation 2012 (No 4)* (Cth) (SLI 2012, No 238) in relation to nomination application made on or after 24 November 2012. The provision previously referred expressly to approvals given to an approved sponsor who was not a party to a work agreement. The amendment is consequential to the removal of reg 2.72A(2)(e) which related to parties to a work agreement.

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Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 02/2014
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Amendment (Temporary Activity Visas) Regulation 2016 (Cth)	F2016L01743	No 06/2016
Migration Amendment (Specification of Occupations) Regulations 2017 (Cth)	F2017L00818	No 03/2017
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 01/2018
Migration Amendment (Skilling Australians Fund) Act 2018 (Cth)	No 38, 2018	No 02/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 02/2018
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 03/2019

Available decision precedent

There are currently no precedents available in relation to review of a temporary work nomination refusal. Members should use the Generic decision template.

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VARIATION OF TERMS OF APPROVAL OF SPONSORSHIP

Overview

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Criteria for variation

- Standard business sponsor
  - Criteria not applicable from 18 March 2018
  - Application for variation made in accordance with the prescribed process: reg 2.68(a)
  - Applicant is a standard business sponsor: reg 2.68(b)
  - Other criteria: regs 2.68(d)–(i)
- Temporary activities sponsor
  - Applicant satisfies criteria for approval as temporary activities sponsor: reg 2.68A(a)
  - Applicant has applied for variation in accordance with prescribed process: reg 2.68A(b)
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Notice of decision

Relevant case law

Relevant legislative amendments

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Available decision templates

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Overview[1]

The Minister can approve a person as a work sponsor in relation to one or more prescribed classes of sponsor.[2] An approval may be on terms specified in the approval and such terms must be of a kind prescribed by the *Migration Regulations 1994* (Cth) (the Regulations).[3] Section 140GA of the *Migration Act 1958* (Cth) (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 for a work sponsor 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.[4] 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.[5]

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*:[6] from 14 September 2009,[7] until 17 March 2018;[8]
- *a temporary work sponsor*:[9] from 14 September 2009 until 24 November 2012 for exchange, foreign government agency, visiting academic, sport, domestic worker religious worker or occupational trainee sponsors;[10] OR until 19 November 2016 for long stay

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

[2] s 140E. The classes of sponsor are listed in reg 2.58 of the Regulations. There has been a general change to the sponsorship framework under div 3A of pt 2 of the Act with the introduction of the sponsored family visa program and the concept of 'approved family sponsor' under the class of approved sponsors, by the *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018) and the *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551), with effect from 17 April 2019. However, these amendments do not make substantive changes to the temporary work sponsorship scheme.

[3] s 140G.

[4] Explanatory Statement to *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115), p.24. Explanatory Statement to *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth) (SLI 2009, No 203), p.32.

[5] Explanatory Memorandum to the Migration Legislation Amendment (Worker Protection) Bill 2008 (Cth) at [76].

[6] A 'standard business sponsor' is defined in reg 1.03 of the Regulations (as amended by F2019L00551) 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(1) of the Act. 'Approved work sponsor' (as introduced by No 162, 2018) is relevantly defined in s 5(1) of the Act as a person who has been approved under s 140E as a work sponsor 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; or a person (other than a Minister) who is a party to a work agreement.

[7] 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* (Cth). *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115), as amended by SLI 2009, No 203 and *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 230).

[8] Standard Business Sponsors were removed from the various provisions in the Regulations prescribing the variation process (regs 2.63, 2.65, 2.66, 2.67, 2.68, etc.) from 18 March 2018 by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262).

[9] A 'temporary work sponsor' was defined in reg 1.03 (prior to amendment by the *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (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)* (Cth) (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 reg 1.03, prior to amendment or repeal from 19 November 2016 (F2016L01743).

[10] Applications for variation of this type of sponsorship closed on 24 November 2012: SLI 2012, No 238.

activity, training and research, entertainment, special program or a superyacht crew sponsors;[11]

- *a temporary activities sponsor*: from 19 November 2016 onwards.[12]

There are separate processes and criteria specified for variation of terms of approval for these types of sponsorship. This commentary discusses the processes and criteria for variation in relation to a temporary activities sponsor and a standard business sponsor. For information on variation of terms of approval for a temporary work sponsor, please contact MRD Legal.

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,[13] 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 regs 2.68(e) and (f) (*for decisions made before 18 March 2018*) or the criterion in reg 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.[14] 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.[15]

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.[16]

On review, the Tribunal may:

- affirm the decision not to vary the term of approval; or

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[11] reg 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: reg 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 sch 1 to the Regulations, as added by F2016L01743.

[12] The various types of temporary work sponsors (defined in reg 1.03) were replaced with the single temporary activities sponsor from 19 November 2016 by F2016L01743.

[13] s 338(9) and reg 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 pt 5 of the Act.

[14] reg 4.02(4C). Regulations 4.02(4C), 2.68(e) and 2.68(f) were all repealed on 18 March 2018: F2018L00262. However, cl 6704(16) of sch 13 to the Regulations, inserted by F2018L00262, provides that reg 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 regs 2.68(e) and (f) were a reference to reg 2.68(g). In *Auservices Pty Ltd v MICMSMA* [2020] FCCA 1250, the Court considered the similar requirement in reg 4.02(4A) (relevant to decisions to refuse an approval of a standard business sponsorship) to mean that the Tribunal will have jurisdiction if the business is based in Australia, notwithstanding that the matter was determined on a discrete issue in reg 2.59 and the delegate had not directly said they had considered regs 2.59(d) and (e) (or reg 2.59(f) for post 18 March 2018 decisions) in the decision (at [59]–[63]). This interpretation would be equally applicable to the similarly worded reg 4.02(4C).

[15] Explanatory Statement to SLI 2009, No 115, p.67.

[16] reg 4.02(5)(m).

- 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.[17]

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),[18] temporary work sponsors (prior to 19 November 2016) and temporary activities sponsors (from 19 November 2016).[19]

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), temporary work sponsor (prior to 19 November 2016) or a temporary activities sponsor (from 19 November 2016) is a term which may be varied.[20] 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.[21]

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, although it is not bound by it. Departmental policy specifies that a decision maker may vary or extend the duration of the sponsorship approval by five years for all temporary activities sponsorships.[22] This period is intended to be consistent with the period of initial sponsorship approval specified in policy.[23]

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[17] s 349(2).
[18] reg 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 reg 2.63A, inserted by F2018L00262. See Approval as standard business sponsor for further detail.
[19] reg 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'.
[20] reg 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'. It was further amended from 18 March 2018 by F2018L00262 to omit the reference to 'standard business sponsor'.
[21] reg 2.63(2).
[22] Policy - 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 (reissued 1/7/2017, 17/1/2018-17/3/2018 stack: N.B. this is the last compilation relevant to variation of standard business sponsorship approvals); and Policy – 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 (reissued 1/1/2017).
[23] Policy - 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 (reissued 1/7/2017, 17/1/2018-17/3/2018 stack: N.B. this is the last compilation relevant to variation of standard business sponsorship approvals); and Policy - 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 (reissued 1/1/2017).

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. Department policy provides the following example of how this would operate in practice 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).*[24]

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.[25] The Regulations currently prescribe one process for variation of terms of approval for a temporary activities sponsor or a parent sponsor.[26] For applications made prior to 18 March 2018, the same process applied for variation of terms of approval of standard business sponsorship.[27] 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.[28]

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,[29] and for variation of terms of approval as a temporary activities sponsor from 19 November 2016.[30]

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[24] Policy - 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 (reissued 1/7/2017, 17/1/2018-17/3/2018 stack: N.B. this is the last compilation relevant to variation of standard business sponsorship approvals).
[25] s 140GA(3).
[26] The provisions under div 2.16 Variation of terms of approval of sponsorship, including the process for variation of terms of approval under reg 2.66 was amended by F2019L00551 from 17 April 2019 to include references to a 'parent sponsor'. This commentary only discusses the application process, criteria and issues in relation to the variation of terms of approval for a 'work sponsor' (i.e. standard business sponsor and temporary activities sponsor).
[27] reg 2.66 was amended on 18 March 2018 to remove references to standard business sponsorship: F2018L00262.
[28] reg 2.66A, which was repealed on 19 November 2016 by F2016L01743. For information on process for variation of terms of approval of a temporary work sponsorship, please contact MRD Legal.
[29] reg 2.66 as amended by F2018L00262 from 18 March 2018 to remove references to standard business sponsorship (no substantive change was made to reg 2.66).
[30] reg 2.66 as amended by F2016L01743 from 19 November 2016 to include references to temporary activities sponsorship (no substantive change was made to reg 2.66).

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.[31] For applications made on or after 1 July 2013, the application must be made using the internet.[32]

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 regs 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 policy instructs officers that where the applicant's term of approval as a 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.[33] However, note that from 18 March 2018, variations of the terms of approval of standard business sponsorships were closed, and although described as 'renewals', only new/further applications for standard business sponsorship approval can be made.[34]

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 and temporary activities sponsors, and one common criterion that applies to all classes of work sponsors.[35]

Standard business sponsor

Regulation 2.68 sets out the criteria for variation of terms of a standard business sponsor approval.[36] 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 reg 2.66;[37]
- the applicant is a standard business sponsor;[38]

[31] regs 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)* (Cth) (SLI 2013, No 146).
[32] reg 2.66(2), as amended by SLI 2013, No 146. Note that reg 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.
[33] Policy – 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 (reissued 1/1/2017); and Policy - 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 (reissued 1/7/2017, 17/1/2018-17/3/2018 stack: N.B. this is the last compilation relevant to variation of standard business sponsorship approvals).
[34] See Explanatory Statement to F2018L00262, pp.26–27, items 60 and 66–78.
[35] Note that prior to 19 November 2016, reg 2.68A specified the criteria for variation of a temporary work sponsorship. However, reg 2.68A was repealed and substituted from 19 November 2016 by F2016L01743 to instead specify the criteria for variation of a temporary activities sponsorship. For information in relation to a temporary work sponsor, please contact MRD Legal.
[36] Note that reg 2.68 was repealed from 18 March 2018 by F2018L00262.
[37] reg 2.68(a).
[38] reg 2.68(b). 'Standard business sponsor' is defined in reg 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.

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- the applicant is lawfully operating a business in or outside Australia;[39]

- *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';[40] 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';[41] 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.[42]

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 reg 2.68 (regs 2.68(e), (f), (j) and (k)). However, these do not apply from 18 March 2018 and also in relation to variation applications for a standard business sponsorship term made, but not finally determined, before 18 March 2018.[43] The criteria 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;[44]

- *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;[45]

- 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

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[39] reg 2.68(d). 'Outside Australia' is further defined in reg 1.03.
[40] reg 2.68(g). This regulation was amended by *Migration Legislation Amendment (2016 Measures No 1) Regulation 2016* (Cth) (F2016L00523) to include the requirement in reg 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 reg 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.
[41] reg 2.68(h). The meaning of 'adverse information' is explained in reg 1.13A and 'associated with' in reg 1.13B.
[42] reg 2.68(i).
[43] See clause 6704(5) of sch 13 to the Regulations, as inserted on 18 March 2018 by F2018L00262.
[44] reg 2.68(e).
[45] reg 2.68(f).

proposed number is reasonable, or the applicant has agreed in writing to another number proposed by the Minister;[46] and

- either the applicant fulfilled any commitments and complied with applicable obligations relating to training requirements, or it is reasonable to disregard that requirement.[47]

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.[48]

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: reg 2.68(a)

The application for variation must be made in accordance with the process in reg 2.66. Information on this process is set out above.

Applicant is a standard business sponsor: reg 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.[49] '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.[50]

If approval as a standard business sponsor has ceased before the decision on the application to vary has been made, Departmental policy recommends that the application to vary be considered as an application for approval as a standard business sponsor.[51] This is possible because the

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[46] reg 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.
[47] reg 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.
[48] See Explanatory Statement to F2018L00262, items 53, 56, 178.
[49] reg 1.03.
[50] reg 2.63(2).
[51] Policy – Migration Regulations – Divisions > Div 2.11-Div 2.16 Temporary Work (Skilled) visa (subclass 457) – sponsorships – [4.7] Varying the length of sponsorship agreement (reissued 1/7/2017, 17/1/2018-17/3/2018 stack: N.B. this is the last compilation relevant to

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: regs 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 reg 2.59. For further information regarding these criteria, see Approval as standard business sponsor.

Temporary activities sponsor

Regulation 2.68A (as in force from 19 November 2016)[52] sets out the criteria for variation of terms of a temporary activities sponsor approval. The criteria are that the Minister is satisfied that:

- the person satisfies the criterion for approval as a temporary activities sponsor set out in reg 2.60;[53] and
- the person has applied for the variation in accordance with the process referred to in reg 2.66.[54]

Applicant satisfies criteria for approval as temporary activities sponsor: reg 2.68A(a)

The criteria for approval as a temporary activities sponsor are prescribed in reg 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 reg 2.61;[55]
- the applicant is not already a temporary activities sponsor;[56]
- 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;[57]

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variation of standard business sponsorship approvals). This reflects comments in the Explanatory Statement to SLI 2009, No 115 at p.24.

[52] 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.

[53] reg 2.68A(a) (as in force from 19 November 2016).

[54] reg 2.68A(b) (as in force from 19 November 2016). Regulation 2.68A(b) was amended by F2018L00262 on 18 March 2018 to substitute '2.61' with '2.66'.

[55] reg 2.60(a) (as in force from 19 November 2016).

[56] reg 2.60(b) (as in force from 19 November 2016).

[57] reg 2.60(c) (as in force from 19 November 2016). Note that 'superyacht' is defined in reg 1.15G by reference to an instrument made by the Minister. The relevant instrument can be accessed from the Register of instruments - Business visas.

- 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;[58] and
- the applicant has the capacity to comply with the sponsorship obligations applicable to a person who is or was a temporary activities sponsor.[59]

These criteria are discussed in more detail in Approval as a temporary activities sponsor.

Applicant has applied for variation in accordance with prescribed process: reg 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.

Common criterion – transfer, recovery and payment of costs: reg 2.68J

Regulation 2.68J applies to all classes of work sponsors 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 an approved work sponsor or recruiting non-citizens, including for the purposes of nomination under s 140GB(1) of the Act.[60] These costs specifically include migration agent costs.

For applications for variation of a term of approval made on or after 18 March 2018, reg 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.[61] For applications for variation made on or after 12 August 2018, these costs expressly include nomination training contribution charge.[62]

Regulation 2.68J(4) provides that the Minister may disregard a criterion referred to in reg 2.68J(2) or (3) if he/she considers is reasonable to do so. The Explanatory Statement which accompanied the amending regulations which inserted this provision states that an example of when the Minister may consider it reasonable to disregard the criteria in reg 2.68J(2) or (3) is where a sponsor inadvertently has a minor failure that, once identified, is rectified by the sponsor.[63]

Notice of decision

The requirements for notice of a primary decision on an application to vary terms of approval as a standard business sponsor or a temporary activities sponsor are set out in reg 2.69.

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[58] reg 2.60(d) (as in force from 19 November 2016).
[59] reg 2.60(e) (as in force from 19 November 2016).
[60] regs 2.68J(2)–(3). Inserted by *Migration Amendment Regulation 2013 (No 5)* (Cth) (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 reg 2.68J was subject to minor amendment from 19 November 2016 by F2016L01743.
[61] regs 2.68J(2)(ba), (bb), 2.68J(3)(a)(ia), (b)(ia) as inserted by F2018L00262.
[62] regs 2.68J(2)(ba), (bb), 2.68J(3)(a)(ia), (b)(ia) as amended by *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (F2018L01093). The amending regulations and the *Migration Amendment (Skilling Australians Fund) Act 2018* (Cth) (No 38, 2018) which commenced on 12 August 2018 introduced a new requirement to pay a nomination training contribution charge in relation to a prescribed nomination, replacing the sponsoring employer's Australian training requirements.
[63] Explanatory Statement to SLI 2013, No 147, Attachment C, p.6.

The requirements are that the notification of decision must:

- be in writing;[64]
- within a reasonable period after making the decision;[65]
- attach a written copy of the decision to vary or not to vary the term of the approval;[66] and
- if the decision is not to vary the term of the approval, attach a statement of reasons for the decision.[67]

There is no definition of 'reasonable period' for notifying a decision after it has been made in relation to reg 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.[68] 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).[69] From 18 March 2018, all notices can be given in electronic form.[70]

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	Legislation Bulletin
Migration Legislation Amendment (Worker Protection) Act 2008 (Cth)	No 159, 2008	No 2/2009
Migration Amendment Regulations 2009 (*No 5*) (Cth) (as amended)	SLI 2009, No 115	No 11/2009
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No 1/2010
Migration Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 13	No 1/2011

[64] reg 2.69(1).
[65] reg 2.69(1)(a).
[66] reg 2.69(1)(b).
[67] reg 2.69(1)(c).
[68] Explanatory Statement SLI 2009, No 115, p.29.
[69] reg 2.69(2). Amended to include reference to form 1478 (Internet) from 19 November 2016 by F2016L01743.
[70] reg 2.69(2) as amended by F2018L00262.

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Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 9/2012
Migration Amendment Regulation 2013 (No 5) (Cth)	SLI 2013, No 145	No 10/2013
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523	No 1/2016
Migration Amendment (Temporary Activity Visas) Regulation 2016 (Cth)	F2016L01743	No 6/2016
Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018
Migration Amendment (Skilling Australians Fund) Act 2018 (Cth)	No 39, 2018	No 2/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 2/2018
Migration Amendment (Family Violence and Other Measures) Act 2018 (Cth)	No 162, 2018	No 1/2019
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 3/2019

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.

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SUBCLASS 408 (TEMPORARY ACTIVITY) (CLASS GG) AND SUBCLASS 407 (TRAINING) (CLASS GF)

Overview

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Passes the support test

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Overview[1]

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.[2] 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.[3] These visa types were accompanied by associated changes designed to streamline the previously existing requirements of sponsorship, nomination, visa application and grant.[4]

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.[5] 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.[6] 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 Approval as a temporary activities sponsor and Temporary work nominations.

Merits review

Subclass 408

Onshore visa applications

A decision to refuse a Subclass 408 visa is reviewable under Part 5 of the *Migration Act 1958* (Cth) (the Act) if the visa applicant made the application while in the migration zone (s 338(2)).[7] In that circumstance a review application must be made by the visa applicant.[8]

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Introduced by the *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (F2016L01743).
[3] See Explanatory Statement to F2016L01743, p.1.
[4] See Explanatory Statement to F2016L01743, p.1.
[5] 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 Legislation Bulletin No 6/2016 for further details of the reforms.
[6] Note that the Research stream of the Subclass 402 has been incorporated into the Subclass 408 visa.
[7] As Subclass 408 is not prescribed for the purposes of s 338(2)(d), only ss 338(2)(a), (b) and (c) need to be satisfied.

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,[9] or a Commonwealth agency, or a State/Territory agency:[10] s 338(9) and reg 4.02(4)(p) of the *Migration Regulations 1994* (Cth) (the Regulations). '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.[11]

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 reg 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 cl 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 reg 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*

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[8] s 347(2)(a).
[9] For decisions made before 13 December 2018, reg 4.02(4)(p)(ii) as inserted by F2016L01743 sets out these types of sponsors.
[10] For decisions made on or after 13 December 2018, reg 4.02(4)(p)(ii) as substituted by the *Migration Amendment (Enhanced Integrity) Regulations 2018* (Cth) (F2018L01707) provides that a nominator or sponsor must be a person, company or partnership referred to in reg 4.02(4AA), which lists the same categories of sponsors as pre-13/12/2018 reg 4.02(4)(p)(ii), with the addition of Commonwealth agencies. For decisions made on or after 16 November 2019, a State or Territory government agency is also added to the list of sponsor/nominator (reg 4.02(4AA)(g) inserted by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578)).
[11] s 347(2)(d) and reg 4.02(5)(o) as inserted by F2016L01743.

an application for review of a decision not to approve the sponsor has been made and that decision is pending;[12] 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.[13]

Applications for review in the former circumstances must be made by the visa applicant,[14] and in the latter the sponsor or nominator.[15]

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);[16] *or*
  - the applicant is a secondary applicant.[17]
- 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 reg 4.02(4AA); *or*

[12] s 338(2)(d) and reg 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 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 Subclass 457 visa.
[13] reg 4.02(4)(o) as inserted by F2018L01707. See Subclass 457 visa for discussion of the identically worded reg 4.02(4)(l).
[14] s 347(2)(a).
[15] s 347(2)(d) and reg 4.02(5)(n).
[16] s 338(2)(d) as substituted by *Migration and Other Legislation Amendment (Enhanced integrity) Act 2018* (Cth) (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).
[17] s 338(9) and reg 4.02(4)(q), which was inserted by F2018L01707, provide that a decision to refuse to grant a visa prescribed under reg 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 ss 338(2)(a)–(c) are met in relation to the non-citizen and the visa.

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- 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 reg 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 reg 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.[18]

Applications for review relating to onshore applicants must be made by the visa applicant[19] or, for secondary applicants, 'a person to whose application the decision relates'.[20] For offshore applications, the person with standing is the person who applied to become the sponsor or who nominated the applicant.[21]

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 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,[22] 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* (Cth) (the Regulations), and include the following requirements:

- **form** – as specified in a legislative instrument;[23]
- **manner and place** – as specified in a legislative instrument, currently requires it to be an online application;[24]

[18] s 338(9) and reg 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.
[19] s 347(2)(a).
[20] s 347(2)(d) and reg 4.02(5)(p) as inserted by F2018L01707.
[21] s 347(2)(d) and reg 4.02(5)(n) as amended by F2018L01707.
[22] Fees can be refunded in the limited circumstances prescribed in reg 4.14.
[23] Item 1237(1). See 'TempWorkApps' tab of the Register of instruments - Business visas for current instrument.

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- **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;[25]

- **location** – visa applicant can be in or outside Australia when the application is made, but not in immigration clearance;[26]

- **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;[27]

- **last visa held** – there are certain requirements relating to an applicant's current or last held visa;[28]

- **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.[29]

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;[30] 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.[31]

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[24] Item 1237(3), item 1 in table. See 'TempWorkApps' tab of the Register of instruments - Business visas for current instrument.
[25] Item 1237(2). See '408Events&Classes' tab of the Register of instruments - Business visas for current instrument.
[26] Item 1237(3), item 2 in table.
[27] Items 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.
[28] Item 1237(3), items 3–5 in table.
[29] Item 1237(3), item 6 in table.
[30] 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).
[31] Item 1238(3) items 3–5 in table.

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.[32] All criteria must be satisfied at the time a decision is made on the application.[33]

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 opportunities, or conditions of employment, for Australian citizens or Australian permanent residents;[34]
- **health insurance** – must have adequate arrangements for period of intended stay;[35]
- **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);[36]
- **visa held** – the applicant must not hold a permanent visa or a temporary visa of a kind specified by legislative instrument (none currently specified);[37]
- **adequate means of support** – the applicant has adequate means or access to adequate means to support themselves during the period of intended stay;[38]
- **public interest and special return criteria** – various must be satisfied;[39]

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[32] cls 408.222(2)–(3).
[33] See Note 2 under heading to sub-div 408.2.
[34] cl 408.211.
[35] cl 408.212.
[36] 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.
[37] cl 408.214.
[38] cl 408.215.
[39] cls 408.216, 408.217. Relevant criteria to be satisfied include health criterion 4005 (see Health criteria - PIC 4005, 4006A and 4007 for further discussion) and PIC 4020 relating to the provision of false or misleading information or bogus documents (see PIC 4020, bogus documents and false or misleading information for further discussion).

- **no payment for visas conduct** – the applicant has not, in the previous 3 years, engaged in conduct in contravention of s 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;[40]

- **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);[41]

- **alternative clause applies** – it is a common criterion that one of the alternative clauses set out in Subdivision 408.22 applies to the applicant.[42]

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.[43] 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.

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.[44] Generally, the types 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 instruments - Business visas.

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;[45]

- **English** – the applicant must have 'functional English' (as defined in s 5(2) of the Act: see English Language Ability - Skilled/Business Visas for further information);[46]

[40] cl 408.218.
[41] cl 408.219.
[42] cl 408.219A.
[43] Note that one of the requirements of the Domestic Worker clause (cl 408.224(b)(ii)) was amended to refer to the new Subclass 482 visa, with effect for all live applications on 18 March 2018: *Migration Legislation Amendment (Temporary Skills Shortage Visa and Complementary Reforms) Regulation 2018* (Cth) (F2018L00262).
[44] cl 408.229.
[45] cl 407.211.

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- **sponsorship** – an approved temporary activities sponsor[47] 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;[48]

- **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 reg 2.72A) and has not ceased;[49]

- **no adverse information** – either there is no adverse information known to 'Immigration'[50] about the sponsor or a person associated with the sponsor or it is reasonable to disregard any such information;[51]

- **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;[52]

- **health insurance** – must have adequate arrangements for period of intended stay;[53]

- **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);[54]

- **visa held** – the applicant must not hold a permanent visa or a temporary visa of a kind specified by legislative instrument (none currently specified);[55]

- **adequate means of support** – the applicant has adequate means or access to adequate means to support themselves during the period of intended stay;[56]

- **public interest and special return criteria** – various must be satisfied;[57]

- **no payment for visas conduct** – the applicant has not, in the previous 3 years, engaged in conduct in contravention of s 245AR(1), 245AS(1), 245AT(1) or 245AU(1)

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[46] cl 407.212.
[47] Or, if the visa application was made on or before 18 May 2017, a professional development sponsor or a training and research sponsor.
[48] cl 407.213.
[49] cls 407.214(a)–(c).
[50] Immigration is defined in reg 1.03 as 'the Department administered by the Minister administering the *Migration Act 1958*', regardless of the name of that department.
[51] cl 407.214(d). 'Adverse information' is defined in reg 1.13A, 'associated with' is defined in reg 1.13B.
[52] cl 407.215.
[53] cl 407.216.
[54] 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.
[55] cl 407.218.
[56] cl 407.219.
[57] cls 407.219A, 407.219B. Relevant criteria to be satisfied include health criterion 4005 (see Health criteria - PIC 4005, 4006A and 4007 for further discussion) and PIC 4020 relating to the provision of false or misleading information or bogus documents (see PIC 4020, bogus documents and false or misleading information for further discussion).

of the Act (essentially relating to payments for visas or sponsorship) or that it is reasonable to disregard such conduct.[58]

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.[59]

This criterion should be considered at the time of decision.[60]

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.[61]

Complied substantially with conditions of last visa

The wording of cls 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 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.[62] 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

[58] cl 407.219C.
[59] cls 408.213, 407.217.
[60] 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.
[61] cls 408.315, 407.315.
[62] 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 cls 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'.

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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.[63]

What constitutes 'substantial compliance' with visa conditions has been considered by the courts in the student visa context, as discussed in 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,[64] 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'.[65] 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).[66] Additionally, for visas granted on the basis of the entertainment clause applying, condition 8109 (time/place of engagements must not change) must be imposed.[67]

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).[68]

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.

[63] Departmental policy on cl 408.213 refers to the general policy on 'Substantial compliance with visa conditions', which do support the reading of 'or' as 'as well as' if applicable. However, the policy states that it '*does not deal with the sch 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 sch 2 'genuine intention' criteria*': Policy - Sch8 - Visa conditions - About visa conditions at [6] (reissued 18/4/15).
[64] A visa is either subject to specified conditions (s 41(1) and reg 2.05(1)) or the Minister may impose certain conditions on a visa (s 41(3) and reg 2.05(2)): *Krummrey v MIMIA* (2005) 147 FCR 557 at [28].
[65] The Full Federal Court in *Krummrey v MIMIA* (2005) 147 FCR 557 at [29] interpreted the language of a condition which 'must be imposed' in sch 2 as being a condition to which visas 'are' subject. There is no further action of 'imposing' the condition.
[66] cl 408.611(a).
[67] cl 408.611(b).
[68] cl 407.611.

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In respect of the Subclass 408 criterion, Departmental policy outlines 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 role;
- whether the applicant's proficiency in English is consistent with their supported activities (noting applicants are not required to undertake English language testing);
- further consideration should be given to the applicant's intentions if it appears the applicant's qualifications/competencies or background is significantly inconsistent with the supported activities.[69]

Policy also directs 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.[70]

While policy 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 Application of policy.

For the Subclass 407 criterion, cl 407.217, Departmental policy states that 'this criterion must be assessed in accordance with the direction given by the Minister under s 499 for Genuine Temporary Entry'.[71] However, no such direction appears to have been given.[72]

Can a Subclass 407 visa applicant change sponsors?

While applicants must specify in their visa application the person who has agreed to be their approved sponsor, and identify an approved or undecided nomination of an occupational training program (in the case of non-Commonwealth agency sponsors),[73] these requirements are not expressly linked to the Schedule 2 criteria. All of the Schedule 2 criteria

[69] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Genuine entrant for temporary stay – clause 408.213 (reissued 29/2/2020).
[70] While the policy goes 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.
[71] Policy – 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 21 September 2018).
[72] 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.
[73] Item 1238(3) table items 3, 4 and 5 of sch 1 to the Regulations.

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must be satisfied at the time of decision. Most relevantly, cl 407.213 requires in general terms that the applicant has a current approved sponsorship, and cl 407.214 requires that there is (for non-Commonwealth agency sponsors) an approved and current nomination of a program of occupational training in relation to the applicant. In addition, the Regulations elsewhere clearly anticipate that there may be multiple nominations associated with a Subclass 407 visa, for example, condition 8107(5), which may be imposed on Subclass 407 visa holders, prohibits ceasing engaging in the most recently nominated program in relation to which the holder is identified, engaging in work or an activity that is inconsistent with the most recently nominated program, and engaging in work or an activity for an employer other than that in the most recent nomination. Therefore, there does not appear to be anything preventing the sponsor changing between time of application and time of decision, as long as all relevant requirements are met.

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 clauses are met.

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' tab of the Register of instruments - Business visas).[74] 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.[75]

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

[74] Schedule 1 items 1237(2)(a)(i)–(iii).
[75] Items 1237(3) table item 3 and 1237(4)–(5).

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organisation' as defined in reg 2.57[76] 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:[77]

- the person is an approved sponsor who has agreed in 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) an approved work sponsor, and this means 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.[78] 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.

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.[79] 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.[80] 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 Approval as a temporary activities sponsor. Note that the definitions of these terms changed on 18 March 2018 (for visa applications made on or after that date).[81]

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[76] See cl 408.111.
[77] cl 408.111.
[78] 'Work sponsor' was introduced as a type of 'approved sponsor' on 17 April 2019 as 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* (Cth) (No 162, 2018) and *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551).
[79] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – 3.3 Assessing a Temporary Activity visa application – Meaning "passes the sponsorship test" (reissued 29/2/2020).
[80] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – 3.3 Assessing a Temporary Activity visa application – Unpaid activities; Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – 3.3 Assessing a Temporary Activity visa application – Religious institution–does it pass the sponsorship test–adverse information (reissued 29/2/2020).
[81] F2018L00262.

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:[82]

- a letter of support is provided if requested by the Minister, outlining various specified details of the proposed activity;[83] 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,[84] 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 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'.

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[82] cl 408.111.
[83] Note that the Department's policy indicates that the Department will seek more details, as a matter of policy, than reflected in the terms of cl 408.111: Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – 3.3. Assessing a Temporary Activity visa application – Meaning of "passes the support test" (reissued 29/2/2020).
[84] Clause 408.112 was amended by F2018L00262.

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.[85] 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 reg 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

(c) that meets the requirements of section 50-50 of the *Income Tax Assessment Act 1997*; and

[85] Explanatory Statement to F2016L01743, p.21.

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(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* (Cth) 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* (Cth),[86] and endorsed by the Commissioner as exempt from income tax.[87] 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).[88]

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.[89]

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.[90]

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).[91] Such activities will generally involve work of

[86] s 50-47 and definition of 'ACNC type entity' in s 995-1 of the *Income Tax Assessment Act 1997* (Cth) (Income Tax Assessment Act) and s 25-5(5) of the *Australian Charities and Not-for-Profit Commissions Act 2012* (Cth).
[87] Income Tax Assessment Act ss 50-52, 50-105.
[88] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Activity type criteria – Religious Worker - clause 408.223 – Religious institution (reissued 29/2/2020).
[89] cls 408.223(a), (c).
[90] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Religious Worker - clause 408.223 - Work or participation that directly serves the religious objectives of the institution (reissued 29/2/2020).
[91] Definitions drawn from Macquarie Dictionary online (www.macquariedictionary.com.au accessed 25 September 2017).

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a devotional nature, for example conducting worship, providing spiritual leadership, teaching of religion, ministering, providing pastoral care or proselytising, and full-time choral director.[92]

Departmental policy 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, aged care, providing meals for the community;
- being involved in building or construction projects for a religious institution; or
- undertaking training to attain a qualification within the institution or organisation.[93]

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.[94]

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.[95] 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.[96] 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.[97]

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[92] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Religious Worker - clause 408.223 - Work or participation that directly serves the religious objectives of the institution (reissued 29/2/2020).
[93] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Religious Worker - clause 408.223 - Work or participation that directly serves the religious objectives of the institution (reissued 29/2/2020).
[94] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Religious Worker - clause 408.223 – Engaged on a full-time basis (reissued 29/2/2020).
[95] cl 408.223(d).
[96] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Activity type criteria – Religious Worker - clause 408.223 – Religious work (reissued 29/2/2020).
[97] Policy – Migration Regulations – Schedules – Temporary Activity (Subclass 408) visa – Activity type criteria – Religious Worker - clause 408.223 – Religious work (reissued 29/2/2020). 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.

Relevant case law

Judgment	Judgment summary
Jayasekara v MIMIA [2006] FCAFC 167; (2006) 156 FCR 199	Summary
Krummrey v MIMIA (2005) 147 FCR 557	Summary
Musapeta v MIAC [2007] FMCA 729	
Weerasinghe v MIMIA [2004] FCA 261	Summary

Relevant legislative amendments

Title	Reference Number	Legislation Bulletin
Migration Amendment (Temporary Activity Visas) Regulation 2016 (Cth)	F2016L01743	No 06/2016
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 01/2018
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (Cth) (No 90)	C2018A00090	No 03/2018
Migration Amendment (Enhanced Integrity) Regulations 2018 (Cth)	F2018L01707	No 05/2018
Migration Amendment (Family Violence and Other Measures) Act 2018 (Cth)	No 162, 2018	No 01/2019
Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 (Cth)	F2019L00551	No 03/2019

Available decision precedent

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 which can be used to satisfy cl 408.219A.

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SUBCLASS 124 (DISTINGUISHED TALENT) (MIGRANT) (CLASS AL) AND SUBCLASS 858 (GLOBAL TALENT) (CLASS BX)

Overview

Merits review

- Subclass 124
- Subclass 858

Requirements for a valid visa application – Schedule 1

Visa criteria – Schedule 2

- Time of application criteria
  - Distinguished/Global Talent criteria
  - Additional requirements for Subclass 858 applications made before 14 November 2020
- Time of Decision Criteria

Legal issues

- Record of exceptional and outstanding achievement
- Internationally recognised
- Still prominent in the area
- Would be an asset to the Australian community
- Obtaining employment or becoming established independently
- Nomination
- Exceptional benefit to the Australian community

Relevant case law

Released by the AAT on 28 February 2022

Relevant legislative amendments

Available decision template/precedent

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Overview[1]

Distinguished Talent/Global Talent[2] 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.[3]

Prior to 14 November 2020, there were two classes of Distinguished Talent visa: Distinguished Talent (Migrant) (Class AL) and Distinguished Talent (Residence) (Class BX). The Class AL contained the Subclass 124 (Distinguished Talent) visa and the Class BX contained the Subclass 858 (Distinguished Talent) visa.[4] From 14 November 2020, the Subclass 124 visa was repealed[5] and Subclass 858 was amended to enable applicants to apply for and be granted the Subclass 858 visa regardless of their location or their previous visa status.[6] However the repeal of the Subclass 124 visa from 14 November 2020 does not affect the processing of visa applications made before that date.

From 27 February 2021, the Distinguished Talent (Class BX) visa was renamed Global Talent (Class BX) visa to better reflect the visa's primary role of attracting exceptionally skilled migrants in priority sectors and high value businesses to Australia under the Global Talent Independent program.[7] A dedicated pathway for the grant of the Global Talent visa to applicants who are endorsed by the Prime Minister's Special Envoy for Global Business and Talent Attraction as being likely to make a significant contribution to the Australian economy was also introduced from this date.[8]

Applications by persons with an internationally recognised record of exceptional and outstanding achievement in a specified area is more commonly reviewed by the Tribunal and is thus the focus of this commentary. The criteria that must be met by these applicants 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 Application of policy.

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] The name of Class BX visa was changed from Distinguished Talent to Global Talent by *Migration Amendment (2021 Measures No 1) Regulations 2021* (Cth) (F2021L00136) from 27 February 2021 to reflect a focus on the Government's Global Talent Program: see footnote 7 below.
[3] cls 124.211(2), (4), and cls 858.212(2), (4) of sch 2 to the Regulations.
[4] Item 1112 (for Subclass 124) and item 1113 (for Subclass 858) of sch 1 to the Regulations as in force prior to 14 November 2020. The Subclass 124 visa was for offshore visa applicants and could be applied for whilst the visa applicant was either onshore or offshore but the visa applicant must have been outside Australia when the visa was granted: cl 124.411. The Subclass 858 was for onshore visa applicants only.
[5] Items 2 and 3, pt 1 of sch 2 to *Home Affairs Legislation Amendment (2020 Measures No 2) Regulations 2020* (Cth) (F2020L01427). However an application may still be taken to have been made in accordance with reg 2.08 or 2.08A (i.e. adding a dependent child or spouse/de facto partner before a decision is made) before, on or after 14 November 2020: see the transitional provision in cl 9202(2) of sch 13 to F2020L01427.
[6] cl 1113(3)(b) of sch 1 to the Regulations, amended by item 7, pt 2 to F2020L01427. The word 'Residence' was also omitted and it is now Distinguished Talent (Class BX).
[7] Amendments to various provisions of the Regulations made by pt 1 of sch 4 to F2021L00136. See also the Explanatory Statement to F2021L00136 at pp.9–10, 18.
[8] Inserted by pt 2 of sch 4 to F2020L00136. See relevant sch 1 and sch 2 requirements below.

Merits review

Subclass 124

A decision to refuse a Subclass 124 (Distinguished Talent) (Migrant) (Class AL) visa, where a valid review application was not made before 27 February 2021, is reviewable under s 338(5) of the *Migration Act 1958* (Cth) (the Act) if the visa applicant is sponsored or nominated under s 338(5)(b).[9] This is only likely to arise under the category of internationally recognised record of achievement where a Form 1000 is included with the application.[10]

The application for review must be lodged within 70 days after the visa applicant is notified of the visa refusal decision.[11] The nominator has standing to apply for review.[12]

For visa applications made before 14 November 2020 but not finally determined before 27 February 2021,[13] a decision to refuse a Subclass 124 visa is a reviewable decision under:

- s 338(7A) if the visa applicant was outside the migration zone at the time of the visa application; or
- s 338(2) if the visa applicant was inside the migration zone but not in immigration clearance at the time of the visa application.[14]

In both circumstances, the application for review must be lodged within 21 days after the visa applicant is notified of the visa refusal,[15] and the visa applicant has standing to apply for review.[16] However, in the former, the applicant must be physically present in the migration zone both at the time the decision to refuse the visa was made and when the review application is made,[17] while in the latter, the applicant must be physically present in the migration zone when the review application is made.[18]

Subclass 858

For visa applications lodged both pre and post 14 November 2020, a decision to refuse a Subclass 858[19] (Class BX) visa is reviewable 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

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[9] Although the Subclass 124 visa was repealed and closed to new applications on or after 14 November 2020, the Tribunal continues to the have jurisdiction to review the refusal of a Subclass 124 visa that was applied for with the Department prior to that date even if the decision to refuse the visa was made after it.
[10] 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.
[11] reg 4.10(1)(c).
[12] s 347(2)(b).
[13] Clause 9503(1) of sch 13 to the Regulations (inserted by item 1 of sch 5 to F2020L00136) provides that cl 124.411 as in force immediately before 14 November 2020, which requires the applicant to be outside Australia when the visa is granted, does not apply to these Subclass 124 visa applications, effectively making it possible for the grant of the visa in or outside Australia but not in immigration clearance.
[14] Item 1112(3)(aa) of sch 1 to the Regulations allows an applicant for a Subclass 124 visa to be in or outside Australia but not in immigration clearance.
[15] reg 4.10(1)(a).
[16] s 347(2)(a).
[17] s 347(3A).
[18] s 347(3).
[19] Note that the reference to 'Residence' is removed from 14 November 2020 as the restructure of the Subclasses 124 and 858 visas into one visa (Subclass 858) that can be applied for and granted regardless of the location of the applicant makes this description redundant: see sch 2 to F2020L01427. Further, the name 'Distinguished Talent' is changed to 'Global Talent' from 27 February 2021 by pt 1 of sch 4 to F2021L00136: see footnotes 2 and 7 above.

visa refusal decision.[20] The visa applicant has standing to apply for review.[21] In addition, the review applicant must be in the migration zone when he or she applies for review.[22]

For visa applications made on or after 14 November 2020, a decision to refuse a Subclass 858 visa is also reviewable under s 338(7A) if the visa application was made outside Australia. The application for review must be made within 21 days after the visa applicant is notified of the visa refusal decision.[23] The visa applicant has standing to apply for review but they must have been physically present in the migration zone at the time the visa refusal decision was made and also when the review application is made.[24]

Requirements for a 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* (Cth) (the Regulations) respectively.[25] These are:

- the specified form;[26]
- visa application charge(s);[27]
- the application must be made at the place and in the manner specified;[28]
- *for Class BX (Subclass 858) applicants:*
    - *application made before 14 November 2020* – the applicant must be in Australia but not in immigration clearance;[29]
    - *application made on or after 14 November 2020* – the applicant may be in or outside Australia but not in immigration clearance,[30] and an applicant in Australia must hold a substantive visa or a bridging A, B or C visa;[31]
- *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

[20] reg 4.10(1)(a).
[21] s 347(2)(a).
[22] s 347(3).
[23] reg 4.10(1)(a).
[24] ss 347(2)(a) and (3A).
[25] Note that an application for Class AL (Subclass 124) visa cannot be made on or after 14 November 2020, except where an application is taken to have been made in accordance with reg 2.08 or 2.08A (i.e. adding a dependent child or spouse/de facto partner before a decision is made) before, on or after 14 November 2020: see the transitional provision in cl 9202(2) of sch 13.
[26] items 1112(1), 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): items 1112(1), 1113(1) as amended by *Migration Amendment (2015 Measures No 1) Regulation 2014* (Cth) (SLI 2015, No 34), sch 6, items 22 and 24. For applications made before 18 April 2015, form 47SV was prescribed in items 1112(1) and 1113(1).
[27] items 1112(2), 1113(2).
[28] items 1112(3)(a), 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): items 1112(3)(a), 1113(3)(a) as amended by SLI 2015, No 34, sch 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: items 1112(3)(a), 1113(3)(aa). Note that reference to specification of addresses in items 1112(3)(a), 1113(3)(aa) was amended by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30), sch 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: sch 1, item 314.
[29] item 1113(3)(b), as in force before 14 November 2020.
[30] item 1113(3)(b), as amended by F2020L01427.
[31] item 1113(3)(ba), inserted by F2020L01427.

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internationally recognised record of exceptional and outstanding achievement, the application must be accompanied by a completed approved form 1000;[32] and

- *for visa applications made on or after 27 February 2021 where the visa applicant seeks to meet the requirement of cl 858.229(2)*, the applicant must have been endorsed by the Prime Minister's Special Envoy for Global Business and Talent Attraction as being likely to make a significant contribution to the Australian economy if granted a Subclass 858 (Global Talent) visa.[33]

Applications by members of the family unit of a person who is an applicant for a Distinguished Talent/Global Talent visa can be made at the same time and place as, and combined with, the application by that person.[34]

Visa criteria – Schedule 2

Time of application criteria

The substantive requirements for the 'distinguished/global talent' criteria in cls 124.211[35] and 858.212[36] are the same for both visa subclasses and are discussed below. For applications made before 14 November 2020, Subclass 858 applicants must additionally meet criteria relating to visa status at the time of application as discussed below.

Distinguished/Global Talent criteria

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;[37] and
- is still prominent in the area;[38] and
- would be an asset to the Australian community;[39] and
- would have no difficulty in obtaining employment, or in becoming established independently, in Australia in the area;[40] and

[32] items 1112(3)(c), 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, an Australian permanent resident, an eligible New Zealand citizen or an Australian organisation, who has a national reputation in relation to the area (see also 'Note' to cls 124.211(2)(e) and 858.212(2)(e)). This requirement was inserted by items 1–2 of sch 2 to *Migration Amendment Regulations 2006 (No 2)* (Cth) (SLI 2006, No 123). Transitional provision is in reg 4(2) of SLI 2006, No 123.
[33] item 1113(3)(f), inserted by item 15 of pt 2, sch 4 to F2021L00136.
[34] items 1112(3)(b), 1113(3)(c).
[35] As in force before 14 November 2020.
[36] As in force before 27 February 2021.
[37] cls 124.211(2)(a), 858.212(2)(a).
[38] cls 124.211(2)(b), 858.212(2)(b).
[39] cls 124.211(2)(c), 858.212(2)(c).
[40] cls 124.211(2)(d), 858.212(2)(d).

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- if the visa application was made on or after 1 July 2006, produces a completed approved form 1000;[41] 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.[42]

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* (Cth); or
  - the Director-General of Security.[43]

For Subclass 858 visa applications made on or after 27 February 2021, the applicant is not required to meet either of the above alternatives if the applicant has been endorsed by the Prime Minister's Special Envoy for Global Business and Talent Attraction.[44]

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 who satisfies or has satisfied the primary criteria in Subdivision 124.21 (time of application criteria for primary applicants).[45]

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.[46]

For visa applications made between 1 November 2003 and 18 November 2016, regs 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.[47] For further information, see Member of the family unit (reg 1.12).

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[41] cls 124.211(2)(e), 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 sch 2 to SLI 2006, No 123. Transitional provision is in reg 4(2) of SLI 2006, No 123.
[42] cls 124.211(2)(f), 858.212(2)(f).
[43] cls 124.211(4), 858.212(4).
[44] cl 858.212(1), as repealed and substituted by item 16 of pt 2, sch 4 to F2021L00136.
[45] cl 124.311.
[46] cl 858.311.
[47] reg 1.12 as amended by *Migration Legislation Amendment (2016 Measures No 4) Regulation 2016* (Cth) (F2016L01696).

Additional requirements for Subclass 858 applications made before 14 November 2020

There are additional time of application requirements that only apply for a Subclass 858 visa application made before 14 November 2020.[48] These are:

- the applicant must not hold or have last held, a specified visa;[49] and
- if the applicant was not the holder of a substantive visa at the time of application, the applicant must meet Schedule 3 criteria 3001, 3003 and 3004.[50] 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:[51]

- for both subclasses – the applicant and members of the applicant's family unit must satisfy various public interest criteria[52] and certain passport requirements;[53]
- for Subclass 124 – where the applicant has previously been in Australia, the applicant must satisfy certain special return criteria;[54]
- for Subclass 858 applications made on or after 14 November 2020 – the applicant and each member of the family unit of the applicant who is included in the application must satisfy certain special return criteria.[55]

For Subclass 858 applications made on or after 27 February 2021, where the applicant, at the time of application, had been endorsed by the Prime Minister's Special Envoy for Global Business and Talent Attraction[56] as being likely to make a significant contribution to the

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[48] cl 858.211 was repealed by F2020L01427.
[49] cls 858.211(1), (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 sch 6, and item 1201 in sch 8 to the *Migration Legislation Amendment Regulation 2013 (No 1)* (Cth) (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)).
[50] cl 858.211(2)(a).
[51] There was also previously a discretionary criterion permitting the requiring of an assurance of support, found in cls 124.223 and 858.222, but these were repealed from 9 August 2008 by *Migration Amendment Regulations 2008 (No 3)* (Cth) (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.
[52] cls 124.221, 124.224, 124.225, 124.226, 124.228, 124.322, 124.325, 124.327, 858.221, 858.223, 858.224, 858.225, 858.227, 858.322, 858.324, 858.326. Note that for Subclass 858 applications made before 14 November 2020, cls 858.221 and 858.223 required the applicant and each member of the family unit (whether or not included in the application) to satisfy PIC 4005. For applications made on or after 14 November 2020, the applicant and each member of the family unit must satisfy PIC 4007, which provides the Minister with the discretion to waive the health requirement: cls 858.221(a), 858.223(1)(a) and (2)(b) amended by F2020L01427. For more information on PIC 4005 and 4007, see Health criteria – PIC 4005, 4006A and 4007.
[53] For visa applications made on or after 1 July 2005 but before 24 November 2012, applicants must meet cls 124.227, 858.226. For visa applications made on or after 24 November 2012 applicants must meet PIC 4021 (cls 124.221(a), 124.322(a), 858.221(a), 858.322(a)): see items 40, 42, 246 and 248, respectively, in sch 2 to the *Migration Legislation Amendment Regulation 2012 (No 5)* (Cth) (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 sch 2 to SLI 2012, No 256).
[54] cl 124.222.
[55] cl 858.228, inserted by F2020L01427.
[56] 'Prime Minister's Special Envoy for Global Business and Talent Attraction' means the SES employee, or acting SES employee, who occupies, or is acting in, the position of Prime Minister's Special Envoy for Global Business and Talent Attraction: reg 1.03, definition inserted by item 12 of pt 2, sch 4 to F2021L00136. The position was created by the Government

Australian economy if granted a Subclass 858 (Global Talent) visa, the Minister must be satisfied that the applicant is likely to make a significant contribution to the Australian economy if the visa is granted.[57] For this assessment, the Minister must not have regard to the fact that the applicant was endorsed by the Prime Minister's Special Envoy.[58]

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,[59] unless, in the case of a Subclass 858 applicant where the visa application was made in Australia, the secondary applicant meets one of the exceptions in cl 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.[60]

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)/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.[61] 'Achievement' as it appears in the relevant criterion is capable of denoting a single achievement and also of operating as a mass noun to denote two or more achievements.[62] 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.[63] What amounts to 'exceptional and outstanding achievement' is a matter of opinion and degree,[64] and it is not required that the applicant be a 'living

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to head the Global Business and Talent Attraction Taskforce, a body based in the Department of Home Affairs and the Australian Trade and Investment Commission, whose aim is to boost Australia's efforts to identify and attract high value business and exceptional talents to Australia to contribute to the development of the Australian economy: Explanatory Statement to F2021L00136, p.19.

[57] cl 858.229(2).

[58] cl 858.229(3). The effect of this subclause is that the Minister must make a fresh assessment of the endorsed applicant's claims, qualifications and other relevant matters and not rely solely on the fact that the applicant was endorsed by the Prime Minister's Special Envoy at the time of application: Explanatory Statement to F2021L00136, p.21.

[59] cls 124.321, 858.321.

[60] cls 124.322–124.327, 858.322–858.326. For applications made on or after 1 July 2005 but before 24 November 2012, secondary applicants also must meet cls 124.326, 858.325.

[61] *Springs v MICMSMA* [2020] FCCA 371 at [61]; *Zhang v MIMA* [2007] FMCA 664 at [36]–[37].

[62] *Springs v MICMSMA* [2020] FCCA 371 at [61].

[63] *Gaffar v MIMIA* [2000] FCA 293 at [19]–[20]. The Court was considering the phrase 'exceptional record of achievement' in an earlier category of skilled residence visa (cl 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 (see for example, *Springs v MICMSMA* [2020] FCCA 371 at [63]).

[64] *Springs v MICMSMA* [2020] FCCA 371 at [63]; upheld on appeal in *Springs v MICMSMA* [2021] FA 197 at [80]. In *Springs*, the applicant (musical/theatre actor) contended, among other things, that the Tribunal's ultimate state of non-satisfaction as to cl 852.212(2)(a) was irrational and illogical as the evidence supported his internationally recognised record of exceptional and outstanding achievement in the arts. The Court found that it was reasonably open to the Tribunal to rely on the inferences and implicit generalisations it drew from the evidence including that the applicant had primarily performed in supporting roles, his few principal or lead roles were performed in smaller venues for relatively short runs and his roles were obtained in an audition

treasure'.[65] 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 cls 124.211 and 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.[66]

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.[67] 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.[68]

With regard to 'exceptional and outstanding' achievement, Departmental policy states the following, among other things:

- individuals with an internationally recognised record of exceptional and outstanding achievement are usually those who are leaders in their particular field;
- an applicant would generally have a record of sustained and multiple achievement. However, a single achievement by an applicant may still be regarded as a record of 'exceptional and outstanding' achievement if that achievement is cutting edge and highly innovative in nature.[69]

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, it should not treat the policy as determinative, but rather ensure its consideration reflects the terms of the legislation. Further, government policy cannot form a pre-determined frame within which the Tribunal considers the relevant criteria, nor should its application relieve the Tribunal from considering a claim made by an applicant where the

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with others rather than as a result of his reputation or knowledge of him by the producers or directors, and it was necessary for the Tribunal to weigh these matters against its being satisfied the applicant has an internationally recognised record of exceptional and outstanding achievement (at [65]–[69]).

[65] *Gaffar v MIMIA* [2000] FCA 293 at [20].

[66] This follows the principle in *Bretag v Immigration Review Tribunal* [1991] FCA 582, a partner visa case. In *Singh v MIBP* [2018] FCCA 506 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 at [13]–[14].

[67] The Court in *Singh v MIBP* [2018] FCCA 506 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 where again the absence of an 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 [13]).

[68] Such an argument was raised, though ultimately rejected by the Court, in *Singh v MIBP* [2018] FCCA 506 at [36]. The Court did note that the Tribunal had used language other than that of the test in 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.

[69] Policy – Migration Regulations – Schedules – Sch2 Visa 124 - Distinguished Talent – 3.3.1.1 Must have an internationally recognised record of exceptional and outstanding achievement - 3.3.1.1.3 Policy requirements of 'record', 'exceptional' and 'outstanding' achievement (re-issued 17/5/2020); Policy – Migration Regulations – Schedules – Sch2 Visa 858 - Distinguished Talent – 3.3.1.1 The applicant's distinguished talent (re-issued 20/1/2021).

claim has a basis in the relevant criteria.[70] For further guidance on the appropriate application of policy see 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.

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.[71] 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.[72] 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.[73] 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 858.212/124.211).[74]

In another *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.[75]

[70] See *Ludgero v MICMSMA* [2021] FCCA 1060 where the Court held the Tribunal erred in failing to consider an integer of a claim because it was so focussed on applying the government policy set out in the PAM3 Guidelines. In *Ludgero*, the applicant claimed an internationally recognised record of exceptional and outstanding achievement in the sport of Brazilian Jiu Jitsu and submitted that his lineage which referred to the master-student relationship and connection to the origin of the sport was a relevant factor to consider. The Court found that the Tribunal had regard to the applicant's national and international rankings and results in international competitions among other considerations in accordance with the policy, but failed to identify or consider the lineage claim which was not irrelevant to the Tribunal's assessment of 'international recognition' in the circumstances of this case (see [62]–[66], [74]).
[71] *Singh v MIBP* [2017] FCCA 2992 at [5].
[72] *Singh v MIBP* [2017] FCCA 2992 at [12]–[13].
[73] *Singh v MIBP* [2017] FCCA 2992 at [21], [29].
[74] This was similarly the subject of argument in *Singh v MIBP* [2018] FCCA 506 though again in that instance no error was found (see [28], [30]). See also *Springs v MICMSMA* [2021] FCA 197 at [85]–[89], where the Court found no error in the Tribunal's reasons but observed that in the process of the subjective, open-textured assessment required by cl 858.212(2), it was inevitable the Tribunal will give an explanation for its conclusions which is couched in terms which lie outside the criteria themselves but those intermediate steps of reasoning cannot be permitted to supplant the criterion itself.
[75] *Singh v MIBP* [2018] FCCA 506 at [28].

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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'.

In *Springs*, the Court considered that the question of whether an applicant has an internationally recognised record of exceptional and outstanding achievement (in this case, in the arts) involves a determination by reference to the opinions or knowledge of persons or of a class of persons ('reference audience') who are distributed among two or more countries and are aware of the applicant's record of achievement. The Court suggested a non-exhaustive list of evidence which it considered may be relevant to determining whether there exists a reference audience who recognises the applicant's record of achievement to be 'exceptional and outstanding' and whether that record of achievement is internationally recognised:[76]

- Evidence that the activities that comprise the record of achievement are regularly assessed by a body of persons for their excellence, and exceptional and outstanding achievement is recognised by the granting of some award or honours that is communicated beyond one country. Evidence that an applicant has received such award or honour would be relevant to whether an applicant has an internationally recognised record of exceptional and outstanding achievement;
- Evidence that persons who participate in the activities are assigned roles and functions that reflect their record of achievement, with particular roles and functions being assigned to persons who are recognised as having a record of exceptional and outstanding achievement;
- Evidence that the activities are the subject of assessment by persons who have or are recognised as having expertise in assessing such activities for their excellence, and that such persons have expressed opinions to the effect that the record, or any part of the achievement, is exceptional and outstanding;
- Opinions by persons about the attributes of the applicant;
- Reputation evidence, including opinions from persons who have knowledge of the field of activities that comprise the applicant's record of achievement.

Departmental policy also provides some guidance as to this criterion but should be approached with caution as the Tribunal's consideration should always reflect the terms of the legislation. 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 and that an achievement that may attract national acclaim would be considered as 'internationally recognised' if that achievement is in an area practised in other countries and has, or would attract, similar acclaim in those countries.[77] 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:

[76] *Springs v MICMSMA* [2020] FCCA 371 at [63]–[64].
[77] Policy – Migration Regulations – Schedules – Sch2 Visa 124 - Distinguished Talent – 3.3.1.1 Must have an internationally recognised record of exceptional and outstanding achievement - 3.3.1.1.1 Policy requirements of international recognition (re-issued 17/5/2020); Policy – Migration Regulations – Schedules – Sch2 Visa 858 - Distinguished Talent – 3.3.1.1.1.1 Policy requirements of international recognition (re-issued 20/1/2021).

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- the field is undertaken and recognised in a number of countries; and
- the achievement would be similarly recognised in relation to international and Australian standards (where such standards apply) for that area.[78]

While the above is useful guidance, focussing on the policy considerations and thereby not properly engaging with the unique circumstances of each case, including those that fall outside of the policy considerations but are nonetheless relevant to the criterion of 'internationally recognised record of exceptional and outstanding achievement', may amount to an error for failure to consider a claim.[79]

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.[80] 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) or 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. The Tribunal should have regard to all the circumstances of the case in determining whether the person is 'still prominent'. Departmental policy provides the following list of information/documentation that may demonstrate the applicant's prominence in their field/area of expertise:[81]

- details of recently completed projects;
- details of recent publications;
- details of current and recently held senior positions in a sizable business or organisation;
- evidence of delivering a presentation at professional forums, conferences and events;
- reference letter from a university or employer;
- evidence of patents, trademarks, copyrights, and other intellectual property held;
- evidence of recent national and international awards;

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[78] Policy – Migration Regulations – Schedules – Sch2 Visa 858 - Distinguished Talent – 3.3.1.1.1.2 Assessing international recognition (re-issued 20/1/2021).
[79] In *Ludgero v MICMSMA* [2021] FCCA 1060, the Court held that the Tribunal failed to consider an integer of a claim because it was so focussed on applying the government policy set out in the PAM3 Guidelines. The applicant had claimed an internationally recognised record of exceptional and outstanding achievement in the sport of Brazilian Jiu Jitsu and submitted that his lineage which referred to the master-student relationship and connection to the origin of the sport was a relevant factor to consider. The Court found that the Tribunal had regard to the applicant's national and international rankings and results in international competitions among other considerations set out in the policy, but failed to identify or consider the lineage claim which was not irrelevant to the assessment of 'international recognition' in the circumstances of the case (see [62]–[66], [74]).
[80] cls 124.211(2)(b), 858.212(2)(b).
[81] Policy – Migration Regulations – Schedules – Sch2 Visa 124 - Distinguished Talent – 3.3.1.2 Must still be prominent (re-issued 17/5/2020); Policy – Migration Regulations - Schedules – Sch2 Visa 858 - Distinguished Talent - 3.3.2.2 Must still be prominent (re-issued 20/1/2021).

- evidence of membership of prominent international bodies, professional associations and current registrations/ licences.

Would be an asset to the Australian community

Departmental policy states that an applicant would be considered an asset if the applicant's settlement in Australia will be 'useful' to and benefit the Australian public, not limited to the applicant and/or nominator, prospective employer or the applicant's local community.[82] As the term 'asset' is not defined in the Regulations, its ordinary dictionary meaning should be applied, and it does not only refer to economic benefit but could also refer to social and/or cultural benefit to the Australian community.

Previously, the policy used 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.[83] This approach may be viewed as imposing an additional criterion than what is required by the Regulations (see *Wolseley v MIMA*[84] discussed below at Exceptional Benefit to the Australian Community). While the Court in *Worseley* 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 and acts as a reminder not to impose additional requirements on applicants outside the terms of the regulations.

Departmental policy sets out the following considerations in relation to determining whether the applicant would be an asset to the Australian community:[85]

An applicant will be an asset if they:

- raise Australia's technical and/or academic standards internationally;
- will introduce and/or transfer skills to Australia;
- will elevate Australia's competitiveness and reputation in sports and the arts; or
- will make a significant positive social or cultural impact on the Australian community,

which can be demonstrated by:

- evidence that they have created a product/technological advancement that is unique, and cutting edge in nature;
- evidence demonstrating that the applicant's research fills a significant knowledge gap and will be of benefit to industry, business or academia in Australia; or

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[82] Policy – Migration Regulations – Schedules - Sch2 Visa 124 - Distinguished Talent – 3.3.1.3 Must be an asset to Australia (reissued 17/5/2020); Policy – Migration Regulations – Schedules - Sch2 Visa 858 - Distinguished Talent – 3.3.2.3 Must be an asset to Australia (re-issued 20/1/2021).
[83] Policy – Migration Regulations – Schedules - Sch2 Visa 124 - Distinguished Talent – Must be an asset to Australia (version as reissued on 19/11/2016); Policy – Migration Regulations – Schedules - Sch2 Visa 858 - Distinguished Talent – Must be an asset to Australia (version as re-issued on 19/11/2016).
[84] *Wolseley v MIMA* [2006] FMCA 1149.
[85] Policy – Migration Regulations – Schedules - Sch2 Visa 858 - Distinguished Talent – 3.3.2.3 Must be an asset to Australia - 3.3.2.3.2 Assessing whether the applicant would be an asset to Australia (re-issued 20/1/2021).

- evidence of their involvement in successfully establishing a start-up company, which is still operating.

However, an applicant will not be an asset if they were involved in an area that:

- is outside the generally accepted social or cultural norms of most people in Australia;
- is 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.

Obtaining employment or becoming established independently

The requirement in cls 124.211(2)(d) and 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:[86]

- employment contracts or offers of employment related to the area of achievement for work in Australia. This may be evidenced by current and future employment opportunities from employers, employment/recruitment agencies, universities or organisations involved with the area of achievement in Australia;
- evidence of self-employment or opportunities to establish a viable business within the area of achievement;
- 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;
- evidence of academic qualifications in the applicant's area of achievement; or
- demonstrated track records of previous employment in the applicant's 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 an applicant would be unable to demonstrate that they would become independently established in their area of achievement should they migrate to and settle in Australia, solely by the existing funds and/or assets held by them.[87] 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

[86] Policy – Migration Regulations - Schedules - Sch2 Visa 858 – Distinguished Talent - 3.3.2.4 Employability – 3.3.2.4.2 Assessing employability (reissued 20/1/2021).
[87] Policy – Migration Regulations – Schedules - Sch2 Visa 124 – 3.3.1.4 Employability (reissued 17/5/2020); Policy – Migration Regulations - Schedules - Sch2 Visa 858 – Distinguished Talent - 3.3.2.4 Employability (reissued 20/1/2021).

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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[88] 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.[89] The Form 1000 itself[90] 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 cls 124.211(2)(e) and 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 referred to in the note. While a note forms part of the Regulations[91] and regard should be had to it in construing cls 124.211(2)(e) and 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.

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,[92] decision makers should start with the ordinary meaning of the word.

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.[93] It is erroneous to think of the 'community *as a whole*'

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[88] reg 2 of SLI 2006, No 123; Items 1112(3)(c), 1113(3)(d) and paras 124.211(2)(e) and 858.212(2)(e), inserted by sch 2 to SLI 2006, No 123.
[89] Items 1112(3)(c), 1113(3)(d).
[90] Accessed at https://immi.homeaffairs.gov.au/form-listing/forms/1000.pdf on 22 March 2021.
[91] Section 13(1) of the *Acts Interpretation Act 1901* (Cth) (applicable to the Regulations due to the operation of s 13(1) of the *Legislation Act 2003* (Cth)) provides that all material forms part of an Act.
[92] While reg 2.57(1) defines the phrase Australian organisation for pt 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.
[93] *Wolseley v MIMA* [2006] FMCA 1149 at [46]–[49].

as this is effectively introducing an additional criterion.[94] 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 cl 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 area in Australia'.[95]

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.[96] 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. The Tribunal should always consider the individual circumstances of each case.

Relevant case law

Judgment	Judgment summary
Gaffar v MIMIA [2000] FCA 293	
Ludgero v MICMSMA [2021] FCCA 1060	Summary
Singh v MIBP [2017] FCCA 2992	
Singh v MIBP [2018] FCCA 506	Summary
Springs v MICMSMA [2020] FCCA 371	
Springs v MICMSMA [2021] FCA 197	Summary
Wolseley v MIMA [2006] FMCA 1149	Summary

[94] *Wolseley v MIMA* [2006] FMCA 1149 at [48].
[95] Policy – Migration Regulations – Schedules - Sch2 Visa 124 - Distinguished Talent – 3.3.1.6 If under 18 years old, or 55 years or older – 3.3.1.6.1 Exceptional benefit (reissued 17/5/2020); Policy – Migration Regulations – Schedules - Sch2 Visa 858 - Distinguished Talent – 3.3.2.6 If under 18 years old, or 55 years or older – 3.3.2.6.1 Exceptional benefit (reissued 20/1/2021).
[96] Policy – Migration Regulations – Schedules - Sch2 Visa 124 - Distinguished Talent – 3.3.1.6 If under 18 years old, or 55 years or older – 3.3.1.6.1 Exceptional benefit (reissued 17/5/2020); Policy – Migration Regulations – Schedules - Sch2 Visa 858 - Distinguished Talent – 3.3.2.6 If under 18 years old, or 55 years or older – 3.3.2.6.1 Exceptional benefit (reissued 20/1/2021).

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Zhang v MIMA [2007] FMCA 664	Summary

Relevant legislative amendments

Title	Reference Number	Legislation Bulletin
Migration Amendment Regulations 2006 (No 2) (Cth)	SLI 2006, No 123	No 2/2006
Migration Amendment Regulations 2008 (No 3) (Cth)	SLI 2008, No 166	No 5/2008
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No 3/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Legislation Amendment (2016 Measures No 4) Regulation 2016 (Cth)	F2016L01696	No 4/2016
Home Affairs Legislation Amendment (2020 Measures No 2) Regulations 2020 (Cth)	F2020L01427	No 3/2020
Migration Amendment (2021 Measures No 1) Regulations 2021 (Cth)	F2021L00136	No 2/2021

Available decision template/precedent

There is no decision template specific to the Distinguished Talent/Global Talent visa classes. It is recommended that the generic decision template be used in these cases.

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SUBCLASS 186

EMPLOYER NOMINATION (PERMANENT) (CLASS EN)

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Overview

Merits review

Visa application requirements

Visa criteria

- Primary criteria
  - Common criteria
  - Criteria for the Temporary Residence Transition stream
  - Criteria for the Direct Entry stream
  - Criteria for the Labour Agreement stream
- Secondary criteria

Key issues

- Common criteria – no 'payment for visas' conduct
- Nomination requirements
  - Can a pre-1 July 2012 nomination be relied on?
  - Can a pre-18 March 2018 nomination be relied on?
  - Can a new nomination be relied on?
  - Adverse information
- Skills requirements – Direct Entry stream
  - First alternative – skills assessment and work experience

Second alternative – exempt persons

English language requirement – Temporary Residence Transition and Direct Entry streams

Can the applicant sit an English test after making the visa application?

Exempt applicants

Relevant case law

Relevant legislative amendments

Available decision template/precedent

Released by the AAT on 28 February 2022

Overview[1]

The Employer Nomination (Permanent) (Class EN) visa is a permanent visa introduced on 1 July 2012,[2] which replaced the Subclass 120 and 855 (Labour Agreement) visas, and the Subclass 121 and 856 (Employer Nomination) visas.[3] There is one subclass: Subclass 186.[4]

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 reg 5.19 of the *Migration Regulations 1994* (Cth) (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 Regulation 5.19 - Approval of nominated positions (employer nomination).

A person may be granted a Subclass 186 visa by meeting the requirements of one of three alternative 'streams', being:

- the Temporary Residence Transition (TRT) stream;
- the Direct Entry (DE) stream; and
- the Labour Agreement stream.[5]

Primary applicants must meet common criteria as well as the criteria for the stream in which they apply for the visa.

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Introduced by *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82).
[3] Explanatory Statement to SLI 2012, No 82, p.51.
[4] Item 1114B(4) of sch 1 to the Regulations.
[5] 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* (Cth) (F2018L00262).

Merits review

A decision to refuse a Subclass 186 visa is a reviewable decision under Part 5 of the *Migration Act 1958* (the Act) (Cth):

- 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]

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.[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 reg 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.[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]

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[6] s 338(2).
[7] ss 338(7A), 347(3A).
[8] s 347(2)(a).
[9] ss 347(3), (3A).
[10] Items 1114B(1) and (3)(a) of sch 1 to the Regulations. For applications made prior to 18 April 2015, the prescribed form is Form 1408 (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* (Cth) (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 reg 2.07(5).
[11] Item 1114B(3)(c).
[12] Item 1114B(3)(c).
[13] Item 1114B(3)(d). Note that from 18 March 2018 even positions nominated as part of a labour agreement must be made under reg 5.19, so that the terms of 1114B(3)(d) were amended by F2018L00262 to refer simply to positions nominated under reg 5.19.
[14] Item 1114B(3)(da) as inserted by *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* (Cth) (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.

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 reg 5.19 are discussed in Regulation 5.19 - Approval of nominated positions (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 186 visa are set out in Part 186 of Schedule 2 to the Regulations. They comprise of 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.[16]

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.[17]

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.[18]

Common criteria

The common criteria that must be met by all primary applicants are set out in sub-div 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:

[15] Item 1114B(3)(e).
[16] cl 186.411.
[17] Note to div 186.2.
[18] Note to div 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.

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- 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 the employment referred to in the application for nomination approval;[20]
- **no 'payment for visas' conduct** - the applicant has not engaged in conduct that breaches s 245AR(1), 245AS(1), 245AT(1) or 245AU of the Act, or it is reasonable to disregard the conduct (see discussion below);[21]
- **holders of Subclass 491 or Subclass 494 visas must have held them for at least 3 years at time of application** - for applications made on or after 16 November 2019, if at the time of application the applicant held a Subclass 491 (Skilled Work Regional (Provisional)) or Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, or the last substantive visa held was a Subclass 491 or 494, then they must have held that visa for at least 3 years at the time of application unless circumstances specified in a legislative instrument exist;[22]
- **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)[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 186 visa must satisfy certain PIC;[25] and

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[19] 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: Policy – 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).
[20] cl 186.212.
[21] 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.
[22] cl 186.212B(1). This requirement was inserted by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578) and applies to applications made on or after 16 November 2019. Clause 186.212B(2) gives the Minister the power to specify by legislative instrument circumstances for the purposes of cl 186.212B(1). There is no instrument in force at the time of writing (February 2020).
[23] cl 186.213. These PIC are (for primary visa applicant and secondary applicants): PIC 4001, 4002, 4003, 4004, 4010, 4020, and for visa applications from 24 November 2012, PIC 4021, 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)* (Cth) (SLI 2012, No 256), which repealed a similar criterion that was found in cl 186.215. Further information on some of these criteria can be found in: Public Interest Criteria 4001, PIC 4020, bogus documents and false or misleading information.
[24] cl 186.214. These are special return criteria 5001, 5002 and 5010. For information on these criteria, see Special Return Criteria (Schedule 5).
[25] cl 186.213(6). These are PIC 4001, 4002, 4003 and 4004.

- **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.[26]

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.[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]
- **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,

[26] 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.
[27] Policy – Migration Regulations – Schedules – Employer Nomination Scheme (subclass 186) – visa applications – [4] Policy intent – [4.2] Objectives of the programme (policy reissued 13 April 2018).
[28] cl 186.221, as amended from 18 March 2018 by F2018L00262. For the relevant instrument specifying the exempt class of persons, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.
[29] cl 186.222, amended for applications made on or after 1 July 2017 by *Migration Legislation Amendment (2017 Measures No 3) Regulations 2017* (Cth) (F2017L00816). For the relevant instrument specifying the exempt class of persons, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.

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» nominated in an application for approval that seeks to meet the requirements of reg 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; [30]

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;[31]

- the Minister has approved the nomination,[32] and it has not subsequently been withdrawn;[33]
- 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);[34]
- the position is still available to the applicant;[35] and
- the visa application was made no more than 6 months after the nomination was approved;[36] 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;[37] 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

[30] cl 186.223(1).
[31] cl 186.223(1) as amended by F2018L00262.
[32] cl 186.223(2).
[33] cl 186.223(3).
[34] 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.
[35] cl 186.223(4).
[36] cl 186.223(5).
[37] cl 186.224. For further information on PIC 4007, see Health Criteria - PIC 4005, 4006A and 4007.

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position relates, the applicant demonstrates that he or she has those skills in the manner specified.[38]

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.[39] 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;[40]
- **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);[41]
- **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 reg 5.19(4)(h)(i), or reg 5.19(2) as in force before 1 July 2012 (i.e. not a regional employer nomination);[42] or *where the position is nominated on or after 18 March 2018,* that seeks to meet the requirements of reg 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;[43] and
    - » in relation to which the declaration required for the visa application was made; [44] and

[38] cl 186.225 as inserted by F2018L00262.
[39] Policy - Migration Regulations - Schedules - Employer Nomination Scheme (subclass 186) - visa applications – [4] Policy intent – [4.2] Objectives of the programme (policy reissued 13 April 2018).
[40] cl 186.231, as amended for visa applications made on or after 1 July 2017 by F2017L00816. For the relevant instrument specifying the exempt class of persons, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business Visas.
[41] cl 186.232. For the relevant instrument specifying the exempt class of persons, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business Visas.
[42] cl. 186.233(1)(a).
[43] cl 186.233(1)(a) as amended by F2018L00262.
[44] cl 186.233(1).

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» *for applications made on or after 1 July 2017,* in relation to which the applicant is identified in the application under reg 5.19(4)(a)(ii);[45] 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;[46]

- the person who will employ the applicant is the person who made the nomination;[47]
- the Minister has approved the nomination,[48] and it has not subsequently been withdrawn;[49]
- 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);[50]
- the position is still available to the applicant;[51] and
- the visa application was made not more than six months after the nomination was approved;[52]

- **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),[53] unless the applicant is in a specified class of persons;[54] 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.[55]

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[45] cl 186.233(1)(aa) inserted by F2017L00816 for applications on or after 1 July 2017.
[46] cl 186.233(1)(a)(i) as inserted by F2018L00262.
[47] cl 186.233(2), as amended by SLI 2015, No 242.
[48] cl 186.233(3).
[49] cl 186.233(4).
[50] 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.
[51] cl 186.233(5).
[52] cl 186.233(6).
[53] cl 186.234(2), as amended by *Migration Amendment (Skills Assessment) Regulation 2013* (Cth) (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* (Cth) (SLI 2014, No 82) (for visa applications made on or after 1 July 2014).
[54] cl 186.234(3). For the relevant instrument specifying the exempt class of persons, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business Visas.
[55] cl 186.235. For further information on PIC 4005, see Health Criteria - PIC4005, 4006A and 4007.

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.[56] 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;[57]
  - *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;[58]
- **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,[59] or
  - *where the nomination was made on or after 18 March 2018,* 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;[60]
  - *only where the nomination was made before 18 March 2018,* the requirements of the labour agreement have been met in relation to the application;[61]
  - the nomination has been 'approved',[62] and has not subsequently been withdrawn;[63]

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[56] Policy - 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'.
[57] cl 186.241.
[58] cl 186.241 as amended by F2018L00262.
[59] cl 186.242(1). The term *labour agreement* is defined in reg 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.
[60] cl 186.242(1) as amended by F2018L00262.
[61] cl 186.242(2). Clause 186.242(2) was repealed by F2018L00262, except where the nomination was made before 18 March 2018.
[62] cl 186.242(3).
[63] cl 186.242(4).

  - 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);[64]

  - the position is still available to the applicant;[65]

- **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;[66]

- **qualifications/experience** - the applicant has the qualifications, experience and other attributes that are suitable for the position;[67] 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;[68]

- **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;[69]

- **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;[70]

- **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.[71]

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.[72] Additionally, they must be included in any nomination approved in respect of the primary

[64] cls 186.242(4A)(a), (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.
[65] cl 186.242(5).
[66] cl 186.242(6).
[67] cl 186.243; cl 186.243(1) as inserted by F2018L00262, for applications made on or after 18 March 2018.
[68] cl 186.243(2) as inserted by F2018L00262.
[69] cl 186.242(3) as inserted by F2018L00262.
[70] cl 186.242(4) as inserted by F2018L00262.
[71] cl 186.244. For further information on PIC 4005, see Health Criteria - PIC 4005, 4006A and 4007.
[72] cl 186.311. For further information on member of a family unit, see Member of the Family Unit (reg 1.12).

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applicant,[73] satisfy various public interest criteria and special return criteria,[74] and (for visa applications made before 24 November 2012) meet passport requirements.[75] 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 it is reasonable to disregard the conduct.[76]

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 s 245AR(1), 245AS(1), 245AT(1) or 245AU of the Act.[77] 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.[78] 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.[79] 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.

Nomination requirements

Applicants in all streams must meet a number of nomination requirements, as set out in cls 186.223, 186.233 and 186.242. These requirements must be met at time of decision. Questions may arise about which nominations can be relied on, and whether there is adverse information about the nominator.

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[73] cl 186.312.
[74] cls 186.313, 186.314.
[75] 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.
[76] 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 s 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.
[77] 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.
[78] cl 186.212A(b).
[79] 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 policy: Explanatory Statement to SLI 2015, No 242 at p.17. At the time of writing there were no published Departmental policy on these matters: Policy - Employer Nomination Scheme (subclass 186) - visa applications – [11.6] EN-186 - No payment for visas conduct (policy reissued on 13 April 2018).

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 reg 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.[80]

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 reg 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 reg 5.19(4)(h)(i) or reg 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 reg 5.19, so that the amendments to reg 5.19 that commenced on 1 July 2012 do not impact the nomination requirements in this stream.[81] 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 reg 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.[82] 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).

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[80] 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 sch 13 to the Regulations, pt 1 item [101], for transitional arrangements.
[81] Note that the terms of cl 186.242 and reg 5.19 were amended to incorporate a nomination approval under reg 5.19 for positions in this stream, but only for nominations of positions made on or after 18 March 2018.
[82] F2018L00262.

Can a new nomination be relied on?

It is a requirement for both the Temporary Residence Transition and Direct Entry streams (cls 186.223 and 186.233 respectively) that the *position* to which the visa application relates is the *position* in 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,[83] 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.[84] This was the view taken in *Singh v MIBP* [2017] FCAFC 105 (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.[85] Although the Court's comments were strictly *obiter*, they are nonetheless persuasive in relation to Subclass 187 visas and were applied in *Patel v MHA* [2019] FCA 1228 where the Court held that there was no argument for a substitution of employer or position for the purposes of satisfying cl 187.233.[86] As the relevant Subclass 186 criteria are in the same terms, the Court's reasoning also appears applicable to cls 186.223 and 186.233. It follows from this that in practice where a nomination is refused, the visa applicant will not meet cl 186.223 or 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.[87]

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[83] *Hasan v MIBP* [2016] FCCA 1049. This judgment considered cl 187.223(1)(c) but the interpretation would appear equally applicable to almost identically worded cls 186.223(1)(c) and 186.233(1)(b).
[84] *Singh v MIBP* [2017] FCAFC 105 at [88]. This is also the interpretation reflected in Departmental policy: Policy - 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).
[85] See *Kaur v MIBP* [2017] FCCA 564 which also considered whether the applicant could meet cl 187.233 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 sch 1 declaration was made. *Singh v MIBP* [2016] FCCA 2229 also concerned the equivalent requirements in cl 187.233. 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, 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.
[86] In *Patel v MHA* [2019] FCA 1228, the appellant had sought an adjournment to find a new employer to nominate a position for his visa application. The Court applied the *obiter* comment in *Singh* and found that there was no argument available for the purpose of satisfying cl 187.233 that there might be some form of substitution of employer or position (at [7]–[8]).
[87] cls 186.223(3A), 186.233(4A), 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.

'Adverse information' is defined in reg 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 reg 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.[88] The term 'associated with' is also given a non-exhaustive definition, in reg 1.13B, but again this varies depending on whether the visa applications was made before or on/after 18 March 2018. Both terms are discussed in more detail in Approval as 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.[89] 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 policy suggests 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 of 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.[90]

[88] reg.1.13A was repealed and substituted by F2018L00262.
[89] cl 186.223(3A)(b), 186.233(4A)(b) or 186.242(4A)(b).
[90] Policy - 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).

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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.[91]

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.[92]

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.[93] 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,[94]
  - *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.[95]
- Secondly, the applicant must have been employed in the occupation for at least 3 years *at the time of application*.[96] 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.[97]

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.[98]

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[91] For example, in *Oakwood Sydney Pty Ltd v MICMSMA* [2020] FCCA 2354, the Court held that the Tribunal was entitled to take into account other adverse information not known to Immigration when considering whether it was reasonable to disregard the adverse information known to Immigration under the similarly worded requirement in reg 5.19(3)(g)(ii).
[92] cl 186.234(a).
[93] 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 'Occ186/407/457&Noms' tab).
[94] cl 186.234(2)(aa) inserted by SLI 2013, No 233.
[95] cls 186.234(2)(ab) and (ac) inserted by SLI 2014, No 82.
[96] cl 186.234(2)(b).
[97] cl 186.234(2)(b) amended by *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146).
[98] See the 'Occ186/407/457&Noms' tab of the Register of Instruments: Business Visas.

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.[99] 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 ('Occ186/407/457&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.[100] 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 reg 5.19(4)(h)(i), a requirement which links the tasks of a position to a specified occupation.[101]

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

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[99] 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.
[100] 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': Policy - Employer Nomination Scheme (subclass 186 visa) – [9.11.2] Skills as at time of visa application (reissued 13 April 2018).
[101] That this is the case was implicitly accepted in *Sutherland v MIBP* [2017] FCA 806. 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'.

Regulations and should be given its ordinary meaning. Departmental policy suggests 'full-time' involves working at least 35 hours per week.[102]

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,[103] 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

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[102] Policy - 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.
[103] See for example cl 187.234(c).

occupation, may be relevant in determining whether the applicant was in fact employed in the relevant occupation.

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.[104]

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 [105]
- persons who are currently in Australia as the holder of a Subclass 444 or 461 visa[106] 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.[107]

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.[108]

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[104] 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 Policy – 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).
[105] IMMI 17/058. See ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments: Business visas. 'Academic' is further defined in the instrument itself by reference to ANZSCO.
[106] Subclasses 444 (Special Category) and 461 (New Zealand Citizen Family Relationship (Temporary)) are temporary visas specifically for New Zealand citizens and their family members.
[107] IMMI 15/109. See the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments: Business visas.
[108] IMMI 15/083. See the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments: Business visas.

The policy basis for this 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.[109] Information on income tax rates is available from the ATO website. It provided that for the financial year 2016-17, the top income category is $180,001 and over.[110] 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.[111]

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):

- Ministers of Religion (ANZSCO 272211) who have applied for a visa to occupy a position as nominated by a religious institution.[112]

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).[113] 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.[114] 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.[115]

'Vocational English' is defined by reg 1.15B and 'competent English' by reg 1.15C. These definitions are explained in detail in English Language Ability - Skilled/Business Visas, but in

[109] Policy - 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).
[110] https://www.ato.gov.au/Rates/Individual-income-tax-rates/ (accessed 14 December 2016).
[111] See Explanatory Statement to IMMI 17/058, under the the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments: Business visas.
[112] IMMI 12/060. See the 'ExmtSkills' tab (under 'Specifications which have ceased' section) 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 reg 1.03.
[113] IMMI 15/083. 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 at p.4.
[114] cl 186.222, subject to amendment from 1 July 2017 by F2017L00816. For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.
[115] cl 186.232, subject to amendment from 1 July 2017 by F2017L00816. For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments: Business visas.

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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.*[116]

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).[117] 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.[118]

For visa applications made on or after 1 July 2017, for the purposes of cl 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.[119]

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 cls 186.222(b) and 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).[120]

[116] *MIAC v Berenguel* (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.

[117] For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab (where visa application made on or after 1 July 2015) of the Register of Instruments: Business visas.

[118] 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 Policy – 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).

[119] 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 where 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 ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments: Business visas.

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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.[121]

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 cls 186.222(b) and 186.232(b):

- Ministers of Religion (ANZSCO 272211) who have applied for a visa to occupy a position as nominated by a religious institution.[122]

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 186.232(b).[123] 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 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 case law

Judgment	Judgment summary
MIAC v Berenguel [2010] HCA 8; (2010) 264 ALR 477	Summary
Hasan v MIBP [2016] FCCA 1049	
Kaur v MIBP [2017] FCCA 564	Summary
Khanom v MIBP [2016] FCCA 3259	
Oakwood Sydney Pty Ltd v MICMSMA; Goo v MICMSMA [2020] FCCA 2354	Summary
Patel v MHA [2019] FCA 1228	

[120] IMMI 15/083. For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments: Business visas.
[121] IMMI 15/083. For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments: Business visas.
[122] IMMI 12/059. See the 'EngLangExempt186/187' tab (under 'Specifications which have ceased' section) 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. 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 186.232(b). The term 'religious institution' is defined in reg 1.03.
[123] 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 at p.4.

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Singh v MIBP [2016] FCCA 2229	Summary
Singh v MIBP [2017] FCAFC 105	Summary
Sutherland v MIBP [2017] FCA 806	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Skills Assessment) Regulation 2013 (Cth)	SLI 2013, No 233	No 15/2013
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82	No 5/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Legislation Amendment (2017 Measures No 3) Regulations 2017 (Cth)	F2017L00816	No 4/2017
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019

Available decision template/precedent

There is one subclass specific template/precedent:

released by the AAT on 28 February 2022

- **Subclass 186 visa refusal** – suitable for review of all Subclass 186 visa refusal decisions. The precedent asks the user 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: 15 December 2020

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SUBCLASS 187

REGIONAL EMPLOYER NOMINATION (PERMANENT) (CLASS RN)

Overview

- Closure of Subclass 187 visa

Merits review

Visa application requirements

Visa criteria

- Primary criteria
  - Common criteria
  - Criteria for the Temporary Residence Transition stream
  - Criteria for the Direct Entry stream
- Secondary criteria

Key issues

- Common criteria – no 'payment for visas' conduct
- Nomination requirements
  - Can a pre-1 July 2012 nomination be relied on?
  - Can a pre-18 March 2018 nomination be relied on?
  - Can a new nomination be relied on?
  - Adverse information
- English language requirement – Temporary Residence Transition and Direct Entry streams
  - Can the applicant sit an English test after making the visa application?

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Exempt applicants

Skills requirements – Direct Entry stream

First alternative – in specified class of persons

Second alternative – specified occupation, qualification not obtained in Australia

Third alternative – qualifications listed in ANZSCO

Relevant case law

Relevant legislative amendments

Available decision template/precedent

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Overview[1]

The Regional Employer Nomination (Permanent) (Class RN) visa is a permanent visa which was introduced on 1 July 2012[2] and closed to new applications from 16 November 2019, except for certain transitional cohorts (see below). 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 reg 5.19 of the *Migration Regulations 1994* (Cth) (the Regulations) or pursuant to a labour agreement; and
- grant of a visa 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 Regulation 5.19 - Approval of nominated positions (employer nomination).

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 (TRT) stream and the Direct Entry (DE) stream.[5] Primary applicants must meet common criteria as well as the criteria for the stream in which they apply for the visa.

Closure of Subclass 187 visa

On 16 November 2019, this visa subclass was closed to new applications, except for certain transitional cohorts, and replaced with the new Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) (Class PE) visa.[6] However, the closure of the Subclass 187 visa does not apply to a 'transitional 457 worker' or a 'transitional 482 worker'. This respectively means a person who held a Subclass 457 visa at any time occurring on or after 18 April 2017,[7] and a person who on 20 March 2019 held a Subclass 482 visa in the Medium-term stream or was an applicant for a Subclass 482 visa in the Medium-term stream that was subsequently granted.[8] The corresponding nomination process for Subclass 187 visas also

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Inserted by *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82).
[3] Item 1114C(4) of sch 1 to the Regulations.
[4] Policy – Migration Regulations – Schedules – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclass 186/187 – 3.1.2 RSMS (issued 18 August 2019).
[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* (Cth) (F2018L00262).
[6] Items 1114C(3)(aa) and 1114C(3A) of sch 1 to the Regulations, as inserted by items 59 and 60 of sch 2 to the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).
[7] reg 1.03, as inserted by item 1 of sch 2 to F2019L00578 and amended by item 1 of pt 1, sch 3 to the *Home Affairs Legislation Amendment (2019 Measures No 1) Regulations 2019* (Cth) (F2019L01423).
[8] reg 1.03, as inserted by item 1 of sch 2 to F2019L00578.

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closed from 16 November 2019, except for nominations for a Subclass 187 visa in the Temporary Residence Transition stream which identify a person who is a 'transitional 457 worker' or 'transitional 482 worker' on 16 November 2019.[9]

Merits review

A decision to refuse a Subclass 187 visa is reviewable under Part 5 of the *Migration Act 1958* (Cth) (the Act):

- if the application was made in the migration zone;[10] 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.[11]

In both cases, it is the visa applicant who has standing to apply for review,[12] and the applicant must be inside the migration zone at the time of lodging the review application.[13]

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.[14] An applicant may be in or outside Australia at the time of application, but not in immigration clearance.[15] An applicant in Australia must hold a substantive visa or a Bridging Visa A, B or C.[16]

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 reg 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.[17]

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.[18]

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[9] Paragraphs 5.19(2)(aa) and 5.19(2A) to the Regulations, as inserted by items 54 and 55 of sch 2 to F2019L00578.
[10] s 338(2).
[11] ss 338(7A), 347(3A).
[12] s 347(2)(a).
[13] ss 347(3) and (3A).
[14] Items 1114C(1), (3)(a). For applications made prior to 18 April 2015, the prescribed form is Form 1408 (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* (Cth) (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 reg 2.07(5).
[15] Item 1114C(3)(b).
[16] Item 1114C(3)(c).
[17] 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 visa type.
[18] Item 1114C(3)(da) as inserted by *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* (Cth) (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.

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 reg 5.19 are discussed in Regulation 5.19 - Approval of nominated positions (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.[19]

In addition to the above, primary applicants must make their visa application before 16 November 2019, unless the stream is the Temporary Resident Transition stream and the applicant is a 'transitional 457 worker' or 'transitional 482 worker'.[20] The term 'transitional 457 worker' is defined in reg 1.03 to mean a person who held a Subclass 457 visa at any time occurring on or after 18 April 2017.[21] The term 'transitional 482 worker' is defined in reg 1.03 to mean a person who on 20 March 2019 held a Subclass 482 visa in the Medium-term stream or was an applicant for a Subclass 482 visa in the Medium-term stream that was subsequently granted.[22]

Visa criteria

The criteria for a Subclass 187 are set out in Part 187 of Schedule 2 to the Regulations. They comprise of 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, but must not be in immigration clearance.[23]

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). Unless otherwise specified, all criteria must be satisfied at the time a decision is made on the application.[24]

All primary applicants must meet the common criteria and the criteria in one of two alternative streams: the Temporary Residence Transition stream or the Direct Entry stream.[25]

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[19] Item 1114C(3)(e).
[20] Items 1114C(3)(aa) and 1114C(3A) of sch 1 to the Regulations, as inserted by F2019L00578.
[21] reg 1.03, as inserted by item 1 to sch 2 to F2019L00578 and amended by item 1 of pt 1, sch 3 to F2019L01423. The original definition limited the persons who could benefit from the transitional arrangements to those who held or had applied for a Subclass 457 visa on 18 April 2017. The amendment to the definition (which commenced on 16 November 2019 – see s 2, table item 4 of F2019L01423) expanded the transitional cohort to persons who applied for a Subclass 457 visa up until 18 March 2018 and were subsequently granted the visa, ensuring that 457 workers who are in the course of satisfying the residence requirement for a permanent Subclass 187 visa in the Temporary Residence Transition stream were not disadvantaged by the closing of the Subclass 187 visa on 16 November 2019, but could continue to apply for the visa after that date (see Explanatory Statement to the F2019L01423 at p.18).
[22] reg 1.03 inserted by Item 1 to sch 2 to F2019L00578.
[23] cl 187.411.
[24] Note to div 187.2.
[25] 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.

Common criteria

The common criteria that must be met by all primary applicants are set out in sub-div 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*;[26]
- **future employment** - the position to which the application relates will provide the applicant with the employment referred to in the application for approval;[27]
- **no 'payment for visas' conduct** - the applicant has not engaged in conduct that breaches s 245AR(1), 245AS(1), 245AT(1) or 245AU of the Act, or it is reasonable to disregard the conduct (see discussion below);[28]
- **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)[29] including, for visa applications made on or after 24 November 2012, PIC 4021 relating to travel documents,[30] and certain special return criteria,[31] 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;[32] 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

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[26] 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: Policy – Migration Regulations – Schedules – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclass 186/187 – 3.7.7. Mandatory registrations, licensing or similar (issued 18 August 2019).
[27] cl 187.212.
[28] 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.
[29] cls 187.213(1)–(5), 187.214. These PIC are (for primary visa applicant and secondary applicants): PIC 4001, 4002, 4003, 4004, 4010, 4020, and for visa applications from 24 November 2012, PIC 4021, and, if 18 at the time of application, PIC 4019. Each member of the family unit who is a 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)* (Cth) (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 commentaries: Public Interest Criterion 4001, PIC 4020, bogus documents and false or misleading information.
[30] cl 187.213(1) amended by SLI 2012, No 256.
[31] cl 187.214. These are special return criteria 5001, 5002 and 5010. For information on these criteria, see Special Return Criteria (Schedule 5).
[32] cl 187.213(6). These are PIC 4001, 4002, 4003 and 4004.

form issued by the official source, unless it would be unreasonable to require the applicant to hold a passport.[33]

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.[34]

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;[35]
- **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);[36]
- **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 reg 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;

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[33] cl 187.215, omitted by SLI 2012, No 256 and replaced by the very similarly termed PIC 4021, which applies to visa application made on or after 24 November 2012.
[34] Policy – Migration Regulations – Schedule – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclass 186/187 – 3.2. Streams (issued 18 August 2019).
[35] cl 187.221, as amended by F2018L00262. For the instrument specifying exempt persons see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments - Business visas.
[36] cl 187.222, as amended from 1 July 2017 by *Migration Legislation Amendment (2017 Measures No 3) Regulations 2017* (Cth) (F2017L00816). For the instrument specifying exempt persons see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments - Business visas. 'Vocational English' is defined in reg 1.15B and 'Competent English' is defined in reg 1.15C: for more information, see English Language Ability - Skilled/Business Visas.

» *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;[37]

- the Minister has approved the nomination[38] and it has not subsequently been withdrawn;[39]
- 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);[40]
- the position to which the application relates is located in regional Australia[41] and is still available to the applicant;[42]
- the visa application was made no more than 6 months after the nomination was approved;[43]

- **health criteria** - the applicant and each member of the family unit who is applying for the visa must satisfy PIC 4007 (health),[44] 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;[45] and
- **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 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.[46]

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[37] cl 187.223(1), as amended by F2018L00262 in relation to positions nominated in an application made under reg 5.19 on or after 18 March 2018.
[38] cl 187.223(2).
[39] cl 187.223(3).
[40] cls 187.223(3A)(a)–(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.
[41] 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 reg 5.19(7), however this was amended by F2018L00262 to refer to reg 5.19(16) without any application or transitional provision. All instruments made under reg 5.19(7) have been repealed from 18 March 2018, and the only instrument made under reg 5.19(16) is expressed to apply only to visa applications made on or after 18 March 2018 (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.
[42] cl 187.223(5).
[43] cl 187.223(6).
[44] cls 187.224(1), (2).
[45] cl 187.224(3). For further information on PIC 4007, see Health Criteria - PIC 4005, 4006A and 4007.
[46] cl 187.225 inserted by F2018L00262, for visa applications made on or after 18 March 2018.

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 Subclass 187 visa from outside Australia or are applying from within Australia but are ineligible for the Temporary Residence Transition stream.[47]

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;[48]
- **English language** - at the time of application, the applicant must have had competent English unless in a class of specified persons;[49]
- **nomination requirements** - all of the following must be satisfied:[50]
  - the position to which the application relates must be the position:
    - » nominated in an application for approval that seeks to meet the requirements of: reg 5.19(4)(h)(ii) [genuine need for regionally located position], or reg 5.19(4) as in force before 1 July 2012 [regional sponsored stream requirements];[51] or *where the position is nominated on or after 18 March 2018,* that seeks to meet the requirements of reg 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;[52] and
    - » in relation to which the visa application declaration was made;[53] and
    - » *for nominations made on or after 1 July 2017,* in relation to which the applicant is identified in the application under reg 5.19(4)(a)(ii);[54] or *for nominations made on or after 18 March 2018,* nominated in an application for approval that identifies the application in relation to the position.[55]

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[47] Policy – Migration Regulations – Schedule – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclass 186/187 – 3.2. Streams (issued 18 August 2019)
[48] cl 187.231, amended from 1 July 2017 by F2017L00816. For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments - Business visas.
[49] cl 187.232. For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) of the Register of Instruments - Business visas. 'Competent English' is defined in reg 1.15C (see English Language Ability - Skilled/Business Visas).
[50] cl 187.233(1).
[51] cl 187.233(1)(a).
[52] cls 187.233(1)(a)(ii)–(iii) as inserted by F2018L00262.
[53] cl 187.233(1)(b).
[54] cl 187.233(1)(aa) inserted by F2017L00816, and repealed by F2018L00262.
[55] cl 187.233(1)(a)(i) inserted by F2018L00262.

- the person who will employ the applicant is the nominator in the application for approval;[56]
- the nomination has been approved,[57] and not subsequently been withdrawn;[58]
- 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);[59]
- the position is still available to the applicant;[60]
- the visa application was made not more than 6 months after the nomination was approved;[61]

- **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;[62] 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;[63] 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; [64]
- **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),[65] 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.[66]

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[56] cl 187.233(2). See also *Yeap v MIBP* [2016] FCCA 1173 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.
[57] cl 187.233(3).
[58] cl 187.233(4).
[59] cls 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.
[60] cl 187.233(5).
[61] cl 187.233(6).
[62] cl 187.234(a). For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made or after 1 July 2015) of the Register of Instruments - Business visas.
[63] 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 Register of Instruments - Business visas.
[64] 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.
[65] cls 187.235(1), (2).
[66] cl 187.235(3). For further information on PIC 4007, see Health Criteria - PIC 4005, 4006A and 4007.

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,[67] and have made a combined visa application with the primary applicant.[68] 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,[69] satisfy various public interest criteria and special return criteria,[70] and (for visa applications made before 24 November 2012) meet passport requirements.[71] 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 it is reasonable to disregard the conduct.[72]

For further information on who is a member of a family unit, see Member of the Family Unit (reg 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 s 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

[67] cl 187.311(a).
[68] cl 187.311(b).
[69] cl 187.312.
[70] cls 187.313, 187.314. Note that cl 187 .313 was amended by SLI 2013, No 256 for visa applications made on or after 24 November 2012 to include PIC 4021 (travel documents).
[71] 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.
[72] 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 s 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.
[73] 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.
[74] cl 187.212A(b).
[75] 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 policy: Explanatory Statement to SLI 2015, No 242 at p.17. At the time of writing there were no published guidelines on these matters within Departmental policy: see Policy – Migration Regulations – Schedule – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclass 186/187 – 3.8. No payment for visas conduct (issued 18 August 2019).

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encompasses not only the conduct itself and the circumstances in which it occurred, but also the applicant's broader circumstances outside of that conduct.

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 which 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 because, prior to 18 March 2018, cl 187.223 refers to a nomination that seeks to meet the requirements of reg 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,[76] this criterion cannot be met by a nomination applied for before that date.

Whereas, in the Direct Entry 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 reg 5.19(4) as in force before 1 July 2012 and as currently in force.[77]

Can a pre-18 March 2018 nomination be relied on?

The nomination scheme in reg 5.19 was revised again on 18 March 2018, and corresponding changes were made to the terms of cls 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 (cls 187.223 and 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

[76] 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 sch 13 to the Regulations, pt 1 item [101], for transitional arrangements.
[77] 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.

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nomination of a position made by a different employer,[78] 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.[79] This was the view taken in *Singh v MIBP* [2017] FCAFC 105.[80] 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.[81] Although the Court's comments were strictly *obiter*, they are nonetheless persuasive and were applied in *Patel v MHA* [2019] FCA 1228 where the Court held that there was no argument for a substitution of employer or position for the purposes of satisfying cl 187.233.[82] 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 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.[83]

'Adverse information' is defined in reg 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 reg 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.[84] The term 'associated with' is given a non-exhaustive definition by reg 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 Approval as Standard Business Sponsor.

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[78] *Hasan v MIBP* [2016] FCCA 1049. This judgment considered cl 187.223(1)(c) but the interpretation would appear equally applicable to the identically worded cl 187.233(1)(b).
[79] That is also the interpretation reflected in Departmental policy: Policy – Migration Regulations – Schedule – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclass 186/187 – 3.4.2. Position must be that for which the visa application was made (issued 18 August 2019).
[80] *Singh v MIBP* [2017] FCAFC 105 at [88].
[81] See *Kaur v MIBP* [2017] FCCA 564 which also considered whether the applicant could meet cl 187.233 in circumstances where the associated nomination had been refused. Similarly, the Court reasoned at [23] 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 sch 1 declaration was made. *Singh v MIBP* [2016] FCCA 2229 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, 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.
[82] In *Patel v MHA* [2019] FCA 1228, the appellant had sought an adjournment to find a new employer to nominate a position for his visa application. The Court applied the *obiter* comment in *Singh* and found that there was no argument available for the purpose of satisfying cl 187.233 that there might be some form of substitution of employer or position (at [7]–[8]).
[83] cls 187.223(3A), 187.233(4A), 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.
[84] Regulation 1.13A as a whole was repealed and substituted by F2018L00262.

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.[85] 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 policy suggests 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 of 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.[86]

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.[87]

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

[85] cl 187.223(3A)(b), 187.233(4A)(b) or 187.242(4A)(b).
[86] Policy – Migration Regulations – Divisions – [Div1.2/Reg1.13A] Adverse information and skilled visas (regulations 1.13A and 1.13B) > [4.4.2] Disregarding of adverse information (policy reissued 18 March 2018).
[87] For example, in *Oakwood Sydney Pty Ltd v MICMSMA* [2020] FCCA 2354, the Court held that the Tribunal was entitled to take into account other adverse information not known to Immigration when considering whether it was reasonable to disregard the adverse information known to Immigration under the similarly worded reg 5.19(3)(g)(ii).

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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.[88]

'Vocational English' is defined by reg 1.15B and 'competent English' by reg 1.15C. These definitions are explained in detail in 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*.[89]

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 cls 187.222(b) and 187.232.[90]

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.[91]

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.[92]

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:

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[88] For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab (visa applications made on or after 1 July 2015) in the Register of Instruments - Business visas.
[89] *MIAC v Berenguel* (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.
[90] For the relevant instrument, see the 'ExmtSkillsAgeEng186,187&494' tab (where visa application made on or after 1 July 2015) of the Register of Instruments - Business visas.
[91] 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 Policy – 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).
[92] For visa applications made on or after 18 March 2018, see IMMI 18/045, for visa applications made between 1 July 2017 and 17 March 2018, see IMMI 17/058. See the 'ExmtSkillsAgeEng186,187&494' tab of the 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.

- persons whose earnings will be at least equivalent to the current Australian Tax Office top individual income tax rate (see discussion below).[93]

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.[94]

For visa applications made *prior to* 1 July 2015, in addition to the two classes of person above, the following persons are specified for cls 187.222(b) and 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.[95]

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.[96]

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.[97]

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;[98] and

[93] IMMI 15/083. See the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments - Business visas.
[94] IMMI 15/083. See the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments - Business visas.
[95] IMMI 12/059. See the 'EngLangExempt186/187' tab (under 'Specifications which have ceased') 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). 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 in cl 187.222(b) or 187.232(b).
[96] 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: Policy – Migration Regulations – Schedule – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclass 186/187 – 3.5.10.2.3. Assessment under 187.234(c) – streamlined skills assessment for all other applicants (issued 18 August 2019). Prior to 1 July 2015, the 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.
[97] 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 in the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments - Business visas. Note that IMMI 17/058 was repealed by IMMI 18/045, but the repeal is expressed not to apply where the nomination and/or visa application was made before 18 March 2018. In any event, the specifications made under these instruments are the same.
[98] This category of exemption has been excluded by 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

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- 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.[99]

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.[100]

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. For the financial year 2016-17, the top income category was $180,001 and over.[101]

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.[102] 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)).[103] Rather, it seems that all that is required is consideration of whether the qualification relied on by the applicant to

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applications made before 1 July 2017: Policy – Migration Regulations – Schedules – Regional Sponsored Migration 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).

[99] IMMI 12/060 and IMMI 15/083. For the applicable instrument see the Register of Instruments - Business visas: for visa applications made on or after 1 July 2015, see the 'ExmtSkillsAgeEng186,187&494' tab.

[100] 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 Policy – Migration Regulations – Schedules – Regional Sponsored Migration 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).

[101] https://www.ato.gov.au/Rates/Individual-income-tax-rates/ (accessed 14 December 2016).

[102] For the relevant instrument, see the 'Occ187' tab of the Register of Instruments - Business visas.

[103] Such an interpretation would be inconsistent with the different language used in cls 187.234(b) and (c) – the latter specifically requires comparison against ANZSCO.

demonstrate they can perform the duties of the nominated position was obtained in Australia or overseas.[104] 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.[105] 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 28 October 2013, the assessment must not be for a Subclass 485 (Temporary Graduate) visa.[106] 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 period of validity of less than 3 years after the date of assessment, then that period must not have ended.[107] Otherwise, not more than 3 years must have passed since the date of the assessment.[108]

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 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.[109]

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.[110]

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[104] 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): Policy – Migration Regulations – Schedules – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclass 186/187 – 5.10.2.2 Assessment under 187.234(b) – assessment of overseas trade qualifications (issued 18 August 2019).
[105] In *Sutherland v MIBP* [2017] FCA 806, 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'.
[106] cl 187.234(b) as amended by *Migration Legislation (Skills Assessment) Regulation 2013* (Cth) (SLI 2013, No 233) and again by *Migration Legislation Amendment (2014 Measures No 1) Regulation 2014* (Cth) (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).
[107] cl 187.234(b)(v), inserted by SLI 2014, No 82.
[108] cl 187.234(b)(vi), inserted by SLI 2014, No 82.
[109] cl 187.234(b)(vii), inserted by F2018L00262.
[110] 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 38 hours per week: Policy – Migration Regulations – Schedule – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclasses 186/187 – 3.7.5.2 Three year work experience (issued 18 August 2019).

Third alternative – qualifications listed in ANZSCO

If neither cl 187.234(a) nor (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.[111] 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).[112]

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 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.[113]

'ANZSCO' stands for the Australian and New Zealand Standard Classification of Occupations, and is defined in reg 1.03.[114] 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.[115]

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.[116]

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

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[111] F2017L00816.
[112] See Explanatory Statement to F2017L00816 at p.47.
[113] cl 187.234(c)(iii), inserted by F2018L00262.
[114] '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 reg 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: reg 1.03 as inserted by *Migration Amendment Regulations 2010 (No 6)* (Cth) (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: reg 1.03 as amended by *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146).
[115] *Dhimal v MIBP* [2016] FCCA 1094 at [16].
[116] Departmental policy highlights that higher level qualifications may not be relevant to the actual occupation: Policy – Migration Regulations – Schedules – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclasses 186/187 – 3.5.10.2.3 Assessment under 187.234(c) – streamlined skills assessment for all other applicants (issued 18 August 2019).

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, Departmental policy 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.[117] The question was considered in *Dhimal v MIBP,* but ultimately left unresolved.[118]

Older departmental policy suggested that AQF Certificate IV qualifications must also include an on the job training component.[119] 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 Departmental policy specifically states that under ANZSCO, AQF Certificate IV qualifications are not required to include an on the job training component.[120]

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.[121]

Relevant case law

Judgment	Judgment summary
MIAC v Berenguel [2010] HCA 8; (2010) 264 ALR 477	Summary
Dhimal v MIBP [2016] FCCA 1094	Summary
Hasan v MIBP [2016] FCCA 1049	

[117] Policy – Migration Regulations – Schedules – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclasses 186/187 – 3.5.10.2.3 Assessment under 187.234(c) – streamlined skills assessment for all other applicants (issued 18 August 2019).
[118] In *Dhimal v MIBP* [2016] FCCA 1094, 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 Departmental policy, ANZSCO allows for a degree of flexibility in determining whether an applicant has the necessary on-the-job training.
[119] Policy – Sch2 Visa 187 - Regional Sponsored Migration Scheme (policy reissued on 14/12/15).
[120] Policy – Migration Regulations - Schedules – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclasses 186/187 – 3.5.10.2.3 Assessment under 187.234(c) – streamlined skills assessment for all other applicants (issued 18 August 2019).
[121] This is the approach adopted in Departmental policy: Policy – Migration Regulations – Schedules – Permanent Employer Sponsored Entry – ENS and RSMS Visa Applications – Subclasses 186/187 – 3.5.10.2.3 Assessment under 187.234(c) – streamlined skills assessment for all other applicants (issued 18 August 2019).

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Kaur v MIBP [2017] FCCA 564	Summary
Khanom v MIBP [2016] FCCA 3259	
Oakwood Sydney Pty Ltd v MICMSMA; Goo v MICMSMA [2020] FCCA 2354	Summary
Patel v MHA [2019] FCA 1228	
Singh v MIBP [2016] FCCA 2229	Summary
Singh v MIBP [2017] FCAFC 105	Summary
Sutherland v MIBP [2017] FCA 806	
Yeap v MIBP [2016] FCCA 1173	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Amendment (Skills Assessment) Regulation 2013 (Cth)	SLI 2013, No 233	No 15/2013
Migration Legislation Amendment (2014 Measures No 1) Regulation 2014 (Cth)	SLI 2014, No 82	No 5/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Legislation Amendment (2017 Measures No 3) Regulations 2017 (Cth)	F2017L00816	No 4/2017
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018

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Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Home Affairs Legislation Amendment (2019 Measures No 1) Regulations 2019 (Cth)	F2019L01423	No 4/2019

Available decision template/precedent

There is one subclass specific template/precedent:

- **Subclass 187 visa refusal** – suitable for review of all Subclass 187 visa refusal decisions. The precedent asks the user 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).

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SUBCLASS 188 (BUSINESS INNOVATION AND INVESTMENT) BUSINESS SKILLS (PROVISIONAL) (CLASS EB)

Released by the AAT on 28 February 2022

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Overview[1]

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.[2] It has one subclass, Subclass 188,[3] and replaces former visa subclasses 160, 161, 162, 163, 164 and 165.[4]

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:

- Business Innovation stream;
- Business Innovation Extension stream;
- Investor stream;
- Significant Investor stream;
- Significant Investor Extension stream;
- Premium Investor stream (closed to new applications from 1 July 2021); and
- Entrepreneur stream.

Business Innovation, Business Innovation Extension and Investor streams are open to visa applications from 1 July 2012.[5] 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.[6] Premium Investor stream was open to visa applications from 1 July 2015 and was closed to new applications from 1 July 2021.[7] Entrepreneur stream was open to visa applications from 10 September 2016.[8]

The requirements for making a valid application differ depending upon which visa 'stream' the applicant is seeking to satisfy. Business Innovation, Business Innovation Extension, Investor, and Entrepreneur streams require the applicant to have been nominated by a State or Territory government agency.[9] Significant Investor and Significant Investor Extension streams require the applicant to have been nominated by a State or Territory government or

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Inserted by *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82).
[3] Item 1202B(7) of sch 1 to the Regulations.
[4] 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.
[5] See SLI 2012, No 82.
[6] Inserted by *Migration Amendment Regulation 2012 (No 7)* (Cth) (SLI 2012, No 255).
[7] See *Migration Amendment (Investor Visa) Regulation 2015* (Cth) (SLI 2015, No 102) for commencement and see *Home Affairs Legislation Amendment (2021 Measures No 1) Regulations 2021* (Cth) (F2021L00852) for repeal.
[8] See *Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016* (Cth) (F2016L01391).
[9] Items 1202B(4), 1202B(5), 1202B(6) and 1202B(6D) of sch 1 to the Regulations.

the CEO of Austrade.[10] Premium Investor stream requires the applicant to have been nominated by the CEO of Austrade.[11] 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* (Cth) (the Act). The visa applicant has standing to apply for review.[12]

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.[13]

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.[14] An applicant may be in or outside Australia at the time of application, but not in immigration clearance.[15]

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 stream** 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.[16] In addition, an applicant for the **Business Innovation, Investor** or **Entrepreneur stream** 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.[17] An applicant for the **Premium Investor stream** requires

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[10] Items 1202B(6A), 1202B(6B) of sch 1 to the Regulations.
[11] Item 1202B(6C) of sch 1 to the Regulations.
[12] s 347(2)(a).
[13] s 347(3).
[14] Items 1202B(1), (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* (Cth) (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 reg 2.07(5).
[15] Item 1202B(3)(b).
[16] Items 1202B(4), (6), (6A), (6C), (6D).
[17] Item 1202B(6A) of sch 1 to the Regulations.

the applicant to have been nominated by the CEO of Austrade.[18] There are no prescribed forms for nomination. The nomination is however recorded electronically in SkillSelect.[19]

There are different requirements for an applicant seeking to satisfy the primary criteria in the **Business Innovation Extension stream** depending upon when the application was made.

For an application made before 19 September 2020, the applicant 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.[20]

For an application made on or after 19 September 2020, the applicant must:

- hold a Subclass 188 visa in the Business Innovation stream; OR have held, during a concession period,[21] a Subclass 188 visa in the Business Innovation stream granted before 1 July 2019 and made the new application no more than 3 months after the end of the concession period; OR have held, during a concession period, a Subclass 188 visa in the Business Innovation Extension stream, made the new application no more than 3 months after the end of the concession period, and held a Subclass 188 visa in the Business Innovation stream granted before 1 July 2019; and
- have held a Subclass 188 visa in the Business Innovation stream for at least 3 years; and
- if at the time of application the applicant holds a Subclass 188 visa in the Business Innovation Extension stream, the applicant must not have held more than one Subclass 188 visa in the Business Innovation Extension stream.[22]

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.[23]

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.[24]

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[18] Item 1202B(6C) of sch 1 to the Regulations.
[19] Policy - Sch2 Visa 188 - Business Innovation and Investment (Provisional) – Applying for a Business Skills (Provisional) (Class EB) visa (reissued 14/10/2016).
[20] Item 1202B(5), as in force prior to 19 September 2020.
[21] 'Concession period' is defined in reg 1.15N as the period commencing on 1 February 2020 and ending on a day specified by the Minister in an instrument (*'initial concession period'*), as well as a period determined by the Minister under an instrument for the purposes of a specified provision of the Regulations in which the expression 'concession period' is used, beginning not before the initial concession period ends: inserted by item 2, pt 1 of sch 1 to the *Migration Amendment (COVID-19 Concessions) Regulations 2020* (Cth) (F2020L01181). An instrument providing these specifications is intended to ensure flexibility since it is not known when the travel restrictions and economic disruptions caused by the COVID-19 pandemic will end and there may be resurgences at some point after the initial concession period: Explanatory Statement to F2020L01181 at p.12. No end date is currently specified.
[22] Item 1202B(5), as repealed and substituted by item 16, pt 3 of sch 1 to F2020L01181.
[23] Item 1202B(6B).
[24] Item 1202B(3)(d).

Visa criteria

The criteria for a Subclass 188 are set out in Part 188 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). There are 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.

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);[25]

- **nomination not withdrawn** – the nominating State or Territory government agency, or the CEO of Austrade, has not withdrawn the nomination.[26] Whether a nomination has been withdrawn is a factual matter for the decision maker;

- **holders of Subclass 491 or Subclass 494 visas must have held these visas for at least 3 years at time of application** – for applications made on or after 16 November 2019, if at the time of application the applicant held a Subclass 491 (Skilled Work Regional (Provisional)) visa or a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, or the last substantive visa held was a

[25] cl 188.211.
[26] 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.

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Subclass 491 or 494, then they must have held that visa for at least 3 years at the time of application unless circumstances specified in a relevant instrument exist;[27]

- **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,[28] and certain special return criteria.[29] 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;[30]

- **passport requirements** – for 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.[31] This criterion has been replaced by the very similarly termed PIC 4021, which applies to visa applications made on or after 24 November 2012.[32]

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.[33] 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.[34] Whether the nominating agency has determined the activity to be of exceptional economic benefit is a matter of fact. Departmental policy notes that this alternative criterion is designed to give the

[27] cl 188.212A(1). This requirement was inserted by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578) and applies to applications made on or after 16 November 2019. Clause 188.212A(2) gives the Minister the power to specify by legislative instrument circumstances for the purposes of cl 188.212A(1). There is no relevant instrument in force at the time of writing (September 2019).
[28] 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). For further information on PIC 4001 and PIC 4020, see Public Interest Criterion 4001, PIC 4020, bogus documents and false or misleading information.
[29] cls 188.214(1), (2). These are 5001, 5002 and 5010. See Special Return Criteria (Schedule 5).
[30] cl 188.213(6). These are PIC 4001, 4002, 4003 and 4004.
[31] cl 188.215. Omitted by SLI 2012, No 256.
[32] Inserted into cl 188.213(1): SLI 2012, No 256.
[33] cl 188.221(1).
[34] cl 188.221(2).

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nominating State/Territory the flexibility to nominate applicants 55 or over in those circumstances.[35]

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.[36] The business innovation and points test is that set out in Schedule 7A.[37] Schedule 7A was amended to increase amounts of investment, assets and turnover for applicants invited to apply for the visa on or after 1 July 2021.[38] Applicants invited to apply before 1 July 2021 continue to be awarded points on the basis of the previous amounts.

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.[39] 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.[40]

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;[41]
- the applicant has overall had a successful business career;[42]
- 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 a specified amount in each of those years;[43]
- 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

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[35] Policy - Sch2 Visa 188 - Business Innovation and Investment (Provisional) – The EB-188 visa main applicant – Business innovation stream primary applicants – Age requirement (reissued 14/10/2016).
[36] cl 188.222(1). To find the applicable instrument, please see the 'PointsBusStreams' tab under the Register of Instruments - Business Visas.
[37] reg 1.03.
[38] See item 64 of F2021L00852.
[39] Note that any score under pt 7A.6 is not counted.
[40] cl 188.222(2).
[41] cl 188.223.
[42] cl 188.224. See below for further details.
[43] cl 188.225(1). For applicants invited to apply for the visa before 1 July 2021 the amount was AUD 500,000. This value was increased to AUD 750,000 for applicants invited to apply for the visa on or after 1 July 2021 by F2021L00852.

more than half the time spent by the applicant from day to day in the conduct of the business;[44]

- 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 a specified amount at the time of the invitation;[45]
  - are lawfully acquired and are available for transfer to Australia within 2 years after the grant of a visa;[46]
- 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 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;[47]
- the applicant genuinely has a realistic commitment to:
  - establish a qualifying business in Australia or participate in an existing qualifying business in Australia;[48]
  - maintain a substantial ownership interest in that qualifying business;[49] 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.[50]

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);[51]
- 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.[52]

[44] cl 188.225(2).
[45] cl 188.226. For applicants invited to apply for the visa before 1 July 2021 the net value of business and personal assets is at least AUD 800,000. This was increased to AUD 1,250,000 for applicants invited to apply for the visa on or after 1 July 2021 by F2021L00852.
[46] cl 188.228.
[47] cl 188.227.
[48] cl 188.229(1).
[49] cl 188.229(2)(a).
[50] cl 188.229(2)(b).
[51] cls 188.229A(1), (2). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.

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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;[53]

- *for applications made before 19 September 2020:* 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,[54] and continues to have that ownership interest;[55]

- *for applications made on or after 19 September 2020:* either

  - 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; or

  - if, during a concession period, the applicant holds or held a Subclass 188 visa in the Business Innovation stream or in the Business Innovation Extension stream and the Business Innovation stream visa the applicant holds or held was granted before 1 July 2019 – the applicant had an ownership in one or more main businesses that were actively operating in Australia for a cumulative period of at least 2 years while the applicant was the holder of the visa;[56] and

  the applicant continues to have that ownership interest;[57]

- 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;[58]

- the applicant and each member of the family unit who is an applicant for the visa must satisfy PIC 4007 (health);[59]

[52] cl 188.229A(3). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[53] cl 188.231.
[54] cl 188.232(1) as in force before 19 September 2020.
[55] cl 188.232(2).
[56] cl 188.232(1), as repealed and substituted by item 17, pt 3 of sch 1 to F2020L01181.
[57] cl 188.232(2)
[58] cl 188.233
[59] cls 188.234(1), (2). For further information about PIC 4007 please see Health criteria - PIC 4005, 4006A and 4007.

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- 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.[60]

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.[61]

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.[62]

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.[63] The business innovation and investment points test is that set out in Schedule 7A.[64] Schedule 7A was amended to increase amounts of investment, assets and turnover for applicants invited to apply for the visa on or after 1 July 2021.[65] Applicants invited to apply before 1 July 2021 continue to be awarded points on the basis of the previous amounts.

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.[66] 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.[67]

Eligible investment

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[60] cl 188.234(3). For further information about PIC 4007 please see Health criteria - PIC 4005, 4006A and 4007.
[61] cl 188.241(1). This reflects the sch 1 requirement in item 1202B(6) that an applicant be invited to lodge a valid visa application under this stream.
[62] cl 188.241(2).
[63] cl 188.242(1). To find the applicable instrument, please see the 'PointsBusStreams' tab under the Register of Instruments - Business Visas.
[64] reg 1.03.
[65] See item 64 of F2021L00852.
[66] Note that any score under pt 7A.5 is not included.
[67] cl 188.242(2).

The applicant is required to demonstrate that he or she has overall had a successful record of eligible investment activity or qualifying business activity.[68] 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,[69] and have demonstrated a high level of management skill in relation to these.[70]

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:

- 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;[71]

    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 a specified amount;[72]
- the business and personal assets of the applicant and/or his/her spouse or de facto partner:
  - had a net value of at least a specified amount or the 2 fiscal years immediately before the time of invitation;[73]
  - are lawfully acquired and are available for transfer to Australia within 2 years after the grant of a visa.[74]

Designated investment requirements

For applicants invited to apply for the visa before 1 July 2021, 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

[68] cl 188.243(1).
[69] cl 188.243(2).
[70] cl 188.243(3).
[71] cl 188.244(a).
[72] cl 188.244(b). For applicants invited to apply for the visa before 1 July 2021 the net value of the eligible investment is at least AUD 1,500,000. This was increased to AUD 2,500,000 for applicants invited to apply on or after 1 July 2021 by F2021L00852,
[73] cl 188.245. For applicants invited to apply for the visa before 1 July 2021 this amount is AUD 2,250,000. This was increased to AUD 2,500,000 for applicants invited to apply for the visa on or after 1 July 2021 by F2021L00852.
[74] cl 188.247.

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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.[75] Further, the funds used to make the designated investment must have been unencumbered[76] 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;[77]

- the applicant genuinely has a realistic commitment to continue to maintain business or investment activity in Australia after the designated investment matures;[78] and

- the applicant has a genuine intention to reside for at least 2 years in the State or Territory in which the nominating State or Territory government agency is located.[79]

For further information on 'designated investments' see below.

Complying significant investment

If the applicant has been invited to apply for the visa on or after 1 July 2021, there are a number of requirements relating to making a 'complying significant investment' rather than a 'designated investment', including:

- the applicant has made a complying significant investment of at least AUD 2,500,000 and has a genuine intention to hold the investment for the whole of the visa period;[80]

- the funds used to make the investment must be accumulated from both or either of one or more qualifying businesses conducted by the applicant, the applicant's spouse or de facto partner, or the applicant and the applicant's spouse or de facto partner together; and eligible investment activities of the applicant, the applicant's spouse or de facto partner, or the applicant and the applicant's spouse or de facto partner together;[81]

- the applicant gives the Minister evidence that the investment complies with the requirements set out in regulation 5.19C as in force at the time of application; and a

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[75] cl 188.246(1).
[76] The term 'unencumbered' is not defined in the Act or the Regulations. Departmental policy indicates that funds would not be considered 'unencumbered' if there was scope for a direct claim upon the funds by a third party, and if funds are borrowed by an applicant using a different asset as security for the loan, the funds themselves would be unencumbered for cl 188.246(2)(a) purposes: Policy - Migration Regulations - Schedules – Sch2Visa188 - Business Innovation and Investment (Provisional) – 22.4 Funds unencumbered (reissued 01/07/2020).
[77] cl 188.246(2).
[78] cl 188.248(1)(a), inserted by F2021L00852.
[79] cl 188.248(2) as amended by F2021L00852
[80] cl 188.246A(2), inserted by F2021L00852.
[81] cl 188.246A(3), inserted by F2021L00852.

completed copy of approved form 1412, signed by the applicant and each other applicant aged at least 18;[82]

- the applicant genuinely has a realistic commitment to continue to maintain business or investment activity in Australia after the investment matures;[83] and
- the applicant has a genuine intention to reside for at least 2 years in the State or Territory in which the nominating State or Territory government agency is located.[84]

For further information on 'complying significant investment' see below.

Public interest criteria

Primary applicants must also meet 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);[85]
- 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.[86]

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;[87]
- *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 reg 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 or, if the applicant was invited to apply for the visa on or after 1 July 2021, for the whole of the visa period;[88]

[82] cl 188.246A(4), inserted by F2021L00852.
[83] cl 188.248(1)(b), inserted by F2021L00852.
[84] cl 188.248(2), as amended by F2021L00852.
[85] cls 188.249(1),(2). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[86] cl 188.249(3). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[87] cl 188.251
[88] cl 188.252 as amended by SLI 2015, No 102 and applying to visa applications made on or after 1 July 2015, and further amended by F2021L00852, which introduced variability of the period in which the investment must be held for applicants invited

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- the applicant has given to the Minister evidence that the investment complies with the requirements set out in reg 5.19C as in force at the time of application;[89]

- 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;[90]

- 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;[91]

- *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;[92]

  - 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;[93]

  - 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;[94]

  - the applicant has a genuine intention to reside in the State/Territory whose government agency nominated the applicant;[95]

- in addition, for visa applications made <u>either</u> prior to, or on or after, 1 July 2015:

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to apply for the visa on or after 1 July 2021 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): Policy - Sch2 Visa 188 - Business Innovation and Investment (Provisional) – Significant Investor Stream primary applicants – Inviting the applicant to make investment (reissued 14/10/2016). 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.

[89] cl 188.253(1) as amended by SLI 2015, No 102 and applying to visa applications made on or after 1 July 2015.

[90] 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.

[91] cl 188.254 as amended by SLI 2015, No 102 and applying to visa applications made on or after 1 July 2015.

[92] 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 reg 5.19B(2)(c).

[93] 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: Policy - Sch2 Visa 188 - Business Innovation and Investment (Provisional) – Significant Investor Stream primary applicants – Inviting the applicant to make investment (reissued 14/10/2016). 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.

[94] 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.

[95] cl 188.254 as it stood prior to the 1 July 2015 amendments by SLI 2015, No 102.

- 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 member to undergo assessment.[97]

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 reg 5.19C as in force at the time the application for that most recent Subclass 188 visa was made;[98]

  - the applicant has given the Minister evidence that the applicant holds an investment as required by reg 5.19C as in force at the time for that most recent Subclass 188 visa was made;[99]

- *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 reg 5.19B as in force at the time the application for that most recent Subclass 188 visa was made;[100]

  - 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;[101]

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[96] cl 188.255(1), (2). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[97] cl 188.255(3). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[98] cl 188.261(1B)(b). Note that there was a period for applications made after 19 September 2020 where the applicant could also meet this requirement if the visa had been granted before 1 July 2019 and the applicant continued to hold a complying significant investment within the meaning of reg 5.19C as in force at the time of application for that visa, except to the extent that the applicant had, during a concession period, withdrawn funds from or cancelled a component of the complying significant investment specified in an instrument under reg 5.19C(8B). This requirement was inserted by F2020L01181 on 19 September 2020. However, in view of the reduced impact of the COVID-19 pandemic, it was subsequently considered not necessary for an instrument to be made under sub-regulation 5.19C(8B) to enable components of a complying significant investment to be withdrawn, so the amendment was repealed by F2021L00852.
[99] cl 188.261(3)(b).
[100] 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.

- 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;[102]
- 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;[103]
- the applicant and each member of the family unit who is an applicant for the visa must satisfy PIC 4007 (health);[104]
- 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.[105]

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 and was closed to new applications from 1 July 2021.[106] 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;[107]
- the applicant has made, on or after the time of application, a complying premium investment (within the meaning of reg 5.19D as in force at the time of application) of at least AUD15,000,000;[108]

[101] 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 reg 5.19B(2)(c).
[102] cl 188.261(2).
[103] 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.
[104] cls 188.262(1), (2). For further information about PIC 4007 please see Health criteria - PIC 4005, 4006A and 4007.
[105] cl 188.262(3). For further information about PIC 4007 please see Health criteria - PIC 4005, 4006A and 4007.
[106] See F2021L00852 for repeal. Live applications for review before the Tribunal as of this date continue unaffected, and merits review is still available for primary decisions made after 1 July 2021 provided the visa application was lodged before then. Note that applications by members of the family units of holders of a Subclass 188 visa in the Premium Investor stream that was granted on the basis of an application made before 1 July 2021 may still be made: item 1202B(3)(d) of schedule 1 and cl 188.311 of schedule 2 to the Regulations.
[107] cl 188.271.

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- 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);[109]

- the applicant has given the Minister evidence that the investment complies with the requirements set out in reg 5.19D as in force at the time of application;[110]

- 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;[111]

- the applicant and each member of the family unit who is an applicant for the visa must satisfy PIC 4005 (health);[112]

- 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.[113]

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.[114]

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.[115]

At the time of the invitation to apply for the visa, the applicant must also have competent English.[116] Please see English language ability - Skilled/Business visas for more information on 'competent English'.

Undertaking of complying entrepreneur activity

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[108] cl 188.272(1).
[109] 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.
[110] cl 188.273(1).
[111] 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.
[112] cls 188.274(1), (2). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[113] cl 188.274(3). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[114] cl 188.281(1).
[115] cl 188.281(2).
[116] cl 188.281(3).

The applicant must be undertaking, or proposing to undertake, a complying entrepreneur activity[117], and must have a genuine intention to undertake, and continue to undertake, the complying entrepreneur activity in Australia.

Additionally, if the applicant was invited to apply for the visa before 1 July 2021 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 reg 5.19E(3)(b).[118] The requirement to secure a funding source in accordance with reg 5.19(3) was removed for applicants invited to apply for the visa on or after 1 July 2021, with these applicants only needing to have a genuine intention to undertake, and continue to undertake, the complying entrepreneur activity in Australia.[119] This is intended to provide greater flexibility to make the Entrepreneur stream more attractive for start-up and early stage entrepreneurs.[120] 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.[121]

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);[122]
- 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.[123]

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;[124]
- the applicant satisfies specified public interest and special return criteria;[125]

[117] cl 188.282(a).
[118] cl 188.282(b).
[119] cl 188.282(ab) as inserted by F2021L00852.
[120] See p 28 of the Explanatory Statement to F2021L00852.
[121] cl 188.283. Please see 'Spouse' and 'de facto partner' for the relevant definitions post 1 July 2009.
[122] cls 188.288(1),(2). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[123] cl 188.288(3). For further information about PIC 4005 please see Health criteria - PIC 4005, 4006A and 4007.
[124] cl 188.311. For further information on member of a family unit, see Member of the family unit (reg 1.12).

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- *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;[126] 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.[127]

Key issues

'Actively operating' main business

Business Innovation Extension stream requires an ownership interest in one or main businesses that were actively operating in Australia.[128] The phrase 'actively operating' is not defined in the Regulations, however in *Shahpari v MIBP*[129] 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.[130] Ultimately it is a finding of fact for the decision maker as to whether a main business is 'actively operating'.

Complying investment – reg 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 2015.[131] 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.[132] The term is defined under reg 5.19B and includes both requirements relating to the investment, and requirements relating to the investor.

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[125] 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.
[126] 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).
[127] cl 188.311A.
[128] As per cl 188.232.
[129] *Shahpari v MIBP* [2016] FCCA 513.
[130] *Shahpari v MIBP* [2016] FCCA 513 at [71].
[131] As per cls 188.252 and 188.261 as they applied prior to amendments in SLI 2015, No 102 for visa applications made prior to 1 July 2015.
[132] As per cl 188.261(1A).

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.[133] 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.[134]

Investor requirements

Under reg 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.[135]

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.[136]

Complying significant investment – reg 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[137] and for the Investor stream where the applicant was invited to apply on or after 1 July 2021.[138] It is also a requirement for the Significant Investor Extension stream where the most recent Subclass

[133] reg 5.19B(2). For the applicable instrument see the '5.19B' tab in the Register of Instruments - Business Visas.
[134] reg 5.19B(3). The term 'unencumbered' for reg 5.19B(3)(a) is not defined in the Act or the Regulations. Departmental policy indicates that funds would not be considered 'unencumbered' if there was scope for a direct claim upon the funds by a third party: Policy - Migration Regulations - Schedules – Sch2Visa188 - Business Innovation and Investment (Provisional) – 22.4 Funds unencumbered (reissued 01/07/2020).
[135] regs 5.19B(4), (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: reg 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 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: reg 5.19B(5)(d).
[136] reg 5.19B(6).
[137] As per cl 188.252.
[138] cl 188.246A, inserted by item 32 of schedule 1 to F2021L00852.

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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.[139] The term is defined under reg 5.19C and includes both requirements relating to the investment, and to the person making the investment (the investor).

Investment requirements

A complying significant investment must be of a kind permitted by the requirements specified in an instrument by the Minister.[140]

There has only been one instrument made since 1 July 2015.[141] 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,[142] and a total of at least AUD1,500,000 in emerging companies investments.[143] Any remaining portion of the investment may be invested in one or more balancing investments.[144]

Further, the funds used to make the investment must be unencumbered and lawfully acquired.[145] The investment must be lawful and must not form the basis for security or collateral for a loan.[146]

Investor requirements

Under reg 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.[147]

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.[148]

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[139] As per cl 188.261(1B).
[140] regs 5.19C(5) and (6). See the 'CompInvests5.19C&D' tab of the Register of Instruments - Business Visas.
[141] IMMI 15/100. See the 'CompInvests5.19C&D' tab of the Register of Instruments - Business Visas for the applicable instrument.
[142] A 'venture capital fund' is, broadly speaking a venture capital partnership or fund registered under the *Venture Capital Act 2002* (Cth). For the full list of requirements, see the 'CompInvests5.19C&D' tab of the Register of Instruments - Business Visas.
[143] 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 'CompInvests5.19C&D' tab of the Register of Instruments - Business Visas.
[144] 'Balancing investments' are certain permitted investments made through one or more management investment funds. For the full list of requirements, see the 'CompInvests5.19C&D' tab of the Register of Instruments - Business Visas.
[145] reg 5.19C(3). The term 'unencumbered' is not defined in the Act or the Regulations. Departmental policy indicates that funds would not be considered 'unencumbered' if there was scope for a direct claim upon the funds by a third party (e.g. mortgages and claims from creditors), and if funds are borrowed by an applicant using a different asset as security for the loan, the funds themselves would be unencumbered for cl 188.246(2)(a) purposes: Policy - Migration Regulations - Schedules – Sch2Visa188 - Business Innovation and Investment (Provisional) – 22.4 Funds unencumbered (reissued 01/07/2020). See also *Pei v MIBP* [2020] FCCA 2068 where the Court accepted that advance rent payments to the applicant as landlord and a loan taken out by the third applicant against properties owned by the applicants but wholly gifted to the first applicant were unencumbered funds (at [18]–[21]).
[146] reg 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).
[147] regs 5.19C(9), (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: reg 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 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: reg 5.19C(10)(d).

Further, for Subclass 188 visa holders in the Significant Investor or Significant Investor Extension stream whose visas were granted before 1 July 2019, the visa holders will not be in breach of condition 8557(b) which requires the holder to hold the complying significant investment for the whole of the visa period, if they withdrew funds from, or cancelled a component of the complying significant investment specified in an instrument.[149]

Complying premium investment – reg 5.19D

The making or holding of a 'complying premium investment' is a requirement of the Premium Investor stream. The term is defined under reg 5.19D and includes requirements relating to the investment, philanthropic contributions, and to the investor. A complying premium investment may be based on an investment or a philanthropic contribution, or a combination of both.[150] Any philanthropic contribution must be approved for reg 5.19D in writing by a State or Territory government agency.[151]

Investment requirements

A complying significant investment must be of a kind permitted by the requirements specified in an instrument by the Minister.[152]

The funds used to make the philanthropic contribution or investment must be unencumbered and lawfully acquired.[153] The investment must be lawful and must not form the basis for security or collateral for a loan.[154]

Investor requirements

Under reg 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.[155]

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[148] regs 5.19C(7), (8). There was a period, for applications made on or after 19 September 2020, where the investment was taken not to have ceased if in a concession period the investor had withdrawn/cancelled part of an investment specified by instrument: see F2020L01181. However, in view of the reduced impact of the COVID-19 pandemic, it was subsequently considered not necessary for an instrument to be made, so the amendment was repealed by F2021L00852.
[149] The application provision in cl 9101(2) of sch 13 to the Regulations (inserted by item 39, pt 6 of sch 1 to F2020L01181) provides that for the purposes of the application of condition 8557(b), regs 5.19C(8A)–(8B) (inserted by item 10, pt 3 of sch 1 to F2020L01181) apply to a complying significant investment held by a Subclass 188 visa holder in the Significant Investor or the Significant Investor Extension stream granted before 1 July 2019, as if they were in force at the time the visa was granted.
[150] reg 5.19D(1).
[151] reg 5.19D(6).
[152] See the 'CompInvests5.19C&D' tab of the Register of Instruments - Business Visas.
[153] reg 5.19D(4). The term 'unencumbered' is not defined in the Act or the Regulations. Departmental policy indicates that funds would not be considered 'unencumbered' if there was scope for a direct claim upon the funds by a third party: Policy - Migration Regulations - Schedules – Sch2Visa188 - Business Innovation and Investment (Provisional) – 22.4 Funds unencumbered (reissued 01/07/2020).
[154] reg 5.19D(5). 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).
[155] regs 5.19D(11)–(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: reg 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 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: reg 5.19D(12)(d).

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.[156]

Complying entrepreneur activity – reg 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.[157] The term is defined under reg 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.[158] The activity must not relate to one specified by a legislative instrument made under reg 5.19E(6)(a).[159] For current instruments, see the Specification of Entities and Excluded Complying Entrepreneur Activities ('ExclCompEntrActvs') tab of the Register of Instruments - Business Visas.

The activity must be the subject of one or more legally enforceable funding agreements.[160] 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 reg 5.19E(5).[161] If the applicant is not the entrepreneurial entity, they must personally have held, at the time the agreement was entered into, at least a 30% share in the ownership of the entrepreneurial entity.[162] The total amount of funding provided or to be provided under the agreement or agreements must be at least $200,000,[163] 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.[164] There must be a business plan that the delegate considers to be appropriately formulated to lead to a result set out in reg 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.[165] Lastly, all funding provided or to be provided to the entrepreneurial entity under the agreement must be unencumbered and lawfully acquired.[166]

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[156] regs 5.19D(9)–(10).
[157] cl 188.282.
[158] reg 5.19E(2). Departmental policy indicates 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: Policy - Div5.3/reg5.19E – Complying entrepreneur activity (issued 10/09/2016).
[159] reg 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.
[160] reg 519E(3)(b).
[161] reg 5.19E(3)(b). By reg 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 reg 5.19E(6)(b). For a list of entities specified by the Minister under reg 5.19E(6)(b), see the 'ExclCompEntrActvs' tab of the Register of Instruments - Business Visas.
[162] reg 5.19E(3)(c). Policy 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 Policy - Div5.3/reg5.19E – Complying entrepreneur activity (issued 10/09/2016).
[163] reg 5.19E(3)(d).
[164] reg 5.19E(3)(e). Policy 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 Policy - Div5.3/reg5.19E – Complying entrepreneur activity (issued 10/09/2016).
[165] reg 5.19E(3)(e).
[166] reg 5.19E(4). Policy indicates that it is open to presume that any funding from the sources referred to in an instrument made under reg 5.19E(6)(b) is unencumbered and lawfully acquired. See Policy - Div5.3/reg5.19E – Complying entrepreneur activity (issued 10/09/2016).

Designated investment

The making of a 'designated investment' is a requirement of the Investor stream of this visa for applicants invited to apply for the visa before 1 July 2021.[167] A 'designated investment' is an investment in a security specified by legislative instrument.[168] The investments specified by such a notice must meet certain requirements specified in reg 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:[169]

- 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 indicates 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.[170] 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.

Eligible investment

Under the Investor stream, an applicant is required to demonstrate (as one alternative) a successful record of eligible investments.[171] Clause 188.112 defines an 'eligible investment' as each of the following:

- an ownership interest in a business;

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[167] As per cl 188.246 as amended by F2021L00852.
[168] cl 188.111 and reg 5.19A. Note that reference in reg 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* (Cth) (SLI 2014, No 30). However, SLI 2014, No 30 does not affect the effect of existing instrument specified under reg 5.19A.
[169] reg 5.19A(2).
[170] see Policy - Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB-188 Visa Main Applicant – Investor Stream primary applicants – Designated investment criteria (reissued 14/10/2016).
[171] As per cls 188.243, 188.244.

- 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.[172]

Fiscal year

'Fiscal year' is a term referred to in the primary criteria for the Business Innovation and Investor streams.[173] It is defined in reg 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.[174] 'Main business' for these purposes is defined in reg 1.11. It is discussed in detail in Main business (reg 1.11).

Managed fund

If the applicant applied for the visa:

- before 1 July 2015 and is seeking to satisfy either the Significant Investor or Significant Investor Extension streams, or;

[172] cl 188.113.
[173] At cls 188.225, 188.244, 188.245.
[174] As per cls 188.225, 188.232.

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- 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.[175] A complying investment (see discussion above) is described in reg 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. IMMI 13/092, the legislative instrument at the time of writing (September 2019) specifies those investments 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 s 9 or 12A of the *Life Insurance Act 1995* (Cth);
- 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.[176]

'Managed fund' is defined in reg 1.03 as follows:

managed fund *means an investment to which all of the following apply:*

(a) the investment is made by a member:

[175] cls 188.253, 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.
[176] IMMI 13/092. For the current Instrument see the '5.19B' tab of the Register of Instruments - Business Visas.

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(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);

(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.[177]

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.[178]

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.[179] Please see Net personal and business assets calculation 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.[180] For these purposes this term is defined in s 134(10) of the Act.[181] Please see Main business (reg 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.[182]

[177] Definition as repealed and substituted by *Migration Amendment (2014 Measures No 2) Regulation 2014* (Cth) (SLI 2014, No 199), for all live applications as at 12 December 2014 and all applications made on and after that date.
[178] Policy - 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).
[179] cls 188.226, 188.227, 188.244, 188.245.
[180] cls 188.225, 188.229, 188.232, 188.233, 188.244 and through the definition of 'eligible investment' in cl 188.112.
[181] reg 1.03.
[182] cl 188.224.

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The policy intention is to measure the business performance of the applicant for their entire business career.[183] 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.[184]

Departmental policy states 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
- 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.[185]

Departmental policy states 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.[186]

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.[187]

Whilst the Tribunal may have regard to the considerations outlined in Departmental policy in assessing whether the applicant has overall had a successful business career, care should be taken not to rigidly apply the policy when making this assessment and it should not be raised to the level of a legislative requirement.

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[183] Policy - GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (reissued 10/09/2016).
[184] Policy - GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (reissued 10/09/2016).
[185] Policy - GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (reissued 10/09/2016).
[186] Policy - GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (reissued 10/09/2016).
[187] Policy - GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – Overall successful business career (reissued 10/09/2016).

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.[188]

Accordingly, 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.[189] In any assessment of the applicant's activities, the performance of the qualifying businesses and/or eligible investments is a relevant factor.[190]

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;
- 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.[191]

Departmental policy provides the following circumstances where this criterion generally should not be considered satisfied:

- 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.[192]

However, the policy notes that it is not intended that an applicant would fail this criterion if the loss is short-term.[193]

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[188] cl 188.243(1).
[189] Policy - Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (reissued 14/10/2016).
[190] Policy - Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (reissued 14/10/2016).
[191] Policy - Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (reissued 14/10/2016).
[192] Policy - Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (reissued 14/10/2016).
[193] Policy - Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (reissued 14/10/2016).

Moreover, in making the assessment, the policy states 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.[194]

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.[195] The term is defined in reg 1.03 and its meaning is discussed in detail in Main business (reg 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.[196]

According to Departmental policy, 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.[197]

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.[198] 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.[199]

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.[200] The issue is not whether a 'history of involvement' was 'not generally

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[194] Policy - Sch2 Visa 188 – Business Innovation and Investment (Provisional) – The EB -188 Visa Main Applicant – Investor stream primary applicants – Management skills (reissued 14/10/2016).
[195] As per cls 188.229, 188.243, 188.244, 188.261.
[196] cl 188.211.
[197] Policy - GenGuide M – Business visas – Visa application and related procedures - Other Business-Related Requirements – The applicant's business history (reissued 10/09/2016).
[198] *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 sch 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.
[199] *Lee v MIAC* (2009) 180 FCR 149 at [34].
[200] *Lee v MIAC* (2009) 180 FCR 149 at [51].

acceptable in Australia', but rather whether the nature of relevant business activities in which the applicant was involved had that character.[201]

'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.[202] 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.[203]

Departmental policy provides 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 policy also notes the unacceptable business activity or practice should be more than a minor, one-off event for such activities or practices to constitute 'a history'.[204] Whilst the Tribunal may have regard to the considerations outlined in Departmental policy in assessing 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 when making this assessment and it should not be raised to the level of a legislative requirement.

Relevant case law

Judgment	Judgment summary
Lee v MIAC [2008] FMCA 1523	Summary

[201] *Lee v MIAC* [2008] FMCA 1523 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.
[202] *Lee v MIAC* [2008] FMCA 1523 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.
[203] *Lee v MIAC* [2008] FMCA 1523 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.
[204] Policy - GenGuide M – Business Skills visas – Visa application and related procedures - Other Business-Related Requirements – The applicant's business history (reissued 10/09/2016).

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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

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Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Amendment Regulation 2012 (No 7) (Cth)	SLI 2012, No 255	No 11/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (2014 Measures No 2) Regulation 2014 (Cth)	SLI 2014, No 199	No 12/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015
Migration Amendment (Investor Visa) Regulation 2015 (Cth)	SLI 2015, No 102	No 6/2015
Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016 (Cth)	F2016L01391	No 2/2016
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Migration Amendment (COVID-19 Concessions) Regulations 2020 (Cth)	F2020L01181	No 2/2020
Home Affairs Legislation Amendment (2021 Measures No 1) Regulations 2021 (Cth)	F2021L00852	No 5/2021

Available decision templates/precedents

Currently there are no precedents specific to this subclass. Members can use the Generic precedent.

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SUBCLASS 457 VISA

Overview

Tribunal's jurisdiction – primary decisions made after 13 December 2018

- Onshore visa applications
  - Primary visa applicants
  - Secondary visa applicants
- Offshore visa applications
  - Secondary visa applicants

Tribunal's jurisdiction – primary decisions made before 13 December 2018

- Onshore visa applications
  - Standard business sponsor stream
  - 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

- Schedule 3 criterion 3003
- Schedule 3 criterion 3004

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Criterion 3004(f)(i) – would have been entitled to be granted a visa of the same class

Schedule 3 criterion 3005

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)

Visa applications made before 23 March 2013: Service sellers – cl 457.223(8)

Pre-24 November 2012 entry streams – cls 457.223 (7), (7A), (9), (10)

No 'payment for visa' conduct: cl 457.223A

Other time of decision criteria: cls 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/precedents

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?

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Overview[1]

The Subclass 457 is a temporary visa which provides for long-term entry up to four years[2] 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,[3] 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.[4] The new name is defined to include the old, and vice versa.[5] The new name is intended to better reflect the purpose of the Subclass 457 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.[6] The Subclass 456 visa was repealed from 23 March 2013.[7]

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* (Cth) and associated amending regulations.[8] 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.[9] A number of integrity measures were introduced into the Subclass 457 programme through further amendments in 2013.[10]

The different 'streams' under which an applicant may be granted this visa are set out in cl 457.223 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). While

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] cl 457.511 of Schedule 2 to the Regulations. However, for Subclass 457 visas in effect on or after 9 July 2020 (whether the visa was granted before, on or after 9 July 2020), if the primary visa holder holds a Hong Kong passport on the date of grant of the Subclass 457 visa, the validity period of the visa held by the primary visa holder and their family members who were granted a Subclass 457 visa on the basis of satisfying the secondary criteria, will end on 8 July 2025: cl 9001 of Part 90, Schedule 13 to the Regulations, inserted by item 3 of Schedule 1 to the *Migration Amendment (Hong Kong Passport Holders) Regulations 2020* (Cth). The definition of 'Hong Kong passport' for this purpose is inserted in reg 1.03 by the same amending regulations and means a Hong Kong Special Administrative Region of the People's Republic of China passport.
[3] *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262).
[4] *Migration Amendment Regulations 2012 (No 4)* (Cth) (SLI 2012, No 238).
[5] reg 1.03.
[6] Explanatory Statement to SLI 2012, No 238.
[7] Subclass 456 visa was repealed by *Migration Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 32).
[8] *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115) as amended by *Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1)* (Cth) (SLI 2009, No 203).
[9] SLI 2012, No 238. The effect of SLI 2012, No 238 is summarised in Legislation Bulletin No 9/2012.
[10] *Migration Amendment Regulation 2013 (No 5)* (Cth) (SLI 2013, No 145). The effect of SLI 2013, No 145 is summarised in Legislation Bulletin No 10/2013.

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.[11]

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.

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 applications) of the *Migration Act 1958* (Cth) (the Act). Both s 338(2) and reg 4.02(4)(l) (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

[11] 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), (da).

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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).[12] 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;[13] 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.[14]

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 (ss 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.[15]

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.

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[12] A Subclass 457 visa is prescribed for s 338(2)(d): reg 4.02(1A).
[13] See reg 2.75 for cessation of nominations associated with 457 visas.
[14] s 338(2)(d) as introduced by the *Migration and Other Legislation Amendment (Enhance Integrity) Act 2018* (Cth) (No 90, 2018), with effect for decisions made on or after 13 December 2018.
[15] 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.

		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 (ss 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.[16]

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 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 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

[16] s 347(2)(a).

requirements of ss 338(2)(a) to (c) are met in relation to the non-citizen and visa.[17] An application for review of the decision may only be made by a person to whose application the decision relates.[18]

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 ss 338(2)(a) to (c)), it would not be reviewable under s 338(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 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,[19] 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 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.[20] The Tribunal has jurisdiction to review these decisions if the applicant is outside Australia at the time of the visa application[21] 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

[17] reg 4.02(4)(q) as introduced by the *Migration Amendment (Enhanced Integrity) Regulations 2018* (Cth) (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. Sections 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.
[18] reg 4.02(4)(p) as introduced by No 90, 2018.
[19] Fees can be refunded in the limited circumstances prescribed in reg 4.14.
[20] reg 4.02(5)(k).
[21] 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 reg 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)* (Cth) (SR 2004, No 390), 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 sch 2 criteria had the result that s 338(5) was no longer applied to Subclass 457 visas, so reg 4.02(4)(l) was inserted to preserve a right of review in respect of offshore visa applications.

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(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.[22]

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.[23]

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.[24] The person who applied to become the sponsor or who nominated the non-citizen has standing.[25]

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.[26] 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.[27] 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,

[22] reg 4.02(4)(l) as repealed and substituted by F2018L01707, for primary decisions made on or after 13 December 2018.
[23] reg 4.02(4AA) as inserted by F2018L01707.
[24] reg 4.02(4)(l)(iv) as inserted by F2018L01707.
[25] reg 4.02(5)(k).
[26] Subclass 456 visa was repealed by SLI 2013, No 32.
[27] 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.

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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),[28] 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.[29] In these circumstances, s 338(2)(d), as prescribed in the Act before being repealed by the *Migration and Other Legislation Amendment (Enhance Integrity) Act 2018* (Cth), 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).[30] Accordingly, to be a reviewable decision, the additional requirement in s 338(2)(d) must be met.[31]

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[28] A Subclass 457 visa is prescribed for s 338(2)(d): reg 4.02(1A).

[29] 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* (Cth). The term 'approved sponsor' is defined in s 5(1) of the Act as 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: reg 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.

[30] 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 *Migration Amendment Regulations 2009 (No 9)* (Cth) (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)* (Cth) (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 reg 4.02(1AA) to include 'being identified in a nomination under s 140GB of the Act': reg 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, No 203, p.80.

[31] In *Ahmad v MIBP* [2015] FCAFC 182, 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. The judgment was consistent with earlier judgments in *MIAC v Islam* [2012] FCA 195 at [53] and *Diamant v MIBP* [2014] FCCA 21 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 cls 457.223(4)(a)(i)(A) and (ii)(A) (standard business sponsor stream) that the applicant be sponsored by an approved sponsor.

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),[32] either:

- 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.[33] This includes a nomination application that has not yet been determined, or an approved nomination.[34] It does not include a nomination that has been refused with no review sought of that refusal,[35] or a nomination that has expired.[36] It likely does also not include a nomination made on or after 18 March 2018.[37] If there has not yet been any sponsorship approval given, the decision is not reviewable.[38] 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;[39] 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.[40]

[32] 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 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; *Ramjali v MIBP* [2017] HCASL 179. For further discussion see Part 1.4.5 of Procedural Law Guide Chapter 1. Visa and related applications.

[33] In *Ahmad v MIBP* [2015] FCAFC 182 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.

[34] See *Ahmad v MIBP* [2015] FCAFC 182 at [111]–[112]. The Court found an earlier judgment in *MIBP v Lee* [2014] FCCA 2881 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 reg 4.02(1AA), that for ss 337 and 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 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.

[35] *Dyankov v MIBP* [2017] FCAFC 81 at [59].

[36] See obiter comments in *Ahmad v MIBP* [2015] FCAFC 182 at [113] and *Gulati v MIBP* [2016] FCCA 2263, upheld in *Gulati v MIBP* [2017] FCA 255.

[37] 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: reg 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.

[38] See *Singh v MIBP* [2018] FCCA 2769 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.

[39] 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).

[40] *Ahmad v MIBP* [2015] FCAFC 182 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 at [18]–[19] which held that the reference to 'the sponsor' in

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For a detailed breakdown of these jurisdictional issues, please see the table 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'.[41] In this 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.[42]

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.[43] 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.[44] 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.[45] 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).[46]

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)),[47] the Tribunal would have jurisdiction under s 338(2), but the requirement in s 338(2)(d) would not apply.

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s 338(2)(d)(ii) is not one that picks up the meaning of 'sponsored' in reg 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.

[41] 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).

[42] See *Kim v MIAC* [2007] FMCA 166 and *Farooq v MIAC* [2008] FMCA 45.

[43] In *MIAC v Islam* [2012] FCA 195, 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 reg 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.

[44] *Ahmad v MIBP* [2015] FCAFC 182 at [111]–[112]. Although the Court didn't refer expressly to the Labour Agreement stream, the findings of the Court would apply equally to this stream.

[45] *Ahmad v MIBP* [2015] FCAFC 182 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.

[46] The Court in *MIAC v Islam* [2012] FCA 195 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).

[47] 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.

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: cls 457.324(1) and (2).

Clause 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.[48] This would occur, for example, as required by reg 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 under cl 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 reg 2.75(2)(c).[49] 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.[50] 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

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[48] 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.

[49] 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 reg 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 cl 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 reg 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).

[50] 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 reg 2.57).

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.[51] The Court's reasoning turned heavily on its understanding that the secondary applicants' review applications could not succeed without the primary applicant.[52] This reasoning was applied in *Sharma v MIBP*,[53] 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).[54] 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, 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.[55]

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). 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 reg 1.03 to have the meaning provided for in reg 1.20 and in reg 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).[56]

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.

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[51] *Kim v MIAC* [2007] FMCA 166 at [22]–[26].
[52] 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.
[53] *Sharma v MIBP* [2016] FCCA 1073.
[54] *Sharma v MIBP* [2016] FCCA 1073 at [15].
[55] See discussion of the extent to which the Tribunal is bound by the decision in *Sharma* in 1412960 [2016] AATA at [29]–[34].
[56] 1412960 [2016] AATA at [45].

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.[57]

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.[58]

Offshore visa applications

For offshore applications, a decision 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[59] 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.[60] In these situations, it is the sponsor or nominator who has the right of review.[61]

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 reg 2.75.[62]

There has been little judicial consideration of reg 4.02(4)(l) and although the requirement in reg 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.[63] 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

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[57] s 338(2)(d)(ii) refers specifically to a review of a decision not to approve the sponsor/nomination.
[58] 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.
[59] 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 reg 4.02(4)(l), it is clear that the regulation was intended to apply to visa applications lodged offshore. Prior to amendments made by SR 2004, No 390, 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 sch 2 criteria had the result that s 338(5) no longer applied to Subclass 457 visas, so reg 4.02(4)(l) was inserted to preserve a right of review in respect of offshore visa applications.
[60] 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 at [12].
[61] reg 4.02(5)(k). *Phornpisutikul v MIBP* [2016] FCCA 1934 at [13].
[62] cl 457.223(4)(a).
[63] This textual difference reflects that reg 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 SR 2004, No 390, p.8.

that the word 'nominated' in reg 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,[64] because it is the sponsoring employer who has standing to apply for review in offshore matters, accepting jurisdiction wouldn't necessary be futile. This is 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.[65]

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 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: cls 457.324(1) and (2). As discussed in more detail 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 reg 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.

[64] See discussion in *Dyankov v MIBP* [2017] FCAFC 81 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 reg 4.02(4)(l).

[65] regs 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.

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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 reg 2.07AA.[66] Note that the Subclass 456 visa was removed from Class UC for visa applications made on or after 23 March 2013.[67]

Where the applicant is seeking a Subclass 457 visa, there are requirements as to application form and charges,[68] where the application must be made[69] and, in certain circumstances, where the applicant must be when their application is made.[70] There are minor differences in these requirements depending on whether the visa application was made before, or on or after 1 July 2013.[71] 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.[72]

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:
  - 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

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[66] Note that reg 2.07AA provides special status to APEC Business Travel Card applicants/holders.
[67] SLI 2013, No 32. Consequential amendments were made to Item 1223A of sch 1 to the Regulations to reflect the removal of the subclass.
[68] Items 1223A(1)(b)–(bc) and 1223A(2) of sch 1 to the Regulations.
[69] Item 1223A(3)(aa) of sch 1 to the Regulations for applications made on or after 1 July 2013; items 1223A(3)(aa)–(ag) and (ca) for applications made before this date.
[70] 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).
[71] Amendments to sch 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.
[72] Item 1223A(3)(e) as inserted by *Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015* (Cth) (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.

- the person who has nominated, or proposes to nominate, the occupation is not the subject of a sponsorship bar.[73]

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.[74]

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.[75]

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.[76] Consequential amendments were also made to reflect the removal of Subclass 456 for visa applications made on or after 23 March 2013.[77]

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:

- to currently hold a substantive visa[78] other than a Subclass 771 (Transit) visa or a special purpose visa;[79] or

[73] Schedule 1, item 1223A(3)(d).
[74] Schedule 1, item 1223A(3)(d)(a).
[75] Schedule 1, item 1223A(3)(c).
[76] SLI 2012, No 238.
[77] SLI 2013, No 32.
[78] reg 1.03 defines 'substantive visa' as a visa other than a bridging visa, criminal justice visa or enforcement visa.
[79] For special purpose visas see definition in ss 5(1) and 33 of the Act.

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- 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.[80]

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,[81] and to applicants who entered Australia unlawfully on or after that date who have not subsequently been granted a substantive visa.[82] 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;[83] and
- there are compelling reasons for granting the visa;[84] 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;[85] 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;[86] or

[80] 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.
[81] 3004(a). 'Substantive visa' is defined in s 5(1) of the Act as a visa other than a bridging visa, a criminal justice visa or an enforcement visa.
[82] 3004(b).
[83] 3004(c).
[84] 3004(d).
[85] 3004(e). 'Entry permit' has the meaning given by s 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)).
[86] 3004(f)(i).

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- 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 grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully;[87] and

- the applicant intends to comply with any conditions subject to which the visa is granted;[88] 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.[89]

Criterion 3004(f)(i) – would have been entitled to be granted a visa of the same class

On current authority, this criterion requires an assessment as to whether the applicant could have met the requirements for the grant of the relevant visa class.[90]

In *Quan v MIMAC*[91] the Court considered the requirements of criterion 3004 in the context of cl 457.211(b)(ii), and held that it was open for the Tribunal to find that the applicant did not meet cl 3004(f)(i) as she was unable to satisfy all the mandatory criteria necessary for the grant of a Subclass 457 visa, including a sponsorship, on the day when she last held a substantive visa.[92] An application seeking an extension of time to appeal this judgment was dismissed in *Quan v MIBP* [2013] FCA 1239, with the Federal Court finding no error in the reasoning of the primary judge and holding that the appellant could not satisfy cl 3004(f) because she did not have an approved sponsor on the last day on which she held a substantive visa.[93] However, in *Zhuang v MICMSMA*[94] the Federal Court held that cl 3004(f)(i) required a consideration as to whether, if an application had been made on the day when the applicant last held a substantive visa, it *could* have been supported by an approved sponsor, rather than as at that relevant date the applicant had in place an approved sponsor. The Court considered that while this was a factual question for the decision maker, cl 3004(f)(i) was framed in terms of a hypothetical question, being what would have occurred if the present visa applicant had actually made the application just before the visa expiry, and as such it would be self-defeating to require the applicant to demonstrate that they had taken a step that would only be taken if an application was in fact being made, in order to meet a criterion that applies where such an application has not been made.[95] This appears to be at odds with the authority in *Quan* and *Kaur*, which were not

[87] 3004(f)(ii).
[88] 3004(g).
[89] 3004(h). For provisions on transitional (temporary) visas, see *Migration Reform (Transitional Provisions) Regulations* (Cth) (SR 1994, 261).
[90] *Zhuang v MICMSMA* [2020] FCA 742.
[91] *Quan v MIMAC* [2013] FCCA 1254.
[92] *Quan v MIMAC* [2013] FCCA 1254 at [37]–[41].
[93] *Quan v MIBP* [2013] FCA 1239 at [32]–[33]. This reasoning (while not binding on the Federal Circuit Court) was adopted in *Kaur v MIBP* [2018] FCCA 141, 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
[94] *Zhuang v MICMSMA* [2020] FCA 742.
[95] *Zhuang v MICMSMA* [2020] FCA 742 at [52]–[55].

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considered in *Zhuang*. However, as appellate authority, the reasoning in *Zhuang* should be followed.

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.[96] That is, a person can be 'saved' by the Schedule 3 provisions only once.[97]

Time of decision criteria

There are various time of decision criteria to be satisfied by the primary applicant.[98] Each of these are discussed below. Clause 457.223 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;[99]
- 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;

[96] *Sapkota v MIBP* [2014] FCAFC 160 at [27]–[28], rejecting the construction adopted at first instance in *Sapkota v MIBP* [2014] FCCA 1285.
[97] Policy – 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).
[98] cl 457.22.
[99] Clause 457.223A was inserted by 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.

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- the applicant satisfies specified public interest criteria: cl 457.224;
- the applicant satisfies special return criteria: cl 457.225;[100]
- *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)[101] (both applicants and non-applicants) meet specified public interest criteria: cl 457.227;[102]
- *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)[103] meets specified public interest and special return criteria: cl 457.227A;[104] 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.[105]

Note that cls 457.226 and 457.226A were repealed for all applications made on or after 24 November 2012.[106] 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).[107]

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.[108] 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

[100] 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.
[101] 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.
[102] Clause 457.227 was omitted by SLI 2012, No 238 for visa applications made on or after 24 November 2012.
[103] 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.
[104] Clause 457.227A was omitted by *Migration Amendment Regulations 2009 (No 7)* (Cth) (SLI 2009, No 144) for visa applications made on or after 1 July 2009.
[105] Clause 457.228 was omitted by *Migration Legislation Amendment Regulation 2012 (No 5)* (Cth) (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.
[106] 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.
[107] 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.
[108] As amended by SR 2004, No 390 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)* (Cth) (SR 2003, No 363) 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)* (Cth) (SR 2002, No 348) applied to *an application made in Australia*.

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information on the legal approach to 'complied substantially' see 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 Visa conditions 8104, 8105, 8607 and 8107 (work restrictions).

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.[109] 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,[110] 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).

The requirements of criterion 3004 in Schedule 3 to the Regulations in the context of cl 457.211(b)(ii) has been the subject of some judicial consideration, as discussed above. The current authority[111] appears equally applicable in the context of cl 457.221A.

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).[112] 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

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[109] SLI 2009, No 202.
[110] For special purpose visas see definition in ss 5(1) and 33 of the Act.
[111] *Zhuang v MICMSMA* [2020] FCA 742.
[112] 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.

streams which could be satisfied.[113] 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 reg 1.03. For details regarding approval of business nominations, please refer to Regulations 2.72 and 2.73 - Nomination and approval of an occupation for Subclass 457 and Subclass 482. For further detail about standard business sponsorship, see Approval as standard business sponsor.

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 reg 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
- **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.[114]

'Labour agreement' is defined in reg 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.

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[113] 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 cl 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.

[114] Amendments to cls 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.

Standard business sponsorship – cl 457.223(4)

Clause 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.[115] 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.

Clause 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 reg 2.75;[116]
- **specified occupation** – the nominated occupation is specified in a written instrument;[117]
- **specified occupation / employment** – either:
    - the applicant is employed to work in the nominated occupation, AND if the person who made the approved nomination met reg 2.59(d) or (e) or reg 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 reg 2.59(h) or 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;[118]
- **genuine intention / position** – the applicant's intention to perform the occupation is genuine and the associated position is genuine;[119]
- **skills, qualifications and employment** – the applicant has the skills, qualifications and employment background that the Minister considers necessary to perform the nominated occupation;[120]

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[115] 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.
[116] 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.
[117] cl 457.223(aa).
[118] 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.
[119] cl 457.223(4)(d).

- **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;[121]
- **English language**
  - certain applicants need to have a prescribed level of English language proficiency;[122]
  - if required to demonstrate her or his English language proficiency, an applicant must do so in the manner specified by the Minister;[123]
- **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.[124]

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 reg 2.75.[125]

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,[126] this may require consideration of the circumstances of a related review application.[127] Note that it must be a

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[120] 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.
[121] cl 457.223(4)(e).
[122] cl 457.223(4)(eb).
[123] cl 457.223(4)(ec).
[124] cl 457.223(4)(f).
[125] 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.
[126] s 338(9) and reg 4.02(4)(d).
[127] In *Kaur v MIBP* [2016] FCCA 1730, 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

nomination applied for before 18 March 2018 (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.[128]

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 reg 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.[129]

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.[130]

The cessation of the nomination approval for a Subclass 457 visa is provided for in reg 2.75. Under reg 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.

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decision, being a misrepresentation as to the date of response to a Departmental letter was due, did not 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]).

[128] 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 reg 2.72(1) as repealed and substituted by F2018L00262.

[129] SLI 2013, No 146.

[130] See for example *Chen v MIBP* [2016] FCCA 2351. 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.

Note that reg 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.[131] 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.[132] However, this savings provision does not operate retrospectively and has no relevance to nominations which had already ceased by operation of reg 2.75(b) before 18 March 2018.[133]

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.[134] 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 reg 2.72(10)(a) or (aa) that is in effect.[135] Regulation 2.72(10)(a) applies to nominations made before 1 July 2010, whilst reg 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.[136] The relevant instrument is the one that is in effect at the time of decision.[137] The instrument for reg 2.72(10)(a) refers to occupations under the Australian Standard Classification of Occupations (ASCO), while the instrument for reg 2.72(10)(aa) refers to the Australian New Zealand Standard Classification of Occupations (ANZSCO).

[131] cl 6704(15) of sch 13 to the Regulations, as inserted by F2018L00262.
[132] Explanatory Statement to F2018L00262, Attachment C item 178.
[133] *Mangat v MHA* [2019] FCCA 2227.
[134] Explanatory Statement to *Migration Amendment Regulations 2009 (No 9)* (Cth) (SLI 2009, No 202) at p.13.
[135] cl 457.223(4)(aa) as amended by *Migration Amendment Regulations 2010 (No 6)* (Cth) (SLI 2010, No 133).
[136] 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).
[137] *Ansari v MICMSMA* [2020] FCCA 458 at [27].

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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.[138] 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).[139] See the 'Occ186/442/457&Noms' tab of the Register of instruments - Business visas for the relevant instrument and Regulations 2.72 and 2.73 - Nomination and approval of an occupation for Subclass 457 and Subclass 482 for further discussion of instruments made under regs 2.72(10)(a) and (aa).

Note that instruments made under reg 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.[140]

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.[141] If the sponsor was approved on the basis of lawfully operating a business in Australia (per reg 2.59(d), 2.59(e), 2.68(e) or 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 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 regs 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.[142] Although there is no express wording as in cl 457.223(4)(aa), it appears from the context as a

[138] See s 9 of IMMI 17/060. This is regardless of whether an associated visa application was made before, on or after 1 July 2017.
[139] Note that IMMI 17/081 only (relevantly) purports to repeal IMMI 16/059 in relation to nominations to which IMMI 17/060 applies (see sch 1, pt 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'.
[140] Note that reg 2.72(10)(aa) was amended on 1 July 2017 by *Migration Amendment (Specification of Occupations) Regulations 2017* (Cth) (F2017L00818) 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 reg 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 'inapplicability conditions', can be found in the Departmental policy 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).
[141] 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).
[142] Explanatory Statement to SLI 2013, No 146, p.56.

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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.[143]

Both cl 457.223(4)(d)(ii) and the identically worded reg 2.72(10)(f) should be approached in the same manner.[144] The starting point is the proper identification of the relevant occupation and position. The word '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.[145] 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.[146] 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.[147]

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.[148] 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.[149]

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[143] 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 reg 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.
[144] *Khan v MIBP* [2016] FCCA 333. For guidance on how to approach reg 2.72(10)(f), see *Cargo First Pty Ltd v MIBP* (2015) 298 FLR 138 and Regulations 2.72 and 2.73 - Nomination and approval of an occupation for Subclass 457 and Subclass 482.
[145] *Khan v MIBP* [2016] FCCA 333 at [9].
[146] *Khan v MIBP* [2016] FCCA 333 at [6].
[147] *Khan v MIBP* [2016] FCCA 333 at [10].
[148] *Bakri v MIBP* [2015] FCCA 3059; upheld on appeal in *Bakri v MIBP* [2016] FCA 396. 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).
[149] *Khan v MIBP* [2016] FCCA 333 at [13]. See also *Aulakh v MIBP* [2015] FCCA 467.

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).[150] 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 in the same ANZSCO groupings.[151] In that context, a focus on the detailed tasks that distinguish the particular occupation in question will generally be appropriate.[152]

Departmental policy suggests 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.[153] The policy suggests that decision makers should generally consider this requirement met on the basis that the related nomination has already been approved,[154] however following judgment in *Bakri*, (above) such an approach should be treated with caution.

The policy 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

[150] *Pasricha v MIBP* [2017] FCA 779 at [51].
[151] *Pasricha v MIBP* [2017] FCA 779 at [49].
[152] *Pasricha v MIBP* [2017] FCA 779 at [50].
[153] Policy – Migration Regulations – Schedules > Sch2 Visa 457-Temporary Work (Skilled) – 457 visa applications – [4.7.5] Genuine intention and position (reissued on 1 October 2017).
[154] Policy – Migration Regulations – Schedules > Sch2 Visa 457-Temporary Work (Skilled) – 457 visa applications – [4.7.5] Genuine intention and position (reissued on 1 October 2017).

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- the applicant's age, qualifications and employment history to the applicant's proposed employment in Australia.[155]

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.[156]

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.[157]

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.[158] However, 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.[159]

Similarly, the certification referred to in reg 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.

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[155] Policy – Migration Regulations – Schedules > Sch2 Visa 457-Temporary Work (Skilled) – 457 visa applications – [4.7.5] Genuine intention and position (reissued on 1 October 2017).
[156] 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.
[157] Explanatory Statement to SLI 2013, No 146, p.57.
[158] See criteria for approval of nomination of occupation under reg 2.72, with specific criteria referring to ASCO for nominations made before 1 July 2010 in regs 2.72(8), (10)(a) and (10)(d) and ANZSCO for nominations made on or after 1 July 2010 in regs 2.72(8A), (10)(aa) and (10)(e). Further information about the nomination scheme is available in Regulations 2.72 and 2.73 - Nomination and approval of an occupation for Subclass 457 and Subclass 482.
[159] *Joshi v MIMIA* [2005] FMCA 1116.

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 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.[160] The policy states 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

[160] 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.

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nominated occupation, by completing such an assessment, in accordance with paragraph 457.223(2)(d) and 457.223(4)(e)'.[161] The policy also imposes such a requirement for certain occupations.[162] 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 – cls 457.223(4)(eb) and (ec)

English language proficiency requirements are contained in cls 457.223(4)(eb) and (ec) as explained below and in the flowchart attachment.[163] Both cls 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.[164]

Clause 457.223(4)(eb) specifies the level of language proficiency, if any, that is required for an applicant.[165] 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'.[166] 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:

- 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.[167]

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

[161] Policy – 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.
[162] Policy – 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).
[163] 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* (Cth) (F2016L00523).
[164] *Tran v MIBP* [2016] FCCA 1984 at [36].
[165] Amendments to this provision made by SLI 2013, No 146 were replaced by *Migration Amendment (2014 Measures No 1) Regulation 2014* (Cth) (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.
[166] cls 457.223(4)(eb)(i) and (ii).
[167] cl 457.223(6).

Released by the AAT on 25 February 2022

has been made and such applications cannot rely on this exception.[168] 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 reg 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.[169]

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.[170]

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.[171]

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[168] See Explanatory Statement to Migration (IMMI 17/057: English Language Requirements for Subclass 457 visas) Instrument 2017.
[169] For reg 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 s 16 of the *Fair Work Act 2009* (Cth) (Fair Work Act). An applicant's ordinary hours of work are not defined, but the Fair Work Act 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.
[170] 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.
[171] 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.

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;[172] and
- achieved the score specified in the instrument, within the period specified in a single attempt at the test.[173]

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[174]	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.[175] 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.[176]

The period currently specified in the instrument for meeting the English requirement is 3 years from the date of the visa application.[177]

In *Guder v MIBP,*[178] 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

[172] cl 457.223(4)(eb)(iv).
[173] cl 457.223(4)(eb)(v).
[174] Note that although IMMI 17/057 lists the total band score for TOEFL iBT as 36, from 18 March 2018 (including for applications made before that date) this should be read as 35: see cl 6702(3) of sch 13 to the Regulations, as inserted by F2018L00262.
[175] 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 at [8].
[176] Explanatory Statement to SLI 2014, No 32, at p.11.
[177] IMMI 17/057, item 9.

Released by the AAT on 28 February 2022

for the Tribunal to make its decision, in circumstances where she'd not yet achieved the requisite test scores but not asked for further time in which to attempt to do so.[179] A failure to do so was a breach of s 360 in that case.[180] 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).[181]

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.[182]

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.[183] 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.

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[178] *Guder v MIBP* [2017] FCCA 2527.
[179] *Guder v MIBP* [2017] FCCA 2527 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.
[180] 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 at [41].
[181] *Tran v MIBP* [2016] FCCA 1984 at [46].
[182] *Tran v MIBP* [2016] FCCA 1984 at [45].
[183] *Tran v MIBP* [2016] FCCA 1984 at [48].

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 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 reg 1.13A (previously reg 2.57(3)) as any adverse information relevant to a person's suitability as a sponsor or nominator.[184] 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).[185] 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.[186] Some of the listed kinds of information require consideration or action by a competent authority (a Department or authority administering or enforcing the law).[187]

The conviction, finding of non-compliance, administrative action, investigation, legal proceedings or insolvency must have occurred within the previous 3 years.[188]

The definition of 'associated with' is found in reg 1.13B (formerly reg 2.57(3)).[189] A person is 'associated with' another person (i.e. the sponsoring or nominating entity) in the circumstances

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[184] reg 1.13A as inserted by SLI 2015, No 242. The definition was previously found in reg 2.57(3), which was repealed by the same amending regulations.
[185] reg 1.13A. The reference to becoming insolvent means insolvent within the meaning of ss 5(2) and (3) of the *Bankruptcy Act 1966* (Cth) and s 95A of the *Corporations Act 2001* (Cth) (Corporations Act).
[186] reg 1.13A(2).
[187] 'Competent authority' has the meaning given by reg 2.57(1): reg 1.13A(4).
[188] reg 1.13A(3).
[189] reg 1.13B as inserted by SLI 2015, No 242. The definition was previously found in reg 2.57(3), which was repealed by the same amending regulations.

referred to in reg 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).[190]

As drafted, cl 457.223(4)(f)(i) refers to adverse information 'known to Immigration'.[191] 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 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.[192] Departmental policy additionally suggests 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.[193]

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[190] reg 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. In relation to an 'entity', this is defined as including an entity within the meaning of s 9 of the Corporations Act; 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. The term 'associated entity' is further defined in reg 1.03 as having the same meaning in s 50AAA of the Corporations Act.
[191] 'Immigration' is defined in reg 1.03 as the Department administered by the Minister administering the Migration Act 1958 and so doesn't appear to encompass the Tribunal.
[192] Explanatory Statement to SLI 2009, No 115, at p.18.
[193] Policy – 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 Policy – Migration Regulations – Schedules – Temporary Work (Skilled) visa (subclass 457) – sponsorships – [4.5.6] No adverse information (policy reissued 01/01/17).

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.[194] The requirements for visa applicants (both primary and secondary) mirror the requirements for approval as a standard business sponsor and nomination of occupation.[195] Similarly, waiver provisions apply to those requirements.[196]

General issues arising under cl 457.223(4)

The sponsor – meaning of 'person'

Clause 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.[197] Section 22 of the *Acts Interpretation Act 1901* (Cth) 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 clear that the references to a 'person' in cl 457.223(4) would include a corporation, a partnership, an unincorporated association or other entity.[198]

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.[199] The change only affects visa applications made on or after 23 March 2013,[200] and accordingly applicants who made applications before 23 March 2013 must still be considered against this stream.

Clause 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.

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[194] cl 457.324B.
[195] reg 2.59(g)(i) for sponsorship approval and reg 2.72(9)(a) for approval of nomination.
[196] regs 2.59(g)(ii), 2.72(9)(b).
[197] Prior to 14 September 2009, cl 457.111 stated that 'person' includes an unincorporated body of persons.
[198] See reg 2.57(2) of pt 2A, inserted by SLI 2009, No 115.
[199] 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 p.45).
[200] SLI 2013, No 32.

There is no Departmental policy for this stream.[201] 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 – cls 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.[202] 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.

Independent Executives, Further stay Independent Executives – cls 457.223(7), (7A)

The Independent Executive (IE) stream (cl 457.223(7)) was omitted from the Regulations on 14 September 2009[203] and the 'continuing' IE stream in cl 457.223(7A) was omitted from the Regulations on 24 November 2012.[204]

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).[205]

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[201] Justice Rares in *Goo v MIAC* [2007] FCA 391 commented that PAM3 (at that time) ascribed an operation to cls 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.'
[202] 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.
[203] SLI 2009, No 202. This applies to all visa applications as at 14 September 2009, whether made before or after that date.
[204] SLI 2012, No 238.
[205] cl 457.223(7A) was omitted by SLI 2012, No 238. See Explanatory Statement to SLI 2012, No 238.

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* (Cth) or the *Overseas Missions (Privileges and Immunities) Act 1995* (Cth) 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 reg 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.[206] 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.[207]

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 s 245AR(1), 245AS(1), 245AT(1) or 245AU of the Act.[208] 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.[209] 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.[210] Whether it is reasonable to disregard such conduct will be a question for the decision maker, and all relevant

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[206] The definition of 'IAAS agreement' in regs 1.03 and 1.16B was omitted for visa applications made on or after 24 November 2012 by SLI 2012, No 238.
[207] SLI 2012, No 238. See Explanatory Statement to SLI 2012, No 238, at p.65.
[208] 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.
[209] These provisions were inserted by the *Migration Amendment (Charging for a Migration Outcome) Act 2015* (Cth) (No 161, 2015) from 14 December 2015.
[210] cl 457.223A(b).

circumstances of the individual case should be considered.[211] 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.[212]

Other time of decision criteria: cls 457.223B–457.228

With limited exceptions relating to the now repealed 'Service sellers' and quasi-diplomatic streams,[213] 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.[214]

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.[215]

Clauses 457.224, 457.227[216] (for pre-24 November 2012 visa applications) and cl 457.227A[217] (for pre-1 July 2009 visa applications) require the applicant to satisfy certain public interest criteria (PIC).[218] These include:

- 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;[219] and

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[211] The Explanatory Statement introducing this requirement does not provide any guidance as 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 policy on these matters.
[212] 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.
[213] 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 cls 457.223B to 457.223(9) was omitted for visa applications made on or after 24 November 2012 by SLI 2012, No 238. The reference in cls 457.223B to 457.223(8) was omitted for visa applications made on or after 23 March 2013 by SLI 2013, No 32.
[214] SLI 2009, No 202. Clause 457.223B was amended by *Migration Amendment Regulations 2010 (No 1)* (Cth) (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* (Cth) (F2017L01425) 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.
[215] SLI 2009, No 202.
[216] Clause 457.227 was omitted by SLI 2012, No 238.
[217] Clause 457.227A was omitted by SLI 2009, No 144.
[218] 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 cls 457.224, 457.227 and 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)* (Cth) (SLI 2011, No 13), do not include an amendment to this clause.
[219] PIC 4021 inserted by SLI 2012, No 256.

- 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.[220] For further detail see PIC 4020, bogus documents and 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).[221] 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 Health criteria – PIC 4005, 4006A and 4007.

Applicants who are outside Australia and who have previously been in Australia must also satisfy special return criteria: cl 457.225.[222]

Clauses 457.226 and 457.226A were repealed for all applications made on or after 24 November 2012.[223] 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 Legislation Bulletin No 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.[224] This requirement is now contained in PIC 4021 outlined above.[225]

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.[226] If the visa application was made prior to that date and this arises as an issue please consult with MRD Legal Services.

Released by the AAT on 28 February 2022

[220] 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.
[221] PIC 4006A(2) as amended by *Migration Amendment Regulations 2009 (No 13)* (Cth) (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.
[222] 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, cls 457.226 and 457.226A have been repealed: SLI 2012, No 238.
[223] 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.
[224] cl 457.228, inserted by *Migration Amendment Regulations 2005 (No 4)* (Cth) (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.
[225] PIC 4021 inserted by SLI 2012, No 256. The amendment applies to visa applications made on or after 24 November 2012.
[226] These amendments were inserted by SR 2004, No 390.

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.[227] For further details see Member of the family unit (reg 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.[228] 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.[229] 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,[230] and must make their application as an internet application using a form specified by the Minister.[231] 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 a form specified by the Minister in that instrument.[232] See the 'Form&Fees' tab of the Register of instruments - Business visas for the relevant instrument.

Released by the AAT on 23 February 2022

[227] For visa applications made prior to 19 November 2016, see reg 1.12(10), inserted by *Migration Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 42). For visa applications made on or after 19 November 2016, see reg 1.12(5), inserted by *Migration Legislation Amendment (2016 Measures No 4) Regulation 2016* (Cth) (F2016L01696).
[228] Amendments made by SLI 2013, No 146 for visa applications made on or after 1 July 2013.
[229] Item 1223A(3)(ca).
[230] Item 1223A(3)(aa).
[231] Items 1223A(1)(b), (bb).
[232] Items 1223A(1)(ba), (bc).

Relevant case law

Judgment	Judgment summary
Ahmad v MIBP [2015] FCCA 1486	Summary
Ahmad v MIBP [2015] FCAFC 182	Summary
Ansari v MICMSMA [2020] FCCA 458	
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

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Islam v MIAC [2011] FMCA 991	Summary
Joshi v MIMIA [2005] FMCA 1116	Summary
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
Mangat v MHA [2019] FCCA 2272	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	

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Sam v MIAC [2007] FCA 1976	
Sapkota v MIBP [2014] FCAFC 160	Summary
Sapkota v MIBP [2014] FCCA 1285	Summary
Sharma v MIBP [2016] FCCA 1073	Summary
Singh v MIBP [2018] FCCA 2769	
Tran v MIBP [2016] FCCA 1984	Summary
Wyse v MIMA [2006] FMCA 1362	Summary
Xavier Fernandez v MIMIA [2005] FMCA 960	Summary
Zhuang v MICMSMA [2020] FCA 742	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulation 2002 (No 2) (Cth)	SR 2002, No 86	RRT Legislation Bulletin MRT Legal Summary
Migration Amendment Regulations 2002 (No 10) (Cth)	SR 2002, No 348	
Migration Amendment Regulations 2003 (No 11) (Cth)	SR 2003, No 363	MRT Legal Summary
Migration Amendment Regulations 2004 (No 8) (Cth)	SR 2004, No 390	
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	No 1/2005
Migration Amendment Regulations 2009 (No 2) (Cth)	SLI 2009, No 42	No 4/2009
Migration Amendment Regulations 2009 (No 5) (Cth)	SLI 2009, No 115	No 11/2009

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Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulations 2009 (No 9) (Cth)	SLI 2009, No 202	No 13/2009
Migration Amendment Regulations 2009 (No 5) Amendment Regulations 2009 (No 1) (Cth)	SLI 2009, No 203	No 11/2009
Migration Amendment Regulations 2009 (No 13) (Cth)	SLI 2009, No 289	No 17/2009
Migration Amendment Regulations 2010 (No 1) (Cth)	SLI 2010, No 38	No 1/2010
Migration Amendment Regulations 2010 (No 6) (Cth)	SLI 2010, No 133	No 7/2010
Migration Amendment Regulations 2011 (No 1) (Cth)	SLI 2011, No 13	No 01/2011
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 04/2012
Migration Legislation Amendment Regulation 2012 (No 4) (Cth)	SLI 2012, No 238	No 9/2012
Migration Legislation Amendment Regulation 2012 (No 5) (Cth)	SLI 2012, No 256	No 10/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 2013, No 32	No 03/2013
Migration Amendment Regulation 2013 (No 5) (Cth)	SLI 2013, No 145	No 10/2013
Migration Legislation Amendment Regulation 2013 (No 3) (Cth)	SLI 2013, No 146	No 10/2013
Migration Amendment (Visa Application Charge and Related Matters No 2) Regulation 2013 (Cth)	SLI 2013, No 253	
Migration Amendment (Clarifying Subclass 457 Requirements) Regulation 2015 (Cth)	SLI 2015, No 185	No 11/2015
Migration Amendment (Charging for a Migration Outcome and Other Measures) Regulation 2015 (Cth)	SLI 2015, No 242	No 12/2015
Migration Legislation Amendment (2016 Measures No 1) Regulation 2016 (Cth)	F2016L00523	No 01/2016
Migration Legislation Amendment (2016 Measures No 4) Regulation 2016 (Cth)	F2016L01696	No 04/2016

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Migration Amendment (Specification of Occupations) Regulations 2017 (Cth)	F2017L00818	No 03/2017
Migration Legislation Amendment (2017 Measures No 4) Regulations 2017 (Cth)	F2017L01425	No 5/2017
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 01/2018
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (Cth)	No 90, 2018	No 03/2018
Migration Amendment (Enhanced Integrity) Regulations 2018 (Cth)	F2018L01707	No 05/2018
Migration Amendment (Hong Kong Passport Holders) Regulations 2020 (Cth)	F2020L01047	

Available decision templates/precedents

The following decision precedents are designed specifically for Subclass 457 reviews:

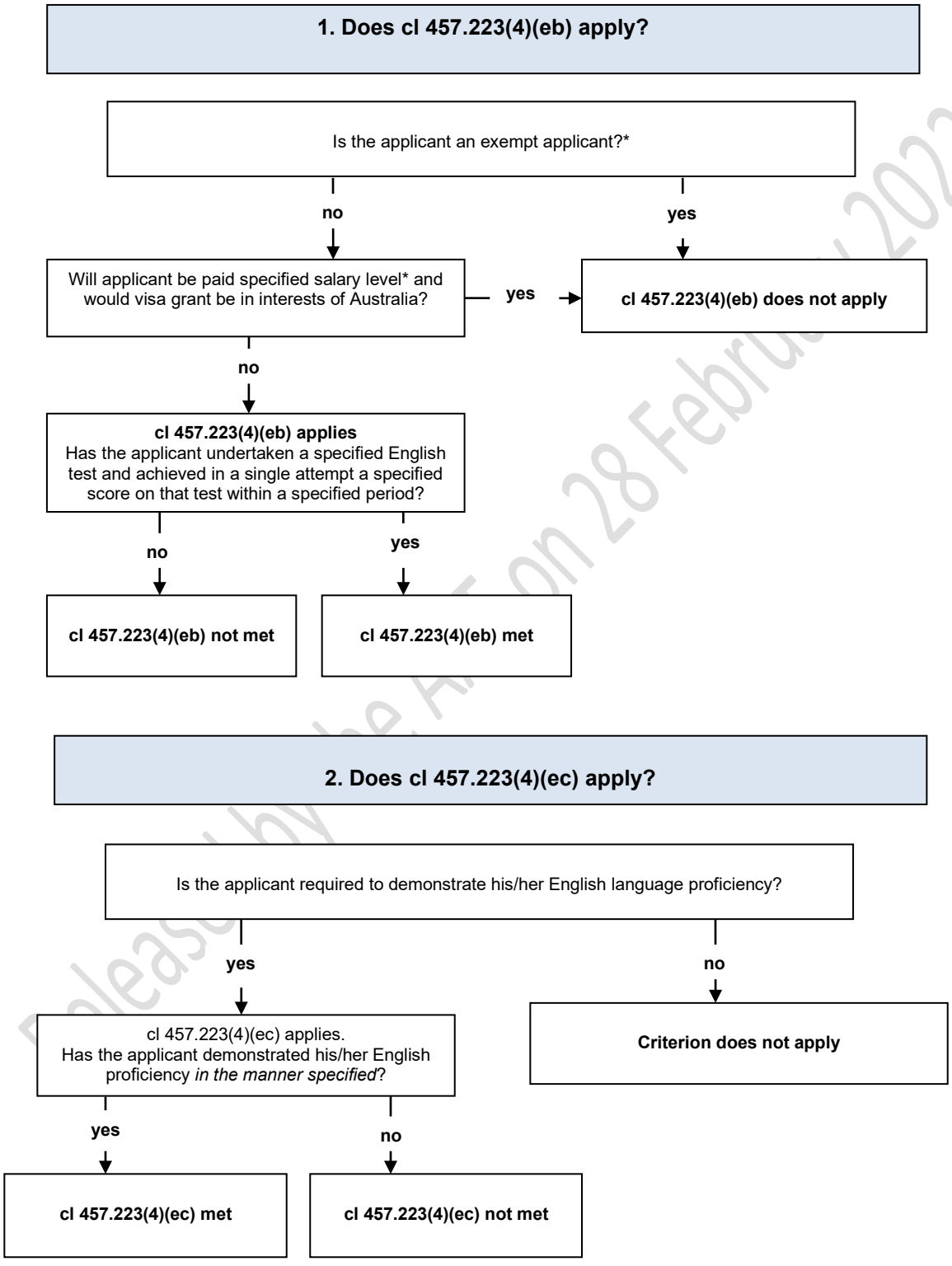
- **Subclass 457 – General**: suitable for Subclass 457 cases where the visa application was made on or after 2 April 2005 and intended for use in cases *other than* where the issue is whether the visa applicant's sponsor is an approved business sponsor (cl 457.223(4)) (see below).
- **Subclass 457 – Standard Business Sponsor**: 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: 26 August 2020

Released by the AAT on 28 February 2022

Attachments

Flowchart: Assessing English language requirements



*** See** '457Eng' tab of Register of instruments - Business visas for relevant specification

Released by the ABF on 28 February 2022

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 *Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018* (Cth).

		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]

[1] On the basis of *Singh v MIBP* [2018] FCCA 2769 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 (*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 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).

[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 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 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 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: reg 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 reg 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.

	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]

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[9] s 338(2)(d)(i) is not met. The applicant is not identified in a nomination under s 140GB (either approved or pending). Section 338(2)(d)(ii) is also not met as there is no pending review of a decision under s 140E or 140GB.

SUBCLASS 482 VISA

Overview

Tribunal's jurisdiction – primary decisions made on or after 13 December 2018

- Onshore visa applications
  - Primary visa applicants
  - Secondary visa applicants
- Offshore visa applications
  - Secondary visa applicants

Tribunal's jurisdiction – primary decisions made before 13 December 2018

- Onshore visa applications
  - Secondary visa applicants
- Offshore visa applications
  - Secondary visa applicants

Requirements for valid visa application

Visa criteria

- Common criteria
  - Complied substantially with conditions on previous visas
  - Current approved nomination
  - Genuine position and intention to perform the occupation
  - Necessary skills, qualifications and background
  - Not engaged in payment for visa sponsorship conduct
  - No adverse information or reasonable to disregard
- Short-term stream criteria
  - Two years of experience in nominated occupation

Released by the AAT on 28 February 2022

Genuine applicant for entry and stay as a short term visa holder

English language requirements

Employment in nominated occupation and in sponsor's business

Medium-term stream criteria

Labour agreement stream criteria

Other issues

Family members

Relevant case law

Relevant legislative amendments

Available decision precedent

Released by the AAT on 28 February 2022

Overview[1]

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.[2] 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 in which the related nomination under s 140GB of the *Migration Act 1958* (Cth) (the Act) is made, and satisfy the criteria for that stream as well as the common criteria prescribed in Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).

An exception to the above visa validity periods applies to certain Hong Kong passport holders from 9 July 2020.[3]

Tribunal's jurisdiction – primary decisions made on or 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

Released by the AAT on 28 February 2022

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262).
[3] For Subclass 482 visas granted and which did not cease to be in effect before 9 July 2020, the validity period will end on 8 July 2025 regardless of the stream for which the visa was granted, if the visa holder satisfied the primary criteria and held a Hong Kong passport on the date of the visa grant, or the visa holder satisfied the secondary criteria as a member of the family unit of the primary visa holder who held a Hong Kong passport on the date of visa grant: cl 9002 of Part 90, Schedule 13 to the Regulations, inserted by item 3 of Schedule 1 to the *Migration Amendment (Hong Kong Passport Holders) Regulations 2020* (Cth) (F2020L01047). Hong Kong passport is defined in reg 1.03. For visas granted on or after 9 July 2020 to a person who satisfied the primary criteria and on the date of visa grant holds a class of Hong Kong passport specified in an instrument, ('eligible primary visa holder'), the validity period will end 5 years from the date of visa grant: table item 2 of cl 482.511(1), as repealed and substituted by item 2 of Schedule 1 to F2020L01047. Currently, there is no instrument specifying the class of Hong Kong passports for the purposes of cl 482.511, and until such an instrument is made, all Hong Kong passports are taken to be in a class specified for this purpose: cl 9003 of Part 90 of Schedule 13 to the Regulations, inserted by item 3 of Schedule 1 to F2020L01047. The family members of these eligible primary visa holders, who are granted the visa on or after 9 July 2020 on the basis of satisfying the secondary criteria, will be able to travel to and remain in Australia until the day on which the eligible primary visa holder's visa ends, and the usual rule that applies to secondary visa holders who are children such that their visa ceases at the end of the day before their 23rd birthday, does not apply to the family members of eligible primary visa holders.

applications) or s 338(9) (offshore applications).[4] 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).

Section 338(2)(d) imposes an additional requirement for certain prescribed temporary visas to be reviewable (including Subclass 482).[5] 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;[6] 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.[7]

All primary Subclass 482 visa applicants must be identified in an approved nomination.[8] Accordingly one of the first three alternative requirements (ss 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.

Released by the AAT on 28 February 2022

[4] Section 338(2)(d) and reg 4.02(4)(l) (made under s 338(9)) were repealed and substituted with effect from 13 December 2018 by the *Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018* (Cth) (No 90, 2018) and the *Migration Amendment (Enhanced Integrity) Regulations 2018* (Cth) (F2018L01707) respectively.
[5] A Subclass 482 visa is prescribed for s 338(2)(d): reg 4.02(1A).
[6] See reg 2.75 for cessation of nominations associated with Subclass 482 visas.
[7] s 338(2)(d) as repealed and substituted by No 90, 2018, with effect for decisions made on or after 13 December 2018.
[8] See cl 482.121(1), which applies to all primary applicants regardless of the stream applied for.

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 a primary decision at the relevant time.[9]

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.[10]

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 ss 338(2)(a) to (c) are met in relation to the non-citizen and the visa.[11] An application for review of the decision may only be made by a person to whose application the decision relates.[12]

[9] 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.
[10] s 347(2)(a).
[11] reg 4.02(4)(q) as introduced by 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. Sections 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.
[12] reg 4.02(5)(p) as introduced by F2018L01707.

Released by the AAT January 2022

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 ss 338(2)(a) to (c)), it would not be reviewable under s 338(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,[13] 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.[14] 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

(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.[15]

The relevant kinds of nominator or sponsor are:

(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

[13] Fees can be refunded in the limited circumstances prescribed in reg 4.14.
[14] reg 4.02(5)(k).
[15] reg 4.02(4)(l) as repealed and substituted by F2018L01707 for primary decisions made on or after 13 December 2018.

Released by the AAT on 28 February 2022

(d) the holder of a permanent visa; or

(e) a New Zealand citizen who holds a special category visa; or

(f) a Commonwealth agency.[16]

This mirrors the requirements for onshore visa applicants (discussed above), with the additional requirement as to the sponsor's identity. The person who applied to become the sponsor or who nominated the non-citizen has standing.[17]

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.[18] The person who applied to become the sponsor or who nominated the non-citizen has standing.[19]

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). All primary applicants must meet s 338(2)(d), which applies to certain prescribed visas, including Subclass 482,[20] where a criterion for the visa grant requires the visa applicant to be sponsored (which includes being identified in a nomination) by an approved work sponsor.[21] As cl 482.212(1) requires that 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 work sponsor at the time of approval, on the basis of case law applicable in the similar Subclass 457 context, the requirements in s 338(2)(d) must be met.

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[16] reg 4.02(4AA) as inserted by F2018L01707.
[17] reg 4.02(5)(k).
[18] reg 4.02(4)(l)(iv) as inserted by F2018L01707.
[19] reg 4.02(5)(k).
[20] reg 4.02(1A).
[21] Being 'sponsored' includes being identified in a nomination under s 140GB: reg 4.02(1AA). Note that an 'approved sponsor' in this context was replaced by 'approved work sponsor' from 17 April 2019 as a technical amendment consequential to the introduction of the sponsored family visa program and the distinction between an 'approved family sponsor' and an 'approved work sponsor' under the umbrella of 'approved sponsors': see *Migration Amendment (Family Violence and Other Measures) Act 2018* (Cth) (No 162, 2018) and *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (Cth) (F2019L00551). An 'approved work sponsor' is a person approved as a work 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) as amended by F2019L00551.

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.[22] 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,[23] or a nomination that has expired.[24] If there has not been any sponsorship approval given, the decision is not reviewable.[25] 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;[26] 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.[27]

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

[22] In *Ahmad v MIBP* [2015] FCAFC 182 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.
[23] *Dyankov v MIBP* [2017] FCAFC 81 at [59].
[24] See obiter comments in *Ahmad v MIBP* [2015] FCAFC 182 at [113] and *Gulati v MIBP* [2016] FCCA 2263, upheld in *Gulati v MIBP* [2017] FCA 255.
[25] See *Singh v MIBP* [2018] FCCA 2769 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.
[26] 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).
[27] *Ahmad v MIBP* [2015] FCAFC 182 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.

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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: cls 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 2.72(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. Subclass 457 visa commentary at Tribunal's jurisdiction – primary decisions made before 13 December 2018 > Onshore visa applications > Secondary visa applicants contains detailed discussion of this issue in relation to the equivalent criteria at cls 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.[28] In these situations, it is the sponsor or nominator who has the right of review.[29] 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: cls 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

[28] 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 at [12].
[29] reg 4.02(5)(k). See *Phornpisutikul v MIBP* [2016] FCCA 1934 at [13].

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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.

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.[30] 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.[31]

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.[32]

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.[33]

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.

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[30] Item 1240(3)(f) of sch 1 to the Regulations.
[31] Item 1240(3)(g) of sch 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.
[32] Items 1240(3)(b), (c) of sch 1 to the Regulations.
[33] See note to div 482.2.

Complied substantially with conditions on previous visas

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 Substantial compliance with visa conditions.

Current approved nomination

Clause 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 work sponsor[34] 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 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.[35]

As a decision to refuse to approve a nomination is a separately reviewable decision,[36] 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 visa 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 work sponsor;
- 12 months after the day 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;[37] 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;[38]
- the day a Subclass 482 visa is granted to the nominee;

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[34] 'Approved work sponsor' is defined in s 5 as a person who has been approved as a work sponsor 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.
[35] Nominations before that date were, under the terms of reg 2.72, only made in relation to the holder of, or an applicant or proposed applicant for, a Subclass 457 (Temporary Work (Skilled)) visa (reg 2.72(1)).
[36] Under s 338(9) and reg 4.02(4)(d).
[37] reg 2.75(2)(b). This provision was amended by the *Migration Amendment (Skilling Australians Fund) Regulations 2018* (Cth) (F2018L01093) after the introduction of Subclass 482 visa on 18 March 2018 but the amendment applies to all nominations made from that date (see cl 7602(4) of sch 13 to the Regulations). 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.
[38] reg 2.75(2)(ba) inserted by F2018L01093.

- 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),[39] 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

Clause 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.[40] 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 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 work sponsor.[41]

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.[42] 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.[43]

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[39] reg 2.75(3) as in force before 16 November 2019. Regulation 2.75(3) was repealed and the definitions of 'nomination end day' and 'sponsorship end day' were moved to reg 1.03 from 16 November 2019 by the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578).
[40] cl 482.111.
[41] *Khan v MIBP* [2016] FCCA 333 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).
[42] *Bakri v MIBP* [2015] FCCA 3059; upheld on appeal in *Bakri v MIBP* [2016] FCA 396. 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) 'genuine position' requirement in the pre-18/3/2018 reg 2.72(10)(f) in the context of Subclass 457 scheme.
[43] *Khan v MIBP* [2016] FCCA 333 at [13]. See also *Aulakh v MIBP* [2015] FCCA 467.

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.[44]

Necessary skills, qualifications and background

Clause 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.

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.[45] 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. Clause 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 it. 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 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

[44] Policy – Migration Regulations – Schedules – Temporary Skill Shortage visa (subclass 482) – visa applications – 4.3.4. Genuine intention (reissued 1/10/2019).
[45] Item 1240(3)(g) of sch 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.

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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 s 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. 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 work 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 work 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,[46] 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 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 as one that the Minister *reasonably suspects*:

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- 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 PIC 4020, bogus documents, false or misleading information.

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 who have or had common friends or acquaintances. The definition was drafted with the 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.[47]

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 amending 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.[48] 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.[49] 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.[50] 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.

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[46] '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.
[47] Explanatory Statement to F2018L00262, item 15.
[48] Explanatory Statement to F2018L00262, item 15.
[49] Explanatory Statement to *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115) at p.18.
[50] 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).

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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.[51]

The nominated occupation is the occupation nominated by the nomination identified in the visa application.[52] 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.[53] 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.[54] 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) (i.e. the applicant has the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation: see above). 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 provision 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

[51] 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.
[52] cl 482.111.
[53] Policy – Migration Regulations – Schedules – Temporary Skill Shortage visa (subclass 482) – visa applications – 4.4.1. Work experience (reissued 1/10/2019).
[54] Policy – Migration Regulations – Schedules – Temporary Skill Shortage visa (subclass 482) – visa applications – 4.4.1. Work experience (reissued 1/10/2019).

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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.[55]

Intends genuinely to stay in Australia temporarily

In assessing 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 criterion requires an applicant to unqualifiedly intend their stay to be temporary,[56] 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.[57] 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 that an applicant 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

[55] Explanatory Statement to F2018L00262, item 168.
[56] *Saini v MIBP* [2015] FCCA 2379 at [23], upheld on appeal in *Saini v MIBP* [2016] FCA 858. 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.
[57] *Saini v MIBP* [2016] FCA 858 at [30].

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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).[58]

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 conditions 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 broadly provides that the visa holder must:

- work only in the nominated occupation in the most recent Subclass 482 application (meaning that any change in occupation requires new nomination and visa applications);
- 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 visa grant) or 90 days of the visa grant (if onshore at time of visa grant);
- 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.

[58] Policy – Migration Regulations – Schedules – Temporary Skill Shortage visa (subclass 482) – visa applications – 4.4.2. Genuine temporary entrant – 4.4.2.3 Where further assessment is required (reissued 1/10/2019).

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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.[59]

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.[60]

Test requirements

The instrument requires that:

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

[59] Policy – Migration Regulations – Schedules – Temporary Skill Shortage visa (subclass 482) – visa applications – 4.4.3. English proficiency – 4.4.3.3 Exempt applicants (reissued 1/10/2019).
[60] 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 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.

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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).[61]

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 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,[62] and the Explanatory Statement to the amending 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,[63] for which there was a time period of 3 years from the date of the visa application.[64] 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*,[65] 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.[66] 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.[67] A failure to do so was a breach of s 360.[68]

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.

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[61] s 5(1) of IMMI 18/032.
[62] Policy – Migration Regulations – Schedules – Temporary Skill Shortage visa (subclass 482) – visa applications – 4.4.3. English proficiency – 4.4.3.2 What evidence is required (reissued 1/10/2019).
[63] Explanatory Statement to FL2018L00262 at p.47.
[64] IMMI 17/057.
[65] *Guder v MIBP* [2017] FCCA 2527.
[66] Clause 457.223(4)(eb)(v) requires the applicant to have achieved the required score in a single attempt at the test within the period specified in the instrument; s 9 of IMMI 17/057 specifies the period of three years from the date of the visa application for this purpose.
[67] *Guder v MIBP* [2017] FCCA 2527 at [17].
[68] 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 at [41].

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 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.[69]

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.[70]

If the sponsor was approved on the basis of lawfully operating a business in Australia,[71] 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,[72] 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 the *Corporations Act 2001* (Cth).

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.

[69] *Tran v MIBP* [2016] FCCA 1984 at [4].
[70] reg 1.03.
[71] per reg 2.59(f) for approval as a standard business sponsor; or for variation of standard business sponsorship approval before 18/3/2018, per reg 2.68(g). Regulation 2.68 was repealed by F2018L00262 from 18/3/2018.
[72] per reg 2.59(h) for approval as a standard business sponsor; or for variation of standard business sponsorship approval before 18/3/2018, pre reg 2.68(i). Regulation 2.68 was repealed by F2018L00262 from 18/3/2018.

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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).
- 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, and the work agreement authorises the recruitment, employment or engagement of services of a person who is intended to be employed or engaged as a Subclass 482 visa holder.
- 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 Schedule 1 and 2 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.

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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 de facto partner of the primary applicant; or a (not married nor engaged) child or step-child of the primary applicant (or their spouse or de facto partner) who has not turned 23, or has turned 23 and is dependent on the primary applicant (or their spouse or de facto partner) as defined in reg 1.05A(1)(b); or is a dependent child of such a person.

Relevant case law

Judgment	Judgment 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	
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

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Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth)	F2018L00262	No 1/2018
Migration Amendment (Skilling Australians Fund) Regulations 2018 (Cth)	F2018L01093	No 2/2018
Migration and Other Legislation Amendment (Enhanced Integrity) Act 2018 (Cth)	No 90, 2018	No 3/2018
Migration Amendment (Enhanced Integrity) Regulations 2018 (Cth)	F2018L01707	No 5/2018
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 4/2019
Migration Amendment (Hong Kong Passport Holders) Regulations 2020 (Cth)	F2020L01047	

Available decision precedent

A Subclass 482 precedent is available for use in reviews of a decision to refuse a Subclass 482 visa. It contains options for a number of criteria common to each stream; 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.

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SUBCLASS 494 VISA

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Overview[1]

The Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) (Class PE) visa enables employers located in regional Australia to employ skilled foreign workers under the sponsorship regime under Division 3A of Part 2 of the *Migration Act 1958* (Cth) (the Act) and Part 2A of the *Migration Regulations 1994* (Cth) (the Regulations). It is a temporary visa granted for a period of five years, replacing the Subclass 187 (Regional Sponsored Migration Scheme) permanent visa, and provides a pathway to permanent residency for holders who may be eligible to apply for the new Subclass 191 (Permanent Residence (Skilled Regional)) (Class PR) visa from 16 November 2022.[2] Subclass 494 has two streams:

- Employer Sponsored stream: for employers in regional Australia recruiting skilled overseas workers to work in occupations specified in an instrument; and
- Labour Agreement stream: where an employer has a labour agreement with the Commonwealth to employ skilled overseas workers.

Applicants must apply in the stream to which the related nomination[3] under s 140GB of the Act was made and satisfy the criteria for that stream as well as the common criteria.

Tribunal's jurisdiction

The Tribunal has jurisdiction to review decisions to refuse the grant of a Subclass 494 visa under s 338(2) (onshore applications) or s 338(9) (offshore applications and secondary applicants).

Onshore visa applications

Primary visa applicants

For onshore visa applications, a decision to refuse to grant a Subclass 494 visa is reviewable in circumstances 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 494 visa application).

Section 338(2)(d) imposes an additional requirement for certain prescribed temporary visas to be reviewable (including Subclass 494).[4] There are four alternative requirements, which must be met *at the time the decision to refuse to grant the visa is made*:

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (Cth) (F2019L00578). Note that Subclass 187 visa may still be applied by certain transitional cohorts who hold Subclass 457 (Temporary Work (Skilled)) and Subclass 482 (Temporary Skill Shortage) visas: see Subclass 187 for further details.

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(i) the non-citizen is identified in an approved nomination that has not ceased under the regulations;[5] 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.

The fourth alternative is not applicable to Subclass 494 as all primary Subclass 494 visa applicants must be identified in an approved nomination.[6] Accordingly, one of the first three alternative requirements (ss 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 the 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.

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[7]	Yes	Yes	N/A[6]	Possibly (within 3 months)[8]
	Refused, review pending	Yes	Yes	Yes	Yes	Yes
	Refused, no review pending	No	No	Yes	No	No

[3] For more information on approval of a nomination of an occupation for Subclass 494 visa, see Regulation 2.72C – Nomination of an occupation for a Subclass 494 visa.
[4] A Subclass 494 visa is prescribed for s 338(2)(d): reg 4.02(1A)(la).
[5] See reg 2.75B for cessation of nominations associated with Subclass 494 visas.
[6] cl 494.213(1).
[7] This scenario should not arise as the s 140GB nomination could not be approved without an approved s 140E sponsor.
[8] It is likely that s 338(2)(d)(i) would be met at least until the nomination ceases under reg 2.75B(2)(e). 'Nomination end day' is defined in reg 1.03 as the day 3 months after the 'sponsorship end day', which is further defined in reg 1.03 as the day on which the approval as a standard business sponsor of the person who made the nomination ceases.

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	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.[9]

Secondary visa applicants

The Tribunal has jurisdiction to review a decision to refuse to grant a Subclass 494 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 494) 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 ss 338(2)(a) to (c) are met in relation to the non-citizen and visa.[10] An application for review of the decision may only be made by a person to whose application the decision relates.[11]

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,[12] even though the review application would be futile.

Offshore visa applications

For offshore visa applications, a decision to refuse to grant a Subclass 494 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.[13] The Tribunal has jurisdiction to review these decisions if 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 2.75B and the nominator was a person, body, company or partnership of a particular kind; or

[9] s 347(2)(a).
[10] reg 4.02(4)(q). 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 494 visa. Sections 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.
[11] reg 4.02(5)(p).
[12] Fees can be refunded in the limited circumstances prescribed in reg 4.14.
[13] reg 4.02(5)(k).

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(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, body, company or partnership of a particular kind; or

(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, body, company or partnership of a particular kind.[14]

The relevant kinds of entity are a person, body, 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, State or Territory agency.[15]

This mirrors the requirements for onshore primary visa applicants, with the additional requirement as to the sponsor or nominator's entity. See above for discussion of those requirements.

Secondary visa applicants

The Tribunal has jurisdiction to review a decision to refuse a Subclass 494 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 the visa was refused because they did not satisfy the secondary criteria for the grant of the visa.[16] The person who applied to become the sponsor or who nominated the non-citizen has standing.[17]

Requirements for valid visa application

The requirements for making a valid Class PE visa are in item 1242 of Schedule 1 to the Regulations.

For primary applicants, a person must have nominated a proposed occupation in relation to the applicant for a Subclass 494 visa in a stream, and the visa application must be in that same stream.[18] The application must identify the nomination, and the nomination must be

[14] regs 4.02(4)(l)(i)–(iii).
[15] reg 4.02(4AA).
[16] reg 4.02(4)(l)(iv).
[17] reg 4.02(5)(k).
[18] Table items 1 and 2 of item 1242(4) of sch 1 to the Regulations.

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approved and not ceased, or a decision on the nomination must be pending.[19] The nominator must also not be the subject of a bar under s 140M, and the visa applicant must declare in the application whether or not they or any secondary applicant who has made a combined application has engaged in conduct in relation to their applications that constitutes a contravention of s 245AS(1) of the Act.[20]

Primary applicants in the Employer Sponsored stream must also declare in the application that their skills have been assessed as suitable for the nominated occupation by a specified assessing authority and the assessment must not be for a Subclass 485 (Temporary Graduate) visa, unless certain circumstances specified in an instrument apply.[21]

Applicants can be inside or outside Australia, but not in immigration clearance.[22]

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.[23]

Common criteria

The common criteria in Subdivision 494.21 of Schedule 2 to the Regulations must be satisfied by all applicants seeking to meet the primary criteria.

Current approved nomination: cl 494.213(1)

Clause 494.213(1) requires that the nomination identified in the application has been approved under s 140GB of the Act; the person who made the nomination was an approved work sponsor[24] at the time the nomination was approved; and the approval of the nomination has not ceased under reg 2.75B. In effect, this means the visa application is linked to the one nomination made in relation to the applicant for a Subclass 494 visa, and this criterion could not be met on the basis of a subsequently lodged and approved nomination or by a nomination made under reg 2.73 in relation to a Subclass 482 visa.

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[19] Table items 3 and 4 of item 1242(4) of sch 1 to the Regulations.
[20] Table items 5 and 6 of item 1242(4) of sch 1 to the Regulations. A person contravenes s 245AS of the Act if they offer to provide, or provides a benefit to another person in return for the occurrence of a sponsorship-related event: s 245AS(1).
[21] Items 1242(5) and (6) of sch 1 to the Regulations. See the '494App' tab of the Register of Instruments - Business visas for the relevant instrument. The current instrument in force at the time of writing, LIN 19/211, specifies at s 6 that item 1242(5) does not apply to an academic applicant or a Subclass 444/461 worker (these terms are defined in s 4 of the instrument).
[22] Item 1242(3)(b) of sch 1 to the Regulations.
[23] See note to div 494.2 of sch 2 to the Regulations.
[24] 'Approved work sponsor' is defined in s 5 as a person who has been approved as a work sponsor 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.

As a decision to refuse to approve a nomination is a separately reviewable decision,[25] 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 visa application.

The cessation of a nomination in relation to a Subclass 494 visa is dealt with in reg 2.75B. Under reg 2.75B(2), 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 work 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; 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;
- the day a Subclass 494 visa is granted to the nominee;
- for Employer Sponsored 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),[26] 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 Employer Sponsored 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: cl 494.213(2)

Clause 494.213(2) requires that the applicant genuinely intends to perform the nominated occupation *and* that the position associated with the nominated occupation is genuine. The latter requirement is also reflected in the related nomination criteria (i.e. reg 2.72C(12)(a)) 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.[27] Nominations (apart from those in the Labour

[25] s 338(9) and reg 4.02(4)(d).
[26] 'nomination end day' and 'sponsorship end day' are defined in reg 1.03.
[27] cl 494.111.

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Agreement stream) must be for certain occupations listed in a legislative instrument, each of which have a 6-digit code which corresponds to that 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 work sponsor.[28]

Case law in the Subclass 457 context considering the similarly worded provision provides guidance as to the required analysis. In *Bakri v MIBP*, the Court emphasised that the decision maker's task in assessing whether the position associated with the nominated occupation is genuine 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.[29] The criterion may fail to be satisfied where: the tasks the applicant claims he or she 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.[30]

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.[31]

No adverse information or reasonable to disregard: cl 494.214

Clause 494.214(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 work 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,[32] 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

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[28] *Khan v MIBP* [2016] FCCA 333 at [10]. While this judgment concerned cl 457.223(4)(d)(ii), the similar wording of the provisions means it would apply equally to cl 494.213(2).
[29] *Bakri v MIBP* [2015] FCCA 3059; upheld on appeal in *Bakri v MIBP* [2016] FCA 396. 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 pre-18/3/2018 reg 2.72(10)(f).
[30] *Khan v MIBP* [2016] FCCA 333 at [13]. See also *Aulakh v MIBP* [2015] FCCA 467.
[31] Policy – Migration Regulations – Schedules – [Sch2Visa494] Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) - visa applications – 3.3. Visa criteria applicable to all primary applicants – 3.3.3. Genuine intention (issued 16/11/2019).

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 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 as 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 PIC 4020, bogus documents, false or misleading information.

Regulation 1.13B provides 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 who have or had common friends or acquaintances, as well as relationships in professional or work context involving consultant, adviser, partner, representative on retainer, officer, employer, employee or member of another person, body or corporation. The definition was drafted with the 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.[33]

Reasonable to disregard

Where 'adverse information' is known, the decision maker must go on to consider whether it is reasonable to disregard it: cl 494.214(b). The Regulations do not provide any guidance on when it may be reasonable to disregard such information. The Explanatory Statement to the amending regulations which significantly expanded the definitions in regs 1.13A and 1.13B 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.[34] The Explanatory Statement relevant to a similarly worded criterion which applies to Subclass 457 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.[35] Department 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

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[32] 'Immigration' is defined in reg 1.03 as the Department administered by the Minister administering the *Migration Act 1958* (Cth) and therefore does not appear to encompass the Tribunal.
[33] Explanatory Statement to the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262), item 15, which amended the definitions in regs 1.13A and 1.13B.
[34] Explanatory Statement to F2018L00262, item 15.
[35] Explanatory Statement to *Migration Amendment Regulations 2009 (No 5)* (Cth) (SLI 2009, No 115) at p.18.

reoccur.[36] Ultimately, whether it is reasonable to disregard the information is a question for the decision maker, having regard to all relevant circumstances of the case.

Not engaged in payment for visa sponsorship conduct: cl 494.215

Clause 494.215 requires that the applicant has not, in the previous three years, engaged in conduct that constitutes a contravention of s 245AR(1), 245AS(1), 245AT(1) or 245AU(1) of the Act, or, if they have engaged in such conduct, it is reasonable to disregard it. These provisions relate to certain prohibited payments for visa sponsorship. 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 work 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 having regard to all relevant circumstances of the individual case.

Other criteria applying to all primary applicants

All applicants seeking to satisfy the primary criteria must also satisfy public interest criteria (PIC) 4001, 4002, 4003, 4004, 4010, 4020 and 4021, and for applicants who had turned 16 years of age at the time of visa application, PIC 4019.[37] Each member of the family unit of an applicant who is also an applicant for the visa must satisfy PIC 4001, 4002, 4003, 4004, 4010 and 4020.[38] Each member of the family unit of the applicant who is an applicant for the visa and had turned 16 years of age at the time of visa application must satisfy PIC 4019, and each member of the family unit of the applicant who is an applicant for the visa and has not turned 18 must satisfy PIC 4015 and 4016.[39] Each member of the family unit of the applicant who is not an applicant for the visa must satisfy PIC 4001, 4002, 4003 and 4004.[40]

The applicant is also required to satisfy special return criteria 5001, 5002 and 5010,[41] and each member of the family unit of the applicant who is an applicant for the visa must satisfy special return criteria 5001, 5002 and 5010.[42]

Employer Sponsored stream criteria

The criteria in Subdivision 494.22 must be satisfied by applicants seeking to meet the primary criteria for a Subclass 494 visa in the Employer Sponsored stream. They are:

[36] 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 5/8/2018).
[37] cls 494.211(1) and (2). For more information on some of the PICs, see Public Interest Criterion 4001, Public Interest Criterion 4013, and Bogus documents, false or misleading information, PIC 4020.
[38] cl 494.211(3).
[39] cls 494.211(4) and (5).
[40] cl 494.211(6).
[41] cl 494.212(1). For more information on the special return criteria, see Special Return Criteria – 5001, 5002 and 5010.
[42] cl 494.212(2).

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- **health criteria** – the applicant and each member of the family unit who is applying for the visa must satisfy PIC 4007 health criteria, 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;[43]

- **direct employment in the nominated occupation** – unless the nominated occupation is specified in an instrument, the applicant must be employed to work in the nominated occupation in a position in the sponsor's business or a business of an associated entity of the sponsor (see below for discussion of this criterion);[44]

- **age** – at the time of application, the applicant must not have turned 45, unless specified circumstances existed;[45]

- **skills assessment** – unless circumstances specified in an instrument existed,[46] the applicant must, at the time of application, meet one of the following skills assessment requirements (see below for further discussion of this criterion):

  - *Recent assessments*:[47]

    - the applicant's skills had been assessed as suitable for the nominated occupation by a specified assessing authority, and that assessment was not for a Subclass 485 (Temporary Graduate) visa; and

    - if the assessment specified a period during which the assessment was valid and the period did not end more than 3 years after the date of the assessment, the period had not ended, or if no period was specified in the assessment, not more than 3 years had passed since the date of the assessment; and

    - if the assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course; OR

  - *Assessments for purposes of previous visas*:[48]

    - the applicant held a Subclass 457 or 482 visa in relation to the same occupation as the nominated occupation, where for its grant they were required to provide a positive skills assessment which was not for a Subclass 485 visa and was made by the same assessing authority as the one specified for the nominated occupation; and

[43] cl 494.221. For further information on PIC 4007, see Health Criteria - PIC 4005, 4006A and 4007.
[44] cl 494.222. For the relevant instrument, see 'ExemptOcc' tab of the Register of Instruments - Business visas.
[45] cl 494.223. For the instrument specifying exempt circumstances, see the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments - Business visas. As at time of writing, s 8(1) of LIN 19/216 specify that the following classes of persons are exempt from the age requirement: academic, regional medical practitioner and science applicants, Subclass 444/461 workers and Subclass 457/482 workers – these terms are defined in s 5 of the instrument.
[46] cl 494.224(7). For the instrument specifying exempt circumstances, see the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments - Business visas.
[47] cls 494.224(2) and (3). For the instrument specifying the assessing authorities, see the 'AssAuthority494Occ' tab of the Register of Instruments - Business visas.
[48] cls 494.224(4) and (5). For the instrument specifying the assessing authorities, see the 'AssAuthority494Occ' tab of the Register of Instruments - Business visas.

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- if the assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course;

- **work experience** – at the time of application, the applicant had been employed in the nominated occupation for at least 3 years on a full-time basis and at the level of skill required for the occupation, unless circumstances specified in an instrument existed (see below for discussion of this criterion);[49]

- **English** – at the time of application, the applicant had competent English, unless circumstances specified in an instrument existed (see below for discussion of this criterion).[50]

Direct employment in nominated occupation in sponsor's business

Clause 494.222 requires the applicant to work in the nominated occupation and in a position in the sponsor's business or a business of an associated entity of the sponsor. This provision mirrors requirements imposed on Subclass 494 visa holders by condition 8608 and criteria which must be met at the nomination stage (see reg 2.72C(13)). 'Associated entity' is defined in reg 1.03 as having the same meaning in s 50AAA of *Corporations Act 2001* (Cth).

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 exempt occupations are same as those specified for the same reason in relation to the Subclass 482 visa, namely a range of medical professionals and senior executives which often involve working for more than one employer and as an independent contractor.

Skills assessment in nominated occupation

Clause 494.224 requires that *at the time of application* the applicant must demonstrate their skills as suitable for the nominated occupation in one of the two alternative ways, unless exempt circumstances apply. The exempt circumstances for this purpose are specified in an instrument: see the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments - Business visas. The instrument in force at time of writing, LIN 19/219, specifies 'academic applicants' and 'Subclass 444/461 workers' as exempt from the skills assessment requirement.[51] All other applicants must satisfy one of the following alternatives:

First alternative – recent positive skills assessment

[49] cl 494.225. For the instrument specifying exempt circumstances, see the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments - Business visas.
[50] cl 494.226. There are currently no circumstances specified for this purpose. 'Competent English' is defined in reg 1.15C.
[51] s 8(2) of LIN 19/216. 'Academic applicant' is a person who is nominated by an Australian university in the occupation of faculty head (ANZSCO 134411) or university lecturer (ANZSCO 242111) in a position for an academic classified as Level A, B, C, D or E; 'Subclass 444/461 worker' is a person who worked for the nominating employer in the nominated occupation for at least two years (whether made up of a continuous period or non-consecutive periods) during the 3 years immediately before making the visa application, and for almost all of those 3 years held a Subclass 444 or 461 visa: s 5 of LIN 19/216.

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The skills assessment requirement under cl 494.224 will be satisfied if cls 494.224(2) and (3) applied at the time of visa application. These require that *at the time of visa application*, the applicant's skills had been assessed as suitable for the nominated occupation by a specified assessing authority;[52] the skills assessment must not have been for a Subclass 485 (Temporary Graduate) visa; and the validity period for the assessment must not have ended if such a period (less than 3 years) was specified, or if no period was specified in the assessment, no more than 3 years must have passed since the date of the skills assessment. Further, if the skills assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification must have been obtained as a result of studying a registered course.[53]

Whether the skills assessment meets the above requirements is usually evident on the face of the assessment. However, where, for example, it is not clear whether the qualification relied on by the applicant for the skills assessment was obtained as a result of studying a registered course, it may be necessary to seek confirmation from the assessing authority. It may also be necessary to check the immigration history of the applicant to determine whether the applicant held a student visa while studying the registered course. 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 which 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. 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).

As cl 494.224 must be met at time of application,[54] the applicant's skills must have been assessed as suitable before or as at the date of visa application, though evidence of the assessment may be provided at a later date.

Where an applicant has provided a positive 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.[55]

Second alternative – positive skills assessment for purposes of previous visa

Alternatively, the skills assessment requirement will be satisfied if cls 494.224(4) and (5) applied at the time of visa application. These require that at the time of visa application:

[52] For the instrument specifying the assessing authorities for this purpose, see the 'AssAuthority494Occ' tab of the Register of Instruments - Business visas. Given this criterion must be met at the time of application, the instrument in force at the time of application is applicable.
[53] 'Registered course' is defined in reg 1.03 as a course of education or training provided by an institution, body or person that is registered, under div 3 of pt 2 of the *Education Services of Overseas Students Act 2000* (Cth) (ESOS Act), to provide the course to overseas students.
[54] cl 494.224(1).
[55] In *Singh v MIBP* (2015) 233 FCR 34, which considered a similar requirement in cl 880.230(1), the Court held that 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 (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.

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- the applicant held a Subclass 457 or 482 visa in relation to the same occupation as the nominated occupation;

- in relation to that visa, the applicant was required to demonstrate he/she had the skills necessary to perform the tasks of the nominated occupation in the manner specified by the Minister, in accordance with the former cl 457.223(2)(d) or (4)(e) or cl 482.212(4);

- that demonstration included a person or body specified in an instrument[56] assessing the applicant's skills as suitable for the occupation, and that assessment was not for a Subclass 485 visa; and

- if the assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification was obtained as a result of studying a registered course.[57]

Three years' full-time work experience in nominated occupation

Clause 494.225 requires that at the time of application, the applicant had been employed in the nominated occupation for at least 3 years on a full-time basis and at the level of skill required for the occupation,[58] or circumstances specified in an instrument apply.[59] Currently, the specified circumstances that exempt an applicant from the work experience requirement are that the applicant is an academic applicant or a Subclass 444/461 worker.[60]

The work experience requirement is aimed at ensuring visa applicants are highly skilled, have experience in the occupation, and can quickly contribute that experience into the Australian workforce.[61]

The nominated occupation is the occupation nominated by the nomination identified in the visa application.[62] Given the specific reference to the employment 'in the nominated occupation…at the level of skill required for the occupation' (contrasted to the similar criterion in cl 494.235(2)(a) for the Labour Agreement stream, which requires the applicant to have worked in the nominated occupation *or a related field*),[63] previous work experience not in the nominated occupation at the requisite skill level would not appear to satisfy this requirement. Ultimately whether an applicant had been employed in the nominated occupation at the level of skill required for that occupation is a finding of fact for the decision maker, involving a comparative analysis of the tasks performed by the applicant during the

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[56] See the 'AssAuthority494Occ' tab of the Register of Instruments - Business visas. Given this criterion must be met at the time of application, the instrument in force at the time of application is applicable.
[57] 'Registered course' is defined in reg 1.03 as a course of education or training provided by an institution, body or person that is registered, under div 3 of pt 2 of the ESOS Act, to provide the course to overseas students.
[58] cl 494.225(1)(a).
[59] cls 494.225(1)(b) and (2). For the instrument specifying exempt circumstances, see the 'ExmtSkillsAgeEng186,187&494' tab of the Register of Instruments - Business visas.
[60] s 8(3) of LIN 19/216. 'Academic applicant' and 'Subclass 444/461 worker' is defined in s 5 of that instrument.
[61] Policy – Migration Regulations – Schedules – [Sch2Visa494] Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) - visa applications – 3.4. Additional visa criteria - primary applicants - Employer Sponsored stream – 3.4.4. Employment history (issued 16/11/2019).
[62] cl 494.111.

claimed employment and the tasks of the nominated occupation. The indicative skill level and the task description for the occupation provided in ANZSCO[64] may provide guidance but these should not be applied inflexibly to require an exact match of the skills and the tasks. Department policy also suggests that where the applicant has not worked in the nominated occupation but in a related occupation, decision makers should consider whether the tasks undertaken in the relevant position are the same or closely related to those of the nominated occupation as outlined in ANZSCO, and are at the same skill level and with at least the same level of responsibility. The focus should always be on the tasks rather than the title of the occupation.[65]

While the applicant must have been employed in the nominated occupation for at least three years, the criterion does not specify where or when this employment must have occurred, or that it would need to have been continuous. Therefore, it would appear to go beyond the terms of the Regulations to impose such requirements.[66]

'Full-time' in the context of employment is not defined in the Regulations or the Act. Consistent with the National Employment Standards (NES), employment will generally be considered 'full-time' where the employee worked 38 hours per week. However, certain occupations may have different work arrangements that do not adhere to a standard work week, and others may allow, under an applicable industry award or an agreement, a period between 32 and 45 hours per week to be considered full-time employment.[67] Accordingly, decision makers should have regard to all relevant circumstances applicable to the occupation and any prevailing work arrangements when considering whether the employment was on a full-time basis.

English language requirements

Clause 494.226 requires that at the time of application, the applicant had competent English, or circumstances specified in an instrument existed. Currently there are no instruments made for this purpose and therefore no specified circumstances exist for an applicant to be exempt from the English language requirement.

Competent English has the meaning set out in reg 1.15C, which prescribes that a person has competent English if:

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[63] See also the similar criteria in Subclass 482 (cls 482.221 and 482.231) which require 'the applicant has worked in the nominated occupation or a related field for at least 2 years.'
[64] available at https://www.abs.gov.au/ANZSCO.
[65] Policy – Migration Regulations – Schedules – [Sch2Visa494] Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) - visa applications – 3.4. Additional visa criteria - primary applicants - Employer Sponsored stream – 3.4.4. Employment history – 3.4.4.2 Employment in the nominated occupation at the relevant skill level (issued 16/11/2019).
[66] This is consistent with the Department policy which indicates that the 3 years employment period does not need to be continuous and does not need to have been immediately before the application was made. It suggests that any period of employment during which an applicant gained work experience in another occupation, unemployment, extended leave without pay, or unpaid or volunteer work should be excluded when calculating the period of employment: Policy – Migration Regulations – Schedules – [Sch2Visa494] Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) - visa applications – 3.4. Additional visa criteria - primary applicants - Employer Sponsored stream – 3.4.4. Employment history – 3.4.4.1. Period of full-time employment (issued 16/11/2019).
[67] Policy – Migration Regulations – Schedules – [Sch2Visa494] Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) - visa applications – 3.4. Additional visa criteria - primary applicants - Employer Sponsored stream – 3.4.4. Employment history – 3.4.4.1. Period of full-time employment (issued 16/11/2019).

- the person undertook a language test specified in an instrument in the 3 years immediately before the date of visa application and the person achieved a score specified in the instrument;[68] or

- the person holds a passport of a type specified in an instrument.[69]

As the terms of cl 494.226 expressly require that the applicant *had* competent English *at the time of application*, test sat and scores achieved after the date of visa application cannot be used to satisfy this criterion.

The applicable instrument specifying the language tests, scores and passports can be accessed at the 'EngTests' tab on the Register of Instruments - Skilled visas. As at time of writing, IMMI 15/005 requires the following tests and scores:[70]

- International English Language Test System (IELTS): at least 6 in each of the four test components of listening, reading, writing and speaking;

- Occupational English Test (OET): at least B in each of the four test components of listening, reading, writing and speaking;

- Test of English as a Foreign Language internet-based Test (TOEFL iBT): at least 12 for listening, 13 for reading, 21 for writing and 18 for speaking;

- Pearson Test of English Academic (PTE Academic): at least 50 in each of the four test components of listening, reading, writing and speaking; or

- Cambridge English Advance (CAE): at least 169 in each of the four test components of listening, reading, writing and speaking.

Alternatively, the applicant must have a valid passport issued by the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland.[71]

Labour agreement stream criteria

The criteria for applicants being assessed against the primary criteria in the Labour Agreement stream include:

- **health criteria** – the applicant and each member of the family unit who is applying for the visa must satisfy PIC 4005 health criteria, and each family member who is not an applicant for the visa must also satisfy PIC 4005, unless it would be unreasonable to require them to undergo an assessment;[72]

[68] regs 1.15C(1)(a), (b), (bb) and (c). For the applicable instrument specifying the English language tests, scores and passports, see the 'EngTests' tab on the Register of Instruments - Skilled visas. Also, for more information on different levels of English proficiency, see English Language Ability - Skilled/Business Visas.
[69] reg 1.15C(2). For the applicable instrument specifying the language tests, scores and passports, see the 'EngTests' tab on the Register of Instruments - Skilled visas.
[70] Items 5(D) and (E) of IMMI 15/005.
[71] Item 5(F) of IMMI 15/005.
[72] cl 494.231. For further information on PIC 4005, see Health Criteria - PIC 4005, 4006A and 4007.

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- **work agreement** – the nominated occupation is the subject of a work agreement between the Commonwealth and the person who nominated the occupation, and the work agreement authorises the recruitment, employment or engagement of services of the applicant;[73]

- **age** – at the time of application, the applicant had not turned 45, unless the Minister has agreed in the work agreement that persons who have turned 45 may be employed;[74]

- **English** – the applicant has English language skills that are suitable to perform the nominated occupation;[75]

- **Skills and work experience**[76]
  - the applicant has the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation, and if the Minister requires the demonstration of skills, the applicant demonstrates those skills in the manner specified by the Minister; and
  - either the applicant has worked in the nominated occupation or a related field for at least 3 years, or the Minister considers it is reasonable to disregard in the circumstances.

Necessary skills, qualifications and employment background

Clause 494.235(1) 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,[77] but a decision could be made on cl 494.235(1) without requiring such a demonstration of skills provided there is clear evidence that the applicant does have the necessary skills, qualifications and background.

Decision makers should refer to the relevant labour agreement for details of the skills and qualifications required. 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.

Skills demonstrated in manner specified

Where the Minister, or Tribunal on review, has reservations about the applicant's skills to perform the tasks of the nominated occupation, it may request the applicant to demonstrate his or her possession of those skills in a particular way. Clause 494.235(3) requires the visa applicant to demonstrate he or she has the skills to perform the nominated occupation, but

[73] cl 494.232.
[74] cl 494.233.
[75] cl 494.234.
[76] cl 494.235.

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only if the decision maker requires the applicant to do so. 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 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. The relevant labour agreement may specify that a specific kind of skills assessment is required for an 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.

Three years' work experience in nominated occupation or related field

In addition to possessing the necessary skills to perform the tasks of the nominated occupation, the applicant must have worked in the nominated occupation or a related field for at least three years, unless the Minister considers it is reasonable to disregard in the circumstances.

What constitutes a related field is a question of fact and may depend on 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. Department policy suggests circumstances where it would be reasonable to disregard this requirement include where the relevant labour agreement provides for a concession to this requirement, in which case meeting the requirements outlined in the labour agreement is sufficient.[78]

Secondary criteria for family members

Family members, whether lodging a combined application with the primary applicant or applying subsequently, can be in or outside Australia, but not in immigration clearance, at the time of application[79] and visa grant.[80] The secondary criteria for the grant of a Subclass 494 visa which must be met by family members, require that the applicant is a member of the family unit of a primary applicant who holds a Subclass 494 visa granted on the basis of

[77] cl 494.235(3).
[78] Policy – Migration Regulations – Schedules – [Sch2Visa494] Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) - visa applications – 3.5. Additional visa criteria - primary applicants - Labour Agreement stream – 3.5.4. Skills, qualifications and employment background (issued 16/11/2019).
[79] See items 1242(3)(b) and (d) of sch 1 to the Regulations.
[80] cl 494.411.

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satisfying the primary criteria for the grant of the visa.[81] The requirement that the primary applicant already holds a Subclass 494 visa limits the circumstances in which the Tribunal can meaningfully review this criterion. Additionally, secondary applicants must be listed on the nomination identified in the primary applicant's application, or the sponsor with the approved nomination in respect of the primary applicant has agreed in writing to sponsor the secondary applicant.[82] There are also requirements to satisfy various public interest criteria and special return criteria;[83] no adverse information known to Immigration about the sponsor or an associated person, unless it is reasonable to disregard;[84] and not engaged in 'payment for visa' conduct that constitutes a contravention of the Act in the previous 3 years, unless it is reasonable to disregard the conduct.[85]

For further information on who is a member of a family unit, see Member of the Family Unit (reg 1.12).

Relevant case law

Judgment	Judgment summary
Aulakh v MIBP [2015] FCCA 467	Summary
Bakri v MIBP [2015] FCCA 3059	Summary
Bakri v MIBP [2016] FCA 396	
Khan v MIBP [2016] FCCA 333	Summary
Singh v MIBP (2015) 233 FCR 34	Summary

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment (New Skilled Regional Visas) Regulations 2019 (Cth)	F2019L00578	No 04/2019

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[81] cl 494.311.
[82] cl 494.314.
[83] cls 494.312 and 494.313.
[84] cl 494.315.
[85] cl 494.316. Specifically, in the previous three years, applicants must not have engaged in conduct that constitutes a contravention of s 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.

Available decision precedent

These are no decision precedents available for this visa subclass. However, the following generic decision precedents may be used:

- **Generic –** suitable for any MRD reviewable visa refusal decisions.
- **PIC 4020 –** suitable for any visa subclass where the issue in dispute is whether the applicant meets public interest criterion 4020 (false or misleading information / bogus documents).

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SUBCLASSES 890–893 BUSINESS SKILLS (RESIDENCE) (CLASS DF)

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Overview[1]

Class DF - Business Skills (Residence) is a permanent visa class and consists of four visa subclasses:[2]

- 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[3] as part of a two-stage visa processing 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).[4] 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), were introduced to eventually replace Class UR and Class DF.[5] Class DF is still open to visa applications, however as the provisional visas[6] 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 890–893 are permanent visas which permit the holders to travel to, and enter Australia for a period of 5 years from the date of grant.[7] 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.[8]

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

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[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] item 1104B(4) of sch 1 to the Regulations.
[3] *Migration Amendment Regulations 2002 (No 10)* (Cth) (SR 2002, No 348).
[4] Explanatory Statement to SR 2002, No 348.
[5] Explanatory Statement to *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82), pp.55, 72.
[6] Business Skills (Provisional) (Class UR) Subclasses 160–165.
[7] cls 890.511, 891.511, 892.511. 893.511.
[8] cls 890.611, 891.611, 892.611, 893.611.

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 *Migration Act 1958* (Cth) (the Act) (for applicants seeking to satisfy secondary criteria who made the visa application whilst outside Australia).

In both instances it is the visa applicant who has standing to apply for review.[9]

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.[10]

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.[11]

Subclass 890 Business Owner

Requirements for making a valid Subclass 890 application

An application for a Class DF (Subclass 890) visa must be made on the approved form[12] and the prescribed fee must be paid.[13] With one exception relevant only to applications made prior to 1 July 2012, the applicant seeking to satisfy the primary criteria for Subclass 890 must hold a Business Skills (Provisional) (Class UR) visa granted on the basis that the applicant, or the spouse or de facto partner of the applicant (if any), or the former spouse or former de facto partner of the applicant, satisfied the primary criteria for the grant of the Class UR visa.[14]

The application must be made at the place and in the manner specified.[15] 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.[16] An application by a person claiming to be a member of the family unit of the applicant may

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[9] s 347(2)(a).
[10] s 347(3).
[11] s 347(3A).
[12] 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* (Cth) (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 reg 2.07(5).
[13] item 1104B(2).
[14] 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 items 1104B(3)(d)(i) and (ii) which provided an alternative requirement for persons designated under reg 2.07AO. Regulation 2.07AO was inserted by *Migration Amendment Regulations 2004 (No 6)* (Cth) (SR 2004, No 269), with effect from 27 August 2004, to allow certain temporary protection and temporary humanitarian stay visa holders to apply for a range of mainstream visas, including Subclasses 890–892. It was repealed from 23 March 2013: *Migration Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 32).
[15] 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 reg 2.07(5).

be made at the same time and place as, and combined with, the application by the applicant.[17]

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 operating main businesses in Australia for at least two years immediately before the application is made;[18]
- 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 (ATO) for the period mentioned in cl 890.211(1) have been submitted to the ATO and have been included in the application;[19]
- the assets of the applicant and/or the applicant's spouse/de facto partner,[20] 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;[21]
- 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;[22]

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[16] items 1104B(3)(b)–(c).
[17] item 1104B(3)(h).
[18] cl 890.211(1). 'Ownership interest' is defined as having the meaning given to it in s 134(10) of the Act: reg 1.03. 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 reg 1.11: reg 1.03. (See Main business (reg 1.11))
[19] cl 890.211(2). In *Nasirzadeh v MIBP* [2019] FCCA 1115, the Court held that the criterion in cl 892.211(2)(b) (identical to cl 890.211(2)(b)) requiring the BAS to have been included in the application imported an objective temporal test and that the Tribunal was correct to conclude on the evidence before it that the requirement was not met (at [45]). However, this is not clear authority on the meaning of 'included in the application' as it was in the context of considering (and rejecting) an argument that the criterion was invalid on the basis of unreasonableness, and the applicant had conceded to both the Court and Tribunal that he had not included the BAS in the application.
[20] 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)* (Cth) (SLI 2009, No 144). 'Spouse' and 'de facto partner' for these purposes are defined in ss 5F and 5CB of the Act respectively and both definitions include same and opposite sex partners.
[21] cl 890.212. The current version applies to visa applications made on or after 9 August 2008: *Migration Amendment Regulations 2008 (No 3)* (Cth) (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. See also Net personal and business assets calculation for further discussion about different kinds of assets and calculation of asset values.
[22] 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

- 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;[23]

- 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;[24]

- 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;[25]

- 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.[26]

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).[27]

Time of decision criteria for Subclass 890

At the time of the decision, applicants must continue to satisfy the primary criteria in cls 890.211, 890.215 and 890.216.[28] Also, applicants and members of the family unit of the primary applicant need to satisfy certain public interest criteria.[29]

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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.

[23] cl 890.214. 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 '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 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'.

[24] cl 890.215. See Net personal and business assets calculation for further discussion about different kinds of assets and calculation of asset values.

[25] cl 890.216.

[26] 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.

[27] cl 890.311.

[28] 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. In *Yu v MICMSMA* [2020] FCA 209, while leaving open the question of whether the term 'continues' in cl 890.221 requires continuous ownership between the time of application and decision, the Court held that as a minimum, the criterion requires the applicant to have an ownership interest in an actively operating main business at the time the relevant decision maker (whether it be the delegate or the Tribunal) comes to decide the application (at [57]–[62]). For further general discussion of the requirement that an applicant 'continues to satisfy' a particular visa criterion, used in relation to a number of visa subclasses, see 'Continues to satisfy' criterion.

[29] cls 890.222, 890.223(1)–(4), 890.224.

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]

Subclass 891 Investor

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:

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[30] cl 890.321.
[31] cls 890.322, 890.323.
[32] cl 890.411.
[33] item 1104B(1) of sch 1 to the Regulations. For applications made prior to 18 April 2015, the prescribed form was 47BU. This provision was amended by 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 reg 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 reg 2.07(5).
[37] items 1104B(3)(b)–(c).
[38] item 1104B(3)(h).

- 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]

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 cls 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]

Primary applicants must also satisfy certain public interest criteria.[46]

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.[47] Various public interest criteria must also be met by secondary applicants at the time of decision.[48]

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).[49]

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[39] 'Spouse' and 'de facto partner' for these purposes are defined in ss 5F and 5CB of the Act respectively and both definitions include same and opposite sex partners.
[40] cl 891.211.
[41] cl 891.212.
[42] cl 891.213.
[43] cl 891.311.
[44] cl 891.221. For further discussion of the requirement that an applicant 'continues to satisfy' a particular visa criterion, used in relation to a number of visa subclasses, see 'Continues to satisfy' criterion.
[45] cl 891.222.
[46] cls 891.223, 891.224(1), 891.224(2), 891.224(3), 891.224(4), 891.225.
[47] cl 891.321.
[48] cls 891.322, 891.323.
[49] cl 891.411.

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[50] and the prescribed fee paid.[51] The application must be made at the place and in the manner specified.[52] 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.[53] 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.[54]

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 granted on the basis that the applicant, or the spouse or de facto partner of the applicant (if any), or the former spouse or former de facto partner of the applicant, satisfied the primary criteria for the grant of the Class UR visa in order to make a valid application.[55] The primary applicant must be sponsored by an appropriate regional authority specified in a legislative instrument made by the Minister,[56] and Form 949 must be signed by an officer of the authority who is authorised to sign a sponsorship of that kind.[57]

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

[50] item 1104B(1) of sch 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 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 reg 2.07(5).
[51] item 1104B(2).
[52] 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 reg 2.07(5).
[53] items 1104B(3)(b)–(c).
[54] item 1104B(3)(h).
[55] 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 p.34.
[56] 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 in relation to the grant of visas of that class: reg 1.03. See the 'ARA' tab of the Register of Instruments - Business visas for the relevant instrument.
[57] item 1104B(3)(i).

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before the application is made;[58]

- 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;[59]

- unless the 'appropriate regional authority' has determined that there are exceptional circumstances, the applicant meets at least two of the following requirements:

  - in the period of 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[60] 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;[61]

  - 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 (as at the time of application), and have had throughout the 12 months ending immediately before the application is made, a net value of at least AUD250 000, and have been lawfully acquired;[62]

  - the 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 (as at the time of application), and have had throughout the 12 months ending immediately before the application is made,

[58] cl 892.211(1). 'Ownership interest' is defined as having the meaning given to it in s 134(10) of the Act: reg 1.03. 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 reg 1.11: reg 1.03. (See Main business (reg 1.11)).

[59] cl 892.211(2). In *Nasirzadeh v MIBP* [2019] FCCA 1115, the Court held that the criterion in cl 892.211(2)(b) requiring the BAS to have been included in the application imported an objective temporal test and that the Tribunal was correct to conclude on the evidence before it that the requirement was not met (at [45]). However, this is not clear authority on the meaning of 'included in the application' as it was in the context of considering (and rejecting) an argument that the criterion was invalid on the basis of unreasonableness, and the applicant had conceded to both the Court and Tribunal that he had not included the BAS in the application.

[60] 'Spouse' and 'de facto partner' for these purposes are defined in ss 5F and 5CB of the Act respectively and both definitions include same and opposite sex partners.

[61] 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'.

[62] 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: *He v MIBP* [2015] FCCA 2915. See also Net personal and business assets calculation.

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a net value of at least AUD75 000; and have been lawfully acquired;[63]

- the applicant meets either of the following:
  - 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;[64] or
  - the applicant meets at least two of the requirements set out in cls 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;[65]
- 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;[66]
- 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,[67] 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 partner, or the applicant's former spouse/de facto partner meeting cl 457.223(7A);[68]
- if the applicant <u>is</u> 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

[63] 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 also, *He v MIBP* [2015] FCCA 2915 and Net personal and business assets calculation.

[64] 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) 213 FCR 362.

[65] cl 892.213(3). For the relevant instrument specifying the regional area for cl 892.213(3)(b), see the 'StateTerrArea' tab in the Register of Instruments - Business visas. 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 in relation to the grant of visas of that class: reg 1.03. See the 'ARA' tab of the Register of Instruments - Business visas for the relevant instrument specifying the appropriate regional authorities.

[66] cl 892.214. Amended by SLI 2009, No 144.

[67] For visa applications made on or after 1 July 2012 item 1104B(3)(f) refers only to Business Skills (Provisional) (Class UR) visa: SLI 2012, No 82.

[68] 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.'

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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&LowPop' tab of the Register of Instruments – Skilled Visas);[69]

- 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&LowPop' tab of the Register of Instruments – Skilled Visas);[70]

- 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.[71]

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).[72] 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.[73]

Time of decision criteria for Subclass 892

At the time of the decision, the applicant must continue to satisfy the primary criteria in cls 892.211 and 892.214, relating to their ownership interest in one or more main businesses and business history (see above),[74] and if the applicant met the requirements of

[69] 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.
[70] 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.
[71] 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.
[72] cl 892.311.
[73] cl 892.312.
[74] Note that in respect of the requirement for cl 892.221 that the applicant 'continues to satisfy' cl 892.211, the applicant must continue to have an ownership interest in the same main business at the time of decision, and it is not possible to rely on an ownership interest in a business that did not exist at the time of application to satisfy the time of decision requirement: *Zhu v MIBP* [2016] FCCA 1874 at [29]–[32]; *Ko v MIBP* [2019] FCCA 2176 at [14]–[16]. See also *Yang v MIBP* [2014] FCCA 1576 considering the identically worded cl 890.221, where the Court held that 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. 'Continues' in this context requires as a minimum that the applicant has an ownership interest in an actively operating main business at the time the relevant decision maker, whether it be the delegate or the Tribunal, comes to decide the application: *Yu v MICMSMA* [2020] FCA 209 at [61] (also considering cl 890.221).

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cl 892.212(b), the requirements in cl 892.212(b).[75] In addition:

- the applicant and members of the family unit need to satisfy certain public interest criteria;[76] and
- 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.[77]

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.[78] Various public interest criteria must also be met by secondary applicants at the time of decision.[79]

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).[80] 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.[81]

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,[82] and the prescribed fee paid.[83] An applicant seeking to satisfy the primary criteria must hold a Subclass 165 (State/Territory Sponsored Investor (Provisional)) visa granted on the basis

[75] cl 892.221. For further general discussion of the requirement that an applicant 'continues to satisfy' a particular visa criterion, used in relation to a number of visa subclasses, see 'Continues to satisfy' criterion.
[76] cls 892.223, 892.224, 892.225.
[77] 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.' 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 in relation to the grant of visas of that class: reg 1.03. See the 'ARA' tab of the Register of Instruments - Business visas for the relevant instrument.
[78] cl 892.321.
[79] cls 892.322, 892.323.
[80] cl 892.411.
[81] cl 892.412.
[82] item 1104B(1) of sch 1 to the Regulations. For applications made prior to 18 April 2015, the prescribed forms were 47BU and 949. This provision was amended by 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 reg 2.07(5).
[83] item 1104B(2).

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that the applicant satisfied the primary criteria for the grant of the visa.[84] 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.[85]

The application must be made at the place and in the manner specified.[86] 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.[87] 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.[88]

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[89] (if any) has a history of involvement in business or investment activities of a nature that is not generally acceptable in Australia;[90] 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;[91] 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.[92]

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

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[84] item 1104B(3)(g).
[85] item 1104B(3)(i). 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 in relation to the grant of visas of that class: reg 1.03. See the 'ARA' tab of the Register of Instruments - Business visas for the relevant instrument.
[86] 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 reg 2.07(5).
[87] items 1104B(3)(b)–(c).
[88] item 1104B(3)(h).
[89] 'Spouse' and 'de facto partner' for these purposes are defined in ss 5F and 5CB of the Act respectively and both definitions include same and opposite sex partners.
[90] cl 893.211.
[91] cl 893.212.
[92] cl 893.213.

primary criteria in Subdivision 893.21 (time of application criteria for primary applicants).[93]

Time of decision criteria for Subclass 893

At the time of the decision, applicants must continue to satisfy the primary criteria in cls 893.211 and 893.213.[94] In addition:

- 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;[95]
- 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;[96] and
- the applicant and members of the applicant's family unit need to satisfy certain public interest criteria.[97]

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.[98] Various public interest criteria must also be met by secondary applicants at the time of decision.[99]

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).[100]

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[93] cl 893.311.
[94] cl 893.221.
[95] 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.' 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 in relation to the grant of visas of that class: reg 1.03. See the 'ARA' tab of the Register of Instruments - Business visas for the relevant instrument.
[96] cl 893.223.
[97] cls 893.224, 893.225, 893.226.
[98] cl 893.321.
[99] cls 893.322, 893.323.
[100] 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 162 (Investor (Provisional)) visa (in the case of Subclass 891) or a Subclass 165 (State/Territory Sponsored Investor (Provisional)) visa (in the case of Subclass 893) 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.[101] 'Designated investment' is defined as an investment in a security specified by a legislative instrument by the Minister under reg 5.19A.[102] The investments specified by such an instrument must meet certain requirements specified in reg 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 reg 5.19A are required to have the following features:[103]

- 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 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.[104]

It should be noted that there is no legislative power to cancel a Subclass 891 or Subclass

[101] cl 891.222/893.223.
[102] cls 891.111, 893.111 and reg 5.19A(1).
[103] reg 5.19A(2).
[104] Policy - Migration Regulations - Schedules - Sch2 Visa 891 - Investor - 5. The visa 891 main applicant - 5.1 Designated investment - 5.1.2 Must have been held for 4 years (re-issued 1 July 2020); Policy - Migration Regulations - Schedules - Sch2 Visa 893 - State/Territory Sponsored Investor - 5. The visa 893 main applicant - 5.1 Designated investments - 5.2 Must have been held for 4 years (re-issued 15 October 2020).

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893 visa for not maintaining business or investment activity in Australia after the maturity of the designated investment.[105]

Sponsorship

Schedule 1 item 1104B(3)(i) requires sponsorship by an 'appropriate regional authority' for making a valid application for both Subclass 892 and 893 visas. Clauses 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, in relation to the grant of visas of that class.[106] 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 Register of Instruments - Business Visas.

In considering whether cl 892.222 or 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 application 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 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.[107]

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),[108] 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.[109]

For a discussion of the term 'ownership interest' as it applies throughout the Act and

[105] Policy - Migration Regulations - Schedules - Sch2 Visa 891 - Investor - 5.4 Commitment to business/investment activity - 5.4.1 Policy overview (re-issued 1 July 2020); Policy - Migration Regulations - Schedules - Sch2 Visa 893 - State/Territory Sponsored Investor - 9. Commitment to business/investment activity - 9.1 Policy overview (re-issued 15 October 2020).
[106] reg 1.03.
[107] *Yang v MIBP* [2014] FCCA 1576 (at [68]) and *Yu v MICMSMA* [2020] FCA 209 (at [57]–[61]) in respect of cl 890.221; *Zhu v MIBP* [2016] FCCA 1874 in respect of cl 892.221.
[108] *Zhou v MIAC* [2003] FMCA 169 at [31].
[109] *Liang v MIAC* (2009) 175 FCR 184 at [54].

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Regulations, see Main business (reg 1.11).

'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*[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] Further, in *Rahbarinejad v MIBP*,[112] the Court held that the absence of a BAS for a given period is not definitive of no 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 reg 1.11. For further details on the meaning of 'main business', see Main business (reg 1.11).

The applicant's business history

For a Subclass 890–893 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.[113]

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.[114]

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.[115] Examples of such conduct could include advertising by business signage which does not comply with by-laws or SP

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[110] *Shahpari v MIBP* [2016] FCCA 513.
[111] *Shahpari v MIBP* [2016] FCCA 513 at [71].
[112] *Rahbarinejad v MIBP* [2018] FCCA 2293 at [31]. However, if BAS 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).
[113] cls 890.216, 891.211, 892.214, 893.211.
[114] Policy - Migration Regulations - Other - GenGuideM - Business visas - Visa application and related procedures - 3.10 Other business-related requirements - 3.10.2. The applicant's business history (re-issued 1 July 2020).
[115] *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 cls 890.216, 891.211, 893.211.

bookmaking, either as a bookmaker or as a better.[116]

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.[117] 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.[118] Once the nature of the business activities has been identified and found to be of a nature not generally acceptable in Australia, the decision maker must consider whether there has been a history of involvement by the applicant in respect of those business activities.[119]

'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.[120] 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.[121]

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, in 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'.[122]

In *Lee v MIMAC*,[123] Ms Lee 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(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.[124] It did not refer to any person other than the person who has sought in the relevant visa application to

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[116] *Lee v MIAC* (2009) 180 FCR 149 at [34].
[117] *Lee v MIAC* (2009) 180 FCR 149 at [51].
[118] *Lee v MIAC* [2008] FMCA 1523 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.
[119] *Aw v MIAC* [2009] FMCA 566 at [20], which considered the similarly worded cl 845.218 but followed *Lee v MIAC* [2008] FMCA 1523.
[120] *Lee v MIAC* [2008] FMCA 1523 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.
[121] *Lee v MIAC* [2008] FMCA 1523 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.
[122] *Lee v MIMAC* (2013) 215 FCR 109 at [14].
[123] *Lee v MIMAC* (2013) 215 FCR 109, on appeal from *Lee v MIAC* [2013] FCCA 396.
[124] *Lee v MIAC* [2013] FCCA 396 at [48].

satisfy the primary criteria for that visa.[125] 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.[126]

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.[127] Ultimately it will be a factual question having regard to the Schedule 1 requirements, and contents of the visa application.

Relevant case law

Judgment	Judgment summary
Aw v MIAC [2009] FMCA 566	Summary
Cheng v MIAC [2012] FMCA 911	Summary
Cheng v MIAC [2013] FCA 405; (2013) 213 FCR 362	Summary
He v MIBP [2015] FCCA 2915	Summary
Ko v MIBP [2019] FCCA 2176	
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
Nasirzadeh v MIBP [2019] FCCA 1115	
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
Yu v MICMSMA [2020] FCA 209	Summary

[125] *Lee v MIAC* [2013] FCCA 396 at [48].
[126] *Lee v MIMAC* (2013) 215 FCR 109 at [16].
[127] *Lee v MIMAC* (2013) 215 FCR 109 at [14].

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Zhou v MIAC [2003] FMCA 169	
Zhu v MIBP [2016] FCCA 1874	

Relevant legislative amendments

Title	Reference number	Legislation Bulletin
Migration Amendment Regulations 2002 (No 10) (Cth)	SR 2002, No 348	
Migration Amendment Regulations 2004 (No 6) (Cth)	SR 2004, No 269	14/09/2004
Migration Amendment Regulations 2005 (No 4) (Cth)	SLI 2005, No 134	No 1/2005
Migration Amendment Regulations 2008 (No 3) (Cth)	SLI 2008, No 166	No 5/2008
Migration Amendment Regulations 2009 (No 7) (Cth)	SLI 2009, No 144	No 9/2009
Migration Amendment Regulation 2012 (No 2) (Cth)	SLI 2012, No 82	No 4/2012
Migration Amendment Regulation 2013 (No 1) (Cth)	SLI 201, No 32	No 3/2013
Migration Amendment (Redundant and Other Provisions) Regulation 2014 (Cth)	SLI 2014, No 30	No 2/2014
Migration Amendment (2015 Measures No 1) Regulation 2015 (Cth)	SLI 2015, No 34	No 1/2015

Available decision template/precedent

- **Subclass 892 visa refusal** – suitable for review of a Subclass 892 visa refusal decision, where the visa application was made on or after 19 April 2010. The user can select from the following criteria in issue: ownership interest in main business, ABN and BAS; no history of involvement in business activities of a nature not acceptable in Australia; assets; and other.

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