

EXPLANATORY STATEMENT

Select Legislative Instrument No.

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing all matters which by the Migration Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act.

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

The purpose of the *Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016* (the Regulation) is to amend the *Migration Regulations 1994* (the Migration Regulations) to implement the Government's 'Supporting Innovation through Visas' initiative as part of the National Innovation and Science Agenda (NISA), by:

- creating new streams in the Business Innovation and Investment visas to provide a pathway to permanent residence for high calibre entrepreneurs with financial backing from third parties in Australia, who are nominated by a State or Territory government and who meet residence requirements and complete successful entrepreneurial activities in Australia; and
- amending the skilled migration points test to provide additional points for applicants who have completed at least two full academic years of post-graduate studies at doctoral or masters (research) level in specified fields, which may include science, technology, engineering, mathematics, or information and communication technology.

A Statement of Compatibility with Human Rights (Statement) has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Statement's overall assessment is that the Regulation is compatible with human rights as, while it engages some of the rights articulated in the seven core human rights treaties, these changes are considered reasonable, necessary and proportionate in achieving the Regulation's objectives. A copy of the Statement is at Attachment B.

Details of the Regulation are set out in Attachment C.

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

The Office of Best Practice Regulation (OBPR) was consulted in relation to the amendments made by the Regulation. As a short form Regulatory Impact Statement was done as part of the package of measures under the NISA, OBPR advised that no further action was required. The OBPR consultation reference is 20000.

In relation to the amendments made by Schedule 1 (Entrepreneur visas), in accordance with section 17 of the *Legislation Act 2003* which envisages consultations where appropriate and reasonably practicable, the Department consulted with State and Territory governments and industry groups, and also received public submissions on the ‘Supporting Innovation through Visas’ initiative. Following these consultations, the Department consulted with the Department of Foreign Affairs and Trade, the Department of Education and Training, the Department of Industry, Innovation and Science, AusIndustry and Austrade.

In relation to the amendments made by Schedule 2 (Specialist educational qualifications), the Department consulted with the Department of Employment, the Department of Education and Training, and the Department of Industry, Innovation and Science, to determine which fields of study would be most appropriate for the award of additional points in relation to the points test for a permanent skilled visa.

The Regulation is a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulation commences on 10 September 2016.

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing all matters which by the Migration Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act.

In addition, the following provisions of the Migration Act may apply:

- subsection 31(3) of the Migration Act, which provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- subsection 40(1) of the Migration Act, which provides that the regulations may provide that visas or visas of a specified class may be granted in specified circumstances;
- subsection 41(1) of the Migration Act, which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
- subsection 45C(1), which provides that the regulations may provide that visa application charge may be payable in instalments, and specify how those instalments are to be calculated, and when instalments are payable;
- subparagraph 45C(2)(a)(iii), which provides that the regulations may make provision for and in relation to working out how much visa application charge is to be paid;
- subsection 46(2), which provides that, subject to subsection 46(2A), an application for a visa is valid if it is an application for a visa of a class prescribed for the purposes of this subsection; and under the regulations, the application is taken to have been validly made;
- subsection 46(3), which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application;
- subsection 93(2), which provides that the regulations may prescribe a number of points and prescribe qualifications for the purposes of section 93 (Determination of an applicant's score); and
- subsection 504(2), which provides that section 14 of the *Legislation Act 2013* does not prevent, and has not prevented, regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the commencement of the regulations.

Statement of Compatibility with Human Rights

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

Migration Amendments for Business Skills visas and the Skilled Migration Points Test

The *Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016* (the Disallowable Legislative Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The ‘Supporting Innovation through Visas’ measure announced by the Prime Minister on 7 December 2015 amongst the suite of the National Innovation and Science Agenda (NISA) measures, provides an opportunity for Australia to attract the best and brightest entrepreneurial talent and skills to Australia.

The amendments to *the Migration Regulations 1994* made by this Disallowable Legislative Instrument include:

- The amendments extend the role of the Business Innovation and Investment programme (Subclass 188 (Business Innovation and Investment (Provisional)) visa and Subclass 888 (Business Innovation and Investment (Permanent)) visa by creating a new Entrepreneur stream. These amendments are designed to enhance the programme and attract individuals who are under 55 years old (unless the age requirement is waived by a nominating state or territory) and have obtained capital backing from a third party to develop and commercialise innovative and entrepreneurial ideas in Australia, with a pathway to permanent residence made available for those who demonstrate a successful record of undertaking entrepreneurial activities in Australia.
- The amendments also enhance pathways to permanent residency for PhD and masters by research graduates from Australian institutions who have studied for a minimum of two full-time academic years in Australia and achieved their qualification in a prescribed Science, Technology, Engineering and Mathematics (STEM) or information and communications technology (ICT) field by awarding them with additional five points under the points test for the points tested skilled migration programme (subclasses 189 Skilled Independent visa, 190 Skilled Nominated visa and 489 Skilled Regional (Provisional) visa).

Human rights implications

This Disallowable Legislative Instrument has been assessed against the seven core international human rights treaties.

Australia's human rights obligations apply to persons subject to Australia's jurisdiction. Potential Business Innovation and Investment programme visa applicants who are not in Australia are not subject to Australia's jurisdiction.

The amendments also impose an age limit for future Entrepreneur stream visa applicants in Australia to those who are under 55 years old, unless the nominating state or territory considers that they could make an exceptional economic contribution.

This aspect of the amendment engages Article 26 of the International Covenant on Civil and Political Rights which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment 18, the UN Human Rights Committee stated that:

The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

The migration programme aims to achieve a cost/benefit balance by setting age limits for certain visa types. Younger migrants are more easily integrated into the workforce and spend longer in employment, with their contributions to the economy offsetting the costs of old age. Setting the upper age limit for the Entrepreneur stream of the Business Innovation and Investment programme at 55 means that visa holders provide a productive benefit to the Australian workforce and economy through their potential years of contribution to the Australian labour market.

Further, the ability for a state or territory to effectively waive the age requirement ensures that applicants over the age of 55 who could make an exceptional economic contribution are not barred solely by virtue of their age and are able to have the totality of their individual circumstances considered.

Conclusion

While this Disallowable Legislative Instrument engages some of the rights articulated in the seven core human rights treaties, these changes are considered reasonable, necessary and proportionate in achieving its objectives.

The Honourable Peter Dutton MP, Minister for Immigration and Border Protection

Details of the Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016

Section 1 – Name

This section provides that the title of the Regulation is the *Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016* (the Regulation).

Section 2 – Commencement

The purpose of this section is to provide for when the amendments to the *Migration Regulations 1994* (the Migration Regulations) made by the Regulation commence.

Subsection 2(1) provides that each provision of the Regulation specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms. The table provides that the whole of the Regulation commences on 10 September 2016. A note clarifies that the table relates only to the provisions of the Regulation as originally made. It will not be amended to deal with any later amendments of the Regulation.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Regulation. Information may be inserted in column 3, or information in it may be edited, in any published version of the Regulation. Column 3 of the table provides the date/details of the commencement date.

Section 3 – Authority

This section provides that the Regulation is made under the *Migration Act 1958* (the Migration Act).

The purpose of this section is to set out the Act under which the Regulation is made.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulation has effect according to its terms.

The purpose of this section is to provide for how the amendments in the Regulation operate. Each Schedule to the Regulation amends the Migration Regulations.

Schedule 1 – Entrepreneur visas

Item 1 – Regulation 1.03

This item inserts a new definition of ***complying entrepreneur activity*** in regulation 1.03 of the Migration Regulations. The new definition provides that for the meaning of ***complying entrepreneur activity***, see regulation 5.19E. New regulation 5.19E is inserted in the Migration Regulations by item 3 of this Schedule. Further details are given below.

Item 2 – Regulation 5.19D (note)

This item repeals the note after regulation 5.19D of the Migration Regulations. The note provided that “Regulations 5.19E and 5.19F are reserved for future use”. The note is no longer appropriate as new regulation 5.19E is inserted in the Migration Regulations by item 3 of this Schedule, below.

Item 3 – At the end of Division 5.3 of Part 5

This item adds a new regulation 5.19E (Complying entrepreneur activity) at the end of Division 5.3 of Part 5 of the Migration Regulations.

The purpose of new regulation 5.19E is to set out the requirements to be met for an activity to be a ***complying entrepreneurial activity***. An applicant for a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Entrepreneur visa must be undertaking, or proposing to undertake, a complying entrepreneurial activity in order to satisfy the criteria for the new Entrepreneur stream inserted in Subclass 188 by item 11 of this Schedule, below.

Subregulation 5.19E(1) provides that an activity is a ***complying entrepreneurial activity*** if all of the requirements of regulation 5.19E are met. These requirements are as follows:

- Subregulation 5.19E(2) requires that the activity must 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. The activity must not relate to an activity that is specified by the Minister in an instrument made under subregulation 5.19E(6) (see below). This provision allows activities that are deemed to be insufficiently innovative to be excluded. Such activities could include the purchase of an existing business or franchise, activities related to real estate, or activities related to labour hire. Provision for the excluded activities to be specified in an instrument will enable the list of excluded activities to be revised or updated from time to time, as appropriate in the circumstances.
- Subregulation 5.19E(3) requires all of the following to be met:
 - there must be one or more legally enforceable agreements under which funding is to be provided to the entrepreneurial entity (which may be the applicant, a body corporate, or a partnership) by one or more entities of a kind covered by subregulation 5.19E(5) (see below);
 - the total amount of funding provided or to be provided under the agreement or agreements must be at least \$200,000;

- if the applicant is not the entrepreneurial entity, the applicant must personally hold at least a 30% ownership share in the entrepreneurial entity at the time the agreement or agreements are entered into, which prevents more than three applicants being eligible in relation to any one entrepreneurial entity;
 - under the agreement or agreements, at least 10% of the funding must be payable to the entrepreneurial entity within 12 months of the day the activity starts to be undertaken in Australia; and
 - there must be a business plan that the Minister considers to be appropriately formulated to lead to an outcome set out in subregulation 5.19E(2) (see above).
- Subregulation 5.19E(4) requires that all funding provided or to be provided to the entrepreneurial entity under the agreement or agreements must be unencumbered and lawfully acquired.
- Subregulation 5.19E(5) provides that entities which may enter into an agreement to provide funding for the purposes of ***complying entrepreneurial activities*** must be entities specified by the Minister in an instrument (see subregulation 5.19E(6), below). The subregulation restricts the kinds of entities that the Minister may specify to agencies of the Commonwealth, States or Territories, or bodies established under a law of the Commonwealth or of a State or Territory; bodies corporate; partnerships; unincorporated bodies; individuals; trustees of trusts that have only one trustee; and the trustees together of a trust that has more than one trustee. Provision for eligible entities to be specified in an instrument will allow the entities permitted to provide funding to entrepreneurs under the Entrepreneur visa stream to be controlled and adjusted from time to time, as appropriate.
- Subregulation 5.19E(6) provides the power for the Minister to make legislative instruments specifying the activities which are excluded from being ***complying entrepreneur activities*** (see subregulation 5.19E(2) above), and the entities that may provide funding for the purposes of meeting the requirements for a ***complying entrepreneur activity*** (see subregulation 5.19E(3) above).

Item 4 – Paragraph 1104BA(2)(a) of Schedule 1

This item repeals paragraph 1104BA(2)(a) from Item 1104BA (Business Skills (Permanent)(Class EC)) of Schedule 1 to the Migration Regulations, and substitutes a new paragraph 1104BA(2)(a).

New subparagraph 1104BA(2)(a)(i) sets out in table form the components of the first instalment of visa application charge payable by an applicant seeking to satisfy the primary criteria for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Entrepreneur stream (see item 17 of this Schedule, below, for details of the new Entrepreneur stream inserted in Subclass 888). The components of the first instalment of visa application charge for these applicants are a base application charge of \$3,600, an additional applicant charge of \$1,800 for an applicant who is at least 18, and an additional applicant charge of \$900 for an applicant who is less than 18.

New subparagraph 1104BA(2)(a)(ii) maintains the previous rates of the components of the first instalment of visa application charge for all other applicants for a Business Skills (Permanent)(Class EC) visa, which are \$2,305, \$1,155 and \$575, respectively.

After subparagraph 1104BA(2)(a)(ii), a note explains, relevantly, that regulation 2.12C explains the components of the first instalment of visa application charge, and that the additional applicant charge is payable by an applicant who claims to be a member of the family unit of another applicant and seeks to combine the application with that applicant's application.

Item 5 – Subparagraph 1104BA(3)(c)(i) of Schedule 1

This item amends subparagraph 1104BA(3)(c)(i) in Item 1104BA of Schedule 1 to the Migration Regulations, by omitting the words “or the Investor stream” and substituting “the Investor stream or the Entrepreneur stream”. This amendment is consequential to the insertion of the new Entrepreneur stream in Subclass 888 by item 17 of this Schedule (see below).

Item 6 – After subitem 1104BA(5B) of Schedule 1

This item inserts a new subitem 1104BA(5C) after subitem 1104BA(5B) in Item 1104BA in Schedule 1 to the Migration Regulations.

New subitem 1104BA(5C) has the effect that to make a valid application, an applicant seeking to satisfy the criteria for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Entrepreneur stream must hold a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Entrepreneur stream. This implements the intended requirement that a person must undertake a complying entrepreneurial activity or activities while holding a provisional Subclass 188 visa, and must apply for a permanent Subclass 888 before the expiry of the Subclass 188 visa.

Item 7 – After subparagraph 1202B(2)(a)(ib) of Schedule 1

This item inserts a new subparagraph 1202B(2)(a)(ic) after subparagraph 1202B(2)(a)(ib) in Item 1202B (Business Skills (Provisional)(Class EB)) of Schedule 1 to the Migration Regulations.

New subparagraph 1202B(2)(a)(ic) sets out in table form the components of the first instalment of visa application charge payable by an applicant seeking to satisfy the primary criteria for the grant of a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Entrepreneur stream (see item 11 of this Schedule, below, for details of the new Entrepreneur stream inserted in Subclass 188), or an applicant whose application is combined, or sought to be combined, with an application by that person. The components of the first instalment of visa application charge for these applicants are a base application charge of \$3,600, an additional applicant charge of \$1,800 for an applicant who is at least 18, and an additional applicant charge of \$900 for an applicant who is less than 18.

Item 8 – After subitem 1202B(6C) of Schedule 1

This item inserts a new subitem 1202B(6D) after subitem 1202B(6C) of Item 1202B in Schedule 1 to the Migration Regulations.

New subitem 1202B(6D) has the effect that to make a valid application, an applicant seeking to satisfy the primary criteria for a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Entrepreneur stream must meet the requirements set out in the table. These requirements are that the applicant must have been invited, in writing, by the Minister to apply for a Subclass 188 visa in the Entrepreneur stream, must apply within the period stated in the invitation, and must be nominated by a State or Territory government agency.

It is intended that persons seeking to apply for a Subclass 188 visa in the Entrepreneur stream will submit an expression of interest. When the person is nominated by a State or Territory government agency an invitation to apply may then be issued to the person, and a valid application for the visa may be made provided the application is made within the period stated in the invitation.

Item 9 – Clause 188.113 of Schedule 2 (notes 2-7)

This item repeals notes 2 to 7 in clause 188.113 of Schedule 2 to the Migration Regulations, and substitutes new notes 2 and 3.

Clause 188.113 provides references to provisions giving the meanings of certain terms used in Subclass 188 (Business Innovation and Investment (Provisional)). The purpose of this amendment is to consolidate the previous six notes into two notes, and to add two further terms which are used in the new Entrepreneur stream inserted in Subclass 188 by item 11 of this Schedule, below. The additional terms used in the new Entrepreneur stream are:

- ***competent English***: paragraph (a) of Note 2 provides that *competent English* has the meaning given by regulation 1.15C; and
- ***complying entrepreneur entity***: paragraph (b) of Note 2 provides that *complying entrepreneurial activity* is defined in regulation 5.19E, which was inserted in the Migration Regulations by item 3 of this Schedule, above.

Item 10 – Division 188.2 of Schedule 2 (note)

This item amends the note to Division 188.2 of Schedule 2 to the Migration Regulations, by inserting the words “If an applicant applies for a Subclass 188 visa in the Entrepreneur stream, the criteria in Subdivisions 188.21 and 188.28 are the primary criteria”.

This amendment is consequential to the introduction of the Entrepreneur stream in Subclass 188 (Business Innovation and Investment (Provisional)). The effect of the note is that an applicant seeking to satisfy the primary criteria for a Subclass 188 visa in the Entrepreneur stream must satisfy the common criteria in Subdivision 188.21 and the criteria for the Entrepreneur stream in Subdivision 188.28 which is inserted in Subclass 188 by item 11 of this Schedule, below.

Item 11 – At the end of Division 188.2 of Schedule 2

This item adds a new Subdivision 188.28 – Criteria for Entrepreneur stream – at the end of Division 188.2 in Subclass 188 of Schedule 2 to the Migration Regulations. The note indicates that the criteria in new Subdivision 188.28 are only for applicants seeking to satisfy the primary criteria for a Subclass 188 visa in the Entrepreneur stream. As noted above in relation to item 10 of this Schedule, these applicants need to satisfy the common criteria in Subdivision 188.21 and the criteria for the Entrepreneur stream in new Subdivision 188.28.

The criteria to be satisfied under the four clauses of new Subdivision 188.28 are as follows:

- Clause 188.281 requires that:
 - The applicant must have been invited, in writing by the Minister to apply for the visa. An invitation is required before a valid application can be made for a Subclass 188 visa in the Entrepreneur visa; see item 8 of this Schedule, above.
 - The applicant must not have turned 55 at the time of the invitation to apply, but this requirement does not apply if the nominating State or Territory government agency considers that the relevant complying entrepreneurial activity is or will be of exceptional economic benefit to the State or Territory. This requirement acknowledges that younger migrants are more easily integrated into the workforce and spend longer in employment with their contribution to the economy offsetting the costs of old age, but at the same time special provision is made for cases determined to be of exceptional economic benefit to a State or Territory.
 - At the time of invitation to apply for the visa, the applicant must have had competent English. *Competent English* is defined in regulation 1.15C in terms of a specified result in a specified English test, or holding a specified type of passport. This requirement ensures that an applicant’s English will be sufficient to undertake entrepreneurial activities in Australia.
- Clause 188.282 requires an applicant to be undertaking, or proposing to undertake, a complying entrepreneurial activity, and that the applicant has a genuine intention to undertake, and to continue to undertake, the complying entrepreneurial activity in Australia in accordance with the agreement or agreements relevant to the activity. The activity must meet all the requirements for a *complying entrepreneurial activity* in regulation 5.19E which is inserted in the Migration Regulations by item 3 of this Schedule. See the notes on item 3, above, for details of the requirements that a *complying entrepreneurial activity* must meet.
- Clause 188.283 requires that the nominating State or Territory government agency must be satisfied that the value of the business and personal assets of the applicant, the applicant’s spouse or de facto partner, or the applicant and the applicant’s spouse and de facto partner together, is sufficient to allow them to settle in Australia. This requirement is intended to ensure that an applicant will not encounter undue financial hardship in Australia.
- Clause 188.284 requires an applicant and each member of the applicant’s family unit who is included in the application to satisfy public interest criterion 4005. It also

requires each member of the applicant's family unit who is not included in the application to satisfy public interest criterion 4005 unless it would be unreasonable to require the family member to undergo assessment in relation to the criterion. Public interest criterion 4005 is in Schedule 4 to the Migration Regulations and relates to health. These requirements ensure that an applicant and all members of the applicant's family unit meet health standards.

Item 12 – Subclause 188.312(4) of Schedule 2

This item amends subclause 188.312(4) of Subclass 188 in Schedule 2 to the Migration Regulations, by omitting the words “or the Premium Investor stream” and substituting “the Premium Investor stream or the Entrepreneur stream”. This amendment adds a reference to the Entrepreneur stream in subclause 188.312(4), with the effect that a secondary applicant applying as a member of the family unit of a primary applicant who holds a Subclass 188 visa in the Entrepreneur stream must satisfy public interest criterion 4005 in relation to health.

Item 13 – Clause 188.511 of Schedule 2

This item amends clause 188.511 of Subclass 188 in Schedule 2 to the Migration Regulations, by omitting the words “or the Premium Investor stream” and substituting “the Premium Investor stream or the Entrepreneur stream”. This amendment adds a reference to the Entrepreneur stream in clause 188.511, with the effect that a Subclass 188 visa in the Entrepreneur stream is a temporary visa permitting the holder to travel to, enter and remain in Australia for 4 years and 3 months from the date the visa is granted.

Item 14 – At the end of Division 188.6 of Schedule 2

This item adds a new clause 188.613 at the end of Division 188.6 of Subclass 188 in Schedule 2 to the Migration Regulations. New clause 188.613 provides that if the applicant is granted a Subclass 188 visa in the Entrepreneur stream, condition 8571 must be imposed. Condition 8571 is a new condition inserted in Schedule 8 to the Migration Regulations by item 17 of this Schedule. For further details, see the notes on that item, below.

Item 15 – Division 888.2 of Schedule 2 (note)

This item amends the note to Division 888.2 of Schedule 2 to the Migration Regulations, by inserting the words “If an applicant applies for a Subclass 888 visa in the Entrepreneur stream, the criteria in Subdivisions 888.21 and 188.26 are the primary criteria”.

This amendment is consequential to the introduction of the Entrepreneur stream in Subclass 888 (Business Innovation and Investment (Permanent)). The effect of the note is that an applicant seeking to satisfy the primary criteria for a Subclass 888 visa in the Entrepreneur stream must satisfy the common criteria in Subdivision 888.21 and the criteria for the Entrepreneur stream in Subdivision 888.26, which is inserted in Subclass 888 by item 16 of this Schedule, below.

Item 16 – At the end of Division 888.2 of Schedule 2

This item adds a new Subdivision 888.26 – Criteria for Entrepreneur stream – at the end of Division 888.2 in Subclass 888 (Business Innovation and Investment (Permanent)) of

Schedule 2 to the Migration Regulations. The note indicates that the criteria in new Subdivision 888.26 are only for applicants seeking to satisfy the primary criteria for a Subclass 888 visa in the Entrepreneur stream. As noted above in relation to item 15 of this Schedule, these applicants need to satisfy the common criteria in Subdivision 888.21 and the criteria for the Entrepreneur stream in new Subdivision 888.26.

The criteria to be satisfied under clause 888.261 of new Subdivision 888.26 are as follows:

- Subclause 888.261(1) requires that at the time of applying for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Entrepreneur stream, an applicant must hold a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Entrepreneur stream and must have held that visa for at least 4 years, and must have resided in Australia for at least 2 years of those 4 years.
- Subclause 888.261(2) requires that an applicant must demonstrate overall a successful record of undertaking, either alone or by participating in a business, activities of an entrepreneurial nature. The applicant may demonstrate this in regard to any entrepreneurial activities that the applicant has undertaken in Australia, however the relevant activities may not include activities specified in an instrument for the purposes of paragraph 5.19E(2)(b). New paragraph 5.19E(2)(b) is inserted in the Migration Regulations by item 3 of this Schedule. See the notes on item 3, above, for further details of activities that would be excluded in respect of demonstrating a successful record of activities of an entrepreneurial nature.
- Subclause 888.261(3) provides that in determining the success of an applicant's record for the purposes of subclause 888.261(2) the matters the Minister must have regard to include, but are not limited to:
 - the number of Australia citizens and Australian permanent residents that are employed in Australia in relation to the applicant's entrepreneurial activities;
 - the level and nature of ongoing funding of, or investment in, the activities; and
 - the annual turnover of businesses related to the activities.

The effect of this provision is that in considering an applicant's record of entrepreneurial activities in Australia, regard may be given to any relevant factor, however the above factors must be taken into consideration.

Item 17 – At the end of Schedule 8

This item adds a new Condition 8571 in Schedule 8 (Visa conditions) to the Migration Regulations. New condition 8571 is prescribed as a condition which must be imposed on a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Entrepreneur stream. See item 14 of this Schedule, above.

Condition 8571 requires that the holder of the visa must maintain an ongoing relationship with the nominating State or Territory government agency or the government of the State or Territory in which the agency is (or was) located. It should be noted that a Subclass 188 visa in the Entrepreneurial stream will be valid for 4 years and 3 months (see item 13 of this Schedule, above). During that time, the State or Territory government agency that was responsible for nominating the visa holder may change its responsibilities or cease to exist. In those circumstances, the condition is worded so that it can still be met by the visa holder

by maintaining an ongoing relationship with the relevant State or Territory government rather than the nominating agency itself.

Schedule 2 – Specialist educational qualifications

Item 1 – After subregulation 2.26AC(5)

This item inserts new subregulations 2.26AC(5A) and (5B) in regulation 2.26AC (Prescribed qualifications and number of points for subclass 189, 190 and 489 visas) in Part 2 of the Migration Regulations.

The purposes of new subregulation 2.26AC(5A) is to provide for when a person meets the requirements for the award of a *specialist educational qualification* for the purposes of the award of extra 5 points under new Item 6D7A1 of the General Skilled Migration points test in Schedule 6D to the Migration Regulations. New Item 6D7A1 is inserted in Schedule 6D by item 3 of this Schedule, below.

An applicant will meet the requirements for the award of specialist educational qualifications if the applicant satisfies the Minister that:

- the applicant has met the requirements for the award, by an Australian educational institution, of:
 - a masters degree by research; or
 - a doctoral degree; and
- the degree included study for at least 2 academic years at the institution in a field specified in an instrument under new subregulation 2.26AC(5B).

The new provisions allow extra points to be awarded under the General Skilled Migration points test to applicants who have achieved Australian qualifications at a higher level in fields where shortages have been identified in Australia. Provision for the relevant fields to be specified in an instrument will allow a quick response when shortages become evident. It is intended that initially the specified fields will be science, technology, engineering, mathematics, and information and communication technology.

The General Skilled Migration points test is relevant to applications for permanent visas of Subclass 189 (Skilled – Independent), Subclass 190 (Skilled – Nominated) and Subclass 489 (Skilled – Regional (Provisional)). The additional points are intended to assist applicants for these permanent visas to meet the criteria for the skilled migration programme.

New subregulation 2.26AC(5B) provides power for the Minister to make a legislative instrument specifying a field or fields of education for the purposes of new paragraph 2.26AC(5A)(b).

Item 2 – Subregulation 2.26AC(6)

This item amends subregulation 2.26AC(6) of the Migration Regulations by inserting the words “and this regulation” after the words “In Schedule 6D”. This amendment is consequential to the insertion of new subregulation 2.26AC(5A) by item 1 of this Schedule, above. The new subregulation uses the term *degree* which is defined in subregulation

2.26AC(6), but as the term is now used in subregulation 2.26AC(5A), the definition in subregulation 2.26AC(6) is no longer restricted to a term used only in Schedule 6D.

Item 3 – After Part 6D.7 of Schedule 6D

This item inserts a new Part 6D.7A – Specialist educational qualifications) in Schedule 6D (General points test for General Skilled Migration visas mentioned in subregulation 2.26AC(1)) to the Migration Regulations.

Schedule 6D sets out the General Skilled Migration points test for applicants for permanent visas of Subclasses 189 (Skilled – Independent), 190 (Skilled – Nominated), and 489 (Skilled – Regional (Provisional)). New item Part 6D.7A provides for the award of an extra 5 points for applicants who meet the requirements for the award of a specialist educational qualification. The requirements for the award of a specialist education qualification are set out in new subregulation 2.26AC(5A), inserted in the Migration Regulations by item 1 of this Schedule and are described in respect of item 1, above.

Schedule 3 – Application and transitional provisions

Item 1 – In the appropriate position in Schedule 13

This item inserts a new Part 56 – Amendments made by the Migration Amendment (Entrepreneur Visas and Other Measures) Regulation 2016 – in Schedule 13 (Transitional arrangements) to the Migration Regulations.

Item 5601 – Operation of Schedule 1 – of new Part 56 provides that the amendments to the Migration Regulations made by Schedule 1 (Entrepreneur visas) to this Regulation apply in relation to an application for a visa made on or after 10 September 2010.

It should be noted that the amendments to the Migration regulations made by Schedule 2 (Specialist educational qualifications) to this Regulation are amendments to a points test prescribed under Subdivision B (The ‘points’ system) of Division 3 of Part 2 of the Migration Act. Subsection 93(2) of the Migration Act provides that a points assessment is to be made under the regulations in force at the time the assessment is made. The effect of this provision is that the amendments to Schedule 6D to the Migration Regulations made by Schedule 2 to this Regulation will apply to all points assessments made on and after 10 September 2016.