**EXPLANATORY STATEMENT**

###### **Select Legislative Instrument 2013 No. 146**

Issued by the Minister for Immigration and Citizenship

*Migration Act 1958*

*Australian Citizenship Act 2007*

*Migration Legislation Amendment Regulation 2013 (No. 3)*

Subsection 504(1) of the *Migration Act 1958* (‘the Act’) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the 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 Act.

Section 54 of the *Australian Citizenship Act 2007* (‘the Citizenship Act’) provides that the Governor-General may make regulations prescribing matters required or permitted by the Citizenship Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Citizenship Act.

In addition, regulations may be made pursuant to the provisions of the Migration and Citizenship Acts in Attachment A.

The purpose of the Regulation is to:

* amend the *Migration Regulations 1994* (‘the Principal Regulations’) to strengthen the integrity of the sponsorship program for Subclass 457 (Temporary Work (Skilled)) visas (‘Subclass 457 visas’) through the introduction of several integrity measures. Broadly, these measures ensure that the sponsorship program for Subclass 457 visas is used to address skills shortages in Australia in accordance with the policy intention. In particular, the Regulation amends the Principal Regulations to:
* require sponsors to meet certain training requirements for training Australian workers;
* introduce a ‘genuineness test’ to be conducted by departmental officers to ensure that the position associated with the nominated occupation is genuinely required to address skills shortages in Australia;
* require sponsors to justify the number of nominations required;
* require sponsors to provide overseas workers with at least the terms and conditions of employment given to an Australian worker performing the same work in the same geographic region;
* strengthen the English language requirements for Subclass 457 visas by requiring the Subclass 457 visa applicant to have vocational English, competent English, proficient English, concessional competent English or superior English, as applicable. These English language levels are defined in the Principal Regulations and set out certain standards that must be met to achieve the relevant English language level;
* clarify the Department of Immigration and Citizenship’s (‘the Department’s’) intention to require a sponsored person to work directly for the sponsor;
* clarify the Department’s intention that, as a criteria for the grant of a   
  Subclass 457 visa, the Subclass visa applicant must continue to be the subject of an approved nomination;
* strengthen the skills requirements for Subclass 457 visas by requiring the Subclass 457 visa applicant to have the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation;
* allow Subclass 457 visa application charges to be refunded if the application is withdrawn because there is no approved nomination;
* clarify the Department’s intention about the meaning of the term ‘entity’;
* require Subclass 457 visa holders to meet the mandatory registration and licencing requirements for their occupation in the relevant State or Territory;
* remove certain redundant provisions; and
* strengthening the nomination requirements under the Permanent Employer Sponsored visa program;
* amend the Principal Regulations to streamline the processing of applications for standard business sponsorship, approval of nominations and Subclass 457 visas. In particular, the Regulation amends the Principal Regulations to require all applications for standard business sponsorship, approval of nominations and Subclass 457 (Temporary Work (Skilled)) visas to be lodged electronically, regardless of the location of the business or visa applicant;
* amend the *Australian Citizenship Regulations 2007* (‘the Citizenship Regulations’) to:
  + incorporate by reference instruments made under the subregulation 5.36(1) and 5.36(1A) of the Principal Regulations, which relate to the payment of fees in foreign currencies and foreign countries; and
  + reflect the changed methodology of foreign currency conversion made under subregulation 5.36(1A) of the Principal Regulations*;*
* amend the Principal Regulations to change the method by which the foreign currency equivalent (‘FCE’) of Australian dollar amounts are to be calculated. It would be done by using exchange rates rather than using the FCE amounts;
* amend the Principal Regulations to implement changes to the Subclass 300 (Prospective Marriage) visa (‘Prospective Marriage visa’) to provide greater protections to applicants, who, on account of their young age, could become victims of forced marriage and/or people trafficking. In particular purpose of the regulations is to:
  + increase the minimum age for applicants and sponsors of a Prospective Marriage visa to 18 years of age at the time of application. Previously, the Principal Regulations did not impose an explicit minimum age restriction on an applicant for a Prospective Marriage visa;
  + remove the ability for a parent or guardian to sponsor an applicant for a Prospective Marriage visa on behalf of the prospective spouse who is under the age of 18;
  + clarify that an applicant for a Prospective Marriage visa and a prospective spouse must have met since turning 18 and are known to each other personally in order for the applicant to be eligible for the grant of a Prospective Marriage visa; and
  + remove the provision allowing a Prospective Marriage visa to be granted where either the applicant or prospective spouse is under 18, on the basis that an Australian court order has been granted authorising the marriage, or that the Minister is satisfied that the underage individual will turn 18 prior to the intended marriage;
* amend the Principal Regulations to amend the prescribed criteria for the Temporary Residence Transition stream and the Direct Entry stream of the permanent employer sponsored visa program, specifically:
  + a nomination under the Temporary Residence Transition stream may only be approved if the nominating employer was lawfully operating a business in Australia at the time they were approved as a standard business sponsor; and
  + that an applicant may be granted a Subclass 186 (Employer Nomination Scheme) visa under the Direct Entry stream if the applicant, among other things, has been employed in the nominated occupation on a full time basis for at least 3 years and at the level of skill required for the occupation;
* amend the Principal Regulations to include public interest criterion 4020 (‘PIC 4020’) to provide a basis for refusing to grant a Family stream visa to all applicants where bogus documentation or information that is false or misleading has been presented by a primary or secondary applicant;
* amend the Principal Regulations to provide that, for eligible family members who are being added to an undecided application where the visa subclass has been repealed since the original application was made, an additional applicant charge is still payable by each person being added to the application. In such cases, the additional applicant charge is set out in an instrument in writing.
* amend the Principal Regulations to change the health requirement for a Subclass 576 (AusAID or Defence Sector) visa, specifically:

substitute public interest criterion (PIC) 4005 with PIC 4007 as a ‘time of decision’ criterion for the grant of a Subclass 576 (AusAID or Defence Sector) visa. Both criteria require a visa applicant to meet certain health requirements. PIC 4007 allows the Minister to waive some of those requirements while PIC 4005 does not.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement’s overall assessment is that the Regulation is compatible with human rights because it advances the protection of human rights. A copy of the Statement is at Attachment B.

Details of the Regulation are set out in Attachment C.

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

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation. The OBPR considers that the changes have a ‘minor’ impact on business or the not-for profit sector and no further analysis is required. The OBPR consultation references are:

* 2012/13779 (Schedule 2);
* 2012/14518 and 2013/14767 (Schedule 4);
* 2012/14534 (Schedule 5);
* 2012/14224 (Schedule 6);
* 2012/14143 (Schedule 7);
* 2012/14523 (Schedule 8); and
* 2013/14917 (Schedule 9).

In relation to the amendments made by Schedules 1, 2 and 3 to the Regulation, the Department has consulted with the various external stakeholders, including the Ministerial Advisory Council on Skilled Migration (‘MACSM’), the Department of Foreign Affairs (‘DFAT’) and Trade and the Office of International Law (‘OIL’) in the Attorney General’s Department.

The MACSM is made up of representatives from industry, union, academia and state and territory governments. The Council’s role is to provide advice to the Minister regarding the Department’s skilled migration programs including: the impact of skilled migration on the Australian economy and labour market, the implementation of changes to the employer sponsored visa categories and the operation of the Subclass 457 visa program. The Department began consultation with the Council on changes to the Subclass 457 visa program in September of 2012. In October the Council created a subcommittee whose role was to ensure the changes to the program achieved their intention without imposing unnecessary burdens on users of the program. The subcommittee met on three occasions. While the members of the subcommittee have divergent opinions their feedback was useful in shaping the changes.

An interdepartmental committee to discuss the changes with other Government agency counterparts was convened on 10 January 2013.  While no strong concerns were raised at the committee, follow up consultation was conducted with the Department of Foreign Affairs and Trade (DFAT) and the Office of International Law (‘OIL’) in the Attorney General’s Department.

DFAT, in consultation with OIL, have raised concerns that some measures may not be consistent with Australia’s international trade obligations under the World Trade Organisation (‘WTO’) General Agreement on Trade in Services (‘GATS’) and various free trade agreements to which Australia is a party. The Department has also met separately with DFAT/OIL and they have provided legal advice on many of the changes.

The Office of Best Practice Regulation (‘OBPR’) in the Department of Finance was consulted through the process of preparing a Regulatory Impact Statement (‘RIS’) as was required for some of the changes. The RIS was not certified prior to the changes being announced. The Department will conduct a full post-implementation review of the measures.

In relation to the amendments made by Schedule 4 to the Regulation, the amendments to the Citizenship Regulations and the Principal Regulationswill not be likely to have a direct, or a substantial indirect, effect on business or restrict competition, or impact significantly on other government departments, non-government organisations, businesses or other interested parties, and no consultation outside the Department of Immigration and Citizenship was undertaken.

In relation to the amendments made by Schedule 5 to the Regulation, the Department has consulted with the Marriage Law and Celebrants Section of the Attorney Generals Department (‘AGD’) via email and telephone. The Department also received comments on the proposal to increase the minimum age of Prospective Marriage visa applicants and sponsors to 18 from the Human Trafficking section of the AGD. The AGD agreed to the proposal and noted that it will likely be an important part of Australia’s framework to combat forced marriage.

In relation to the amendments made by Schedule 6 to the Regulation, the amendments are minor or machinery and address ambiguity in Principal Regulations. The amendments reflect the intent of current policy settings and do not substantially alter existing arrangements and so, consistent with section 18 of the *Legislative Instruments Act 2003,* no substantial consultation was undertaken.

In relation to the amendments made by Schedule 7 to the Regulation, the amendments will not be likely to have a direct, or a substantial indirect, effect on business or restrict competition, or impact significantly on other government departments, non-government organisations, businesses or other interested parties, and no consultation outside the Department was undertaken.

In relation to Schedule 8 to the Regulation, consultation for these amendments was undertaken as part of the Department’s consultation for the Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013 for the Department’s Visa Pricing Transformation (‘VPT’) project.  In relation to the VPT project, high level consultation on VPT implementation milestones and plans for future implementation initiatives was undertaken with key government agencies and stakeholders including the Department of Foreign Affairs and Trade, the Department of Human Services and the Commonwealth Ombudsman, and Cross Agency Committee meetings with the Department of the Prime Minister and Cabinet, the Treasury, the Department of Finance and Deregulation.

Briefings were given to the Regional Outreach Officer Network, which comprises officers from the Australian Industry Group, the Australian Chamber of Commerce and Industry, the National Farmer’s Federation, the ACT & Region Chamber of Commerce and Industry, the Australian Information Industry Association, Business South Australia, the Chamber of Commerce and Industry of Western Australia, the Chamber of Commerce of the Northern Territory, the Chamber of Commerce and Industry Queensland, Consult Australia, Defence Teaming Centre Inc, Growcom, the Housing Industry Association, the Master Builders Association, the Motor Trades Association of Australia, the New South Wales Business Chamber, the Queensland Tourism Industry Council, the Resources Sector Consortium: Australian Mines & Metals Association, Australian Petroleum & Exploration Association, Chamber of Minerals & Energy and Restaurant & Catering Australia.

Consultation on the VPT project was also undertaken with the Education Visa Consultative Committee, which comprises the Department of Education, Employment and Workplace Relations, Austrade, State and Territory Governments, Australian Council for Private Education and Training, Australian Council of Trade Unions, Australian Government Schools International, Business Council of Australia, Council of International Students Australia, Council of Private Higher Education, English Australia, International Education Association Australia, Independent Schools Council of Australia and TAFE Directors Australia.

In addition, consultation took place with the Tourism Visa Advisory Group, which comprises the Department of Resources, Energy and Tourism, Australian Hotels Association, Australian Tourism Export Council, Business Events Council of Australia, National Tourism Alliance, Board of Airline Representatives of Australia, Qantas and the Virgin Group.

In relation to the amendments made by Schedule 9 to the Regulation, the Department has consulted with Australian Agency for International Development (‘AusAID’) and the Department of Defence as key stakeholders.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

**ATTACHMENT A**

Section 54 of the *Australian Citizenship Act 2007* (‘the Citizenship Act’) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provision may apply:

* subsection 46(1)(d) of the Citizenship Act, which provides that an application made under a provision of that Act must be accompanied by the fee (if any) prescribed by the Citizenship Regulations.

Subsection 504(1) of the *Migration Act 1958* (‘the Act’) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the 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 Act.

In addition, the following provisions may apply:

* subsection 31(1) of the Act, which provides that there are to be prescribed classes of visas;
* subsection 31(3) of the Act, which provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section [32](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_32-Specialcategoryvisas$3.0#JD_32-Specialcategoryvisas), [36](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_36-Protectionvisas$3.0#JD_36-Protectionvisas), [37](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_37-Bridgingvisas$3.0#JD_37-Bridgingvisas), [37A](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_37A-Temporarysafehavenvisas$3.0#JD_37A-Temporarysafehavenvisas) or [38B](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_38B$3.0#JD_38B) but not by section [33](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_33-Specialpurposevisas$3.0#JD_33-Specialpurposevisas), [34](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_34-absorbedpersonvisas$3.0#JD_34-absorbedpersonvisas), [35](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_35-Ex-citizenvisas$3.0#JD_35-Ex-citizenvisas), [38](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_38-Criminaljusticevisas$3.0#JD_38-Criminaljusticevisas) or [38A](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff004f8e$cid=legend_current_ma$t=document-frame.htm$an=JD_38A$3.0#JD_38A));
* subsection 31(5) of the Act, which provides that the regulations may specify that a visa is a visa of a particular class;
* subsection 40(1) of the Act, which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
* subsection 41(1) of the Act, which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
* subsection 41(2) of the Act, which provides that, without limiting subsection 41(1), the Principal Regulations may provide that a visa, or visas of a specified class, are subject to:
  + a condition that, despite anything else in the Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa or a temporary visa of a specified kind), while he or she remains in Australia; or
  + a condition imposing restriction on doing any work, work other than specified work or work of a specified kind.
* subsection 45(1) of the Act, which provides that, subject to this Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class;
* subsection 45B(1) of the Act, which provides that the amount of visa application charge is the amount, not exceeding the visa application charge limit, prescribed in relation to the application;
* subsection 45C(1) of the Act, 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
  + specify when instalments are payable;
* subsection 45C(2) of the Act, which provides in part that the Regulations may also:
  + make provision for and in relation to:  
    - the way, including the currency, in which visa application charge is to be paid; or
    - working out how much visa application charge is to be paid; or
    - the time when visa application charge is to be paid; or
    - the persons who may be paid visa application charge on behalf of the Commonwealth;
* section 140A of the Act, which provides that Division 3A of Part 2 of the Act applies to visas of a prescribed kind;
* subsection 140E(1) of the Act, which provides that the Minister must approve a person as a sponsor in relation to one or more classes [prescribed](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00575$t=document-frame.htm$3.0$p=',48,48,169,114)) for the purpose of subsection 140E[(2)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff0064a1$cid=legend_current_ma$t=document-frame.htm$an=JD_140E40241$3.0#JD_140E40241) if [prescribed criteria](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00576$t=document-frame.htm$3.0$p=',48,48,164,260)) are satisfied;
* subsection 140E(2) of the Act, which provides that the [regulations](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001144f$cid=legend_current_mr$t=document-frame.htm$an=JD_258$3.0#JD_258) must prescribe classes in relation to which a person may be approved as a sponsor;
* subsection 140E(3) of the Act, which provides that different criteria may be prescribed for:
  + different kinds of visa (however described); and
  + different classes in relation to which a person may be approved as a sponsor; and
  + different classes of person within a class in relation to which a person may be approved as a sponsor;
* subsection 140F(1) of the Act, which provides that the regulations may establish a process for the Minister to approve a person as a sponsor;
* subsection 140F(2) of the Act, which provides that different processes may be prescribed for:
  + different kinds of visa (however described); and
  + different classes in relation to which a person may be approved as a sponsor;
* subsection 140G(1) of the Act, which provides that an approval as a sponsor may be on terms specified in the approval;
* subsection 140G(2) of the Act, which provides that the terms must be of a kind [prescribed](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00580$t=document-frame.htm$3.0$p=',48,48,190,110)) by the regulations;
* subsection 140G(3) of the Act, which provides that an actual term may be prescribed by the regulations;
* subsection 140G(4) of the Act, which provides that different kinds of terms may be prescribed for:
  + different kinds of visa (however described); and
  + different classes in relation to which a person may be approved as a sponsor;
* subsection 140GA(1) of the Act, which provides that the [regulations](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00583$t=document-frame.htm$3.0$p=',48,48,169,114)) may establish a process for the Minister to vary a term of a person’s approval as a sponsor;
* subsection 140GA(2) of the Act, which provides that the Minister must vary a term specified in an approval if:  
  + the term is of a kind [prescribed](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00585$t=document-frame.htm$3.0$p=',48,48,169,114)) by the regulations for the purposes of this paragraph; and

* + [prescribed criteria](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00586$t=document-frame.htm$3.0$p=',48,48,169,114)) are satisfied;
* subsection 140GA(3) of the Act, which provides that different processes and different criteria may be prescribed for:  
  + different kinds of visa (however described); and
  + different kinds of terms; and
  + different classes in relation to which a person may be approved as a sponsor;
* subsection 140GB(1) of the Act, which provides that an approved sponsor may nominate:   
  + an applicant, or proposed applicant, for a visa of a [prescribed](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00588$t=document-frame.htm$3.0$p=',48,48,256,57)) kind (however described), in relation to:   
    - the applicant or proposed applicant’s proposed occupation; or
    - the program to be undertaken by the applicant or proposed applicant; or
    - the activity to be carried out by the applicant or proposed applicant; or
  + a proposed occupation, program or activity;
* subsection 140GB(2) of the Act, which provides that the Minister must approve an approved sponsor’s nomination if prescribed criteria are satisfied;
* subsection 140GB(3) of the Act, which provides that the regulations may establish a process for the Minister to approve an approved sponsor’s nomination.
* subsection 140GB(4) of the Act, which provides that different criteria and different processes may be prescribed for:   
  + different kinds of visa (however described); and
  + different classes in relation to which a person may be approved as a sponsor.
* subsection 140H(1) of the Act, which provides that a person who is or was an approved sponsor must satisfy the sponsorship obligations [prescribed by the regulations](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00595$t=document-frame.htm$3.0$p=',48,48,313,149));
* subsection 140H(4) of the Act, which provides that the regulations may require a person to satisfy sponsorship obligations in respect of each visa holder sponsored by the person or generally;
* subsection 140H(5) of the Act, which provides that sponsorship obligations must be satisfied in the manner (if any) and within the period (if any) prescribed by the regulations; and
* subsection 140H(6) of the Act, which provides that different kinds of sponsorship obligations may be prescribed for:   
  + different kinds of visa (however described); and
  + different classes in relation to which a person may be, or may have been, approved as a sponsor.

**ATTACHMENT B**

**Statement of Compatibility with Human Rights**

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

This 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*.

* **Schedule 1 – Amendments relating to Subclass 457 (Temporary Work (Skilled)) visas**

**Items 1 and 2 – paragraph 2.59(i) and 2.68(j)**

Under previous provisions of the *Migration Regulations 1994* (the Regulations) there was no restriction as to the number of Subclass 457 (Temporary Work (Skilled)) visa (‘Subclass 457 visa’) workers which a company could nominate once a sponsorship was approved. Thus, there was no capacity for the Department of Immigration and Citizenship to intervene in cases where an employer was using the program beyond its stated policy intent to address skill shortages.

Regulations 2.59 ([Criteria for approval as a standard business sponsor](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop01146$t=document-frame.htm$3.0$p=',48,48,405,114))) and 2.68 ([Criteria for variation of terms of approval — standard business sponsor](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop01204$t=document-frame.htm$3.0$p=',48,48,433,114))) are amended in order to restrict the number of Subclass 457 visa workers that a business can nominate to the number approved in the application for sponsorship approval.

If the sponsor’s circumstances change and they wish to increase the approved level of nominations, they may lodge an application to vary the terms of their sponsorship approval, or lodge a new application for sponsorship approval. This will provide the Department an opportunity to reassess the sponsor’s eligibility to use the Subclass 457 program and ensure that they are using the program as a supplement the Australian labour market rather than a substitute for it.

This change will be complemented with existing paragraph 2.63(2)(c) which allows for a sponsorship to cease at the occurrence of a particular event, of which reaching the nomination ceiling will be one under policy.

**Human rights implications**

The measure restricts the number of Subclass 457 workers which a company can nominate once a sponsorship is approved. As the restriction relates to ensuring an approved business sponsor uses the program appropriately, it engages and builds upon Article 6.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 6.2 of the ICESCR states that:

*The steps to be taken by a State Party of the present Covenant to achieve the full realization of [the right to work] shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.*

Australia owes a ‘right to work’ under Article 6.1 to Australians and permanent residents, and correspondingly the obligations under Article 6.2 are engaged. Ensuring the Subclass 457 visa program is used in a justified and reasonable way in line with its policy intent is an effective mechanism to comply with this obligation. The measure correspondingly positively engages Article 6.1 and 6.2 of the ICESCR.

**Conclusion**

The legislative instrument is compatible with human rights because it promotes the employment of Australian citizens and permanent residents.

**Items 1 and 2 – paragraph 2.59(j) and 2.68(k)**

Regulation 2.59 of the *Migration Regulations 1994* (the Regulations) is a criterion for approval as a standard business sponsor under the Temporary Work (Skilled) (Subclass 457) visa program. It includes a requirement to meet a benchmark for the training of Australian citizens and permanent residents (if trading for 12 months or more) or have an auditable plan to meet those benchmarks (if trading for less than 12 months).

Monitoring of sponsors has highlighted that there are limitations to the Department of Immigration and Citizenship’s ability to enforce a sponsor’s compliance in continuing to meet a training benchmark.

The legislative instrument amends regulations within Part 2A –Sponsorship Applicable to Division 3A of Part 2 of the Act, of the Regulations. The amendments:

1) introduce an obligation to require sponsors to meet a training benchmark through the term of sponsorship, thereby enabling the Department to take administrative action, serve an infringement notice, or potentially pursue civil proceedings against sponsors who are found to have contravened this obligation; and

2) amend regulation 2.82 (Obligation to keep records) to make it a requirement to keep records of training and related expenditure, which will enable the Department to investigate compliance with the new obligation.

**Human rights implications**

The approval of standard business sponsorship is conditioned on meeting a benchmark for the provision of training of Australian citizens and permanent residents. This obligation builds on previous arrangements which were non-binding in nature. As the obligation relates to the imposition of training requirements it engages and builds upon Article 6.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 6.2 of the ICESCR states that:

*The steps to be taken by a State Party of the present Covenant to achieve the full realization of [the right to work] shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.*

Australia owes a ‘right to work’ under Article 6.1 to Australians and permanent residents, and correspondingly the obligations under Article 6.2 are engaged. Making the training obligation to Australians and permanent residents part of the sponsorship obligation is an effective mechanism to comply with this obligation. The measure correspondingly positively engages Article 6.1 and 6.2 of the ICESCR.

**Conclusion**

The legislative instrument is compatible with human rights because it promotes the training of Australian citizens and permanent residents.

**Item 3**

There are three processing stages in sponsoring an employee from overseas under the Temporary Work (Skilled) (Subclass 457) visa program:

1. Sponsorship – the employer applies for approval as a standard business sponsor. This is required to nominate an occupation for a Subclass 457 visa
2. Nomination – the employer nominates an eligible occupation for a prospective or existing Subclass 457 visa holder. Eligible occupations are specified in the legislative instrument F2013L00547.
3. Visa application – the person nominated to work in the nominated occupation applies for the Subclass 457 visa. This is the final step to obtaining a Subclass 457 visa

Under previous provisions of the *Migration Regulations 1994* (the Regulations), employers are required to certify that the tasks of the nominated position correspond to the tasks of an occupation eligible under the Subclass 457 visa program. However, there is no ability for a delegate to consider the veracity of the certification provided.

The Legislative Instrument amends paragraph 2.72(10)(f) by introducing a criterion which requires that the nominated occupation is genuine.

In most cases, case officers may consider this requirement met on the basis that the sponsor has certified in writing as part of the nomination that the tasks of the nominated position correspond to the tasks of an occupation eligible under the Subclass 457 visa program as specified at subparagraphs 2.72(10)(d)(i) or (e)(i) of the Regulations. In cases where the case officer has any doubt as to the veracity of the certifications, further assessment should be undertaken.

Further consideration should be given to the veracity of the certification if it appears that:

* the occupation is being presented as an occupation that is eligible for the program, when it is in fact not. For example, information provided about the occupation indicates that it is a Bar Manager, an occupation which is not eligible for the program, however, the employer has nominated the person as a Restaurant or Café Manager, which is eligible for the program; or
* the salary level appears inconsistent with other workers in the occupation (for example, if the nominated salary is significantly lower than industry standards for the nominated occupation); or
* the position does not appear to fit broadly within the scope of the activities and scale of the business.

**Human rights implications**

This Legislative Instrument indirectly relates to Articles 6 and 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and engages Article 2.2 of ICESCR given the proposal purports to exclude nominees from a nominated position if such a position is found not to be genuine.

*Article 6 and Article 4 of the ICESCR*

As the proposal may result in a nominee not being nominated and thus not being able to apply for a Subclass 457 visa, consideration needs to be had to Article 6 of the ICESCR which relates to the right to work. Article 6 provides that:

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

It is the long standing position of the Australian Government that an authority from the Government needs to be granted before a non-citizen is permitted to work. This authority and associated ‘work rights’ are attached to certain types of visas, including the Subclass 457 visa. A person is not permitted to work in Australia unless work rights have been granted, and merely arriving lawfully in Australia does not entitle a person to work rights.

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

*…only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.*

The authority from the Government granting work rights and conditions or limitations placed on temporary non-citizens in respect of those work rights (such as language requirements) are lawful as a matter of domestic law and have as their objective the continued access of Australian citizens and permanent residents to paid employment. As such, the amendments are justified in accordance with Article 4 of ICESCR.

*Article 2 of ICESCR*

Article 2.2 provides:

*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The measure excludes a nominee on the basis that the position is not genuine, so the question is whether this exclusion amounts to discrimination. It is clear that this exclusion is not targeted towards any of the prohibited grounds, such as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property , birth’. The Committee on Economic, Social Council Rights, in its General Comment Number 20 (at 15) stated that the words ‘“other status” indicate that this list is not exhaustive and other grounds may be incorporated in this category.

General Comments Number 20 lists other elements which could be classified as ‘other status’ (see paragraphs 28 to 35). However, it is evident that the ground for exclusion in the measure, noting the reasoning provided in paragraph 27 of the General Comments Number 20, would not engage Article 2.2. In other words, the exclusion in the measure would not fall under ‘other status’ and consequently would not be considered discriminatory.

**Conclusion**

The Legislative Instrument is compatible with human rights insofar as any limitations upon Article 6 of the ICESCR comply with limitation requirements in Article 4 of the ICESCR. Further, the amendment would not be considered discriminatory within the meaning of Article 2 of the ICESCR.

**Item 6 and 7**

**Overview of the Legislative Instrument**

Regulation 2.59 of the *Migration Regulations 1994* (the Regulations) is a criterion for approval as a standard business sponsor under the Temporary Work (Skilled) (Subclass 457) visa program. It includes a requirement to meet a benchmark for the training of Australian citizens and permanent residents (if trading for 12 months or more) or have an auditable plan to meet those benchmarks (if trading for less than 12 months).

Monitoring of sponsors has highlighted that there are limitations to the Department of Immigration and Citizenship’s ability to enforce a sponsor’s compliance in continuing to meet a training benchmark.

The legislative instrument amends regulations within Part 2A –Sponsorship Applicable to Division 3A of Part 2 of the Act, of the Regulations. The amendments:

1) introduce an obligation to require sponsors to meet a training benchmark through the term of sponsorship, thereby enabling the Department to take administrative action, serve an infringement notice, or potentially pursue civil proceedings against sponsors who are found to have contravened this obligation; and

2) amend regulation 2.82 (Obligation to keep records) to make it a requirement to keep records of training and related expenditure, which will enable the Department to investigate compliance with the new obligation.

**Human rights implications**

The approval of standard business sponsorship is conditioned on meeting a benchmark for the provision of training of Australian citizens and permanent residents. This obligation builds on previous arrangements which were non-binding in nature. As the obligation relates to the imposition of training requirements it engages and builds upon Article 6.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 6.2 of the ICESCR states that:

*The steps to be taken by a State Party of the present Covenant to achieve the full realization of [the right to work] shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.*

Australia owes a ‘right to work’ under Article 6.1 to Australians and permanent residents, and correspondingly the obligations under Article 6.2 are engaged. Making the training obligation to Australians and permanent residents part of the sponsorship obligation is an effective mechanism to comply with this obligation. The measure correspondingly positively engages Article 6.1 and 6.2 of the ICESCR.

**Conclusion**

The legislative instrument is compatible with human rights because it promotes the training of Australian citizens and permanent residents.

* **Schedule 2 – Further amendments relating to Subclass 457 (Temporary Work (Skilled)) visas**

**Overview of the Legislative Instrument**

In July 2012, the Government introduced major reforms to the skilled migration program. One of the reforms was the agreement to implement key legislative and supporting systems changes to ensure that the skilled visa programs are lodged electronically only.

The previous Subclass 457 (Temporary Work (Skilled)) visa regulatory requirements prevent certain cohorts of applicants from lodging an electronic application. These cohorts included:

* Overseas businesses – sponsorship and nomination applications;
* Visa applicants who are sponsored by an overseas business; and
* Visa applicants who are in Australia and do not currently hold a substantive visa.

The amendments change the *Migration Regulations 1994* to amend regulations 2.61, 2.66, 2.73 Item 1223A, Item 1303 and Item 1305 to:

* change the location for lodgement and processing of applications associated with overseas businesses to Australia; and
* ensure mandatory electronic lodgement for all Standard Business Sponsor and Labour Agreement 457 applications.

The paper pathway will be maintained for emergency situations where there is a risk of a visa applicant becoming unlawful in the event of a Departmental system preventing electronic lodgement of their application.

**Human rights implications**

The amendments have been considered against each of the seven core international human rights treaties. These amendments seek to effect administrative efficiencies and do not seek to alter any potential benefit to clients.

As such, the amendments do not engage any of the rights enunciated in the seven core international human rights treaties.

**Conclusion**

This regulation amendment is compatible with human rights.

* **Schedule 3 – Further amendments relating to Subclass 457 (Temporary Work (Skilled)) visas**

**Item 10**

**Overview of the Legislative Instrument**

On 1 July 2012 reforms to the permanent Employer Sponsored program were implemented. It has been identified since implementation of the reforms that there is some ambiguity with the construction of two of the regulations – paragraph 5.19(3)(f) and subregulation 186.234(b).

The Temporary Residence Transition (TRT) stream of the permanent Employer Sponsored program is intended for Australian businesses to nominate employees for permanent residence in Australia. Australian businesses seeking to nominate employees through the TRT stream either are, or were, approved Standard Business Sponsors (SBS) under the Subclass 457 (Business (Long Stay)) visa program. To be approved as a SBS, Australian businesses must have met the benchmarks for the training of Australian citizens and permanent residents, as specified in an instrument, or they had an auditable plan to do so. At the time of approval as a SBS, overseas businesses are not required to meet the training benchmarks and therefore are not required to do so at the time of TRT employer nomination. Accordingly, an overseas business may successfully nominate an employee for permanent residence in Australia. This means that the policy intention that only Australian businesses are able to nominate employees for permanent residence under the TRT stream is not being achieved.

The Direct Entry stream of the Subclass 186 (Employer Nomination Scheme) visa is for people who have never, or only briefly, worked in the Australian labour market and applicants currently on a Subclass 457 (Business (Long Stay)) visa who do not meet the requirement of having worked for a minimum period of two years with their nominating employer.

Among other criteria, paragraph 186.234(2)(b) requires a person who is applying for an ENS Direct Entry stream visa to demonstrate that they have been employed for three years in the nominated occupation. The policy intention of this requirement is that it is expected that the applicant should have gained the work experience on a full-time basis (or equivalent to at least 35 hours a week) and be at the same skill level as required by the nominated position.

The changes amend the *Migration Regulations 1994* to:

1. amend paragraph 5.19(3)(b) to clarify that an SBS who is located overseas cannot nominate a Subclass 457 visa holder for permanent residence under the TRT stream; and
2. amend paragraph 5.19(3)(f) under the TRT stream to clarify that the nominator
   * was lawfully operating a business in Australia for the purpose of their SBS approval , and
   * is required to demonstrate that they have fulfilled any commitments they made in meeting the training requirement for their most recent standard business sponsorship approval; and
3. amend paragraph 186.234(b) to clarify that the applicant’s employment experience is required to be at the same skill level as that of the nominated position and gained on a full-time basis.

**Human rights implications**

The amendment does not engage any of the rights enunciated in the seven core international human rights treaties.

**Conclusion**

This regulation amendment is compatible with human rights.

**Item 8, 18, 19 and 20**

Paragraphs 457.223(4)(ea) and (eb) of the *Migration Regulations 1994* (the Regulations) prescribe the English language requirements that Subclass 457 primary visa applicants must meet. They state that for applicants who are required to demonstrate that they meet the English language requirement, a proficiency equivalent to the level to achieve an International English Language testing System (IELTS) test score of more than five in each of the four test components is required. The four test components are speaking reading, writing and listening.

Paragraphs 457.223(4)(ea) and (eb) will be amended to replace the current English language requirement above with a requirement to demonstrate Vocational English. Vocational English is defined at regulation 1.15B:

1)      A person has ***vocational English*** if:

(a) the person undertook a language test, specified by the Minister in an [instrument in writing](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001a157$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-IMMI1247018$3.0#JD_FRLI-IMMI1247018) for this paragraph; and

(b) the test was conducted in the 3 years immediately before the day on which the application was made; and

(c) the person achieved a score specified in the [instrument](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001a157$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-IMMI1247018$3.0#JD_FRLI-IMMI1247018).

(2)      A person has ***vocational English*** if the person holds a [passport](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff00708a$cid=legend_current_ma$t=document-frame.htm$an=JD_5-passportdefinition$3.0#JD_5-passportdefinition) of a type specified by the Minister in an [instrument in writing](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001a157$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-IMMI1247018$3.0#JD_FRLI-IMMI1247018) for this subregulation.

The instrument in writing which is referred to in subregulation 1.15B(2) specifies that applicants who hold a passport from Canada, New Zealand, the Republic of Ireland, the United Kingdom or the United States of America are considered to have vocational English.

**Human rights implications**

The proposal seeks to adopt vocational English as the English language requirement for Subclass 457 applicants. The impact of this change on Subclass 457 applicants is that a test result of B in the Occupation English Test will also be accepted as evidence that the requirement has been met.

IELTS results with a score of five in each of the four test components will continue to be accepted and the exemptions related to applicants who hold a specified passport, salaries above a specified threshold or who have received tuition in English for five years will remain in place.

As the measure deals with the extension of work rights to non-citizens, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) is relevant. Article 6 provides:

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

It is the long standing position of the Australian Government that an authority from the Government needs to be granted before a non-citizen is permitted to work. This authority and associated ‘work rights’ are attached to certain types of visas, including the Subclass 457 visa. A person is not permitted to work in Australia unless work rights have been granted, and merely arriving lawfully in Australia does not entitle a person to work rights.

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

*…only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.*

The authority from the Government granting work rights and conditions or limitations placed on temporary non-citizens in respect of those work rights (such as language requirements) are lawful as a matter of domestic law and have as their objective the continued access of Australian citizens and permanent residents to paid employment. As such, the amendments are justified in accordance with Article 4 of ICESCR.

As the measure purports to discriminate in favour of the abovementioned passport holders, consideration has to be had to whether this engages Article 2.2 of ICESCR. Article 2.2 provides:

*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

‘Language’ is listed as a discriminatory ground, however the purpose of the measure needs to be assessed. As discussed above, the purpose of the measure is to require Subclass 457 visa holders to have vocational English. Despite the fact that that the measure *prima facie* is targeted towards those workers, the objectives of the measure are to ensure those working in and living in Australia have minimum standards of English, given English is the official language of Australia and possessing this standard of English is essential.

Therefore, whilst the measure does purport to affect a cohort of applicants differently, given English is essential for communication in Australia, the measure is considered reasonable, legitimate and proportionate in the circumstances.

**Conclusion**

The measures do not engage Australia’s human rights obligations under Article 6 of the ICESCR. To the extent that the measure is inconsistent with Article 2.2, it is reasonable, legitimate and proportionate on the facts.

**All other items**

**Overview of the Legislative Instrument**

This legislative instrument includes minor technical amendments to the *Migration Regulations 1994* (the Regulations).

1. Direct employer requirement for overseas business sponsors

There are three processing stages in sponsoring an employee from overseas under the Temporary Work (Skilled) (Subclass 457) visa program:

1. Sponsorship – the employer applies for approval as a standard business sponsor. This is required to nominate an occupation for a Subclass 457 visa
2. Nomination – the employer nominates an eligible occupation for a prospective or existing Subclass 457 visa holder
3. Visa application – the person nominated to work in the nominated occupation applies for the Subclass 457 visa. This is the final step to obtaining a Subclass 457 visa

The intention of the Subclass 457 visa program is that Subclass 457 visa holders sponsored by overseas business sponsors may only work directly for their employer (and may not work for an associated entity of that business). This intention is currently articulated in the certification required at nomination stage (subparagraphs 2.72(10)(e)(ii) and (iii)) and also in condition 8107 which may be placed on Subclass 457 visa holders. However, this intention is not replicated in the Subclass 457 visa requirements (paragraph 457.223(4)(ba)).

Paragraph 457.223(4)(ba) will be amended to remove confusing and unnecessary words relating to the recruitment and hiring of labour to unrelated businesses and will insert a specific subregulation to cover this issue.

2. Clarify the requirement to have an approved nomination

A further intention of the Subclass 457 visa program is that 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. However, this intention was not clearly articulated in previous paragraph 457.223(4)(a). Currently paragraph 457.223(4)(a) is as below:

*[(4)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mp%3Ar%3A0000000000748c7$cid=legend_current_mp$t=document-frame.htm$an=JD_457-40tp41SponsorshipbyaStandardBusinesssponsor$3.0" \l "JD_457-40tp41SponsorshipbyaStandardBusinesssponsor)      The applicant meets the requirements of this subclause if:*

*[(a)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mp%3Ar%3A0000000000748c7$cid=legend_current_mp$t=document-frame.htm$an=JD_457-48ApprovedNomination$3.0" \l "JD_457-48ApprovedNomination)      either:*

*(i)      if the applicant and a business activity specified in the application and relating to the applicant were the subject of an approved business nomination under regulation 1.20H as in force immediately prior to 14 September 2009:*

*(A)      the nomination was made by a person who was a* [*standard business sponsor*](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004b9$cid=legend_current_mr$t=document-frame.htm$an=JD_103-standardbusinesssponsor$3.0#JD_103-standardbusinesssponsor) *at the time the nomination was approved; and*

*(B)      the approval of the nomination has not ceased to have effect under subregulation 1.20H(5) as in force immediately prior to 14 September 2009; or*

*(ii)      if a nomination of an* [*occupation*](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) *in relation to the applicant has been approved under section* [*140GB*](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff0064a1$cid=legend_current_ma$t=document-frame.htm$an=JD_140GB$3.0#JD_140GB) *of the Act:*

*(A)      the nomination was made by a person who was a* [*standard business sponsor*](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004b9$cid=legend_current_mr$t=document-frame.htm$an=JD_103-standardbusinesssponsor$3.0#JD_103-standardbusinesssponsor) *at the time the nomination was approved; and*

*(B)      the approval of the nomination has not ceased as provided for in regulation* [*2.75*](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000011ce2$cid=legend_current_mr$t=document-frame.htm$an=JD_275$3.0#JD_275)*; and*

Paragraph 457.223(4)(a) will be amended by removing the transitional provision at subparagraph 457.223(4)(a)(i), as this provision refers to nominations which were subject to a regulation which was in effect prior to 12 September 2009 and is therefore no longer required.

Paragraph 457.223(4)(a) will also be amended by removing the word “if” at the beginning of subparagraph 457.223(4)(a)(ii) and adding an “and” before the two sub-subparagraphs. This will change the requirement to require a visa applicant who applies under the standard business sponsorship stream to be subject to a related nomination which has been approved and is still valid.

3. Improve the skill requirement

Subclass 457 visa applicants are required to demonstrate that they have the skills, qualifications and/or experience to fill their nominated position if so required by the Minister.

Previous paragraph 457.223(4)(e) requires that further information be requested by the Department before the visa application can be refused, regardless of whether information already provided by the applicant clearly demonstrates that the applicant does not meet the skills requirement.

The Regulations are amended by inserting a new paragraph between paragraphs 457.223(4)(d) and (e) to allow a decision maker to refuse a visa application without having to request additional information, if evidence clearly indicates that the applicant does not have the necessary qualifications and/or experience to effectively work in the nominated occupation in Australia. A delegate would retain the ability to request additional information if appropriate.

4. Amend the Visa Application Charge refund provisions

When a nomination is refused or withdrawn, the associated visa application cannot be approved. In these circumstances the visa applicant is given the opportunity to withdraw the visa application. However, current refund provisions under paragraphs 2.12F(2)(f) and (g) only allow for the Visa Application Charge (VAC) to be refunded if the visa application has been refused due to a lack of approved nomination.

These provisions encourage the visa applicant to seek a decision from the Department on the application in order to have the VAC refunded placing an unnecessary administrative burden on processing centres.

To rectify this unnecessary administrative complexity, the VAC refund provisions will be amended to provide that a VAC may only be refunded where the visa application has been withdrawn on the basis that the correlating nomination has been refused or withdrawn.

5. Clarify definition of ‘entity’

Under subparagraph 2.72(10)(e)(iii) of the Regulations, a visa holder may be employed by a sponsor or, if the sponsor is an Australian business, an ‘associated entity’ of the sponsor.

The current interpretation in the Regulations provides that the associated entity has the same meaning as in section 50AAA of the *Corporations Act 2001* (Corporations Act). This definition excludes government bodies.

The Department currently takes a purposive approach to the interpretation of the word ‘entity’ for the purposes of the Subclass 457 visa program (such that the test of associated entities would apply to all bodies and not just ‘entities’ as defined in the Corporations Act). However, there is a risk that a tribunal or court may take a strict statutory approach to the interpretation meaning of the word ‘entity’ resulting in government bodies being excluded from the flexibility provided to other sponsors. Should this occur, it would have a significant detrimental effect on State Health Departments and other government bodies.

Regulation 2.57 is amended to make clear that, for the purposes of determining whether an entity is ‘associated’, federal and state government bodies are included associated entities.

6. Aligning registration/ licensing requirements with the requirement to work in the nominated occupation

If registration/licensing is mandatory to work in an occupation in Australia, the Regulations do not require the visa holder to meet these requirements prior to grant of a Subclass 457 visa (with the exception of medical practitioners). This is intended to provide for the requirement of some licensing bodies that the person must be in Australia to be eligible for registration/licencing.

If a visa holder works in an occupation without mandatory registration/licensing then the visa can only be cancelled after the relevant licensing authority has taken action, or if the sponsor has been sanctioned under the Subclass 457 visa program.

Condition 8107 is amended to clarify that, if registration or licensing is mandatory to work in an occupation in Australia, a visa holder must obtain the relevant registration or licensing.

Condition 8107 is a condition placed on certain visa holders. For Subclass 457 holders it specifies that they must only work in their nominated occupation and for the employer who sponsored them. If a visa holder does not comply with condition 8107 the Department would seek to cancel the visa.

7. Removal of redundant provisions.

The Regulations previously provided transitional arrangements for sponsorship, nomination and visa applications lodged before 14 September 2009 and before 1 July 2010.

Transitional arrangements for applications lodged before 14 September 2009 relate to those applications which were lodged prior to the commencement of the Worker Protection Regulations. The other group, lodged before 1 July 2010, relate to those applications which were lodged using the Australian Standard Classification of Occupations (ASCO) to classify the nominated occupations. The use of ASCO by the Department was replaced with ANZSCO on 1 July 2010.

These transitional provisions ensured that amendments to the Regulations made at that time did not disadvantage people who had lodged applications prior to the changes being introduced. However, given the passage of time, it is unlikely that there are any applications that would need to rely on these arrangements.

In the spirit of simplification and deregulation the Regulations are amended to remove those irrelevant and redundant provisions which no longer have any operative effect. In any removal of redundant provisions there will be no consequences for the current Subclass 457 caseload.

**Human rights implications**

Minor technical amendments 3, 4, 5 and 7 do not engage human rights obligations.

Amendments 1, 2 and 6, inasmuch as they relate to imposing conditions on temporary non-citizens who enter Australia to work, are relevant to Article 2.2, 4 and 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

*Article 2 of ICESCR*

Article 2.2 provides:

*The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The question is whether imposing conditions on temporary non-citizens (per the technical amendments) can be considered discriminatory. The amendments are not targeted towards any of the prohibited grounds, such as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth’. The Committee on Economic, Social Council Rights, in its General Comment Number 20 (at 15) stated that the words ‘“other status” indicates that this list is not exhaustive and other grounds may be incorporated in this category’.

General Comments Number 20 lists other elements which could be classified as ‘other status’ (see paragraphs 28 to 35). However, it is evident that the technical amendments in the measure, noting the focus paragraph 27 of the General Comments Number 20, would not engage Article 2.2. In other words, the three amendments would not fall under ‘other status’ and consequently would not be considered discriminatory.

*Article 6 of ICESCR and Article 4 of ICESCR*

Pursuant to Article 6.1 of the ICESCR, Australia has committed to recognising the right to work of Australians and permanent residents.

In relation to Article 6, it is the long standing position of the Australian Government that an authority from the Government needs to be granted before a non-citizen is permitted to work. This authority and associated ‘work rights’ are attached to certain types of visas, including the Subclass 457 visa. A person is not permitted to work in Australia unless work rights have been granted, and merely arriving lawfully in Australia does not entitle a person to work rights.

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. For instance, a temporary non-citizen who has been granted a Subclass 457 visa to work in a particular industry cannot change positions to work for another employer unless he or she has been nominated by another sponsor.

Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

*…only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.*

The authority from the Government granting work rights and conditions or limitations placed on temporary non-citizens once work rights have been granted are lawful as a matter of domestic law and have as their objective the continued access of Australian citizens and permanent residents to paid employment. As such, the amendments are justified in accordance with Article 4 of ICESCR.

**Conclusion**

The Legislative Instrument is compatible with human rights on the basis that many of the amendments do not engage human rights, but for those that do, any limitation on human rights is justified in accordance with the terms of ICESCR itself.

* **Schedule 4 – Amendments relating to payments in foreign currency**

**Overview of the Legislative Instrument**

Regulation 12A of the *Australian Citizenship Regulations 2007* (the Regulations) sets out, among other things, in which foreign currencies and countries a citizenship application fee may be paid and how the exchange rate is to be calculated.

The acceptable foreign currencies and countries are set out in legislative instruments made under the *Migration Regulations 1994*.

The relevant instruments, *Places and Currencies for Paying of Fees* and *Payment of Visa Application Charges and Fees in Foreign Currencies*, are updated in January and July each year and are given a new instrument number each time.

Consequently, to ensure that citizenship application fees can continue to be paid in foreign currencies and countries, regulation 12A of the Regulations must be amended to specify the updated instrument numbers.

The updating of the instrument number is the only change and is merely technical in nature. There is no change to the substantive content of the instrument.

**Human rights implications**

The amendment has been assessed against the seven core international human rights treaties and does not engage any of the applicable rights or freedoms.

**Conclusion**

This Regulation amendment is compatible with human rights as it does not raise any human rights issues.

**Overview of the Legislative Instrument**

The instrument makes amendments to subregulation 5.36(1A) of Part 5 of the *Migration Regulations 1994* that provides a means of calculating visa application charges and related fees in other currencies in amounts corresponding to Australian dollars.

Previously, subregulation 5.36(1A) provided that the amount of the payment for visa application charges and related fees is to be ascertained as follows:

* the amount payable in Australian dollars is converted into the foreign currency using the foreign currency equivalents table in the current legislative instrument (IMMI 12/076).

Amended subregulation 5.36(1A) provides instructions on how to calculate the amount payable as follows:

* the amount payable for visa application charges and related fees in Australian dollars is converted into the foreign currency using the exchange rate listed in the current legislative instrument.(IMMI 13/045).

**Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

* **Schedule 5 –Amendments relating to Subclass 300 (Prospective Marriage) visas**

**Overview of the current Legislative Instrument**

The Subclass 300 (Prospective Marriage) visa is a temporary visa that allows its holder to enter and remain in Australia for up to nine months from the date the visa is granted. During this nine month period, the holder is expected to marry their prospective spouse (who is usually their visa sponsor) and then lodge a Subclass 820/Subclass 801 (Partner– temporary/permanent) visa application.

Currently, migration legislation mirrors the *Marriage Act 1961* and allows the Prospective Marriage visa to be granted to a person under the age of 18, provided they will turn 18 by the time the intended marriage takes place, or they have permission from an Australian court to marry if they are under 18. This means it is open for an applicant to be under 18 years of age when they apply for the visa and when the visa is granted. Similarly, the prospective spouse of an applicant can also be under the age of 18 when the application is lodged. In these circumstances, the prospective spouse’s parent or guardian must sponsor the applicant.

Clause 300.214 of the *Migration Regulations 1994* requires the applicant and prospective spouse to have met and be known to each other personally. It does not, however, specify that the couple need to have met in person since turning 18. This allows for persons who only met in person as children to apply for and be granted the visa.

These issues were highlighted in the Senate Legal and Constitutional Affairs Committee report, *Prospective Marriage Visa Program*, which was tabled in June 2012. This report recommended that the minimum age for the grant of a Prospective Marriage visa be increased to 18 years. The Government has formed the view that there is scope to build on the Committee’s recommendations, and is proposing to:

* require applicants and sponsors to be at least 18 years of age when the application is lodged;
* amend the requirements for visa grant so that an applicant and their prospective spouse must have met in person, and been known to each other personally, since turning 18;
* remove the ‘time of decision’ provisions which allows the Prospective Marriage visa to be granted where the applicant or the prospective spouse is under 18; and
* remove the provision allowing a parent or guardian to sponsor a Prospective Marriage visa applicant on behalf of a prospective spouse who is under the age of 18.

The amendments address the Senate Committee’s concern to ensure that both parties to a Prospective Marriage Visa application genuinely consent to a marriage by ensuring that both visa applicant and sponsor are of marriageable age and legally able to consent to the marriage before they are able to lodge a valid visa application. Evidence presented to the Committee also suggested that even a slight increase in the minimum age would increase the likelihood of applicants and sponsors being more mature and so better able to respond to pressure from family members to enter an unwanted marriage. While forced marriage is not restricted to children, young age is considered to be one of the risk factors.

**Human rights implications**

The amendments engage a number of international human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC) and the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

*Marriage*

The amendments engage Article 23(3) of the ICCPR and Article 16(1) of CEDAW.

Article 23(3) of the ICCPR provides that:

*No marriage shall be entered into without the free and full consent of the intending spouses.*

Article 16(1) of CEDAW provides that:

*States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

*…*

*(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;*

Being over 18 years of age, and legally considered an adult under Australian domestic law, visa applicants and sponsors will be considered more likely to enter into a marriage, with full consent. By increasing the minimum age for both visa applicant and sponsor at time of visa application, these amendments also increase the likelihood that the parties to an intended marriage will be more mature and so more likely to be able to respond to pressure to agree to a marriage.

As such, the amendments are consistent with those obligations under Article 23(3) of the ICCPR and Article 16(1) of the CEDAW.

*Discrimination*

The proposal to impose an age limit on applicants and sponsors may be perceived as a limitation on the right to equality and non-discrimination as stipulated in Article 2(1) and Article 26 of the ICCPR because those under the age of 18 will no longer be eligible to apply for a Prospective Marriage visa notwithstanding their particular circumstances.

Article 2(1) of the ICCPR states that:

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26 of the ICCPR further provides that:

*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, sec, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Though not specifically cited in Articles 2(1) and 26 of the ICCPR, age has been held by the United Nations Human Rights Committee as being a prohibited ground upon which to discriminate for the purposes of these two Articles.

However, not all differential treatment will amount to prohibited discrimination where that treatment is lawful, reasonable and proportionate and in pursuit of a legitimate objective under the ICCPR.

Discrimination on the basis of age in the context of the Prospective Marriage program will be lawful by virtue of these amendments. Further and more generally, Australian domestic law permits discrimination on the basis of age when such discrimination provides a bona fide benefit to persons of a particular age, seeks to meet a direct need that arises out of a person of a particular age or aims to reduce disadvantage experienced by people of a particular age. Following from the Senate Legal and Constitutional Affairs Committee report, the Government believes that children remain more vulnerable to forced marriages, non-consensual relationships, sex slavery, people trafficking and other forms of abuse and seeks to implement these measures to reduce this vulnerability.

Further, the amendments are reasonable and proportionate measures in pursuit of the legitimate policy goal that all marriages are entered into with the free and full consent of both parties. As stated above, evidence presented to the Committee suggested that even a slight increase in the minimum age would increase the likelihood of applicants and sponsors being more mature and so better able to respond to pressure from family members to enter an unwanted marriage.

To the extent that these measures may be viewed as discrimination on the basis of age, such discrimination is both lawful as a matter of domestic law and are reasonable and proportionate to the legitimate objective of ensuring persons enter into marriage with free and full consent. As such, these amendments are consistent with Articles 2(1) and 26 of the ICCPR.

*Child Protection*

Article 3(1) of the CRC states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

These measures are consistent with Article 3(1) of the CRC because the regulation amendments are designed to provide additional protections for young people against forced marriage.

Articles 3(2), 19(1) and 34 of the CRC state respectively:

*3(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.*

*…*

*19(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

*…*

*34. States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*

*(a) The inducement or coercion of a child to engage in any unlawful sexual activity;*

*(b) The exploitative use of children in prostitution or other unlawful sexual practices;*

*(c) The exploitative use of children in pornographic performances and materials.*

These measures are consistent with these articles of the CRC because they ensure that both parties to a Prospective Marriage Visa application are of marriageable age. They also provide additional protections against forced marriage for children who may be more vulnerable to pressure to accept a marriage.

The amendments are consistent with Australia’s obligations under Articles 3(1), 3(2), 19(1) and 34 of the CRC.

*Protection of women*

Article 6 of CEDAW states:

*States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation or prostitution of women.*

The amendments aim to protect children from exploitation by ensuring that both parties are of marriageable age before a visa application is made and by increasing the likelihood that the parties will be more mature and so better able to resist pressure to enter an unwanted marriage. This includes girl children. On that basis, the amendments are consistent with Article 6 of CEDAW.

Article 16(2) states:

*The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.*

The amendments are consistent with and support Australia’s obligations under with Article 16(2) of CEDAW as they prevent the betrothal or marriage of child by increasing the age in which people may partake in the Prospective Marriage program to 18 years of age.

**Conclusion**

The amendments to the Regulations for the Subclass 300 (Prospective Marriage) visa are compatible with human rights as they are consistent with our obligations under the ICCPR, CRC and CEDAW.

* **Schedule 6 – Amendments relating to permanent employer sponsorship**

**Overview of the Legislative Instrument**

On 1 July 2012 reforms to the permanent Employer Sponsored program were implemented. It has been identified since implementation of the reforms that there is some ambiguity with the construction of two of the regulations – paragraph 5.19(3)(f) and subregulation 186.234(b).

The Temporary Residence Transition (‘TRT’) stream of the permanent Employer Sponsored program is intended for Australian businesses to nominate employees for permanent residence in Australia. Australian businesses seeking to nominate employees through the TRT stream either are, or were, approved Standard Business Sponsors (‘SBS’) under the Subclass 457 (Business (Long Stay)) visa program. To be approved as a SBS, Australian businesses must have met the benchmarks for the training of Australian citizens and permanent residents, as specified in an instrument, or they had an auditable plan to do so. At the time of approval as a SBS, overseas businesses are not required to meet the training benchmarks and therefore, are not required to do so at the time of TRT employer nomination. Accordingly, an overseas business may successfully nominate an employee for permanent residence in Australia. This means that the policy intention that only Australian businesses are able to nominate employees for permanent residence under the TRT stream is not being achieved.

The Direct Entry stream of the Subclass 186 (Employer Nomination Scheme) visa is for people who have never, or only briefly, worked in the Australian labour market and applicants currently on a Subclass 457 (Business (Long Stay)) visa who do not meet the requirement of having worked for a minimum period of two years with their nominating employer.

Among other criteria, paragraph 186.234(2)(b) requires a person who is applying for an Direct Entry stream visa to demonstrate that they have been employed for three years in the nominated occupation. The policy intention of this requirement is that it is expected that the applicant should have gained the work experience on a full-time basis (or equivalent to at least 35 hours a week) and be at the same skill level as required by the nominated position.

The changes amend the *Migration Regulations 1994* to:

* amend paragraph 5.19(3)(b) to clarify that an SBS who is located overseas cannot nominate a Subclass 457 visa holder for permanent residence under the TRT stream; and
* amend paragraph 5.19(3)(f) under the TRT stream to clarify that the nominator
  + was lawfully operating a business in Australia for the purpose of their SBS approval; and
  + is required to demonstrate that they have fulfilled any commitments they made in meeting the training requirement for their most recent standard business sponsorship approval; and
* amend subregulation 186.234(b) to clarify that the applicant’s employment experience is required to be at the same skill level as that of the nominated position and gained on a full-time basis.

**Human rights implications**

The amendment does not engage any of the rights enunciated in the seven core international human rights treaties.

**Conclusion**

This regulation amendment is compatible with human rights.

* **Schedule 7 – Amendments relating to Public Interest Criterion 4020**

**Overview of the Legislative Instrument**

This legislative amendment introduces the fraud related Public Interest Criterion (PIC) 4020 into all family stream visas.

There have been numerous instances of fraud detected in the family stream caseload, particularly in relation to family composition, claimed (or denied) partner relationships and claimed age of applicants.

A current difficulty for delegates is that even where fraud is detected, unless it clearly demonstrates a person does not satisfy the required criterion, the visa may not be able to be refused. There is, therefore, effectively no disincentive to commit fraud.

The introduction of PIC 4020 provides delegates with a more objective basis for refusing to grant a visa where false or misleading information has been provided by any applicant included in the application. This necessarily means that if one family member does not satisfy PIC 4020, all family members will fail to satisfy the PIC 4020, thus ending their application for entry into Australia. It also introduces a three-year bar on all applicants (primary and secondary) from being granted any other visa that includes PIC 4020 if they have previously been refused a visa under PIC 4020.

Provision exists within PIC 4020 to allow a delegate to grant a visa or waive the three-year period before any applicant (primary or secondary) may be granted a visa where compelling circumstances that affect the interests of Australia or compelling or compassionate circumstances exist that affect the interests of an Australian citizen or permanent resident or an eligible New Zealand citizen.

The changes amend the relevant Schedule 2 provisions of the *Migration Regulations 1994*. The amendment will affect all visas in the following visa classes:

* Aged Parent (Residence)(Class BP);
* Child(Migrant)(Class AH);
* Child (Residence) (Class BT);
* Contributory Aged Parent (Residence) (Class DG);
* Contributory Aged Parent (Temporary) (Class UU);
* Contributory Parent (Migrant) (Class CA);
* Contributory Parent (Temporary) (Class UT);
* Extended Eligibility (Temporary) (Class TK);
* Other Family (Migrant) (Class BO);
* Other Family (Residence) (Class BU); and
* Parent (Migrant) (Class AX);
* Partner (Migrant) (Class BC);
* Partner (Provisional) (Class UF);
* Partner (Residence) (Class BS);
* Partner (Temporary) (Class UK);
* Prospective Marriage (Temporary) (Class TO);
* New Zealand Citizen Family Relationship (Temporary) (Class UP).

**Human rights implications**

Australia’s obligations under the seven core international treaties are only engaged where the applicant is within Australia’s jurisdiction.

For those applicants within Australia’s jurisdiction, the most relevant human rights requiring consideration are the best interests of the child (Articles 3 and 10 of the *Convention on the Rights of the Child* (CROC)) and the principle of family unity (Articles 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR)).

*International Covenant on Civil and Political Rights*

Article 17(1) of the ICCPR prohibits the arbitrary or unlawful interference with a person’s privacy, family, home or correspondence and articulates the right to protection of the law in this respect.

Article 23(1) of the ICCPR states that the family is the natural and fundamental group unit in society and, as such, is entitled to protection by society and the State.

However, Articles 17(1) and 23(1) do not guarantee a right of entry or residence in Australia. Further, these articles will not be engaged where the applicant is offshore and has no family in Australia.

The amendments are legitimate in so far as they seek to address the Department’s integrity concerns regarding the increase of incidents and growing sophistication of fraud within particular cohorts of the family stream program, and the measures therefore will have a lawful basis. Further, the changes cannot be said to be arbitrary as they seek to implement the legitimate objective of maintaining the integrity of Australia’s family migration program and will have no impact on applicants who do not use fraudulent means to apply for these visas. To that end, the amendments may be said to be reasonable and proportionate to the objective of the amendments.

*Convention on the Rights of the Child*

The relevant provisions of the CROC are Articles 3, and 10.

Article 3(1) of the CROC states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.*

Similarly to the ICCPR, the rights of children under the CROC are only engaged where a child is within Australia’s jurisdiction. In relation to Article 3(1), the amendments will include a discretion on the part of the decision maker to waive the waiting period where compassionate and compelling circumstances exist. This allows the decision maker to take into consideration the best interests of the child, though a child’s best interests can be balanced against countervailing primary considerations including the integrity of Australia’s family migration program as the best interest of the child are a, not *the*, primary consideration.

Article 10 of the CROC states that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.

Article 10 does not amount to a right of a child to bring their parent/s to Australia for the purposes of reunification but establishes expectations with respect to applications of that nature. The introduction of PIC 4020 will provide a clear method by which a delegate may refuse to grant a visa where evidence of fraud exists which will not impact on legitimate applications, therefore supporting the expeditious finalisation of visa applications. The existence of the discretion allows for compassionate circumstances to be taken into consideration and as such, supports the requirement that the visa application be dealt with in a humane manner.

**Conclusion**

The legislative change to the *Migration Regulations 1994* is compatible with human rights.

* **Schedule 8 – Amendments relating to fees**

**Overview of the Legislative Instrument**

VPT Amendments

This Legislative Instrument amends Divisions 2.2 and 2.2A of Part 2 and Schedule 1 to the *Migration Regulations 1994* (‘the Regulations’) to alter the existing visa application charge (‘VAC’) regime by requiring certain visa applicants to pay a number of extra charges at the time of application, in addition to the existing first instalment of the VAC. Applicants will have to pay the extra charges in order to make a valid application for a visa.

The purpose of these changes is to close the gap between visa access charges and the estimated costs of administering visas. The new charging regime is in line with comparable structures in other countries. It safeguards Australia’s international competitiveness as visa pricing will be more comparable with other similar nations. At the same time, these changes create a ‘per application’ system of charging individuals for the lodgement and processing of visa applications that will facilitate VACs that more accurately reflect the cost of processing visa applications.

The additional charges are:

Additional Applicant Charge (‘AAC’)

* The AAC is a component of the new first instalment of VAC that applies to an applicant who combines his or her application with another application in a way permitted by relevant provisions in the Regulations.
* For certain visas, applicants are permitted to combine their application with an original application either at the same time as the original application or after the original application was made but before a decision has been made.
* Previously, these applicants were not required to pay a first instalment of the visa application charge. These additional applicants will now be required to pay the AAC.
* The AAC that an additional applicant must pay will depend on the kind of visa that the additional applicant applies for, and their age at the time of application.
* The AAC for additional applicants who are 18 years or over is an amount of money between 50 per cent and 100 per cent of the base application charge (‘BAC’) for the relevant visa.
* The AAC for additional applicants who are under 18 years old is approximately 25 per cent of the BAC for the relevant visa.
* If the BAC for a particular visa is nil, the AACs for that visa will also be nil.

Subsequent Temporary Application Charge (‘STAC’)

* The STAC is a component of the new first instalment.
* The STAC only applies to certain kinds of substantive temporary visas. An applicant for one of those visas is required to pay the STAC if they are in Australia at the time they make the application, and:
  + they hold a specified kind of substantive temporary visa that they applied for when they were in Australia; or
  + their last substantive visa was a specified kind of temporary visa that they applied for when they were in Australia. STAC is intended to discourage non-citizens from making serial onshore applications for substantive temporary visas in order to achieve a quasi-permanent stay in Australia without making an application for a permanent visa.
* The STAC is a $700 charge.

The Non-Internet Application Charge (‘NIAC’)

* The NIAC is a component of the new first instalment of the VAC that is intended to encourage visa applicants to make their applications using electronic means (i.e. an internet application) and to offset the cost of processing applications made through non-electronic means (i.e. paper and oral applications). The NIAC is $80.
* The NIAC is only imposed once on each paper application form (including forms containing combined applications from multiple applicants) or oral application. The NIAC only applies to visas which allow applicants to choose whether to make an application by electronic means or an application through non-electronic means. The NIAC does not apply to visas that only allow applicants to make non-electronic applications, or to visas that only allow applicants to make electronic applications.

Visa Evidence Charge (‘VEC’) amendments

Subregulation 2.19A(3) of the Regulations currently exempts from having to pay the VEC for a first request for a visa label the holders of “a student visa for which the amount of visa application charge was nil on the basis that the requirement in

sub-subparagraph 1222(2)(a)(i)(A), (D) or (E) of Schedule 1 was satisfied” (see item 28 of the table under subregulation 2.19A(3)).

The Regulations are amended so that:

* The holder of a Subclass 576 (AusAID or Defence Sector) visa pays nil VEC for a first request for a visa label in relation to that subclass.
* The holders of student visas for which the amount of visa application charge was nil on the basis that they are Defence students who have been approved by the Defence Minister to undertake full-time study pay nil VEC for a visa label. The same applies to family members of such students. They may be granted any of the student visas, not just a Subclass 576.

The Regulations previously exempted certain Subclass 403 visa holders from having to pay the VEC for the first request for a visa label (see item 12 in the table under subregulation 2.19A(3)).

The Regulations are amended so that:

* The holder of a Subclass 403 (Temporary Work (International Relations)) visa pays nil VEC for all requests for a visa label.

Removing ‘sibling concession’

Under previous provisions, an applicant for a child category visa who applies at the same time and place as their sibling is exempt from paying the relevant VAC. To support the VPT amendments, the Regulations are amended to remove the concession to the VAC, which applies to siblings of applicants for child category visas (i.e. subclasses 102, 117, 802, 837 and 445). This is to avoid an outcome that is not consistent with the intention of the new AAC for family members included on visa applications. With the removal of the sibling concessions, siblings who apply for visas are required to pay the BAC or the AAC (as applicable) when they make their application. This ensures that the siblings are consistently liable to pay the new visa pricing dimensions.

The following provisions of Schedule 1 are amended:

* For subclass 102 and 117 visas – paragraph 1129(3)(a);
* For subclass 802 and 837 visas – paragraph 1220A(3)(a);
* For subclass 445 visas – paragraph 1215(3)(a);

If the sibling concessions are retained alongside the AAC there will be a financial benefit, and therefore an incentive, for parents who have more than one child to leave those children off the permanent visa application and then sponsor each child at the same time at a later date for a child category visa. The Department is concerned that this will increase the demand for limited child category visa places. This will result in increased visa processing costs at no extra revenue generation for the government. It will also limit the number of child category visa places available to children of Australian citizens and permanent residents who have no other migration pathway, such as children adopted through an inter-country adoption program.

Additionally, the incentive to leave children off permanent visa applications is a risky migration strategy for older children as they may not be able to meet the legal requirements for the grant of a child category visa. For example, they may no longer be taken to be a dependent child of their parent due to their age, study and/or relationship status by the time an application is lodged and assessed. This in turn may see a significant increase in Ministerial intervention requests.

The removal of the sibling concession will have the effect that all primary visa applicants for a child category visa will be subject to the full child visa category VAC.

Ability to specify address for lodging paper applications in Australia

Amendments are also made to the Regulations which will allow for the future ability to remove the option for clients to lodge paper applications for certain Family program visas at onshore counters. Instead, it will be a requirement for such paper applications to be posted/couriered to a specified address in order to be a valid application. This will enable DIAC to respond flexibly to changing business contexts and restrict lodgements if further investigation shows that this is the best way to efficiently manage specific caseloads.

For each visa set out in the list below, we wish to amend Schedule 1 to the Regulations to require paper applications to be sent to an address that is specified in an instrument in writing.

* Class BC – Partner (Permanent) visa
* Class UP – New Zealand Citizen Family Relationship visa
* Class BS – Partner (Permanent) visa
* Class BT – Child visa
* Class BP – Aged Parent visa
* Class UK – Partner (Temporary) visa
* Class BU – Remaining Relative, Aged Dependent Relative and Carer Onshore visas
* Class BT – Orphan Relative visas
* Class DG – Contributory Aged Parent visa
* Class UU – Contributory Aged Parent (Temporary) visa.

We do not intend to specify any address at the time the amendments commence in the Regulations. However, we require the amendments to be made in order for the ability to specify addresses to be used at some time in the future.

**Human rights implications**

The Department of Immigration and Citizenship (‘DIAC’) has considered the amendments against the seven key international human rights treaties, in particular the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Australia’s obligations under the seven core international treaties are not engaged.

**Conclusion**

The legislative change in the Regulations is compatible with human rights insofar as the rights articulated in the seven core human rights treaties are not engaged.

* **Schedule 9- Amendments relating to health requirements**

This 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 Legislative Instrument**

This legislative instrument substitutes the current health public interest criterion 4005 (‘PIC 4005) with public interest criterion 4007 (‘PIC 4007’) for Subclass 576 (AusAID or Defence Sector) visas (‘Subclass 576 visa’). Applicants for this visa subclass are scholarship students who have been identified by the Australian Agency for International Development (‘AusAID’) or the Department of Defence (‘Defence’)

The programs include the Australia Award Scholarships for AusAID, the Australian Defence Cooperation Scholarship Program (DCSP) for Defence or any fulltime course of study/training under a scholarship scheme/training program approved by the Minister for AusAID or by the Minister for Defence.

Under the current statutory framework, Subclass 576 visa applicants are required to meet public interest criteria (PIC) including PIC 4005. PIC 4005 provides what an applicant must satisfy to meet the health requirement. PIC 4005 relevantly provides that the applicant is to be free from:

* tuberculosis;
* a disease or condition that is, or may result, in the applicant being a threat to public health in Australia or a danger to the Australian community;
* a disease or condition in relation to which the person who has it would be likely to require health care or community services, or meet the medical criteria for the provision of a community service, which would be likely to:
* result in a significant cost to the Australian Community in the areas of health care and community services;or
* prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the health care or community services will actually be used in connection with the applicant.

PIC 4005 does not allow for the consideration that AusAID or Defence may cover the costs of treatment in Australia for scholarship awardees. Furthermore, PIC 4005 does not include a waiver provision to apply in these circumstances. The result is that where an applicant is unable to meet the ‘significant costs’ or ‘prejudice to access’ requirements of PIC 4005 the grant of a Subclass 576 visa for scholarship students will be refused, irrespective of the fact that health costs will be covered by the sponsor, i.e. AusAID or Defence.

Replacing PIC 4005 with PIC 4007 for Subclass 576 visas will significantly improve client service processing times, reduce the number of refusals of visas to AusAID and Defence scholarship awardees. PIC 4007 includes a waiver provision, which will allow for the consideration of AusAID or Defence being able to cover the health costs of the scholarship awardee.

With the exception of a waiver provision, PIC 4007 and PIC 4005 are identical. Replacing PIC 4005 with PIC 4007 to Subclass 576 visas does not diminish the intent of the *Migration Act 1958* or the *Migration Regulations 1994* which is to protect the Australian community from public health risks. The avenues to refuse applicants that pose a health risk or danger to the community remain the same.

**Human Rights Implications**

Applicants for a Subclass 576 visa may be onshore or offshore at the time of application and the time of grant of that visa. Australia’s international human rights obligations under the Convention on the Rights of Persons with Disabilities (the CRPD) do not extend beyond its territory and jurisdiction. As such, the below analysis of the human rights implications of the amendment is in respect of those persons present within the Australian territory and jurisdiction only.

The amendment engages Article 4 of the CRPD which states:

*States Parties undertake to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:*

*…*

*(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities ….*

The amendment also engages aspects of Article 5 of the CRPD, including Articles 5(1) and 5(2) which state respectively that:

1. *States Parties recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.*
2. *States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*

Upon ratification of the CRPD, Australia lodged a declaration to the following effect:

*Australia recognises the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia’s health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.*

The health related PICs are based on legitimate, objective and reasonable criteria insofar as they seek to:

* protect the Australian community from public health risks;
* contain public expenditure on health care and community services; and
* safeguard Australians' access to health services in short supply.

The amendment substitutes PIC 4005 with PIC 4007 for applicants of a Subclass 576 visa. Noting Australia’s declaration to the CRPD, the amendment itself does not engage human rights but provides administrative flexibility for decision-makers to take into account that AusAID or Defence will meet the costs associated with an applicant’s disability.

**Conclusion**

The health related PIC engage Article 4 of the Disabilities Convention, however, to the extent that they limit the operation of Article 4 of that Convention, the health related PIC are consistent with Australia’s declaration to that Convention and are based on legitimate, objective and reasonable criteria.

Noting Australia’s declaration to the CRPD, the amendment itself does not engage human rights but is a positive administrative step aimed at allowing decision-makers to take into consideration that the cost of the applicant’s health care will be met by either AusAID or Defence.

**ATTACHMENT C**

**Details of the *Migration Legislation Amendment Regulation 2013 (No. 3)***

Section 1 – Name of Regulation

This section provides that this Regulation is the *Migration Legislation Amendment Regulation 2013 (No. 3)*.

Section 2 – Commencement

This section provides that this Regulation commences on 1 July 2013.

Section 3 – Authority

This section provides that this regulation is made under the *Australian Citizenship* 2007 (‘the Citizenship Act’) and *Migration Act 1958* (‘the Act’).

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

Section 4 – Schedule(s)

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

The purpose of this section is to provide for how the amendments in this regulation operate.

**Schedule 1 – Amendments relating to Subclass 457 (Temporary Work (Skilled)) visas**

***Migration Regulations 1994***

The Temporary Sponsored Skilled Migration Program is designed to enable employers to address skilled labour shortages in Australia by recruiting skilled overseas workers where skilled local workers are not available in Australia. This Program comprises of three distinct stages:

* the first stage requires the person seeking to become a sponsor to apply for approval as a sponsor. If the person is already a sponsor, then they would be required to apply to vary the terms of approval as a sponsor;
* the second stage requires the sponsor to nominate an occupation in relation to a holder of, or an applicant or a proposed applicant, for a Subclass 457 (Temporary Work (Skilled)) visa (‘Subclass 457 visa’);
* the third stage requires the person who is proposed to be nominated for sponsorship to apply for a Subclass 457 visa program. This stage would not apply to a person who already holds a Subclass 457 visa.

Subsection 140E(1) of the Act relevantly provides that the Minister must approve a person as a sponsor if the [prescribed criteria](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00576$t=document-frame.htm$3.0$p=',48,48,164,260)) are satisfied. The prescribed criteria for approval of sponsor are provided for in regulation 2.59 to regulation 2.60K. The applicable criteria for approval of sponsor depend on which class of sponsor that the applicant applied for. For example, a standard business sponsor is required to satisfy the criteria in regulation 2.59.

Subsection 140GA(2) of the Act provides that the Minister must vary a term specified in an approval if:

* the term is of a kind [prescribed](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00585$t=document-frame.htm$3.0$p=',48,48,169,114)) by the regulations for the purposes of this paragraph; and
* [prescribed criteria](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00586$t=document-frame.htm$3.0$p=',48,48,169,114)) are satisfied.

To vary the terms of sponsorship approval, the sponsor would have to satisfy the applicable criteria in regulation 2.68 or regulation 2.68A.

Subsection 140GB(1) of the Act provides that an approved sponsor may nominate:

* an applicant, or proposed applicant, for a visa of a [prescribed](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00588$t=document-frame.htm$3.0$p=',48,48,256,57)) kind (however described), in relation to:   
  + the applicant or proposed applicant’s proposed occupation; or
  + the program to be undertaken by the applicant or proposed applicant; or
  + the activity to be carried out by the applicant or proposed applicant; or
* a proposed occupation, program or activity.

An approved sponsor may nominate a person if they meet the relevant nomination criteria in Division 2.17. To nominate a person for a Subclass 457 visa, the sponsor must meet the criteria for approval of nomination in regulation 2.72.

Subsection 140GB(2) of the Act prescribes that the Minister must approve an approved sponsor’s nomination if [prescribed](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_maPop00590$t=document-frame.htm$3.0$p=',48,48,270,57)) criteria are satisfied.

Subregulation 2.72(2) provides that for subsection [140GB(2)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff0064a1$cid=legend_current_ma$t=document-frame.htm$an=JD_140GB40241$3.0#JD_140GB40241) of the Act, the criteria that must be satisfied for the Minister to approve a nomination by a person are set out in subregulation 2.72[(3)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001151d$cid=legend_current_mr$t=document-frame.htm$an=JD_27240341$3.0#JD_27240341) to subregulation 2.72(12).

Subregulation 2.72(10) sets out the criteria which the Minister must be satisfied for approval of a nomination made by a person who is a standard business sponsor.

Subsection 140H(1) of the Act provides that a person who is or was an approved sponsor must satisfy the sponsorship obligations prescribed by the regulations. Subsection 140H(4) of the Act provides that the sponsorship obligations must be satisfied in the manner (if any) and within the period (if any) prescribed by the regulations. Regulation 2.77 provides that, for subsection 140H(1) of the Act, each of the obligations mentioned in Division 2.19 of Part 2A of the Principal Regulations is a sponsorship obligation that a person to whom the obligation applies must satisfy.

Accordingly, an approved sponsor is required to meet the sponsorship obligations in Division 2.19.

Item 1 – At the end of regulation 2.59 and item 2 – At the end of regulation 2.68

Item 1 adds a new paragraph 2.59(i) and a new paragraph 2.59(j) of Division 2.13 of Part 2A of the Principal Regulations, providing for further criteria for approval as a standard business sponsor.

Item 2 adds a new paragraph 2.68(j) and a new paragraph 2.68(k) of Division 2.16 of Part 2A of the Principal Regulations, providing for further criteria for variation of terms of approval as a standard business sponsor.

Item 1 and item 2 mirror provisions of each other. This means that the wording of new paragraph 2.59(i) and new paragraph 2.68(j) would be the same, and the wording of new paragraph 2.59(j) and new paragraph 2.68(k) would be the same.

***Restriction on number of nominations – new paragraph 2.59(i) and 2.68(j)***

New paragraph 2.59(i) and new paragraph 2.68(j) provide that the applicant has provided to the Minister the number of persons who the applicant proposes to nominate during the period of the applicant’s approval as a standard business sponsor, and:

* the proposed number is reasonable, having regard to the information provided to the Minister; or
* if the Minister proposes another number of people as part of considering the application—the applicant has agreed, in writing, to nominate no more than the other number of people during the period of the applicant’s approval as a standard business sponsor.

The amendment requires the applicant to provide the number of person they intend to nominate for the period of their approval as a standard business sponsor. If an alternative number is proposed by the Minister, then to meet the criteria for approval of sponsorship or variation of the terms of sponsorship, the applicant would have to have agreed, in writing, to nominate no more than the alternative number proposed by the Minister.

The purpose of the amendment is to require the sponsor to justify the number of people they intend to nominate for a Subclass 457 visa over the term of the sponsorship approval. It is intended that officers would be able to assess the reasonableness of the proposed nomination number and propose an alternative nomination number if the proposed nomination number is not considered to be reasonable by the decision maker.

This amendment is necessary to strengthen the integrity of the Temporary Sponsored Skilled Migration Program by ensuring that the program is used to address skills shortages in Australia, rather than as a substitution for Australian workers.

***Requirement to train Australian workers – paragraph 2.59(j) and 2.68(k)***

New paragraph 2.59(j) and new paragraph 2.68(k) provide that if the applicant has previously been a standard business sponsor:

* the applicant:
  + fulfilled any commitments the applicant made relating to meeting the applicant’s training requirements during the period of the applicant’s most recent approval as a standard business sponsor; and
  + complied with the applicable obligations under Division 2.19 relating to the applicant’s training requirements during the period of the applicant’s most recent approval as a standard business sponsor; or
* it is reasonable to disregard subparagraph 2.59(j)(i) or subparagraph 2.68(k)(i).

The effect of this amendment is that only applicants who have actually complied with the relevant training requirements and obligations would be eligible to be approved as a sponsor, or have their term of approval as a sponsor varied. To provide for flexibility in the program, the Minister may disregard this criterion if he considers it reasonable to do so.

The purpose of this amendment is to ensure that the Temporary Sponsored Skilled Migration Program is used as a temporary means to fill skills shortages in Australia by requiring sponsors of overseas workers to provide training to Australian workers.

Item 3 – At the end of subregulation 2.72(10)

This item adds a new paragraph 2.72(10)(f) of Division 2.17 of Part 2A of the Principal Regulations to provide for an additional criterion for assessment of a nomination made by standard business sponsors.

New paragraph 2.72(10)(f) provides that, as a criteria for approval of nomination, the position associated with the nominated occupation is genuine.

The effect of this new paragraph is that, in addition to the other criteria in subregulation 2.72(10), the Minister must also be satisfied that the position associated with the nominated occupation is genuine to approve a nomination made by a standard business sponsor.

The purpose of this amendment is to ensure that the Temporary Sponsored Skilled Migration Program is to address skills shortages in the Australian labour market. More specifically, the purpose of this amendment is to strengthen the Department’s capacity to ensure that positions nominated under this Program are in skilled occupations and are genuinely needed by the nominating employer.

Item 4 – Paragraph 2.82(2)(c)

This item omits the phrase ‘subparagraph (3)(a)(iii) or (3)(e)(i) or (ii)’ in subparagraph 2.82(2)(c)(ii) of Division 2.19 of Part 2A of the Principal Regulations and substitute the phrase with ‘subparagraph (3)(a)(iii) or (3)(e)(i), (3)(e)(ii) or paragraph (3)(g)’.

Subregulation 2.82 provides for the sponsors’ obligation to keep certain records.

Previously, subregulation 2.82(2) provided for the requirements that must be met in relation to the records kept. Previously, paragraph 2.82(2)(c) provides that the person must keep records either:

* in the manner specified by the Minister in an instrument in writing (if any) made for this subparagraph; or
* if the record is a record mentioned in subparagraph (3)(a)(iii) or (3)(e)(i) or (ii) – in a manner that is capable of being verified by an independent person.

The effect of this amendment is to provide that if the record is a record mentioned in new paragraph 2.82(3)(g) (to be inserted by item 5), then that record must be kept in a manner that is capable of being verified by an independent person.

This amendment is a consequential amendment to the changes in Item 5 of Schedule 1 to this amendment regulation.

Item 5 – At the end of subregulation 2.82(3)

This item adds new paragraph 2.82(3)(g) to Division 2.19 of Part 2A of the Principal Regulations.

Subregulation 2.82(3) lists the types of records that must be kept by a standard business sponsor.

New subparagraph 2.82(3)(g) provides that if the person was lawfully operating a business in Australia at the time of:

* the person’s approval as a standard business sponsor; or
* the approval of a variation to the person’s approval as a standard business sponsor;

all records showing that the person has complied with requirements relating to training specified by the Minister in an instrument in writing for subregulation 2.87B(2).

The purpose and effect of this amendment is to require a standard business sponsor to keep all records demonstrating their compliance with the training requirements applicable under subregulation 2.87B(2). This amendment would complement the amendments in item 6 below.

Item 6 – At the end of Division 2.19

This item inserts a new regulation 2.87B after regulation 2.87A in Division 2.19 of Part 2A of the Principal Regulations.

Previously, sponsors did not have an obligation to provide training to Australian workers.

New subregulation 2.87B(1) provides that this regulation applies to a person who was lawfully operating a business in Australia at the time of:

* the person’s approval as a standard business sponsor; or
* the approval of a variation to the person’s approval as a standard business sponsor.

New subregulation 2.87B(2) provides if, during all or part of:

* the period of 12 months commencing on the day the person is approved as a standard business sponsor; or
* a period of 12 months commencing on an anniversary of that day;

the person is a standard business sponsor of at least one primary sponsored person, the standard business sponsor must comply with requirements relating to training, specified by the Minister in an instrument in writing for this subregulation, for that 12 month period.

New subregulation 2.87B(3) provides that if, during all or part of:

* the period of 12 months commencing on the day the terms of the person’s approval as a standard business sponsor are varied; or
* a period of 12 months commencing on an anniversary of that day;

the person is a standard business sponsor of at least one primary sponsored person, the standard business sponsor must comply with requirements relating to training, specified by the Minister in an instrument in writing for this subregulation, for that 12 month period.

New subregulation 2.87B(4) provides that the obligations referred to in subregulations 2.87B(2) and (3) start to apply on the day the sponsor is approved as a standard business sponsor.

New subregulation 2.87B(5) provides that, if the period of the sponsor’s approval as a standard business sponsor is less than 6 years, the obligation referred to in subregulation 2.87B(2) or (3) ends 3 years after the sponsor is approved as a standard business sponsor.

New subregulation 2.87B(6) provides that, if the period of the sponsor’s approval as a standard business sponsor is at least 6 years, the obligation referred to in subregulation 2.87B(2) or (3) ends 6 years after the sponsor is approved as a standard business sponsor.

Consistent with the intention of the Temporary Sponsored Skilled Migration Program, 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.

The purpose of this amendment is to ensure that the Temporary Sponsored Skilled Migration Program is used as a temporary means to fill skills shortages in Australia by requiring sponsors of overseas workers to provide training to Australian workers. As such, consistent with the intent of the program, if the sponsor has not sponsored an overseas worker within the relevant 12 months period, then it is intended that they would not be required to provide training to Australian workers. A sponsor would only be required to provide training to Australian workers when they access the Temporary Sponsored Skilled Migration Program to sponsor overseas workers.

If the sponsor is approved as a standard business sponsor for less than 6 years, then the obligation would cease 3 years after their approval as a sponsor. If the sponsor is approved as a standard business sponsor for at least 6 years, then the obligation would cease 6 years after the person is approved as a standard business sponsor.

The obligation period is set to be 3 years or 6 years after the sponsor’s approval as a standard business sponsor to align with the current terms of approval as a sponsor, which is either 3 years or 6 years.

**Schedule 2 – Further amendments relating to Subclass 457 (Temporary Work (Skilled)) visas**

Under the previous legislative framework, applications under the Temporary Sponsored Skilled Migration program could be lodged electronically or by paper. Whether an applicant could lodge their application using an electronic application form or a paper application form was largely dependent on the applicant’s particular circumstances.

As part of SkillSelect, the Government agreed to implement key legislative and supporting systems changes to ensure that applications under this Program are lodged electronically. The purpose of the amendments is to implement the Government’s decision to streamline the existing processing model and centralise the management of the Subclass 457 (Temporary Work (Skilled)) visa (‘Subclass 457 visa’) program.

The amendments require all applications for sponsorship, nomination and Subclass 457 visas to be made electronically using the internet, regardless of the location of the applicant or their business, using the required forms and paying the required fees.

However, in circumstances specified by the Minister, the amendments allow the application to be made using alternative methods and forms and with different fees.

An example of a circumstance specified by the Minister is where the applicant is unable to lodge an application using the relevant form on the internet due to errors with the Department’s electronic systems. In this circumstance, if the Department is unable to rectify the error, the applicant would be provided a written authorisation and an alternative form to make the application.

Item 1 – Subregulation 2.61(2) (table items 1 and 2)

Item 1 repeals items 1 and 2 in the table in subregulation 2.61(2) in Division 2.14 of Part 2A of the *Migration Regulations 1994* (‘the Principal Regulations’).

Subregulation 2.61(2) provides that, subject to subregulation 2.61(3), a person mentioned in an item of the table must:

* make the application in accordance with the approved form mentioned in the item; and
* pay the application fee (if any) mentioned in the item.

The table in subregulation 2.61(2) provides for the approved form and fee for an application for approval as a sponsor.

Previously, item 1 in the table in subregulation 2.61(2) provided:

* if the person:   
  + makes an application for approval as a standard business sponsor; and
  + operates a business in Australia

the approved form is 1196S or 1196 (Internet) and the application fee is $420.

Previously, item 2 in the table in subregulation 2.61(2) provided:

* if the person:   
  + makes an application for approval as a standard business sponsor; and
  + does not operate a business in Australia

the approved form is 1196S and the application fee is $420.

This item repeals items 1 and 2 in the table in subregulation 2.61(2) because the information in those items would be amended in subregulation 2.61(3A) and subregulation 2.61(3B) after subregulation 2.61(3).

Item 2 – After subregulation 2.61(3)

This item inserts new subregulation 2.61(3A) and subregulation 2.61(3B) and a note after subregulation 2.61(3) in Division 2.14 of Part 2A of the Principal Regulations.

New subregulation 2.61(3A) provides that if a person makes an application for approval as a standard business sponsor:

* the application must be made using the internet; and
* the application must be made using the form specified by the Minister in an instrument in writing for this paragraph; and
* the application must be accompanied by the fee specified by the Minister in an instrument in writing for this paragraph.

New subregulation 2.61(3B) provides that, for subregulation (3A):

* if the Minister specifies in an instrument in writing for this subregulation a different way of making an application for approval as a standard business sponsor, in circumstances specified in the instrument, the application may be made in that way; and
* if the Minister specifies in the instrument a form for the different way of making the application, the application must be made using that form; and
* if the Minister specifies in the instrument a different application fee for making the application, the application must be accompanied by that fee.

The note after new subregulation 2.61(3B) provides that subregulation (3A) relates to making applications on the internet. It may be necessary for the Minister to specify arrangements other than those in subregulation (3A) if special circumstances exist.

The purpose and effect of this amendment is to require all applications for approval as a standard business sponsor to be made using the internet, using the form, and paying the fee, specified by the Minister in an instrument in writing. This amendment also provides for alternative ways of lodging an application for approval as a standard business sponsor in circumstances specified in the instrument made under subregulation 2.61(3B) by the Minister.

Item 3 – Subregulations 2.66(2), (3) and (4)

This item repeals and substitutes subregulation 2.66(2), 2.66(3) and 2.66(4), and inserts new subregulation 2.66(5), in Division 2.14 of Part 2A of the Principal Regulations. This item would also insert a new note under subregulation 2.66(5).

Regulation 2.66 provides for the process to apply for variation of terms of approval for standard business sponsors.

Previously, subregulation 2.66(2) provided that the person must make the application in accordance with approved form 1196S or approved form 1196 (Internet).

Previously, subregulation 2.66(3) provided that if the person does not operate a business [in Australia](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop01195$t=document-frame.htm$3.0$p=',48,48,276,140)), the person must make the application in accordance with approved form 1196S.

Previously, subregulation 2.66(4) provided that the application must be accompanied by a fee of $420.

Substituted subregulation 2.66(2) provides that the application must be made using the internet.

Substituted subregulation 2.66(3) provides that the application must be made using the form specified by the Minister in an instrument in writing for this subregulation.

Substituted subregulation 2.66(4) provides that the application must be accompanied by the fee specified by the Minister in an instrument in writing for this subregulation.

New subregulation 2.66(5) provides that for subregulations (2) to (4):

* if the Minister specifies in an instrument in writing for this subregulation a different way of making an application for a variation of a term of an approval as a standard business sponsor, in circumstances specified in the instrument, the application may be made in that way; and
* if the Minister specifies in the instrument a form for the different way of making the application, that form is the approved form for making the application; and
* if the Minister specifies a different application fee for making the application, the application must be accompanied by that fee.

New note under subregulation 2.66(5) provides that subregulation (2) relates to making applications on the internet. It may be necessary for the Minister to specify arrangements other than those in subregulation (2) to (4) if special circumstances exist.

The purpose and effect of this amendment is to require all applications for variation of a term of approval as a standard business sponsor to be made using the internet, using the form, and paying the fee, specified by the Minister in an instrument in writing. This amendment also provides for alternative ways of lodging an application for variation of a term of approval as a standard business sponsor in circumstances specified in the instrument made under subregulation 2.66(5) by the Minister.

Item 4 – Subregulation 2.73(1A)

This item inserts “and subregulation (9)” after “(6)” in the chapeau of   
subregulation 2.73(1A) in Division 2.17 of Part 2A of the Principal Regulations.

Regulation 2.73 sets out the process for the nomination of a person.

Previously, subregulation 2.73(1A) provided that subregulations (1) to (6) apply to a person:

* who is nominating an occupation under paragraph [140GB(1)(b)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff0064a1$cid=legend_current_ma$t=document-frame.htm$an=JD_140GB4014140b41$3.0#JD_140GB4014140b41) of the Act; and
* who identifies in the nomination a holder of, or an applicant or a proposed applicant for, a [Subclass 457 (Temporary Work (Skilled)) visa](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Subclass45740TemporaryWork40Skilled4141visa$3.0#JD_103-Subclass45740TemporaryWork40Skilled4141visa) as the person who will work in the occupation.

The purpose and effect of this amendment is to make clear that the requirements in subregulations 2.73(1) to (6) and new subregulation 2.73(9) would apply to a person provided for in subregulation 2.73(1A).

Item 5 – Subregulations 2.73(2) and (3)

This item repeals and substitutes subregulation 2.73(2) and subregulation 2.73(3) of Division 2.17 of Part 2A of the Principal Regulations.

Previously, subregulation 2.73(2) provided that the sponsor must make the nomination in accordance with approved form 1196N or approved form 1196 (Internet).

Previously, subregulation 2.73(3) provided that, if the person does not operate a business in Australia, the person must make the application in accordance with approved form 1196N.

New subregulation 2.73(2) and subregulation 2.73(3) provides that:

* the nomination must be made using the internet; and
* the approved form is the form specified by the Minister in an instrument in writing for this subregulation.

The purpose and effect of this amendment is to require all nominations to be made using the internet and using the form specified by the Minister in an instrument in writing.

Item 6 – Subregulation 2.73(5)

This item repeals and substitutes subregulation 2.73(5) of Division 2.17 of Part 2A of the Principal Regulations.

Previously, subregulation 2.73(5) provided that the application must be accompanied by a fee of $85.

New subregulation 2.73(5) provides that the nomination must be accompanied by the fee specified by the Minister in an instrument in writing for this subregulation.

The purpose and effect of this amendment is to require all nominations to be accompanied by the fee specified by the Minister in an instrument in writing.

Item 7 – At the end of regulation 2.73

This item adds subregulation 2.73(9) and a note to Division 2.17 of Part 2A of the Principal Regulations.

New subregulation 2.73(9) provides that:

* for subregulations (2) to (5):  
  + if the Minister specifies in an instrument in writing for this subregulation, a different way of making a nomination of an occupation, in circumstances specified in the instrument, the application may be made in that way; and
  + if the Minister specifies in the instrument a form for the different way of making the nomination, the nomination must be made using that form; and
  + if the Minister specifies in the instrument a different fee for making the nomination, the nomination must be accompanied by that fee; and
  + an instrument made for this subregulation does not apply to a nomination made before 1 July 2010.

The new note provides that subregulation (2) relates to making nominations on the internet. It may be necessary for the Minister to specify arrangements other than those in subregulations (2) to (5) if special circumstances exist.

The effect of inserting subregulation 2.73(9) is to allow, in certain circumstances specified by the Minister in an instrument, a nomination application to be made using alternative methods, forms and with different fees as specified by the Minister in an instrument in writing.

However, an instrument made for new subregulation 2.73(9) does not apply to a nomination made before 1 July 2010 because the new regulations only apply to nominations made on or after 1 July.

The purpose of this amendment is to allow for alternative means of nomination in certain circumstances that would be specified by the Minister in an instrument in writing made under subregulation 2.73(9).

Item 8 – Paragraphs 1223A(1)(b) to (bc) of Schedule 1

This item repeals and substitutes paragraphs 1223A(1)(b) to (bc) of Schedule 1 to the Principal Regulations.

Previously, subitem 1223A(1) provided for the form that must be used to make a Temporary Business Entry (Class UC) visa.

Previously, paragraphs 1223A(1)(b) to (bc) provided that the required form is:

* if the applicant:
* seeks to satisfy the criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa; and
* is outside Australia at the time of application; and
* is making the application for the visa:
  + in connection with a standard business sponsor who is operating a business in Australia; or
  + as part of a labour agreement; or
  + in circumstances in which the person who proposes to nominate an occupation in relation to the applicant has made an application for approval as a standard business sponsor on Form 1196 (Internet); or
  + in circumstances in which:
* an approved nomination of an occupation in relation to the applicant has been made by a person who was a standard business sponsor who is operating a business in Australia; and
* that nomination has not ceased to have effect under regulation 2.75: 1066 or 1066 (Internet).
* If the applicant:
  + seeks to satisfy the criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa; and
  + is in Australia at the time of application; and
  + is making the application for the visa:
* in connection with a standard business sponsor who is operating a business in Australia; or
* as part of a labour agreement; or
* in circumstances in which the person who proposes to nominate an occupation in relation to the applicant has made an application for approval as a standard business sponsor on Form 1196 (Internet); or
* in circumstances in which:
* an approved nomination of an occupation in relation to the applicant has been made by a person who was a standard business sponsor who is operating a business in Australia; and
* that nomination has not ceased to have effect under regulation 2.75; and
  + holds a substantive visa at the time of application for the Temporary Business Entry (Class UC) visa: 1066 or 1066 (Internet).
* If the applicant:
  + seeks to satisfy the secondary criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa; and
  + is not making a combined application with the applicant seeking to satisfy the primary criteria for the grant of that visa; and
  + either:
* the applicant is outside Australia at the time of the application; or
* at the time of the application, the applicant is in Australia and holds a substantive visa: 1066 or 1066S (Internet).
* If:
  + the applicant seeks to satisfy the criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa; and
  + paragraphs (b), (ba) and (bb) do not apply: 1066.

New paragraphs 1223A(1)(b) to (bc) relevantly provide that the form is required:

* If:
  + the applicant seeks to satisfy the criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa; and
  + paragraph (bb) does not apply;

the application must be made as an internet application using the form specified by the Minister in an instrument in writing for paragraph (1)(b).

* If:
  + the applicant seeks to satisfy the criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa; and
  + paragraph (bb) does not apply; and
  + the applicant has been unable to lodge an application in accordance with paragraph (b) in a circumstance specified by the Minister in an instrument in writing for paragraph (1)(ba);

the application may be made in a way, and using a form, specified by the Minister in that instrument.

* If the applicant:
  + seeks to satisfy the secondary criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa; and
  + is not making a combined application with the applicant seeking to satisfy the primary criteria for the grant of that visa;

the application must be made as an internet application using the form specified by the Minister in an instrument in writing for paragraph (1)(bb).

* If:
  + the applicant seeks to satisfy the secondary criteria for the grant of a Subclass 457 (Temporary Work (Skilled)) visa; and
  + the applicant has been unable to lodge an application in accordance with paragraph (bb) in a circumstance specified by the Minister in an instrument in writing for paragraph (1)(bc);

the application may be made in a way, and using a form, specified by the Minister in that instrument.

The purpose and effect of this amendment is to require all applications for a Temporary Business Entry (Class UC) visa to be made using the internet and on the form specified by the Minister in an instrument in writing. This amendment also provides for alternative means of application lodgement if the applicant has been unable to lodge the application in the circumstances specified by the Minister in an instrument in writing.

Item 9 – Paragraph 1223A(3)(aa), (af) and (ag) of Schedule 1

This item repeals paragraphs 1223A(3)(aa), (3)(af) and (3)(ag) and substitutes with new paragraph 1223A(3)(aa) of Schedule 1 to the Principal Regulations.

Item 1223A provides for the application validity criteria for the Temporary Business Entry (Class UC) visas.

Previously, paragraph 1223A(3)(aa) provided that subject to paragraphs (af) and (ag), an application by an applicant who seeks to satisfy the criteria for the grant of a Subclass 457 visa may be made in or outside Australia, but not in immigration clearance.

Previously, paragraph 1223A(3)(af) provided that subject to paragraph (ag), an application by an applicant who:

* seeks to satisfy the criteria for the grant of a [Subclass 457 (Temporary Work (Skilled)) visa](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Subclass45740TemporaryWork40Skilled4141visa$3.0#JD_103-Subclass45740TemporaryWork40Skilled4141visa); and
* seeks to meet the requirements of subclause [457.223(2)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45722340241-labagreementsheading$3.0#JD_45722340241-labagreementsheading) or [(4)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45722340441$3.0#JD_45722340441) of Schedule 2;

must be made:

* [in Australia](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop02160$t=document-frame.htm$3.0$p=',48,48,276,140)), but not [in immigration clearance](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff007087$cid=legend_current_ma$t=document-frame.htm$an=JD_5-inimmigrationclearancedefinition$3.0#JD_5-inimmigrationclearancedefinition); or
* as an [Internet application](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Internetapplication91def93$3.0#JD_103-Internetapplication91def93).

Previously, paragraph 1223A(3)(ag) provided that in the case of an applicant:

* who seeks to satisfy the criteria for the grant of a [Subclass 457 (Temporary Work (Skilled)) visa](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Subclass45740TemporaryWork40Skilled4141visa$3.0#JD_103-Subclass45740TemporaryWork40Skilled4141visa); and
* in relation to whom the nomination of an occupation has been made, or is proposed to be made, by a person who does not operate a business [in Australia](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop02161$t=document-frame.htm$3.0$p=',48,48,276,140));

the applicant must be [outside Australia](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-outsideAustraliadefinition$3.0#JD_103-outsideAustraliadefinition) and the application must be made [outside Australia](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-outsideAustraliadefinition$3.0#JD_103-outsideAustraliadefinition).

These paragraphs are repealed because it is intended that all applications for   
Subclass 457 visas would be made using the internet, regardless of the location of the applicant and their business.

New paragraph 1223A(3)(aa) provides that an applicant for a Subclass 457 (Temporary Work (Skilled)) visa may be in or outside Australia, but not in immigration clearance.

The purpose and effect of this amendment is to allow an applicant to make a Subclass 457 visa application in or outside of Australia, but not in immigration clearance.

Item 10 – Paragraph 1223A(3)(ca) of Schedule 1

This item repeals paragraph 1223A(3)(ca) of Schedule 1 to the Principal Regulations.

Previously, paragraph 1223A(3)(ca) provided that an application by an applicant who:

* seeks to satisfy the [secondary criteria](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_4573$3.0#JD_4573) for the grant of a [Subclass 457 (Temporary Work (Skilled)) visa](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Subclass45740TemporaryWork40Skilled4141visa$3.0#JD_103-Subclass45740TemporaryWork40Skilled4141visa); and
* claims to be a [member of the family unit](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop02165$t=document-frame.htm$3.0$p=',48,48,434,94)) of an applicant who seeks to satisfy, or has satisfied, the primary criteria on the basis of meeting the requirements of subclause [457.223(2)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45722340241-labagreementsheading$3.0#JD_45722340241-labagreementsheading) or [(4)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45722340441$3.0#JD_45722340441) of Schedule 2;

(other than an applicant in relation to whom the nomination of an occupation in relation to the primary applicant has been made or is proposed to be made by a person who does not operate a business [in Australia](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop02166$t=document-frame.htm$3.0$p=',48,48,276,140))) must be made:

* [in Australia](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop02167$t=document-frame.htm$3.0$p=',48,48,276,140)), but not [in immigration clearance](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff007087$cid=legend_current_ma$t=document-frame.htm$an=JD_5-inimmigrationclearancedefinition$3.0#JD_5-inimmigrationclearancedefinition); or
* as an [Internet application](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Internetapplication91def93$3.0#JD_103-Internetapplication91def93).

This paragraph is repealed because, under paragraph 1223A(3)(aa), an application can be lodged by an applicant who is in or outside Australia.

Item 11 – Subitem 1303(1) of Schedule 1

This item amends subitem 1303(1) of Schedule 1 to the Regulations to insert forms “1066 (Internet) and 1066S (Internet)” as application forms for a Bridging C (Class WC) visa.

Subitem 1303(1) provides for the application forms that could be used to apply for a   
Bridging C (Class WC) visa.

Form 1066 (Internet) and 1066S (Internet) are application forms for Subclass 457 visas. This amendment allows applicants for Subclass 457 visas to also apply for a Bridging C (Class WC) visa when they apply for a Subclass 457 visa. The purpose of this amendment is to ensure that, in accordance with the Government’s decision to have all Subclass 457 visa applications lodged electronically, applicants for Subclass 457 visas are only required to lodge one application form to apply for both Subclass 457 visas and Bridging C (Class WC) visa.

Item 12 – Subitem 1305(1) of Schedule 1

This item amends subitem 1305(1) of Schedule 1 to the Principal Regulations to insert forms 1066 (Internet) and 1066S (Internet).

Subitem 1305(1) provides for the applications forms that could be used to apply for a Bridging E (Class WE) visa.

Form 1066 (Internet) and 1066S (Internet) are application forms for Subclass 457 visas. This amendment allows applicants for Subclass 457 visas to also apply for a Bridging E (Class WE) visa when they apply for a Subclass 457 visa. The purpose of this amendment is to ensure that, in accordance with the Government’s decision to have all Subclass 457 visa applications e-lodged, applicants for Subclass 457 visas are only required to lodge one application form to apply for both Subclass 457 visas and Bridging E (Class WE) visa.

**Schedule 3 – Further amendments relating to Subclass 457 (Temporary Work (Skilled)) visas**

Item 1 – Regulation 1.03 (definition of *ANZSCO*, including the note)

Item 1 repeals and substitutes the definition of ‘ANZSCO’ in regulation 1.03 of Division 1.2 of the Principal Regulations.

Previously, regulation 1.03 provided that ANZSCO means the Australian and New Zealand Standard Classification of Occupations:

* published by the Australian Bureau of Statistics; and
* as current on 1 July 2010.

The substituted definition of ANZSCO would provide that ANZSCO has the meaning specified by the Minister in an instrument in writing for this definition.

ANZSCO was recently revised by the Australian Bureau of Statistics. As such, the purpose of this amendment is to ensure that the definition of ANZSCO reflects the latest ANZSCO published by the Australian Bureau of Statistics.

Items 2 and 3 – Paragraphs 2.12F(2)(f) and (g)

Items 2 and 3 omits the word “refused” and substitute with “withdrawn” in paragraphs 2.12F(2)(f) and (g), respectively, of Division 2.2A of Part 2 of the Principal Regulations.

Regulation 2.12F provides for the requirements for the refund of first instalment of visa application charge.

Subparagraph 2.12F(1)(a)(i) relevantly provides that the Minister must refund the amount paid by way of the first instalment of the visa application charge in relation to an application for a visa if a circumstance mentioned in subregulation 2.12F(2) exists.

Previously, paragraph 2.12F(2)(f) relevantly provided that, a circumstance for subparagraph (1)(a)(i) is where the applicant’s application for a class of visa mentioned in subregulation 2.12F(2B) was refused because there was not an approved nomination that identified the applicant.

Previously, paragraph 2.12F(2)(g) relevantly provided that, a circumstance for subparagraph (1)(a)(i) is, in relation to an application for a class of visa mentioned in subregulation 2.12F(2B), the applicant’s application was refused because the applicant:

* was not required to be identified in an approved nomination; and
* did not have an approved sponsor.

Substituted 2.12F(2)(f) relevantly provides that, a circumstance for   
subparagraph (1)(a)(i) is where the applicant’s application for a class of visa mentioned in subregulation 2.12F(2B) was withdrawn because there was not an approved nomination that identified the applicant.

Substituted 2.12F(2)(g) relevantly provides that, a circumstance for subparagraph (1)(a)(i) is, in relation to an application for a class of visa mentioned in subregulation 2.12F(2B), the applicant’s application was withdrawn because the applicant:

* was not required to be identified in an approved nomination; and
* did not have an approved sponsor.

This amendment allows the Minister to refund the first instalment of the visa application charge where the application for the visa is withdrawn in the circumstances outlined in paragraphs 2.12F(2)(f) and (g).

At present, in the circumstances outlined in paragraphs 2.12(2)(f) and (g), the visa application charge cannot be refunded to an applicant unless the application is refused. As such, in circumstances where it is clear that the visa application would be refused because of issues with the nomination or the applicant did not have an approved sponsor, applicants would still seek a decision from the Department, rather than withdraw their application, so that they can seek to have the visa application charge refunded. This places unnecessary administrative burdens on the Department. As such, the purpose of this amendment is to provide for a refund of the visa application charge where the applicant chooses to withdraw their application rather than have it refused.

Item 4 – subregulation 2.57(1)

Item 4 inserts the definition of ‘entity’ in subregulation 2.57(1) of Division 2.11 of Part 2A of the Principal Regulations.

Previously, section 50AAA of the *Corporations Act 2001* (‘the Corporations Act’) provided for the meaning of an ‘associated entity’ and section 9 of the Corporations Act provides for the meaning of ‘entity’. The definition of ‘entity’ in the Corporations Act excludes Commonwealth, State or Territory government bodies.

The new definition of ‘entity’ in subregulation 2.57(1) provides that an entity, in relation to an associated entity, includes:

* an entity within the meaning of section 9 of the Corporations Act; and
* a body of the Commonwealth, State or Territory.

It is the Department’s intention for an ‘entity’, in relation to an associated entity, in the Principal Regulations to include Commonwealth, State or Territory government bodies. As such, the purpose of the amendment is to clarify the Department’s intention about the meaning of ‘entity’ and to specifically provide that it includes Commonwealth, State and Territory Government bodies.

Item 5 – Paragraph 2.59(b)

Item 5 repeals and substitutes a new paragraph 2.59(b) of Division 2.19 of Part 2A of the Principal Regulations to provide, as a criterion for approval as a standard business sponsor, that the applicant is not a standard business sponsor.

Previously, paragraph 2.59(b) provided that, for subsection 140E(1) of the Act, the criterion that must be satisfied for the Minister to approve an application by a person (the applicant) for approval as a standard business sponsor is that the Minister is satisfied that the applicant:

* is not a standard business sponsor; or
* is a standard business sponsor because of the application of subitem 45(2) of Part 2 of Schedule 1 to the *Migration Legislation Amendment (Worker Protection) Act 2008*.

New paragraph 2.59(b) provides that, for subsection 140E(1) of the Act, the criterion that must be satisfied for the Minister to approve an application by a person (the applicant) for approval as a standard business sponsor is that the Minister is satisfied that the applicant is not a standard business sponsor.

The purpose of this amendment is to remove the criterion that the applicant is a standard business sponsor because of the application of subitem 45(2) of Part 2 of Schedule 1 to the *Migration Legislation Amendment (Worker Protection) Act 2008* because there are no longer any sponsors who are standard business sponsors because of the application of subitem 45(2) of Part 2 of Schedule 1 to the *Migration Legislation Amendment (Worker Protection) Act 2008*. As such, this criterion is redundant and the Department proposes for its removal.

Item 6 – Paragraph 2.68(c)

Item 6 repeals paragraph 2.68(c) of Division 2.16 of Part 2A of the Principal Regulations.

Previously, paragraph 2.68(c) relevantly provided that, for paragraph 140GA(2)(b) of the Act, the criterion that must be satisfied for the Minister to approve an application for a variation of a term of approval as a standard business sponsor is that the Minister is satisfied that, among others, the approval the applicant is seeking to vary was granted on or after 14 September 2009.

There were no sponsors who were approved before 14 September 2009. As all current sponsors are approved on or after 14 September 2009, it would follow that any approval they seek to vary would also be granted on or after 14 September 2009. Accordingly, this provision is redundant and this amendment to remove this provision.

Item 7 – Paragraph 2.72(10)(c)

Item 7 omits the words ‘in the person’s workplace’ from paragraph 2.72(10)(c) of Division 2.17 of Part 2A of the Principal Regulations.

Regulation 2.72 sets out the criteria for approval of nomination for a Subclass 457 visa.

Previously, paragraph 2.72(10)(c) provided that if the sponsor is a standard business sponsor, the Minister is satisfied that the terms and conditions of employment of the person identified in the nomination will be no less favourable than the terms and conditions that:

* are provided; or
* would be provided;

to an Australian citizen or an Australian permanent resident for performing equivalent work in the person’s workplace at the same location.

This amendment removes the words ‘in the person’s workplace’ from paragraph 2.72(10)(c) so that the Minister would be comparing the terms and conditions of employment of the person identified in the nomination with an Australian citizen or permanent resident performing equivalent work at the same location, regardless of whether the Australian worker is working in the same workplace as the person identified in the nomination.

The purpose of this amendment is to strengthen the integrity of the Temporary Skilled Sponsorship Migration Program and mitigate the integrity risks in circumstances where the terms and conditions of employment given in a particular workplace is less favourable than the terms and conditions of employment given in other workplaces.

This amendment ensures 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. Under the amendments, the Minister would be able to consider the terms and conditions of employment for Australian workers outside of the workplace of the person identified in the nomination. In doing so, the Minister can consider a broader range of information and ensure that the terms and conditions of employment for the person identified in the nomination is no less favourable than the average terms and conditions of employment given to Australian workers performing the same work at the same location.

Item 8 – At the end of subregulation 2.72(10)

Item 8 adds a new paragraph 2.72(10)(g) and a note at the end of subregulation 2.72(10) of Division 2.17 of Part 2A of the Principal Regulations.

New paragraph 2.72(10)(g) provides that if the person has identified in the nomination the holder of a Subclass 457 (Temporary Work (Skilled)) visa in relation to whom the requirements in subclause 457.223(6) of Schedule 2 were met — one of the following applies:

* the requirements in subclause 457.223(6) of Schedule 2 continue to be met;
* if the holder would be required to hold a licence, registration or membership that is mandatory to perform the occupation nominated in relation to the holder – the holder demonstrates that he or she has competent English, proficient English, concessional English or superior English of at least the standard required for the grant (however described) of the licence, registration or membership;
* the holder is an exempt applicant within the meaning of subclause 457.223(4) of Schedule 2;
* the holder has vocational English.

Previously, subclause 457.223(6) of Schedule 2 provided that this subclause applies to an applicant if:

* the applicant will be paid, in connection with the [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) nominated in relation to the applicant, a level of salary that is at least the level of salary worked out in a way specified by the Minister in an [instrument in writing](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000188bd$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-4572234064140a413845722340114158Salary38Englishreqtexemptions91IMMI12-04893$3.0#JD_FRLI-4572234064140a413845722340114158Salary38Englishreqtexemptions91IMMI12-04893) for this paragraph; and
* the Minister considers that granting a Subclass 457 visa to the applicant would be in the interests of Australia.

Subclause 457.223(11) of Schedule 2 provides that, in subclause (4), an exempt applicant means an applicant who is in a class of applicants specified by the Minister in an [instrument in writing](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000188bd$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-4572234064140a413845722340114158Salary38Englishreqtexemptions91IMMI12-04893$3.0#JD_FRLI-4572234064140a413845722340114158Salary38Englishreqtexemptions91IMMI12-04893) for this subclause.

The new note at the end of subregulation 2.72(10) provides that vocational English, competent English, proficient English, concessional English and superior English are defined in regulations 1.15B to 1.15EA.

This amendment provides for the English language proficiency of the person identified in the nomination where that person is a holder of a Subclass 457 visa who had previously met the requirements of subclause 457.223(6) of Schedule 2 to the Principal Regulations. This amendment requires the nominated person to continue to be paid at least a level of salary specified by the Minister in an instrument in writing for subclause 457.223(6), or be an exempt applicant pursuant to subclause 457.223(4) and subclause 457.223(11), or have a certain English language proficiency level.

The purpose of this amendment is to require, as a nomination criteria, a visa holder who was exempt from the English language requirement on the basis of being paid a high salary, to continue to be paid a salary that would exempt them from the English language requirement, or to meet the requirement, or to be otherwise exempt within the meaning of 457.223(4).

The requirement for Subclass 457 visa holders who are required to hold a licence, registration or membership that is mandatory to perform the occupation in relation to the holder to demonstrate that they have the English language proficiency required for the grant of the licence, registration or membership, would replicate the requirement for subparagraph 457.223(4)(ea)(ii) (see item 18 below).

If the person identified in the nomination is not in a class of people who would not be required to have a specific level of English language proficiency, and are not required to hold a licence registration or membership, then they must satisfy the Minister that they have vocational English.

Item 9 – Subregulations 2.73(7) and (8) (including the subheading)

This item repeals these subregulations.

Previously, subregulation 2.73(7) provided that subregulation 2.73[(8)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000011be1$cid=legend_current_mr$t=document-frame.htm$an=JD_27340841$3.0#JD_27340841) applies to a person who:

* nominated an activity under subregulation 1.20G or 1.20GA (as in force immediately before 14 September 2009); and
* did not identify in the nomination a holder of, or an applicant or a proposed applicant for, a [Subclass 457 (Business (Long Stay)) visa](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Subclass45740Business40LongStay4141visa$3.0#JD_103-Subclass45740Business40LongStay4141visa) as the person who would undertake the activity; and
* received approval for the nomination under regulation 1.20H (as in force immediately before 14 September 2009).

Previously, subregulation 2.73(8) provided that the Minister may refund the nomination fee paid by the person for the approved nomination if the person makes a written request for the refund before the approval for the nomination ceases to have effect under subregulation 1.20H(5) (as in force immediately before 14 September 2009).

These provisions applied to nominations under regulation 1.20H, as in force immediately before 14 September 2009. As there are no longer any nominations made before 14 September 2009 before the Department, these provisions are no longer used and are redundant. Accordingly, these provisions are repealed.

Item 10 – Paragraph 5.19(3)(f) (excluding the note)

This item repeals and substitutes paragraph 5.19(3)(f) of Division 5.3 of Part 5 of the Principal Regulations.

Regulation 5.19 sets out the criteria for approval of nominated positions by an employer (‘the nominator’).

Previously, paragraph 5.19(3)(f) relevantly provided that the Minister must, in writing, approve a nomination if the nominator has met the training requirements that the nominator was required to meet under:

* paragraph [2.59(d)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001145a$cid=legend_current_mr$t=document-frame.htm$an=JD_25940d41$3.0#JD_25940d41) or [(e)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001145a$cid=legend_current_mr$t=document-frame.htm$an=JD_25940e41$3.0#JD_25940e41); or
* paragraph [1.20D(2)(c)](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop01588$t=document-frame.htm$3.0$p=',48,48,462,54));

for the purpose of approval as a [standard business sponsor](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-standardbusinesssponsor$3.0#JD_103-standardbusinesssponsor).

Substituted paragraph 5.19(3)(f) provides that either:

* the nominator:
  + fulfilled any commitments the nominator made relating to meeting the nominator’s training requirements during the period of the nominator’s most recent approval as a standard business sponsor; and
  + complied with the applicable obligations under Division 2.19 relating to the nominator’s training requirements during the period of the nominator’s most recent approval as a standard business sponsor; or
* it is reasonable to disregard the requirements above.

This amendment requires the applicant to demonstrate that they have fulfilled any training related commitments that they made during the period of their most recent approval as a standard business sponsor. The amendment also requires the applicant to demonstrate that they have complied with the applicable training-related obligations under Division 2.19 of Part 2A of the Regulations during the period of their most recent approval as a standard business sponsor. However, if the Minister considers it reasonable, then these requirements could be disregarded.

The purpose and effect of this amendment is that only applicants who have actually complied with the relevant training requirements and obligations would be eligible to nominate a person under regulation 5.19 for the Temporary Residence Transition program. To provide for flexibility in the program, the Minister may disregard this criterion if he considers it reasonable to do so.

Item 11 – Subclause 457.111 (1) of Schedule 2 (definition of *occupation*)

Item 11 repeals the definition of occupation in subclause 457.111(1) of Schedule 2 to the Regulations.

Previously, subclause 457.111(1) provided that an occupation includes an activity:

* that was nominated under regulation 1.20G or 1.20GA as in force immediately prior to 14 September 2009; and
* in relation to which the nomination has not ceased to have effect.

This amendment removes this definition because all nominations made under regulations 1.20G or 1.20GA as in force immediately prior to 14 September 2009 have ceased to have effect. Accordingly, this definition is redundant and is repealed.

Item 12 – Subclause 457.111(2) of Schedule 2 (except the note)

This item repeals subclause 457.111(2) of Schedule 2 (except the note) to the Principal Regulations.

Previously, subclause 457.111(2) provided that in this Part, a business is of benefit to Australia if:

* the conduct of the business contributes to:
  + the creation or maintenance of employment for Australian citizens or [Australian permanent residents](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000000328$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Australianpermanentresidentdefinition$3.0#JD_103-Australianpermanentresidentdefinition); or
  + expansion of Australian trade in goods or services; or
  + the improvement of Australian business links with international markets; or
  + competitiveness within sectors of the Australian economy; and
* the operator of the business:
  + introduces to, or utilises or creates [in](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop04521$t=document-frame.htm$3.0$p=',48,48,276,140)), Australia new or improved technology or business skills; or
  + has a satisfactory record of, or a demonstrated commitment towards, training Australian citizens and [Australian permanent residents](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000000328$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Australianpermanentresidentdefinition$3.0#JD_103-Australianpermanentresidentdefinition) in the business [in Australia](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop04522$t=document-frame.htm$3.0$p=',48,48,276,140)).

The consideration of whether a business is of benefit to Australia is a criterion that must be satisfied for a visa applicant for the ‘Independent Executives’ stream. This stream was repealed on 24 November 2012. As the visa criteria for Subclass 457 visas no longer refers to whether a business is of benefit to Australia, this subclause is redundant and is to be repealed.

Item 13 – Subclause 457.111(2) of Schedule 2 (at the end of the note)

This item adds that ‘Vocational English’ is defined in regulation 1.15B in subclause 457.111(2) of Schedule 2 at the end of the note to the Principal Regulations.

Subregulation 1.15B(1) provides that a person has vocational English if:

* the person undertook a language test, specified by the Minister in an [instrument in writing](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001a157$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-IMMI1247018$3.0#JD_FRLI-IMMI1247018) for this paragraph; and
* the test was conducted in the 3 years immediately before the day on which the application was made; and
* the person achieved a score specified in the [instrument](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001a157$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-IMMI1247018$3.0#JD_FRLI-IMMI1247018).

Subregulation 1.15B(2) provides that a person has *vocational English* if the person holds a [passport](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff006a8a$cid=legend_current_ma$t=document-frame.htm$an=JD_5-passportdefinition$3.0#JD_5-passportdefinition) of a type specified by the Minister in an [instrument in writing](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001a157$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-IMMI1247018$3.0#JD_FRLI-IMMI1247018) for this subregulation

The purpose and effect of this amendment is to make clear that ‘Vocational English’, in the Subclass 457 visa criteria in Schedule 2 to the Regulations is defined in regulation 1.15B.

Item 14 – Paragraph 457.223(4)(a) of Schedule 2 (including the note)

This item repeals and substitutes paragraph 457.223(4)(a) and the note of Schedule 2 to the Principal Regulations.

Previously, paragraph 457.223(4)(a) provided that:

* the applicant meets the requirements of this subclause if:
  + either:
    - if the applicant and a business activity specified in the application and relating to the applicant were the subject of an approved business nomination under regulation 1.20H as in force immediately prior to 14 September 2009:
      * the nomination was made by a person who was a [standard business sponsor](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-standardbusinesssponsor$3.0#JD_103-standardbusinesssponsor) at the time the nomination was approved; and
      * the approval of the nomination has not ceased to have effect under subregulation 1.20H(5) as in force immediately prior to 14 September 2009; or
    - if a nomination of an [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) in relation to the applicant has been approved under section [140GB](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff0064a1$cid=legend_current_ma$t=document-frame.htm$an=JD_140GB$3.0#JD_140GB) of the Act:
      * the nomination was made by a person who was a [standard business sponsor](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-standardbusinesssponsor$3.0#JD_103-standardbusinesssponsor) at the time the nomination was approved; and
      * the approval of the nomination has not ceased as provided for in regulation [2.75](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001c33f$cid=legend_current_mr$t=document-frame.htm$an=JD_275$3.0#JD_275).

The note after paragraph 457.223(4)(a) provided that the definition of occupation in   
clause 457.111 includes the activity mentioned in subparagraph 457.223(4)(a)(i).

Substitute paragraph 457.223(4)(a) provides that:

* each of the following applies:
  + a nomination of an occupation in relation to the applicant has been approved under section [140GB](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff0064a1$cid=legend_current_ma$t=document-frame.htm$an=JD_140GB$3.0#JD_140GB) of the Act;
  + the nomination was made by a person who was a standard business sponsor at the time the nomination was approved;
  + the approval of the nomination has not ceased as provided for in regulation [2.75](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001c33f$cid=legend_current_mr$t=document-frame.htm$an=JD_275$3.0#JD_275).

This amendment replicates the existing requirements about a nomination of an occupation in relation to the applicant that has been approved under section 140GB of the Act and remove the references to nominations under regulation 1.20H as in force immediately prior to 14 September 2009 because there are no longer any such nominations. Accordingly, these references are redundant and are removed.

Item 15 – Paragraph 457.223(2)(b) of Schedule 2 (including the note)

This item repeals and substitutes paragraph 457.223(2)(b) (including the note) of Schedule 2 to the Regulations.

Previously, paragraph 457.223(2)(b) provided that the applicant meets the requirements of this subclause if:

* either:
  + both of the following apply:
    - the applicant and a business activity specified in the application and relating to the applicant were the subject of an approved business nomination under regulation 1.20H as in force immediately prior to 14 September 2009; and
    - the approval has not ceased to have effect under subregulation 1.20H(5) as in force immediately prior to 14 September 2009; or
  + a nomination of an [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) in relation to the applicant:
    - has been approved under section [140GB](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff0064a1$cid=legend_current_ma$t=document-frame.htm$an=JD_140GB$3.0#JD_140GB) of the Act; and
    - has not ceased to have effect under regulation [2.75](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001c33f$cid=legend_current_mr$t=document-frame.htm$an=JD_275$3.0#JD_275).

Previously, the note after paragraph 457.223(2)(b) provided that the definition of occupation in clause 457.111 includes the activity mentioned in subparagraph 457.223(2)(b)(i).

Substitute paragraph 457.223(2)(b) provides that:

* a nomination of an [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) in relation to the applicant:
  + has been approved under section [140GB](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_ma%3Ar%3A0000000ff0064a1$cid=legend_current_ma$t=document-frame.htm$an=JD_140GB$3.0#JD_140GB) of the Act; and
  + has not ceased to have effect under regulation [2.75](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000001c33f$cid=legend_current_mr$t=document-frame.htm$an=JD_275$3.0#JD_275).

This amendment replicates the existing requirements about a nomination of an occupation that has been approved under section 140GB of the Act and remove all references to nominations under regulation 1.20H as in force immediately before 14 September 2009. These references are redundant and are to be removed because there are no longer any nominations made before 14 September 2009.

Item 16 – Paragraph 457.223(4)(ba) of Schedule 2

This item repeals and substitutes paragraph 457.223(4)(ba) of Schedule 2 to the Regulations.

Previously, paragraph 457.223(4)(ba) provided that the applicant meets the requirements of this subclause if:

* if the business activities of the person who made the approved nomination include activities relating to either or both of:
  + the recruitment of labour for supply to other unrelated businesses; and
  + the hiring of labour to other unrelated businesses;
* either:
  + the [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) is undertaken in a position with a business, or an associated entity, of the person who made the approved nomination; or
  + the [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) is specified by the Minister in an [instrument in writing](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000013c7f$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-27240104140d4140ii4140B4127240104140d4140iii4140B41286402B414572234044140ba4140iv41-Specofoccupations91IMMI104703093$3.0#JD_FRLI-27240104140d4140ii4140B4127240104140d4140iii4140B41286402B414572234044140ba4140iv41-Specofoccupations91IMMI104703093) for this subparagraph.

Substituted paragraph 457.223(4)(ba) provides that:

* either:
  + the nominated occupation is specified by the Minister in an instrument in writing for this paragraph; or
  + each of the following applies:
    - the applicant is employed to work in the nominated occupation;
    - if the person who made the approved nomination met paragraph 2.59(d) or (e), or paragraph 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 the person;
    - if the person who made the approved nomination met paragraph 2.59(h), or paragraph 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.

Regulation 2.59 provides for the criteria for approval as a standard business sponsor.

Regulation 2.68 provides for the criteria for variation of terms of approval as a standard business sponsor.

Paragraphs 2.59(d) and 2.68(e) are mirror provisions of each other and relevantly provide that, 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 made for this paragraph.

Paragraph 2.59(h) and 2.68(i) are mirror provisions of each other and relevantly provide that if the applicant is lawfully operating a business [outside Australia](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-outsideAustraliadefinition$3.0#JD_103-outsideAustraliadefinition) and does not lawfully operate a business [in Australia](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop01161$t=document-frame.htm$3.0$p=',48,48,276,140)) — the applicant is seeking to be approved as a [standard business sponsor](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-standardbusinesssponsor$3.0#JD_103-standardbusinesssponsor) in relation to a holder of, or an applicant or a proposed applicant (the visa applicant) for, a [Subclass 457 (Temporary Work (Skilled)) visa](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Subclass45740TemporaryWork40Skilled4141visa$3.0#JD_103-Subclass45740TemporaryWork40Skilled4141visa), and the applicant intends for the visa holder or visa applicant to:

* establish, or assist in establishing, on behalf of the applicant, a business operation [in Australia](javascript:gopopup('/NXT/gateway.dll?f=id$id=legend_current_mrPop01162$t=document-frame.htm$3.0$p=',48,48,276,140)) with overseas connections; or
* fulfil, or assist in fulfilling, a contractual obligation of the applicant.

This amendment substantially replicates the effect of current paragraph 457.223(4)(ba) and makes clear that the applicant would only be able to work for certain employers depending on whether the employer was approved as a person who is lawfully operating a business in Australia or who is not lawfully operating a business in Australia.

If the employer was approved as a sponsor who lawfully operated a business in Australia, then this amendment would require the visa applicant to only work in a position in the sponsor’s business, or in a business of an associated entity of the sponsor. However, if the employer was approved as a sponsor who lawfully operated a business outside of Australia and does not lawfully operate a business in Australia, then this amendment would require the visa applicant to only work in a position in the sponsor’s business.

The requirement to only work for the sponsor, or an associated entity of the sponsor, would replicate the current requirement and is intended to continue the exclusion of on-hire industry from the Temporary Sponsored Skilled Migration Program, unless the nominated occupation is specified by the Minister in an instrument in writing.

Item 17 – After paragraph 457.223(4)(d) of Schedule 2

This item inserts new paragraph 457.223(4)(da) into Schedule 2 to the Principal Regulations.

Paragraph 457.223(4)(e) provided that if the Minister requires the applicant to demonstrate that he or she has the skills that are necessary to perform the [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) — the applicant demonstrates that he or she has those skills in the manner specified by the Minister

New paragraph 457.223(4)(da) provides, as a criteria for the Subclass 457 visa, that the applicant has the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation.

Most Subclass 457 visa applications that are submitted to the Department already contain evidence of the applicant’s skills, qualifications and employment background. As such, in instances where it is clear from the documents submitted that the applicant does not have the necessary skills, qualifications and employment background to perform the tasks of the nominated occupation, this amendment would allow the visa application to be refused. This amendment is necessary because, previously, to refuse an applicant on the basis that they did not have the necessary skills to perform the nominated occupation, the Minister had to request the applicant to demonstrate that he or she had the skills that are necessary to perform the occupation pursuant to paragraph 457.223(4)(e).

This amendment increases the efficiency in visa processing because it would allow visa applications to be refused where it is clear that the applicant does not have the necessary skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation. This amendment would also strengthen the integrity of the Subclass 457 visa program and ensure that it is used as a means to supplement the skills shortages in Australia.

Item 18 – Subparagraph 457.223(4)(ea)(ii) of Schedule 2

This item repeals and substitutes subparagraph 457.223(4)(ea)(ii) of Schedule 2 to the Principal Regulations and insert a note after the substituted subparagraph 457.223(4)(ea)(ii).

Previously, if an applicant were required to hold a licence, registration or membership that is mandatory to perform the [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) nominated in relation to the applicant, subparagraph 457.223(4)(ea)(ii) provided that if:

* in order to obtain the licence, registration or membership, the applicant would need to demonstrate a level of English language proficiency equivalent to the level of English language proficiency that is required to achieve an [IELTS test](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-IELTStestdefinition$3.0#JD_103-IELTStestdefinition) score of more than 5 in each of the 4 test components of speaking, reading, writing and listening;

the applicant has proficiency in English of at least the standard required for the grant (however described) of the licence, registration or membership.

Substituted subparagraph 457.223(4)(ea)(ii) provides that, in order to obtain the licence, registration or membership, the applicant would need to demonstrate competent English, proficient English, concessional English or superior English.

The note provides that competent English, proficient English, concessional English and superior English are defined in regulations 1.15B to 1.15EA to the Principal Regulations.

This amendment removes all references to IELTS test scores as the measurement for the applicant’s level of English language proficiency and, instead, require the applicant to demonstrate competent English, proficient English, concessional English and superior English. Pursuant to the requirements of regulations 1.15B to 1.15EA, a person would have competent English, proficient English, concessional English and superior English depending on, amongst other things, whether they achieved a score specified by the Minister in an instrument in writing for the relevant regulation.

Previously, Subclass 457 visas were the only visas under the Temporary Sponsored Skilled Migration Program which references IELTS test scores as the measurement for the applicant’s level of English language proficiency. The purpose of this amendment is to remove all references to IELTS test scores in Subclass 457 visa criteria and align the English language proficiency levels with the requirements of other visas under the Skilled Migration Visa Program.

The purpose and effect of the note is to make clear that competent English, proficient English, concessional English and superior English are defined in regulations 1.15B to 1.15EA to the Principal Regulations.

Item 19 – Paragraph 457.223(4)(eb) of Schedule 2

This item omits ‘a level of English language proficiency that is required to achieve an IELTS test score of at least 5 in each of the 4 test components of speaking, reading, writing and listening’ from paragraph 457.223(4)(eb) of Schedule 2 to the Regulations and substitute with ‘vocational English’.

Previously, paragraph 457.223(4)(eb) provided that if:

* the applicant is not an [exempt applicant](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_457223401141-exemptapplicant$3.0#JD_457223401141-exemptapplicant); and
* subclause [(6)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45722340641$3.0#JD_45722340641) does not apply to the applicant; and
* at least 1 of subparagraphs [(ea)(i)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_4572234044140ea4140i41$3.0#JD_4572234044140ea4140i41) and [(ii)](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_4572234044140ea4140ii41$3.0#JD_4572234044140ea4140ii41) does not apply;

the applicant has a level of English language proficiency that is required to achieve an [IELTS test](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000004ba$cid=legend_current_mr$t=document-frame.htm$an=JD_103-IELTStestdefinition$3.0#JD_103-IELTStestdefinition) score of at least 5 in each of the 4 test components of speaking, reading, writing and listening.

This amendment removes all references to IELTS test scores as the measurement for the applicant’s level of English language proficiency and, instead, require the applicant to demonstrate that they have vocational English if they do not fit into the exceptions under paragraph 457.223(4)(eb).

The purpose of this amendment is to remove all references to IELTS test scores in Subclass 457 visa criteria and align the English language proficiency levels with the requirements of other visas under the Temporary Sponsored Skilled Migration Program.

Item 20 – Paragraph 457.223(6)(a) of Schedule 2

This item repeals and substitutes paragraph 457.223(6)(a) of Schedule 2 to the Regulations.

Previously, paragraph 457.223(6)(a) provided that this subclause applies to an applicant if:

* the applicant will be paid, in connection with the [occupation](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000006a85$cid=legend_current_mr$t=document-frame.htm$an=JD_45711140141-occupation$3.0#JD_45711140141-occupation) nominated in relation to the applicant, a level of salary that is at least the level of salary worked out in a way specified by the Minister in an [instrument in writing](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000188bd$cid=legend_current_mr$t=document-frame.htm$an=JD_FRLI-4572234064140a413845722340114158Salary38Englishreqtexemptions91IMMI12-04893$3.0#JD_FRLI-4572234064140a413845722340114158Salary38Englishreqtexemptions91IMMI12-04893) for this paragraph.

Substituted paragraph 457.223(6)(a) provides that the base rate of pay for the applicant, under the terms and conditions of employment about which the Minister was last satisfied for paragraph 2.72(10)(c), is at least the level of salary worked out in the way specified by the Minister in an instrument in writing for this paragraph.

Under this amendment, any applicants who seek to be exempt from the English language requirement, and is not an exempt applicant and at least 1 of subparagraphs 457.223(4)(ea)(i) and (ii) does not apply, would need to have a base rate of pay that is at least the level of salary worked out in the way specified by the Minister in an instrument in writing. The base rate of pay for the applicant which would be measured against the level of salary specified by the Minister in an instrument is the base rate of pay under the terms and conditions of employment about which the Minister was last satisfied for paragraph 2.72(10)(c).

Regulation 2.79 requires the sponsor to provide the primary sponsored person the terms and conditions of employment that is no less favourable than the terms and conditions of employment that the Minister was satisfied, under paragraph 2.72(10)(c), were no [less favourable](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A0000000000113b7$cid=legend_current_mr$t=document-frame.htm$an=JD_257403A41$3.0#JD_257403A41) than the terms and conditions of employment that are provided, or would be provided, to an Australian citizen or an [Australian permanent resident](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A000000000000328$cid=legend_current_mr$t=document-frame.htm$an=JD_103-Australianpermanentresidentdefinition$3.0#JD_103-Australianpermanentresidentdefinition).

As such, the purpose of this amendment is to ensure that the base rate of pay which allows the applicant to be exempt from the English language requirement would be the provided by the sponsor, pursuant to the requirements of regulation 2.79.

Item 21 – After paragraph 8107(3)(a) of Schedule 8

This item inserts new paragraph 8107(3)(aa) into Schedule 8 to the Principal Regulations.

New paragraph 8107(3)(aa) provides that the holder must commence that work within 90 days after the holder’s arrival in Australia.

Subclause 8107(3) provides for the requirements that a Subclass 457 visa holder who last met subclause 457.223(2) or (4) must abide by.

Subclause 457.223(2) provides for the visa criteria for an applicant who is nominated by a party to a labour agreement.

Subclause 457.223(4) provides for the visa criteria for an applicant who is nominated by a standard business sponsor.

This amendment would require the Subclass 457 visa holder to commence work with the relevant employer within 90 days after their arrival in Australia.

The purpose of this amendment is to strengthen the integrity of the Subclass 457 visa and address instances where the visa holder does not commence work with the sponsor after their arrival in Australia. This amendment would ensure that the visa holder actually does commence work within 90 days of their arrival in Australia. 90 days is considered to be a reasonable period of time for the visa holder to commence their work in Australia.

Item 22 – at the end of Clause 8107 of Schedule 8

This item adds new paragraph 8107(3)(c) at the end of subclause 8107(3) of Schedule 8 to the Principal Regulations.

New paragraph 8107(3)(c) provides that if the holder is required to hold a licence, registration or membership that is mandatory to perform the occupation nominated in relation to the holder, in the location where the holder’s position is situated – the holder must:

* hold the licence, registration or membership; and
* comply with each condition or requirement to which the licence, registration or membership is subject.

Previously, there was no requirement for the Subclass 457 visa holder to meet the licence, registration or membership requirements for the nominated occupation. As such, to strengthen the integrity of the Subclass 457 visa program, this amendment would require the Subclass 457 visa holder to actually hold the required licence, registration or membership for the nominated occupation and comply with the relevant conditions and requirements for that licence, registration or membership.

It is not intended for a visa applicant to have obtained the relevant licence, registration or membership before visa grant because some bodies require the visa applicant to be in Australia to obtain the relevant licence, registration or membership. As such, this amendment only applies to a visa holder.

**Schedule 4 – Amendments relating to payment in foreign currency**

***Australian Citizenship Regulations 2007***

Item 1 – Subregulation 12A(4)

This item repeals and substitutes subregulation 12A(4) of the *Australian Citizenship Regulations 2007* (‘the Citizenship Regulations’).

Previously, subregulation 12A(4) provided that if the currency in which the amount is to be paid is a currency for which an amount corresponding to the amount of the fee is Australian dollars is mentioned in the conversion instrument, the amount of the payment is to be worked out in accordance with the amount mentioned in the instrument that corresponds to the amount of the fee in Australian dollars.

The term ‘conversion instrument’ was previously defined in subregulation 12A(7) to mean the instrument titled *Payment of Visa Application Changes and Fees in Foreign Currencies* (IMMI 12/076) that commenced on 1 January 2013.

Substituted subregulation 12A(4) provides that, if the currency in which the amount is to be paid is specified by the Minister in the conversion instrument, the amount is to be ascertained in accordance with the exchange rate for the currency specified in the instrument.

This amendment is consequential to the new subregulation 5.36(1A) of the *Migration Regulations 1994* (‘Principal Regulations’), under which the conversion instrument is made. The purpose of this amendment is to maintain consistency between subregulation 12A(4) of the Citizenship Regulations and subregulation 5.36(1A) of the Principal Regulations.

Item 2 – Subregulation 12A(5)

This item omits from subregulation 12A(5) the words “a currency for which an amount corresponding to the amount of the fee in Australian dollars is mentioned” and substituted the word “specified”.

Previously, subregulation 12A(5) provided that, if the currency in which the amount is to be paid is not a currency for which an amount corresponding to the amount of the fee in Australian dollars is mentioned in the conversion instrument, the amount of the payment is to be worked out using the formula set out in subregulation 12A(5).

Amended subregulation 12A(5) provides that, if the currency in which the amount is to be paid is not specified in the conversion instrument, the amount of the payment is to be worked out using the formula set out in subregulation 12A(5).

This amendment is consequential to the new subregulation 5.36(1A) of the Principal Regulations, under which the conversion instrument is made. The purpose of this amendment is to maintain consistency between subregulation 12A(4) of the Citizenship Regulations and subregulation 5.36(1A) of the Principal Regulations.

Item 3 – Subregulation 12A(7)

This item repeals and substitutes subregulation 12A(7).

Subregulation 12A(7) provides for the definitions of the terms “conversion instrument” and the “places and currencies instrument”. Substituted subregulation 12A(7) amends those definitions.

The definitions of “conversion instrument” and “places and currencies instrument” are relevant to provisions in the Citizenship Regulations which allow a person who makes an application under the Citizenship Act to pay the prescribed fee in a foreign currency specified in the conversion instrument and in a foreign country specified in the places and currencies instrument.

Substituted subregulation 12A(7) repeals the definition of “conversion instrument” numbered IMMI 12/076, which commenced on 1 January 2013, and substitutes a reference to the instrument numbered IMMI 13/045 that will commence on 1 July 2013.

Substituted subregulation 12A(7) also repeals the definition of “places and currencies instrument” numbered IMMI 12/007, which commenced on 1 January 2013, and substitutes a reference to the instrument IMMI 13/046 that will commence on 1 July 2013.

Amending the definition of “conversion instrument” and “places and currencies instrument” allows a person to pay the fee for an application made under the Citizenship Act in a foreign currency in a foreign country. Without this amendment, it is possible that clients making applications at overseas posts would suffer hardship, as there would be no provision in the Citizenship Regulations to indicate how much application fee would be payable in a currency other than the Australian dollar.

Due to the operation of section 14 of the *Legislative Instruments Act 2003*, it is not possible to incorporate, by reference, the instrument made under subregulation 5.36(1A) of the Principal Regulations as in force from time to time. Rather, the new instrument would have to be incorporated, by reference, at the time of commencement of the amendment Regulation.

Instruments made under the Principal Regulations are incorporated in the Citizenship Regulations because the Citizenship Act does not currently permit the Minister for Immigration and Citizenship to make instruments under the Citizenship Regulations.

The purpose of the amendment provides for the new definitions of “conversion instrument” and “places and currencies instrument" to incorporate, by reference, new instruments titled “conversion instrument” (IMMI 13/045) and “places and currencies instrument” (IMMI 13/046) that are made under subregulation 5.36(1A) of the the Principal Regulations. The new instruments commence on 1 July 2013 and sets out the currency in which the amount is to be paid is to be ascertained in accordance with the exchange rate for the currency specified in the instrument.

***Migration Regulations 1994***

Item 4 – Subregulation 5.36(1A)

This item repeals and substitutes subregulation 5.36(1A) of Part 5 of the Principal Regulations.

Subregulation 5.36(1) provides that payment of a fee must be made in a place, being Australia or a foreign country, that is specified for the purposes of this paragraph by Gazette Notice and in a currency that is specified for the purposes of this paragraph by Gazette Notice as a currency in which a fee may be paid in that place.

Previously, subregulation 5.36(1A) provided that the amount of the payment is to be ascertained as follows:

* if the currency in which the amount is to be paid in a currency for which an amount corresponding to the amount of the fee in Australian dollars is specified for the purposes of this paragraph by Gazette Notice – in accordance with the amount specified in the Gazette Notice that corresponds to the amount of the fee in Australian dollars:
* if the currency in which the amount is to be paid is any other currency – in accordance with the formula in subregulation 5.36(2).

Substituted subregulation 5.36(1A) provides that the amount of the payment is to be worked out as follows:

* if the currency in which the amount is to be paid is specified by the Minister in an instruments in writing for this paragraph, use the exchange rate for the currency specified in the notice;
* if the currency in which the amount is to be paid is not specified in an instrument for paragraph 5.36(1A)(a), use the formula in subregulation 5.36(2).

The effect of the amendment is to change the method by which the foreign currency equivalent of Australian dollar amounts are to be calculated. It would be done by using exchange rates rather than using the foreign currency equivalent (‘FCE’) amounts listed in the table.

The purpose of the amendment is to reflect the change in the FCE instrument that expresses the way in which amounts payable for visa application charges in countries other than Australia are to be calculated. The FCE instrument no longer takes the form of a table listing the FCEs, but rather list the exchange rate for each foreign currency to be used to calculate the FCEs.

**Schedule 5 – Amendments relating to Subclass 300 (Prospective Marriage) visas**

***Migration Relations 1994***

Item 1 – After clause 300.211 of Schedule 2

This item inserts subclause 300.212A into Schedule 2 to the Principal Regulations.

New subclause 300.212A is a criterion to be satisfied at the time the application was made and provides that the applicant has turned 18.

Previously, the Principal Regulations did not impose an explicit minimum age restriction on an applicant for a Prospective Marriage visa.

The effect of this subclause requires that an applicant for a Prospective Marriage visa be at least 18 at the time of application.

The purpose of this amendment is to implement the Government’s acceptance of the recommendation of the Senate Legal and Constitutional Affairs Committee (‘the Committee’), that the Australian Government increase the minimum age of visa holders within the Prospective Marriage program to 18 years of age to help minimise the incidence of forced marriage and human trafficking. The Committee held the view that persons over the age of 18 are less likely to be forced into a marriage and more likely to seek help if they find themselves in a forced marriage arrangement. This amendment ensures that all applicants for a Prospective Marriage visa are at least 18 years of age at the time of application.

Item 2 – Clauses 300.213 and 300.214 of Schedule 2

This item repeals and substitutes clause 300.213 and clause 300.214 of Schedule 2 to the Principal Regulations.

***Clause 300.213***

Previously, clause 300.213 provided that the applicant is sponsored by:

* if the prospective spouse has tuned 18 – the prospective spouse; or
* if the prospective spouse has not turned 18 – a person who
  + is:
    - an Australian citizen; or
    - an Australian permanent resident; or
    - an eligible New Zealand citizen; and
  + is a parent or guardian of the prospective spouse; and
  + has tuned 18.

Substituted clause 300.213 of Schedule 2 provides that:

* the applicant is sponsored by the prospective spouse.
* the prospective spouse has turned 18.

Previously, where a prospective spouse is under 18, their parent or guardian may sponsor an applicant on their behalf.

The effect of this amendment is that only a prospective spouse over the age of 18 is eligible to sponsor an applicant.

The purpose of this amendment is to remove the ability of a parent or guardian to sponsor an applicant for a Prospective Marriage visa, on the prospective spouse’s behalf, and to ensure that the only a prospective spouse, over the age of 18 at time of application, will be able to sponsor an applicant. This amendment is consistent with the new clause 300.212A which requires, at the time of application, that an applicant has turned 18.

***Clause 300.214***

Previously, clause 300.214 provided that the applicant and the prospective spouse have met and are known to each other personally.

Substituted clause 300.214 provides that:

* the applicant and the prospective spouse have met in person since each of them turned 18.
* the applicant and the prospective spouse are known to each other personally.

Previously, it was only a policy intention rather than a legislative requirement that the parties have met as adults and are known to each other personally. The effect of this amendment requires that the applicant and the prospective spouse have met in person since turning 18 and that they are known to each other personally.

The purpose of this amendment is to make it a legislative requirement that an applicant and prospective spouse have met in person, as adults and also to add an extra layer of protection to vulnerable applicants and sponsors who may never have met since becoming of marriageable age; that is, since turning 18.

Item 3 – Clause 300.221A of Schedule 2

This item omits “subject to clause 300.221B, there is” in clause 300.221A and substitutes “There is”.

Previously, clause 300.221A provided that, subject to clause 300.221B, there is no impediment to the marriage in Australian Law.

Amended clause 300.221A provides that, there is no impediment to the marriage in Australian Law.

This amendment is consequential to the repeal of clause 300.221B and ensures that clause 300.221A is consistent with the intention that both the applicant and the prospective spouse have attained 18 years of age at time of application.

Item 4 – Clause 300.221B of Schedule 2 (including the note)

This item repeals clause 300.221B of Schedule 2 to the Principal Regulations.

Previously, clause 300.221B provided that, if the applicant or the prospective spouse is under 18:

* the Minister must be satisfied that the applicant or the prospective spouse, as the case requires, is due to turn 18 before the end of the period within which the intended marriage is to take place; or
* a Judge or a magistrate has made an order under section 12 of the *Marriage Act 1961* authorising the applicant to marry the prospective spouse, or the prospective spouse to marry the applicant, as the case requires, and that order is in force relates to applicants and prospective spouses that are under 18 years of age and the Minister is satisfied that the marriage will take place.

Previously, if the applicant or the prospective spouse was under the Australian marriageable age (18 years of age) at the time of decision, one way they meet this criterion is if the Minister is satisfied that the applicant or prospective spouse will turn 18 before the period within which the intended marriage is to take place. Given that a Prospective Marriage visa is valid for a period of 9 months, the effect of 300.221B was that an applicant or prospective spouse may be 17 and 3 months at time of decision. Alternatively, previously, under clause 300.221B, an Australian Judge or Magistrate may have made an order under section 12 of the *Marriage Act 1961* authorising the underage applicant to marry the prospective spouse or the underage prospective spouse to marry the applicant. Under this alternative, an applicant or prospective spouse could have been as young as 16 at the time of decision.

The effect of the amendments are that both the applicant and the prospective spouse have to be 18 at time of decision, despite the existence of an order under section 12 of the *Marriage Act 1961*, or despite the fact that they may turn 18 before the end of the period within which the marriage is to take place.

The purpose of removing clause 300.221B is to be consistent with the removal of provisions which allow an underage applicant to satisfy the criteria for the grant of the Prospective Marriage visa.

Item 5 – Clause 300.223 of Schedule 2

This item repeals and substitutes clause 300.223 of Schedule 2 to the Principal Regulations.

Previously clause 300.223 provided that the applicant:

* satisfies the public interest criteria (‘PIC’) [4001](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4001$3.0#JD_4001), [4002](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4002$3.0#JD_4002), [4003](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4003$3.0#JD_4003), [4004](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4004$3.0#JD_4004), [4007](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4007$3.0#JD_4007), [4009](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4009$3.0#JD_4009), [4010](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4010$3.0#JD_4010) and [4021](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4021$3.0#JD_4021); and
* if the applicant had turned 18 at the time of application — satisfies public interest criterion [4019](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4019$3.0#JD_4019).

Clause 300.223 provides that the applicant satisfies PIC [4001](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4001$3.0#JD_4001), [4002](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4002$3.0#JD_4002), [4003](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4003$3.0#JD_4003), [4004](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4004$3.0#JD_4004), [4007](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4007$3.0#JD_4007), [4009](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4009$3.0#JD_4009), [4010](http://immibelweh08/NXT/gateway.dll?f=id$id=legend_current_mr%3Ar%3A00000000000ab62$cid=legend_current_mr$t=document-frame.htm$an=JD_4010$3.0#JD_4010), 4019, 4020 and 4021.

The effect of this amendment is be to remove the age distinction in respect to the applicant satisfying PIC 4019 and also insert a new requirement that an applicant satisfy   
PIC 4020.

***Removing the age distinction***

The purpose of this amendment is to remove the reference to applicants being under the age of 18.

PIC 4019 requires an applicant to sign a values statement unless, if compelling circumstances exist, the Minister decides that the applicant is not required to sign a statement. Because people under the age of 18 are not required to sign a values statement and because it is an applicant must be aged 18 to be eligible for the grant of a Prospective Marriage visa, it is no longer be necessary to retain the age distinction.

***Inserting PIC 4020***

The PIC 4020 in Part 1 of Schedule 4 to the Principal Regulations enables refusal of a visa if the applicant provides a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa the applicant held in the 12 months before making the current application.

Applicants who are refused a visa because they do not satisfy PIC 4020 may be barred for a period of three years from being granted another visa to which PIC 4020 applies. This bar, does not, however, extend to family members who did not combine their visa applications with a family member.

Schedule 7 to this Regulation to amends all family stream visas to insert PIC 4020 as a visa criterion. As the Prospective Marriage visa is a family stream visa and because it was necessary to amend clause 300.223 to remove the age distinction, PIC 4020 has been be inserted into the criteria for the grant of a Prospective Marriage visa by this item rather than by Schedule 7.

The effect of inserting PIC 4020 into the criteria for the grant of a Prospective Marriage visa is that all applicants who are seeking to satisfy the criteria for the grant of a Prospective Marriage visa must satisfy PIC 4020 to be eligible for grant of that visa.

The purpose of the amendment is to address integrity concerns regarding documentation and information presented by applicants for a Prospective Marriage visa in support of their claims. The amendments provide a basis for refusing to grant a Prospective Marriage visa to all applicants where they present bogus documentation or information that is false or misleading has been presented by a primary or secondary applicant.

**Schedule 6 – Amendments relating to permanent employer sponsorship**

***Migration Regulation 1994***

Item 1 – At the end of paragraph 5.19(3)(b)

This item inserts subparagraph 5.19(3)(b)(iii) in Division 5.3 of Part 5 to the Principal Regulations.

Subparagraph 5.19(3)(b)(iii) is an additional criterion that must be satisfied in order for a nomination of a position in Australia to be approved. The additional criterion provides that the nominator did not, as the standard business sponsor referred to in subparagraph 5.19(3)(b)(i), meet paragraph 2.59(h), paragraph 2.68(i) or regulation 1.20DA in the most recent approval as a standard business sponsor.

The permanent employer sponsored visa program (‘PES visa program’) allows employers to sponsor foreign workers for permanent residence to fill genuine vacancies in their Australian business. The PES visa program benefits Australian employers who have longer term employment requirements to recruit highly skilled workers from overseas.

The Temporary Residence Transition stream (‘TRT stream’), as part of the PES visa program, is a simplified pathway from Australia’s principal temporary work visa category, the Subclass 457 (Temporary Work (Skilled)) visa (‘Subclass 457 visa’) to permanent residence. The TRT stream allows an approved standard business sponsor to nominate an employee, who is a holder of a Subclass 457 visa and has worked for the employer for   
two years (within the previous three years), for a permanent position.

Presently, a business operating outside of Australia may establish a branch of the business in Australia, and obtain an Australian Recognised Business Number. By doing so, the overseas business can satisfy the requirement of ‘actively and lawfully operating a business in Australia’ to be able to nominate an employee for permanent employment under the TRT stream. It is inconsistent with the intention of the PES visa program that an overseas business should be able to nominate foreign workers for permanent residence in Australia.

New subparagraph 5.19(3)(b)(iii) addresses this by inserting a requirement that the nominator, did not, as the standard business sponsor for the nomination of a holder of a Subclass 457 visa, meet paragraph 2.59(h), paragraph 2.68(i) or regulation 1.20DA in their most recent approval as a standard business sponsor.

Paragraphs 2.59(h) and 2.68(i) provide for the criteria for approval as a standard business sponsor or for approval to vary the terms of an approval as a standard business sponsor where the primary employer is a business outside of Australia. Before 14 September 2009   
regulation 1.20DA provided for the approval of an overseas business as a standard business sponsor.

The effect of the new subparagraph 5.19(3)(b)(iii) is to ensure that, where an overseas business, as an approved standard business sponsor, nominates the holder of a Subclass 457 visa under the TRT stream, that nomination cannot be approved. The purpose of this is to ensure that only a standard business sponsor approved as lawfully operating a business in Australia would be able to nominate a Subclass 457 visa holder for permanent residence.

Item 2 – Paragraph 186.234(2)(b)

This item amends paragraph 186.234(2)(b) of Schedule 2 to the Principal Regulations.

This item amends paragraph 186.234(2)(b) so that it provides that 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. Previously, that paragraph only provided that the applicant has been employed in the occupation for at least 3 years.

Previously, the absence of a skill level and full time requirement can allow applicants who had worked part time for 3 years, or who did not have the previous experience to perform the duties of the occupation, such as work as an apprentice, trainee, assistant or other developmental role, to be able to meet the three year relevant work experience requirement to be granted a Subclass 186 (Employer Nomination Scheme) visa (‘Subclass 186 visa’).

The purpose of the amendment is to support the objective of the Employer Nomination Scheme visa program as being a highly skilled program for highly skilled non-citizens by ensuring that an applicant for a Subclass 186 visa not only has the qualifications for the nominated occupation, but the capabilities and experience to fill the role.

**Schedule 7 – Amendments relating to Public Interest criterion 4020**

***Migration Regulation 1994***

Items 1-25, 27-39, 41-51, 53-69 and 71-76 of Schedule 2

These items insert PIC 4020 into each of the provisions of Schedule 2 to the Principal Regulations listed below.

Each of the provisions listed in the table below are criteria to be satisfied by a visa applicant at the time of decision. The PIC 4020 allows a visa application to be refused following the providing of information that is false or misleading in a material particular.

The PIC 4020 provides that:

* There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
* the application for the visa; or
* a visa that the applicant held in the period of 12 months before the application was made.
* The Minister is satisfied that during the period:
* starting 3 years before the application was made; and
* ending when the Minister makes a decision to grant or refuse the application;
* the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
* To avoid doubt, subclauses (1) and (2) whether or not the Minister become aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
* The Minister may waive the requirements of any or all the paragraphs (1)(a) or (b) and subclass (2) if satisfied that:
* compelling circumstances that affect the interest of Australia; or
* compassionate or compelling circumstances that affect the interests of an Australian Citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

* In this clause,

***information that is false or misleading in a material particular*** means information that is:

* false or misleading at the time it is given; and
* relevant to any of the criteria that Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

The provisions being amended are as follows:

| *Item* | *Provisions* | *Visa Subclass* |
| --- | --- | --- |
|  | In Schedule 2 of the Regulations |  |
| 1  2  3 | Paragraph 100.222(a)  Paragraph 100.224(1)(a)  Paragraph 100.322(a) | Subclass 100 Partner |
| 4  5  6 | Paragraph 101.223(a)  Paragraph 101.227(1)(a)  Paragraph 101.323(a) | Subclass 101 Child |
| 7  8  9 | Clause 102.223  Sub-clause 102.226(1)  Clause 102.323 | Subclass 102 Adoption |
| 10  11  12 | Paragraph 103.224(a)  Paragraph 103.227(1)(a)  Paragraph 103.323(a) | Subclass 103 Parent |
| 13  14  15 | Clause 114.223  Paragraph 114.226(1)(a)  Paragraph 114.323(a) | Subclass 114 Aged Dependant Relative |
| 16  17  18 | Paragraph 115.223(a)  Paragraph 115.226(1)(a)  Paragraph 115.323(a) | Subclass 115 Remaining Relative |
| 19  20  21 | Paragraph 116.223(a)  Paragraph 116.226(1)(a)  Paragraph 116.323(a) | Subclass 116 Carer |
| 22  23  24 | Clause 117.223  Sub-clause 117.225(1)  Clause 117.323 | Subclass 117 orphan relative |
| 25  27 | Paragraph 143.224(a)  Paragraph 143.323(a) | Subclass 143 Contributory Parent |
| 28  29  30 | Paragraph 173.224(a)  Paragraph 173.226(a)  Clause 173.328 | Subclass 173 Contributory Parent (Temporary) |
| 31  32 | Paragraph 300.226(1)(a)  Paragraph 300.323(a) | Subclass 300 Prospective Marriage |
| 33  34  35 | Paragraph 309.225(a)  Paragraph 309.228(1)(a)  Paragraph 309.323(a) | Subclass 309 Partner (Provisional) |
| 36  37  38 | Paragraph 445.225(a)  Paragraph 445.227(1)(a)  Paragraph 445.324(a) | Subclass 445 Dependent Child |
| 39 | Paragraph 461.223(a) | Subclass 461 New Zealand Citizen Family Relationship (Temporary) |
| 41  42 | Clause 801.226  Clause 801.325 | Subclass 801 Partner |
| 43  44  45  46 | Paragraph 802.223(a)  Paragraph 802.224(1)(a)  Subparagraph 802.226A(2)(a)(ii)  Clause 802.326 | Subclass 802 Child |
| 47  48  49  50  51 | Clause 804.225  Subclause 804.226(1) (table, paragraph (a) in item 1)  Subclause 804.226(1) (table, paragraph (a) in item 2)  Clause 804.322 (table, paragraph (a) in item 1)  Clause 804.322 (table, paragraph (a) in item 2) | Subclass 804 Aged Parent |
| 53  54 | Clause 820.226  Clause 820.326 | Subclass 820 Partner |
| 55  56  57 | Paragraph 835.223(a)  Paragraph 835.224(1)(a)  Paragraph 835.322(a) | Subclass 835 Remaining Relative |
| 58  59  60 | Paragraph 836.223(a)  Paragraph 836.224(1)(a)  Paragraph 836.322(a) | Subclass 836 Carer |
| 61  62  63 | Clause 837.223  Subclause 837.224(1)  Clause 837.322 | Subclass 837 Orphan Relative |
| 64  65  66 | Clause 838.223  Paragraph 838.224(1)(a)  Paragraph 838.322(a) | Subclass 838 Aged Dependant Relative |
| 67  68  69  71 | Clause 864.223 (table, item 1)  Clause 864.223(table, paragraph (a) in item 2)  Paragraph 864.224(a)  Paragraph 864.323(a) | Subclass 864 Contributory Aged Parent |
| 72  73  74  75  76 | Clause 884.224 (table, paragraph (a) in item 1)  Clause 884.224 (table, paragraph (a) in item 2)  Clause 884.226 (table, paragraph (a) in item 2)  Clause 884.226 (table, paragraph (a) in item 2)  Clause 884.328 | Subclass 884 Contributory Aged Parent (Temporary) |

The effect of the amendments is that all applicants for a Family Stream visa must satisfy PIC 4020 to be eligible for the grant of the visa they applied for. In addition, it would be a criterion for an applicant seeking to satisfy the primary criteria for the grant of a Family Stream visa that each member of the family unit of the applicant who is also applying for that visa must satisfy PIC 4020.

The purpose of the amendment is to address integrity concerns regarding documentation and information presented by applicants for a Family Stream visa in support of their claims. The amendments provide a basis for refusing to grant a Family stream visa to all applicants where bogus documentation or information that is false or misleading has been presented by a primary or secondary applicant.

Item 26 – After clause 143.225 of Schedule 2

This item inserts clause 143.225A into Part 143 of Schedule 2 to the Principal Regulations.

Clause 143.225A provides that each member of the family unit of the applicant who is an applicant for a Subclass 143 visa is a person who satisfies PIC 4020.

The purpose of the amendment is to provide that, for each applicant who seeks to satisfy the primary criteria for the grant of a Subclass 143 visa, each member of their family unit who is also an applicant must also satisfy PIC 4020 at the time of decision of the applicant’s Subclass 143 visa application. This amendment is intended to address integrity concerns regarding documentation and information presented by applicants by providing a basis for refusing to grant a Subclass 143 visa to applicants where bogus documentation or information that is false or misleading has been presented by a primary or secondary applicant.

Item 40 – After paragraph 801.224(1)(b) of Schedule 2

This item inserts paragraph 801.224(1)(c) into Part 801 of Schedule 2 to the Principal Regulations.

Paragraph 801.224(1)(c) provides that each member of the family unit of the applicant who is an applicant for a Subclass 801 visa is a person who satisfies public interest criterion 4020.

Previously, subclause 801.224(1) provided, as a criterion that must be satisfied for each applicant who seeks to satisfy the primary criteria for the grant of a Subclass 801 visa, for the PIC that each member of the family unit of the applicant who is an applicant for a Subclass 801 visa must satisfy.

The public interest criteria are set out in Schedule 4 to the Principal Regulations and they relate to matters reflecting the general public interest. They include interests such as health, character, national security and Australia’s foreign policy interests.

The purpose of the amendment is to provide that, for each applicant who seeks to satisfy the primary criteria for the grant of a Subclass 801 visa, each member of their family unit who is also an applicant, must also satisfy PIC 4020 at the time of decision of the applicant’s Subclass 801 visa application. This amendment is intended to address integrity concerns regarding documentation and information presented by applicants by providing a basis for refusing to grant a Subclass 801 visa to applicants where bogus documentation or information that is false or misleading has been presented by a primary or secondary applicant.

Item 52 – After paragraph 820.224(1)(b) of Schedule 2

This item inserts paragraph 820.224(1)(c) into Part 820 of Schedule 2 to the Principal Regulations.

Paragraph 820.224(1)(c) provides that each member of the family unit of the applicant who is an applicant for a Subclass 801 visa is a person who satisfies PIC 4020.

Previously, subclause 820.224(1) provided, as a criterion that must be satisfied for each applicant who seeks to satisfy the primary criteria for the grant of a Subclass 820 visa, for the public interest criteria that each member of the family unit of the applicant who is an applicant for a Subclass 820 visa must satisfy.

The public interest criteria are set out in Schedule 4 to the Principal Regulations and they relate to matters reflecting the general public interest. They include interests such as health, character, national security and Australia’s foreign policy interests.

The purpose of the amendment is to provide that, for each applicant who seeks to satisfy the primary criteria for the grant of a Subclass 820 visa, each member of their family unit who is also an applicant, must also satisfy PIC 4020 at the time of decision of the applicant’s Subclass 820 visa application. This amendment is intended to address integrity concerns regarding documentation and information presented by applicants by providing a basis for refusing to grant a Subclass 820 visa to applicants where bogus documentation or information that is false or misleading has been presented by a primary or secondary applicant.

Item 70 – After clause 864.224 of Schedule 2

This item inserts clause 864.224A into Part 864 of Schedule 2 to the Principal Regulations.

Clause 864.224A provides that each member of the family unit of the applicant who is an applicant for a Subclass 864 visa is a person who satisfies PIC 4020.

The purpose of the amendment is to provide that, for each applicant who seeks to satisfy the primary criteria for the grant of a Subclass 864 visa, each member of their family unit who is also an applicant, must also satisfy PIC 4020 at the time of decision of the applicant’s Subclass 864 visa application. This amendment is intended to address integrity concerns regarding documentation and information presented by applicants by providing a basis for refusing to grant a Subclass 864 visa to applicants where bogus documentation or information that is false or misleading has been presented by a primary or secondary applicant.

**Schedule 8 – Amendments relating to fees**

Item 1 – Paragraph 2.08A(1)(a)

This item inserts the words “, including Schedule 1 as it applies in relation to a particular class of visa,” after the reference to “Schedule 1” in paragraph 2.08A(1)(a) of Division 2.2 of Part 2 of the Principal Regulations.

The new paragraph 2.08(1)(a) ensures that applicants who wish to make a combined application under regulation 2.08A are able to do so even though the visa subclass for which they are intending to make an application has been repealed since the original applicant made their application.

Item 2 – Regulation 2.08A (note)

This item inserts a note at the end of regulation 2.08A in Part 2 of the Principal Regulations which explains that certain transitional provisions have provided that, even where a visa subclass has been repealed, certain Schedule 1 provisions continue to apply for the purposes of combined applications made under regulation 2.08A.

The new note at the end of regulation 2.08A clarifies that combined applications can be made under regulation 2.08A, as permitted by a former Schedule 1 provision, despite the repeal of the visa subclass.

The item also re-inserts the existing note relating to regulation 2.07AL and regulation 2.08AA in order to provide numbering for the two notes.

Item 3 – Subregulation 2.12C(4) (note 2)

This item inserts a note after subregulation 2.12C(4) in Part 2 of the Principal Regulations to provide that the amount of the additional applicant charge varies according to the visa involved and that the amount is set out either in Schedule 1 or in subregulation (4A).

The new note at the end of subregulation 2.12C(4) provides that the additional applicant charge may be set out either in the relevant Schedule 1 provision or in the instrument under subregulation 2.12C(4A). It is intended that the instrument under subregulation 2.12C(4A) list the additional applicant charge for repealed visas.

Item 4 – After subregulation 2.12C(4)

This item inserts a new subregulation 2.12C(4A) into Part 2 of the Principal Regulations to allow the Minister to set additional applicant charges for visas of a class as set out in an instrument.

New subregulation 2.12C(4A) sets out what the additional applicant charge is for an eligible family member who is being added to an application after it has been made but before it has been decided and where the visa subclass has been repealed since the primary application was made. In such cases, where the visa subclass has been repealed, the additional applicant charge will be set out in an instrument under this subregulation.

**Schedule 9 – Amendments relating to health requirements**

Items 1 and 2 – Schedule 2, paragraph 576.223(a) and paragraph 576.323(a)

This amendment omits public interest criterion 4005 (‘PIC 4005’) and inserts public interest criterion 4007 (‘PIC 4007’) in paragraph 576.223(a) and paragraph 576.323(a) of Schedule 2 to the Principal Regulations.

Previously, to be granted a Subclass 576 (AusAID or Defence Sector) visa (‘Subclass 576 visa’), an applicant, whether required to satisfy the primary or secondary criteria, was required to meet the health requirements in PIC 4005 in Schedule 4 to the Principal Regulations. One of those health requirements is that the applicant:

* is free from a disease or condition in relation to which:
  + a person who has it would be likely to:
    - require health care or community services; or
    - meet the medical criteria for the provision of a community service

during the period described; and

* + the provision of the health care or community services would be likely to:
    - result in significant cost to the Australian community in the areas of health care and community services; or
    - prejudice the access of an Australia citizen or permanent resident to health care or community services.

The PIC 4007 has exactly the same health requirements as PIC 4005 but includes the ability that the Minister may waive the health requirements related to cost and access to health care or community services if:

* the applicant satisfies all other criteria for the grant of the visa applied for; and
* the Minister is satisfied that the granting of the visa would be unlikely to result in:
  + undue cost to the Australian community; or
  + undue prejudice to the access to health care or community services of an Australian citizen or permanent resident.

This waiver provision allows for an applicant’s individual circumstances to be taken into account when considering whether or not they satisfy PIC 4007. This is because, as held by in the Federal Court in *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1626, the health requirement to do with costs and access to health care or community services is to be considered by reference to a hypothetical person who suffers from that form or level of the condition.

Previously, PIC 4005 was the relevant criterion for the grant of a Subclass 576 visa. This means that, for a Subclass 576 visa applicant who did not meet this health requirement, their visa application must have been refused, even if they were a scholarship recipient and if they were to receive support from Australia Agency for International Development (‘AusAID’) or the Department of Defence for the provision of health care or community services.

The effect of the amendments in item [1] and [2] is to replace the health criterion in PIC 4005 with the health criterion in PIC 4007 for both primary criteria and secondary criteria for the grant of a Subclass 576 visa.

The existence of a waiver regarding the significant cost and prejudice to access requirements provides an opportunity for the Minister to consider, amongst other things, the support an applicant for a Subclass 576 visa will receive from AusAID or Department of Defence if the applicant is found to have a disease or condition that may result in significant cost or prejudice access to health care or community services.

**Schedule 10 – Amendments made by the *Migration Legislation Amendment Regulation 2013 (No. 3)***

***Australian Citizenship Regulations 2007***

Item 1 – After regulation 22

This item inserts regulation 23 in Part 4 of the *Australian Citizenship Regulations 2007*.

Regulation 23 provides that the amendments of the Citizenship Regulations made by Schedule 4 to the *Migration Legislation Amendment Regulation (No. 3)* apply in relation to an application made under Division 2, 3 or 4 of Part 2 of the Act on or after 1 July 2013.

The purpose of this amendment is to make it clear to whom the amendments made by Schedule 4 to the Regulations apply.

***Migration Regulations 1994***

Item 2 – At the end of Schedule 13

This item inserts a new Part 19 at the end of into Schedule 13 to the Principal Regulations to deal with transitional arrangements in respect of amendments that are made by this Regulation.

The heading of new Part 19 is ‘Amendments made by *Migration Legislation Amendment Regulation 2013 (No. 3).*’

Clause 1901 – Operation of Schedule 1

This item inserts a new clause 1901 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1901 is ‘Operations of Schedule 1’.

Subclause 1901(1) provides that the amendments of these Regulations made by items 1 and 2 of Schedule 1 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to an application for approval as a sponsor, or for the variation of the terms of approval as a sponsor:

* made, but not finally determined, before 1 July 2013; or
* made or after 1 July 2013.

Subclause 1901(2) provides that the amendment of these Regulations made by item 3 of Schedule 1 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to a nomination under subsection 140GB(1) of the Act:

* made, but not finally determined, before 1 July 2013; or
* made on or after 1 July 2013.

Subclause 1901(3) provides that the amendment of these Regulations made by items 4 to 6 of Schedule 1 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to a person who is or was a standard business sponsor on or after 1 July 2013.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.

Clause 1902 – Operation of Schedule 2

This item inserts a new clause 1902 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1902 is ‘Operation of Schedule 2’.

Clause 1902 provides that the amendments of these Principal Regulations made by Schedule 2 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to:

(a) an application for approval as a sponsor made on or after 1 July 2013; and

(b) an application for a variation of a term of an approval made on or after 1 July 2013; and

(c) a nomination under subsection 140GB(1) of the Act made on or after 1 July 2013; and

(d) an application for a visa made on or after 1 July 2013.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.

Clause 1903 – Operation of Schedule 3

This item inserts a new clause 1903 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1903 is ‘Operation of Schedule 3’.

Subclause 1903(1) provides that the amendments of these Regulations made by item 1 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to

* a nomination under subsection 140GB(1) of the Act made on or after 1 July 2013; and
* a nomination under regulation 5.19 made on or after 1 July 2013; and
* an application for a visa made on or after 1 July 2013.

Subclause 1903(2) provides that the amendments of these Regulations made by items 2 and 3 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to an application for a visa:

* made, but not finally determined, before 1 July 2013; or
* made on or after 1 July 2013.

Subclause 1903(3) provides that the amendments of these Regulations made by item 4 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply on and after 1 July 2013.

Subclause 1904(4) provides that the amendments of these Regulations made by items 5 and 6 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No.3)* apply in relation to:

* an application for approval as a sponsor:
  + made, but not finally determined, before 1 July 2013; or
  + made on or after 1 July 2013; and
* (b) an application for a variation of a term of an approval as a sponsor:
  + made, but not finally determined, before 1 July 2013; or
  + made on or after 1 July 2013.

Subclause 1903(5) provides that the amendments of these Regulations made by items 7, 8 and 9 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to a nomination under subsection 140GB(1) of the Act.

* made, but not finally determined, before 1 July 2013; or
* made on or after 1 July 2013.

Subclause 1903(6) provides that the amendments of these Regulations made by item 10 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to a nomination under regulation 5.19 made on or after 1 July 2013.

Subclause 1903(7) provides that the amendments of these Regulations made by items 11 to 20 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to an application for a visa:

* made, but not finally determined, before 1 July 2013; or
* made on or after 1 July 2013.

Subclause 1903(8) provides that the amendments of these Regulations made by items 21 and 22 of Schedule 3 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to a visa that is:

* in effect on 1 July 2013; or
* granted on or after 1 July 2013.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.

Clause 1904 – Operation of Schedule 4

This item inserts a new clause 1904 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1904 is ‘Operation of Schedule 4.’

Subclause 1904 provides that the amendments made by Schedule 4 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to an application for a visa made on or after 1 July 2013.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.

Clause 1905 – Operation of Schedule 5

This item inserts a new clause 1905 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1905 is ‘Operation of Schedule 5.’

Subclause 1905 provides that the amendments made by Schedule 5 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply to an application for a visa made on or after 1 July 2013.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.

Clause 1906 – Operation of Schedule 6

This item inserts a new clause 1906 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1906 is ‘Operation of Schedule 6’.

The purpose of new subclause 1906 (1) is to provide that the amendments made by item 1 of Schedule 6 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply to an application for approval of the nomination of a position made on or after 1 July 2013; and

The purpose of new subclause 1906 (2) is to provide that the amendments made by item 2 of Schedule 6 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply to an application for a visa made on or after 1 July 2013.

Clause 1907 – Operation of Schedule 7

This item inserts a new clause 1907 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1907 is ‘Operation of Schedule 7’.

Clause 1907 provides that the amendments made by Schedule 7 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply to an application for a visa:

1. made, but not finally determined, before 1 July 2013; or
2. made on or after 1 July 2013.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.

Clause 1908 – Operation of Schedule 8

This item inserts a new clause 1908 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1908 is ‘Operation of Schedule 8’.

Clause 1908 provides that the amendments made by Schedule 8 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to a request made for the purposes of regulation 2.08A or 2.08B on or after 1 July 2013.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.

Clause 1909 – Operation of Schedule 9

This item inserts a new clause 1909 in new Part 19 of Schedule 13 to the Principal Regulations.

The title of new clause 1909 is ‘Operation of Schedule 9’.

Clause 1909 provides that the amendments made by Schedule 9 to the *Migration Legislation Amendment Regulation 2013 (No. 3)* apply in relation to an application for a visa, made on or after 1 July 2013, or made, but not finally determined, before 1 July 2013.

The purpose of this amendment is to clarify to whom the amendments in this Regulation apply.