

Date of published – 10th April 2019

OVERVIEW OF THE PROPOSED NEW VISA SCHEMES FROM NOVEMBER 2019

EXPLANATORY STATEMENT

**Issued by the Minister for Immigration, Citizenship and
Multicultural Affairs**

Migration Act 1958

*Migration Amendment (New Skilled Regional Visas)
Regulations 2019*

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

Subsection 504(1) of the Migration Act relevantly provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

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

The *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to introduce three new visas to assist regional Australia (designated regional areas) and make related amendments. At the commencement of the new regional provisional visas, it is intended that the designated regional areas, to be identified in a legislative instrument, will include all of Australia except for Sydney, Melbourne, Perth, Brisbane and the Gold Coast.

Schedule 1 to the Regulations, from **16 November 2019**:

- **Introduces the Subclass 491 Skilled Work Regional (Provisional) visa (Subclass 491)**, a new and enhanced points-tested visa to assist regional Australia, for applicants nominated by a state or territory government agency or sponsored by an eligible family member residing in a designated regional area; and
- **Closes the Subclass 489 (Skilled – Regional (Provisional) visa (Subclass 489) to primary applicants seeking to satisfy the criteria for the grant of a Subclass 489 visa in the First Provisional Visa stream. Subclass 489 is superseded by Subclass 491.**

Schedule 2 to the Regulations, from 16 November 2019:

- introduces the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa (Subclass 494), a new and enhanced employer-sponsored visa to assist regional Australia, with two streams: Employer Sponsored and Labour Agreement;
- brings employers seeking to employ foreign workers on a Subclass 494 visa under the sponsorship regime for employers in the Migration Act (Division 3A of Part 2 of the Migration Act); and
- closes the Subclass 187 (Regional Sponsored Migration Scheme) visa, except for certain transitional cohorts. Subclass 187 is superseded by Subclass 494;

Schedule 3 to the Regulations, from 16 November 2022:

- introduces a new Subclass 191 (Permanent Residence (Skilled Regional)) visa for persons who hold a Subclass 491 or a Subclass 494 visa at the time of application; and
- details eligibility criteria for the Subclass 191 visa, including that the primary applicant must:
 - hold a regional provisional visa when they apply for the Subclass 191 visa, and have held that visa for at least three years;

- have earned a minimum income for at least three years as the holder of a regional provisional visa; and
- have complied with the conditions of the regional provisional visa.

The amendments in Schedules 1 and 2 to the Regulations commence on **16 November 2019**. The amendments in Schedule 3 to the Regulations commence on 16 November 2022. The delayed commencement for Schedule 3 is because of the requirement to have held a regional provisional visa for three years before applying for the Subclass 191 visa. Eligibility will not arise before 16 November 2022.

The Regulations operate prospectively, **except for changes to the points test that apply to existing applications, but only do so in a way that is beneficial for applicants, by providing additional points**. With that exception, the **amendments do not apply to applications that have already been made, but not yet decided**, at the time the Regulations commence. The Regulations make provision for nominations relating to a Subclass 187 visa where the proposed visa applicant has not made an application before the visa closes to new applications, and cannot make an application after that date. In addition, the Regulations make provision for refunds of the nomination training contribution charge in some circumstances.

Section 17 of the *Legislation Act 2003* requires consultations which are appropriate and reasonably practicable to be undertaken. The following Commonwealth government agencies were consulted in relation to the proposed Regulations: the Department of the Prime Minister and Cabinet; the Attorney-General's Department; the Department of the Treasury; the Department of Finance; the Australian Taxation Office; the Department of Social Services; the Department of Education and Training; Austrade; the Department of Jobs and Small Business; the Department of Industry, Innovation and Science; the Department of Infrastructure, Regional Development and Cities; the Department of Agriculture and Water Resources; the Department of Health, the Department of Defence; and the Department of Human Services.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at Attachment B. Details of the Regulations are set out in Attachment C.

The Office of Best Practice Regulation (OBPR) advised that this proposal is non-regulatory/machinery in nature and has no regulatory cost (OBPR Ref ID 25045).

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

The Regulations are a legislative instrument for the purpose of the Legislation Act.

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

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

- Subsections 29(2) and 29(3), which provide that the regulations may prescribe a period during which the holder of a visa may travel to, enter and remain in Australia;
- subsection 31(1), which provides that the regulations may prescribe classes of visas;
- subsection 31(3), 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, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A);

- subsection 31(4), which provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;
- subsection 31(5), which provides that the regulations may specify that a visa is a visa of a particular class;
- subsection 40(1), which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 40(2), which provides that, without limiting subsection 40(1), the circumstances may be, or may include, that, when the person is granted the visa, the person:
 - (a) is outside Australia; or
 - (b) is in immigration clearance; or
 - (c) has been refused immigration clearance and has not subsequently been immigration cleared; or
 - (d) is in the migration zone and, on last entering Australia, was immigration cleared or bypassed immigration clearance and had not subsequently been immigration cleared;
- subsection 41(1), which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
- subsection 41(2), which provides that, without limiting subsection 41(1), the regulations may provide that a visa, or visas of a specified class, are subject to:
 - (a) 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), while he or she remains in Australia; or
 - (b) a condition imposing restrictions about the work that may be done in Australia by the holder, which, without

limiting the generality of this paragraph, may be restrictions on doing any work, work other than specified work or work of a specified kind;

- subsection 41(3), which provides that, in addition to any conditions specified under subsection 41(1), the Minister may specify that a visa is subject to such conditions as are permitted by the regulations for the purpose of subsection 41(3);
- subsection 45A, which provides that the regulations may prescribe that a non-citizen who makes an application for a visa is liable to pay a visa application charge if, assuming the charges were paid, the application would be a valid visa application;
- subsection 45B(1), which provides that the regulations may prescribe the amount of visa application charge, not exceeding the visa application charge limit;
- subsection 45B(2), which provides that the regulations may prescribe that the visa application charge in relation to an application may be nil;
- subsection 45C(1), which provides that the regulations may:
 - (a) provide that the visa application charge may be payable in instalments; and
 - (b) specify how those instalments are to be calculated; and
 - (c) specify when the instalments are payable;
- subsection 46(1), which provides that the regulations may prescribe the criteria and requirements to be satisfied for a visa application to be valid;

- subsection 46(3), which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application;
- subsection 46(4), which provides that, without limiting subsection 46(3), the regulations may prescribe:
 - (a) the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
 - (b) how an application for a visa of a specified class must be made; and
 - (c) where an application for a visa of a specified class must be made; and
 - (d) where an applicant must be when an application for a visa of a specified class is made;
- subsection 140E(1), which provides that the Minister must approve a person as a sponsor in relation to one or more classes prescribed for the purpose of subsection 140E(2) if prescribed criteria are satisfied;
- subsection 140F, which provides that the regulations may establish a process for the Minister to approve a person as a sponsor;
- section 140G, which provides that an approval as a sponsor may be on terms specified in the approval and that the terms must be of a kind prescribed by the regulations;
- subsection 140GA(1), which provides that the regulations may establish a process for the Minister to vary a term of a person's approval as a sponsor;

- subsection 140GB(3), which provides that the regulations may establish a process for the Minister to approve an approved sponsor's nomination;
- subsection 140ZM(1), which provides that a person is liable to pay nomination training contribution charge to the Commonwealth in relation to a nomination by the person under section 140GB if the nomination is a nomination of a kind prescribed by the regulations;
- subsection 140ZM(2), which provides that a person applying under the regulations, or in accordance with the terms of a work agreement, for approval of a nomination of a position in relation to the holder of, or an applicant or proposed applicant for, a visa, is liable to pay nomination training contribution charge to the Commonwealth in relation to the nomination if:
 - the visa is of a kind (however described) prescribed by the regulations; and
 - the nomination is a nomination of a kind prescribed by the regulations.
- subsection 140ZN(1), which provides that the regulations may make provision for, or in relation to, all or any of the following matters:
 - when nomination training contribution charge is due and payable;
 - the method of paying nomination training contribution charge (including the currency in which the charge must be paid);
 - the remission or refund of nomination training contribution charge;
 - the overpayment or underpayment of nomination training contribution charge;
 - the payment of a penalty in relation to the underpayment of nomination training contribution charge;

- the giving of information and keeping of records relating to a person's liability to pay nomination training contribution charge.
- paragraph 338(2)(d), which provides that the regulations may prescribe a temporary visa for the purposes of making certain decisions in relation to that visa *Part 5-reviewable decisions*;
- subsection 338(9), which provides that a decision that is prescribed for the purposes of this subsection is a *Part 5-reviewable decision*;
- paragraph 504(1)(e), which provides that regulations may be made in relation to the giving of documents to, the lodging of documents with, or the service of documents on, the Minister, the Secretary or any other person or body, for the purposes of the Act;
- subsection 504(2) which provides that section 14 of the *Legislation Act 2003* does not prevent, and has not prevented regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the regulations have taken effect; and
- subsection 506B(1) which provides that the Secretary may request any of the persons mentioned in subsection (2) (which include an applicant for, and holder or former holder of, a visa, as well as nominators and approved sponsors) to provide the tax file number of a person who is an applicant for, or holder or former holder of a visa of a kind prescribed by the regulations.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Migration Amendment (New Skilled Regional Visas) Regulations 2019

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 amends the *Migration Regulations 1994* (the Migration Regulations) with the aim of delivering skilled workers to regional Australia through two new skilled regional provisional visas, whilst ensuring that Australians have first priority for jobs. Further, the amendments introduce a new permanent visa, to be granted to holders of the two regional provisional visas (subject to satisfying the criteria).

Schedule 1 – Changes to certain skilled visas

Schedule 1 to the legislative instrument makes amendments to:

- **close the Subclass 489 (Skilled – Regional (Provisional)) visa to primary applicants for a first provisional visa;**
- introduce the Subclass 491 Skilled Work Regional (Provisional) visa, a points-tested visa for applicants sponsored by a State or Territory government agency or sponsored by a family member residing in a designated regional area;
- **amend the points test in Schedule 6D to the Migration Regulations to award:**
 - **15 points for nomination by a State or Territory government agency or sponsorship by a family member residing in regional Australia, to live and work in regional Australia;**
 - **10 points for a skilled spouse or de facto partner;**

- 10 points for certain Science, Technology, Engineering and Mathematics (STEM) qualifications;
- 5 points for a spouse or de facto partner with ‘competent English’;
- 10 points for applicants without a spouse or de facto partner; and
- make a number of minor technical amendments.

Schedule 2 – Changes to Employer Nominated visas

Schedule 2 to the legislative instrument makes amendments to:

- close the permanent Subclass 187 (Regional Sponsored Migration Scheme) visa, except for certain Subclass 457 (Temporary Work (Skilled)) visa and Subclass 482 (Temporary Skill Shortage) visa holders;
- create the Subclass 494 Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) with two streams: Employer Sponsored and Labour Agreement, for employers in regional Australia to employ skilled foreign workers; and
- bring employers seeking to employ foreign workers under the sponsorship regime under Division 3A of Part 2 of the Migration Act and Part 2A of the Migration Regulations, which includes provisions aimed at the protection of both Australian and foreign workers and at the integrity of the program.

Schedule 3 – New permanent visa

Schedule 3 to the legislative instrument makes amendments to:

- introduce a new permanent visa, the Subclass 191 (Permanent Residence (Skilled Regional)) visa (Subclass 191) from 16 November 2022;
- provide that the new Subclass 191 may only be applied for by holders of the new Subclass 491 and Subclass 494 visa;
- detail eligibility criteria for the grant of a Subclass 191 visa, including that the applicant must (for primary applicants who held a Subclass 491 or Subclass 494 visa at the time of application):

- have earned a minimum taxable income for three years as the holder of a regional provisional visa ; and
- have complied with the conditions of the regional provisional visa; in particular, including that the holder must live, work and study in a designated regional area of Australia.

The amendments made by Schedules 2 and 3 apply only in relation to applications made on or after the date of commencement. This means there is no impact on people who make a valid visa application for the Subclass 489 or Subclass 187 which is to be closed, before 16 November 2019. Subclass 489 visa holders will continue to be able to access the Subclass 887 (Skilled – Regional) visa which is the permanent pathway visa for this group, subject to satisfying existing criteria. The amendments made by Schedule 1 in relation to changes to the Schedule 6D Points Test will apply to both new applicants who apply for the Subclass 491 visa as well as applicants for a Subclass 189, 190 and 489 who are yet to be assessed under the Points Test. The changes to the points test however are beneficial – no applicant with a pending application will be adversely affected because the changes provide for the award of additional points.

Human rights implications

The amendments have been assessed against the seven core treaties to which Australia is a party. The human rights implications are detailed below, with a focus on the amendments that represent a substantive change from current arrangements for the equivalent visas.

Right to work, rights in work and non-discrimination – Subclass 491 (Skilled Work Regional (Provisional) and Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa

Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 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.

Article 7 provides:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8(1)(a) provides:

The States Parties to the present Covenant undertake to ensure the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.

Article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides:

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 2 (2) of the ICESCR reflects the provision relating to discrimination in article 2(1) of the ICCPR:

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

Article 26 of the ICCPR provides:

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

In continuing to impose various visa requirements on persons seeking to migrate to Australia under the skilled migration program, the amendments in this Legislative Instrument engage the above rights to non-discrimination, including, for those persons who are already in Australia, as they relate to the right to work.

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

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

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), UNCESCR has stated (at 13) that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

Neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking residence or employment. The UN Human Rights Committee, in its General Comment 15 on the position of aliens under the Covenant, stated that:

The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does so on the basis of reasonable and objective criteria. The aim of the skilled migration program is to maximise the benefits of skilled entrants to the Australian economy. This includes channelling provisional

skilled migrants into occupations that have been identified to be in the long term strategic interest of the economy in regional Australia and awarding a greater number of points to those who are likely to make the greatest economic contribution. Australia sets the requirements for the entry and conditions of stay for skilled migrants on the basis of reasonable and objective criteria formulated through labour market analysis and stakeholder consultation.

Further, 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 of the Australian Government to grant provisional visas for five years and the authority to place conditions and limitations on non-citizens in respect of those visas, including their work rights, is lawful as a matter of domestic law and has as its objectives ensuring the continued access of Australian citizens and permanent residents to paid employment and the continued integrity of Australia's migration program. **The measures in this Legislative Instrument are intended to ensure that persons who are already in Australia permanently are given the opportunity to seek work before those seeking to enter Australia to work and live in Australia on a provisional basis. Providing Australian citizens and permanent residents with the first priority for jobs ensures that Australians are provided the opportunity to improve their standard of living and promotes their right to work. Broadly speaking, access to such opportunities promotes social stability. As such, they are for the "purpose of promoting the general welfare in a democratic society" and are justified in accordance with Article 4 of ICESCR.**

For example, the new subclass 491 and Subclass 494 visas include requirements related to the skills of applicants and the type of jobs they can be nominated for (if the visa has a requirement to be nominated by an employer), age, English language and work experience requirements and requirements that the relevant

occupation be on a list of regional skills in long-term need and meet minimum salary levels. These requirements generally reflect the current requirements for the equivalent visas and are reasonable and proportionate to ensure that Australia's skilled migration programs continue to operate with integrity and support Australia's economic needs, as well as helping ensure that the visa applicant has the necessary skills to function effectively in their job and receive fair and appropriate remuneration.

The amendments introduce a revised points system for the subclass 491 visa as well as existing General Skilled Migration visas. Points are awarded for attributes that are linked with the applicant's ability to make the greatest economic contribution, as the key purpose of the skilled migration program is to maximise the economic benefits of migration to Australia. The changes to the points test are to introduce:

- more points for having a skilled spouse or de facto partner (10 points);
- more points for applicants nominated by a State or Territory government or sponsored by a family member residing in regional Australia (15 points);
- more points for having certain STEM qualifications (10 points);
- points for applicants who do not have a spouse or de facto partner (10 points); and
- points for applicants with a spouse or de facto partner who has competent English (5 points).

The additional points for skilled spouses or de facto partners build on a recommendation of the Productivity Commission in its 2016 Report called *Migrant Intake into Australia*. The Productivity Commission recommended (at p.435) that the points system be amended so that secondary applicants with skills and other desirable employment-related characteristics contribute significantly to the points score of the primary applicant. **The Commission noted that around 50 per cent of Australia's permanent skill intake are secondary applicants, many of whom have limited skills.** Given the significant share of secondary

applicants in the permanent skill stream immigration, the Productivity Commission stated that it is important to assess their contribution to the Australian economy and the community more generally as failing to give appropriate weight to the skill (and other) attributes of a spouse or de facto partner can shift the composition of immigration away from those that are most likely to benefit Australia (at p.454).

The Commission also noted that English proficiency is a key factor affecting the labour market success of migrants and their integration into Australian society more broadly. The Department's Continuous Survey of Australia's Migrants also identifies that the ability to speak English fluently is an important pre-requisite for finding work in Australia. Awarding five points to primary applicants whose spouse or de facto partner has Competent English at the time of invitation but are otherwise ineligible for spouse or de facto partner skills points will incentivise secondary applicants to acquire Competent English prior to migration. The additional points will raise the overall English proficiency of secondary skilled migrants and improve their economic outcomes.

The additional points for single applicants will ensure a single person with identical skills to a primary applicant who has a skilled spouse or de facto partner will not be displaced in the points test. This measure is based on a recommendation from *Migrant Intake into Australia*. The extra points for partners with competent English incentivise couples as a unit to improve their English competency in order to be more competitive in points test rankings. The additional points ensure Australia is able to select the best and brightest skilled migrants for its valuable migration places – single or partnered.

This will ensure that primary applicants without a partner (singles) will be ranked equally to other primary applicants who have the same human capital attributes. If all other points claims are equal, invitations for points tested visas will be ranked by the Migration Points Test as described below:

- First – primary applicants with a skilled spouse or de facto partner

- Equal First – primary applicants without a spouse or de facto partner
- Second - Primary applicants with a spouse or de facto partner who can demonstrate competent English but does not have the skills for skilled partner points (age and skills)
- Third - Primary applicants with a partner who is ineligible for either competent English or Skilled partner points. These applicants will be ranked below all other cohorts, if all other points claims are equal.

Additional points for certain STEM qualifications are also in line with the findings of *Migrant Intake into Australia* and are designed to address a STEM skills shortage in Australia. STEM skills are needed for Australia's future productivity, innovation and economic success. Australia's Office of the Chief Scientist has published multiple reports on the need for a workforce strong in STEM skills. Its 2013 report noted that 'Australia will benefit most if there is a widespread and general STEM literacy throughout the community, complementing the deep expertise of STEM practitioners. Many countries are relying on their STEM enterprise and its quality to build knowledge based communities and economies. Australia must do the same.' (source: Office of the Chief Scientist, "Science, Technology, Engineering, and Mathematics in the National Interest: A Strategic Approach", A Position Paper, July 2013).

Awarding additional points for certain points-tested migrants, who are nominated by a State or Territory Government agency or sponsored by an eligible family member to live and work in a designated regional area, is designed to enhance regional economic development and help those communities to grow.

These measures are reasonable and proportionate to achieving the legitimate aims explained above and are therefore a permissible differentiation in the exercise of the right to work by non-citizens seeking to enter and work in Australia, compared to Australian citizens and permanent residents.

The scope of the right to work and rights in work is to assure individuals their right to freely choose and accept work. It should also be protected by providing the worker with just and favourable conditions of work, particularly in relation to safe working conditions.

The new Subclass 491, Subclass 494 and Subclass 191 visas give holders the right to work in Australia. Upon undertaking work with an employer in Australia, they are subject to the protections of Australian conditions and awards, and have the right to form and join trade unions, consistently with Article 8 of the ICESCR. While the Government does not direct the recruitment practices of companies, these practices must satisfy Australian equal opportunity and non-discrimination laws. Holders of work visas are subject to the same workplace laws, entitlements, and protections as Australian citizens and permanent residents. The Fair Work Ombudsman (FWO) enforces these protections and monitors the compliance of employers with Australian workplace law.

A number of the features of the new Subclass 494 visa ensure that holders of this visa enjoy fair conditions of work and are protected from exploitation by their sponsoring employer. These include the sponsorship obligations framework (under Division 3A of Part 2 of the Migration Act and Part 2A of the Migration Regulations), and the annual market salary rate, which helps ensure that a visa applicant receives remuneration and employment conditions that are at least equivalent to what is, or would be, provided to an Australian worker performing the same work at the same location. Should a Subclass 494 visa holder cease their employment, they are provided with a grace period of 90 days to find another employer sponsor and be nominated. These measures promote the right to fair conditions of work under Article 7 of the ICESCR.

Non-discrimination – permanent residence visa

There is no general right for a non-citizen in Australia to remain in Australia on a permanent basis. However, noting the economic and social benefits of a migration program, Australia provides non-citizens who meet the relevant requirements the opportunity to remain in Australia on a permanent basis. These requirements are set on the

basis of reasonable and objective criteria aimed at ensuring the continued benefits of migration to Australian society. The new subclass 191 visa replicates many existing general requirements for permanent residence, and for most other visas, including security, health and character requirements.

An income requirement for primary applicants holding Subclass 491 and subclass 494 visas is included for the Permanent Residence visa to ensure the economic objectives of these visas are maintained. **This will require a primary applicant to submit evidence of their minimum taxable income for least 3 income years. The applicant's minimum taxable income for three years must be no less than the minimum amount specified by the Minister in a legislative instrument.**

The salary threshold will be determined by the Minister and is intended to be used as an indicator that an occupation is skilled and that the visa holder has the capacity to make a strong economic contribution to Australia in the future. Requiring evidence of taxable income provides clear evidence of their contribution to Australia's income tax system. This is consistent with the economic objectives of Australia's migration program.

Regional provisional visas are valid for five years and the income requirement should be met for three out of those five years. This means that people who may not be earning income the entire time due to illness, injury, or any other circumstances, will still have reasonable time to satisfy this criterion.

Right to freedom of movement

Holders of the new regional provisional visas will be subject to visa condition 8579, requiring the visa holder to live, work and study in regional Australia. If a visa holder chooses not to reside in regional Australia, this may result in cancellation of their visa. In addition, for a Subclass 191 visa to be granted to an applicant who held a regional provisional visa that was subject to condition 8579, the applicant must have complied with the condition.

Article 12(1) of the ICCPR provides that:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

As noted earlier the UNHRC has stated that ‘consent for entry [of aliens] may be given subject to conditions relating, for example, to movement, residence and employment’ (General Comment 15).

The new regional provisional visas are subject to a condition that requires visa holders, who have chosen to migrate to Australia on the basis of being nominated by a State or Territory government agency or sponsored by a family member residing in a designated regional area, to live, work and study in a designated regional area. **They will be required to live, work, and study (where relevant) in designated regional areas in any State or Territory.** The purpose of this requirement is to promote economic development in regional communities. The regional component of the regional provisional visas is designed to encourage persons to choose to settle in a designated regional area by offering extra points that assist the person with meeting visa eligibility requirements.

The amendments also limit regional provisional visas holders from being granted any permanent skilled migration visa unless they have held their regional provisional visa for at least three years. The purpose of this amendment is to ensure that people who apply for a regional provisional visa, and thereby agree to be subject to condition 8579, stay in a designated regional area, rather than moving to an urban centre.

It is reasonable to impose the requirement to live, work and study in any designated regional area of Australia, and prevent access to other skilled migration visas in the interests of supporting population growth and economic development in regional communities. **It is intended that a designated regional area will be any part of Australia excluding Sydney, Melbourne, Brisbane and the Gold Coast, and Perth.**

It is important to note that visa holders who have condition 8579 imposed on their visas are free to travel throughout Australia without

restriction. They may live in any State or Territory of Australia provided that the location is classified as a designated regional area. Further, these visa holders will have chosen to apply for this visa on the basis of a regional State or Territory nomination or regional sponsorship by a family member and in full knowledge that condition 8579 will be imposed and that they cannot access other skilled migration visas for at least three years. Cancellation for breach of this condition is discretionary and would take into account the individual circumstances of the case. These may include the reason for the person moving to an urban area, the extent of compliance with other visa conditions, the degree of hardship that may be caused to a visa holder, whether there are extenuating circumstances, and other relevant matters.

Persons who choose to migrate also have the future benefit of being able to access permanent residence if they have continued to live, work and study in a designated regional area while holding a regional provisional visa. This does not force people to remain in a particular area, but provides a benefit if they have lived, worked and studied in any area classified as a regional area for the relevant period of time. Hence, the amendments to the regulations requiring holders of regional provisional visas to live, work and study in regional Australia are compatible with Article 12 of the ICCPR.

Child and family rights

Article 2 (1) of the Convention on the Rights of the Child (CRC) provides:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Article 3(1) of the Convention on the Rights of the Child (CRC) provides:

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.

Article 10(1) of the CRC provides:

In accordance with the obligation of States Parties under article 9, paragraph 1, 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. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

Article 10(1) of the CRC provides:

No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

Articles 17(1) and (2) of the ICCPR provide that:

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
- 2. Everyone has the right to the protection of the law against such interference or attacks.*

Articles 23(1) and (2) of the ICCPR provide that:

- 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
- 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.*

The scope of the right to respect for the family and the right to freedom from interference with the family requires countries to adopt legislative, administrative and other measures to protect families, and

to refrain from arbitrary interference in families. The obligations under the CRC include the obligation to treat the best interests of the child as a primary consideration and to treat applications for reunification of children with their parents in a positive, humane and expeditious manner. However, none of these obligations guarantee a right of entry or reunification in Australia for non-citizens.

The visa subclasses introduced by these amendments have a range of provisions to allow families to remain together, in a similar way to the visas they are replacing, when migrating in Australia and to cater to the particular situation of children at the permanent residence stage.

Both the Subclass 491 and Subclass 494 visas enable members of the family unit to make a visa application at the same time as the primary applicant. They are also able to lodge a valid visa application, after the primary applicant makes his or her application, provided the primary applicant's visa application has not been refused. Applications may also be made after the primary applicant has been granted a Subclass 491 or Subclass 494 visa, provided that person continues to hold a Subclass 491 or a Subclass 494 visa. Both Subclass 491 and Subclass 494 visas are granted for 5 years from the date of grant to primary applicants. Secondary applicants granted a Subclass 491 or Subclass 494 visa are granted a visa aligning to the end date of the primary applicant's visa. This allows the members of the family unit of a skilled primary applicant to migrate to Australia at the same time, or to join the primary applicant during the validity period of the visa.

The application requirements for Subclass 191 require family members to make a combined application with the primary applicant. This enables spouses and de facto partners and children to remain with their family members in Australia on a permanent basis (provided that visa criteria are satisfied).

Hence, the amendments to the regulations are consistent with the rights relating to families and children in the ICCPR and the CRC.

Conclusion

The legislative instrument is compatible with human rights because, to the extent that it may limit some human rights, those limitations are reasonable, necessary and proportionate.

The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT C

Details of the *Migration Amendment (New Skilled Regional Visas) Regulations 2019*

Section 1 – Name

This section provides that the name of the instrument is the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (the Regulations).

Section 2 – Commencement

This section provides that:

- the amendments made by Schedule 1 and 2 to the Regulations commence on 16 November 2019; and
- the amendments made by Schedule 3 to the Regulations commence on 16 November 2022.

Section 3 – Authority

This section provides that the Regulations are made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

This section provides that each instrument 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 effect of this section is that the *Migration Regulations 1994* (the Migration Regulations) are amended as set out in the applicable items in the Schedules to the Regulations.

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

Schedule 1 – Amendments relating to the Skilled Work Regional (Provisional) visa

Migration Regulations 1994

Item 1 – Regulation 1.03

This item inserts a new definition of *designated regional area* in regulation 1.03. *Designated regional area* is defined to mean a part of Australia specified in an instrument under new regulation 1.15M.

Item 2 – Regulation 1.03 (definition of *General Skilled Migration visa*)

This item amends the definition of *General Skilled Migration visa* in regulation 1.03 to include the new Subclass 491 (Skilled Work Regional (Provisional)) visa as a General Skilled Migration visa.

Item 3 – At the end of Division 1.2 of Part 1

This item inserts a new regulation 1.15M (Designated regional area). New regulation 1.15M operates in conjunction with the definition of *designated regional area* in regulation 1.03 (see above). A *designated regional area* is a part of Australia specified in an instrument made under regulation 1.15M. New regulation 1.15M provides that the Minister may, by legislative instrument, specify a part of Australia to be a designated regional area.

Providing for the Minister to make a legislative instrument specifying a part or parts of Australia to be a designated regional area allows flexibility to specify parts of Australia for the purposes of the definition, in response to factors such as changing economic, labour market and demographic conditions. At the commencement of the new regional provisional visas it is intended that the designated regional areas will include all of Australia except for Sydney, Melbourne, Perth, Brisbane and the Gold Coast.

Item 4 – Paragraph 1.20(2)(a)

This item inserts a reference to the new Skilled Work Regional (Provisional)(Class PS) visa in paragraph 1.20(2)(a).

The effect of this amendment is that the obligations of a family member who sponsors an applicant for a new Subclass 491 (Skilled Work Regional (Provisional)) visa are the obligations set out in paragraph 1.20(2)(a). The sponsor's obligations to the visa applicant are to undertake to assist the applicant to the extent necessary, financially, in relation to accommodation, and in relation to participation in English language classes provided under the Adult Migrant English Program, for a period of 2 years after the person is granted the visa or first enters Australia as holder of the visa.

Item 5 – Subregulation 1.20(3)

This item inserts a reference to the new Skilled Work Regional (Provisional)(Class PS) visa in subregulation 1.20(3).

The effect of this amendment is to provide for how a family member who sponsors an applicant for a Subclass 491 (Skilled Work Regional (Provisional)) visa must enter into the sponsorship.

Item 6 – Subregulation 2.06AAB(1) (after table item 14)

This item inserts a new item 14A in the table in subregulation 2.06AAB(1). New item 14A refers to a Subclass 491 (Skilled Work Regional (Provisional)) visa.

Regulation 2.06AAB prescribes the visas for which holders and certain former holders of safe haven enterprise visas may make a valid application under subsection 46A(1A) of the Migration Act. The effect of this amendment is that an unauthorised maritime arrival who holds a safe haven enterprise visa, or who is a lawful non-citizen who has ever held a safe haven enterprise visa, may make a valid application for a Subclass 491 (Skilled Work Regional (Provisional)) visa, subject to meeting the requirements prescribed in new item 1241 of Schedule 1 to the Migration Regulations.

Item 7 – Subparagraph 2.08B(1)(a)(xiii)

This item makes a technical amendment consequential to the amendment made by the following item.

Item 8 – At the end of paragraph 2.08B(1)(a)

This item inserts a new subparagraph (xiv) in paragraph 2.08B(1)(a). New subparagraph (xiv) adds a reference to the new Skilled Work Regional (Provisional)(Class PS) visa in subregulation 2.08B(1).

Regulation 2.08B provides for dependent children of primary applicants for temporary visas to which the regulation applies to be added to the primary applicant's application as additional (secondary) applicants, up until the time the primary application is decided. This amendment applies the provision to an application for the new Skilled Work Regional (Provisional)(Class PS) visa.

Item 9 – Regulation 2.26AC (heading)

This regulation inserts a reference to new Subclass 491 in the heading of regulation 2.26AC.

This amendment is consequential to the amendments made by the following items, which apply the points test in Schedule 6D to the Migration Regulations to an application for a new Subclass 491 visa as well as to applications for visa Subclasses 189, 190 and 489.

Item 10 – At the end of subregulation 2.26AC(1)

This item adds a reference to a Skilled Work Regional (Provisional)(Class PS) visa to subregulation 2.26AC(1).

The effect of this amendment is to provide that for the purposes of subsection 93(1) of the Migration Act, the points test in Schedule 6D to the Migration Regulations also applies to an application for a Skilled Work Regional (Provisional)(Class PS) visa.

Item 11 – At the end of subregulation 2.26AC(2)

This item adds a reference to a Subclass 491 (Skilled Work Regional (Provisional) visa in subregulation 2.26AC(2).

The effect of this amendment is to prescribe the qualifications set out in Schedule 6D for the purposes of a points test in relation to an application for the new Subclass 491 visa.

Item 12 – Subparagraphs 4.02(4)(1)(i) to (iii)

This item inserts the word “body” after the word “person” in each of subparagraphs 4.02(4)(1)(i) to (iii).

These amendments clarify that the nominator or sponsor in relation to decisions to refuse certain visas which are prescribed as Part 5-reviewable decisions in paragraph 4.02(4)(1), may be a body as well as a person, company or partnership. The purpose of these amendments is to ensure that the conferral of a review right extends to a sponsor or nominator that is a State or Territory government agency.

Item 13 – Paragraph 4.02(4)(1a)

This item amends paragraph 4.02(4)(la) to insert a reference to the new Subclass 491 (Skilled Work Regional (Provisional)) visa.

The effect of this amendment is to prescribe as a Part 5-reviewable decision, a decision refusing to grant a Subclass 491 (Skilled Work Regional (Provisional)) visa to a non-citizen who is outside Australia at the time of application for the visa, and who is sponsored or nominated as required by a criterion for the grant of the visa.

Item 14 – Subparagraphs 4.02(4)(la)(ii), (o)(i) to (iii) and (p)(ii)

This item inserts the word “body” after the word “person” in each of subparagraphs 4.02(4)(la)(ii), 4.02(4)(o)(i) to (iii), and 4.02(4)(p)(ii).

These amendments clarify that the nominator or sponsor in relation to decisions to refuse certain visas which are prescribed as Part 5-reviewable decisions in paragraphs 4.02(4)(la), 4.02(4)(o) and 4.02(4)(p) may be a body as well as a person, company or partnership. The purpose of these amendments is to ensure that the conferral of a review right extends to a sponsor or nominator that is a State or Territory government agency.

Item 15 – At the end of subregulation 4.02(4AA)

This item adds a new paragraph 4.02(4AA)(g) in subregulation 4.02(4AA) to insert a reference to a State or Territory government agency in subregulation 4.02(4AA).

This amendment clarifies that the sponsor or nominator in relation to the Part-5 reviewable decisions prescribed in paragraphs 4.02(4)(l), (la), (o) and (p) may be a State or Territory government agency.

Item 16 – After paragraph 5.35AB(1)(l)

This item inserts a new paragraph 5.35AB(la) in subregulation 5.35AB(1) to add a reference to the new Subclass 491 (Skilled Work Regional (Provisional)) visa in subregulation 5.35AB(1).

Regulation 5.35AB (Tax file numbers) prescribes visas for the purposes of subsection 506B(1) of the Migration Act. That subsection provides a power for the Secretary of the Department to request the

provision of the tax file number of a person who is an applicant for, or holder or former holder of, a prescribed visa. The effect of this amendment is to prescribe the new Subclass 491 (Skilled Work Regional (Provisional)) visa for the purposes of subsection 506B(1). A tax file number provided under this provision may be used for any of the purposes prescribed in subregulation 5.35AB(2), which include verifying the identity of the visa applicant or holder, ensuring compliance with the conditions of the visa, and the development of policy in relation to the relevant prescribed visas.

Item 17 – At the end of subitem 1214C(3) of Schedule 1

This item adds a new paragraph 1214C(3)(h) in item 1214C of Schedule 1 to the Migration Regulations. Item 1214C deals with the requirements to make a valid application for a Partner (Temporary)(Class UK) visa. The effect of paragraph 1214C(3)(h) is that, if an applicant for the partner visa is the holder of a Subclass 491 (Skilled Work Regional (Provisional)) visa or a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, or the last substantive visa held by the applicant was a visa of one of those subclasses, the applicant must have held that visa for at least three years.

The purpose of this amendment is to prevent a holder of a Subclass 491 or Subclass 494 visa from avoiding the conditions of that visa, including the requirement to live, work and study only in a designated regional area, by moving to the partner visa pathway to permanent residence. Subclass 491 and 494 visas are granted on the basis that the holder will not be eligible for permanent residence until the holder has held the visa for at least 3 years and has complied with the conditions of the visa during those 3 years (see the criteria for the new Subclass 191 (Permanent Residence (Skilled Regional)) visa set out in Schedule 3 to this instrument).

Item 18 – Before paragraph 1230(3)(a) of Schedule 1

This item adds a new paragraph 1230(3)(aa) in item 1230 (Skilled – Regional Sponsored (Provisional))(Class SP) of Schedule 1 to the Migration Regulations.

New paragraph 1230(3)(aa) provides that an application by a person seeking to satisfy the primary criteria for a Subclass 489 (Skilled – Regional (Provisional)) visa in the First Provisional Visa stream must be made before 16 November 2019. After that date, applicants seeking a visa on the basis of nomination by a State or Territory government agency or sponsorship by a family member living in a designated regional area, who would previously have applied for a Subclass 489 visa in the First Provisional Visa stream, will be able to apply for the new Subclass 491 (Skilled Work Regional (Provisional)) visa. Applications by persons seeking to satisfy the primary criteria for a Subclass 489 visa in the Second Provisional Visa stream and applications seeking to satisfy the secondary criteria may continue to be made on and after 16 November 2019.

Item 19 – At the end of Part 2 of Schedule 1

This item adds a new item 1241 in Schedule 1 (Classes of visa) to the Migration Regulations.

New item 1241 creates a new Skilled Work Regional (Provisional)(Class PS) visa. The new class has one subclass, Subclass 491 (Skilled Work Regional (Provisional)) (see below). New item 1241 sets out the requirements for making a valid application for the visa. Details of item 1241 are as follows:

Subitem 1241(1) – Form: This subitem provides that the form for making an application for a Skilled Work (Provisional) (Class PS) visa is the approved form specified by the Minister in a legislative instrument made for the purposes of item 1241 under subregulation 2.07(5).

Subitem 1241(2) – Visa application charge: This subitem prescribes the visa application charge that must be paid in respect of an application for a Skilled Work Regional (Provisional) (Class PS) visa. The visa application charge is a tax imposed on visa applications by the *Migration (Visa Application Charge) Act 1997* (the VAC Act). The amount payable on a particular application is prescribed in the Migration Regulations. The prescribed amount may be any amount up to the visa application charge limit set for most visas under section 5

of the VAC Act. The original visa application charge limit in the 1996-1997 financial year was \$12,500. This amount has been indexed annually in relation to the Consumer Price Index.

The table in paragraph 1241(2)(a) sets out the amounts of the first instalment payable on application. The amounts are:

- the base application charge (payable by an applicant seeking to satisfy the primary criteria) is \$3,755
- the additional applicant charge (payable by an applicant seeking to satisfy the secondary criteria whose application is combined with that of a primary applicant) is:
 - for an applicant who is at least 18: \$1,875
 - for an applicant who is less than 18: \$940

The table in paragraph 1241(2)(b) sets out the second instalment of the visa application charge, payable before the visa is granted. The amounts are:

- for an applicant who was at least 18 at the time of application, and is assessed as not having functional English: \$4,890
- for any other applicant: Nil.

Subitem 1241(3) sets out other requirements for making a valid application. The application must be made at the place, and in the manner specified by the Minister in a legislative instrument made for the purposes of item 1241 under subregulation 2.07(5). An applicant may be in or outside Australia but not in immigration clearance. A further requirement is that an applicant who is in Australia must hold a substantive visa or a Bridging A, B, or C visa. An application by a person claiming to be a family member of another applicant may be made at the same time, and combined with, the other person's application.

Subitem 1241(4) requires an applicant seeking to satisfy the primary criteria to meet the requirements set out in the table.

- Items 1 and 2 of the table require an applicant to have been invited by the Minister in writing to apply for the visa, and to have applied within the period stated in the invitation.

- Item 3 of the table requires that an applicant must not have turned 45 at the time of the invitation to apply for the visa.
- Item 4 of the table requires an applicant to nominate a skilled occupation that is specified by the Minister in a legislative instrument, and that is the skilled occupation that was specified in the invitation as a skilled occupation that the applicant may nominate. Applicants must also declare in the application that their skills have been assessed as suitable by the relevant assessing authority for the nominated occupation and that the assessment is not for a Subclass 485 (Temporary Graduate) visa.
- Item 5 of the table requires that an applicant must either be nominated by a State or Territory government agency and that nomination has not been withdrawn, or must declare that the applicant is sponsored by a person who has turned 18, and is an Australian citizen, Australian permanent resident or eligible New Zealand citizen.
- Item 6 of the Table requires that if an applicant declared under item 5 that the applicant is sponsored, the applicant must also declare that the sponsor is usually resident in a designated regional area and is related to the applicant or the applicant's spouse or de facto partner, as a parent, child or step-child, sibling, aunt or uncle, nephew or niece, grandparent or first cousin. The applicant must also declare that each person who is included in the application and claims to be a member of the applicant's family unit, is also sponsored by the sponsor.
- Item 7 of the Table provides that applicants must declare that they, and members of their family unit included in the application, have a genuine intention to live, work and study in a designated regional area.

Subitem 1241(5) provides a power for the Minister to make a legislative instrument specifying skilled occupations for the purposes of item 4 of the table. The broad list of skilled occupations is specified in an instrument made by the Minister under regulation 1.15I. The power in subitem 1241(5) allows a list of skilled occupations to be specified as skilled occupations that may be nominated in relation to

Subclass 491 visa applications, as an occupation in which the applicant intends to work in a designated regional area. This enables a flexible and timely response to changing economic and labour market conditions identifying employment needs in designated regional areas.

Subitem 1241(6) provides that the new Skilled Work Regional (Provisional)(Class PS) visa has one subclass: 491 (Skilled Work Regional (Provisional)).

Item 20 – Before paragraph 010.611(3B)(e) of Schedule 2

This item inserts a new paragraph 010.611(3B)(db) in Subclass 010 (Bridging A) in Schedule 2 to the Migration Regulations. New paragraph 010.611(3B)(db) refers to a Skilled Work Regional (Provisional)(Class PS) visa. The effect of this amendment is that there are no conditions on a Bridging A visa granted to certain applicants who have made a valid application for a Subclass 491 (Skilled Work Regional (Provisional)) visa, or to applicants seeking judicial review of a decision on an application for a Subclass 491 visa.

Item 21 – Before paragraph 020.611(4)(e) of Schedule 2

This item inserts a new paragraph 020.611(4)(db) in Subclass 020 (Bridging B) in Schedule 2 to the Migration Regulations. New paragraph 020.611(4)(db) refers to a Skilled Work Regional (Provisional)(Class PS) visa. The effect of this amendment is that there are no conditions on a Bridging B visa granted to certain applicants who have made a valid application for a Subclass 491 (Skilled Work Regional (Provisional)) visa, or to applicants seeking judicial review of a decision on an application for a Subclass 491 visa.

Item 22 – Before paragraph 030.613(1)(e) of Schedule 2

This item inserts a new paragraph 030.613(1)(db) in Subclass 030 (Bridging C) in Schedule 2 to the Migration Regulations. New paragraph 020.613(1)(db) refers to a Skilled Work Regional (Provisional)(Class PS) visa. The effect of this amendment is that there are no conditions on a Bridging C visa granted to certain applicants who have made a valid application for a Subclass 491

(Skilled Work Regional (Provisional)(Class PS)) visa, or to applicants seeking judicial review of a decision on an application for a Subclass 491 visa.

Item 23 – At the end of Subdivision 124.21 of Schedule 2

Item 24 – After clause 132.212 of Schedule 2

Item 25 – After clause 186.212A of Schedule 2

Item 26 – After clause 188.212 of Schedule 2

Item 27 – After clause 189.224 of Schedule 2

Item 28 – After clause 190.215 of Schedule 2

These items add new clauses 124.212, 132.212A, 186.212B, 188.212A, 189.224A and 190.215A in Subclasses 124 (Distinguished Talent), 132 (Business Talent), 186 (Employer Nomination Scheme), 188 (Business Innovation and Investment (Provisional)), 189 ((Skilled – Independent) and 190 (Skilled – Nominated), in Schedule 2 to the Migration Regulations, respectively.

The new clauses provide that if an applicant for a **visa of the relevant subclass is the holder of a Subclass 491 (Skilled Work Regional (Provisional)) visa or a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa**, or the last substantive visa held by the applicant was a Subclass 491 or Subclass 494 visa, the applicant must have held that visa for at least three years at time of applying for the visa, unless circumstances specified by the Minister in a legislative instrument exist.

The purpose of these amendments is to prevent a holder of a Subclass 491 or Subclass 494 visa from avoiding a condition of the visa that requires the visa holder to live, work and study only in a designated regional area, by moving to another pathway to permanent residence that does not require a period of regional residence. Subclass 491 and 494 visas are granted on the basis that the holder will not be eligible for permanent residence until the holder has held the visa for at least 3 years and has complied with the condition to live, work and study only in a designated regional area. (See Schedule 3 of these Regulations, which creates the new Subclass 191 (Permanent Residence (Skilled

Regional)) visa, for further details of the requirements to be satisfied for the grant of the permanent visa to holders of Subclass 491 and Subclass 494 visas.)

The new clauses include provision for the Minister to specify in a legislative instrument, circumstances in which a visa of the relevant subclass may be granted to the holder of a Subclass 491 or 494 visa. This provision recognises that, from to time, exceptional circumstances may arise where it may be appropriate to allow grant of the visa.

Item 29 – After Part 489 of Schedule 2

This item inserts a new Part 491 (Subclass 491 – Skilled Work Regional (Provisional)) in Schedule 2 to the Migration Regulations. The purpose of new Part 491 is to prescribe the criteria for grant of a Subclass 491 visa and to make provisions in relation to the circumstances applicable to the grant of the visa, when the visa is in effect, and the conditions imposed on the visa.

Details of the criteria and provisions for Subclass 491 are:

Division 491.1 (Interpretation) notes that terms used in Subclass 491, *competent English, designated regional area, registered course, relevant assessing authority and skilled occupation*, are defined in regulation 1.03. There are no defined terms specific to Subclass 491.

Division 491.2 (Primary criteria) sets out the primary criteria that must be satisfied by at least one member of the family unit at the time of decision. Details of the criteria are:

- Clause 491.211 prescribes the public interest criteria including health and character which must be satisfied by all primary applicants and members of the family unit of primary applicants. This includes public interest criteria that must be satisfied by members of the family unit who are also applying for the visa as well as certain members of the family unit who are not applicants. The effect of these requirements is that if the applicant or any member of the applicant's family unit fails to meet a public interest criterion prescribed for the person, the

visa cannot be granted to the primary applicant or to any family member.

- Clause 491.212 prescribes the special return criteria which must be satisfied by primary applicants, and members of the family unit of a primary applicant who are also applicants for a Subclass 491 visa.
- Clause 491.213 requires that a primary applicant must have been invited by the Minister in writing to apply for the visa.
- Clause 491.214 requires that at the time of invitation, a primary applicant's skills must have been assessed as suitable for the applicant's nominated occupation by the relevant assessing authority for the occupation. **The assessment must be made within the last 3 years or must still be valid if the validity period is less than 3 years.** It must not have been an assessment for a Subclass 485 (Temporary Graduate) visa, and if the assessment was made on the basis of an Australian qualification obtained while the applicant held a student visa, it must have been obtained as a result of studying a registered course.
- Clause 491.215 requires that at the time of invitation, a primary applicant must have competent English.
- Clause 491.216 requires a primary applicant to obtain a score on the points test in Schedule 6D (General points test for General Skilled Migration visas mentioned in subregulation 2.26AC(1)), that is not less than the score stated in the applicant's invitation to apply, and that is not less than the relevant pass mark specified by the Minister in a legislative instrument made under section 96 of the Migration Act.
- Subclause 491.217(1) requires that if the applicant is nominated by the State or Territory government agency, the nomination must not have been withdrawn. This provision would apply, for example, if the State or Territory government

agency discovered that an applicant had provided them with fraudulent or misleading information in order to obtain the nomination. Withdrawal of the nomination would prevent the grant of a Subclass 491 visa.

- Subclause 491.217(2) requires that if a primary applicant declared in the application that the applicant is sponsored by a relevant family member, the Minister must have accepted the sponsorship on satisfaction of the circumstances set out in the subclause.

Division 491.3 sets out the secondary criteria to be satisfied by members of the family unit of an applicant who satisfies the primary criteria. Details of the criteria to be satisfied by a secondary applicant are:

- Clause 491.311 requires that the applicant must be a member of the family unit of a person who holds a Subclass 491 visa granted on the basis of satisfying the primary criteria.
- Clause 491.312 sets out the public interest criteria, including health and character, which must be satisfied by secondary applicants.
- Clause 491.313 sets out the special return criteria which must be satisfied by secondary applicants.

Division 491.4 prescribes the circumstances applicable to grant of a Subclass 491 visa. The applicant may be in or outside Australia when the visa is granted, but must not be in immigration clearance.

Division 491.5 sets out when a Subclass 491 visa is in effect.

- For an applicant who satisfies the primary criteria, it is a temporary visa permitting the holder to travel to, enter and remain in Australia for 5 years from the date of grant.
- For an applicant who satisfies the secondary criteria as a member of the family unit of a person who satisfies the primary criteria, it is a temporary visa permitting the holder to travel to,

enter and remain in Australia for 5 years from the date of grant of the primary visa holder's visa.

Division 491.6 sets out the conditions that are imposed on a Subclass 491 visa.

- If the applicant is outside Australia when the visa is granted, the visa holder's first entry to Australia must be made by a date specified by the Minister.
- Condition 8515 may be imposed on a Subclass 491 visa granted to a secondary applicant. This condition requires that the visa holder must not marry or enter into a de facto relationship before entering Australia.
- Conditions 8578, 8579, 8580 and 8581 must be imposed. These are new conditions created by these Regulations in Schedule 8 to the Migration Regulations (see below). The conditions require visa holders to live, work and study only in a designated regional area of Australia; to notify Immigration of a change to their residential address, contact details, passport details, the address or addresses of an employer of the holder and the address of the location of a position in which the holder is employed; to provide information and evidence relating to their location if requested to do so; and, if requested in writing by the Minister to do so, attend an interview at a place and time, or at a time, and in a manner, specified in the request.

Item 30 – Before paragraph 773.213(3)(t) of Schedule 2

This item amends the criteria for the grant of a Subclass 773 (Border) visa, consequential to the creation of the Subclass 491 (Skilled Work Regional (Provisional)) visa. The Subclass 773 visa facilitates entry to Australia by dependent children of visa holders who arrive at the border without a visa. It also facilitates re-entry by former visa holders who departed Australia in circumstances where it was not reasonable to obtain another visa before departure. The new Subclass 491 visa is added, as paragraph 773.213(3)(sb), to the list of visas that engage these criteria.

Items 31-34 – Clauses 820.212 and 820.313 of Schedule 2

Items 31-34 add references to a Skilled Work Regional (Provisional)(Class PS) visa in a number of provisions relating to the primary and secondary criteria for grant of a Subclass 820 (Partner) visa. The effect of each of these amendments is to provide that if an applicant for a Subclass 820 (Partner) visa is the holder of a Skilled Work Regional (Provisional)(Class PS) visa, or the last substantive visa held by the applicant was a Skilled Work Regional(Provisional)(Class PS) visa, the applicant must have substantially complied with the conditions of that visa.

In particular, a Skilled Work Regional (Provisional)(Class PS) visa is subject to a number of conditions, including condition 8579 that requires the holder to live, work and study only in a designated regional area, and other conditions requiring the visa holder to provide information and evidence about their location if requested to do so. If a person who holds, or who held, a Skilled Work Regional (Provisional)(Class PS) visa subject to those conditions applies for a Subclass 820 (Partner) visa, the person is required to have complied substantially with the conditions before a Subclass 820 visa may be granted. These amendments ensure that the holder of a Subclass 491 visa cannot avoid the conditions on which that visa was granted by applying for a Subclass 820 visa.

Item 35 – At the end of Subdivision 858.21 of Schedule 2

This item adds new clause 858.213 in Subclass 858 (Distinguished Talent) in Schedule 2 to the Migration Regulations.

The new clause provides that if an applicant for a Subclass 858 visa is the holder of a Subclass 491 (Skilled Work Regional (Provisional)) visa or a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, or the last substantive visa held by the applicant was a visa of one of those subclasses, the applicant must have held that visa for at least three years at time of applying for a Subclass 858 visa, unless circumstances specified by the Minister in a legislative instrument exist.

The purpose of clause 858.213 is to prevent a holder of a Subclass 491 visa or a Subclass 494 visa from avoiding a condition of the visa that

requires the visa holder to live, work and study only in a designated regional area, by moving to a Subclass 858 permanent visa that does not require a period of regional residence. Subclass 491 and 494 visas are granted on the basis that the holder will not be eligible for permanent residence until the holder has held the visa for at least 3 years and has complied the conditions of the visa including the requirement to live, work and study only in a designated regional area. (See Schedule 3 of these Regulations, which creates the new Subclass 191 (Permanent Residence (Skilled Regional)) visa, for further details of the criteria for the grant of permanent residence to holders of a Subclass 491 or Subclass 494 visa.)

The new clauses include provision for the Minister to specify in a legislative instrument, circumstances in which a visa of the relevant subclass may be granted to the holder of a Subclass 491 or 494 visa. This provision recognises that, from to time, exceptional circumstances may arise where it may be appropriate to allow grant of the visa.

Item 36 – Part 6D.7A of Schedule 6D (table item 6D7A1, column headed “Number of points”)

This item amends Part 6D.7A (Specialist educational qualifications) of Schedule 6D (General points test for General Skilled Migration visas mentioned in subregulation 2.26AC(1)) to the Migration Regulations, by increasing the number of points awarded to an applicant who met the requirement for the award of a specialist education qualification, from 5 points to 10 points. Subregulation 2.26AC(5A) provides that an applicant meets the requirements for the award of a *specialist educational qualification* if the Minister is satisfied that the applicant has qualified for the award by an Australian institution of a masters degree by research or a doctoral degree, and the degree included at least 2 academic years of study in a field of education that is specified by the Minister in an instrument.

Item 37 – Part 6D.10 of Schedule 6D

This item repeals Part 6D.10 of Schedule 6D and substitutes a new Part 6D.10, with one item, 6D101.

New Part 6D.10 changes the name of the Part from “Study in regional Australia or low-population growth metropolitan area qualifications” to “Study in designated regional area qualification”, to more accurately reflect the basis on which points are awarded for this qualification.

New item 6D101 prescribes 5 points for applicants who, at the time of the invitation to apply for the visa, met the Australian study requirement as a result of study at a campus or campuses located in a designated regional area while the applicant was living in a designated regional area. It is a requirement of the item that none of the study undertaken constituted distance education.

The *Australian study requirement* is defined in regulation 1.15F of Part 1 of the Migration Regulations to mean completion within a specified time of a registered course for the award of a degree, diploma or trade qualification by an Australian educational institution while the holder of a visa authorising the applicant to study in Australia.

A new definition of the term *designated regional area* is inserted in regulation 1.03 by these Regulations (see above).

Item 38 – Part 6D.11 of Schedule 6D (heading)

This item amends the heading of part 6D.11 to omit the word “skill” from the current heading “Partner skill points”. This amendment is consequential upon the amendments to Part 6D.11 made by the following item, the effect of which is that points are available in respect of an applicant’s partner on other grounds in addition to the partner’s skills.

Item 39 – Part 6D.11 of Schedule 6D (table item 6D111, column headed “Number of points”)

This item increases the points available for item 6D111 from 5 points to 10 points. Item 6D111 awards points to an applicant whose spouse

or de facto partner is also an applicant for the same visa, is aged under 45 years, has suitable skills for a specified nominated skilled occupation, and has competent English.

Item 40 – Part 6D.11 of Schedule 6D (at the end of the table)

This item adds two new items to Part 6D.11 of the Schedule 6D to the Migration Regulations. These are:

- New item 6D112 provides for 10 points to be awarded to an applicant who either does not have a spouse or de facto partner, or has a spouse or de facto partner who is an Australian permanent resident or an Australian citizen. The additional points help balance the disadvantage to an applicant who is not eligible for the award of skilled partner points under item 6D111 because they do not have a spouse or de facto partner.

- New item 6D113 provides for 5 points to be awarded to an applicant whose spouse or de facto partner:
 - is an applicant for the same visa as the primary applicant; and
 - is not an Australian permanent resident or Australian citizen; and
 - at the time of invitation to apply for the visa, had competent English.

These new points recognise the value of English language skills within the family unit.

Item 41 – Part 6D.13 of Schedule 6D (heading)

This item repeals the heading of Part 6D.13 and substitutes “Part 6D.13 – Designated regional area nomination or sponsorship qualifications”. This amendment is consequential upon the introduction of the new term *designated regional area* by the Regulations, in place of the current references to a “designated area”.

Item 42 – Part 6D.13 of Schedule 6D (table item 6D131, column headed “Qualification”)

This item inserts a reference to the new Subclass 491 (Skilled Work Regional (Provisional) visa in item 6D131 of Part 6D.13. This amendment ensures that points are awarded under item 6D131 to applicants for a new Subclass 491 visa as well as to applicants for a Subclass 489 (Skilled – Regional (Provisional)) visa. (See the following item for further details of item 6D131.)

Item 43 – Part 6D.13 of Schedule 6D (table item 6D131, column headed “Number of points”)

This item amends item 6D131 of Part 6D to raise the number of points awarded to an eligible applicant from 10 points to 15 points. These points are available to an applicant for a Subclass 489 visa or a new Subclass 491 visa who is nominated by a State or Territory government agency or sponsored by an eligible Australian citizen or permanent resident family member who resides in regional Australia.

Item 44– After clause 8577 of Schedule 8

This item inserts four new visa conditions in Schedule 8 (Visa conditions) to the Migration Regulations.

The four new conditions are imposed on the Subclass 491 (Skilled Work Regional(Provisional)) visa (see this Schedule, above) and Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa (see Schedule 2 to these Regulations), to require visa holders to live, work and study only in designated regional areas of Australia, and to assist with monitoring compliance with that requirement.

The new conditions are:

Condition 8578 requires the visa holder to notify Immigration of any change, within 14 days of the change occurring, to the holder’s residential address, an email address of the holder, a phone number of the holder, the holder’s passport details, the address of an employer of the holder, or the address of the location of a position in which the holder is employed.

Condition 8579 requires that while the visa holder is in Australia, they must live, work and study only in a designated regional area.

A *designated regional area* is a part of Australia specified by the Minister in an instrument made under regulation 1.15M.

Subclass 491 (Skilled Work Regional (Provisional)) visa

- A holder of a Subclass 491 (Skilled Work Regional (Provisional)) visa must live, work and study only in a part of Australia that was a designated regional area at the time the visa was granted.

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

- If only one nomination has been made in relation to a person who was granted a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa on the basis of satisfying the primary criteria (the primary visa holder), they must live, work and study only in a part of Australia that was a designated regional area at the time that nomination was made.
- If another nomination in relation to the primary visa holder is approved, the visa holder must live, work and study only in a part of Australia that was a designated regional area at the time that later nomination was made. In effect, this means that if there is a change to the instrument specifying the parts of Australia which are ‘designated regional areas’, the instrument which is in force at the time the most recent approved nomination was made is the instrument which determines what is a designated regional areas for the purposes of condition 8579. However, any changes only start to apply from the time the person commences work in the position associated with the new nomination. This is to ensure that visa holders are not inadvertently in breach of the condition during the period between the nomination being approved and the date on which they commence work in their new position.
- Visa holders who were granted a visa on the basis of satisfying the secondary criteria as a member of the family unit of another person must live, work and study only in a part of Australia that was a designated regional area at the time the

relevant nomination in relation to the primary visa holder was made. Where the nomination is a second or subsequent nomination, any changes to the applicable definition of ‘designated regional area’ take effect for the secondary visa holder at the same time as they take effect for the primary visa holder. This is to ensure that the same definition of designated regional area applies to both primary and secondary visa holders.

The wording of the condition in relation to Subclass 494 visa holders takes into account that specified designated regional areas could change in the future, depending on the economic and population growth conditions and outlooks in certain parts of Australia. It is possible that an area that was specified as a designated regional area at the time a nomination was made could cease to be a designated regional area at a later time, or new designated regional areas could be added.

Subclass 494 primary visa holders can seek a new nomination of the same nominated occupation with a new associated position, for instance where their previous employment ceases or where they wish to undertake a new regional employment opportunity. The condition is worded to ensure that, provided an employment position was in a designated regional area at the time the relevant nomination was made, that area will remain a designated regional area in respect of a visa holder working in the position. In addition, the condition operates so that, if a new nomination is approved in relation to a primary visa holder, they (and any secondary visa holders) must live, work and study in a part of Australia that was a designated regional area at the time the primary applicant commenced work in relation to that later nomination.

Condition 8580 requires that, if requested in writing by the Minister to do so, the visa holder must within 28 days provide any or all of the following: the visa holder’s residential address, the address of their employer or employers; the address of the location of each position in which the holder is employed; the address of any educational institution attended by the visa holder.

Condition 8581 requires the visa holder, if requested in writing by the Minister, to attend an interview at a place and time or in the manner specified in the request. The interview may be face to face or undertaken using modern video conferencing applications such as Skype or Facetime.

Schedule 2 – Amendments relating to the Skilled Employer Sponsored Regional (Provisional) visa

Migration Regulations 1994

Item 1 – Regulation 1.03

This item inserts two new definitions in regulation 1.03. The new terms are ***transitional 457 worker*** and ***transitional 482 worker***.

Transitional 457 worker means a person who on 18 April 2017 either held a Subclass 457 (Temporary Work (Skilled)) visa, or was an applicant for a Subclass 457 visa that was subsequently granted. This cohort is referred to subsequently for the purpose of exempting them from the closure on 16 November 2019 of the Temporary Residence Transition stream in the Subclass 187 (Regional Sponsored Migration Scheme) visa.

Transitional 482 worker means a person who on 20 March 2019 either held a Subclass 482 (Temporary Skill Shortage) visa in the Medium-term stream, or was an applicant for a Subclass 482 (Temporary Skill Shortage) visa in the Medium-term stream that was subsequently granted. This cohort is referred to subsequently for the purpose of exempting them from the closure on 16 November 2019 of the Temporary Residence Transition stream in the Subclass 187 (Regional Sponsored Migration Scheme) visa.

This item also makes a technical change by relocating two existing definitions (***nomination end day*** and ***sponsorship end day***) from subregulation 2.75(3). The definitions have been moved to the general definitions regulations because they are now also used in new regulation 2.75B.

Item 2 – After paragraph 1.20(4)(i)

This item amends subregulation 1.20(4) with the effect that regulation 1.20 does not apply to a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. The Subclass 494 visa is not subject to the sponsorship undertakings set out in regulation 1.20 because it falls under a different sponsorship regime created by Division 3A of Part 2 of the Migration Act. The regime in the Migration Act provides for sponsorship obligations to be prescribed in the regulations. The sponsorship obligations are set out in Division 2.19 of Part 2A of the Migration Regulations.

Item 3 – At the end of subregulation 2.05(4AA)

This item amends subregulation 2.05(4AA) to allow the Minister to waive visa condition 8503 if the holder of a visa subject to that condition has a genuine intention to apply for a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

The effect of visa condition 8503 is that a person subject to the condition cannot apply for another visa, other than a protection visa, after entering Australia. The Minister can waive this condition in prescribed circumstances. One of the circumstances, set out in subregulation 2.05(4AA), is that the visa holder has a genuine intention to apply for a skilled visa as listed in that subregulation. The Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa is listed to provide flexibility to the Minister to allow applications for that visa to be made.

Item 4 – At the end of paragraph 2.05(5A)(b)

This item amends subregulation 2.05(5A) to allow the Minister to waive visa condition 8534 if the holder of a visa subject to that condition has a genuine intention to apply for a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

The effect of visa condition 8534, which is attached to student visas, is that a person subject to the condition cannot apply for a visa other than a protection visa, a Subclass 485 (Temporary Graduate) visa or a Subclass 590 (Student Guardian) visa after entering Australia.

The Minister can waive this condition in prescribed circumstances. One of the circumstances, set out in subregulation 2.05(5A), is that the visa holder has a genuine intention to apply for a skilled visa as listed in that subregulation. The Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa is listed to provide flexibility to the Minister to allow applications for that visa to be made.

Item 5 – Subregulation 2.06AAB(1) (before table item 15)

This item adds a reference to the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa in the list of visas that can be applied for by holders and certain former holders of safe haven enterprise visas.

The effect of this amendment is that unauthorised maritime arrivals who hold a safe haven enterprise visa, or who are lawful non-citizens who have ever held a safe haven enterprise visa, may make a valid application for a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, subject to meeting other requirements prescribed in Schedule 1 to the Migration Regulations for making a valid application for this visa.

Item 6 – At the end of subregulations 2.07AG(1) and (2)

This item amends regulation 2.07AG to allow an application to be made for the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa following the waiver of visa conditions 8503 and 8534.

Items 7 and 8 – Amendments to paragraph 2.08B(1)(a)

These items amend paragraph 2.08B(1)(a) to ensure that regulation 2.08B applies to an application for the new Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. Regulation 2.08B provides for dependent children of applicants for certain temporary visas to be added to the primary applicant's application as an

additional (secondary) applicant up until the time the first person's application is decided.

Items 9 and 10 – Amendments to regulation 2.12F

These items provide that the Minister may refund the amount paid by way of the first instalment of the visa application charge in relation to a visa application for a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, where:

- the visa application relates to an occupation nominated under subsection 140GB(1) of the Migration Act; and
- the application is withdrawn for one of the reasons listed in new paragraph 2.12F(3C)(c); and
- after the withdrawal, the Minister receives a written request for a refund from the relevant person, as set out in new paragraph 2.12F(3C)(d).

The grounds for providing a refund reflect the existing grounds available to applicants for the the Subclass 187 (Regional Sponsored Migration Scheme) visa, as set out in subregulation 2.12F(3B).

Merits review will not be available in relation to a decision not to refund the first instalment of the visa application charge. This is consistent with the current position in relation to refunds of fees and charges under the Migration Regulations, including nomination fees, the nomination training contribution charge and visa application charges.

See also new regulation 2.73C which provides for a refund of nomination fee and nomination training contribution charge in certain circumstances.

Items 11 to 14 – Amendments to regulation 2.43

These items amend regulation 2.43, which lists grounds on which a visa can be cancelled under section 116 of the Migration Act. The effect of the amendments is as follows:

Item 11 – this item inserts new paragraph (kd), which provides that a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa can be cancelled if the visa holder did not have a genuine intention at the time of grant to perform the nominated occupation, the holder has ceased to have a genuine intention to perform that occupation, or the position associated with that occupation is not genuine.

Item 12 – this item amends the cancellation ground at paragraph 2.43(1)(l) to include a reference to the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. As amended, paragraph 2.43(1)(l) allows a Subclass 494 visa to be cancelled if: the sponsor has given false or misleading information to the Department or the Administrative Appeals Tribunal; the sponsor has failed to satisfy a sponsorship obligation; or the sponsor has been cancelled or barred under section 140M of the Act; or, in cases where the sponsor is a party to a labour agreement, the labour agreement has been terminated, suspended, or has ceased.

Item 13 – this item amends paragraph 2.43(1)(ld) to include a reference to the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. This paragraph allows visas held by family members of a primary visa holder to be cancelled where the sponsor has not listed the family member in the latest nomination relating to the primary visa holder.

Item 14 – this item amends paragraph 2.43(1)(le) to include a reference to the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. This paragraph allows a visa to be cancelled where the sponsor has paid the return travel costs of the holder in accordance with the sponsorship obligation mentioned in regulation 2.80 or 2.80A of the Migration Regulations.

Item 15 – After paragraph 2.56(m)

This item adds a reference at new paragraph 2.56(ma) to the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa in regulation 2.56, which lists the visas that are covered by the sponsorship regime in Division 3A of Part 2 of the Migration Act.

Items 16 and 17 – Definitions of *primary sponsored person* and *secondary sponsored person* in subregulation 2.57(1)

These items update the definitions of *primary sponsored person* and *secondary sponsored person* to include references to holders of the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

Items 18 and 19 – Amendments to subregulation 2.57(3A)

These items amend subregulation 2.57(3A). The effect of subregulation 2.57(3A) is that the terms and conditions of employment (of a nominated or sponsored overseas worker) will be regarded as less favourable than other terms and conditions of employment (of an equivalent Australian worker) if the earnings will be less. The subregulation does not apply to provisions that are specifically concerned with terms and conditions of employment other than earnings. The amendment includes reference to two new provisions, paragraph 2.72C(17)(a) and subparagraph 2.79A(3)(a)(iii), that fall into that category, in the nomination criteria for the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa and related sponsorship obligations.

Items 20 and 21 – Amendments to regulation 2.60S

These items amend criteria, for approval as a standard business sponsor, dealing with transfer, recovery and payment of costs. In summary, the criteria exclude persons who have passed on the costs of sponsorship to the overseas worker or a third party. The effect of the amendments is that the criteria are extended to cover fees and the nomination training contribution charge applicable to nominations for the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

Items 22 to 24 – Amendments to criteria for approval of nominations for the Subclass 482 (Temporary Skill Shortage visa)

These items make consequential and technical amendments to regulation 2.72 to ensure that there is a clear distinction between the existing nomination criteria for the Subclass 482 (Temporary Skill

Shortage) visa and the new nomination criteria for the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

In particular, the items amend the criteria for approval of nominations for a Subclass 482 (Temporary Skill Shortage) visa in the Labour Agreement stream to clarify that:

- the Minister must be satisfied that the sponsor is a party to a work agreement that authorises the recruitment, employment or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 482 visa (as opposed to a work agreement that relates only to the Subclass 494 visa); and
- the number of nominations in relation to Subclass 457 (Temporary Work (Skilled)) visas and Subclass 482 visas made by the sponsor and approved by the Minister under section 140GB of the Act is less than the number of approved nominations in relation to those types of visas permitted under the work agreement for the year.

The amendments to regulation 2.72 are consistent with of the amendments to regulation 2.76, which expand the definition of a ‘work agreement’ to include a labour agreement that authorises the recruitment, employment, or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 494 visa. A labour agreement may relate to either the Subclass 494 visa or the Subclass 482 visa, or it may relate to both visas. This will be specified in individual labour agreements. The references to Subclass 457 visas is a transitional provision to cover the remaining holders of Subclass 457 visas. The Subclass 457 visa was repealed on 18 March 2018 and replaced by the Subclass 482 visa.

The amendments to paragraph 2.72(5)(b) and 2.72(19)(c) clarify that:

- in order for a nomination for a Subclass 482 visa to be approved, the relevant work agreement must authorise nominations for the purpose of the Subclass 482 visa (whether or not it also authorises nominations for the purpose of the Subclass 494 visa); and

- the limitation on the number of nominations in paragraph 2.72(19)(c) applies only to nominations in relation to Subclass 457 and Subclass 482 visas. This provision is necessary because a labour agreement that covers both Subclass 482 (including remaining Subclass 457 holders) and Subclass 494 will specify a separate maximum number of nominations for each visa subclass. It is the number of nominations approved for the subclass that is relevant to whether further nominations can be approved for that subclass.

These provisions are mirrored, in relation to nominations for Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visas, in new paragraph 2.72C(5)(b) and new paragraph 2.72C(21)(c).

Item 23 makes consequential amendments to update subregulation 2.72(13), which provides that the Minister may, by legislative instrument, specify occupations for the purposes of the provisions listed in that subregulation. The item amends subregulation 2.72(13) to reflect the renumbering of the relevant provisions in regulation 2.86.

Item 25 – After regulation 2.72B

This item inserts new regulation 2.72C, which sets out the criteria that apply to a nomination of an occupation in relation to the holder of a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, or an applicant or proposed applicant for a Subclass 494 visa. These nomination criteria are prescribed for the purposes of paragraph 140GB(2)(b) of the Migration Act.

Each of the following persons is able to nominate an occupation in relation to a Subclass 494 visa applicant, proposed applicant or holder: a standard business sponsor, a person who has applied to be a standard business sponsor, a party to a work agreement or a party to negotiations for a work agreement (other than a Minister). The criteria for approval as a standard business sponsor are set out in regulations 2.59 and 2.60S. The requirements for work agreements are set out in regulations 2.76 and 2.76A. See also section 140GC of the Migration

Act and the definition of “work agreement” in subsection 5(1) of the Migration Act.

Criteria for approval of nomination

In addition to the requirements in s140GBA, 140GBB and 140GBC of the Migration Act, the following general criteria apply to a nomination under new regulation 2.72C:

- the application must be made in accordance with the process in regulation 2.73B (subregulation 2.72C(3));
- the Minister must be satisfied that there is no adverse information known to the Department about the sponsor or a person associated with the sponsor, or it is reasonable to disregard the information (subregulation 2.72C(4)). The term “adverse information” is defined in regulation 1.13A and the term “associated with” is defined in regulation 1.13B;
- an eligible sponsor must be approved (subregulation 2.72C(5)). For an occupation nominated for the Subclass 494 visa in the Labour Agreement stream, the sponsor must be a party to a work agreement that authorises the recruitment, employment or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 494 visa. For an occupation nominated for the Subclass 494 visa in the Employer Sponsored stream, the sponsor must be a standard business sponsor other than an overseas business sponsor. The exclusion of overseas business sponsors is because the Subclass 494 visa is restricted to Australian businesses. Overseas businesses, seeking to nominate workers to establish a business in Australia, or fulfil contractual obligations, can continue to use the Subclass 482 (Temporary Skill Shortage) visa;
- the Minister must be satisfied that the position associated with the occupation is located at a place in a part of Australia that, when the nomination was made, was a designated regional area (subregulation 2.72C(6)). This reflects the purpose of the Subclass 494 visa, which is to provide skilled workers in

regional Australia. The definition of ‘designated regional area’ is inserted by Schedule 1 to this instrument.

- any debt due by the sponsor as mentioned in section 140ZO of the Act (recovery of nomination training contribution charge and late payment penalty) must have been paid in full (subregulation 2.72C(7));

The following criteria apply to a nomination under new regulation 2.72C, and relate to the information that must be provided as part of the nomination:

- if the nominee holds a Subclass 494 visa, the nomination must cover family members of the nominee who already hold a Subclass 494 visa on the basis of that relationship, unless the Minister considers it is reasonable to disregard that requirement (subregulations 2.72C(8) and (9)). This means that a sponsor who is nominating a worker who is already in Australia on a Subclass 494 visa is expected to assume the obligations of a sponsor in relation to family members of that person who are also in Australia as secondary visa holders;

The following criteria apply to a nomination under new regulation 2.72C, and relate to the nominated occupation:

- for nominations for the Subclass 494 visa in the Employer Sponsored stream, the nominated occupation must be an occupation specified by the Minister in a legislative instrument made under subregulation 2.72C(11) and in force at the time the nomination is made (subparagraph 2.72C(10)(a)(i)). The occupation must apply to the nominee in accordance with the instrument (paragraph 2.72C(10)(b));
 - the online nomination system will only allow nominations to be made in relation to occupations that are specified in the legislative instrument. This will prevent employers from inadvertently nominating an occupation that is not eligible;
 - the Minister may, by legislative instrument made under subregulation 2.72C(11), specify occupations, as

well as a 6-digit code for the occupation (which must be the ANZSCO code if there is one) and, if there is no 6-digit ANZSCO code for the occupation, the tasks, qualifications and experience for the occupation. The Minister may also specify any matters relevant to determining whether an occupation applies to a nominee including the location of the position in which the nominee is to work;

- for nominations for the Subclass 494 visa in the Labour Agreement stream, the occupation must be specified in the work agreement as an occupation that can be nominated (subparagraph 2.72C(10)(a)(ii)). The occupation must apply to the nominee in accordance with the work agreement (paragraph 2.72C(10)(b));
- the Minister must be satisfied that the position associated with the occupation is genuine, a full-time position and likely to exist for at least 5 years (subregulation 2.72C(12)). The reference to the position being genuine is intended to have a broad meaning, including that the position genuinely requires the performance of the tasks of the occupation as described in ANZSCO and that the position has not been contrived for the purpose of securing a visa for the nominee (including cases where the standard business sponsor is a business controlled by the nominee). The requirement for the position to be full-time is consistent with the Subclass 187 (Regional Sponsored Migration Scheme) visa, which the Subclass 494 visa is replacing. The requirement for the position to be available for at least five years reflects the fact that the Subclass 494 visa will always be granted for a period of five years (see clause 494.511).

Additional requirements in relation to the Employer Sponsored stream

New subregulations 2.72C(13) to (20) set out additional requirements in relation to the Employer Sponsored stream.

Subregulation 2.72C(13): if the nominated occupation is not specified in an instrument made under subregulation 2.72C(14), the Minister must be satisfied that the nominee will be engaged only as an employee under a written contract of employment by the nominating employer or an associated entity of that employer. The Minister must also be satisfied that the nominating employer will provide a copy of the contract, signed by the nominee and the employer. There must not be an express exclusion of the possibility of extending the period of employment.

As noted in subregulation 2.72C(13), the requirements in that regulation do not apply to occupations specified in an instrument under subregulation 2.72C(14). The intention is that the occupations specified for that purpose will be low risk occupations where the normal employer-employee relationships do not necessarily apply. The intention is that the occupations will be the same occupations that are specified for the same reason in relation to the Subclass 482 (Temporary Skill Shortage) visa (see subregulation 2.72(13)). At the present time, the occupations are Chief Executive or Managing Director (ANZSCO code 111111), Corporate General Manager (ANZSCO code 111211), General Medical Practitioner (ANZSCO code 253111) and all of the specialist medical occupations. These occupations often involve work for more than one employer and work as an independent contractor. For example, a medical specialist may be engaged by more than one hospital and may have an associated private practice. This exception to the criterion is consistent with current practice for sponsored work visas.

Subregulations 2.72C(15) and (16): These subregulations apply the existing remuneration framework to nominations for Subclass 494 visas in the Employer Sponsored stream. The framework already applies to nominations for Subclass 482 (Temporary Skill Shortage) visas in the Short-term stream and Medium-term stream. It also applies to nominations for the Direct Entry streams in the Subclass 186 (Employer Nomination Scheme) visa and the Subclass 187 (Regional Sponsored Migration Scheme) visa. The framework ensures that sponsored overseas workers are remunerated at the level that would apply to an equivalent Australian worker.

If the Minister is not satisfied that the nominee's annual earnings in relation to the occupation will be at least the amount specified in an instrument made for the purposes of paragraph 2.72(15)(b) (currently \$250,000 per year), the Minister must instead be satisfied that:

- the annual market salary rate in relation to the occupation has been determined by the sponsor in accordance with the instrument made under subregulation 2.72(17) (paragraph 2.72C(15)(c));
- the annual market salary rate for the occupation, excluding non-monetary benefits (such as accommodation) must equal or exceed the temporary skilled migration income threshold (TSMIT) as specified in a legislative instrument made for the purposes of paragraph 2.72(15)(d) (currently \$53,900) (paragraph 2.72C(15)(d));
- the nominee's annual earnings in relation to the occupation (which can include non-monetary benefits) will not be less than the annual market salary rate for the occupation (paragraph 2.72C(15)(e)); and
- the nominee's annual earnings in relation to the occupation, excluding any non-monetary benefits, will be equal to or exceed TSMIT (paragraph 2.72C(15)(f)); and
- there is no information known to the Department that indicates that the annual market salary rate for the occupation is inconsistent with Australian labour market conditions relevant to the occupation, or it is reasonable to disregard any such information (paragraph 2.72C(15)(g)).

If satisfied that it is reasonable to do so, the Minister may disregard the requirements at paragraph 2.72C(15)(d) (that the annual market salary rate, *excluding* non-monetary benefits, must equal or exceed TSMIT), provided that the annual market salary rate *including* non-monetary benefits is equal to or exceeds TSMIT (paragraph 2.72C(16)(a)). The requirement set out by paragraph (d) implements the fundamental policy that overseas workers must not undercut Australian salaries. However, one example where it might be reasonable to disregard the requirement at paragraph 2.72C(15)(d) is

where the position involves a significant accommodation component, in relation to workers in remote locations.

Likewise, the Minister may disregard the requirements at paragraph 2.72C(15)(f) (that the nominee's annual earnings, *excluding* non-monetary benefits, must equal or exceed TSMIT), if satisfied that it is reasonable to do so (paragraph 2.72C(16)(b)). The policy underpinning the requirement at paragraph 2.72C(15) (f) is that, even if an overseas worker will earn the same as an Australian worker, it is not intended to allow recruitment of overseas workers if the monetary component of their earnings will be less than TSMIT. Exceptions will only be made if it is clearly established that this is reasonable.

“Annual market salary rate” is defined in regulation 1.03. It is the benchmark for assessing the nomination and represents what an Australian citizen or permanent resident earns, or would earn (in cases where there is no equivalent Australian worker), for performing the occupation in the same location on a full-time basis for a year. The current instrument made under paragraph 2.72(15)(b) and 2.72(17) is the *Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018* made on 15 March 2018 [F2018L00284] and published on the Federal Register of Legislation: <https://www.legislation.gov.au/Details/F2018L00284>.

The above arrangements do not apply to nominations for the Subclass 494 visa in the Labour Agreement stream. This is consistent with existing arrangements for labour agreements in relation to the Subclass 482 (Temporary Skill Shortage) visa and Subclass 186 (Employer Nomination Scheme) visa. Salary arrangements in relation to these nominations are managed through the negotiation process to establish the labour agreement. It is a core principle in those negotiations that Australian salary rates must be paid to visa holders.

If the occupation is nominated for a Subclass 494 visa in the Employer Sponsored stream, there must be no information known to the Department that the employment conditions (other than in relation to earnings) to be provided to the nominee will be less favourable

than those provided to Australian citizens or permanent residents. The Minister must also be satisfied that the sponsor has not engaged in any discriminatory recruitment practices (subregulation 2.72C(17)).

The definition of “discriminatory recruitment practice” is provided for in subregulation 2.57(1) as follows: *a recruitment practice that directly or indirectly discriminates against a person based on the immigration status or citizenship of the person, other than a practice engaged in to comply with a Commonwealth, State or Territory law.* For example, a business which relies heavily on workers from a particular country may be asked to demonstrate that the business is genuinely seeking local workers and has open, competitive and merit-based recruitment practices. However, the Government recognises that there may be legitimate reasons why a business needs to employ a high proportion of overseas workers.

Subregulations 2.72C(18), (19) and (20) collectively provide that:

- it is a requirement for approval of a nomination of an occupation for the Subclass 494 visa in the Employer Sponsored stream that the Minister has been advised by a body about whether the nominee would be paid at least the annual market salary rate for the occupation; and
- the Minister may, by legislative instrument, specify a body or bodies, for the purpose of providing this advice; and
- in relation to a particular nomination, the body providing the advice must:
 - be located in the State or Territory in which the position is located; and
 - have responsibility for the area in which the position is located.

These arrangements are consistent with the existing nomination criteria for nominations of positions in regional Australia made for the purpose of the Direct Entry stream in the Subclass 187 (Regional Sponsored Migration Scheme) visa (see regulation 5.19).

Additional requirements in relation to the Labour Agreement Stream

If the nomination is for a Subclass 494 visa in the Labour Agreement stream, the Minister must be satisfied that the additional requirements at subregulation 2.72(21) are satisfied. These requirements ensure that the nomination is consistent with the terms of the relevant labour agreement.

Items 26 and 27 – Amendments to regulation 2.73

These items amend paragraphs 2.73(9)(b) and 2.73(15)(a) (relating to the process for nomination for the Subclass 482 (Temporary Skill Shortage) visa in the Labour Agreement stream) to clarify that nominations can only be made if the work agreement or proposed work agreement relates to Subclass 482 visas (whether or not it also relates to Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visas).

The purpose of the amendment is to clarify that the Subclass 482 visa and Subclass 494 visa have separate (although similar) nomination procedures. Amendments to regulation 2.76 expand the definition of a ‘work agreement’ to include a labour agreement that authorises the recruitment, employment, or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 494 visa. The intention is to avoid situations where a work agreement that relates only to Subclass 482 can be used to support a nomination for Subclass 494, or where a work agreement that relates only to Subclass 494 can be used to support a nomination for Subclass 482.

Subregulation 2.73B separately sets out the process for nominating an occupation for the purpose of the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visas.

Items 28 and 29 - Amendments to regulation 2.73AA

These items amend subparagraph 2.73AA(3)(c)(i) and subparagraph 2.73AA(3)(c)(ii) (relating to refunds of nomination fees and the

nomination training contribution charge for nominations made for the purpose of Subclass 457 (Temporary Work (Skilled)) visas and Subclass 482 (Temporary Skill Shortage) visas). The purpose of the amendments is to ensure that the refund provisions continue to work appropriately in the cases where the nomination was made by a party to a work agreement or negotiations for a work agreement.

The amendments reflect the fact that work agreements may now also relate to the Subclass 494 visa. Item 28 makes it clear that a refund based on nomination of the wrong occupation is referring to occupations that may be nominated, in accordance with the work agreement, for the purpose of Subclass 457 visas and Subclass 482 visas. Item 29 makes it clear that a refund, based on the annual limit for nominations being reached, is referring to nominations in relation to Subclass 457 and Subclass 482 visas.

Subregulation 2.73C makes separate provision for refunds of nomination fees and the nomination training contribution charge for Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visas.

Item 30 – After regulation 2.73A

New regulation 2.73B – Process for nomination – Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa

New regulation 2.73B sets out the process for nominating a proposed occupation in relation to a holder of a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, or an applicant or proposed applicant for a Subclass 494 visa. This nomination process is prescribed for the purposes of paragraph 140GB(1)(b) of the Migration Act. The nomination process is closely modelled on the nomination process for the Subclass 482 (Temporary Skill Shortage) visa, as set out in regulation 2.73.

Nominations must be made via the internet using the approved form and the nomination fee specified in a legislative instrument must be paid (subregulations 2.73B(3) to (5)). The nomination must also be accompanied by any nomination training contribution charge the

sponsor is liable to pay in relation to the nomination (subregulation 2.73B(6)).

Subregulation 2.73B(7) further provides that the Minister may specify an alternative method for making a nomination of an occupation, or a different form or fee, in circumstances specified in the instrument. If so specified, the nomination application must be made in that way, or using that form or paying that fee. This subregulation is included to cater for situations where online lodgement is not available because of an IT systems issue.

Subregulations 2.73B(8) and (9) provide that certain information must be included in nominations, relating to matters such as the identity of the nominee, the nominated occupation, the annual turnover for the nomination, the location in which the occupation is to be carried out, and other information specified by the Minister in a legislative instrument made under new paragraph 2.73B(14)(d) of the Migration Regulations.

Subregulation 2.73B(10) provides that the sponsor must certify, in writing, whether or not the person has engaged in conduct in relation to the nomination that contravenes subsection 245AR(1) of the Act, which prohibits a person from asking for or receiving a benefit in return for the occurrence of a sponsorship-related event.

Subregulations 2.73B(11) to (13) provide that the sponsor must certify, in writing, certain other matters:

- compliance of the employment contract with Commonwealth, State and Territory requirements relating to employment, including the National Employment Standards (within the meaning of the *Fair Work Act 2009*) if applicable (this requirement applies unless the nominated occupation is specified in an instrument in writing under subregulation 2.72C(14));
- that the tasks of the position include a significant majority of the tasks specified for the occupation in ANZSCO (if there is an ANZSCO code for the occupation) or, for the Employer Sponsored

stream, the relevant legislative instrument or, for the Labour Agreement stream, the relevant work agreement;

- that the qualifications and experience of the nominee are commensurate with the qualifications and experience specified for the occupation, either in ANZSCO (if there is an ANZSCO code for the occupation) or, for the Employer Sponsored stream, the relevant legislative instrument. For the Labour Agreement stream the sponsor must certify that the qualifications and experience of the nominee are commensurate with the qualifications and experience specified in the relevant work agreement; and
- for nominations for a Subclass 494 visa in the Employer Sponsored stream, unless the occupation is specified in an instrument in writing under subregulation 2.72C(14), that the position is in the nominator's business or a business of an associated entity of the nominator.

Subregulation 2.73B(14) gives the Minister an express power to make legislative instruments for the purpose of the provisions in regulation 2.73B that refer to matters being specified in a legislative instrument.

New regulation 2.73C – Refund of nomination fee and nomination training contribution charge – Subclass 494 (Skilled Work – Employer Sponsored Regional (Provisional)) visa

New regulation 2.73C inserted by this item provides for refunds of the nomination fee and nomination training contribution charge. The availability of refunds reflects the possibility that, for various reasons, employers may not receive any benefit from the nominated foreign worker and this may be through no fault of the employer. Refunds are available in the following circumstances:

- the nomination is made as a result of a mistake by the Department (subregulation 2.73C(2));
- in the case of a nomination in the Labour Agreement stream, the nominated occupation is not covered by the work agreement or the ceiling on nominations in relation to Subclass 494 (Skilled

Employer Sponsored Regional (Provisional) visas under the work agreement has been reached (subregulation 2.73C(3));

- the person withdraws the nomination before a decision is made because the nomination identified the wrong occupation or stream by mistake or the information in the nomination used to work out the amount of nomination training contribution charge in relation to the nomination was incorrect (subregulation 2.73C(4));
- in the case of a nomination in the Employer Sponsored stream, the application to be a sponsor has been withdrawn or refused, or, in the case of a nomination in the Labour Agreement stream, the nomination is withdrawn before the work agreement is entered into (subregulations 2.73C(5) and (6));
- an application for a Subclass 494 visa made on the basis of the nomination is refused under certain sections of the Act relating to character or because the visa application did not satisfy certain public interest criteria (subregulation 2.73C(7));
- the visa holder fails to commence employment in the position associated with the nominated occupation or ceases employment within 1 year after commencing employment (subregulations 2.73C(8) and (9)). In the second of these situations, a pro rata amount representing the first year of the sponsorship, as specified in subregulation 2.73C(9), would be deducted. This recognises that the employer has received some benefit from the sponsorship arrangement.

Merits review will not be available in relation to a decision not to refund a nomination fee or the nomination training contribution charge. This is consistent with the current position in relation to refunds of fees and charges under the Migration Regulations, including nomination fees, the nomination training contribution charge and visa application charges.

Item 31 – Subregulation 2.75(3)

This item repeals subregulation 2.75(3) as the definitions for ***nomination end day*** and ***sponsorship end day*** have been moved to regulation 1.03.

Item 32 – At the end of Division 2.17

This item inserts new regulation 2.75B to provide for the period of approval of a nomination of an occupation relating to a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. The new regulation is modelled on the equivalent provision applicable to the period of approval of a nomination for the purposes of the Subclass 482 (Temporary Skill Shortage) visa (see regulation 2.75).

The nomination will cease on the earliest of the following events:

- the day on which the Department receives notification in writing that the nomination has been withdrawn;
- 12 months after the day on which the nomination is approved, unless the related visa application is still outstanding (in which case, the nomination ceases on the day on which the visa application is finally determined or withdrawn);
- the day on which the nominee is granted a Subclass 494 visa;
- if the nomination relates to a Subclass 494 visa in the Employer Sponsored stream – the nomination end day unless on this day the person is a standard business sponsor or there is an application for approval as a standard business sponsor made by the person before the sponsorship end day and a decision has not yet been made under subsection 140E(1) of the Act. In the second situation, the nomination will end on the day on which such an application is refused. The definitions of ***nomination end day*** and ***sponsorship end day*** are set out in regulation 1.03;
- the day on which the sponsor's approval as a standard business sponsor (if applicable) is cancelled;
- the day on which the work agreement (if applicable) ceases.

Item 33 – Paragraph 2.76(2)(b)

This item amends regulation 2.76 which defines “work agreement” for the purpose of the definition in the Migration Act. The definition in subsection 5(1) of the Migration Act provides that “work agreement” means an agreement that satisfies the requirements prescribed by the regulations for the purposes of this definition.

This amendment provides that a work agreement for the purposes of the Migration Act is a labour agreement that authorises the recruitment, employment or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 482 (Temporary Skill Shortage) visa or a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. A labour agreement can relate to one or other of the visas, or to both visas.

Prior to this amendment, regulation 2.76 referred only to labour agreements relating to Subclass 482 visas. The effect of this amendment is that a work agreement can also be a labour agreement relating to Subclass 494 visas. The amendment is necessary to support the operation of the Labour Agreement stream in the Subclass 494 visa (see Subdivision 494.23 – *Criteria for Labour Agreement stream*).

Items 34 and 35 – Amendments to insert new 2.79A

New regulation 2.79A provides for a new obligation applying to standard business sponsors and parties to work agreements in relation to the terms and conditions of employment provided to sponsored workers who hold or held a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. The new regulation is modelled on the equivalent provision applicable to sponsors of sponsored workers who hold or held a Subclass 482 (Temporary Skill Shortage) visa (see regulation 2.79).

Regulation 2.79A provides as follows:

- the obligations apply in relation to sponsored workers who hold a Subclass 494 visa, or whose last substantive visa was a Subclass 494 visa (subregulation 2.79A(1));

- the obligations in regulation 2.79A do not apply to a standard business sponsor if the sponsored visa holder or former visa holder is paid at least the amount specified in a legislative instrument for the purposes of paragraph 2.79(1A)(b) of the Migration Regulations (subregulation 2.79A(2)). The specified amount is currently \$250,000;
- the following obligations must be met by standard business sponsors and former standard business sponsors:
 - the sponsor must provide annual earnings that are not less than the annual earnings that the sponsor indicated would be provided when the nomination was approved (subparagraph 2.79A(3)(a)(i));
 - the sponsor must provide earnings (as defined in regulation 2.57A of the Migration Regulations) that are not less than an Australian citizen or permanent resident earns or would earn for performing equivalent work in the same workplace at the same location (subparagraph 2.79A(3)(a)(ii)). This means that the earnings of the visa holder or former visa holder must keep pace with any increases in the earnings that are provided, or would be provided, to Australian workers performing equivalent work; and
 - the sponsor must provide employment conditions (other than in relation to earnings) that are no less favourable than those that apply, or would apply to an Australian citizen or permanent resident performing equivalent work at the same location (subparagraph 2.79A(3)(a)(iii));
- parties to a work agreement must ensure that the terms and conditions of employment provided to the sponsored person are no less favourable than the terms and conditions of employment set out in the work agreement (paragraph 2.79A(3)(b)). Whether a set of terms and conditions are less favourable must be determined in accordance with subsection 2.57(3A);
- the obligation begins on the day the nomination is approved or, if the sponsored person does not hold a Subclass 494 visa

when the nomination is approved, the day on which the sponsored person is granted the visa (paragraph 2.79A(4)(a));

- the obligation ends on the earlier of: the day on which the sponsored person is granted a further substantive visa, other than a Subclass 494 visa, which is in effect; and the day on which the sponsored person ceases employment with the sponsor (paragraph 2.79A(4)(b)).

Items 36 to 42 – Amendments to regulation 2.80

These items amend regulation 2.80, which provides for the obligation for sponsors to pay travel costs to enable sponsored persons to leave Australia. These amendments ensure that this obligation applies to a person who is or was a standard business sponsor or a party to a work agreement in relation to sponsored persons who hold a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, or whose last substantive visa was a Subclass 494 visa. The obligations mirror the obligations that apply to sponsors of foreign workers who hold or held a Subclass 482 (Temporary Skill Shortage) visa.

Items 43 and 44 – Subregulation 2.82(3)

Regulation 2.82 provides for the obligation to keep records. The obligation applies to everyone who is or was an approved sponsor, including both standard business sponsors and parties to a work agreement. The amendment to paragraph 2.82(3)(e) is consequential to the new obligation created by regulation 2.79A above, to ensure equivalent terms and conditions of employment in relation to the Subclass 494 visa. It ensures that paragraph 2.82(3)(e) applies to an approved sponsor if the obligation mentioned in regulation 2.79A applies to the person. Regulation 2.79A applies to standard business sponsors and parties to work agreements in relation to sponsored persons who hold a Subclass 494 visa, or whose last substantive visa was a Subclass 494 visa.

Items 45 to 49 – Amendments to regulation 2.86

These items amend regulation 2.86, which provides for the obligations of sponsors to ensure that the primary sponsored person

works or participates in the nominated occupation, program or activity. These amendments ensure that, in addition to applying to sponsors where the sponsorship relates to a Subclass 457 (Temporary Work (Skilled)) visas and Subclass 482 (Temporary Skill Shortage) visas, the relevant obligations also apply to a person who is or was a standard business sponsor or a party to a work agreement in relation to sponsored persons who hold a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, or whose last substantive visa was a Subclass 494 visa.

In particular, the amendments insert new subregulation 2.86(2B) of the Migration Regulations. Subregulation 2.86(2B) provides that if the primary sponsored person holds a Subclass 494 visa, or their last substantive visa was a Subclass 494 visa, and the nominated occupation is not specified in an instrument in writing under subregulation 2.72C(14) (e.g. medical occupations), the sponsor must ensure that the primary sponsored person is engaged only as an employee of the sponsor or an employee of an associated entity of the person. However, employment by associated entities is only permissible if the sponsor is or was a standard business sponsor. The obligations replicate the obligations that apply to sponsors where the sponsorship relates to a Subclass 457 or 482 visa.

In addition to the obligations imposed by subregulation 2.86(2B), subregulation 2.86(2BA) provides that if the sponsor is or was a standard business sponsor, the primary sponsored person holds a Subclass 494 visa, or their last substantive visa was a Subclass 494 visa, and the nominated occupation is not specified in an instrument in writing under subregulation 2.72C(14) (e.g. medical occupations), the sponsor must ensure that:

- the primary sponsored person is employed under a written contract of employment;
- the sponsor does not engage in activities that relate to the recruitment of a visa holder or visa applicant for the purpose of supplying them to a business other than a business associated with the sponsor; and

- the sponsor does not engage in activities that relate to the hire of a visa holder to a business other than a business associated with the sponsor.

Consequential to the above, amendments to subregulation 2.86(2AA) limit the effect of that provision to circumstances where the sponsor is or was a standard business sponsor, the primary sponsored person holds a Subclass 457 visa or a Subclass 482 visa, or their last substantive visas was a Subclass 457 or Subclass 482 visa and the nominated occupation is not specified in an instrument in writing under subregulation 2.72(13) (e.g. medical occupations).

Item 50 – Subparagraphs 2.87(1A)(a)(iia) and (b)(iia) and (1B)(a)(iia) and (b)(iia)

This item amends regulation 2.87, which imposes an obligation on sponsors and former sponsors not to seek to transfer or recover certain costs. In summary, the obligation prevents a sponsor or former sponsor from passing on the costs of sponsorship to the foreign worker or a third party. The effect of the amendments is that the obligation is extended to cover fees and nomination training contribution charge applicable to nominations for the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

Items 51 to 53 – Amendments to regulation 4.02

These items amend regulation 4.02, which deals with eligibility to seek review of decisions by the Administrative Appeals Tribunal (AAT). The amendments insert references to the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. The effect of the amendments is as follows:

- item 51 – this item includes a reference to the Subclass 494 visa in subregulation 4.02(1A) of the Migration Regulations. The effect of the item is that a primary applicant for a Subclass 494 visa may seek merits review by the AAT of a decision to refuse to grant the visa if the visa applicant was in Australia when the visa application was made and, at the time that the visa application is refused, the visa applicant is the subject of a nomination that has not ceased or the nominator is seeking AAT review of either a

decision to refuse to approve the person as a sponsor or a decision to refuse to approve the nomination. This limitation of review rights by reference to the status of the sponsor and nomination is provided for by paragraph 338(2)(d) of the Migration Act, under which subregulation 4.02(1A) is made. The same review rights apply to decisions to refuse to grant Subclass 482 (Temporary Skill Shortage) visas;

- items 52 and 53 – these items amend paragraph 4.02(4)(l) of the Migration Regulations. Subregulation 4.02(4) prescribes certain decisions as decisions that are reviewable by the AAT, pursuant to subsection 338(9) of the Migration Act.
 - One effect of the amendments to paragraph 4.02(4)(l) is to provide review rights for primary applicants for Subclass 494 visas who apply outside Australia. The review rights are equivalent to the review rights that apply to onshore applicants, i.e. the review right is subject to the same requirements in relation to the status of the sponsor and nomination. However, if the visa applicant is outside Australia when the visa application is made, the right to seek review of a refusal decision is given to the sponsor rather than the visa applicant (see paragraph 4.02(5)(k)). In addition, the sponsor must be a type of sponsor listed in subregulation 4.02(4AA) (which includes a company or partnership that operates in the migration zone). As is the case with the review rights for onshore applicants, the review rights in relation to offshore applicants are the same as those that currently apply in relation to decisions to refuse to grant Subclass 482 (Temporary Skill Shortage) visas;
 - Another effect of the amendments to paragraph 4.02(4)(l) is to provide for AAT review of a Subclass 494 visa refusal decision that relates to a family member of a Subclass 494 visa holder. If the family member is outside Australia at the time of application, the review right arises under subparagraph 4.02(4)(l)(iv). As with primary

applicants, the review right is given to the sponsor rather than the visa applicant (see paragraph 4.02(5)(k)). By contrast, the review right for a secondary applicants who apply for Subclass 494 visa in Australia arises under paragraph 4.02(4)(q). In those cases the review right is given to the visa applicant (see paragraph 4.02(5)(p)). These arrangements are the same as those that currently apply in relation to decisions to refuse to grant Subclass 482 (Temporary Skill Shortage) visas.

Items 54 and 55 – Amendments to regulation 5.19

Regulation 5.19 provides for the approval of nominated positions for the purpose of the Subclass 186 (Employer Nomination Scheme) visa and the Subclass 187 (Regional Sponsored Migration Scheme) visa.

The purpose of these items is to close the nomination process for the Subclass 187 visa. Subject to the transitional arrangements noted below, the last day for making an application for approval of a nomination, or an application for the visa, will be 15 November 2019.

New paragraph 5.19(2)(aa) and subregulation 5.19(2A) collectively provide that the application for approval of the nomination of a position in Australia must be made before 16 November 2019 if the application is for the purpose of a Subclass 187 visa. However, this does not apply if the application for approval of a nomination is for the purpose of a Subclass 187 visa in the Temporary Residence Transition stream and the identified person is a “transitional 457 worker” or “transitional 482 worker” at the time the application is made.

The term “transitional 457 worker” means a person who on 18 April 2017 held a Subclass 457 visa or was an applicant for a Subclass 457 visa that was subsequently granted. The date of 18 April 2017 is the date on which the Government announced a broad package of reforms for the employer sponsored skilled visa programs, including the proposed repeal of the Subclass 457 visa. These transitional arrangements ensure that people who already held or had applied for a

Subclass 457 visa when the changes were announced on 18 April 2017 are not disadvantaged by the new requirements.

The term “transitional 482 worker” means a person who on 20 March 2019 either held a Subclass 482 (Temporary Skill Shortage) visa in the Medium-term stream, or was an applicant for a Subclass 482 (Temporary Skill Shortage) visa in the Medium-term stream that was subsequently granted. The date of 20 March 2019 is the date on which the Government announced the proposed introduction of the Subclass 494 visa as a replacement for the Subclass 187 visa. The transitional arrangements ensure that people who already held or had applied for a Subclass 482 visa when the changes were announced on 20 March 2019 are not disadvantaged by the new requirements.

Item 56 – At the end of regulation 5.19M

This item ensures that the regime in the Migration Act prohibiting sponsors from seeking or receiving payment or other benefits in return for sponsorship and related matters will cover such activities if they relate to the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

Item 57 – Before paragraph 5.35AB(1)(m)

This item ensures that section 506B of the Migration Act relating to a request for the tax file number of an applicant or holder, or former holder of a visa, applies to the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

Regulation 5.35AB (Tax file numbers) prescribes visas for the purposes of subsection 506B(1) of the Migration Act. That subsection provides a power for the Secretary of the Department to request the provision of the tax file number of a person who is an applicant for, or holder or former holder of, a prescribed visa. The effect of this amendment is to prescribe the new Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa for the purposes of subsection 506B(1). A tax file number provided under this provision may be used for any of the purposes prescribed in subregulation 5.35AB(2),

which include verifying the identity of the visa applicant or holder, ensuring compliance with the conditions of the visa, and the development of policy in relation to the relevant prescribed visas.

Item 58 – At the end of subregulation 5.42(1)

This item prescribes a nomination of a proposed occupation in relation to a holder of, or an applicant or proposed applicant for the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa for the purposes of subsection 140ZM(1) of the Migration Act, which means that the sponsor is liable to pay a nomination training contribution charge to the Commonwealth in relation to the nomination.

Subsection 140ZM(1) of the Migration Act states that a person is liable to pay nomination training contribution charge to the Commonwealth in relation to a nomination by the person under section 140GB of the Migration Act if the nomination is a nomination of a kind prescribed by the regulations. The nomination training contribution charge is imposed by the *Migration (Skilling Australians Fund) Charges Act 2018*. The amount of the nomination training contribution charge is specified in the *Migration (Skilling Australians Fund) Charges Regulations 2018* as amended with effect from 16 November 2019 by the *Migration (Skilling Australians Fund) Charges Amendment (Subclass 494 Visa) Regulations 2019* (‘the Charges Amendment regulation’).

In accordance with new subregulation 2.73B(6) of the Migration Regulations, a nomination in relation to a Subclass 494 visa must be accompanied by any nomination training contribution charge the person is liable to pay in relation to the nomination. Under new regulation 2.73C of the Migration Regulations this charge may be refunded to the person in certain circumstances.

Items 59 and 60 – Amendments to subitem 1114C(3) of Schedule 1

The effect of these amendments is to ensure that an application for a Regional Employer Nomination (Permanent) (Class RN) visa (i.e. the

Subclass 187 (Regional Sponsored Migration Scheme) visa) made by a person seeking to satisfy the primary criteria must be made before 16 November 2019. From that date, applicants who would previously have applied for a Subclass 187 visa will have the option of applying for the new Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. Transitional arrangements apply for transitional Subclass 457 workers and transitional 482 workers and members of the family unit of the primary applicant who are taken to have made a combined application.

Item 61 – At the end of Part 2 of Schedule 1

This item inserts new item 1242 at the end of Part 2 of Schedule 1 to the Migration Regulations. Item 1242 creates the Skilled Employer Sponsored Regional (Provisional) (Class PE) visa, containing one subclass, which is the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. Item 1242 contains the requirements which must be met to make a valid application for the Subclass 494 visa. The requirements are as follows:

- the application must be made on an approved form specified by the Minister in a legislative instrument made for the purposes of this item under subregulation 2.07(5);
- the prescribed visa application charge (VAC) must be paid (subitem 1242(2)). The visa application charge is a tax imposed on visa applications by the *Migration (Visa Application Charge) Act 1997* (the VAC Act). The amount payable on a particular application is prescribed in the Migration Regulations. The prescribed amount may be any amount up to the visa application charge limit set for most visas under section 5 of the VAC Act. The original visa application charge limit in the 1996-1997 financial year was \$12,500. This amount has been indexed annually in relation to the Consumer Price Index;
 - o the table in paragraph 1242(2)(a) sets out the amounts of the first instalment payable on application. The amounts are:

- the base application charge is \$3,755
 - the additional applicant charge (payable by an applicant seeking to satisfy the secondary criteria whose application is combined with that of a primary applicant) is:
 - for an applicant who is at least 18: \$1,875
 - for an applicant who is less than 18: \$940
- the table in paragraph 1242(2)(b) sets out the second instalment of the visa application charge, payable before the visa is granted. The amounts are:
- for an applicant who was at least 18 at the time of application, is assessed as not having functional English and who satisfies the primary criteria for the grant of a Subclass 494 visa: \$9,800;
 - for an applicant who was at least 18 at the time of application, is assessed as not having functional English and who satisfies the secondary criteria for the grant of a Subclass 494 visa: \$4,890;
 - for any other applicant: Nil;
 - despite the above, for an applicant who satisfies the primary criteria for the grant of a Subclass 494 visa on the basis of a nomination of the occupation of Minister of Religion, or a member of their family unit, the amount of the visa application charge is nil.
- an application must be made at the place, and in the manner (if any) specified by the Minister in a legislative instrument made for the purposes of this item under subregulation 2.07(5), and the applicant may be in Australia (but not in immigration clearance) or outside Australia when applying for the Subclass 494 visa (paragraphs 1242(3)(a) and (b));
- an applicant in Australia must hold a substantive visa or a Bridging A, B, or C visa (paragraph 1242(3)(c)). It is not possible to make an application for this visa in Australia if the

person is an unlawful non-citizen or holds a Bridging D, E, F, or R visa;

- applications by family members can be combined with an application by the primary applicant or any other member of the family unit (paragraph 1242(3)(d)). This is a standard provision in the Migration Regulations;
- for applicants seeking to satisfy the primary criteria, the visa application must be supported by a nomination and must be an application for the stream identified in the nomination (subitem 1242(4), table items 1, 2 and 3). It is permissible to lodge the visa application before the nomination is approved (subitem 1242(4), table item 4). However, the visa cannot be granted unless and until the nomination is approved. If necessary, it is possible to lodge an application for approval as a standard business sponsor, a nomination, and a visa application at the same time, provided they are lodged in that sequence. However, a visa application will not be valid if the standard business sponsor is the subject of a sanction under section 140M of the Act (i.e. the approval has been cancelled or the sponsor has been barred from sponsoring more overseas workers) (subitem 1242(4), table item 5). The applicant must also make a declaration in the application that no contravention of subsection 245AS(1) of the Migration Act has occurred as a result of the conduct of the applicant or any person who has made a combined application with the applicant (this is a prohibition on offering or providing a benefit in return for the occurrence of a sponsorship related event) (subitem 1242(4), table item 6);
- except in circumstances specified by the Minister in a legislative instrument made under subregulation 2.07(5), it is a requirement for the Employer Sponsored stream that the applicant's skills have been assessed as suitable by the assessing authority for the nominated occupation, and that the assessment is not for a Subclass 485 (Temporary Graduate) visa. The assessing authorities will be specified by the Minister in a legislative instrument made under subclause 494.224(6) of

Schedule 2 to the Migration Regulations (subitems 1242(5) and (6)).

Items 62 to 67 – Amendments to the conditions imposed on bridging visas

These items amend the provisions in Schedule 2 to the Migration Regulations dealing with bridging visas. The amendments are consequential to the creation of the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa and the new visa condition 8608. This condition restricts the employment which may be engaged in by holders of a Subclass 494 visa. It is in similar form to visa condition 8607, which applies to holders of Subclass 482 (Temporary Skill Shortage) visas. The effect of the amendments is as follows:

- Item 62 amends subclause 010.211(4) with the effect that the holder of a Bridging A or Bridging B visa that is subject to condition 8608 may be granted a Bridging A visa that is not subject to that condition if the Minister is satisfied that the applicant has a compelling need to work;
- Item 63 amends subclause 010.611(3B) with the effect that there are no conditions on a Bridging A visa granted to a person who meets the requirements for the grant of a Bridging A visa on the basis of a valid application for a Skilled Employer Sponsored Regional (Provisional) (Class PE) visa (Subclass 494 visa);
- Item 64 amends subclause 010.611(4) with the effect that condition 8608 will apply to a Bridging A visa granted to a holder or former holder of a Subclass 494 visa if that person is entitled to the grant of a Bridging A visa on the basis of an application for a visa other than a visa for which conditions are specified in subclauses 010.611(1) to 010.611(3E);
- Item 65 and item 66 make amendments to the provisions for Bridging B visa that are equivalent to the amendments to Bridging A visa made by items 63 and 64;

- Item 67 amends subclause 030.613(1) with the effect that there are no work restrictions on a Bridging C visa granted to a person who meets the requirements for the grant of a Bridging C visa on the basis of a valid application for a Skilled Employer Sponsored Regional (Provisional) (Class PE) visa (Subclass 494 visa).

Item 68 – Clause 482.241 of Schedule 2

This item repeals and substitutes clause 482.241 to clarify that it is a primary criterion for grant of a Subclass 482 (Temporary Skill Shortage) visa in the Labour Agreement stream that the work agreement authorises the recruitment, employment or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 482 visa.

This clarification is required as a result of amendments to regulation 2.76, which expand the definition of a ‘work agreement’ to include a labour agreement that authorises the recruitment, employment, or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. This means that a work agreement may be a labour agreement that relates to Subclass 482 or Subclass 494, or it may cover both visas.

New clause 482.241 clarifies that, in order for a Subclass 482 visa to be granted, the work agreement must be in relation to a Subclass 482 visa (whether or not it also relates to Subclass 494 visas).

Item 69 – Before Part 500 of Schedule 2

This item inserts new Part 494 into Schedule 2 to the Migration Regulations. Part 494 contains the criteria for the grant of the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa and also specifies the visa conditions and when the visa is in effect.

The Subclass 494 visa contains two streams for skilled workers. The requirements for the visa are made up of common criteria, which must

be met by all primary applicants, as well as criteria specific to each stream. Part 494 also includes the secondary criteria that must be met by family members who are applying for the visa.

Division 494.1 provides for the definition of “nominated occupation”, which means the occupation nominated by the nomination identified in the application for the Subclass 494 visa.

Division 494.2 sets out the primary criteria. These are the criteria that must be met by the nominated skilled worker. The primary criteria contain common criteria which must be met by all primary applicants. In addition, a primary applicant must satisfy the criteria in the stream to which the application relates. The stream to which the application relates is the stream identified in the nomination.

Common criteria

Subdivision 494.21 sets out the following common criteria:

- the primary applicant, and members of the family unit of the primary applicant who are also applying for a Subclass 494 visa, must satisfy the public interest criteria prescribed by subclauses 494.211(1) to (5). This includes public interest criteria relating to health and character. Members of the family unit who are not applicants must satisfy public interest criteria prescribed by subclause 494.211(6). If the applicant or any member of the applicant’s family unit fails to meet a public interest criterion prescribed for the person, the visa cannot be granted to the primary applicant or to any family member;
- the primary applicant, and members of the family unit of the primary applicant who are also applying for a Subclass 494 visa, must satisfy the special return criteria prescribed by 494.212;
- a nomination by an approved sponsor must have been approved and must remain in effect (subclause 494.213(1)). The criteria for approval of nominations are set out in regulation 2.72C;

- the applicant must genuinely intend to perform the nominated occupation and the position associated with the nominated occupation must be genuine (subclause 494.213(2)). The requirement for the position to be genuine is also assessed at the nomination stage (subregulation 2.72C(12));
- there must be no adverse information known to the Department about the sponsor or a person associated with the sponsor, unless it is reasonable to disregard that information (clause 494.214). This is a standard criterion that applies at every stage of decision-making: sponsor approval; nomination approval; and visa grant. The term “adverse information” is defined in regulation 1.13A and the term “associated with” is defined in regulation 1.13B of the Migration Regulations;
- the applicant must not, in the previous 3 years, have engaged in conduct that contravenes certain provisions of the Migration Act relating to asking for or receiving a benefit in return for sponsorship, or offering to provide or providing a benefit in return for sponsorship, unless the Minister considers it reasonable to disregard the conduct (clause 494.215).

Criteria for the Employer Sponsored stream

The criteria that apply to applicants in the Employer Sponsored stream, in addition to the common criteria outlined above, are as follows:

- the applicant, and each member of the family unit of the applicant who is also an applicant for the visa, must satisfy public interest criterion 4007 relating to the requirement to undertake a medical assessment and be free from certain health conditions that would be a threat to public health in Australia (subclauses 494.221(1) and (2));
- each member of the family unit of the applicant who is not an applicant for a Subclass 494 visa must satisfy public interest criterion 4007, unless it would be unreasonable to require the

person to undergo assessment in relation to the criterion (subclause 494.221(3))

- the applicant must be employed to work in the nominated occupation and in a position in the sponsor's business or the business of an associated entity of the sponsor, unless the nominated occupation is specified in an instrument in writing under subregulation 2.72C(14) of the Migration Regulations (subclause 494.222). It is intended that the occupations that will be specified in the instrument are the same occupations that are specified for the same reason in relation to the Subclass 482 (Temporary Skill Shortage) visa (see subregulation 2.72(13) of the Migration Regulations). At the present time, the occupations are Chief Executive or Managing Director (ANZSCO code 111111), Corporate General Manager (ANZSCO code 111211), General Medical Practitioner (ANZSCO code 253111) and all of the specialist medical occupations. These occupations often involve work for more than one employer and work as an independent contractor. For example, a medical specialist may be engaged by more than one hospital and may have an associated private practice. This exception to the criterion is consistent with current practice for sponsored work visas;
- unless circumstances specified by the Minister in a legislative instrument made under subclause 494.223(2) existed, at the time of application the applicant must have been under 45 years of age (clause 494.223);
- unless circumstances specified by the Minister in a legislative instrument made under subclause 494.224(7) existed, at the time of application the applicant must meet the skills assessment requirements prescribed by clause 494.224, namely that:
 - o (i) the applicant's skills must have been assessed as suitable for the applicant's nominated occupation by the assessing authority for the nominated occupation (specified in a legislative instrument), the assessment must

be made within the previous 3 years or must still be valid if the stated validity of the assessment is less than 3 years; or (ii) the applicant must hold a Subclass 457 (Temporary Work (Skilled)) visa or a Subclass 482 (Temporary Skill Shortage) visa, and have previously been assessed by the assessing authority for the applicant's nominated occupation (specified in a legislative instrument) as suitable for that occupation; and

- the assessment must not have been made for a Subclass 485 (Temporary Graduate) visa; and
 - if the assessment was made on the basis of a qualification obtained in Australia while the applicant held a student visa, the qualification must have been obtained as a result of studying a registered course;
- unless circumstances specified by the Minister in a legislative instrument made under subclause 494.225(2) existed, at the time of application the applicant must have been employed in the nominated occupation for at least 3 years on a full-time basis and at the level of skills required for the occupation (clause 494.225);
- unless circumstances specified by the Minister in a legislative instrument made under subclause 494.226(2) existed, at the time of application the applicant must have had competent English. The meaning of “competent English” is set out in regulation 1.15C of the Migration Regulations.

Criteria for the Labour Agreement stream

The Labour Agreement stream caters for applicants nominated by a party to a work agreement. A work agreement is an agreement between the Commonwealth and an employer that authorises the recruitment of foreign workers on the understanding that they will be eligible for the grant of a visa, as specified in the work agreement, if the requirements of the work agreement and all relevant statutory criteria are satisfied.

The criteria that apply to applicants in the Labour Agreement stream, in addition to the common criteria outlined above, are as follows:

- the applicant, and each member of the family unit of the applicant who is also an applicant for the visa, must satisfy public interest criterion 4005 relating to the requirement to undertake a medical assessment and be free from certain health conditions that would be a threat to public health in Australia (subclause 494.231(1) and (2)). If the applicant or any member of the applicant's family unit fails to meet a public interest criterion prescribed for the person, the visa cannot be granted to the primary applicant or to any family member;
- each member of the family unit of the applicant who is not an applicant for a Subclass 494 visa must satisfy public interest criterion 4005, unless it would be unreasonable to require the person to undergo assessment in relation to the criterion (subclause 494.231(3));
- the nominated occupation must be the subject of a work agreement between the Commonwealth and the person who nominated the occupation, and the work agreement must authorise the recruitment, employment, or engagement of services of a person who is intended to be employed or engaged as a holder of a Subclass 494 visa (clause 494.232);
- at the time of application, the applicant must have been under 45 years of age unless the work agreement specifies otherwise (clause 494.233);
- the applicant must have English language skills that are suitable to perform the nominated occupation (clause 494.234);
- the applicant must have the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation (subclause 494.235(1));

- the applicant must have worked in the nominated occupation or a related field for at least 3 years, unless the Minister considers it reasonable not to require this in the circumstances (subclause 494.235(2));
- the Minister can require the applicant to demonstrate that he or she has the skills necessary to perform the tasks of the nominated occupation and if so, the applicant must demonstrate this in the manner specified by the Minister (subclause 494.235(3)).

Secondary criteria

Division 494.3 sets out the criteria that must be met by family members who are applying for a Subclass 494 visa with the primary applicant, or applying subsequently on the basis of being a family member of a Subclass 494 visa holder who satisfied the primary criteria. Details of the criteria to be satisfied by a secondary applicant are:

- clause 494.311 requires that the applicant must be a member of the family unit of a person who holds a Subclass 494 visa granted on the basis of satisfying the primary criteria;
- clause 494.312 sets out the public interest criteria, including those related to health and character which must be satisfied by secondary applicants.
- clause 494.313 sets out the special return criteria which must be satisfied by secondary applicants;
- clause 494.314 requires that either the secondary applicant is listed on the primary applicant's nomination, or that the sponsor has agreed in writing for the secondary applicant to be a secondary sponsored person in relation to that sponsor;
- clause 494.315 requires that there must be no adverse information known to the Department about the sponsor or a

person associated with the sponsor, unless it is reasonable to disregard that information. This is a standard criterion which applies at every stage of decision-making: sponsor approval; nomination approval; and visa grant. The term “adverse information” is defined in regulation 1.13A and the term “associated with” is defined in regulation 1.13B of the Migration Regulations;

- clause 494.316 requires that the applicant must not, in the previous 3 years, have engaged in conduct that contravenes certain provisions of the Migration Act relating to asking for or receiving a benefit in return for sponsorship, or offering to provide or providing a benefit in return for sponsorship, unless the Minister considers it reasonable to disregard the conduct.

Circumstances applicable to grant

Division 494.4 prescribes the circumstances applicable to grant of a Subclass 494 visa. An applicant for a Subclass 494 visa may be in Australia (other than in immigration clearance) or outside Australia when the visa is granted (clause 494.411).

When visa is in effect

Division 494.5 sets out when a Subclass 494 visa is in effect. Clause 494.511 provides for the commencement and duration of a Subclass 494 visa, and the extent to which the visa permits travel to Australia. For a person who satisfies the primary criteria, the Subclass 494 visa is a temporary visa permitting the holder to travel to, enter and remain in Australia for 5 years from the date of grant. For a person who satisfies the secondary criteria, the period is 5 years from the date of grant of the primary visa holder’s visa. This ensures that the visas of all family members cease at the same time, even if one or more family members were granted the visa after the primary holder.

Conditions

Division 494.6 sets out the conditions that are imposed on a Subclass 494 visa.

Clause 494.611 provides that if the applicant is outside Australia when the visa is granted, the applicant must enter before a date specified by the Minister. The visa is granted to allow the visa holder to take up employment in Australia. If the visa holder does not travel to Australia before the specified date, this may trigger consideration of visa cancellation under section 116 of the Migration Act. The clause also provides that if the applicant satisfies the secondary criteria for grant of the visa, condition 8515 (*the visa holder must not marry or enter into a de facto relationship before entering Australia*) may be imposed. This condition may be relevant where the visa was granted to the secondary applicant because the person was a dependent child. The person would cease to be eligible as a dependent child on marriage or entry into a de facto relationship.

- Clause 494.612 provides that the following mandatory conditions apply to primary applicants: conditions 8578, 8579, 8580, 8581 and 8608.
 - Condition 8578 requires the visa holder to notify the Department of any change, within 14 days of the change occurring, to: the holder's residential address; an email address of the holder; a phone number of the holder; the holder's passport details; the address of an employer of the holder; the address of the location of a position in which the holder is employed.
 - Condition 8579 provides that the holder must live, work and study only in a designated regional area. For a detailed explanation of condition 8579, see item 44 of Schedule 1 to this instrument.
 - Condition 8580 requires that, if requested in writing by the Minister to do so, the visa holder must within 28 days provide evidence of any or all of the following: the visa

holder's residential address, the address of their employer or employers; the address of each location of each position in which the holder is employed; the address of an educational institution attended by the visa holder.

- Condition 8581 provides that the holder must attend an interview at a specified place and time, or in the specified manner and at the specified time, if requested in writing by the Minister.
- Condition 8608 requires the holder to work only in the nominated occupation, and imposes other related requirements (explained further below).
- Clause 494.613 provides that the same conditions (other than condition 8608) as must be imposed on the primary applicant must be imposed on secondary applicants for the visa.

Item 70 - After paragraph 773.213(3)(s) of Schedule 2

This item amends the criteria for the grant of the Subclass 773 (Border) visa and is consequential to the creation of the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. The Subclass 773 visa facilitates entry to Australia by dependent children of visa holders who arrive at the border without a visa. It also facilitates re-entry by former visa holders who departed Australia in circumstances where it was not reasonable to obtain another visa before departure. The Subclass 494 visa is added to the list of visas that engage these criteria.

Items 71 to 74 – Amendments to the Subclass 820 visa

These items make amendments to the Subclass 820 (Partner) visa which are consequential to the creation of the new Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa.

The effect of items 71 and 72 is to provide that if the applicant is the holder of a Subclass 494 visa, or the last substantive visa held by the applicant was a Subclass 494 visa, the applicant must have

substantially complied with the conditions of that visa to be eligible for a Subclass 820 (Partner) visa.

The effect of items 73 and 74 is to provide for the same rule for secondary visa applicants.

Item 75 – At the end of Schedule 8

This item inserts new visa condition 8608 in Schedule 8 to the Migration Regulations. Condition 8608 is a mandatory condition for holders of the Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa who satisfy the primary criteria. The condition is substantially the same as condition 8607, which applies to holders of the Subclass 482 (Temporary Skill Shortage) visa. The requirements imposed by condition 8608 are as follows:

- the visa holder must work only in the nominated occupation identified in the most recent Subclass 494 visa application (subclause 8608(1)). This means that a visa holder who wishes to change occupation must apply for a new visa. This is to allow the Department to assess the suitability of the Subclass 494 visa holder in relation to the new occupation;
- the visa holder must only work in positions as set out in subclause 8608(2), unless the occupation is specified in an instrument in writing under subregulation 2.72C(14) or the visa holder is continuing to work for a person for the purpose of fulfilling a requirement under a law relating to industrial relations and relating to the giving of notice (subclause 8608(3)). In summary, the effect of subclause 8608(2) is as follows:
 - o visa holders in the Employer Sponsored stream must work only in a position in the sponsor's business or the business of an associated entity of the sponsor. Other arrangements, such as labour hire to unrelated businesses, are not permitted; and

- visa holders in the Labour Agreement stream must work only for the nominating employer;
- the visa holder must commence work within 90 days of visa grant (if in Australia) or 90 days of arrival in Australia (if outside Australia), must not cease employment for more than 90 consecutive days, and must obtain and continue to hold any relevant occupational licences, registrations and memberships (subclauses 8608(4), (5) and (6)).

Item 76 – In the appropriate position in Schedule 13

This item amends Schedule 13 to the Migration Regulations (titled *Transitional Arrangements*) to insert Part 81 titled *Amendments made by the Migration Amendment (New Skilled Regional Visas) Regulations 2019*. The purpose of Part 81 is to explain how the new regulations apply, including whether they affect accrued rights or liabilities.

The context for Schedule 13 is provided by the *Legislation Act 2003* which has the effect that amendments to the Migration Regulations cannot apply retrospectively, i.e. a provision of this Regulation would not apply in relation to a person (other than the Commonwealth or an authority of the Commonwealth) if the provision commenced before the day the instrument is registered, to the extent that as a result: (a) the person's rights as at that day would be affected so as to disadvantage the person; or (b) liabilities would be imposed on the person in respect of anything done or omitted to be done before that day (subsection 12(2) of the *Legislation Act 2003*). None of the provisions of this Regulation commence before registration, and subsection 12(2) is not engaged.

Further context for Schedule 13 is provided by paragraph 13(1)(a) of the *Legislation Act 2003*, which has the effect that the *Acts Interpretation Act 1901* applies to this Regulation as if it were an Act. Paragraph 7(2)(c) of the *Acts Interpretation Act 1901* is particularly relevant, as it has the effect that the repeal and amendment of provisions of the Migration Regulations made by this Regulation do

not affect any right, privilege, obligation or liability acquired, accrued or incurred under the Migration Regulations.

As a preliminary point, it can be noted that no application provisions are required for the new Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, as it only comes into existence on 16 November 2019 when this Regulation commences. Hence it will only apply to applications made on or after 16 November 2019.

Clause 8101, titled *Transitional provisions in relation to Subclass 187 (Regional Sponsored Migration Scheme) visa*, provides for the finalisation of nominations that relate to the Subclass 187 visa, to take account of the arrangements for the closure of that visa on 16 November 2019.

Subclauses 8101(1) and (2) provide that nominations relating to a Subclass 187 visa, other than a nomination for the purpose of the Temporary Residence Transition stream which relates to a transitional 457 worker or a transitional 482 worker, are taken to be withdrawn if the person identified in the nomination does not apply for a Subclass 187 visa by 16 November 2019. The purpose of this provision is to deal efficiently with nominations that become redundant on 16 November 2019 because the person identified in the nomination is no longer able to apply for a Subclass 187 visa on the basis of the nomination.

Subclauses 8101(3) and (4) provide for refunds of any nomination training contribution charge paid in relation to the nomination (see paragraph 5.19(2)(fa) in Part 5 of the Migration Regulations, and also the *Migration (Skilling Australians Fund) Charges Regulations 2018* which sets out the amount of the charge).

The Minister *must* refund the nomination training contribution charge if the nomination is taken to be withdrawn under subclause 8101(2) or if the Minister refused to approve the nomination under paragraph 5.19(3)(b) and on 16 November 2019 the application for approval of the nomination is not finally determined. This extends the refund to situations where the refusal decision is subject to AAT review. To avoid situations where the Minister has a duty that cannot be

performed because the nominator cannot be contacted, the mandatory refund only applies if the Minister either receives a written request for a refund or considers it reasonable to refund the amount without a written request (see subclause 8101(3)). Provision for a mandatory refund is appropriate because the nomination has become redundant and is taken to be withdrawn.

If the Minister approved the nomination under paragraph 5.19(3)(a) of Part 5 of the Migration Regulations on or before 15 November 2019 and the Minister either receives a written request for a refund or considers it reasonable to refund the amount without a written request, the Minister *may* refund the nomination training contribution charge (see subclause 8101(4)). The discretion is necessary in this scenario to ensure that refunds are not claimed in cases where the failure of the identified person to apply for the Subclass 187 visa before 16 November 2019 was unrelated to the closure of the visa. For example, a refund would not be provided if the nomination was approved several months before 16 November 2019 and the identified person had decided not to proceed with the visa application.

Any refund paid under subclauses 8101(3) and 8101(4) must be paid to the person who paid the amount (subclause 8101(5) refers).

Merits review will not be available in relation to a discretionary decision not to refund the nomination training contribution charge. This is consistent with the current position in relation to refunds of fees and charges under the Migration Regulations, including nomination fees, the nomination training contribution charge and visa application charges.

Schedule 3 – Amendments relating to the Permanent Residence (Skilled Regional) visa

Migration Regulations 1994

Item 1 – Regulation 1.03

This item inserts a new definition in regulation 1.03 (Interpretation) of the Migration Regulations to define a new term, ***regional provisional visa***.

Regional provisional visa is defined to mean a Subclass 491 (Skilled Work Regional (Provisional)) visa or a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. Subclasses 491 and 494 are new visas, introduced by Schedules 1 and 2 to these Regulations, respectively. The new term is used in new item 1139 Permanent Residence (Skilled Regional) (Class PR), inserted in Schedule 1 to the Migration Regulations by item 4 of this Schedule, below. This new visa class has one subclass, Subclass 191 (Permanent Residence (Skilled Regional)), which is inserted in Schedule 2 to the Migration Regulations by item 5 of this Schedule, below. A person must hold a provisional residence visa to make a valid application for a Permanent Residence (Skilled Regional) (Class PR) visa.

Item 2 – Subregulation 1.12(5) (at the end of the table)

Regulation 1.12 of the Migration Regulations sets out the persons who are members of the family unit of a person who applies for a visa on the basis of satisfying the primary criteria. A member of that applicant's family unit needs to satisfy only the secondary criteria for grant of the relevant visa.

This item inserts references in the table in subregulation 1.12(5) to the new visas created by these Regulations. A reference to the new Permanent Residence (Skilled Regional) (Class PR) is inserted in Column 1 (New visa applied for) of the table. As noted above, this new visa class has one subclass, Subclass 191 (Permanent Residence (Skilled Regional)), which is inserted in Schedule 2 to the Migration Regulations by item 5 of this Schedule, below.

References to the new Subclass 491 Skilled Work Regional (Provisional) visa and the new Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa are inserted in column 2 (old visa person holds at time of application for the new visa) of the table.

The new Subclass 491 and 494 visas are created by schedules 1 and 2 to these Regulations, respectively.

The effect of this amendment is that if a person meets the requirements in subregulation 1.12(2) to be a member of the family unit of another applicant for the grant of a Subclass 491 Skilled Work Regional (Provisional) visa or a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa, that person will continue to be a member of the first person's family unit for the purposes of an application for a Subclass 191 (Permanent Residence (Skilled Regional)) visa, even though the person may no longer meet the requirements in subregulation 1.12(2) at the time of the application for a Subclass 191 visa.

For instance, at the time of applying for a Subclass 491 visa or Subclass 494 visa, the person may have been a dependent child of the primary applicant, but at the time of applying for a Subclass 191 visa, which may be a number of years later, the person may no longer be a dependent child of the first applicant. This amendment ensures that the person will continue to be a member of the first applicant's family unit for the purpose of the permanent visa application. The rationale is that, if a family unit is on a pathway to permanent residence, all members of the family unit should be able to progress to permanent residence, even if one or more members of the family unit no longer fall within the general definition of that term in regulation 1.12(2).

Item 3 – After paragraph 5.35AB(1)(g)

This item inserts a new paragraph 5.35AB(1)(ga) in subregulation 5.35AB(1) of the Migration Regulations. New paragraph 5.35AB(1)(ga) refers to the new Subclass 191 (Permanent Residence (Skilled Regional)) visa.

Regulation 5.35AB – tax file numbers – prescribes visas for the purposes of subsection 506B(1) of the Migration Act. That subsection provides a power for the Secretary of the Department to request the provision of the tax file number of a person who is an applicant for, or holder or former holder of, a prescribed visa. The

effect of this amendment is to prescribe the new Subclass 191 (Permanent Residence (Skilled Regional)) visa for the purposes of subsection 506B(1). A tax file number provided under this provision may be used for any of the purposes prescribed in subregulation 5.35AB(2), which include verifying the identity of the visa applicant or holder, ensuring compliance with the conditions of the visa, and the development of policy in relation to the prescribed visas.

Item 4 – At the end of Part 1 of Schedule 1

This item inserts a new item 1139 Permanent Residence (Skilled Regional) (Class PR) in Part 1 (Permanent visas) of Schedule 1 (Classes of visa) to the Migration Regulations.

New item 1139 creates the new Permanent Residence (Skilled Regional) (Class PR) visa. The new class has one subclass, Subclass 191 (Permanent Residence (Skilled Regional)) , which is inserted in Schedule 2 to the Migration Regulations by item 5 of this Schedule. New item 1139 sets out the requirements for making a valid application for the new visa. Details of item 1139 are as follows:

Subitem 1139(1) – Form: This subitem provides that an application for a Permanent Residence (Skilled Regional) (Class PR) visa must be made on the approved form specified by the Minister in a legislative instrument made for item 1139 under subregulation 2.07(5) of the Migration Regulations.

Subitem 1139(2) sets out the visa application charge (VAC) payable in respect of an application for a Permanent Residence (Class PR) visa. The visa application charge is a tax imposed on visa applications by the *Migration (Visa Application Charge) Act 1997* (the VAC Act). The amount payable on a particular application is prescribed in the Migration Regulations. The prescribed amount may be any amount up to the visa application charge limit set for most visas under section 5 of the VAC Act. The original visa application charge limit in the 1996-1997 financial year was \$12,500. This amount has been indexed annually in relation to the Consumer Price Index.

The table in paragraph 1139(2)(a) sets out the amounts of the VAC payable on application.

The amounts are:

- the base application charge (payable by an applicant seeking to satisfy the primary criteria) is \$385
- the additional applicant charge (payable by an applicant seeking to satisfy the secondary criteria whose application is combined with that of a primary applicant) is:
 - for an applicant who is at least 18: \$195
 - for an applicant who is less than 18: \$100

Subitem 1139(3) sets out the other requirements to be met for a valid application for a Permanent Residence (Skilled Regional) (Class PR) visa.

Paragraph 1139(3)(a) requires an applicant to make the visa application at the place and in the manner (if any) specified by the Minister in a legislative instrument.

Paragraph 1139(3)(b) provides that an applicant for a Permanent Residence (Skilled Regional) (Class PR) visa may be in or outside Australia, but not in immigration clearance.

Paragraph 1139(3)(c) requires that an applicant who is seeking to satisfy the primary criteria must hold a regional provisional visa to make a valid application for a Permanent Residence (Skilled Regional) (Class PR) visa, and must have held that visa for at least 3 years. A definition of *regional provisional visa* is inserted in regulation 1.03 of the Migration Regulations by item 1 of this Schedule, and is defined to mean a Subclass 491 Skilled Work Regional (Provisional) visa or a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa. The effect of this provision is that a primary applicant must hold one of those visas for at least 3

years, including at the time of application, in order to make a valid application for a Permanent Residence (Skilled Regional) (Class PR) visa.

Paragraph 1139(3)(d) provides that an application by a person seeking to satisfy the secondary criteria for the grant of a Permanent Residence (Class PR) visa on the basis of being a member of the family unit of another applicant for the visa, must be made at the same time and place, and combined with, the application of that other applicant. This allows all members of a family to apply together on the same application form.

New subitem 1139(4) provides that Permanent Residence (Skilled Regional) (Class PR) has one subclass, Subclass 191 (Permanent Residence (Skilled Regional)).

Item 5 – After Part 190 of Schedule 2

This item inserts a new subclass in Schedule 2 to the Migration Regulations. The new subclass is Subclass 191 – Permanent Residence. Part 191 provides the criteria and other provisions relating to the grant of a Subclass 191 visa. Details of Subclass 191 are as follows:

Division 191.1 – Interpretation – provides definitions of terms used in Subclass 191.

Subclause 191.111 inserts the definitions of the terms of *income year* and *taxable income* which have the meaning given by the *Income Tax Assessment Act 1997*, and *relevant income year* that provides an income year is a *relevant income year* for an applicant if the income year ended before the date of application, and the applicant held a regional provisional visa for all or part of the income year.

A note advises that the term *regional provisional visa*, which is also used in Subclass 191, is defined in regulation 1.03

Division 191.2 sets out the primary criteria to be satisfied for grant of a Subclass 191 visa. Note 1 advises the primary criteria must be satisfied by at least one member of a family unit. Other members of

the family unit who are applicants for a Subclass 191 visa need to satisfy only the secondary criteria. Note 2 advises that all criteria must be satisfied at the time a decision is made on the application.

The primary criteria are prescribed in Subdivision 191.21 - Criteria. Details of the criteria are:

Clause 191.211 provides for the public interest criteria, including those relating to health and character, that must be satisfied by a primary applicant. To satisfy clause 191.211, the prescribed public interest criteria must be met by both the primary applicant and members of the primary applicant's family unit, including both family members who are included in the application for a Subclass 191 visa and family members who are not included in the application. The effect of these provisions is that if the primary applicant or a family member fail to satisfy a public interest criterion prescribed in relation to the person, the primary applicant and all family members included in the application will be refused the grant of the visa.

Clause 191.212 requires the primary applicant and members of the family unit included in the application to meet specified special return criteria.

Clause 191.213 sets out requirements for an applicant to have complied with the conditions that applied to the provisional residence visa or subsequent bridging visa. Subclause 191.213(1) provides, that the applicant must have substantially complied with the conditions (other than condition 8579) of the regional provisional visa held by the applicant at the time of application for the Subclass 191 visa, or any subsequent bridging visa held by the applicant.

Subclause 191.213(2) requires that applicant complied with condition 8579, unless the applicant is in a class of persons specified by the Minister in an instrument under subclause 191.213(3) (see below). Condition 8579 is inserted in Schedule 8 to the Migration Regulations by Schedule 1 to these Regulations. The condition requires the visa holder to live, work and study only in a designated regional area of Australia. The effect of subclause 191.213(2) is that the applicant must have strictly complied with the condition by living, working and

studying only in a designated regional area of Australia while holding the regional provisional visa.

Subclause 191.213(3) provides that the Minister may make a legislative instrument specifying a class of persons who are not required to have complied with condition 8579 (see subclause 191.213(2) above). The provision provides flexibility to administer the provisional residence requirements by exempting persons who would otherwise have been required to comply strictly with condition 8579, if it is appropriate to do so.

Clause 191.214 requires a primary applicant for a Subclass 191 visa to have attained a minimum level of income for at least three years as the holder of a regional provisional visa.

Subclause 191.214(1) requires the applicant to provide documents relating to the applicant's taxable income for three income years as the holder of a regional provisional visa.

Subclause 191.214(2) requires the applicant to attain a level of taxable income for each of those income years that is at least equal to the amount specified in an instrument at subclause 191.214(3).

Subclause 191.214(3) provides for the Minister to make a legislative instrument specifying income amounts for the purpose of subclause 191.217(2) (see above) in relation to all applicants or different classes of applicants. This enables the amount to be adjusted as appropriate in relation to particular classes of applicants and in response to changes in economic conditions.

Subclause 191.214(4) makes clear that subclause 191.214(1) is satisfied in relation to a copy of a notice of assessment under the *Income Tax Assessment Act 1936* even if the copy does not include the applicant's tax file number within the meaning of Part VA of that Act.

Division 191.3 contains the secondary criteria, to be satisfied by an applicant for a Subclass 191 (Permanent Residence (Skilled Regional)) visa who is a member of the family unit of another applicant who satisfies the primary criteria. (See item 2 of this Schedule, above, which makes an amendment relating to applicants

who are members of the family unit of an applicant for a Permanent Residence (Skilled Regional) (Class PR) visa). The secondary criteria apply to an application by a member of the family unit of another applicant who satisfies the primary criteria.

Subdivision 191.31 prescribes the criteria to be met by secondary applicants.

Clause 191.311 requires the applicant to be a member of the family unit of a person who holds a Subclass 191 visa granted on the basis of having satisfied the primary criteria, and that an application for a Subclass 191 visa must be a combined application with the primary applicant.

Clause 191.312 prescribes the public interest criteria, including relating to health and character, that must be satisfied by a secondary applicant.

Clause 191.313 prescribes the special return criteria that must be satisfied by a secondary applicant.

Clause 191.314 sets out the requirements for secondary applicants to have complied with the conditions that applied to the visa held by the applicant at time of application. Subclause 191.314(1) provides, that the applicant must have substantially complied with the conditions (other than condition 8579) of any substantive visa held by the applicant at the time of application for the Subclass 191 visa, or any subsequent bridging visa held by the applicant.

Subclause 191.314(2) requires that, if the applicant held a regional provisional visa at time of application for the Subclass 191 visa, the applicant must have complied with condition 8579 to which the regional provisional visa was subject, unless the applicant is in a class of persons specified by the Minister in an instrument under subclause 191.314(3) (see below). Please see above for detail in relation to condition 8579.

Subclass 191.314(3) provides that the Minister may make a legislative instrument specifying a class of persons who are not required to have complied with condition 8579 (see subclause 191.314(2) above).

Division 191.4 sets out the circumstances applicable to the grant of a Subclass 191 (Permanent Residence (Skilled Regional)) visa. Clause 191.411 provides that the applicant may be in or outside Australia when the visa is granted, but not in immigration clearance.

Division 191.5 sets out when a Subclass 191 (Permanent Residence (Skilled Regional)) visa is in effect. Clause 191.511 provides that it is a permanent visa permitting the holder to travel to and enter Australia for 5 years from the date of grant.