

## **EXPLANATORY STATEMENT**

Issued by the Minister for Citizenship and Multicultural Affairs

*Migration Act 1958*  
*Medical Indemnity Act 2002*  
*Migration Legislation Amendment (Temporary Skill Shortage Visa and*  
*Complementary Reforms) Regulations 2018*

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.

The *Medical Indemnity Act 2002* (the Medical Indemnity Act) is an Act to make provision in relation to indemnities in relation to the practice of medical professions and vocations, and for related purposes.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, 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.

Subsection 79(1) of the Medical Indemnity Act 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 Medical Indemnity Act.

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

The *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) and the *Medical Indemnity Regulations 2003* (the Medical Indemnity Regulations) to strengthen and update immigration policy and administrative practice.

In particular, Part 1 of Schedule 1 to the Regulations amends the Migration Regulations to repeal the Temporary Work (Skilled) (Subclass 457) visa and introduce the new Temporary Skill Shortage (Subclass 482) visa. The Subclass 482 visa enables employers to access a temporary skilled overseas worker if an appropriately skilled Australian worker is unavailable. An overseas worker must be nominated by a sponsoring business and obtain a Subclass 482 visa before they can commence work in Australia. The Subclass 482 visa has three streams:

- Short-term stream – this stream allows employers to source skilled overseas workers in occupations on the Short-term Skilled Occupation List (STSOL) for a maximum of two years (or up to four years if the two year limitation would be inconsistent with an international trade obligation);
- Medium-term stream – this stream allows employers to source skilled overseas workers for occupations on the Medium and Long-term Strategic Skills List (MLTSSL) for up to four years; and

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

Part 1 of Schedule 1 to the Regulations also amends the Migration Regulations to implement changes to the Employer Nomination Scheme (Subclass 186) visa and the Regional Sponsored Migration Scheme (Subclass 187) visa complementary to the introduction of the Subclass 482 visa. In particular, the changes tighten eligibility for these visas by reference to criteria dealing with age, employment history, salary, English language, and eligible occupations. Changes to eligibility requirements for the Temporary Residence Transition stream in the Subclass 186 and Subclass 187 visas will not apply to persons who held or had applied for a Subclass 457 visa when the changes were announced by the Government on 18 April 2017. This transitional cohort will be defined in, and have existing eligibility preserved by, legislative instruments made under regulation 5.19 and the Schedule 2 criteria for Subclass 186 and Subclass 187.

Part 2 of Schedule 1 to the Regulations makes consequential amendments to the Medical Indemnity Regulations, which are administered by the Minister for Health, to reflect the transition from the Subclass 457 visa to the Subclass 482 visa. This amendment maintains the current operation of the Medical Indemnity Regulations, and covers claims against overseas doctors who have worked in Australia on visa arrangements as in force from time to time, where they have both permanently ceased medical practice in Australia and no longer reside in Australia.

The Regulations are part of a broad package of reforms for the employer sponsored skilled visa programs, announced by the Government on 18 April 2017. The Department of Home Affairs has engaged extensively with external stakeholders since the announcement in developing the policy settings and considered feedback received. Some elements of the existing framework are carried over to the Subclass 482 visa without amendment, and have not been the subject of consultation.

These reforms were also informed by earlier reviews including: the 2014 *Independent Review into Integrity in the Subclass 457 Programme*; the 2016 Productivity Commission Inquiry Report: *Migrant Intake into Australia*; and the 2016 Senate Inquiry *A National Disgrace: The Exploitation of Temporary Work Visa Holders*. These reviews were subject to extensive consultation processes, including: individuals; academics; bodies and businesses who use the employer sponsored skilled visa programs; migration agents; representatives of foreign governments; the Ministerial Advisory Council on Skilled Migration; and government departments and agencies.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

Details of the Regulations are set out in [Attachment C](#).

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulations, and has advised that the Regulation Impact Statement

is compliant with the Government's requirements. The OBPR reference is 21946.  
The Regulation Impact Statement is at [Attachment D](#).

The Migration Act and Medical Indemnity Act specify no conditions that need to be satisfied before the power to make the proposed Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 18 March 2018.

**AUTHORISING PROVISIONS**

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

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

- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified 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 41(1), which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
- paragraph 45C(2)(b), which provides that the regulations may make provision for the remission, refund or waiver of visa application charge or an amount of visa application charge;
- 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 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 504(2), which provides that section 14 of the *Legislation Act 2003* does not prevent regulations whose operation depends on a country or other matter being specified by the Minister in an instrument made under the regulations after the commencement of the regulations.

For the purposes of Part 2 of Schedule 1, subsection 79(1) of the *Medical Indemnity Act 2002* (the Medical Indemnity Act) 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 Medical Indemnity Act.

## **Statement of Compatibility with Human Rights**

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

### **Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018**

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**

On 18 April 2017, the Government announced changes to the employer sponsored temporary and permanent skilled work visa arrangements. This amendment to the *Migration Regulations 1994* (the Migration Regulations) implements some of the changes, including:

- repealing the Temporary Work (Skilled) (Subclass 457) visa and introducing the new Temporary Skill Shortage (Subclass 482) visa; and
- implementing complementary measures for the Employer Nomination Scheme (Subclass 186) visa and the Regional Sponsored Migration Scheme (Subclass 187) visa.

The purpose of this Legislative Instrument is to introduce skilled visa arrangements aimed at:

- continuing to support Australian businesses to access critical skills if skilled Australian workers are not available;
- ensuring that Australians have first priority for jobs;
- better meeting Australia's skill needs; and
- increasing the quality and economic contribution of skilled migrants.

#### **Features of the Subclass 482 visa**

This Legislative Instrument repeals the Subclass 457 visa and replaces it with the new Subclass 482 visa. The new visa enables employers to access a skilled overseas worker if an appropriately skilled Australian worker is unavailable. In this program, an overseas worker must be nominated by a sponsoring business and obtain a Subclass 482 visa before they can commence work in Australia. The Subclass 482 visa has three streams:

- Short-term stream – to source skilled overseas workers in occupations on the Short-term Skilled Occupation List (STSOL) for a maximum of two years (or up to four years if the two year limitation would be inconsistent with an international trade obligation);
- Medium-term stream – to source skilled overseas workers for occupations on the Medium and Long-term Strategic Skills List (MLTSSL) for up to 4 years; and
- Labour Agreement stream – to source skilled overseas workers in accordance with a labour agreement with the Commonwealth, where there is a demonstrated need that

cannot be met in the Australian labour market and standard visa programs are not available.

There are features of the Subclass 482 visa that are common with the repealed Subclass 457 visa. This Statement of Compatibility with Human Rights focuses on the human rights compatibility of the new features.

The previous market salary rate provisions are reformulated around the concept of *annual market salary rate* (AMSR), which is defined in regulation 1.03 of the Migration Regulations. The change is in response to stakeholder feedback that previous arrangements were complex and confusing. The intent is that visa holders must be provided with remuneration and employment conditions that are at least equivalent to the conditions that are, or would be, provided to an Australian worker performing the same work at the same location. The AMSR achieves the same outcome as previous arrangements, but simplifies the assessment process to better reflect industry practices and provide greater consistency.

Other new features of the Subclass 482 visa include the following:

- a Short-term stream, with a maximum visa term of up to two years and capacity for onshore renewal only once (unless this would be inconsistent with international trade obligations). Persons who are not eligible to apply for a further Short-term stream visa onshore are expected to depart Australia at the end of their visa, but may reapply from outside Australia. Another criterion requires assessment of whether the applicant genuinely intends to stay in Australia temporarily, having regard to the applicant's circumstances, immigration history, compliance with visa conditions and other relevant matters. These features of the Short-term stream reflect the purpose of the stream, which is to cater for short-term skill shortages in Australia, as reflected in the occupations on the STSOL;
- a Medium-term stream, with a maximum visa term of up to four years and no restriction on renewals while in Australia. Occupations eligible for this stream, which are occupations on the MLTSSL, are those required to meet medium to longer term skill shortages in Australia;
- a requirement that the primary applicant has at least two years relevant work experience. This measure assists in ensuring that the applicant has the skills to do the job and contribute to Australia's economy. It also encourages businesses to consider training and developing the skills of Australians before turning to overseas workers to address skill shortages. Relevant work experience will be considered in the context of the nominated occupation, and experience in related roles and flexible working arrangements may be recognised;
- an English language requirement, as specified by the Minister in a legislative instrument. The instrument will specify a level of English for the Medium-term stream that is higher than the Short-term stream. The English requirement for the Short-term stream will be the same as applied to the Subclass 457 visa. The Medium-term stream will require an International English Language Testing System score (or equivalent) of level 5 overall, with a minimum of 5 in each component score. Raising the English language level for the Medium-term stream recognises the importance of English language ability in the workplace and for community participation. It reflects the longer period of stay of Medium-stream visa holders and their potential to progress to permanent residence via the Subclass 186 or Subclass 187 visa;

- a ‘non-discriminatory workforce’ test to allow refusal of nominations by employers who systematically employ overseas workers without appropriate regard to Australian workers;
- an increase in the Visa Application Charge (VAC) as compared to the VAC for the Subclass 457 visa. There is a small increase for the Short-term stream. The increase for the Medium-term stream brings it closer to the VAC for skilled migration visas. This increased VAC reflects the longer stay period available to holders of the Medium-term stream and the option of transitioning to permanent residence;
- all applicants must satisfy public interest criterion (PIC) 4007 relating to health, instead of PIC 4006A which applied to the Subclass 457 visa. This change aligns the Subclass 482 visa program with other temporary and permanent visas. The amendments do not change the nature of the health requirement applicable to temporary skilled migrants. The difference in PICs only affects the ability to waive aspects of the health requirement. PIC 4006A enabled a visa applicant to be considered for a health waiver if the employer provided a written undertaking to meet the costs of the applicant’s condition. These undertakings were difficult to monitor and enforce. In addition, visa applicants whose employer refused to provide an undertaking would be refused a visa, despite having a skill in shortage in Australia or otherwise being able to mitigate health costs. PIC 4007 allows the same aspects of the health requirement to be waived, without an undertaking by the employer, where the grant of the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to access to health services by Australian citizens or permanent residents;
- the primary applicant will need to satisfy condition 8607, instead of condition 8107 which applied to the Subclass 457 visa. These conditions relate to working in the position for which the person was nominated. Condition 8607 includes the same provisions as condition 8107, and adds a provision that requires the visa holder to work only in the occupation in relation to which the Subclass 482 visa was granted. This means that a visa holder must obtain a new nomination and apply for a new visa to change occupation. The purpose is to allow skills and experience to be assessed in relation to the new occupation;
- as under the 457 program, the Department will consider any adverse information known about a business applying to be a sponsor under the Subclass 482 visa program. The meaning of adverse information has been amended to ensure that any adverse information relevant to the suitability of a business to sponsor overseas workers can be taken into consideration; and
- the visa period for dependent children who are members of the family unit has been amended to finish at the end of the day before the holder’s 23<sup>rd</sup> birthday.

### **Features of the Subclass 186 visa and Subclass 187 visa**

The Subclass 186 visa and Subclass 187 visa are demand-driven programs which allow employers to nominate skilled workers for permanent residence to fill genuine vacancies in their business. The Subclass 186 visa is available nationally, while the Subclass 187 is for skilled workers who want to work in regional Australia. Both programs comprise three streams:

- the Temporary Residence Transition (TRT) stream is for Subclass 457 visa holders, or Subclass 482 visa holders, who have worked in Australia for a specified period with a nominating employer who wishes to offer them a permanent position;
- the Direct Entry (DE) stream is for people nominated by an employer for permanent residence; and



- the Agreement stream is for people sponsored by an employer through a labour agreement negotiated between an employer and the Minister.

Eligibility for the DE stream is limited to applicants who are nominated in relation to an occupation specified in the relevant legislative instrument.

The measures implemented by this amendment for the Subclass 186 visa and the Subclass 187 visa include:

- creating a labour agreement stream in the nomination criteria in regulation 5.19. This will align the process for labour agreement nominations with the process for Direct Entry (DE) and Temporary Residence Transition (TRT) nominations;
- a requirement for the nominating employer to select the appropriate stream. The Department will only assess the selected stream. This will improve efficiency in nomination processing;
- a requirement that the primary applicant is 45 years of age or under (reduced from 50) at time of visa application for the TRT and Labour Agreement streams. This aligns with a change to the DE stream made in July 2017. Transitional arrangements will apply to applicants who held, or had applied for, a Subclass 457 visa on 18 April 2017, which was when the Government announced the changes, to ensure they are not disadvantaged;
- a requirement that the primary applicant has at least three years relevant work experience, as compared to the two year work experience requirement in the Subclass 482 visa. This measure assists in ensuring that the applicant has the skills to do the job and contribute to Australia's economy. It also encourages businesses to consider training and developing the skills of Australians before turning to overseas workers to address skill shortages;
- a requirement that an applicant nominated in the TRT stream has worked, at the time of nomination, for three years out of the previous four years in the position in relation to which the Subclass 457 visa or Subclass 482 visa was held. This compares to the previous requirement to have worked for two years out of three. Transitional arrangements will apply to applicants for the TRT stream who held, or had applied for, a Subclass 457 visa on 18 April 2017 to ensure they are not disadvantaged;
- aligning the TRT with the DE stream by requiring an applicant's nominated occupation to be on the MLTSSL at the time of nomination. If the position is in a regional area, additional occupations will be available for selection. The MLTSSL contains occupations that have been assessed as being of high value to the Australian economy and aligned to the Government's longer-term training and workforce strategies. The list is reviewed regularly by the Department of Jobs and Small Business, based on labour market analysis and stakeholder consultation. Requiring an applicant's nominated occupation to be on the MLTSSL, or the associated list of regional occupations, will ensure that permanent migrants are filling a current skill need in the labour market, maximising their contribution to Australia's overall economic prosperity. Transitional arrangements will apply to applicants who held, or had applied for, a Subclass 457 visa on 18 April 2017 to ensure they are not disadvantaged by this new requirement;
- applying the AMSR framework, including the associated Temporary Skilled Migration Income Threshold (TSMIT) to the TRT and DE streams of the Subclass 186 and Subclass 187. As per the recommendation of the May 2016 TSMIT review, this will address the discrepancy that exists between the temporary employer sponsored program and the Subclass 186 and 187 programs, and will ensure that permanent visa applicants

must be provided with remuneration and employment conditions that are at least equivalent to what is, or would be, provided to an Australian worker performing the same work;

- as with the Subclass 482 visa, applying the expanded definition of adverse information to the Subclass 186 and Subclass 187 programs;
- a requirement that visa applicants hold, or are eligible to hold, any mandatory licensing or registration required for their specified occupation at the time their employer lodges a nomination application for that person;
- a requirement that employers nominating a skilled worker through the DE stream of the Subclass 187 demonstrate that the position cannot be filled by an Australian citizen or Australian permanent resident who is either living in the same local area or willing to move to that local area;
- a requirement that employers nominating a skilled worker through the DE stream of the Subclass 187 are endorsed by a Regional Certifying Body (RCB) which is located in the same State or Territory and is responsible for the local area where the position is located. The intention of this amendment is to prevent local employers from advertising a position in a limited local regional area without considering obtaining employees from larger cities, and to prevent people “forum shopping” across RCBs where a non-local RCB is less likely to have specific knowledge of local businesses and labour market. The previous regulations enabled any RCB in a State or Territory to assess an application regardless of where the position is located;
- provision to refuse a nomination if a decision maker has information that a person nominated in the TRT stream has been performing a different occupation to their nominated occupation, or at a lower skill level;
- provision to refuse a nomination if the decision maker is not satisfied that the business has the capacity to lawfully and actively operate for at least two years and employ the nominee for that period at no less than the AMSR;
- repeal of the Agreement stream of the Subclass 187 visa. The Subclass 187 Agreement stream was not used and new labour agreements will be implemented through the Subclass 186 program, which is current practice; and
- the addition of new VAC refund provisions for the Subclass 186 and Subclass 187 visas.

### **Human rights implications**

The Legislative Instrument has been assessed against the seven core international human rights treaties. The Legislative Instrument includes a number of measures to be implemented for the Subclass 482, Subclass 186 and Subclass 187 visas, which engage, primarily:

- the right to work under Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right to non-discrimination under both the ICESCR and the International Covenant on Civil and Political Rights (ICCPR), including as it relates to the right to work; and
- the right to fair conditions of work under Article 7 of the ICESCR.

#### General implications of the measures as a whole

Article 6 of ICESCR provides that:

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

Article 7 of the ICESCR 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 2(1) of the 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 of the ICESCR reflects the provision relating to discrimination in article 2(1) of the ICCPR.

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 foreign workers, 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 entry program is to maximise the benefits of skilled entrants to the Australian economy. This includes channelling permanent skilled migrants into occupations that have been identified to be in the long term strategic interest of the Australian economy, and restricting short-term temporary skilled migrants to occupations that are currently in shortage but for which there may not be a long term requirement. Australia sets the requirements for the entry and conditions of stay for skilled migrants and temporary entrants 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 visas of a particular duration 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 either on a temporary or permanent basis. Providing Australians 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 measures include requirements related to the skills of applicants and the type of jobs they can be nominated for, including English language and work experience requirements and requirements that the relevant occupation be on a list of skills in demand and meet minimum salary levels as specified in the TSMIT. Such measures 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.

The measures in this Legislative Instrument as a whole 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.

A number of the features of the repealed Subclass 457 visa, the new Subclass 482 visa, and the Subclass 186 and Subclass 187 permanent visas, are aimed at ensuring that non-citizens enjoy fair conditions of work and are protected from exploitation. These include the sponsorship obligations framework, and the AMSR, which helps ensure that a visa applicant must receive 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. The AMSR framework will also be applied to the TRT and DE streams of the permanent programs for these reasons. These measures promote the right to fair conditions of work under Article 7 of the ICESCR.

#### *Measures with specific implications*

Like the repealed Subclass 457 visa, the new Subclass 482 visa allows applicants to have their partner and/or children join them in Australia while on this visa, thereby continuing to promote rights relating to family unity. In November 2016, the member of the family unit (MOFU) provision for the Subclass 457 visa was amended so that certain members of the family unit of a primary applicant could remain in Australia until the end of the day before that visa holder’s 23rd birthday, rather than 21st birthday as previously. That amendment extended the period of these visas to bring them into line with the amended definition of member of the family unit in subregulation 1.12(2) of the Migration Regulations. This Legislative Instrument continues this arrangement for the new Subclass 482 visa.

The Legislative Instrument clarifies that, apart from spouses/partners, the only persons who are able to obtain a Subclass 482 visa on the basis of being a MOFU are certain children under the age of 23 and children who, regardless of age, are dependent, under paragraph 1.05A(1)(b) of the Migration Regulations, due to being physically or mentally incapacitated for work. The provisions to end the visa period on the visa holder’s 23<sup>rd</sup> birthday, and ensure that visa grant on the basis of being a MOFU is limited to spouses/partners and dependent children, are reasonable and proportionate as they ensure that persons, who would otherwise be considered independent and no longer part of the family unit, are not able to remain in Australian indefinitely under the Subclass 482 program on the basis that they were previously dependent on the primary visa holder.

This Legislative Instrument imposes an English language requirement for Subclass 482 visas. The details of the language test, the required score and the period within which the score must be achieved will be specified by an instrument. The repealed Subclass 457 visa, as well as other skilled visas, also have an English language requirement. Having an English language requirement as part of visa criteria engages the right to non-discrimination, particularly as it relates to the right to work, as it may impact the ability of some non-citizens to obtain a skilled work visa on the basis of language ability and hence work in Australia. As noted earlier, 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 main objective of the English language requirement in the skilled visa criteria is to ensure that non-citizens seeking to live and work in Australia have a standard of English that will enable them to effectively perform the skilled work in relation to which they have been nominated for entry and stay in Australia, and also to facilitate their participation in the Australian community more broadly.

As noted above, it is the Government's intention to specify by instrument a higher level of English for the Medium-term stream of the Subclass 482 visa compared with the Short-term stream and with the previous Subclass 457 arrangements. This higher level is only a small increase from the English language requirement for the Subclass 457 visa. This recognises that visa holders in the Medium-term stream are eligible to spend a longer period in Australia than those in the Short-term stream, and may also be eligible to move on to permanent residence, and the higher level of English will allow them to better participate in Australian society during those longer periods.

Insofar as these measures differentiate on the basis of language, they are a reasonable and proportionate response to the objective of promoting economic participation, social cohesion and integration into the Australian community.

The non-discriminatory workforce test applying to sponsors when nominating a Subclass 482 visa applicant mirrors the existing sponsor obligation not to engage in discriminatory recruitment practices. This provides complementary front-end assessment and enforcement powers to target employers who systematically employ overseas workers without appropriate regard to Australian workers.

The workforce test allows the Department to refuse a nomination on the basis that the nominating business has engaged in discriminatory recruitment practices. This will allow closer examination of nominations from employers whose workforce is predominately made up of overseas workers. The Government recognises, however, that there may be legitimate reasons to have a workforce that has a high proportion, or is entirely composed of, skilled overseas workers and this will not necessarily result in the refusal of the nomination. As such, this measure improves the operation of existing regulations, seeks to address discrimination in recruitment practices and promotes the right to non-discrimination of Australian citizens and permanent residents.

Aspects of the Short-term stream of the Subclass 482 visa such as:

- the 'genuine temporary entrant' requirement;
- the shorter maximum duration of the visa; and
- the requirement to lodge applications for subsequent visas of this kind from outside Australia after two or more visas have been held, if their previous visa was applied for onshore;

may be seen to discriminate against the cohorts of people whose occupation is on the short-term skills list, compared to those whose occupation is on the medium to long-term skills list. These aspects of the short-term stream of the Subclass 482 visa are important to support the Government's intent that this stream is only used to support short-term skill needs. As such, insofar as this measure may differentiate between applicants on the basis of their occupation, that differentiation is a reasonable and proportionate response to promoting the objective of supporting Australia's economic needs and helping Australian citizens and permanent residents retain access to the employment market. It is also based on objective criteria, as the decisions as to which occupations will be on which list are made based on labour market analysis and stakeholder consultation undertaken by the Department of Jobs and Small Business.

The amendments to change the maximum age of visa applicants for the Subclass 186 and Subclass 187 visas at the time of application also engage the right to non-discrimination under Articles 2(1) and 26 of the ICCPR. They also engage the right to non-discrimination in relation to the right to work under Articles 2(2) and 6(1) of the ICESCR respectively.

However, as already discussed, neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking permanent residence or employment. 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 migration to the Australian economy.

The amendments to change the maximum age of visa applicants for skilled permanent visas are reasonable because they are directed to increasing the economic contribution of skilled migrants to Australia. The Productivity Commission, in their inquiry report *Migrant Intake Into Australia*, released in 2016, acknowledges the importance of applying an age limit to Australia's skilled migration program. The Productivity Commission notes, at page 24, that "given that the objective of the skill stream is largely economic, this [the economic impacts on Australia] should be given primacy in determining eligibility criteria for that stream".

The Productivity Commission notes that:

*'permanent immigrants who arrive at a relatively young age, particularly those who are highly educated, generally contribute more tax revenue over their lifetime and make comparatively lower use of government-funded services. In contrast, those who arrive at an older age have lower rates of labour force participation and contribute to higher costs due to their use of government-subsidised health care and other support services'* (Productivity Commission, p. 13).

In particular, the Commission notes that:

*'Government expenditure per person increases rapidly after the age of 60 years, labour market participation falls precipitously and taxes paid decrease. The steep rise in such net costs to taxpayers after age 60 years means that the present value of the future stream of net transfers to immigrants required from existing Australians is positive at ages much earlier than 60 years (and under any realistic scenarios at an age less than 50 years).'* (Productivity Commission, p. 444-5)

After extensive economic and demographic analysis, The Productivity Commission found that there are “*strong grounds for reducing the current age limit [50] for eligibility for permanent residency*” (Productivity Commission, p. 445), resulting in Recommendation 13.1 of its report.

The reduction in the maximum age requirement will not prevent any current holders of Subclass 186 or Subclass 187 visas, including those aged over 45, from accessing work or impede on their right to work. In addition, transitional arrangements will apply to applicants who held, or had applied for, a Subclass 457 visa on 18 April 2017 to ensure they are not disadvantaged by this new requirement.

The amendment to lower the maximum age for the Subclass 186 and Subclass 187 visa is based on reasonable and objective criteria aimed at maximising the economic benefits of the skilled migration stream for Australia, as recommended by the Productivity Commission. Other visa pathways are available for applicants aged over 45 both in and outside Australia to enter and/or remain in, and seek employment, in Australia. For persons already holding these visas, their right to work is unaffected.

### **Conclusion**

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

**The Hon Alan Tudge MP**  
**Minister for Citizenship and Multicultural Affairs**



**Details of the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018**

**Item 1 – Name**

This item provides that the name of the instrument is the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*.

**Item 2 – Commencement**

This item provides that the instrument commences on 18 March 2018.

**Item 3 – Authority**

This item provides that the instrument is made under the *Migration Act 1958* and the *Medical Indemnity Act 2002*.

**Item 4 – Schedules**

This item provides for the effect of the Schedules to the instrument.

**Schedule 1—Amendments**

**Part 1—Main amendments**

***Migration Regulations 1994***

**Item 1 – Regulation 1.03**

This item inserts a definition of *annual market salary rate* into regulation 1.03 of the *Migration Regulations 1994* (the Migration Regulations). The definition is used in the criteria for approval of nominations for the employer sponsored visas (Subclass 482 (Temporary Skill Shortage), Subclass 186 (Employer Nomination Scheme), and Subclass 187 (Regional Sponsored Migration Scheme)). The principle is that an employer who is sponsoring a worker for temporary or permanent residence in Australia must undertake to pay that person at least the same as an Australian citizen or permanent resident earns, or would earn, for performing equivalent work on a full-time basis in the same workplace in the same location. The definition references annual earnings in order to provide a reliable basis for comparison. This reflects the fact that the Subclass 482 (Temporary Skill Shortage) visa will always be granted for a period of one, two, three or four years. In addition to satisfying the nomination criterion requiring payment of at least the annual market salary rate, standard business sponsors have an ongoing obligation to continue paying at least the annual earnings indicated at the time the nomination was approved.

**Item 2 – Regulation 1.03 (definition of *associated entity*)**

This item inserts a definition of *associated entity*. The definition references the meaning in the *Corporations Act 2001* and also extends the meaning to encompass government entities. The

definition does not involve any substantive change to the law that applied to the repealed Subclass 457 (Temporary Work (Skilled)) visa. The definition is used in nomination criteria for the Subclass 482 (Temporary Skill Shortage) visa to permit the recruitment of workers who will be working in an associated entity of the nominating business, such as a subsidiary company. A visa condition (8607 – see item 175) imposed on holders of Subclass 482 (Temporary Skill Shortage) visas allows the visa holder to work for the nominating business or an associated entity. This flexibility is only provided if the nominating business is an Australian business. Overseas businesses can only nominate workers to work in the nominating business. This continues the previous arrangements applicable to the Subclass 457 (Temporary Work (Skilled)) visa. Condition 8607 specifies that holders of Subclass 482 visas nominated by overseas businesses can only work in the nominating business.

#### Item 3 – Regulation 1.03 (definition of *associated with*)

This item amends the definition of *associated with* in regulation 1.03 to reflect the fact that the new expanded definition of *associated with* in regulation 1.13B (item 15) is an inclusive definition which does not limit the circumstances in which persons are associated with each other. The function of the definition is explained at item 15.

#### Item 4 – Regulation 1.03

This item inserts a definition of *earnings*, which notes that earnings has a meaning affected by regulation 2.57A. The definition of *earnings* in regulation 2.57A is the subject of a minor amendment made by item 52.

#### Item 5 – Regulation 1.03 (note to the definition of *long stay activity sponsor*)

This item repeals a redundant note.

#### Item 6 – Regulation 1.03

This item inserts definitions of *non-monetary benefits* and *overseas business sponsor*.

The definition of non-monetary benefits is a cross-reference to the definition in subregulation 2.57A(3). The meaning of the definition is unaffected by these amendments.

The definition of overseas business sponsor has been introduced to provide a convenient term of reference for persons who were approved as standard business sponsors on the basis that they operated a business outside Australia and did not operate a business in Australia. Sponsors in that category are approved on the basis that they wish to place an overseas worker in Australia to establish a business or fulfil contractual obligations. They are subject to some restrictions which do not apply to Australian businesses (see items 54, 60 and 79).

#### Items 7 to 11 – Repeal of redundant notes and definitions

These items repeal redundant notes and definitions.

#### Items 12 to 14 – Amendments to subregulation 1.12(5)

These items update subregulation 1.12(5), which provides that certain persons who are no longer members of the family unit of the primary visa applicant are taken to be members of the family unit for certain visa applications. The provision maintains the eligibility of the family

unit in cases where the family is on a pathway to permanent residence from specified temporary visas to specified permanent visas, even though a member or members of the family unit would no longer meet the general rule. For example, a child may have turned 18 (if non-dependent) or 23 (if dependent) and therefore no longer qualify under the general rule. This concession operated in a modified way for persons applying for a second or subsequent Subclass 457 (Temporary Work (Skilled)) visa. A limited concession also applies to applicants for a second or subsequent Subclass 482 (Temporary Skill Shortage) visas. This is explained in item 168, in the discussion of the visa criteria applicable to family members (clause 482.312).

#### Item 15 – Regulations 1.13A and 1.13B

This item inserts new definitions of *adverse information* (regulation 1.13A) and *associated with* (regulation 1.13B). The definitions replace the previous definitions. The concepts are used in criteria for approval as a sponsor, approval of nominations, and grant of visas. At all three stages of the process of bringing a worker to Australia, it is a criterion that there is no adverse information known about the sponsor or a person associated with the sponsor, or it is reasonable to disregard such information. This is an important integrity measure, intended to prevent exploitation of overseas workers and ensure that Australian employment standards and opportunities for Australian workers are not compromised.

The previous definitions were inadequate to deal with some abuses. For example, a company approved as a standard business sponsor could have its approval cancelled for underpayment of wages, but the person behind the company was able to continue sponsoring workers via a different company. Instances of ‘phoenixing’ and businesses operating through multiple corporate entities need to be addressed through flexible definitions which can address these types of arrangements.

*Adverse information* is defined in regulation 1.13A as any information relevant to a person’s suitability as a sponsor or nominator. The definition makes it clear that the examples of adverse information in subregulation 1.13A(2) do not limit the meaning of adverse information. The definition also includes a non-exhaustive reference to the provision of bogus documents or false or misleading information. This is to make it very clear to sponsors and visa applicants that the Department has power to refuse to approve nominations and power to refuse to grant visas in cases where documents are bogus or information is false or misleading. The inclusion of this provision is intended to reinforce the message that a high standard of integrity is required of businesses seeking to sponsor workers to Australia.

The definition of *associated with* in regulation 1.13B is also non-exhaustive. The definition has been drafted in terms which encompass the wide range of associations among family, friends and associates which can be used to continue unacceptable or unlawful business practices via different corporate entities.

The breadth of these provisions is necessary to maintain the integrity of Australia’s sponsored worker programs. There are two safeguards against inappropriate reliance on the provisions. The Minister always has a discretion to disregard adverse information and associations if it is reasonable to do so. That discretion would be exercised to disregard information which did not have serious bearing on the suitability of the business to sponsor overseas workers. Further, if the decision relates to a business operating in Australia, all relevant decisions – refusal to approve a person as a sponsor, refusal to approve a nomination, and refusal to grant a visa to the nominated employee – are subject to independent merits review by the Administrative Appeals Tribunal. The Government considers that these provisions strike an appropriate

balance between the need to uphold the integrity of the sponsored worker program and the need to ensure consistent and fair decision making.

Item 16 – At the end of subregulation 1.20(4)

This item amends subregulation 1.20(4) to add the Subclass 482 (Temporary Skill Shortage) visa to the list of visas that are not subject to the sponsorship undertakings set out in regulation 1.20. The listed visas are not subject to those undertakings because they fall under the 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 17 – 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 482 (Temporary Skill Shortage) visa. The visa condition states: *The holder will not, after entering Australia, be entitled to be granted a substantive visa, other than a protection visa, while the holder remains in Australia.* This condition means 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. Whereas the Subclass 457 (Temporary Work (Skilled)) visa was not listed, the Subclass 482 (Temporary Skill Shortage) visa is listed to provide flexibility to the Minister to allow applications to be made.

Item 18 – At the end of subregulation 2.05(4AC)

This item amends subregulation 2.05(4AC) to specify that the Subclass 482 (Temporary Skill Shortage) visa is a visa that permits the holder to engage in offshore resources activity. Offshore resources activity is dealt with in section 9A of the Migration Act. Defined activities are taken to occur in the migration zone, which means that a person working in those activities must hold an Australian visa with work rights. The effect of paragraph 41(2B)(b) of the Migration Act is that only specified visas are eligible. Prior to 18 March 2018, the specified visas were the Subclass 400 (Temporary Work (Short Stay Specialist)) visa and the Subclass 457 (Temporary Work (Skilled)) visa. This item adds the Subclass 482 (Temporary Skill Shortage) visa.

Item 19 – 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 482 (Temporary Skill Shortage) visa. The visa condition states: *The holder will not be entitled to be granted a substantive visa, other than (a) a protection visa; or (b) a Subclass 485 (Temporary Graduate) visa; or (c) a Subclass 590 (Student Guardian) visa; while the holder remains in Australia.* The condition, which is attached to student visas, means that a person subject to the condition cannot apply for another visa, other than the three visas mentioned, 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. Whereas the Subclass 457 (Temporary

Work (Skilled)) visa was not listed, the Subclass 482 (Temporary Skill Shortage) visa is listed to provide flexibility to the Minister to allow applications to be made.

#### Item 20 – Subregulation 2.05(6)

This item repeals subregulation 2.05(6), which allowed the waiver of visa condition 8534 (see previous item) to allow nurses to apply for the Subclass 457 (Temporary Work (Skilled)) visa. This special waiver power is no longer required because Subclass 457 has been repealed and condition 8534 can now be waived for any person subject to that condition (not just nurses) who is applying for the Subclass 482 (Temporary Skill Shortage) visa.

#### Item 21 – Subregulation 2.06AAB(1) (table item 12)

This item removes a redundant reference to the Subclass 457 (Temporary Work (Skilled)) visa from the list of visas that can be applied for by holders and certain former holders of safe haven enterprise visas. The reference is redundant following the repeal of Subclass 457.

#### Item 22 – Subregulation 2.06AAB(1) (after table item 13)

This item adds a reference to the Subclass 482 (Temporary Skill Shortage) visa in the list of visas that can be applied for by holders and certain former holders of safe haven enterprise visas.

#### Items 23 to 24 – Amendments to regulation 2.06AAC

These items amend regulation 2.06AAC to allow holders of the Subclass 482 (Temporary Skill Shortage) visa to enter Australia otherwise than at a port or on a pre-cleared flight if the visa holder is entering Australia to participate in offshore resources activity. Persons engaged in offshore resources activity may travel directly to the relevant location where the offshore resources activity is carried out (see also item 18 dealing with the visa status of persons engaged in offshore resources activity).

#### Items 25 to 26 – Amendments to regulation 2.07AA

These items update the procedures relating to applications for visitor visas for APEC Business Travel Card holders. It was necessary to update the regulation because it contained a reference to the Temporary Business Entry (Class UC) visa which is repealed by this regulation (item 134). This visa class had only one subclass, that is Subclass 457.

#### Item 27 – 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 482 (Temporary Skill Shortage) visa following the waiver of visa conditions 8503 and 8534 (see items 17 and 19).

#### Items 28 to 30 – Amendments to regulation 2.07AH

These items amend regulation 2.07AH to put in place a transitional arrangement for nurses who were subject to condition 8534 (see items 19 and 20). The intention is that a nurse who had condition 8534 waived under the waiver provision in subregulation 2.05(6), which was repealed on 18 March 2018, and who had not lodged a Subclass 457 visa application before

that date, will be able to make an application for the Subclass 482 (Temporary Skill Shortage) visa, but not for any other visa.

As noted at item 19, from 18 March 2018 all visa holders subject to condition 8534 can obtain waiver of that condition if they have a genuine intention to apply for a skilled visa listed in subregulation 2.05(5A), which now includes the Subclass 482 (Temporary Skill Shortage) visa.

#### Items 31 to 36 – Amendments to regulation 2.12F

These items amend regulation 2.12F, which deals with refunds of the first instalment of the visa application charge (VAC), to reflect the repeal of the Subclass 457 (Temporary Work (Skilled)) visa, the creation of the Subclass 482 (Temporary Skill Shortage) visa, and the amendment of regulation 5.19 which deals with nominations for the Subclass 186 (Employer Nomination Scheme) visa and the Subclass 187 (Regional Sponsored Migration Scheme) visa. The amendments have the following effect:

- existing refund provisions applicable to the Subclass 457 (Temporary Work (Skilled)) visa are retained for transitional purposes;
- existing refund provision relevant to the Subclass 186 (Employer Nomination Scheme) visa and the Subclass 187 (Regional Sponsored Migration Scheme) visa are retained. Some of these grounds have ongoing relevance. Others have been retained for transitional purposes; and
- refund grounds are created to reflect the changes on 18 March 2018 creating the Subclass 482 (Temporary Skill Shortage) visa and amending the nomination criteria for the Subclass 186 (Employer Nomination Scheme) visa and the Subclass 187 (Regional Sponsored Migration Scheme) visa.

Specific details of the changes are as follows:

Item 31 – the effect of this item is that a VAC can be refunded if a Subclass 482 visa application is withdrawn because the visa applicant is no longer nominated by the approved sponsor;

Item 32 – this item clarifies that a reference to the criteria for the Subclass 457 visa is a reference to those criteria as in force prior to 18 March 2018 when the visa was repealed;

Item 33 – this item retains an existing refund ground related to Subclass 186 and Subclass 187 visa applications and creates an equivalent new ground which reflects the revised structure of regulation 5.19. As outlined at item 129, regulation 5.19 now requires a nominating employer to select one of three categories of nomination. If the wrong category is selected, the nomination must be withdrawn and remade. As visa applications are tied to the specific nomination, the visa application also needs to be withdrawn and remade. A refund of the VAC is provided in this situation;

Item 34 – this item makes a technical amendment to an existing refund ground related to Subclass 186 and Subclass 187 visa applications. The amendment reflects a rationalisation of language in regulation 5.19, which previously referred to the nominating employer “actively, lawfully and directly” operating a business in Australia. The reference to direct operation of the business was removed as it is unnecessary in a context where there must be a business actively and lawfully operating in Australia and the nominee is required to work under the direct

control of the nominator. The requirement for direct control was introduced by amendments to the Migration Regulations which took effect on 1 July 2017;

Item 35 – this item updates an existing refund ground related to Subclass 186 and Subclass 187 visa applications, by providing that the VAC can be refunded if the visa application is in the Temporary Residence Transition stream and the visa application is withdrawn because the applicant is no longer working in the position in respect of which the applicant held a Subclass 482 visa;

Item 36 - this item updates an existing refund ground related to Subclass 186 and Subclass 187 visa applications, by providing that the VAC can be refunded if the visa application is in the Temporary Residence Transition stream and the visa application is withdrawn because the nomination was made prematurely. A nomination for the Temporary Residence Transition stream can only be approved if, at the time it is made, the nominee has worked in the position or, in some cases, worked in the occupation, for a specified period of time. This is explained in more detail in relation to item 129. If the nomination is made prematurely, it may be withdrawn and remade at the appropriate time. This also necessitates withdrawing and remaking the visa application.

#### Item 37 – Subregulation 2.25A(1)

This item omits references to certain health criteria from a provision requiring referral to a Medical Officer of the Commonwealth. The amendment is consequential to the repeal of health criterion 4006A (see item 171). The reason for the change is explained at item 171.

#### Items 38 to 45 – 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 amendments are consequential to the repeal of the Subclass 457 (Temporary Work (Skilled)) visa and the creation of the Subclass 482 (Temporary Skill Shortage) visa. The effect of the amendments are as follows:

Items 38 and 39 – these items clarify that the reference to Subclass 457 criteria in paragraph 2.43(1)(kb) is a reference to those criteria as in force prior to 18 March 2018 when the visa was repealed. Although the Subclass 457 visa was repealed, the cancellation grounds relevant to that subclass will be retained until they are no longer required, i.e. when there are no remaining holders of Subclass 457 visas;

Item 40 – this item inserts new paragraph 2.43(1)(kc). The effect of the paragraph is that a Subclass 482 visa can be cancelled if the visa holder did not have, or no longer has, a genuine intention to perform the nominated occupation, or if the position associated with the occupation is not genuine;

Items 41 and 42 – these items amend the cancellation ground at paragraph 2.43(1)(l) to include a reference to Subclass 482 and remove redundant references to sponsor undertakings. As amended, paragraph 2.43(1)(l) allows a Subclass 457 or a Subclass 482 visa to be cancelled if: the sponsor has given false or misleading information to the Department of Home Affairs (or the former Department of Immigration and Border Protection) 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, has been suspended, or has ceased.

Item 43 – this item repeals paragraph 2.43(1)(la) which applied to Subclass 457 holders nominated before 14 September 2009. There are no remaining Subclass 457 visa holders in that category and paragraph 2.43(1)(la) is redundant;

Items 44 to 45 – these items amend subparagraphs 2.43(1)(ld)(ix) and 2.43(1)(le)(iv) to include references to the Subclass 482 visa. These paragraphs allow cancellation of visas held by family members of visa holders in two situations: (i) if the family member is not included in the most recent nomination by the sponsor; and (ii) if the return travel costs of the visa holder have been paid in accordance with the applicable sponsor obligation to pay return travel costs.

Item 46 – After paragraph 2.56(k)

This item adds a reference to the Subclass 482 (Temporary Skill Shortage) visa in regulation 2.56, which lists the visas that are covered by the sponsorship regime in Division 3 of Part 2A of the Migration Act.

Item 47 – Subregulation 2.57(1) (definition of *base rate of pay*)

This item omits the definition of *base rate of pay* from regulation 2.57. The concept of base rate of pay was used in relation to nomination criteria for the Subclass 457 (Temporary Work (Skilled)) visa. The requirement was that the base rate of pay was more than the temporary skilled migration income threshold (currently \$53,900). These provisions continue to apply to nominations for Subclass 457 visas that were not finalised prior to 18 March 2018. For the purposes of nominations for the Subclass 482 (Temporary Skill Shortage) visa, the concept of base rate of pay is replaced by the concept of *annual market salary rate* (see the definition at item 1, and also the new nomination criteria at subregulations 2.72(15) to (17), inserted by item 79).

Item 48 – Subregulation 2.57(1) (definition of *information and communication technology activity*)

This item repeals a redundant definition.

Items 49 to 50 – definitions of *primary sponsored person* and *secondary sponsored person*

These items update the definitions of *primary sponsored person* and *secondary sponsored person* to include references to holders of the Subclass 482 (Temporary Skill Shortage) visa.

Item 51 – Subregulation 2.57(3A)

This item makes a technical amendment to the interpretation provision in subregulation 2.57(3A) to clarify that the requirement to focus on earnings when considering terms and conditions of employment does not apply to two new provisions, in the nomination criteria for the Subclass 482 (Temporary Skill Shortage) visa and related sponsorship obligations, which relate to other terms and conditions of employment (see items 79 and 91).



#### Item 52 – Subregulation 2.57A(1)

This item makes a technical amendment to regulation 2.57A (Meaning of *earnings*) to reflect the usage of the concept of *earnings* in provisions not located in Part 2A of the Migration Regulations.

#### Item 53 – Paragraphs 2.59(b), (d) and (e)

These items omit paragraphs 2.59(b), (d) and (e), which were criteria to be met to be approved as a standard business sponsor. The paragraphs are omitted because:

- paragraph (b) prevented a person who was a standard business sponsor from applying to be a standard business sponsor, on the basis that an existing standard business sponsor would be ‘renewed’ via a variation of the initial term of approval. As part of the streamlining of the online sponsor application and renewal system, this procedure is no longer used and ‘renewals’ now take the form of a new application for approval as a sponsor;
- paragraphs (d) and (e) were criteria about the need for persons seeking approval as standard business sponsors to meet benchmarks for the training of Australians. This approach to ensuring that sponsors of overseas workers make a contribution to the training of Australian workers will continue to apply through the sponsorship obligations at paragraph 2.87B. A new nomination training contribution charge (referred to as the SAF levy) is currently the subject of Bills before Parliament (the *Migration (Skilling Australians Fund) Charges Bill 2017* and the *Migration Amendment (Skilling Australians Fund) Bill 2017*). When the Bills are passed by Parliament, a nomination training contribution charge payable at the time of nomination will replace the training benchmark requirement for sponsors.

#### Item 54 – Paragraph 2.59(h)

This item amends paragraph 2.59(h) to include a reference to the Subclass 482 (Temporary Skill Shortage) visa. The effect of the amendment is that, as was the case with the Subclass 457 (Temporary Work (Skilled)) visa, an overseas business can become a standard business sponsor for the purposes of sponsoring a person on a Subclass 482 visa to establish or assist in establishing a business in Australia, or to fulfil contractual obligations of the overseas business.

#### Item 55 – Subparagraph 2.59(h)(ii)

This item makes a technical amendment to punctuation.

#### Item 56 – Paragraphs 2.59(i) and (j)

This item omits paragraphs 2.59(i) and (j) which were criteria to be met to be approved as a standard business sponsor. The paragraphs are omitted because:

- paragraph (i) required the person to provide the number of proposed overseas workers to be nominated, and the Minister to decide if the number was reasonable. The requirement did not link to the criteria for approval of individual nominations, and added no value to the process of deciding whether to approve a person as a standard business sponsor or whether to approve individual nominations;

- paragraph (j) required a person who had previously been a standard business sponsor to have met obligations relating to the training of Australian workers. Along with paragraphs 2.59(d) and (e), paragraph 2.59(j) is omitted because this requirement will continue to be met through the sponsorship obligations at paragraph 2.87B to ensure that sponsors of overseas workers make a contribution to the training of Australian workers.

#### Item 57 – Regulation 2.59 (note)

This item omits a redundant note.

#### Items 58 to 59 – 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 applicable to nominations for the Subclass 482 (Temporary Skill Shortage) visa and the Subclass 407 (Training) visa.

#### Item 60 – Paragraph 2.61(3A)(b)

This item amends regulation 2.61 which deals with the process for making an application to be approved as a standard business sponsor or a temporary activities sponsor. The effect of the amendment is to change the arrangement for applying for approval as a standard business sponsor:

- As has been the case for several years, the application must be made using the internet;
- There is a new streamlined form for existing standard business sponsors (other than overseas business sponsors) who are ‘renewing’ sponsorship, noting that this takes the form of a new application for approval;
- There is a more detailed form for applicants who are not already standard business sponsors (including those who have allowed the sponsor approval to end without applying for ‘renewal’); and
- Overseas business sponsors must always use the more detailed form. This is because an overseas business sponsor (see the definition in item 6) is approved on the basis that the sponsor intends to establish an Australian business or fulfil contractual obligations. If overseas workers are required for one of these purposes after five years (the period of approval as a standard business sponsor), it is a situation that may warrant closer scrutiny by the Department. On the other hand, if an Australian business has been established in that period, the new Australian business is expected to become a standard business sponsor if there is an ongoing requirement to utilise overseas workers.

#### Item 61 – At the end of regulation 2.61

This item amends regulation 2.61 to provide a capacity to refund the fee for applying to be a standard business sponsor if the application is made because of a mistake by the Department. One situation which may arise, on rare occasions, is that a mistake, as a result of human error, is made in relation to a nomination or visa approval (e.g. approving the nomination for the wrong period or imposing incorrect conditions on the visa). If this requires a new nomination or visa application, and the approval as a standard business sponsor has ended, it is appropriate

and fair to provide a refund of the fee for seeking a further approval as a standard business sponsor.

#### Item 62 – Subregulation 2.62(2)

This item amends regulation 2.62 to facilitate electronic notification of decisions about approval or refusal of approval as a sponsor.

#### Items 63 to 65 – Amendments to Division 2.15 (Terms of approval of sponsorship)

These items amend Division 2.15 which deals with terms of approval of sponsorship. Regulation 2.63A is inserted to provide new arrangements for the duration of approval as a standard business sponsor. The purpose of regulation 2.63A is to allow one approval to commence when the previous approval ends, and to prevent sponsors from obtaining multiple approvals which will run end to end. The effect of the regulation is as follows:

- Approval as a standard business sponsor is for five years;
- There is a distinction between when a sponsor is approved and when the approval comes into effect;
- If a person is not a standard business sponsor when the approval is granted, the approval comes into effect on the day on which the approval is granted;
- If the person is a standard business sponsor, the approval comes into effect on the day that the previous approval ends (unless there has been an intervening cancellation of the first approval), but the new approval runs for five years from the date the new approval was granted. This prevents any advantage from multiple approvals or early applications for renewal;
- However, the previous rule does not apply to an overseas business sponsor. For those sponsors, a new approval comes into effect immediately, and the previous approval ceases immediately. This reflects the Department's processes for scrutiny of overseas business sponsors. If it is appropriate to 'renew' an overseas business sponsor, it will usually be because the intentions of the overseas business have evolved or changed to some extent, and the new approval as a sponsor commences immediately so that there is a clear understanding of the basis on which the overseas business has been approved. For example, an overseas business in the process of setting up an Australian business may initially seek visas for executives to begin setting up the Australian operation and may later seek visas for workers for other subordinate or supporting roles. The Department examines these situations closely, because the expectation is that an Australian business will be established and that business should seek approval as a standard business sponsor if there is an ongoing need for overseas workers.

#### Items 66 to 78 – Amendments to Division 2.16 (Variation of terms of approval of sponsorship)

These items amend Division 2.16 – Variation of terms of approval of sponsorship. The previous function of this Division was to allow for the 'renewal' of approval as a standard business sponsor or a temporary activities sponsor. The only term of approval that could be varied was the duration of the approval. In the absence of any statutory renewal process, the mechanism of varying the duration of approval was used for this purpose. This mechanism is no longer used for standard business sponsors. As noted at item 60, the 'renewal' of approval as a standard business sponsor is now implemented through a further application for approval as a standard business sponsor, made via a streamlined online form.

The amendments make the required consequential changes to Division 2.16 to reflect this change, noting that the variation procedure continues to be used for temporary activities sponsors.

These amendments also update the variation criteria for temporary activities sponsors to reflect the expanded prohibition on cost recovery (see items 58 to 59).

The amendments also facilitate electronic notification of decisions about the approval or refusal of an application for variation of a term of approval.

#### Item 79 – Regulation 2.72

This item repeals regulation 2.72 and substitutes a new regulation 2.72. The old regulation contained the criteria for the approval of a nomination of an occupation in relation to the holder of, or an applicant or proposed applicant for, a Subclass 457 (Temporary Work (Skilled)) visa. The new regulation contains the equivalent criteria for the Subclass 482 (Temporary Skill Shortage) visa. The regulation sets out the criteria which apply to a nomination of an occupation, made from 18 March 2018, in relation to the holder of a Subclass 457 or Subclass 482 visa, or an applicant or proposed applicant for a Subclass 482 visa. The reference to Subclass 457 is included because, although that visa has been repealed, holders of Subclass 457 visas will require a new nomination if they change employer. In order to obtain a new nomination for a Subclass 457 holder, a nomination must be applied for and approved under the new criteria. The old criteria continue to apply to nominations made prior to 18 March 2018.

The criteria for approval of a nomination under the new regulation 2.72 are noted below, also noting the differences from the previous rules:

- the application must be made in accordance with the process in regulation 2.73 (subregulation 2.72(3));
- the Minister must be satisfied that there is no adverse information known to Immigration about the nominator or an associated person or it is reasonable to disregard the information (subregulation 2.72(4)). This criterion is in the same terms as the previous criterion, but it has an expanded operation because of the new definitions of *adverse information* and *associated with* (see item 15). Note that the term *Immigration* continues to be used. The definition in regulation 1.03, referring to the Minister administering the *Migration Act 1958*, means that *Immigration* is now a reference to the Department of Home Affairs;
- the occupation must be nominated by an appropriate sponsor – this means a standard business sponsor for an occupation nominated for the Subclass 482 visa in the Short-term stream or Medium-term stream, or a party to a work agreement if the occupation is nominated for a Subclass 482 visa in the Labour Agreement stream (subregulation 2.72(5));
- the nomination must cover family members of the nominee who already hold a Subclass 457 or Subclass 482 visa, unless the Minister considers it is reasonable to disregard that requirement (subregulations 2.72(6) and (7)). This means that a sponsor who is nominating an overseas worker who is already in Australia on a Subclass 457 or

Subclass 482 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;

- for nominations for the Subclass 482 visa in the Short-term stream or Medium-term stream, the nominated occupation must be an occupation specified by the Minister in a legislative instrument in force at the time the nomination is made. This is different to the previous position which was that the occupation had to be specified when a decision was made in relation to the nomination. The new approach is fairer and provides greater certainty to employers and visa applicants. The online nomination system will only allow nominations to be made in relation to occupations which are specified in the legislative instrument. This will prevent employers from inadvertently nominating an occupation that is not eligible. For nominations for the Subclass 482 visa in the Labour Agreement stream, the occupation must be specified in the work agreement as an occupation which can be nominated (subregulation 2.72(8));
- Subregulation 2.72(9) provides that the Minister may, by legislative instrument, specify occupations and, for each occupation, whether the occupation is a *short term skilled occupation* or a *medium and long term strategic skills occupation*. This is a new statutory distinction between occupations. It forms the basis of the distinction between the Short-term stream and the Medium-term stream in the Subclass 482 visa (see item 168). Subregulation 2.73(6) (see item 80) is also a key to this scheme. The effect is that, leaving aside nominations for the Labour Agreement stream, a *short term skilled occupation* can only be nominated for the Short-term stream and a *medium and long term strategic skills occupation* can only be nominated for the Medium term stream. Subregulation 2.72(9) also provides that the Minister can specify any matters relevant to determining whether an occupation applies to a nominee. This continues the previous practice. For example, the instrument can provide that an occupation is only specified for positions located in regional Australia;
- The Minister must be satisfied that the position associated with the occupation is genuine and a full time position (subregulation 2.72(10)). 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 (for example, see *Pasricha v Minister for Immigration and Border Protection* [2017] FCA 779) 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 Minister must be satisfied that, if the nomination relates to the Short-term stream or Medium-term stream, the nominee will be engaged as an employee under a written contract of employment and a copy of the contract, signed by both parties, will be provided to the Minister. This replaces the previous requirement which did not specify that a signed copy of the contract had to be provided to the Minister. If the standard business sponsor is an Australian business, the nominee must be employed by that sponsor or an associated entity of the sponsor. If the standard business sponsor is an overseas business sponsor, the nominee must be directly employed by that sponsor. This restriction reflects the limited purposes for which overseas businesses are approved as standard business sponsors, in that they must be intending to establish a business in Australia or fulfil contractual obligations (subregulations 2.72(11), (12) and (13));

- As noted in subregulations 2.72(11) and (12), the requirements in those regulations do not apply to occupations specified in an instrument under subregulation 2.72(13). The occupations specified for that purpose are occupations where the normal employer-employee relationships do not necessarily apply. The list of occupations will, at this time, remain the same as the list which has applied to Subclass 457 nominations for several years (<https://www.legislation.gov.au/Details/F2013L01244>). The list covers the occupations of General Manager, Chief Executive or Managing Director, and all of the specialist medical occupations. These are occupations where the visa holder is permitted to 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;
- The Minister must be satisfied that, if the nominee already holds a Subclass 457 visa, or holds a Subclass 482 visa in the Short-term stream or Medium term steam stream, the relevant English language criteria are satisfied by the nominee (subregulation 2.72(14)). The English language requirements are contained in a legislative instrument made under criteria for the grant of a Subclass 482 visa in the Short-term stream (clause 482.223) and the Medium-term stream (clause 482.232) (see item 168). Accordingly, English is assessed for the purposes of the visa application. However, some visa applicants are exempt from the requirement to undertake English language testing. This includes visa applicants who hold an occupational licence or registration which requires a high level of English language skill (e.g. medical practitioners), or who will be working for a diplomatic or consular mission in Australia, or who are intra-corporate transferees earning more than \$96,400 per year. The purpose of subregulation 2.72(14) is to ensure that persons who were granted a Subclass 457 visa or Subclass 482 visa on the basis of an exemption, continue to be covered by the exemption or otherwise meet the English language requirements for the Subclass 482 visa;
- The Minister must be satisfied that a nominee for the Subclass 482 visa in the Short-term or Medium term stream will be paid at least the market salary rate for the occupation, which is assessed in accordance with the rules in subregulations 2.72(15), (16) and (17). Salary arrangements in relation to nominees for Subclass 482 visas in the Labour Agreement stream are managed through the negotiation process for the labour agreement. It is a core principle in those negotiations that Australian salary rates must be paid to visa holders;
- The effect of subregulations 2.72(15), (16) and (17) is as follows:
  - salary assessment is not required if the nominee's annual earnings will be more than the amount specified in a legislative instrument (currently \$250,000 per year) (paragraph 2.72(15)(b));
  - in all other cases, the *annual market salary rate* (defined in regulation 1.03) must be determined by the nominator in accordance with a methodology set out in a legislative instrument made under subregulation 2.72(17) (paragraph 2.72(15)(c)). The annual market salary rate is the benchmark for assessing the nomination. It 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 annual market salary rate, excluding non-monetary benefits (such as accommodation) must equal or exceed the temporary skilled migration income threshold (TSMIT) as specified in a legislative instrument (currently \$53,900) (paragraph 2.72(15)(d)). If this is not satisfied, the nomination will be refused unless the total annual earnings (including monetary and non-monetary benefits) exceed TSMIT and the Minister is satisfied that the outcome is reasonable (paragraph 2.72(16)(a)), e.g. because the position involves a significant accommodation component such as might apply to workers in remote locations;
- after the annual market salary rate has been determined, there are two elements in the assessment of the nomination. The first element is that the Minister must be satisfied that the annual earnings of the nominee will equal or exceed the annual market salary rate (paragraph 2.72(15)(e)). This rule implements the fundamental policy position that overseas workers must not be undercutting Australian salaries;
- the second element is that the Minister must be satisfied that the annual earnings of the nominee, not including non-monetary benefits, will not be less than the TSMIT (paragraph 2.72(15)(f)). However, as with the benchmark annual market salary rate, the Minister has a discretion to disregard this criterion if it is reasonable to do so (paragraph 2.72(16)(b)). The policy underpinning this rule 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;
- The Minister must also be satisfied that there is no evidence that the employment conditions (other than earnings) to be provided to the nominee will be less favourable than those provided to Australian workers, and must be satisfied that the nominator has not engaged in discriminatory recruitment practices (subregulation 2.72(18)). The definition of *discriminatory recruitment practice* is 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* (subregulation 2.57(1)). For example, a business which relies heavily on overseas workers from a particular country may be asked to demonstrate that the business is genuinely seeking local workers and has open, competitive and merit-based recruitment practices. However, the Government recognises that there are legitimate reasons why a business may employ a high proportion of overseas workers. This criterion will complement the existing sponsor obligation under regulation 2.87C (the obligation not to engage in discriminatory recruitment practices) by introducing a front-end assessment and enforcement powers to target employers who systematically employ overseas workers without appropriate regard to Australian workers;
- If the nomination is for a Subclass 482 visa in the Labour Agreement stream, the Minister must be satisfied that the additional requirements at subregulation 2.72(19) are satisfied.

## Item 80 – Regulation 2.73

This item omits regulation 2.73 and substitutes a new subregulation 2.73 and new regulation 2.73AA. The repealed regulation set out the process for nominating an occupation for the purpose of the Subclass 457 (Temporary Work (Skilled)) visa. The new regulation 2.73 establishes a similar process for the Subclass 482 (Temporary Skill Shortage) visa. The regulation establishes a process for nominating occupations in relation to holders of Subclass 457 visas, holders of Subclass 482 visas, and applicants and proposed applicants for Subclass 482 visas. Holders of Subclass 457 visas are included because the Subclass 457 visa and the related nomination criteria have been repealed. Holders of Subclass 457 visas who change employers, and therefore require a new nomination, will need to be nominated under the new criteria. This will also allow the Subclass 457 visa holder to apply for a Subclass 482 visa if necessary, noting that a nomination expires 12 months after it is approved. A Subclass 457 holder who wishes to change occupation will be required to apply for a Subclass 482 visa and will require a nomination for that purpose.

Nominations must be made via the internet using the approved form and the nomination fee specified in a legislative instrument must be paid (currently \$330) (subregulations 2.73(3) to (5)).

A new feature of the nomination process is that the selected occupation determines the relevant visa stream (subregulation 2.73(6)). This occurs automatically in the system unless the nominator identifies that the nomination is made for the purposes of a labour agreement. If a *short-term skilled occupation* is chosen, the system identifies that as a nomination for the purpose of the Subclass 482 visa in the Short-term stream. If a *medium and long term strategic skills occupation* is chosen, the system identifies that as a nomination for the purpose of the Subclass 482 visa in the Medium-term stream.

Another new feature is that the nominator must select a proposed period of stay (subregulations 2.73(9) to (11)). The selected period must be one, two, three, or four years. However, if the nomination is for the Subclass 482 visa in the Short-term stream a maximum of two years can be chosen, unless this would be inconsistent with Australia's international trade obligations. If the nomination is for the Subclass 482 visa in the Labour Agreement stream, the selected period must not exceed the period of stay specified in the labour agreement. If the nomination and related Subclass 482 visa application are both approved, the visa will be granted for the selected period (see clause 482.511 at item 168).

Another new feature is that, for occupations which require an employer-employee relationship (i.e. all occupations except General Manager, Chief Executive or Managing Director, and medical occupations as noted at item 79), the nominator must certify that the employment contract complies, or will comply when it exists, with all applicable requirements imposed by Commonwealth, State or Territory law relating to employment including, if applicable, the National Employment Standards as defined in the *Fair Work Act 2009* (subregulation 2.73(13)). The intention is to reinforce to nominating businesses that all relevant Australian workplace standards must be provided and maintained and will be monitored by the Fair Work Ombudsman.

The other requirements of regulation 2.73 for the provision of information and certification that there has been no conduct specified in subsection 245AR(1) of the Act are based on the provisions as in force prior to 18 March 2018.



New regulation 2.73AA provides for refunds of the nomination fee (\$330) if the nomination is made as a result of a mistake by the Department or if, in the case of a nomination in the Labour Agreement stream, the ceiling on nominations under the labour agreement has been reached. The potential for a mistake by the Department is explained at item 61.

#### Item 81 – Subregulation 2.74(2)

This item amends regulation 2.62 to facilitate electronic notification of decisions about approval or refusal of nominations.

#### Items 82 to 85 – Amendments to regulation 2.75

These items amend regulation 2.75 which specifies when nominations cease to be in effect. The heading is changed to include a reference to the Subclass 482 (Temporary Skill Shortage) visa. As amended, the regulation has the following effect:

- The amendments apply to nominations made from 18 March 2018. Nominations made before that date are subject to the provisions of regulation 2.75 as in force prior to that date;
- An approval of a nomination ceases on the earliest of the following dates:
  - o the date of written notification to the Department that the nomination is withdrawn (paragraph 2.75(2)(a), which has not been amended);
  - o 12 months after the day on which the nomination is approved (paragraph 2.75(2)(b), which has not been amended);
  - o the day on which the nominee is granted a Subclass 482 visa (new paragraph 2.75(2)(c));
  - o for nominations for the Subclass 482 visa in the Short-term stream or Medium-term stream – three months after the approval as a standard business sponsor ceases unless, when that three month period ends:
    - the person has been approved as a standard business sponsor (new subparagraph 2.75(2)(d)(i)); or
    - there is a further application for approval as a standard business sponsor awaiting a decision by the Department that was lodged before the person's previous sponsorship period ended (new subparagraph 2.75(2)(d)(ii));
  - o the day on which the further application for approval as standard business sponsor mentioned in the previous point is refused (new paragraph 2.75(2)(e));
  - o for nominations for the Subclass 482 visa in the Short-term stream or Medium-term stream – the day on which the nominator's approval as a standard business sponsor is cancelled under subsection 140M(1) (new paragraph 2.75(2)(f)); and
  - o for nominations by a party to a work agreement in relation to the Labour Agreement stream – the day on which the work agreement ceases (new paragraph 2.75(2)(g)).

#### Item 86 – Paragraph 2.76(2)(b)

This item amends regulation 2.76 which defines *work agreement* for the purpose of the definition in the Act. The definition in subsection 5(1) of the Act states that:

**"work agreement"** means an agreement that satisfies the requirements prescribed by the regulations for the purposes of this definition. Prior to amendment, regulation 2.76 required a work agreement to be 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 457 (Temporary Work (Skilled)) visa. The reference to Subclass 457 has been omitted and replaced by a reference to the Subclass 482 (Temporary Skill Shortage) visa. This reflects the repeal of the Subclass 457 visa and the creation of the Subclass 482 visa.

#### Items 87 to 95 – Amendments to regulation 2.79

These items amend regulation 2.79 which deals with the obligations of standard business sponsors and parties to labour agreements in relation to the terms and conditions of employment provided to sponsored workers. The regulation has been updated to omit redundant material and to reflect the creation of the Subclass 482 (Temporary Skill Shortage) visa. Provisions relevant to the repealed Subclass 457 (Temporary Work (Skilled)) visa are retained as there will continue to be Subclass 457 holders working in Australia for a number of years. The effect of regulation 2.79, as amended, is as follows:

- the obligations apply in relation to sponsored workers who hold or held a Subclass 457 or Subclass 482 visa (subregulation 2.79(1));
- the obligations applicable to standard business sponsors and former standard business sponsors do not apply if the visa holder or former visa holder is paid at least the amount specified in a legislative instrument (currently \$250,000) (regulation 2.79(1A));
- the obligations applicable to standard business sponsors and former standard business sponsors in relation to holders and former holders of Subclass 457 visas are carried forward by new paragraph 2.79(3)(a) (item 91);
- the obligations applicable to standard business sponsors and former standard business sponsors in relation to holders and former holders of Subclass 482 visas are provided for in new paragraph 2.79(3)(b) (item 91). There are three obligations which must be met:
  - o provide annual earnings which are not less than the annual earnings which the sponsor indicated would be provided when the nomination was approved (subparagraph 2.79(3)(b)(i));
  - o provide earnings 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 2.79(3)(b)(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
  - o 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;
- the obligation of parties to labour agreements and former parties to labour agreements are unchanged. The terms and conditions of employment provided to the visa holder or former visa holder must be no less favourable than the terms and conditions of employment set out in the labour agreement (paragraph 2.79(3)(e)); and
- the provisions specifying when obligations begin and end are updated to refer to the Subclass 482 visa but are otherwise unchanged (subregulation 2.79(4)) (items 93 – 95).

#### Items 96 to 105 – Amendments to regulation 2.80

These items amend regulation 2.80, which deals with the obligations of sponsors to pay travel costs to enable sponsored persons to leave Australia. The amendments are consequential to the creation of the Subclass 482 (Temporary Skill Shortage) visa. The amendments create obligations that are the same as the obligations in relation to holders and former holders of Subclass 457 (Temporary Work (Skilled)) visas.

#### Items 106 to 108 – Amendments to regulation 2.82

These items amend regulation 2.82, which deals with the obligations of sponsors to keep records. The amendments are consequential to the creation of the Subclass 482 (Temporary Skill Shortage) visa. The amendments create obligations that are the same as the obligations in relation to primary sponsored persons who hold Subclass 457 (Temporary Work (Skilled)) visas. Item 108 also omits redundant language.

#### Items 109 to 113 - Amendments to regulation 2.84

These items amend regulation 2.84, which deals with the obligations of sponsors to provide information to the Department of Home Affairs when certain events occur. The effect of the amendments is as follows:

- items 109 and 110 omit a redundant reference to registered post and provide for all notifications to occur electronically, as specified in a legislative instrument. The legislative instrument will specify email notification or notification by an eForm linked to the sponsor's online ImmiAccount;
- item 111 creates a new obligation for standard business sponsors and parties to work agreements to notify the Department if a sponsored worker does not commence employment at the agreed time. The purpose of this obligation is to allow the Department to initiate compliance action if necessary, noting that a visa condition applicable to Subclass 457 visas (condition 8107) and Subclass 482 visas (condition 8607 – see item 175) is that the holder must commence work within 90 days of visa grant (if in Australia) or 90 days of arrival in Australia (if outside Australia);
- items 112 and 113 omit the obligation to notify the Department if information provided to the Department in the application for approval as a sponsor, or the application for variation of a term of approval, relating to workforce training, has changed.

#### Items 114 to 122 – Amendments to regulation 2.86

These items amend regulation 2.86, which deals with the obligations of sponsors to ensure that the primary sponsored person works or participates in the nominated occupation, program or activity. The effect of the amendments is as follows:

- Item 114 repeals and substitutes subregulation 2.86(2) to omit redundant material and to strengthen the obligation to ensure that a primary sponsored person holding a Subclass 457 (Temporary Work (Skilled)) visa or a Subclass 482 (Temporary Skill Shortage) visa works in the nominated occupation. The previous form of the subregulation only imposed an obligation to ensure that the visa holder did not work in any other occupation. There was a gap in the sponsorship obligations framework for

Subclass 457 in situations where the sponsor made no effort to require the visa holder to work in the nominated occupation. A visa holder may be liable for visa cancellation in this situation, and it is also appropriate to have a basis for imposing sanctions on the sponsor;

- Items 115 to 122 make changes to regulation 2.86 to reflect the creation of the Subclass 482 (Temporary Skill Shortage) visa. There is no change to the content of the obligations, which relate to the requirement for the visa holder to be employed by the sponsor (or by an associated entity in the case of a standard business sponsor that is an Australian business), and to be employed under a written contract of employment and, in the case of standard business sponsors, for the sponsor not to engage in labour hire to unrelated businesses. A legislative instrument creates an exception for the occupations of General Manager, Chief Executive or Managing Director, and medical occupations, as explained in relation to subregulation 2.72(13) at item 79.

#### Item 123 – After subparagraphs 2.87(1A)(a)(iii) and (b)(iii) and (1B)(a)(iii) and (b)(iii)

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 overseas worker or a third party. The effect of the amendments is that the obligation is extended to cover fees applicable to nominations for the Subclass 482 (Temporary Skill Shortage) visa and the Subclass 407 (Training) visa.

#### Item 124 – Regulation 2.94B

This item repeals regulation 2.94B which allowed the Minister to impose sanctions on a standard business sponsor or former standard business sponsor if that person did not pay medical or hospital expenses incurred by a sponsored person arising from treatment in a public hospital. This was a transitional provision which only applied to Subclass 457 visas granted before 14 September 2009. There are no remaining visas holders from that cohort, and regulation 2.94B is redundant.

#### Items 125 to 128 – 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. The amendments insert references to the Subclass 482 (Temporary Skill Shortage) visa, to provide the same review rights as existed in relation to the repealed Subclass 457 (Temporary Work (Skilled)) visa. In particular, the effect of the amendments is as follows:

- item 125 – the effect of this item is that a decision to refuse to grant a Subclass 482 visa is reviewable by the Administrative Appeals Tribunal (AAT) if the visa applicant was in Australia when the application was made, and the visa applicant is nominated by an approved sponsor when the application to the AAT is made or the sponsor 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. In this situation, it is the visa applicant who may seek review of the visa refusal decision;
- item 126 - the effect of this item is that a decision to refuse to grant a Subclass 482 visa is reviewable by the AAT if the visa applicant was outside Australia when the

application was made, and the visa applicant was sponsored or nominated by an Australian citizen, a company or partnership that operates in the migration zone, the holder of a permanent visa, or a New Zealand citizen who holds a special category visa. In this situation, it is the sponsor who may seek review of the visa refusal decision;

- item 127 – this item continues the exclusion of businesses that are not operating in Australia from access to AAT review of decisions to refuse to approve a person as a sponsor, decisions to refuse to approve a nomination, and decisions to impose a sanction on a sponsor. It is long-standing policy that only businesses which operate in Australia should have access to merits review;
- item 128 – this item makes a technical amendment.

#### Item 129 – Regulation 5.19

This item repeals regulation 5.19 and substitutes a new 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 previous version of regulation 5.19 provided criteria for the Temporary Residence Transition and Direct Entry streams. Those sets of criteria for the approval of nominations linked to the Temporary Residence Transition stream and the Direct Entry stream in Subclass 186 and Subclass 187. The third stream in those visas, called the Agreement stream, which catered for nominations under labour agreements, did not require a nomination under regulation 5.19. Those nominations were made in accordance with the terms of the labour agreement.

The new version of regulation 5.19 provides for nominations for the Temporary Residence Transition, Direct Entry, and Labour Agreement streams. Those nominations link to the criteria for the equivalent streams in Subclass 186 and Subclass 187. However, as noted in relation to item 164, the Agreement stream has been omitted from Subclass 187. This is because it is not used. In practice, all nominations under labour agreements are processed through Subclass 186. The amendments formalise this position.

Under the previous version of regulation 5.19, decision-makers were required to assess both sets of criteria in order to refuse a nomination. This created unnecessary processing work. It could also result in the approval of the nomination on a basis which was not sought by the applicant and which did not enable the nominated person to qualify for a visa. The new version of regulation 5.19 provides for three mutually exclusive streams. The nominator will be required to select the appropriate stream and will only be assessed against that stream.

In addition to the structural changes noted above, there are a number of changes consequential to the introduction of the Subclass 482 (Temporary Skill Shortage) visa, and other changes to policy settings to strengthen program integrity, as noted below.

Subregulations 5.19(1) and (2) are similar to the previous provisions. The only significant change is that the nominator must identify the visa subclass and stream to which the nomination relates.

Subregulation 5.19(4) sets out requirements for approval of a nomination that are applicable to all three streams. The only new requirement is that the nominee must hold, or be eligible to hold, any mandatory occupational licences, registrations or memberships. This was previously only assessed when deciding a visa application. It is now assessed at both stages.

#### *Temporary Residence Transition stream*

Subregulations 5.19(5) to (8) set out the criteria that are specific to the Temporary Residence Transition stream. The details are as follows:

- the Temporary Residence Transition stream is for nominations of persons who have worked in Australia as holders of a Subclass 457 (Temporary Work (Skilled)) visa and/or a Subclass 482 (Temporary Skill Shortage) visa in the Medium-term stream for specified periods of time. The qualifying period is increased from two years to three years. Transitional arrangements will apply to ensure that there is no disadvantage to persons who held or had applied for a Subclass 457 visa on 18 April 2017 when the Government announced the changes (the transitional cohort);
- the restriction of the Temporary Residence Transition stream to persons holding a visa in the Medium-term stream of Subclass 482, except for the transitional cohort, reflects a policy change for nominations from 18 March 2018, limiting the availability of permanent residence to persons who have been working in occupations on the Medium and Long-term Strategic Skills List (MLTSSL). In addition, except for the transitional cohort, the occupation must continue to be listed on the MLTSSL when the nomination is made. Requiring an applicant's nominated occupation to be on the MLTSSL, or the associated list of regional occupations, will ensure that permanent migrants are filling a current skill need in the labour market, maximising their contribution to Australia's overall economic prosperity. This will be implemented via the legislative instrument mentioned in paragraph 5.19(5)(c) and subregulation 5.19(8);
- the qualifying time periods are set out in paragraphs 5.19(5)(e), (f) and (g). These provisions have the same effect as the previous version of regulation 5.19, except that the qualifying periods have been increased from two years out of the previous three years to three years out of the previous four years. This change aligns with the extended work experience requirement being implemented for the Subclass 482 visa, and supports the intention that the nominee has the relevant skills to do the job and contribute to Australia's economy. In summary, the provisions require that the nominee has worked in a position for three out of the four years prior to the lodgement of the nomination, unless the nominee is a General Manager, Chief Executive or Managing Director, or a medical professional, in which case it is only necessary to have worked in the occupation rather than a particular position. This cohort will be identified in an instrument under subregulation 2.72(13), as referenced at paragraph 5.19(5)(g);
- it continues to be a requirement that there must be a genuine need for the nominee to be employed in a position under the direct control of the nominator for at least two years on a full-time basis. These requirements do not apply to the occupations of General Manager, Chief Executive or Managing Director, or to medical professionals, as the

nature of employment in these occupations makes the requirements difficult to fulfil. This cohort will be identified in an instrument under subregulation 2.72(13), as referenced at subregulation 5.19(7);

- the Minister must be satisfied that the nominee will be paid no less than the annual market salary rate for the position and this salary rate must not be less than the Temporary Skilled Migration Income Threshold. The criteria are the same as the criteria that apply to nominations for the Subclass 482 visa under regulation 2.72(15) (item 79). Those criteria are incorporated by reference at paragraph 5.19(5)(o). The new market salary assessment framework provides a stronger basis for ensuring that Australian equivalent wages are being paid;
- the Minister must also be satisfied that the nominator's business has the capacity to employ the nominee for at least two years and to pay the annual market salary rate for each year (paragraph 5.19(5)(n)). This is a strengthened criterion which aims to improve the integrity of the program by allowing the Minister to refuse nominations by businesses that do not appear to be viable. This is particularly relevant in cases where the business appears to exist for the primary purpose of securing permanent residence for the nominee; and
- another new integrity measure is that the Minister must be satisfied that there is no information known to the Department that other employment conditions are less favourable than the conditions that are provided, or would be provided, to Australian citizens or permanent residents performing equivalent work at the same location, unless it is reasonable to disregard that information (paragraph 5.19(5)(p)). Information about such matters would be disregarded, for example, if it was found to be without substance or concerned trivial matters.

### *Direct Entry stream*

Subregulations 5.19(9) to (13) set out the criteria that are specific to the Direct Entry stream. The criteria are consistent with the previous version of regulation 5.19 except that, as noted below, there are new integrity measures mirroring the provisions noted above in the Temporary Residence Transition stream:

- the Minister must be satisfied that the nominee will be paid no less than the annual market salary rate for the position (paragraph 5.19(9)(h));
- the Minister must be satisfied that the nominator's business has the capacity to employ the nominee for at least two years and to pay the annual market salary rate for each year (paragraph 5.19(9)(g));
- the Minister must be satisfied that there is no information known to the Department that other employment conditions are less favourable than the conditions that are provided, or would be provided, to Australian citizens or permanent residents performing equivalent work at the same location, unless it is reasonable to disregard that information (paragraph 5.19(9)(i)).

The previously existing requirement that positions can only be nominated for Direct Entry if the occupation is specified in a legislative instrument has been carried forward. In addition, the previously existing occupation-related requirements for Subclass 186 (now covered by subregulations 5.19(10)) and (11)) and Subclass 187 (now covered by subregulations 5.19(12) and (13)) have been largely maintained. The only substantive change is that the occupation identified in the nomination now only has to be specified in the legislative instrument in force when the nomination is made. It will not affect the nomination if the occupation is removed from the legislative instrument before a decision is made. This provides greater certainty for nominating employers and visa applicants.

#### *Labour Agreement stream*

Subregulation 5.19(14) inserts a new labour agreement stream. As noted above, nominations under labour agreements were previously made and approved by reference to the labour agreement, without a statutory nomination process. The new approach provides greater transparency and consistency by applying statutory criteria that apply to all nominations, including the online application process, payment of the fee under regulation 5.37, and application of the integrity and licensing criteria in subregulation 5.19(4). The additional criteria at subregulation 5.19(14) reflect the purpose of labour agreements, which is to allow nomination of occupations as set out in the labour agreement approved by the Minister.

#### Item 130 – After paragraph 5.19M(f)

This item ensures that the regime in the 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 482 (Temporary Skill Shortage) visa.

#### Item 131 – Subregulation 5.37(1) (note)

This item make a technical amendment.

#### Item 132 – Subregulations 5.37(2) to (4)

This item amends regulation 5.37 which specifies the fee for making a nomination under regulation 5.19. The previously existing fee structure is maintained for the Temporary Residence Transition stream – \$540 unless the position is located in regional Australia in which case no fee is payable. The same fee structure is now also applied to the Direct Entry stream, which in practice will mean that nominations for the Subclass 186 visa will be \$540, but no fee will be payable for nominations for the Subclass 187 visa. The amendments introduce the same fee structure as the Temporary Residence Transition stream for the new Labour Agreement stream.

#### Item 133 – Paragraphs 1114B(3)(d) and 1114C(3)(d) of Schedule 1

This item amends the requirements, in Schedule 1 to the Migration Regulations, for making an application for a Subclass 186 (Employer Nomination Scheme) visa or a Subclass 187 (Regional Sponsored Migration Scheme) visa. The effect of the amendment is to require a declaration by the visa applicant that the position identified in the visa application has been nominated in accordance with regulation 5.19. This amendment is consequential to the change,



noted at item 129, relating to labour agreement nominations, which are now required to be made under regulation 5.19.

#### Item 134 – Item 1223A of Schedule 1

The item repeals item 1223A of Schedule 1 to the Migration Regulations, which sets out the requirements for making an application for a Subclass 457 (Temporary Work (Skilled)) visa. This item, together with item 167, repeals the Subclass 457 (Temporary Work (Skilled)) visa. The repeals do not affect visa applications made prior to the repeal on 18 March 2018.

#### Item 135 – At the end of Part 2 of Schedule 1

This item inserts item 1240 at the end of Part 2 of Schedule 1 to the Migration Regulations. Item 1240 creates the Temporary Skill Shortage (Class GK) visa, containing one subclass, which is the Subclass 482 (Temporary Skill Shortage) visa. Item 1240 also contains the criteria which must be met to make a valid application for the Subclass 482 visa. The requirements are as follows:

- an internet application must be made on an approved form which is built into the Department's online application system. Alternative arrangements will be provided in a legislative instrument to cater for system outages. The application arrangements will be set out in a legislative instrument under subitem 1240(1), paragraph 1240(3)(a), and subregulation 2.07(5);
- a visa application charge (VAC) must be paid (subitem 1240(2)). The VAC structure reflects the difference between the Short-term stream of Subclass 482, which can only be granted for two years (unless an international trade obligation applies) and has a base application charge of \$1,150, and the Medium-term stream which can be granted for up to four years and has a base application charge of \$2,400. Adult family members pay the same base application charge as the principal applicant. Family members under the age of 18 pay \$290 or \$600, based on the stream applicable to the principal applicant;
- an applicant may be in Australia or outside Australia when applying for the Subclass 482 visa, except for an applicant for the Short-term stream who must be outside Australia if more than one Short-stream visa has been held and the most recently held Short-term stream visa was applied for in Australia (paragraphs 1240(3)(b) and (c)). This is known as the 'one onshore renewal' rule. It is intended to deter visa holders from remaining in Australia for long periods, which would be contrary to the purpose of the Short-term stream. The restriction on onshore renewals does not apply if it would be contrary to Australia's international trade obligations. The restriction also does not apply to family members seeking to meet the secondary criteria. It is only the principal applicant who applies for the Subclass 482 visa in a stream. The Department will also assess applications for Short-term stream visas to determine if the applicant is a genuine applicant for entry and stay as a short term visa holder (see clause 482.222 at item 168);
- an applicant in Australia must hold a substantive visa or a Bridging A, B, or C visa (paragraph 1240(3)(d)). 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 visa E. This rule aligns the Subclass 482 visa with the permanent employer sponsored visas (Subclass 186 and Subclass 187). It is a departure from the rules that applied to the repealed Subclass 457 visa, under which unlawful non-citizens could be eligible for the grant of

the visa in very limited circumstances. This resulted in processing inefficiencies and significant numbers of futile applications. The new rule is consistent with the expectation of the Government that non-citizens will maintain lawful status in Australia;

- applications by family members can be combined with an application by the primary applicant or any other member of the family unit (paragraph 1240(3)(e)). This is a standard provision in the Migration Regulations;
- the visa application must be supported by a nomination and must be an application for the stream identified in the nomination (paragraph 1240(3)(f)). It is permissible to lodge the visa application before the nomination is approved, but the visa cannot be granted unless and until the nomination is approved. If necessary, it is possible to lodge an application for approval as 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);
- for applicants specified in a legislative instrument, it is a requirement that the applicant's skills have been assessed as suitable or an arrangement has been made to have the skills assessed by an assessing authority specified in the instrument (paragraph 1240(3)(g)). The purpose is to ensure applicants in cohorts with high refusal rates have the skills required for their nominated occupation. The legislative instrument will identify applicants by reference to nominated occupation and the visa applicant's passport. Where the applicant is relying on an arrangement for a skills assessment, the outcome of that assessment will be taken into account when the visa application is assessed under subclause 482.212(3) (*The applicant has the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation*). If necessary, the Minister can also request a further skills assessment during the processing of the visa application under clause 482.212(4) (see item 168).

#### Items 136 to 140 – Amendments to the conditions imposed on bridging visas

These items amend the provisions in Schedule 2 to the Migration Regulations, setting out the conditions imposed on bridging visas. The amendments are consequential to the creation of new visa condition 8607 (item 175). This condition restricts the employment which may be engaged in by holders of Subclass 482 (Temporary Skill Shortage) visas. It is in similar form to visa condition 8107, which applies to holders of Subclass 457 (Temporary Work (Skilled)) visas. The effect of the amendments is that the relevant employment restrictions continue when the former holder of a Subclass 457 or Subclass 482 visa is granted a bridging visa associated with an application for another visa.

#### Items 141 to 152 – Amendments to the Subclass 186 (Employer Nomination Scheme) visa

These items amend the criteria in Schedule 2 to the Migration Regulations for the grant of the Subclass 186 (Employer Nomination Scheme) visa. The Subclass 186 visa is a permanent visa catering for employer nomination of overseas workers in three streams:

- *Temporary Residence Transition*, for persons transitioning from the temporary

sponsored work visa (Subclass 457 (Temporary Work (Skilled)) visa pursuant to nominations under regulation 5.19 by their sponsors;

- *Direct Entry*, for any person nominated by an employer under regulation 5.19; and
- *Labour Agreement*, for persons nominated under regulation 5.19 for positions covered by a labour agreement between the employer and the Minister;

Items 141, 146 and 147 – the *Agreement stream* has been renamed the *Labour Agreement stream* to better reflect the purpose of the stream, which is to cater for labour agreements between an employer and the Minister pursuant to which nominated overseas workers can obtain permanent residence by being granted a Subclass 186 visa in the Labour Agreement stream;

Items 142 and 148 – These items lower the maximum age of visa applicants, in the Temporary Residence Transition stream and Labour Agreement stream, from 50 to 45. This change was previously made to the Direct Entry stream, with effect from 1 July 2017. The effect of items 142 and 148 is that, on the day that the visa application is made, the applicant must be under the age of 45 unless in an exempt class of persons. The exemptions for the Temporary Residence Transition stream will be specified in a legislative instrument under paragraph 186.221(b). The exemptions for the Labour Agreement stream will be specified in individual labour agreements as provided for in paragraph 186.241(b). The changes apply to applications for visas in the Temporary Residence Transition stream and Labour Agreement stream made from 18 March 2018. However, the changes to the Temporary Residence Transition stream will not affect persons who held a Subclass 457 visa on 18 April 2017 or were subsequently granted a visa applied for before that date. This was the date the Government announced the new policy. This transitional cohort will be included in the legislative instrument made under paragraph 186.221(b) and will continue to be subject to the requirement to apply for the Subclass 186 visa before turning 50;

Items 143, 145 and 149 – These items make amendments consequential to the repeal and substitution of regulation 5.19 (item 129). The amendments make it clear that a nomination under regulation 5.19 in relation to a particular stream (Temporary Residence Transition, Direct Entry, or Labour Agreement) is only relevant to the equivalent stream in the Subclass 186 visa, and the visa can only be granted if the relevant nomination has been approved by the Minister under regulation 5.19;

Item 144 – this item introduces a new criterion for the Temporary Residence Transition stream, requiring the applicant to undergo a skills assessment if required by the Minister. This criterion applied to applicants for the repealed Subclass 457 visa, and it now applies to applicants for the Subclass 482 visa (subclause 482.212, inserted by item 168). The introduction of a capacity to require skills assessment in the Temporary Residence Transition is an integrity measure, to address the possibility that holders of a Subclass 457 or Subclass 482 visa (who may not have had their skills tested when the temporary visa was granted) may not genuinely be performing the claimed occupation and may not have the appropriate skills to adequately perform the occupation. It is appropriate, before permanent residence is granted, that the Minister can assess this issue if required.

Item 150 – this item omits subclause 186.242(2) which provided, as a criterion for the grant of a Subclass 186 visa in the Labour Agreement stream, that the requirements of the labour agreement have been met in relation to the application. The criterion has been moved from the

visa application criteria to the nomination criteria (paragraph 5.19(14)(c), inserted by item 129). Assessment of compliance with the labour agreement is more appropriately undertaken when the nomination is being assessed.

Items 151 and 152 – these items amend the criteria for the grant of a Subclass 186 visa in the Labour Agreement stream, by inserting a criterion requiring the applicant to have English language skills that are suitable to perform the occupation to which the position relates. This criterion mirrors the criterion in the Labour Agreement stream in Subclass 482 (clause 482.243, inserted by item 168). English requirements in the form of English test scores are specified in some labour agreements, and in those cases the nomination of a person with inadequate English could be refused on the basis that the requirements of the labour agreement have not been complied with. However, the statutory criteria are appropriate to ensure that there is always a proper basis for refusing a visa application if the applicant's English skills are inadequate.

#### Items 153 to 164 – Amendments to the Subclass 187 (Regional Sponsored Migration Scheme) visa

These items amend the criteria in Schedule 2 to the Migration Regulations for the grant of the Subclass 187 (Regional Sponsored Migration Scheme) visa. The Subclass 187 visa was designed to mirror the Subclass 186 (Employer Nomination Scheme) visa, but with some variations, reflecting a focus on positions in regional Australia. The main structural change to the Subclass 187 visa is the repeal of the Agreement stream (items 154 and 164). The Agreement stream in Subclass 187 was redundant, because it was identical to the Agreement stream in Subclass 186, and all labour agreements relating to positions in regional Australia were processed through the Subclass 186 visa. The repeal of the Agreement stream from Subclass 187 formalises this position and rationalises the regulations.

The other amendments have the following effect:

Item 155 – this item lowers the maximum age of visa applicants, in the Temporary Residence Transition stream, from 50 to 45. This change was previously made to the Direct Entry stream, with effect from 1 July 2017. The effect of item 155 is that, on the day that the visa application is made, the applicant must be under the age of 45 unless in an exempt class of persons. The exemptions will be specified in a legislative instrument under paragraph 187.221(b). As noted above in relation to the equivalent amendment to Subclass 186, the transitional Subclass 457 cohort will not be affected by this change;

Items 156 and 158 – these items make amendments consequential to the repeal and substitution of regulation 5.19 (item 129). The amendments make it clear that a nomination under regulation 5.19 in relation to a particular stream (Temporary Residence Transition or Direct Entry) is only relevant to the equivalent stream in the Subclass 187 visa, and the visa can only be granted if the relevant nomination has been approved by the Minister under regulation 5.19;

Item 157 – this item introduces a new criterion for the Temporary Residence Transition stream, requiring the applicant to undergo a skills assessment if required by the Minister. It mirrors the provision inserted into Subclass 186 (see item 144);

Items 159 to 163 – these items amend clause 187.234 to include a requirement for applicants in the Direct Entry stream of Subclass 187 to have been employed in the occupation for at least three years on a full-time basis and at the level of skill required for the occupation. The

intention of this amendment is to strengthen the criteria for visa grant. The three year work experience requirement has been carried across from the Subclass 186 visa (paragraph 186.234(2)(b)) to ensure that only appropriately qualified and experienced workers are granted permanent residence under the Subclass 187 visa.

Item 165 – Clause 408.112 of Schedule 2

This item amends the definition of *adverse supporter information* in clause 408.112 to reflect the changes made to the definition of *adverse information* in regulation 1.13A (item 15).

Item 166 – Subparagraph 408.224(b)(ii) of Schedule 2

This item amends a criterion allowing certain senior executives, at national or State/Territory manager level, employed on Subclass 457 (Temporary Work (Skilled)) visas, to sponsor domestic workers on a Subclass 408 (Temporary Activity) visa. As the Subclass 457 visa is repealed and replaced by the Subclass 482 (Temporary Skill Shortage) visa, a reference to the Subclass 482 visa has been included.

Item 167 – Part 457 of Schedule 2

This item repeals the criteria for the grant of the Subclass 457 (Temporary Work (Skilled)) visa. The repeal does not affect visa applications made prior to the repeal on 18 March 2018 (see subitem 6702(2) of part 67 of Schedule 13 to the Migration Regulations, inserted by item 178).

Item 168 – After Part 476 of Schedule 2

This item inserts new Part 482 into Schedule 2 to the Migration Regulations. Part 482 contains the criteria for the grant of the Subclass 482 (Temporary Skill Shortage) visa and also specifies the visa conditions and when the visa is in effect. The purpose of the Subclass 482 visa is to replace the Subclass 457 (Temporary Work (Skilled)) visa, which is repealed by items 134 and 167. The Subclass 482 visa improves and strengthens the arrangements for the employer nomination of temporary skilled workers. The visa contains three streams for skilled workers, as explained below. There are also common criteria which must be met by all primary applicants. Part 482 also includes the criteria which must be met by family members who are accompanying the skilled worker to Australia.

Division 482.2 sets out the primary criteria. These are the criteria that must be met by the nominated overseas 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 is determined by the nominated occupation, as explained below.

*Common criteria*

Subdivision 482.21 sets out the following common criteria:

- the applicant has complied substantially with previous visa conditions (clause 482.211);
- a nomination by an approved sponsor has been approved and remains in effect (subclause 482.212(1)). The criteria for approval of nominations are set out in

regulation 2.72 (item 79). In addition, the labour market testing criterion set out in the Migration Act (section 140GBA) must be satisfied for a nomination to be approved;

- the applicant genuinely intends to perform the nominated occupation and the position associated with the nominated occupation is genuine (subclause 482.212(2)). The requirement for the position to be genuine is also assessed at the nomination stage (subregulation 2.72(10), inserted by item 79);
- the applicant has the skills, qualifications and employment background that the Minister considers necessary to perform the tasks of the nominated occupation (subclause 482.212(3)). This criterion complements the criteria in the streams, noted below, which require the applicant to have worked in the nominated occupation or a related field for at least two years;
- if required by the Minister, the applicant has demonstrated that he or she has the necessary skills to perform the tasks of the nominated occupation (subclause 482.212(4)). Provision of a skills assessment is not mandatory for all applicants. It is requested where necessary, based on a risk assessment. This continues the approach that applied to the Subclass 457 visa;
- the applicant has not engaged in payment for visa sponsorship conduct (clause 482.213);
- the applicant has adequate arrangements for health insurance (clause 482.214);
- if the applicant is nominated as a medical practitioner, the applicant's qualifications are recognised by the relevant Australian authorities (clause 482.215). This criterion is necessary because the general position in relation to occupational licensing under Subclass 482, as was also the case for Subclass 457, is that it is enforced as a visa condition (see subclause 8607(6) at item 175). This is inappropriate for medical practitioners who must be entitled to practice in Australia before the visa is granted;
- there must be no adverse information known to the Department about the nominator or a person associated with the nominator, 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. New definitions of *adverse information* and *associated with* are inserted by item 15;
- the applicant satisfies standard requirements relating to health, character and other public interest criteria and special return criteria (clause 482.217 and clause 482.218). These criteria are unchanged from the Subclass 457 criteria, except that health criterion 4007 now applies rather than criterion 4006A, which has been repealed. The reason for this change is explained at item 171.

#### *Criteria for the Short-term stream*

The Short-term stream caters for nominations in relation to *short-term skilled occupations* (see subregulation 2.72(9), inserted by item 79). These occupations will be specified from time to time in the legislative instrument made under subregulation 2.79 and are collectively referred to in the instrument as the Short-term Skilled Occupation List (STSOL). A nomination in

relation to a *short-term skilled occupation* is a nomination for the Subclass 482 visa in the Short-term stream (see paragraph 2.73(6)(a), inserted by item 80). A visa application based on a nomination for the Short-term stream is an application for the Subclass 482 visa in that stream and not an application for the Subclass 482 visa in any other stream (see paragraph 1240(3)(f) in Schedule 1 to the Migration Regulations, inserted by item 135).

The criteria that apply to applicants for the Short-term stream, in addition to the common criteria outlined above, are as follows:

- the applicant has worked in the nominated occupation or a related field for at least two years (clause 482.221);
- the applicant is a genuine applicant for entry and stay as a short term visa holder having regard to specified matters (clause 482.222). This clause provides grounds for a comprehensive consideration of the *bona fides* of the visa applicant, having regard to the applicant's circumstances, immigration history, and other relevant matters. This reflects the intent of the Short-term stream to fill short-term vacancies in Australia;
- the applicant satisfies any English language test requirements specified in a legislative instrument and, if required, demonstrates English language proficiency in a manner required by the Minister (clause 482.223). The English language requirements for the Short-term stream, and exemptions, will be the same as existed for Subclass 457. Consideration was given to whether the detailed provisions for English language requirements should be specified in the Migration Regulations, rather than in a non-disallowable legislative instrument. It was decided to continue the previous practice of specifying this detail in a legislative instrument to provide flexibility for future amendments, noting that five different English language tests, and their various scores, are currently specified. It is considered that this level of detail is appropriately included in a legislative instrument;
- the applicant must be employed to work in the nominated occupation in a position in the business of the nominating employer or, except for overseas business sponsors, in a position in an associated entity of the nominating employer. The distinction between Australian and overseas businesses is explained at items 54, 60, and 79. The restrictions on the employment of the applicant do not apply to the occupations of General Manager, Chief Executive or Managing Director, and all of the medical occupations, which will be listed in the instrument under subregulation 2.72(13) (see the explanation at item 79).

#### *Criteria for the Medium-term stream*

The Medium-term stream caters for nominations in relation to *medium and long-term strategic skills occupations* (see subregulation 2.72(9), inserted by item 79). These occupations will be specified from time to time in the legislative instrument made under subregulation 2.79 and are collectively referred to in the instrument as the Medium and Long-term Strategic Skills List (MLTSSL). A nomination in relation to a *medium and long-term strategic skills occupation* is a nomination for the Subclass 482 visa in the Medium-term stream (see paragraph 2.73(6)(b), inserted by item 80). A visa application based on a nomination for the Medium-term stream is an application for the Subclass 482 visa in that stream and not an application for the Subclass

482 visa in any other stream (see paragraph 1240(3)(f) in Schedule 1 to the Migration Regulations, inserted by item 135).

The criteria that apply to applicants for the Medium-term stream are the same as the criteria that apply to the Short-term stream, except that the visa applicant may have an intention to remain in Australia permanently (i.e. there is no equivalent to clause 482.222). This reflects the availability of permanent residence via the Temporary Residence Transition streams in the Subclass 186 (Employer Nomination Scheme) visa and Subclass 187 (Regional Sponsored Migration Scheme) visa (see the temporary residence transition criteria in regulation 5.19 at item 129).

#### *Criteria for the Labour Agreement stream*

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

- the nominated occupation is the subject of a work agreement between the Commonwealth and the nominating employer (clause 482.241);
- the applicant has worked in the nominated occupation or a related field for at least two years unless the Minister considers that it is reasonable in the circumstances to disregard this requirement (clause 482.242); and
- the applicant has English language skills that are suitable to perform the nominated occupation (clause 482.243).

The criteria for the Labour Agreement stream are broadly consistent with the criteria that applied to labour agreements under the repealed Subclass 457 visa. The work experience requirement, and the requirement for suitable English skills, were previously implemented through individual labour agreements. That approach will continue, but the inclusion of visa criteria creates transparency and provides increased flexibility for the Department to ensure that only appropriately qualified applicants are granted Subclass 482 visas on the basis of a labour agreement.

#### *Secondary criteria*

Division 482.3 sets out the criteria that must be met by family members who are applying for a Subclass 482 visa with the primary applicant, or applying subsequently on the basis of being a family member of a Subclass 457 or Subclass 482 visa holder who satisfied the primary criteria. The criteria are standard provisions, and are substantially the same as the criteria that applied to secondary applicants under the repealed Subclass 457 visa.

The only family members who can be granted a second or subsequent Subclass 482 visa if they have ceased to be a member of the family unit, as defined in regulation 1.12, are children who have turned 18, and are under the age of 23, and are no longer dependent (subclause 482.312(2)). The general rule is that children cease to be members of the family unit if they are over 18 and no longer dependent. For the Subclass 482 visa (as was the case for Subclass 457), these children are treated as members of the family unit. However, the visas of all children, other than children who are dependent because of incapacity, will cease when the child turns 23 (see Division 482.5, noted below).



### *Circumstances applicable to grant*

As was the case with the Subclass 457 visa, an applicant for the Subclass 482 visa may be in Australia (other than in immigration clearance) or outside Australia when the visa is granted (clause 482.411).

### *When visa is in effect*

Clause 482.511 provides for the commencement and duration of a Subclass 482 visa, and the extent to which the visa permits travel to Australia.

For all applicants, the visa will come into effect on the date that it is granted. For applicants outside Australia this means that any delay in travelling to Australia will reduce the permitted length of stay. Given the purpose of the Subclass 482 visa, the expectation is that visa holders will usually travel to Australia to commence work within a short period of time after the visa is granted.

For all applicants, the visa permits multiple entry into Australia while the visa is in effect.

The effect of paragraph 482.511(a) is that the duration of a Subclass 482 visa, for a primary applicant, is the period of stay selected by the nominating employer in accordance with the requirements of paragraph 2.73(9)(d) and subregulations 2.73(10) and (11) (see item 80). For a Subclass 482 visa in the Short-term stream, the visa period will be one or two years (as specified in the nomination), unless this is inconsistent with an international trade obligation, in which case it can be one, two, three, or four years (as specified in the nomination). For a Subclass 482 visa in the Medium-term stream, it will be one, two, three, or four years (as specified in the nomination). For a Subclass 482 visa in the Labour Agreement stream, it will be one, two, three or four years (as specified in the nomination). Labour agreements may individually specify the visa periods which may be nominated and in those cases the nominated period must not exceed what is allowed by the labour agreement.

Paragraph 482.511(b) covers the position of family members of Subclass 457 holders who are granted a Subclass 482 visa to join the primary holder of the Subclass 457 visa in Australia. The visa ceases when the primary holder's Subclass 457 visa ceases.

Paragraph 482.511(c) covers the position of family members of Subclass 482 holders who are granted a Subclass 482 visa to join the primary holder in Australia. The visa ceases when the primary holder's Subclass 482 visa ceases.

Paragraph 482.511(d) has the effect that a Subclass 482 visa held by a child or step-child of the primary visa holder or his or her spouse or de facto partner will cease when the primary holder's visa ceases, or when the child turns 23, whichever is earlier. This rule does not apply to children who have an ongoing dependency because of incapacity. The rationale for cessation of visas when children turn 23 is that, in the context of the temporary work visa program, it is reasonable that children who have turned 23 should regularise their status (e.g. by obtaining a student visa if they are studying), or otherwise leave Australia. Children over the age of 18 who are no longer dependent are not defined as members of the family unit under the general rule in the Migration Regulations. The capacity to obtain a further visa (albeit a visa that ceases at age 23) is a concession to those applicants.

## *Visa conditions*

Clause 482.611 sets out the applicable visa conditions. Condition 8607 is a new work condition (see item 175) that is mandatory for all applicants who satisfy the primary criteria. Condition 8501 (*The holder must maintain adequate arrangements for health insurance while the holder is in Australia*) is mandatory for all applicants. Condition 8303 may be imposed if appropriate (*The holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community*).

### Items 169 to 170 – Amendments to the Subclass 773 (Border) visa

These items amend the criteria for the grant of the Subclass 773 (Border) visa. Item 169 corrects a minor textual error. Item 170 is consequential to the creation of the Subclass 482 (Temporary Skill Shortage) 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 482 visa is added to the list of visas which engage these criteria.

### Item 171 – Clause 4006A of Schedule 4

This item omits clause 4006A from Schedule 4 to the Regulations. Clause 4006A was a health criterion applicable to the Subclass 457 (Temporary Work (Skilled)) visa. It allowed a visa to be granted to an applicant who would otherwise not meet the criterion if the nominating employer gave the Minister a written undertaking that the nominator would meet all costs related to the relevant disease or condition. The criterion was difficult to monitor and enforce. The criterion also resulted in refusal decisions for qualified and suitable visa applicants, because some employers were not prepared to provide undertakings. The equivalent health criterion applicable to the Subclass 482 (Temporary Skill Shortage) visa is condition 4007 which gives the Minister a power to waive certain health requirements if the Minister is satisfied that the granting of the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to the access to health care or community services of an Australian citizen or permanent resident (subclause 4007(2) in Schedule 4 to the Migration Regulations). This gives the Minister the flexibility to grant visas to high value visa applicants if the potential health costs are reasonable (noting that all visa applicants are required to have adequate health insurance).

### Item 172 – Paragraph 4013(2)(d) of Schedule 4

This item amends the public interest criterion at item 4013 in Schedule 4 to the Migration Regulations. The criterion imposes an exclusion period for persons who have had a visa cancelled. The amendment inserts a reference to the new cancellation ground at paragraph 2.43(1)(kc) (see item 40). The amendments are consequential to the creation of the Subclass 482 (Temporary Skill Shortage) visa.

### Items 173 to 174 – Amendments to visa condition 8107

These items amend visa condition 8107 in Schedule 8 to the Migration Regulations to clarify that references to visa and nomination criteria relating to the Subclass 457 (Temporary Work (Skilled)) visa are references to those criteria as in force prior to 18 March 2018 when the Subclass 457 visa was repealed.

### Item 175 – At the end of Schedule 8

This item inserts new visa condition 8607 in Schedule 8 to the Migration Regulations. Condition 8607 is a mandatory condition for holders of the Subclass 482 (Temporary Skill Shortage) visa who satisfy the primary criteria (see item 168). The condition is substantially the same as the parts of condition 8107 that apply to holders of the Subclass 457 (Temporary Work (Skilled)) visa. The requirements imposed by condition 8607 are as follows:

- the visa holder must work only in the nominated occupation identified in the most recent Subclass 482 visa application (subclause 8607(1)). This means that a visa holder who wishes to change occupation must apply for a new visa. This is a change from condition 8107(3)(a)(i) which referred to the occupation listed in the most recently approved nomination. The change is to allow the Department to assess the suitability of the Subclass 482 holder in relation to the new occupation;
- the visa holder must only work in positions as set out in subclauses 8607(2) and (3). In summary, the effect of those subclauses is as follows:
  - o visa holders in the occupations of General Manager, Chief Executive or Managing Director, and all of the medical occupations, are not restricted in relation to who the employer may be (these occupations are listed in the legislative instrument referenced at subclause 8607(3));
  - o visa holders in the Labour Agreement stream must work only for the nominating employer, but on-hire arrangements to third parties are permitted provided that the salary is paid by the nominating employer (paragraph 8607(2)(a));
  - o visa holders in the Short-term stream and Medium-term stream must work only in a position in the business of the nominating employer or an associated entity (paragraph 8607(2)(b)). However, if the nominating employer is an overseas business sponsor, the position must be in the business of the nominating employer (paragraph 8607(2)(c)). The distinction between businesses operating in Australia and overseas businesses is explained at items 54, 60, and 79; and
  - o in relation to the previous two points, the visa holder will not be in breach of the condition if he or she is working for another employer to fulfil a contractual requirement in relation to the giving of notice, prior to commencing work with the new employer (paragraph 8607(3)(b));
- 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 60 consecutive days, and must obtain and continue to hold any relevant occupational licences, registrations and memberships (subclauses 8607(4), (5) and (6)) These subclauses are unchanged from the relevant parts of condition 8107.

### Items 176 to 177 – Amendments to Schedule 9 of the Migration Regulations

These items amend Schedule 9 to the Migration Regulations to include a reference to the Subclass 482 (Temporary Skill Shortage) visa. The effect of the amendment is that Subclass 482 holders who are entering Australia to engage in offshore resources activity are not required

to comply with standard immigration clearance procedures. This is because they may be travelling directly to the site of the offshore resources activity. This item is complementary to item 18.

### Item 178 – In the appropriate position in Schedule 13

This item amends Schedule 13 to the Migration Regulations to insert Part 67 entitled *Amendments made by the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* and inserts new clauses 6701 to 6705. Schedule 13 sets out the application provisions (sometimes referred to as transitional provisions) which 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 482 (Temporary Skill Shortage) visa, as it only comes into existence on 18 March 2018 when this Regulation commences.

Clause 6702, entitled *Application provisions in relation to visa applications* has the effect that the amendments and repeal of various regulations do not affect applications for visas made before 18 March 2018. This is a routine application provision for changes to visa criteria in the Migration Regulations. Subclause 6702(2) also has the effect that any instruments made under repealed regulations continue to apply in relation to applications for visas made before 18 March 2018. This provision is included to avoid doubt.

Subclause 6702(3) modifies the operation of a legislative instrument dealing with English language requirements for the grant of the Subclass 457 (Temporary Work (Skilled)) visa. The instrument contained a minor error in the statement of the total band score required under the TOEFL iBT English test. The instrument stated a score of '36' when the correct score is '35'. The error resulted from the provision of incorrect information to the Department. The change made by this item is beneficial for the remaining Subclass 457 applicants. The TOEFL iBT English test is one of five eligible English tests and is not in common usage by applicants for the Subclass 457 visa. As far as the Department is aware, the error has not disadvantaged any applicants.

Clause 6703, entitled *Application provisions in relation to adverse information and adverse supporter information*, has the effect that the repeal and substitution of regulation 1.13A and 1.13B (item 15) and clause 408.112 of Schedule 2 (item 165) does not affect applications made before 18 March 2018. As with subclauses 6702(1) and 6702(2), this is a routine application provision. It is located in a separate clause because it covers the four situations where the concept of adverse information is relevant: applications for approval as sponsor; nominations of occupations; applications for nomination of a position, and visa applications.

Clause 6704, entitled *Application and transitional provisions in relation to amendments of Part 2A*, has the effect that changes to regulations relating to sponsorship and nomination under Part 2A of the Migration Regulations do not affect applications and nominations made before 18 March 2018. There are two exceptions:

- Subclauses 6704(2) and 6704(5) provide that certain criteria that are repealed on the commencement day will not apply to applications for approval as a standard business sponsor, or variation of a term of approval as a standard business sponsor, made before the commencement day. These changes are beneficial for applicants. Apart from criteria that are redundant (paragraph 259(i) and paragraph 2.68(j) – see the explanation at item 56), the other changes are related to the proposed introduction of a nomination training contribution charge to replace the existing training benchmarks (see the explanation at item 53);
- Subclause 6704(15) ensures that a nomination linked to a Subclass 457 visa application will not cease during AAT review of a decision to refuse the visa. This is a beneficial change to extend the validity of a nomination, which would otherwise cease 12 months after approval (paragraph 2.75(2)(b) of the Regulations), to avoid situations where the applicant is successful at the AAT but the related nomination has ceased to be in effect, noting that it is not possible to make another Subclass 457 nomination as of 18 March 2018.

Subclauses 6704(9) to (12) provide for refunds of the fee paid in relation to a nomination lodged prior to 18 March 2018 in relation to a proposed applicant for a Subclass 457 visa. The refund is available if the proposed applicant did not lodge a visa application prior to 18 March 2018 when Subclass 457 was repealed. In this situation, the nomination serves no purpose.

Clause 6705, entitled *Application provisions in relation to nominations under regulation 5.19* has the effect that the repeals and amendments commencing on 18 March 2018 do not affect nominations made before 18 March 2018 under regulation 5.19, or made before 18 March 2018 in accordance with the terms of a labour agreement, and also do not affect related Subclass 186 or Subclass 187 visa applications, whether made before or after 18 March 2018.

## **Part 2—Consequential amendments**

### ***Medical Indemnity Regulations 2003***

#### **Item 179 – Subparagraphs 12(1)(b)(i) and (ii)**

This item makes consequential amendments to the *Medical Indemnity Regulations 2003* (the Medical Indemnity Regulations), to reflect the transition from the Subclass 457 (Temporary Work (Skilled)) visa to the Subclass 482 (Temporary Skill Shortage) visa. Overseas based doctors working temporarily in Australia must hold an appropriate temporary visa. From 1994 to 2012, a Subclass 422 Medical Practitioner visa was available. As part of visa reform initiatives, that visa was repealed and doctors instead used the Subclass 457 visa. As part of ongoing visa reform, the Subclass 457 visa has been replaced by the Subclass 482 visa.

To avoid further consequential changes to the Medical Indemnity Regulations when visa names and subclass numbers change, new subparagraph 12(1)(b)(i) now refers a person being “the holder of a temporary visa (within the meaning of the *Migration Act 1958*) that permitted the holder to work in Australia and that did not prohibit the holder from engaging in medical practice in Australia”.

This amendment maintains the current operation of the Medical Indemnity Regulations, and covers claims against overseas doctors who have worked in Australia on visa arrangements as in force from time to time, where they have both permanently ceased medical practice in Australia and no longer reside in Australia.

**Abolition and replacement of 457 visas**

**Regulation Impact Statement  
(OBPR ID: 21946)**

**Department of Immigration and Border Protection**

**August 2017**

## Contents

Overview: Australia’s employer sponsored skilled visa programme .....	57
Current regulatory framework .....	57
The problem.....	61
Why is Government action needed.....	65
Policy options .....	66
Option 1 .....	66
Overview of Option 1 .....	66
Likely outcomes of Option 1 .....	68
Option 2 .....	75
Overview of Option 2 .....	75
Likely outcomes of Option 2 .....	75
Option 3 .....	77
Overview of Option 3 .....	77
Likely outcomes of Option 3 .....	78
Consultation.....	78
Best option.....	81
Implementation and evaluation .....	82



## Overview: Australia's employer sponsored skilled visa programme

- 1.The employer sponsored skilled visa programme, and the underpinning legal and regulatory framework, is the primary way the Australian Government regulates how non-citizens may enter and remain to work in Australia, as well as many of the circumstances in which they may work. It also provides mechanisms to ensure that migrants do not pose unacceptable health, character and security risks to the Australian community.
- 2.The employer sponsored skilled visa programme is part of the broader migration programme, and allows sponsoring businesses to nominate an appropriately skilled non-citizen to fill a temporary or permanent employment vacancy in Australia. This programme regulates both the sponsor and the migrant to facilitate certain policy outcomes, such as ensuring that employers only seek to fill vacancies with overseas workers where appropriately skilled Australian workers are not available.

### Current regulatory framework

- 3.The employer sponsored skilled visa programme is comprised of the Temporary Work (Skilled) (subclass 457) visa (457 visa) and the permanent Employer Nomination Scheme (subclass 186) visa (ENS, 186 visa) and Regional Sponsored Migration Scheme (subclass 187) visa (RSMS, 187 visa) (permanent employer sponsored skilled visas).

**Top named industries for primary subclass 457, 186, and 187 visa grants in 2016-17 to 31 March 2017<sup>1</sup>**

Rank	Sponsor Industry	Total
1	Other Services	8,639
2	Accommodation and Food Services	7,224
3	Professional, Scientific and Technical	7,202
4	Information Media and Telecommunications	6,813
5	Health Care and Social Assistance	5,306
6	Construction	3,634
7	Education and Training	2,899
8	Manufacturing	2,525
9	Retail Trade	2,213
10	Financial and Insurance Services	2,017

<sup>1</sup> There were 16,452 visas granted to an industry, which is not specified in departmental reporting systems.

**Top occupations for primary subclass 457, 186, and 187 visa grants  
in 2016-17 to 31 March 2017**

Rank	Nominated Occupation	Total
1	351411 Cook	4,635
2	141111 Cafe or Restaurant Manager	3,031
3	261312 Developer Programmer	2,334
4	351311 Chef	2,004
5	225113 Marketing Specialist	1,987
6	242111 University Lecturer	1,872
7	261111 ICT Business Analyst	1,834
8	224711 Management Consultant	1,550
9	221111 Accountant (General)	1,487
10	261313 Software Engineer	1,464

4. Only certain occupations are eligible for use under Australia's permanent and temporary employer sponsored skilled visa programmes.<sup>2</sup> Depending on which visa programme is applied for, applicants must nominate an occupation from either:

- the Medium and Long-term Strategic Skills List (MLTSSL), previously known as the Skilled Occupation List (SOL), which targets occupations that are relevant to the medium to long term skill needs of the economy; or
- the Short-Term Skilled Occupation List (STSOL), previously known as the Consolidated Sponsored Occupation List (CSOL), which targets occupations that are relevant to the short term needs of the economy.<sup>3</sup>

Additionally, the Direct Entry (DE) stream of RSMS can apply for Australian and New Zealand Standard Classification of Occupations (ANZSCO) skill level 1-3 occupations.

5. The SOL and the CSOL were replaced with the MLTSSL and STSOL on 19 April 2017, which involved a reduction of 216 occupations from eligibility for the 457 visa. The number of eligible occupations fell from 651 to 435. The replacement of the CSOL with the STSOL represented a significant shift in approach by limiting temporary migrant occupations to those in need in the Australian labour market and distinguishing between short and medium to long term needs. On 1 July 2017, the occupation lists were updated based on

<sup>2</sup> Further information on the occupation lists can be found at:  
<http://www.border.gov.au/Trav/Work/Work/Skills-assessment-and-assessing-authorities/skilled-occupations-lists>

<sup>3</sup> CSOL was an expansive list of skilled occupations not based on labour market shortages, which was used to determine eligibility for sponsored temporary and permanent migration.

stakeholder consultation, labour market analysis, and advice from government departments to ensure they accurately reflect the skill needs of the Australian economy. These lists will be reviewed biannually.

### *Temporary employer sponsored skilled visa*

6. The 457 visa allows employers to address temporary labour shortages by enabling businesses, as approved sponsors, to nominate overseas workers when an appropriately qualified Australian citizen or permanent resident is not available. It is an uncapped and demand driven temporary visa aimed at meeting genuine temporary skill shortages.

7. As of 31 March 2017, there were 95,360 primary 457 visa holders in Australia. To be granted a 457 visa, applicants must meet certain requirements including:<sup>4</sup>

- demonstrating that they have the skills and experience necessary to work in the nominated occupation;
- holding any mandatory registration, license or professional membership;
- demonstrating that they have the required English language skills, unless exempt;
- meeting health and character requirements;
- holding adequate health insurance, unless covered by Medicare;
- having no outstanding debts to the Australian Government; and
- providing biometrics if asked.

8. In the 2015-16 programme year there were 34,493 active sponsors in the 457 visa programme. There are two ways an eligible business can become an approved sponsor:

- apply to be a standard business sponsor; or
- negotiate a labour agreement.

9. To become a standard business sponsor, a business must:<sup>5</sup>

- be a lawfully operating business;
- have no relevant adverse information against their business; and
- if the business is in Australia:
  - meet training requirements;
  - demonstrate a commitment to employing local labour; and
  - not engage in discriminatory recruitment practices.

10. Alternatively, a business may be able to enter into a labour agreement if they have a demonstrated need for skilled migrants that cannot be met by the Australian labour market and which falls outside standard employer sponsored skilled visa programmes.

11. All businesses who sponsor a 457 visa holder must meet sponsorship obligations including:

- cooperating with inspectors;
- ensuring equivalent terms and conditions of employment;
- keeping records;

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<sup>4</sup> Further information about what a skilled overseas worker needs to do to apply for a primary 457 visa can be found at: <http://www.border.gov.au/Trav/Visa-1/457-#tab-content-1>

<sup>5</sup> Further information about what an employer needs to do to apply for be a sponsor for the 457 visa programme can be found at: <http://www.border.gov.au/Trav/Visa-1/457-#tab-content-3>

- providing records and information to the Minister of Immigration and Border Protection (the Minister);
- notifying the Department of Immigration and Border Protection (the Department) when certain events occur;
- ensuring the visa holder participates in the nominated occupation;
- not recovering from, transferring or charging certain costs to another person;
- paying travel costs to enable sponsored people to leave Australia;
- paying costs to remove sponsored people who become unlawful non-citizens;
- providing training to Australians and permanent residents; and
- not engaging in discriminatory recruitment practices.

12. To nominate an overseas worker for a 457 visa, an approved sponsor must:<sup>6</sup>

- ensure that the overseas worker works directly for their business or for an associated entity of their business, unless the nominated occupation is exempt;<sup>7</sup>
- ensure that the overseas worker is afforded equivalent terms and conditions of employment to Australian workers;
- meet the 'genuineness' criterion;
- meet the Temporary Skilled Migration Income Threshold (TSMIT) requirements, set at \$53,900 as at 31 March 2017;
- not be subject to adverse information; and
- conduct Labour Market Testing (LMT) for professional, nursing and engineering occupations, unless it conflicts with international trade obligations.

### *Permanent employer sponsored skilled visa*

13. The permanent employer sponsored skilled visas were introduced in their current form in 2012 and are demand-driven programmes, which allow employers to nominate skilled workers for permanent residence to fill genuine vacancies in their business. These skilled workers can be overseas or already in Australia on temporary visas.

14. While ENS applies nation-wide, the RSMS helps businesses in regional, remote or low population growth areas (outside the major metropolitan centres of Brisbane, Gold Coast, Sydney, Newcastle, Wollongong and Melbourne) to recruit the skilled workers they need to manage and grow their operations.

15. The ENS and RSMS visas each have three streams:

- the Temporary Residence Transition (TRT) stream is for subclass 457 visa holders who are nominated by their employer after having worked for two years in the same occupation;
- the Labour Agreement stream is for skilled migrants nominated by an employer who is party to a labour agreement; and
- the Direct Entry (DE) stream is for other employer nominated skilled migrants.

<sup>6</sup> Further information about how a sponsor can nominate a skilled overseas worker can be found at:

<http://www.border.gov.au/Trav/Visa-1/457-#tab-content-4>

<sup>7</sup> A list of exempted occupations can be found in the Legislative Instrument: *Specification of Occupations for Nominations in Relation to Subclass 457 (Temporary Work (Skilled)) for Positions other than in the Business of the Nominator - IMMI 13/067*.

16. In the 2016-17 programme year to 31 March 2017, there were 17,044 primary ENS visa grants and 5,228 primary RSMS visa grants. To be granted an ENS or RSMS visa, applicants must meet certain requirements including:

- having been nominated by an approved Australian employer (in regional Australia for RSMS) within the six months before the application;
- being under the age of 50 at the time of application, unless exempt;
- demonstrating that they have the skills and experience necessary to work in the nominated occupation, which may include an assessment by the relevant assessing authority;
- holding any mandatory registration, license or professional membership;
- demonstrating that they meet the required English language skills, unless exempt;
- meeting health and character requirements; and
- meeting other requirements of the relevant visa stream.

17. In the 2016-17 programme year to 31 March 2017, 8,315 individual businesses utilised the ENS and 2,933 individual businesses utilised the RSMS. To nominate a worker for an ENS or RSMS visa, a business must:

- actively and lawfully operate in Australia (in regional Australia for RSMS);
- have a genuine need for a paid employee to fill a skilled position;
- offer a skilled position in the applicant's field that is full time and ongoing for at least two years;
- pay a market salary rate;
- comply with Australian immigration and workplace relations laws;
- have no adverse information known about the business or any person associated with the business; and
- nominate the applicant in one of the three streams and meet the requirements of that stream.

### *Training benchmark requirements*

18. The current training benchmark requirements are applicable to the 457 visa and the DE stream of the 186 visa. The current framework requires employers nominating a 457 visa applicant or 186 visa applicant in the DE stream to meet either:

- training benchmark A - The business must provide evidence of recent expenditure, to the equivalent of at least 2 per cent of the payroll of the business, in payments allocated to an industry-training fund that operates in the same industry as the business; or
- training benchmark B - The business must provide evidence of recent expenditure, to the equivalent of at least 1 per cent of the payroll of the business, in the provision of training to employees of the business.

### **The problem**

19. The employer sponsored skilled visa framework is not effectively meeting the Australian Government's policy objective of enabling businesses to access skilled labour from overseas, when an appropriately skilled Australian is unavailable, while maintaining visa programme integrity. The current framework settings have resulted in:

- some businesses using the programmes where Australian workers are available.<sup>8</sup> This problem resulted from an inability of the policy settings to make certain that businesses only access overseas migrants for occupations which had been identified as in shortage in the Australian labour market;
- some businesses and visa applicants not meeting the intended requirements of the programmes. This problem has arisen due to a number of legislative inconsistencies and gaps relating to the current policy settings, including English language, training benchmarks, genuine need, and skills assessment requirements;
- some individuals and businesses using the temporary visa programme primarily to seek longer term or permanent residence without a further control to determine they continue to meet Australia's social, economic, and skill needs.<sup>9</sup> This has resulted from current policy settings, such as eligible occupation, English language and age requirements, failing to be set at the requisite levels;
- skills supplied by the visa programme not fully aligning with Australia's short or long term needs.<sup>10</sup> This problem resulted from failures in the occupation lists to ensure that the occupations eligible for temporary skilled migration visas reflect Australia's short or medium to long term needs; and
- widespread criticism that the programme does not successfully balance the facilitation of skilled workers, and prevention of negative impacts on Australian and overseas workers.

20. The employer sponsored skilled visa programmes allow employers to address labour shortages by bringing in skilled overseas workers where there is no appropriately skilled Australian workers available. Whilst it is against the intent of the programme, there are many reasons that employers may seek to use an overseas worker instead of an available Australian worker. Some of these reasons may be that the employer:

- finds it more expeditious to employ an overseas worker than train an Australian worker;
- perceives the overseas worker to have desirable attributes that are lacking in an equivalent Australian worker; or
- is helping to achieve a migration outcome for the overseas worker.

21. The above shortcomings have led to:

- some overseas workers transitioning to permanent residence without having the attributes which optimise their economic contribution and settlement outcomes;
- displacement of Australian workers;<sup>11</sup>
- continuing skills gaps; and

<sup>8</sup> In 2016, the Department received approximately 15,000 enquiries, complaints, suggestions or compliments regarding the 457 visa programme. One of the main issues raised is that overseas workers are using the 457 programme to take Australian jobs.

<sup>9</sup> Departmental data indicates that this pathway is taken by many, with 84 per cent of 186 and 187 visas granted from 1 July 2016 to 31 March 2017 being to individuals whose last substantive visa was a 457 visa.

<sup>10</sup> This is supported by labour market analysis undertaken by the Department of Employment who provided advice to the Department in April 2017 identifying over 200 occupations, which were extraneous to Australia's labour market needs.

<sup>11</sup> The 2016 Senate Inquiry received evidence from several unions that 457 visa holders were being used to fill positions that could have been taken by qualified Australian workers, and were also displacing some Australian workers.

- overreliance on and an over-supply of skilled overseas workers in some occupations.

22. The 457 programme has been the subject of a number of enquiries and reviews. These reviews have involved wide consultation and feedback from a broad range of stakeholders, including industry peak bodies/associations, unions, government, businesses, migration agents and academics. The policy options set out in this document take this feedback into consideration.

23. Evidence of the problems within the employer sponsored skilled visa programmes can be found in:

- the 2014 *Independent Review into Integrity in the Subclass 457 Programme* (the 457 Integrity Review);
- the 2016 Senate Inquiry, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (the 2016 Senate Inquiry);
- the 2016 *Productivity Commission Inquiry Report: Migrant Intake into Australia* (the 2016 Productivity Commission Report);
- departmental sponsor monitoring activities outlined in the *Department of Immigration and Border Protection Annual Report 2015-16* (the 2015-16 Annual Report); and
- in the continuing stakeholder representations received by the Department.

24. The purpose of the 457 Integrity Review was to recommend a system that, operating in the national interest<sup>12</sup>, was sound and resistant to misuse, and, at the same time, flexible and able to respond quickly to economic and business changes. The review examined:

- the level of non-compliance in the 457 visa programme;
- the current framework to better understand whether the existing requirements balance the needs of business with the integrity of the programme;
- the viability of a deregulation strategy of the current programme; and
- the appropriateness of the current compliance and sanctions.

25. The 457 Integrity Review found that, whilst contentious, there was strong support from businesses for a programme that enabled them to fill genuine workforce shortages. Unions also supported this function whilst highlighting the need to protect Australian jobs and vulnerable overseas workers. The Review found that Australians who experience difficulties in finding work see 457 visa holders as a threat.<sup>13</sup>

26. The 457 Integrity Review found that there was a “lack of responsiveness of the current occupation list” and that “employees...say that [the current system] is too easily subverted and, in practice, can turn into a free-for-all, to the disadvantage of Australians”.<sup>14</sup> The 457 Integrity Review also found that the training benchmarks were flawed and should be abolished. The review made 22 recommendations, including

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<sup>12</sup> As noted in the 2016 Productivity Commission Report, it is the broad intent of the visa programmes to meet Australia’s national interest (including national security and economic and social development).

<sup>13</sup> The 457 Integrity Review, p23.

<sup>14</sup> The 457 Integrity Review, p8.

reviewing the occupation lists, introducing a national training fund, publishing sponsor sanctions and providing the Department with tax file numbers (TFN).

27. The 2016 Productivity Commission Report examined the costs and benefits of temporary and permanent migration and looked at the scope for reforms within the current system that could deliver superior overall outcomes for the Australian community. The report found that younger and more skilled immigrants are more likely to make a positive economic contribution to Australia. It also noted that employment is a key indicator of integration, and that high levels of English language ability and qualifications result in better employment outcomes.
28. The 2016 Productivity Commission Report identified that significant gains could be made by recalibrating the intake of permanent skilled immigrants, by tightening entry requirements relating to age, skills and English language proficiency. For example, the Productivity Commission found that the fiscal benefit of skilled migrants decreases with age and recommended that the current 50 year age limit for the permanent employer sponsored skilled visa programmes be reduced. Migrants who arrive at a relatively young age, particularly those who are highly educated, generally contribute more tax revenue over their lifetime and make comparatively lower use of government-funded services.
29. The 2016 Senate Inquiry looked at the impact that the 457 visa programme has on employment opportunities for Australian permanent residents and citizens. The inquiry looked at concerns raised by employers seeking to efficiently supplement their workforce with overseas workers, and concerns raised by unions seeking to protect the wages, conditions and job opportunities of Australian workers.
30. The 2016 Senate Inquiry noted that for the 457 programme to be effective “the employment of 457 visa workers must match genuine, short-term skill shortages”. However, the inquiry found that there was evidence that there are occupations eligible for the current 457 programme where there is no skill shortage.
31. As indicated in the 2015-16 Annual Report, in 2015–16 the Department finalised the monitoring of 1390 temporary work sponsors, the majority of which were 457 sponsors. Approximately 58 per cent of sponsors monitored were considered to have satisfactorily met their obligations, while the remaining 42 per cent were found to be in breach of their obligations. Of the sponsors found to be in breach, a total of 372 sponsors were sanctioned (cancelling and/or barring the sponsor), 210 received a formal warning and 28 were issued with infringement notices totalling just under \$272,580. The top industries where employers were found to be in breach were Accommodation and Food Services, Other Services, Construction and Retail Trade. This rate is higher than in past years, reflecting improved targeting of risk. These results are indicative of the continued misuse of the programme by some businesses.
32. In 2016, the Department received approximately 15,000 enquiries, complaints, suggestions or compliments regarding the 457 visa programme by a range of stakeholders including individuals, legal and industry peak bodies, businesses and migration agents who use the



employer sponsored skilled visa programmes and domestic and foreign government representatives. Broadly, the issues raised include:

- overseas workers using the 457 programme to take Australian jobs;
- overseas workers being exploited; and
- certain programme settings make it more difficult for overseas workers to use the programme and prevent businesses and industries from meeting their needs.

33. The Government has already implemented several measures to address this problem. In particular, the Government has implemented the majority of the recommendations by the 457 Integrity Review, which included measures to strengthen integrity in the 457 visa programme, prevent abuse and protect Australian workers. However, whilst the measures implemented have gone some way to address the problem they have not completely solved it.

### **Why is Government action needed**

34. The Government regulates the entry and stay of overseas workers in Australia. Given the competing views from employers, employees and employee organisations, the Government is required to balance these views to meet the national interest. It is therefore appropriate that the Government take action on this matter.

35. External reviews outlined above, and the Department, have identified several failures in the current employer sponsored skilled visa programmes, such as occupation lists that do not sufficiently support Australia's skills needs and policy settings that do not ensure sufficient programme compliance, are not set at requisite levels and have a number of legislative inconsistencies and gaps.

36. To resolve issues in the employer sponsored skilled visa programmes, the Government aims to achieve the following objectives:

- ensure that that employers only seek to fill vacancies with overseas workers where appropriately skilled Australian workers are not available;
- enhance integrity measures to prevent the misuse of the employer sponsored skilled programmes;
- ensure that skilled overseas workers have the necessary attributes to successfully contribute to Australia's social and economic prosperity, either temporarily or permanently; and
- meet Australia's skills needs through policy settings which distinguish between short and medium to long term needs.

37. To resolve issues in the employer sponsored skilled visa programmes, the Government needs to address the areas in which the programmes are currently failing, by:

- regularly reviewing and updating the occupation lists to ensure they support Australia's short and medium to long term skills needs;
- tightening policy settings to support programme compliance;
- ensuring that policy settings distinguish between short and medium to long term needs and are set at requisite levels to support settlement outcomes; and

- address legislative inconsistencies and gaps identified within the policy settings.

38. There are barriers that will impact the Government's ability to achieve its objectives:

- the Australian economy is dynamic. Policy settings will need to be responsive to Australia's changing skill needs while prioritising Australian workers; and there will continue to be people who seek to misuse the employer sponsored skilled visa programmes. Policy settings will need to mitigate risks as they arise.

39. If the Government does not take action, then the failures identified in the current employer sponsored skilled visa programmes will continue to result in integrity issues and suboptimal economic benefits.

## Policy options

40. Three policy options have been considered:

- abolish and replace the 457 visa, and implement complementary reforms to the temporary and permanent employer sponsored skilled visas;
- reform the 457 visa; and
- retain the employer sponsored skilled visa framework without changes.

## Option 1

### Overview of Option 1

#### *Temporary skill shortage visa*

41. Under Option 1, by March 2018 the 457 visa would be abolished and replaced with a new Temporary Skill Shortage (TSS) visa with two streams. The two streams would enable greater control over settings by distinguishing between short-term and medium-term skills needs.

42. The Short-Term stream would enable employers to source genuinely temporary overseas skilled workers to fill short-term positions in a range of occupations for up to 24 months, until they can recruit and train an Australian if the role continues. This would be supported by a genuine temporary entrant requirement and provision for renewal of the visa onshore once only. The Short-Term stream would be underpinned by the STSOL.

43. The Medium-Term stream would enable employers to source highly skilled overseas workers to fill medium-term critical skill gaps for up to four years, with eligibility to apply for permanent residence after three years. The medium-term stream would be underpinned by the MLTSSL.

44. Other key features of the TSS visa, distinguishing it from the current 457 visa, include:

- a requirement that the primary applicant has at least two years relevant work experience;
- mandatory LMT in a prescribed manner, with limited exemptions to accommodate international obligations;

- a higher English language requirement for the Medium-Term stream of an International English Language Testing System (IELTS) score of level 5 overall, with a minimum of 5 in each component score; and
- a non-discriminatory workforce test to allow closer examination of applications from employers whose workforce is predominantly made up of overseas workers.

### *Complementary reforms*

45. From the date of announcement, the Department would implement a number of complementary reforms leading up to the abolition and replacement of the 457 visa in March 2018.

### *Changes to temporary skilled employer sponsored visas*

46. Changes to the 457 visa before the introduction of the TSS visa include:

- reducing the maximum duration of 457 visas issued for occupations that are on the STSOL to two years (unless international trade obligations require a longer period);
- removing the English language salary exemption threshold, which exempts applicants whose salary is over \$96,400 from the English language requirement;
- Processing efficiencies to expand the scope of sponsorship accreditation and streamline nominations for lower risk-sponsors, including trusted traders and government agencies;
- mandatory provision of penal clearance certificates;
- expanded skills assessments; and
- authorising the Department to publicly disclose the details of sponsors who are sanctioned for breaching the sponsor obligations framework.

### *Changes to temporary and permanent employer sponsored skilled visas*

47. Proposed changes to both the temporary and permanent employer sponsored skilled visa programmes include:

- authorising the Department to collect and use TFNs of temporary and permanent skilled visa holders; and
- tightening and clarifying the training benchmarks policy settings, including regarding the requirements a training fund must meet, and the types of acceptable training expenditure. Then, from March 2018, replacing the training benchmarks with a levy to a government managed training fund payable by employers nominating a temporary or permanent skilled migrant.

### *Changes to permanent employer sponsored visas*

48. Proposed changes to the permanent employer sponsored skilled visas include:

- specifying eligible occupations in the MLTSSL, with additional occupations available to support regional employers using the RSMS;
- extending the residence period required to apply for permanent residence from two to three years;
- paying a market rate salary not less than the TSMIT;<sup>15</sup>

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<sup>15</sup>Currently, employers are required to pay the market salary rate to permanent skilled employer sponsored visa holders.

- more stringent age, English language, and relevant work experience requirements;
- requiring migrants who accessed regional concessions for their temporary visa to have lived in regional Australia in order to be eligible for permanent residency;
- requiring nominators to provide evidence of ‘genuine need’ for the person to work in the nominated position;
- removing the exemptions to the skills assessment and English language requirements for applicants earning at least \$180,001; and
- providing the ability to refund application fees where an application must be refused or withdrawn at no fault of the applicant.

## Likely outcomes of Option 1

### Australian labour market

49. As Australia’s skills needs are constantly evolving and the skilled migration programme is designed to respond to those needs, use of the programme, and the impact of this option, will depend on labour market circumstances in the years ahead. In April 2017, 457 workers accounted for less than one per cent of the Australian workforce,<sup>16</sup> and between 0.17 - 4.47 per cent of any industry.<sup>17</sup> Therefore, the impact that the option 1 measures might have on the overall economy and particular industries is limited but will vary by industry and occupation. A key aspect of option 1 is six-monthly reviews of the occupation list to ensure it remains responsive to Australia’s skills needs.

50. The measures in option 1 will have a higher impact on occupations that have the highest percentage of 457 workers compared to total employment. The maximum visa period of two years for occupations on the STSOL, such as Cooks, may result in an increase in the training and employment of Australians and/or a higher turnover of temporary skilled migrants. Of the top ten ANZSCO occupation groups with the highest percentage of 457 visa holders, there is only one ANZSCO occupation group (with the smallest historic 457 use) that does not have an occupation eligible for the 457 programme.<sup>18</sup>

### Top ten ANZSCO occupation groups with highest percentage of 457 visa holders<sup>19</sup>

ANZSCO code	ANZSCO occupation group	Employed Total in May 2017 ('000)	457 visa holders at 31 May 2017	% of 457 visa holders to total employment
3514	Cooks	43.6	6168	14.16%
3125	Mechanical Engineering Draftspersons and Technicians	5.3	692	13.05%
2632	ICT Support and Test Engineers	12.2	1373	11.28%
2611	ICT Business and Systems Analysts	27.3	2900	10.63%

<sup>16</sup> As at 18 April 2017, there were 92,896 primary 457 visa holders in Australia. This accounted for 0.78 per cent of the total Australian workforce, which was 11,922,100 as at February 2016.

<sup>17</sup> Based on the same data as footnote 15, primary 457 visa holders accounted for between 0.17 - 4.47 per cent of the Australian workforce in an industry. The highest percentage (4.47 per cent) of primary 457 visa holders are in the Information Media and Telecommunications industry.

<sup>18</sup> The Graphic Pre-press Trade Workers group only has one occupation, 392211 Graphic Pre-press Trades Worker, which is not currently eligible for the 457 programme.

<sup>19</sup> Sources: Department of Immigration and Border Protection, BP0014 Temporary Work (Skilled) visa holders 2017-05-31 ULv100, and Australian Bureau of Statistics, 6291.0.55.003 - EQ08 - Employed persons by Occupation unit group of main job (ANSSCO), Sex, State and Territory, August 1986 onwards, released 22 June 2017.

3922	Graphic Pre-press Trades Workers	1.2	109	9.15%
2252	ICT Sales Professionals	12.8	1133	8.86%
6392	Retail and Wool Buyers	4.3	291	6.74%
1411	Cafe and Restaurant Managers	67.5	4391	6.50%
2613	Software and Applications Programmers	106.8	6545	6.13%
3123	Electrical Engineering Draftspersons and Technicians	8.7	509	5.82%

51. There are differing expert opinions on the impact that the option 1 measures might have on the Australian labour market. For example, Dr Birrell has argued that there it is very likely that these measures would significantly reduce the number of overseas workers on the employer sponsored skilled visa programmes, which will benefit domestic job seekers.<sup>20</sup> Whereas, Dr Wright has argued that whilst he agrees that the measures could reduce the number of overseas workers in these programmes, "any claim that a major reduction in workers on temporary visas would have a significant impact upon the Australian labour market is a bit far-fetched".<sup>21</sup>

### *Australia's ability to attract overseas skilled workers*

52. The measures in option 1 are not expected to substantially affect Australia's competitive position among its peers (Canada, New Zealand, the United Kingdom and the United States) in attracting and retaining the best and brightest skilled migrant workers from around the globe that are in need in the Australian labour market. Visa settings are only one factor in a migrant's choice of destination, with other key aspects including lifestyle, taxation, and education. There are also other skilled migration options, such as Labour Agreements which allow employers with a demonstrated skill need that cannot be met by the Australian labour market to access skilled migrants in occupations outside the skilled occupation lists.

53. Some industries have expressed concern that the option 1 measures will impact on their international competitiveness to attract talent. This issue has predominately stemmed from removing the eligibility for permanent residency for some occupations. Some of those who expressed concern are:

- the tertiary education sector, which raised concerns about their ability to attract PhDs, researchers and academics; and
- multinational businesses, which raised concerns about their ability to attract Chief Executive Officers.

54. These concerns were considered as part of the review of occupation lists on 1 July 2017, and resulted in 23 occupations moving from the STSOL to the MLTSSL. Occupations on the MLTSSL are eligible for a visa of up to four years, and the option to apply for permanent residency. Occupations which moved from the STSOL to the MLTSSL include Chemist,

<sup>20</sup> The Australian Population Research Institute's research report: *The Coalition's 457 Visa Reset: Tougher Than You Think*, August 2017

<sup>21</sup> Dr Wright, of the University of Sydney specialises in labour market regulation and immigration. Quotes sourced from A., 'Numerically insignificant': 457 visa overhaul unlikely to be a game changer for local jobs', *SBS News*, viewed 11 August 2017, < <http://www.sbs.com.au/news/article/2017/08/10/numerically-insignificant-457-visa-overhaul-unlikely-be-game-changer-local-jobs>>

Chief Executive or Managing Director, Environmental Research Scientist, Software & Applications Programmers (*nec*), and University Lecturer.

55. Option 1 will also affect the ability for employers to retain a temporary skilled migrant. This will only affect employers who are employing overseas workers in an occupation on the STSOL, which is subject to biannual reviews. These occupations will be restricted to visas of up to two years (unless international trade obligations require a longer period), and the visa holder will only be able to renew once onshore. However, these settings reflect the policy intent to address short term skill needs and encourage the training of Australians rather than reliance of overseas migrants. The industries that have the highest proportion of visa holders in occupations that are on the STSOL compared the MLTSSL are:

- Accommodation and Food Services;
- Arts and Recreation Services;
- Administrative and Support Services;
- Retail Trade; and
- Wholesale Trade.<sup>22</sup>

### *Improving the quality of migrants*

56. The tighter settings would improve the quality of temporary and permanent migrants and ensure they have the necessary attributes to successfully contribute to Australia's social and economic prosperity. They would also ensure that migrants have the necessary attributes to improve employment and community integration outcomes, and are able to successfully transition to permanent residency, if they are eligible. Key aspects include:

- more targeted occupation lists based on labour market analysis and stakeholder consultation that differentiate between short-term and long-term skills that are needed in the Australian labour market;
- reducing the current age limit for the permanent employer sponsored skilled visa programmes from 50 to 45 years will improve the fiscal contribution of these migrants;<sup>23</sup>
- the increased work experience requirement for temporary and permanent employer sponsored skilled migrants recognises the importance of this attribute for effective productivity, workplace contributions and enhanced fiscal outcomes;
- higher English language requirements ensure that migrants are less vulnerable to exploitation, are able to integrate more easily in the workforce and community, and enable the transfer of skills from migrants to Australian workers; and
- enhanced character checking for the temporary employer sponsored skilled visa programme supports visa integrity and aligns with the way in which other visa programmes operate.<sup>24</sup> While applicants would incur regulatory costs associated with police checks, there is benefit in assessing this requirement before permanent residence to ensure that the Australian community is protected and that persons of concern are identified as early as possible.

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<sup>22</sup> This is based on visa holder data from 1 July 2012 to 30 June 2017 and the breakdown is for occupations that are on the STSOL or MLTSSL as at 1 July 2017.

<sup>23</sup> 2016 *Productivity Commission Inquiry Report: Migrant Intake into Australia*

<sup>24</sup> Further details on character and police certificate requirements can be found here: <http://www.border.gov.au/Trav/Visa/Char>

57. Whilst the option 1 measures will improve the quality of migrants, they will also result in some migrants not being eligible to use the programmes. For example, recent graduates or those over 45 years old may not meet the new work experience or age requirements respectively. However, employers may look at other options to source skilled migrants who meet the new requirements where Australian workers are not available and there will continue to be exemptions to the age requirement.

### *Supporting Australia's skill needs*

58. The proposed TSS settings under Option 1 would bring a sharper focus on Australia's labour market and skill needs by implementing more targeted, evidence based occupations lists that differentiate between short and medium term skill shortages. Option 1 supports Australia's skill needs by ensuring employers can only nominate occupations in short-term need for shorter visa periods with limited renewal (under the Short-Term stream), but can nominate occupations in medium to long-term need for longer visa periods (under the Medium-Term stream, and through permanent visas) and with no renewal limits.

59. Whether an occupation is, or is not, eligible for the employer sponsored skilled visa programmes will have the most significant impact on employers. For other option 1 measures such as increased English language, skill, age requirements or enhanced LMT, employers will still be able to source an overseas worker if there is a genuine need to fill a skills need. However, employers may need to source skilled overseas workers from outside of existing sources if those sources cannot meet the requirements. In some cases, this may delay, although not prevent, an employer from sourcing skill labour. Some employers may instead choose to recruit an Australian worker.

60. The 1 July 2017 occupation lists update considered several factors including labour market analysis, and advice from government departments. Stakeholder feedback was also considered, in particular feedback regarding skilled occupations that had been removed from eligibility on 19 April 2017 and that employers considered were still needed to fill skills gaps. For the for the subclass 186 and 457 visa programmes, the 1 July 2017 update included the addition of:

- 16 occupations to the STSOL. This included Aeroplane Pilot which had been removed from eligibility on 19 April 2017; and
- 20 occupations to the MLTSSL.<sup>25</sup>

Regular review of the occupation lists enables stakeholders to provide timely feedback, and ensures the lists meet Australia's skill needs.

61. There will inevitably be differences of opinion as to the need to source overseas migrants in a particular occupation. The occupation lists review process continues to be refined and is designed to consider qualitative labour market data as well as qualitative feedback from industry, unions and the general community. The broad range of stakeholders that have provided input to the occupation list reviews demonstrates the interest in engaging in regular updates of occupation lists.

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<sup>25</sup> More information on the 1 July 2017 changes to the lists of eligible skilled occupations can be found: <http://www.border.gov.au/WorkinginAustralia/Pages/summary-of-1-july-2017-changes-to-list-of-eligible-skilled-occupations.aspx>.



62. Labour Agreements will remain an avenue to sponsor skilled migrants in occupations not on the lists where there is a demonstrated need that cannot be met by the Australian labour market. Labour agreements are formal arrangements negotiated between an employer and the Australian Government that let an employer recruit an agreed number of skilled workers from outside Australia. They provide a flexible, tailored skilled migration arrangement for businesses and sectors with specific needs that sit outside the mainstream skilled migration programme.

63. The impact on business and visa holders who have made investments on the basis of meeting previous permanent residency criteria would be mitigated by grandfathering access to the permanent skilled employer sponsored visa pathway for existing 457 visa holders and applicants at the time of the Government announcement.

### *Incentivising employers to give priority to Australian workers*

64. Option 1 would incentivise employers to give preference to appropriately skilled and available Australian workers by tightening the circumstances in which overseas workers could be employed. Measures that would incentivise employers to look to the Australian labour market include:

- better targeted occupation lists, and visa duration linked to the lists;
- limited onshore renewal, and a genuine temporary entrant requirement for the Short-Term stream of the TSS visa. These criteria reinforce the temporary nature of the Short-Term stream, and provide mechanisms to refuse a visa where a migrant is seeking to use temporary visas to establish longer term residence in Australia;
- restricting the ability to access permanent residence through the Temporary Transition stream to the Medium-Term stream of the TSS visa only;
- a national training fund levy which would improve training and employment outcomes for Australians, and reduce longer term reliance on overseas workers;
- a non-discriminatory workforce test to ensure employers are not actively discriminating against Australian workers; and
- mandatory LMT in a prescribed manner, with exemptions to accommodate international trade obligations.

65. The LMT measure will impact employers who have not previously needed to meet this criteria. In particular, this will affect employers of professional occupations. There is expected to be minimal impact employers who have previously sought to find an available and appropriately skilled Australian prior to hiring an overseas worker. Employers whose default approach was to source overseas workers will now have to first test the local labour market.

### *International obligations*

66. Currently, the 457 visa is the primary visa that facilitates Australia's international trade obligations on the movement of natural persons. The measures in option 1 are consistent with Australia's international trade obligations, which include commitments regarding visa duration, and not imposing LMT and occupations.



### *Settlement Outcomes*

67. As the Department's submission to the Joint Standing Committee on Migration's inquiry into migrant settlement outcomes notes, "poor settlement outcomes can have a detrimental effect on individual migrants' lives as well as on the economy and society as a whole. Migrants must be equipped with the tools that assist with positive settlement outcomes, an ability and willingness to integrate, and an understanding of Australia."<sup>26</sup> Characteristics of positive settlement outcomes include social and economic participation, and economic and physical well-being.<sup>27</sup> Settlement outcomes can be improved by measures in option 1 such as:

- extending the period from two to three years that employer-sponsored migrants must remain in their nominated position before being eligible for permanent residence, because they have had additional time to settle in Australia; and
- increasing, and removing exemptions to, the English language requirements.<sup>28</sup>

### *Increased training opportunities for Australians*

68. As the 2016 Productivity Commission Report noted, "ready access to temporary skilled immigration dampens incentives for employers to invest in skills and training". This highlights the importance of a strengthened mechanism to improve Australian training outcomes. An overarching requirement for employers nominating an overseas skilled worker to pay a levy to a government managed training fund would improve training and employment outcomes for Australians and reduce longer-term reliance on overseas workers. This would also address the integrity concerns with the current training benchmark requirements, which were raised by the 457 Integrity Review.

69. The proposed new training fund contribution model aims to make compliance and monitoring simpler by removing the need to maintain complex records to demonstrate expenditure to meet the current training benchmark requirements, and replacing it with a levy paid to the Skilling Australians Fund (SAF).

70. It is expected that for most employers the cost of the SAF levy will be less than the costs under the training benchmarks, and Australian citizens and permanent residents will have improved training opportunities, with more transparent outcomes.

### *Addressing integrity risks*

71. The Department has identified several legislative inconsistencies and gaps that present integrity risks, which make it easier for employers to misuse the programme. These risks would be addressed by the following measures:

- tightening the current training benchmarks and then replacing them with a national training fund levy;
- removing salary-based exemptions to English language (including the English Language Salary Exemption Threshold (ELSET)) and skills assessments

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<sup>26</sup> Further information on the inquiry can be found at:

[http://www.apf.gov.au/Parliamentary\\_Business/Committees/Joint/Migration/settlementoutcomes](http://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Migration/settlementoutcomes)

<sup>27</sup> As noted in Appendix 20 to the Department of Immigration and Multicultural and Indigenous Affairs submission to the Joint Standing Committee on Migration report, *To make a contribution: Review of skilled labour migration programs 2004*.

<sup>28</sup> As noted in the 2016 Productivity Commission Report, an overseas worker's English language ability is an important factor in integration and settlement outcomes.

requirements to address misuse, improve social cohesion, and decrease the risk of vulnerability in the workplace. This would have regulatory costs to individuals who otherwise would not have been required to provide evidence of English language competence or skills assessments and do not possess that evidence;

- requiring nominators to provide evidence of ‘genuine need’ for the person to work in the nominated position. This is to prevent positions from being fraudulently created for the purpose of facilitating the grant of a permanent visa;
- providing the ability to refund application fees where an application must be refused or withdrawn at no fault of the applicant;
- publishing details of sponsor sanctions. This would help to deter businesses from breaching their sponsor obligations by misusing the employer sponsored skilled visa programme, and address public about the integrity of this programme;
- enabling the Department to collect and use TFNs to strengthen compliance monitoring and targeting;
- expanding the skills assessment to cover cohorts of concern, for example, where particular combinations of occupation and nationality have been identified as an integrity risk; and
- requiring nominators to provide evidence of ‘genuine need’ for the person to work in the nominated position.

### *Regional Australia*

72. Option 1 is likely to have a positive overall impact on regional Australia. It would recognise that employers in regional areas can find it harder to attract and retain skilled employees in comparison to metropolitan employers, and seek to address this through a number of mechanisms:

- regional employers would have access to a broader range of eligible occupations than would be available to metropolitan employers. This broader occupation list available under the RSMS would be extended to also apply to the two streams of the TSS visa;
- the maximum age at time of application for a permanent employer sponsored visa would be reduced from 50 to 45 years of age. However, there are existing age exemptions based on occupation, region (for medical practitioners), employer, salary, and for New Zealand citizens. If needed, these exemptions could be expanded in future to support regional Australia; and
- a requirement for temporary visa holders who accessed a regional occupation concession to have lived in a regional area for three years to be eligible for a permanent employer sponsored visa would ensure that migrants have a strong incentive to live and settle in regional Australia.

### *Addressing public concerns*

73. The new framework addresses public concerns regarding negative impacts of the existing 457 visa programme on the Australian labour market. Implementing reforms from July 2017 to tighten the 457 visa and permanent skilled employer sponsored visa settings would address the concerns while the new framework is being built, and more closely align the current legislative framework with the future state of the employer sponsored skilled visa programme.

## Regulatory costs

74. The Office of Best Practice Regulation (the OBPR) has agreed to the regulatory cost savings of \$1.193 million on average per annum for option 1. Not all measures in option 1 are expected to have a regulatory impact on businesses or individuals. The ones that do have been outlined below. Since the proposal is deregulatory, no regulatory offsets are identified.

Change in costs (\$ million)	Business	Individuals	Total change in costs
Extended LMT	- \$1.839		- \$1.839
Enhanced character assessment		- \$3.819	- \$3.819
Removal of ELSET		- \$1.596	- \$1.596
Educate sponsors on new visa framework	- \$0.445		- \$0.445
Expanded skills assessment		- \$0.116	- \$0.116
SAF levy	- \$0.351		- \$0.351
Removal of training benchmarks	\$9.359		\$9.359
<b>Total, by sector</b>	<b>\$6.724</b>	<b>- \$ 5.531</b>	<b>\$ 1.193</b>

## Option 2

### Overview of Option 2

75. Option 2 would involve retaining the 457 visa, and only implementing integrity reforms to the 457 visa. The key differences between Option 2 and Option 1 are:

- the 457 visa would be retained; and
- the Department would not reform the permanent employer sponsored skilled visas, but would instead consider changes as part of future visa reform.

76. The Department would introduce integrity measures to the 457 visa, including:

- condensing the occupation list and including additional occupation caveats;
- removing the ELSET;
- expanded skills assessments;
- enhanced character checking;
- publishing details of sponsors who have been sanctioned; and
- allowing the Department to collect and use TFNs of temporary and permanent skilled visa holders.

### Likely outcomes of Option 2

77. Option 2 would go some way to improve quality and integrity outcomes for the 457 visa. However, it would not fix all the problems identified in the temporary employer sponsored skilled visa programme and would not address any of the issues with the permanent employer sponsored skilled visa programme until broader visa reforms were introduced. Waiting for broader visa reform means that these programmes will continue to face integrity issues and will in some cases be inconsistent with the temporary 457 visa programme.

78. Option 2 would not address some current issues inherent in the 457 visa framework. This includes not clearly distinguishing between short-term and medium-term skill needs. Occupation lists and visa validity policy settings which differentiate between short and medium-term skills needs would go some way to addressing this issue. However there would be no mechanism to prevent longer term residence for skills that were only in temporary need and for preventing visa holders and sponsors from seeking to use the temporary programme as a vehicle for permanent migration.

79. Option 2 would also run the risk of creating an imbalance between the temporary and permanent employer sponsored skilled visa settings, with permanent settings being lower in some cases, and create uncertainty as to potential future further changes to permanent residence.

80. Like option 1, it is expected that the measures in option 2 will have a limited impact on the overall economy and particular industries, which would vary by industry and occupation. Also, the measures in option 2 are not expected to substantially affect Australia's ability to attract and retain talent. Unlike option 1, the measures in option 2 won't affect the ability for employers to retain a temporary skilled migrant, as there is no shortened visa stream with restrictions on onshore renewal.

81. Industry stakeholders and migration programme users are expected to be less critical of the changes in Option 2 than Option 1. However, the Department expects there would still be criticism of tightening access to the Australian labour market for overseas workers.

### *Addressing integrity risks*

82. There would be no measures implemented to address the integrity risks in the permanent employer sponsored skilled visa programmes. This would result in continuing misuse by some employers. However, some but not all of the integrity risks for the 457 visa programme would be addressed through the following measures:

- publicly disclosing the details of sponsors who are sanctioned for breaching the sponsor obligations framework;
- enabling the Department to collect and use TFNs to strengthen compliance targeting and outcomes;
- updating the skilled occupation lists;
- expanded skills assessments; and
- removing the ELSET.

83. The current training benchmarks would continue to exist unchanged. Therefore, the following problems would also continue:

- a lack of transparency;
- no demonstrable training outcomes; and
- the benchmarks are overly complex and inequitable.

84. As mentioned in Option 1, removing the ELSET and introducing enhanced character checking would increase regulatory costs to individuals.

### *Addressing public concerns*

85. Not replacing the 457 visa would fail to address public concerns about the employer sponsored skilled migration visa programme. This could impede effective reform to the temporary skilled migration visa programmes and the Government's ability to support the Australian economy by facilitating access to skilled labour.

### *Supporting Australia's skill needs*

86. One of the problems with the current settings of the 457 visa programme is that migrant intake is not necessarily reflecting Australia's short, medium and long-term needs. A significant factor is that the 457 programme has become a de-facto pathway to permanent residency. This issue would continue with Option 2 and would result in the skills needs of the Australian economy not being adequately met, as visa settings other than the occupation lists would not differentiate between short and medium-term skills shortages.

87. The occupation list would be condensed, more targeted, and would differentiate between short and medium-term skills shortages. However, the current 457 visa framework would not effectively implement these changes as it lacks the regulatory mechanisms proposed under Option 1 for the Short-Term and Medium-Term stream of the TSS.

### *Improving the quality of migrants*

88. The tighter settings would slightly increase the quality of overseas migrants using the 457 visa programme. Key aspects include:

- more targeted occupation lists based on labour market analysis and stakeholder consultation that differentiate between short-term and long-term skill needs; and
- mandatory penal clearance certificates.

89. Option 2 would not ensure that policy settings are set at requisite levels to support settlement outcomes support. It would not include measures to support skilled overseas workers to have the necessary attributes to successfully contribute to Australia's social and economic prosperity on a permanent basis.

### *Incentivising employers to give priority to Australian workers*

90. Whilst the 457 visa programme currently has some incentives to prioritise Australian workers, Option 2 would not provide further incentives. Therefore, situations would continue where employers do not use the 457 visa programme to meet genuine temporary skill needs, and instead hire skilled overseas workers rather than training and or employing appropriately skilled Australians.

## **Option 3**

### **Overview of Option 3**

91. Option 3 would involve retaining the employer sponsored skilled visa programmes with no changes (status quo).

### Likely outcomes of Option 3

92. Option 3 would not address the current problems with the temporary and permanent employer sponsored skilled visas. In particular, it would not address the issues within the current framework settings which have resulted in:

- some businesses using the programmes where Australian workers are available;
- some businesses and visa applicants not meeting the intended requirements of the programmes;
- some individuals and businesses using the temporary visa programme primarily to seek longer term or permanent residence without a further control to determine they continue to meet Australia's social, economic, and skill needs; and
- skills supplied by the visa programme not fully aligning with Australia's short or long term needs.

### Consultation

93. The Department provided an interim Regulatory Impact Statement (RIS) to the OBPR at an earlier decision point. The OBPR agreed to the provision of an interim RIS on the basis that a final RIS would be prepared to inform the final decision point.

94. The Department has drawn on consultation with and feedback received from a broad range of stakeholders to identify issues addressed through the reform, and to obtain stakeholder views on the proposed reforms. The Department identified the following interested stakeholders:

- individuals, legal and industry peak bodies, and businesses who use the employer sponsored skilled visa programmes;
- migration agents whose clients use the employer sponsored skilled visa programmes;
- foreign government representatives; and
- federal government departments and agencies, including:
  - the Department of Foreign Affairs and Trade;
  - the Attorney-General's Department;
  - the Department of the Prime Minister and Cabinet;
  - the Department of Finance;
  - the Australian Tax Office;
  - the Department of Health, Austrade;
  - the Department of Education & Training;
  - the Department of Employment;
  - the Department of Human Services;
  - the Department of Industry, Innovation and Science;
  - the Department of Social Services; and
  - the Treasury.

95. The Department's consultation process included individual meetings, roundtables, interdepartmental committee (IDC) meetings, submissions, and feedback received through other channels. A range of reforms developed as a result of these consultations have already been implemented. The main consultative processes included:

- the 457 Integrity Review, which met with over 150 stakeholders and received 189 written submissions;
- the 2016 Productivity Commission Report, which received over 100 public submissions, met with a range of stakeholders in Canada, New Zealand, the United States and Australia;
- the 2016 Review of the Temporary Skilled Migration Income Threshold, which involved consultation through 19 one-on-one meetings, a forum with 11 attendees and 40 written submissions;
- the 2016 Senate Inquiry, from the Senate Education and Employment References Committee;
- consultation with and input from the Ministerial Advisory Council on Skilled Migration;
- meetings of the Skilled Migration Officials Group;
- IDC meetings between the Department and other federal government agencies and departments;
- eight roundtables in Melbourne, Sydney and Canberra; and
- meetings, and associated correspondence, with individual stakeholders.

### Stakeholder feedback

96. The feedback from the consultations can be summarised as follows:

- there is broad support for the intent of the reforms and the use of skilled overseas workers where skilled Australians are not available, so long as those employing them offer employment and training opportunities for Australians;
- there are some concerns about the impact of the reforms in limiting access to skilled migrants (expanded on below); and
- there is some support to further tighten policy settings than is proposed.

### Stakeholder feedback

97. Stakeholder consultation shows that the Government needs to consider a wide range of varying, and often opposing views. The Department continues to consider feedback raised by stakeholders in the development of the TSS visa and future reviews of the occupation list.

98. During the consultation, the Department has considered and subsequently addressed many concerns raised by stakeholders. Some of these have been outlined previously in this RIS and others are outlined in this section.

### Initial feedback

99. Initial media after the Government's reform announcement made 18 April 2017 (which reflect the option 1 measures) highlighted both support for and concerns of some stakeholders. Some stakeholders, such as the Australian Industry Group, agreed that the programme needed significant reform, and this could be achieved by replacing it with a new visa that more clearly defined its purpose – to address skill shortages that exist in the Australian economy<sup>29</sup>. The Australian Chamber of Commerce and Industry supported the

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<sup>29</sup> Sydney Morning Herald, Business welcomes 457 visa changes, warns on red tape, 18 April 2017



need for a reset in the way in which the Government handled temporary skilled visas<sup>30</sup>. Other feedback was mixed where stakeholders expressed support for certain aspects of reform, and concerns regarding other measures.

100. Concerns raised centred on the occupation changes which had immediate impact.

Through the consultation process, the Department considered a number of concerns raised by stakeholders and made some adjustments to address these concerns, such as:

- expanding the number of eligible occupations, particularly on the MLTSSL, on 1 July 2017 where there was evidence to support an ongoing need for particular occupations. This took into account feedback from employers within the horse racing sector, science and research sector, IT tech and retail sector, tertiary sector and the aviation industry;
- clarifying that the work experience requirement would be assessed in a way that reflects the nature of the particular occupation, including experience in related occupations where relevant. This feedback addresses concerns raised by the tertiary education industry, the medical sector, arts and performance sector and the science and research sector; and
- providing for a high salary exemption to the English language requirement for intra-company transferees. This addressed concerns raised by some of Australia's trading partners about the impact of removing the ELSET.

### *New policy settings for the TSS visa*

101. Stakeholders raised concerns regarding the new policy settings for the TSS visa, including:

- the reduced visa lengths and access to permanent residence, and whether this would impact on Australia's ability to attract talent;
- the reduction in occupations available, and whether this would impact application numbers for permanent skilled employer sponsored visas;
- the two years' work experience requirement, which would negatively impact the tertiary industry, the medical sector, arts and performance sector and the science and research sector;
- increased English language requirements, ELSET removal and introduction of mandatory police checks, which could negatively impact an employer's ability to access and recruit overseas workers;
- replacing the training benchmarks with a government managed training fund levy would add to existing training costs for some businesses, and may not address specific skills gaps in those businesses; and
- the reforms could increase red tape and negatively impact businesses.

### *Australian labour market*

102. Some members of the public and unions raised concerns about the negative impact of the current temporary employer sponsored skilled visa programme on the wages, conditions and job opportunities for Australian workers will continue under the new TSS visa.

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<sup>30</sup> Australian Chamber of Commerce and Industry, Media Release: migration changes will help make system sustainable, 18 April 2017



### ***Transitional arrangements***

103. Concerns were raised about how the reforms would impact existing and future visa holders and applicants, particularly regarding:

- how existing 457 visa holders would be affected where their occupation has been removed from the relevant skilled occupation list; and
- how exemptions, such as to the age and English language requirements, would apply.

### ***Integrity of the employer sponsored skilled visa programmes***

104. Stakeholders raised concerns about whether the integrity measures would go far enough to address the exploitation of overseas workers.

### ***Consultation***

105. Stakeholders were critical about the lack of transparency and engagement about the reforms prior to the Government's announcement. Notwithstanding this criticism, stakeholders appreciated the early engagement by the Department on the specific policy settings, following the announcement.

### ***Regional Australia***

106. Stakeholders sought clarification on how the reforms would provide regional concessions. Stakeholders suggested that the Government should consult further with regional Australia and the agricultural sectors on the reforms.

### ***Visa processing***

107. Stakeholders sought clarification on whether the reforms would lead to processing efficiencies or impact visa processing timeframes.

## **Best option**

108. The recommended option is to abolish and replace the 457 visa, and implement complementary reforms to the temporary and permanent employer sponsored skilled visas (option 1). This option has a deregulatory impact.

109. Option 1 is the preferred option as it:

- provides a comprehensive and complementary package of reforms to the temporary and permanent employer sponsored skilled visa framework;
- incentivises employers to only seek to fill vacancies with overseas workers where appropriately skilled Australian workers are not available;
- has enhanced integrity measures to prevent the misuse of the employer sponsored skilled programmes;
- meets Australia's skill needs through policy settings which distinguish between short and medium to long term needs;
- ensures that skilled overseas workers have the necessary attributes to successfully contribute to Australia's social and economic prosperity, either temporarily or permanently; and
- provides increased training outcomes for Australians.

110.Options 2 and 3 would not fully differentiate between the short, medium and longer-term skilled labour needs of the Australian economy, and would run the risk creating an imbalance in temporary and permanent employer sponsored skilled visa settings.

111.Options 2 and 3 would not enable the employer sponsored skilled visa programmes to better meet Australia's labour market and economic needs.

## Implementation and evaluation

112.Option 1 would have IT systems, processing, resourcing and legislative implications. The Department undertakes changes to legislation and systems using its Change Management Framework. This includes a detailed implementation plan with risk management strategies.

113.The Department proposes a phased approach for implementing Option 1, with integrity and quality measures introduced between April and December 2017, and the new TSS visa and SAF levy introduced in March 2018. The Department would leverage existing systems, processes and monitoring governance arrangements.

114.Amendments to the *Migration Act 1958*, Migration Regulations 1994, legislative instruments, and policy would be required to change settings for the temporary and permanent employer sponsored skilled visas. Publishing sponsor sanctions and sharing TFNs may also require changes to the *Tax Administration Act 1953* and the *Income Tax Assessment Act 1936*. The proposal to establish a government managed training fund would require taxing Bills.

115.It is possible that legislation to enable the Department will not be passed by Parliament. This would mean:

- in the case of sharing TFNs, the Department would not benefit from an enhanced compliance targeting or enhanced long term research on skilled migration employment outcomes. The overall rating for these risks has been assessed as medium. If this legislation were not to pass, the Department would continue compliance targeting and research using other client identifiers, however this would be less effective than TFN sharing;
- in the case of publishing sponsor sanctions, the Department would not publish sponsor sanctions. This has been assessed as a medium risk. If this legislation were not to pass, the Department would consider other public facing communication strategies to further deter sponsors from breaching their obligations, however, these would be less effective; and
- in the case of the government managed training fund, the Department would have to consider other options to improve training outcomes for Australians. This has been assessed as a high risk.

116.To prepare stakeholders to transition to these arrangements, the Department has developed a communications plan and is continuing to engage closely with stakeholders about the reforms. This engagement plan includes:

- maintaining up to date information about the reforms on the department's website, including factsheets with timelines and frequently asked questions and answers;
- maintaining a register of issues to inform future policy directions;
- ongoing feedback through broader visa reform stakeholder consultation; and
- engagement with stakeholders through existing fora:
  - Ministerial Advisory Council on Skilled Migration;
  - Senior Migration Officials Group;
  - annual migration planning;
  - net overseas migration forecasting;
  - migration agents; and
  - public information.

117. After the measures have been implemented, the Department will evaluate them through existing processes, as well as specific reviews as required. The Department will take into account both internal and external stakeholder feedback to determine if the Government's objectives have been met. As previously stated, the Government aims to achieve the following objectives:

- ensure that that employers only seek to fill vacancies with overseas workers where appropriately skilled Australian workers are not available;
- enhance integrity measures to prevent the misuse of the employer sponsored skilled programmes;
- ensure that skilled overseas workers have the necessary attributes to successfully contribute to Australia's social and economic prosperity, either temporarily or permanently; and
- meet Australia's skill needs through policy settings which distinguish between short and medium to long term needs.