

## EXPLANATORY STATEMENT

Issued by the Minister for Population, Cities and Urban Infrastructure  
for the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

*Migration Act 1958*

*Migration Amendment (COVID-19 Concessions) Regulations 2020*

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

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act. In addition, regulations can be made pursuant to, or for the purposes of, the provisions listed at [Attachment A](#).

The *Migration Amendment (COVID-19 Concessions) Regulations 2020* (the COVID-19 Concessions Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to assist certain temporary and provisional visa holders, including individuals who are on a pathway to permanent residence, who have been disadvantaged by the consequences of the COVID-19 pandemic, such as border closures, restrictions imposed on businesses and the general economic downturn.

Schedule 1 to the COVID-19 Concessions Regulations amends the Migration Regulations in six Parts.

**Part 1 – COVID-19 concession period** inserts *concession period* as a defined term in the Migration Regulations. The initial concession period begins on 1 February 2020 and continues until a date determined by the Minister in a legislative instrument. Additional concession periods can be specified as required, to begin immediately after the end of the initial concession period or at a later date. The duration of a concession period may vary for different purposes.

**Part 2 – Subclass 887 (Skilled – Regional) visas** amends the criteria for the Subclass 887 visa to provide concessions in relation to application requirements, and in relation to visa criteria requiring specified periods of residence and full-time work in regional Australia. The Subclass 887 visa is a permanent visa and the amendments assist holders of qualifying provisional visas or related bridging visas, who are on a pathway to the permanent visa.

**Part 3 – Subclass 888 (Business Innovation and Investment (Permanent)) visas** amends visa criteria to provide concessions to visa applicants who are on a pathway from the Subclass 188 (Business Innovation and Investment (Provisional)) visa to the Subclass 888 (Business Innovation and Investment (Permanent)) visa. The amendments provide concessions in relation to application requirements, and in relation to visa criteria requiring specified periods of residence, and specified levels of business and investment activity. The amendments also permit Subclass 188 visa holders to obtain another Subclass 188 visa if they need more time to establish a qualifying business in Australia.

**Part 4 – Subclass 790 (Safe Haven Enterprise) visas** provides concessions to holders, and certain former holders, of a Subclass 790 (Safe Haven Enterprise) visa (SHEV) in relation to eligibility to apply for other visas. SHEV holders, and certain former holders, may be permitted to apply for other specified visas if, while the holder of a SHEV, they are employed (and not in receipt of Special Benefit payments), or study full-time, in a specified regional area for a total period of 42 months. The concession is that periods may be counted toward the 42 month requirement if, during a concession period, the applicant was unemployed, or was receiving Special Benefit payments, or was employed outside a specified regional area in a specified essential service.

**Part 5 – Subclass 485 (Temporary Graduate) visas** amends the application requirements and visa criteria for the Subclass 485 (Temporary Graduate) visa, to assist international students, by allowing applications for this post-study visa to be made from outside Australia during a concession period. The amendments also allow the visa to be granted to an applicant who is outside Australia. Prior to this amendment, most applicants were required to be in Australia to apply for the visa and to be granted the visa. The amendments provide former international students with the opportunity to obtain a visa to return to Australia when travel restrictions are lifted. The visa period will run from the date of entry to Australia.

**Part 6 – Application and transitional provisions** amends Schedule 13 to the Migration Regulations to provide for the application of the amendments and transitional arrangements.

The matters dealt with in the COVID-19 Concessions Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions listed at [Attachment A](#). These include, for example, subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to emerging situations such as the COVID-19 pandemic.

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 COVID-19 Concessions Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

Details of the COVID-19 Concessions Regulations are set out in [Attachment C](#).

The Department of Home Affairs has consulted with the Department of Prime Minister and Cabinet, the Department of Education, Skills and Employment, Austrade, the Department of Finance, Treasury, the Department of Social Services, and the Global Reputation Taskforce of the Council for International Education. No other consultation was undertaken for the purposes of the COVID-19 Concessions Regulations as it was not considered appropriate or reasonably practicable. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the COVID-19 Concessions Regulations, and has advised that a Regulation Impact Statement is not required. The OBPR reference numbers are:

- Part 1 – Not applicable;
- Part 2 – 26488;
- Part 3 – 42531;
- Part 4 – 42802;
- Part 5 – 42535;
- Part 6 – Not applicable.

The COVID-19 Concessions Regulations are a legislative instrument for the purposes of the Legislation Act.

The COVID-19 Concessions Regulations commence on 19 September 2020.

**AUTHORISING PROVISIONS**

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

In addition, the following provisions of the Migration Act may be relevant:

- subsection 29(1), which provides that the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following: (a) travel to and enter Australia; (b) remain in Australia;
- subsection 29(2), which provides that, without limiting subsection 29(1), a visa to travel to, enter and remain in Australia may be one to: (a) travel to and enter Australia during a prescribed or specified period; and (b) if, and only if, the holder travels to and enters during that period, remain in Australia during a prescribed or specified period or indefinitely;
- subsection 29(3), which provides that, without limiting subsection 29(1), a visa to travel to, enter and remain in Australia may be one to: (a) travel to and enter Australia during a prescribed or specified period; and (b) if, and only if, the holder travels to and enters during that period: (i) remain in it during a prescribed or specified period or indefinitely; and (ii) if the holder leaves Australia during a prescribed or specified period, travel to and re-enter it during a prescribed or specified period;
- 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;
- 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 46A(1A), which provides that subsection 46A(1) (which prevents visa applications by certain unauthorised maritime arrivals) does not apply in relation to an application for a visa if: (a) either: (i) the applicant holds a safe haven enterprise visa; or (ii) the applicant is a lawful non-citizen who has ever held a safe haven enterprise visa; and (b) the application is for a visa prescribed for the purposes of paragraph 46A(1A)(b); and (c) the applicant satisfies any employment, educational or social

security benefit requirements prescribed in relation to the safe haven enterprise visa for the purposes of paragraph 46A(1A)(c); and

- 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.

**Statement of Compatibility with Human Rights**

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

***Migration Amendment (COVID-19 Concessions) Regulations 2020***

The *Migration Amendment (COVID-19 Concessions) Regulations 2020* (the COVID-19 Concessions Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Disallowable Legislative Instrument**

The COVID-19 Concessions Regulations amend the *Migration Regulations 1994* (the Migration Regulations) to assist temporary and provisional visa holders affected by COVID-19, including individuals who may no longer be able to meet the requirements for permanent residence.

The objective of the amendments is to ensure that temporary and provisional visa holders, including individuals who are on a pathway to permanent residence, are not disadvantaged by circumstances beyond their control, including border closures, restrictions imposed on businesses and the general economic downturn related to COVID-19. The amendments affect a number of visa subclasses, as detailed below.

The amendments provide concessions to visa requirements and conditions where the impact of COVID-19 would otherwise prevent or disrupt visa holders and applicants from meeting them.

Many of the concessions provided for by these amendments operate during a ‘concession period’. The concession period commences on 1 February 2020 (as the date on which the Australian Government first introduced travel restrictions in relation to COVID-19) and ends on a date specified by the Minister in a legislative instrument. Given the ongoing health situation and associated uncertainty, an end date has not been specified in the COVID-19 Concessions Regulations.

***Amendments to the Subclass 887 (Skilled – Regional) visa***

These amendments are inserted by Part 2 of Schedule 1 to the COVID-19 Concessions Regulations.

The Subclass 887 (Skilled – Regional) visa is a permanent visa. These amendments allow flexibility in meeting visa eligibility requirements for prospective Subclass 887 visa applicants and their families who have been adversely affected by the COVID-19 pandemic. The amendments include changes to:

- allow provisional visa holders and former provisional visa holders (whose visas expired during a concession period) to apply for a Subclass 887 visa while outside Australia during a concession period;
- allow Subclass 887 visas to be granted to applicants who are outside Australia;
- provide provisional visa holders and former provisional visa holders (whose visas expired during a concession period) with a concession toward the requirement to live for two years in a specified regional area. The applicant is taken to have lived in a specified regional area for six months (or a longer period specified in a legislative

instrument) if the applicant was outside Australia during a concession period and made the application during the concession period; and

- reduce the requirement for full-time work in a specified regional area from 12 months to nine months (or a shorter period specified in a legislative instrument) if the applicant held a provisional visa during a concession period and the application is made no later than three months after the end of the concession period.

In line with the policy intent of the Subclass 887 visa being for individuals who have lived and worked in regional Australia, reasonable limits have been placed on concessions in order to strike a balance between providing flexibility and maintaining program integrity.

The reference above to provisional visas is a reference to the Subclass 489 (Skilled-Regional (Provisional)) visa and to four skilled visas which previously provided a pathway to the Subclass 887 visa but are now closed to new applications (the Subclass 475 (Skilled - Regional Sponsored) visa, the Subclass 487 (Skilled - Regional Sponsored) visa, the Subclass 495 (Skilled - Independent Regional (Provisional)) visa and the Subclass 496 (Skilled - Designated Area Sponsored) visa). There are very few remaining holders of the closed visas.

The amended Subclass 887 eligibility requirements are advantageous for prospective Subclass 887 visa applicants as they provide flexibility to visa holders and those applicants adversely affected by COVID-19 associated travel restrictions and rising rates of unemployment and underemployment. Additionally, the amendments are advantageous for regional businesses allowing them to address labour skill shortages in regional Australia.

The purpose of these amendments is to ensure that skilled visa holders who held a provisional visa and were on a pathway to permanent residence prior to the commencement of the COVID-19 pandemic retain their eligibility for a Subclass 887 visa despite the disruptions caused by the pandemic.

***Amendments to the Subclass 888 (Business Innovation and Investment (Permanent) visa and the Subclass 188 (Business Innovation and Investment (Provisional)) visas***

These amendments are inserted by Part 3 of Schedule 1 to the COVID-19 Concessions Regulations

The amendments provide concessions for Subclass 888 (Business Innovation and Investment (Permanent)) and Subclass 188 (Business Innovation and Investment (Provisional)) visa applicants and holders to assist those who are on a pathway from a provisional visa to a permanent visa, who have demonstrated a commitment to the Australian economy, and who have since been adversely affected by the restrictions imposed as a response to the COVID-19 pandemic. This includes the following measures:

- allow applications for a Subclass 888 visa to be made by a former Subclass 188 visa holder whose visa ceased during a concession period when travel was restricted due to the COVID-19 pandemic;
- ensure that holders and former holders of a Subclass 188 visa who are not able to meet the requirements to hold a visa, or not able to meet the Australian residency requirements for a Subclass 888 visa, as a result of COVID-19 travel restrictions, are still able to apply for and be granted the visa if certain requirements are met;
- allow former holders of a Subclass 188 visa in the Business Innovation stream, who held the visa during a concession period, to apply for a Subclass 188 visa in the Business Innovation Extension stream, and to allow Subclass 188 visa holders and former holders affected by COVID-19 travel restrictions to apply for up to two

Subclass 188 visas in the Business Innovation Extension stream (previously only one visa extension in that stream is available);

- modify the investment requirements for applicants for a Subclass 888 visa in the Investor stream who hold or held a Subclass 188 visa granted before 1 July 2019, so that investments can be withdrawn or cancelled during a concession period where the holder of a Subclass 188 visa in the Investor stream has met the requirement to live in Australia for two years;
- modify the investment requirements for applicants for a Subclass 888 visa in the Significant Investor stream who hold or held a Subclass 188 visa granted before 1 July 2019, so that they are able to withdraw or cancel their balancing investment component during a concession period, while maintaining their investment component in venture capital and emerging companies;
- as a consequential amendment, amend the primary criteria for the Subclass 188 visa in the Significant Investor Extension stream so that applicants who first held a Subclass 188 visa granted before 1 July 2019 are not prevented from accessing the visa if they have withdrawn or cancelled investments in accordance with the concession above; and
- ensure that visa holders whose visa is subject to a condition requiring them to hold an investment throughout the visa period are still able to comply with the condition after withdrawing or cancelling investments under the new arrangements.

These amendments reduce disadvantages faced by Subclass 188 visa holders and former visa holders, and Subclass 888 visa applicants, who are negatively impacted by the COVID-19 pandemic, helping to ensure that Australia remains competitive in the international market when attracting business and migrants of high economic value.

#### ***Amendments to the Subclass 790 (Safe Haven Enterprise) visa***

These amendments are inserted by Part 4 of Schedule 1 to the COVID-19 Concessions Regulations

Holders of Subclass 790 (Safe Haven Enterprise) visas (SHEV) are permitted to apply for a range of prescribed visas if they satisfy certain requirements ('the SHEV pathway'). Prior to these amendments, the SHEV pathway required that, for a total of 42 months, the person was the holder of a SHEV and:

- did not receive specified social security benefits (only Special Benefit payments have been specified for this purpose) and was employed in a regional area specified for the purposes of the SHEV program ('a SHEV regional area'); or
- was enrolled in full-time study in a SHEV regional area; or
- undertook a combination of both work and full-time study in a SHEV regional area.

These amendments, which are intended to help minimise the impact of the COVID-19 pandemic on the SHEV pathway, allow SHEV holders or former SHEV holders to count periods of time during a concession period towards the 42-month requirement even if they:

- receive Special Benefit payments; or
- are unemployed; or
- work outside a SHEV regional area, provided the work is in an essential service specified by the Minister in a legislative instrument.

The amendments align with the policy intent in introducing the SHEV in 2014, which was to encourage refugees to work or study in, and contribute to the development of, regional



Australia. In addition, allowing for work in essential services in metropolitan areas supports sectors identified as essential during the pandemic crisis, for example, health and aged care.

The purpose of the amendments is to:

- assist SHEV holders and former holders who are on a pathway to apply for other prescribed visas;
- help regional Australia bounce back stronger through SHEV holders maintaining visa pathway eligibility and remaining in SHEV regional areas; and
- support Australia's essential services during the pandemic.

***Amendments to facilitate offshore applications for Subclass 485 (Temporary Graduate) visas.***

These amendments are inserted by Part 5 of Schedule 1 to the COVID-19 Concessions Regulations

Part 5 amends the Migration Regulations to allow primary applicants to apply offshore for a Subclass 485 (Temporary Graduate) visa during a concession period. The schedule also amends visa eligibility requirements for Subclass 485 visa applicants who have been adversely affected by the COVID-19 pandemic. The amendments:

- allow applicants to apply for, and be granted, a Subclass 485 visa while outside Australia during a concession period;
- allow applications to be made outside Australia during a concession period without the usual requirement to have held a student visa within the six month period immediately before making the application; and
- extend the period to meet the Australian Study Requirement (i.e. the period between completing study and applying for the Subclass 485 visa), from six months to 12 months for applicants prevented from returning to Australia due to COVID-19 travel restrictions.

The amendments are advantageous for Subclass 485 applicants as they provide flexibility to visa holders adversely affected by the COVID-19 associated travel restrictions. Additionally, the amendments support the international competitiveness of Australia's international education sector at this critical time.

The desired outcome of these amendments is to ensure that Student visa holders who were eligible to apply for a Subclass 485 visa prior to COVID-19 retain their eligibility for a Subclass 485 visa despite the impact of the COVID-19 pandemic.

**Human rights implications**

The COVID-19 Concessions Regulations engage the right to work as provided for by Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Article 6(1) of the ICESCR states:

*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.*

The amendments provide concessions to mitigate the impact of the COVID-19 pandemic on the ability of visa holders and applicants to continue on a permanent residence pathway.

*Amendments to Subclass 790 (Safe Haven Enterprise) visa*

The amendments in Schedule 2 of the Migration Regulations in relation to the Subclass 790 (Safe Haven Enterprise) visa (SHEV) positively engage the right to work provided for by Article 6(1) of the ICESCR.

These amendments allow SHEV holders working in essential services in metropolitan areas during a concession period to count this period towards the 42-month requirement. In doing so, the amendments promote the right to work for SHEV holders to the extent that the amendments provide them with a greater flexibility as to the location of the work that they undertake without adversely affecting their ability to meet the SHEV pathway.

*Amendments to the Subclass 888 (Business Innovation and Investment (Permanent) visa)*

These amendments positively engage the right to work to the extent that they provide access to an additional visa extension for Subclass 188 visas in the Business Innovation Extension stream for business owners whose business has been negatively affected by the COVID-19 pandemic and its economic impact, enabling those business owners to continue working.

**Conclusion**

The COVID-19 Concessions Regulations are compatible with human rights because they promote the protection of human rights.

**Details of the Migration Amendment (COVID-19 Concessions) Regulations 2020****Section 1 – Name**

This section provides that the title of the Regulations is the *Migration Amendment (COVID-19 Concessions) Regulations 2020* (referred to in this Explanatory Statement as the COVID-19 Concessions Regulations).

**Section 2 – Commencement**

This section is the formal enabling provision for the instrument (that is, for the whole of the COVID-19 Concessions Regulations). It provides that the instrument commences on 19 September 2020.

**Section 3 – Authority**

This section provides that the COVID-19 Concessions Regulations are made under the *Migration Act 1958* (the Migration Act).

**Section 4 – Schedules**

The purpose of this section is to provide for the operation of the amendments in the COVID-19 Concessions Regulations.

**Schedule 1 – Amendments*****Migration Regulations 1994*****Part 1 – COVID-19 concession period****Item 1 – Regulation 1.03 and Item 2 – At the end of Division 1.2**

The COVID-19 Concessions Regulations amend the *Migration Regulations 1994* (the Migration Regulations) to assist certain temporary and provisional visa holders and former holders, including individuals who are on a pathway to permanent residence, who have been disadvantaged by the consequences of the COVID-19 pandemic, such as border closures, restrictions imposed on businesses and the general economic downturn.

In order to achieve this objective, Parts 2 to 5 of the COVID-19 Concessions Regulations create a number of concessions for temporary and provisional visa holders which apply during, or are otherwise linked to, a ‘concession period’, which is a defined term that is inserted in regulation 1.03 by item 1. The meaning of ‘concession period’ is set out in regulation 1.15N, which makes provision for both an ‘initial concession period’ and for later concession periods for the purposes of specified provisions.

Subregulations 1.15N(1) and (2) provide for the initial concession period, which is a period commencing on 1 February 2020 and ending on a day specified by the Minister under subregulation 1.15N(2). As a result, any reference to ‘a concession period’ inserted in the Migration Regulations by the COVID-19 Concessions Regulations, is , from 19 September

2020, a reference to a period commencing on 1 February 2020 and ending on a future date to be specified by the Minister by legislative instrument.

If the Minister specifies a day under subregulation 1.15N(2) for the purposes of paragraph 1.15N(1)(b) then the initial concession period ends on that day for all purposes. The initial concession period will be ended by legislative instrument to ensure that, if necessary, the concessions created by the COVID-19 Concessions Regulations can continue for affected non-citizens. Since it is not known when the travel restrictions and economic disruption caused by the COVID-19 pandemic will end, it is not appropriate to provide an end date in the COVID-19 Concessions Regulations .

Subregulation 1.15N(3) allows the Minister to determine, by legislative instrument, a later period as a concession period for the purposes of a specified provision of the Migration Regulations in which the expression ‘concession period’ is used. Subregulation 1.15N(4) provides that a later concession period must not begin before the initial concession period ends.

It is possible for a new concession period to commence immediately after the end of the initial concession period. This flexibility is necessary in case some of the concessions set out in Parts 2 to 5 of the COVID-19 Concessions Regulations are still required after the initial concession period has ended.

Alternatively, a new concession period could commence, for the purposes of one or more provisions of the Migration Regulations containing that expression, at any time after the initial concession period has ended. It is possible, for example, for the Minister to determine a period as a later concession period for the purposes of all provisions in the Migration Regulations which refer to a ‘concession period’. This flexibility might be required if there is a resurgence of the COVID-19 pandemic at some point after the initial concession period has ended.

## **Part 2 – Subclass 887 (Skilled – Regional) visas**

### ***Migration Regulations 1994***

#### Item 3 – Subparagraph 1136(2)(a)(i) of Schedule 1

This item repeals and substitutes subparagraph 1136(2)(a)(i) of Schedule 1 to the Migration Regulations. The purpose of the subparagraph is to specify the amount of the first instalment of the visa application charge that is payable by an applicant for a Subclass 887 (Skilled-Regional) visa. The amendment reflects the provision that is made by the COVID-19 Concessions Regulations for Subclass 887 visa applications to be made by persons whose qualifying provisional visas or related bridging visa expired during a concession period while the holder was outside Australia (explained at item 4 and item 5 below).

For the meaning of *concession period*, see Part 1 (COVID-19 concession period) of Schedule 1 to the COVID-19 Concessions Regulations , above.

#### Item 4 – Paragraph 1136(3)(b) of Schedule 1

This item repeals and substitutes paragraph 1136(3)(b) of Schedule 1 to the Migration Regulations. That paragraph specifies where the applicant must be in order to apply for a Subclass 887 (Skilled-Regional) visa. Prior to this amendment, the paragraph required all

applicants to be in Australia. This reflects the purpose of the Subclass 887 visa as a permanent visa that is granted to persons who are already living and working in regional Australia on a qualifying provisional visa. The substituted paragraph allows Subclass 887 visa applications to be made outside Australia during a concession period in the following circumstances:

- the applicant holds a qualifying provisional visa or a related bridging visa; or
- the applicant was the holder of a qualifying provisional visa or a related bridging visa (in which case the applicant must be outside Australia); or
- the applicant is a family member of one of these applicants, and is seeking to satisfy the secondary visa criteria.

The paragraph also provides that, except in the above situations, the applicant must be in Australia (but not in immigration clearance) to make an application.

The amendments reflect the provision made by the COVID-19 Concessions Regulations for persons who are outside Australia during COVID-19 travel restrictions to apply for the Subclass 887 visa from outside Australia. The amendments in item 4 must be read in conjunction with the amendments in item 5 below, which limit the circumstances in which applications can be made.

#### Item 5 – Paragraph 1136(7)(a) of Schedule 1

This item repeals and substitutes paragraph 1136(7)(a) of Schedule 1 to the Migration Regulations. The paragraph specifies what visa the applicant must hold in order to apply for a Subclass 887 (Skilled-Regional) visa. Prior to this amendment, the paragraph specified the qualifying provisional visas and bridging visas granted on the basis of an application for one of three specified provisional visas.

The only active provisional visa is the Skilled-Regional Sponsored (Provisional) (Class SP) visa, which contains the Subclass 489 (Skilled-Regional (Provisional)) visa. The other provisional visas were repealed some years ago, and there are very few remaining holders of those visas. Those visas are included in these amendments for completeness and to ensure that no visa holder who may require a concession is overlooked.

The substantive changes from the current paragraph are as follows:

Subparagraph 1136(7)(a)(vii) makes provision for Subclass 887 visa applications by persons who have ceased to hold the relevant visa when all of the following circumstances apply:

- the visa applicant is outside Australia; and
- the visa applicant held a relevant visa that ceased during a concession period; and
- the visa applicant was outside Australia when the visa ceased; and
- the visa application is made during a concession period.

Subparagraph 1136(7)(a)(viii) makes provision for applications by children who are born outside Australia. This was not previously required because all applicants are required to be in Australia to apply, and are required to hold one of the qualifying visas. A child born in Australia is taken to have been granted a visa of the same class as the parent or parents (section 78 of the Migration Act). There is no equivalent provision for children born outside Australia and, in any event, the parent's visa may have expired before the child is born. Subparagraph

1136(7)(a)(viii) ensures that children born outside Australia are able to be included in the parent's Subclass 887 visa application.

Item 6 – Clause 887.212 of Schedule 2

This item makes a technical amendment to support item 7.

Item 7 – At the end of clause 887.212 of Schedule 2

This item amends the residence criterion that applies to applications for the Subclass 887 (Skilled-Regional) visa, to provide a concession to holders or former holders of specified provisional visas or related bridging visas who are outside Australia during a concession period.

Clause 887.212 previously required the primary applicant to have lived in a specified regional area for a total period of at least two years as the holder of one or more of the specified provisional visas or related bridging visas. The effect of the amendment is to retain this criterion as subclause 887.212(1), and to qualify the criterion by inserting subclause 887.212(2).

The effect of subclause 887.212(2) is that the visa applicant is taken (i.e. is deemed) to have lived in a specified regional area for six months, and therefore only needs to have actually lived in a specified regional area for 18 months, rather than two years. In accordance with the subclause, this concession applies if:

- the applicant was outside Australia during a concession period; and
- the applicant applied for the Subclass 887 visa outside Australia during the concession period; and
- the applicant holds a specified provisional visa or related bridging visa, or was the holder of one of those visas that expired during the concession period.

The effect of subclause 887.212(3) is that the Minister may, by legislative instrument, specify a longer period than the six months provided under subclause 887.212(2).

The six month reduction in the residence requirement is intended to provide a reasonable level of assistance to Subclass 887 applicants who have been unable to return to Australia because of COVID-19 travel restrictions, while at the same time maintaining the integrity of a key criterion for the Subclass 887 visa, which is the requirement for applicants to have lived in a specified regional area of Australia for a substantial period. In particular, the concession assists applicants who were almost qualified to apply for a Subclass 887 visa when travel restrictions came into effect. The concession should be adequate to address the needs of potential Subclass 887 applicants who are outside Australia at the commencement of these amendments. However, the option of extending the concession by legislative instrument provides flexibility if travel restrictions continue for an extended period.

Item 8 – Clause 887.213 of Schedule 2

This item repeals and substitutes clause 887.213. Clause 887.213 requires the primary visa applicant to have undertaken full-time work in a specified regional area while holding one of the qualifying provisional visas mentioned in that clause or a related bridging visa. All primary

applicants were previously required to have worked full-time in a specified regional area for a total period of at least 12 months.

The amendment reduces the requirement to work full-time, from 12 months to nine months, if the applicant held one of the qualifying provisional visas or related bridging visa during a concession period, provided that the application for the Subclass 887 visa is made no later than three months after the end of the concession period.

In addition, subclause 887.213 provides that the Minister can specify a shorter period in a legislative instrument.

The amendments assist Subclass 887 visa applicants by making an allowance for the impact of the COVID-19 pandemic, while at the same time maintaining the integrity of a key criterion for the Subclass 887 visa, which is the requirement for applicants to contribute to regional Australia by working full-time for a substantial period. In particular, the amendments assist applicants who were almost qualified to apply for the Subclass 887 visa when they lost employment or had their hours reduced because of the impact of the pandemic. Although some visa holders may be without full-time work for longer periods, the relevant provisional visas are granted for up to four years and the full-time work can be undertaken across that period. In addition, the Minister will be able to reduce the work requirement by specifying a shorter period in a legislative instrument if economic circumstances do not improve.

#### Item 9 – Clause 887.411 of Schedule 2

This item repeals and substitutes clause 887.411. The purpose of clause 887.411 is to specify where the visa applicant must be when the visa is granted. The clause previously required all applicants to be in Australia when the visa is granted.

The amendment allows applicants to be in Australia or outside Australia when the visa is granted. However, if they are in Australia they must not be in immigration clearance.

The amendment provides flexibility to deal with applicants who are permitted to make applications outside Australia during a concession period (see item 4 above). The amendment also aligns the Subclass 887 visa with other skilled visas.

### **Part 3 – Subclass 888 (Business Innovation and Investment (Permanent)) visas**

#### ***Migration Regulations 1994***

#### Item 10 – After subregulation 5.19C(8)

This item inserts subregulations 5.19C(8A) and (8B) in regulation 5.19C (Complying significant investment) of the Migration Regulations.

Regulation 5.19C sets out the requirements for a complying significant investment which must be made by an applicant for the grant of a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Significant Investor stream, and must be held by an applicant for the grant of a Subclass 188 visa in the Significant Investor Extension stream. In addition, a complying significant investment must be held for a specified period by an applicant for the

grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Significant Investor stream.

A complying significant investment must be of a kind, and comply with requirements, specified by the Minister in a legislative instrument (see subregulation 5.19C(5)).

Subregulation 5.19C(8A) provides that a complying significant investment does not cease to be a complying significant investment if, during a concession period, the visa holder or applicant has withdrawn funds from, or cancelled, a component of the complying significant investment which is specified by the Minister in a legislative instrument. Subregulation 5.19C(8B) provides for the Minister to make a legislative instrument for the purposes of subregulation 5.19C(8A).

For the meaning of *concession period*, see Part 1 (COVID-19 concession period) of Schedule 1 to the COVID-19 Concessions Regulations, above.

The arrangements are intended to assist certain holders of Subclass 188 visas in the Significant Investor or Significant Investor Extension stream who may be adversely affected by the economic impact of the COVID-19 pandemic, by allowing part of their complying significant investment to be withdrawn or cancelled during a concession period.

The provisions operate in conjunction with amendments to paragraph 188.261(1B)(b) and subclause 888.241(2C) in Schedule 2 to the Migration Regulations. Those amendments enable criteria to be met for the grant of a Subclass 188 visa in the Significant Investor Extension stream or a Subclass 888 visa in the Significant Investor stream, if applicants have withdrawn or cancelled part of their complying significant investment as permitted by subregulation 5.19C(8A).

The arrangements are restricted to visa holders whose Subclass 188 visas were granted before 1 July 2019. These visa holders have shown commitment to investing in Australia by retaining the full investment at least until the beginning of the concession period (1 February 2020).

In addition, a transitional provision (subclause 9102(2), inserted by item 39 below) ensures that visa holders, whose visas were granted before 1 July 2019, are not in breach of visa condition 8557, which requires the visa holder to continue to hold a significant complying investment for the full visa period, if they withdraw or cancel investments as permitted by subregulation 5.19C(8A). This is explained further at item 39.

Use of a legislative instrument to provide for the components of the investment that may be withdrawn or cancelled provides flexibility to ensure that key components are retained in the investment to meet the objectives of the Business Innovation and Investment Program. The use of a legislative instrument for this purpose mirrors the use of a legislative instrument to specify the kinds of investments that may be included in a significant complying investment (see subregulation 5.19C(5)).

#### Item 11 – Subitem 1104BA(4) of Schedule 1 (after table item 1)

This item inserts item 1A in the table in subitem 1104BA(4) of Schedule 1 to the Migration Regulations.



Item 1A provides that an applicant seeking to satisfy the primary criteria for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Business Innovation stream may make a valid application for the visa if the applicant was the holder of a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Business Innovation stream or the Business Innovation Extension stream and the visa expired during a concession period, provided that the application is made no later than three months after the end of the concession period during which the visa was held.

Prior to this amendment, applicants for a Subclass 888 visa in the Business Innovation stream were required to hold a valid Subclass 188 visa at the time of application. The amendment facilitates an application for a Subclass 888 visa by applicants who may have been adversely impacted by travel and other restrictions resulting from the COVID-19 pandemic and failed to apply for the permanent visa before their Subclass 188 visa ceased to be in force during the concession period.

Item 12 – Subitem 1104BA(4) of Schedule 1 (after table item 2)

This item inserts item 2A in the table in subitem 1104BA(4) of Schedule 1 to the Migration Regulations.

Item 2A provides that an applicant seeking to satisfy the primary criteria for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Business Innovation stream may make a valid application for the visa if the applicant was the holder of a Subclass 188 (Business Innovation and Investment (Provisional)) visa granted on the basis that the applicant was the spouse or de facto partner of a person who held a Subclass 188 visa in the in the Business Innovation stream or the Business Innovation Extension stream, and the applicant’s visa expired during a concession period, provided that the application is made no later than three months after the end of the concession period during which the visa was held.

Prior to this amendment, applicants for a Subclass 888 visa in the Business Innovation stream were required to hold a valid Subclass 188 visa at the time of application. The amendment facilitates an application for a Subclass 888 visa by applicants who may have been adversely impacted by travel and other restrictions resulting from the COVID-19 pandemic and failed to apply for the permanent visa before their Subclass 188 visa ceased to be in force during the concession period.

Item 13 – Subitem 1104BA(5) of Schedule 1 (at the end of the table)

This item inserts items 3 and 4 in the table in subitem 1104BA(5) of Schedule 1 to the Migration Regulations.

Item 3 provides that an applicant seeking to satisfy the primary criteria for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Investor stream may make a valid application for the visa if the applicant was the holder of a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Investor stream, and the applicant’s visa expired during a concession period, provided that the application is made no later than three months after the end of the concession period during which the visa was held.

Item 4 provides that an applicant seeking to satisfy the primary criteria for the grant of a Subclass 888 visa in the Investor stream may make a valid application for the visa if the

applicant was the holder of a Subclass 188 visa granted on the basis that they were the spouse or de facto partner of a person who held a Subclass 188 visa in the Investor stream, and the applicant's visa expired during a concession period, provided that the application is made no later than three months after the end of the concession period during which the visa was held.

Prior to this amendment, applicants for a Subclass 888 visa in the Investor stream were required to hold a valid Subclass 188 visa at the time of application. The amendment facilitates an application for a Subclass 888 visa by applicants who may have been adversely impacted by travel and other restrictions resulting from the COVID-19 pandemic and failed to apply for the permanent visa before their Subclass 188 visa ceased to be in force during the concession period.

Item 14 – Subitem 1104BA(5A) of Schedule 1 (at the end of the table)

This item inserts items 3 and 4 in the table in subitem 1104BA(5A) of Schedule 1 to the Migration Regulations.

Item 3 provides that an applicant seeking to satisfy the primary criteria for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Significant Investor stream may make a valid application for the visa if the applicant was the holder of a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Significant Investor stream or the Significant Investor Extension stream, and the applicant's visa expired during a concession period, provided that the application is made no later than three months after the end of the concession period during which the visa was held.

Item 4 provides that an applicant seeking to satisfy the primary criteria for the grant of a Subclass 888 visa in the Significant Investor stream may make a valid application for the visa if the applicant was the holder of a Subclass 188 visa granted on the basis that they were the spouse or de facto partner of a person who held a Subclass 188 visa in the Significant Investor stream or the Significant Investor Extension stream, and the applicant's visa expired during a concession period, provided that the application is made no later than three months after the end of the concession period during which the visa was held.

Prior to this amendment, applicants for a Subclass 888 visa in the Significant Investor stream were required to hold a valid Subclass 188 visa at the time of application. The amendment facilitates an application for a Subclass 888 visa by applicants who may have been adversely impacted by travel and other restrictions resulting from the COVID-19 pandemic and failed to apply for the permanent visa before their Subclass 188 visa ceased to be in force during the concession period.

Item 15– Subitem 1104BA(5C) of Schedule 1

This item amends subitem 1104BA(5C) of Schedule 1 to the Migration Regulations.

The amendment provides that an applicant seeking to satisfy the primary criteria for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Entrepreneur stream may make a valid application for the visa if the applicant was the holder of a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Entrepreneur stream, and the applicant's visa expired during a concession period, provided that the application is made

no later than three months after the end of the concession period during which the visa was held.

Subitem 1104BA(5C) previously required applicants for a Subclass 888 visa in the Entrepreneur stream to hold a Subclass 188 visa in the Entrepreneur stream at the time of application.

The amendment facilitates an application for a Subclass 888 visa by applicants who may have been adversely impacted by travel and other restrictions resulting from the COVID-19 pandemic and failed to apply for the permanent visa before their Subclass 188 visa ceased to be in force during a concession period.

#### Item 16 – Subitem 1202B(5) of Schedule 1 (table items 1, 2, and 3)

This item amends the table in subitem 1202B(5) of Schedule 1 to the Migration Regulations by repealing and substituting items 1, 2 and 3. The purpose of the table is to prescribe requirements to be satisfied to make an application for a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Business Innovation Extension stream. The purpose of this visa is to allow a person who has held a Subclass 188 visa in the Business Innovation stream for three or more years to have more time to establish a qualifying business to meet the criteria for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Business Innovation stream.

Prior to this amendment, an applicant was required to hold a Subclass 188 visa in the Business Innovation stream at the time of application, and a person could apply for only one Subclass 188 visa in the Business Innovation Extension stream.

The effect of the amendment is that an applicant who holds or held a Subclass 188 visa in the Business Innovation stream or the Business Innovation Extension stream during a concession period and whose first Subclass 188 visa in the Business Innovation stream was granted before 1 July 2019, may apply for up to two Subclass 188 visas in the Business Innovation Extension stream provided the application is made not more than three months after the end of the concession period during which the visa was held.

The amendment assists applicants impacted by the COVID-19 pandemic by facilitating an application for a Subclass 188 visa in the Business Innovation Extension stream after visa expiry during a concession period. The amendment also assists applicants by permitting applications for an additional Subclass 188 visa in the Business Innovation Extension stream during a concession period. In conjunction with the amendments to clause 188.512 of Schedule 2 to the Migration Regulations (see item 19 below), this allows these applicants up to eight years to establish a business to meet the requirements for grant of a Subclass 888 visa in the Business Innovation stream.

#### Item 17 – Subclause 188.232(1) of Schedule 2

This item repeals and substitutes subclause 188.232(1) of Schedule 2 to the Migration Regulations.

Prior to this amendment, subclause 188.232(1) required an applicant for the grant of a Subclass 188 visa in the Business Innovation Extension stream to have an ownership interest, for the two

years immediately before the application for the visa was made, in one or more main businesses that were actively operating in Australia.

The amendment provides, as an alternative requirement in paragraph 188.232(1)(b), that if the applicant holds or held a Subclass 188 visa in the Business Innovation stream or a Subclass 188 visa in the Business Innovation Extension stream during a concession period and the applicant was granted a Subclass 188 visa in the Business Innovation stream before 1 July 2019, the applicant must have had an ownership interest in one or more main businesses that were actively operating in Australia for at least a cumulative period of two years while the applicant held a Subclass 188 in the Business Innovation stream or in the Business Innovation Extension stream.

The effect of the amendment is that the two year period during which a specified applicant's business must have been actively operating for eligibility for grant of Subclass 188 visa in the Business Innovation Extension stream may have accumulated from different periods of operation rather than from a continuous period of two years. This recognises that an applicant's business may be disrupted during the concession period when lockdowns and other restrictions are in place, and enables the person to obtain a further Subclass 188 visa to complete the requirements for the grant of a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Business Innovation stream.

#### Item 18 – Paragraph 188.261(1B)(b) of Schedule 2

This item repeals and substitutes paragraph 188.261(1B)(b) of Schedule 2 to the Migration Regulations.

Prior to this amendment, paragraph 188.261(1B)(b) required an applicant for a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Significant Investor Extension stream to continue to hold a complying significant investment within the meaning of regulation 5.19C as in force at the time the person applied for a Subclass 188 visa in the Significant Investor stream.

The amendment allows the requirement to be met by an applicant whose Subclass 188 visa in the Significant Investor stream was granted before 1 July 2019 and who, during a concession period, withdrew or cancelled components of the investment as permitted under subregulation 5.19C(8A), which is inserted in the Migration Regulations by this Part (see item 10 above).

#### Item 19 – Clause 188.512 of Schedule 2

This repeals and substitutes clause 188.512 of Schedule 2 to the Migration Regulations. Clause 188.512 prescribes the period for which a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Business Innovation Extension stream is granted.

Paragraph 188.512(a) replicates the previous rule by providing that the first Subclass 188 visa in the Business Innovation Extension stream that is granted to an applicant is for six years from the date of grant of the Subclass 188 visa in the Business Innovation stream.

The amendment also adds the rule in paragraph 188.512(b) to the effect that a second Subclass 188 visa in the Business Innovation Extension stream is granted for eight years from the date of grant of the applicant's Subclass 188 visa in the Business Innovation stream. This new rule is

consequential to the amendment to the table in subitem 1202B(5) of Schedule 1 to the Migration Regulations made by this Part (see item 16 above) which allows certain applicants to apply for a second Subclass 188 visa in the Business Innovation Extension stream.

Item 20 – Clause 888.221 of Schedule 2

This item makes a technical amendment consequential to the insertion of a subclause in clause 888.221 by the following item.

Item 21 – At the end of clause 888.221 of Schedule 2

This item adds subclause (2) to clause 888.221 of Schedule 2 to the Migration Regulations.

Clause 888.221 requires an applicant for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Business Innovation stream to have been in Australia as the holder of an eligible visa, which includes a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Business Innovation or the Business Innovation Extension stream, or a Subclass 188 visa granted on the basis that the applicant was the spouse or de facto partner of a person who held a Subclass 188 visa in the Business Innovation or the Business Innovation Extension stream (the Business Innovation visas), for a total of at least one year in the two years immediately before the application was made.

Subclause 888.221(2) provides that, in calculating periods in Australia for the purposes of subclause 888.221(1), an applicant is taken to have been in Australia if the applicant was outside Australia during a concession period and during the concession period the applicant was the holder of one or more Business Innovation visas, provided that the first such visa held by the applicant was granted before 1 July 2019.

The amendment assists an applicant to satisfy the criteria for a Subclass 888 visa in the Business Innovation stream if the applicant held a Business Innovation visa but was unable to complete the requirement to have been in Australia because of travel restrictions introduced as a result of the COVID-19 pandemic.

Item 22 – Clause 888.231 of Schedule 2

This item makes a technical amendment consequential to the insertion of a subclause in clause 888.231 by the following item.

Item 23 – At the end of clause 888.231 of Schedule 2

This item adds subclause (2) to clause 888.231 of Schedule 2 to the Migration Regulations.

Clause 888.231 requires an applicant for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Investor stream to have been in Australia as the holder of a Subclass 188 visa in the Investor stream or a Subclass 188 visa granted on the basis that the applicant was the spouse or de facto partner of a person who held a Subclass 188 visa in the Investor stream (the Investor visas) for a total of at least two years in the four years immediately before the application was made.

Subclause 888.231(2) provides that, in calculating periods in Australia for the purposes of subclause 888.231(1), an applicant is taken to have been in Australia if the applicant was outside Australia during a concession period while holding an Investor visa, provided that the visa was granted before 1 July 2019. The amendment assists an applicant to satisfy the criteria for a Subclass 888 visa in the Investor stream if the applicant held an Investor visa but was unable to complete the requirement to have been in Australia because of travel restrictions introduced as a result of the COVID-19 pandemic.

Item 24 – Clause 888.232 of Schedule 2

This item repeals and substitutes clause 888.232 in Schedule 2 to the Migration Regulations.

Clause 888.232 requires an applicant for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Investor stream to have held a designated investment for a specified period while the applicant was the holder of a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Investor stream. If the Subclass 188 visa was applied for on or after 1 July 2015, the specified period is at least four years.

The amendment provides that the requirement may also be met by an applicant who was granted a Subclass 188 visa before 1 July 2019 and withdraws funds from, or cancels, the designated investment during a concession period, provided the applicant had been resident in Australia for at least two years immediately before withdrawing or cancelling the investment, and the investment had been held continuously in the name of the applicant, or the applicant and the applicant's spouse or de facto partner together, during that two years. In addition, the applicant must not have withdrawn funds from, or cancelled any part of, the designated investment outside a concession period.

The amendment assists certain applicants impacted by the economic effects of the COVID-19 pandemic by allowing them to withdraw funds from their designated investment, or cancel their designated investment, and remain eligible for the grant of a Subclass 888 visa. The requirement that the investment must have been held continuously for at least two years, during which the applicant was resident in Australia, immediately before any withdrawal or cancellation can occur, ensures that the objectives of the business and investment migration program continue to be met.

Item 25 – At the end of subclause 888.241(1) of Schedule 2

This item adds a paragraph (d) to subclause 888.241(1) of Schedule 2 to the Migration Regulations. Paragraph (d) provides that an applicant for the Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Significant Investor stream is not required to hold a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Significant Investor stream if the applicant held such a visa, granted to the applicant before 1 July 2019, and the visa expired during a concession period.

This amendment is consequential to the amendment to Schedule 1 to the Migration Regulations made by item 14 of this Part, above, which allows an application for a Subclass 888 visa in the Significant Investor stream to be made by a person who held a Subclass 188 visa in the Significant Investor stream that expired during a concession period, provided that the application is made no later than three months after the end of the concession period during which the visa was held.

Item 26 – Subclause 888.241(2) of Schedule 2

This item makes a technical amendment to subclause 888.241(2) of Schedule 2 to the Migration Regulations consequential to the amendment made by the following item which inserts subclause (2C) in clause 888.241.

Item 27 – After subclause 888.241(2B) of Schedule 2

This item inserts subclause (2C) in clause 888.241 of Schedule 2 to the Migration Regulations.

Prior to this amendment, subclauses 888.241(2A) and (2B) required an applicant for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Significant Investor stream to hold a complying significant investment for the period during which the applicant held a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Significant Investor stream.

The amendment provides that the requirement may also be met by an applicant who was granted a Subclass 188 visa in the Significant Investor stream before 1 July 2019 and, during a concession period, held the visa, or a Subclass 188 visa in the Significant Investor Extension stream, and withdrew funds from, or cancelled, a component of their complying significant investment specified in an instrument under subregulation 5.19C(8B).

The amendment operates in conjunction with the amendment to regulation 5.19C (Complying significant investment) which is made by item 10 of this Part, above. Please see the notes on that item for details of that amendment.

The amendment assists certain applicants impacted by the economic effects of the COVID-19 pandemic by allowing them to withdraw funds from their complying significant investment and remain eligible for the grant of a Subclass 888 visa, while ensuring that the objectives of the business and investment migration program continue to be met.

Item 28 – Paragraph 888.241(4)(b) of Schedule 2

This item inserts a reference to subclause 888.241(2C) in paragraph 888.241(4)(b). This item is consequential to the insertion of subclause 888.241(2C) in clause 888.241 by the previous item, and requires applicants coming within the subclause to provide evidence that the applicant holds investments to meet the provisions of the subclause.

Item 29 – After subclause 888.242(2) of Schedule 2

This item inserts subclause (2A) in clause 888.242 of Schedule 2 to the Migration Regulations.

Clause 888.242 requires an applicant for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Significant Investor stream to meet the requirements of either subclause 888.242(2) or 888.242(3). Subclause 888.242(2) requires that the applicant has been in Australia for the number of days specified in that subclause before a Subclass 888 visa may be granted.

Subclause 888.242(2A) provides that, in working out the number of days the applicant has been in Australia for the purposes of subclause 888.242(1), an applicant is taken to have been

in Australia if the applicant was outside Australia during a concession period while holding a Subclass 188 visa in the Significant Investor or Significant Investor Extension stream and the Subclass 188 visa in the Significant Investor stream was granted before 1 July 2019.

The amendment assists certain applicants to satisfy the criteria for a Subclass 888 visa in the Significant Investor stream if they were unable to be in Australia for the required number of days because of travel restrictions introduced as a result of the COVID-19 pandemic.

Item 30 – After subclause 888.242(3) of Schedule 2 (before the note)

This item adds subclause (4) to clause 888.242 of Schedule 2 to the Migration Regulations.

As an alternative to subclause 888.242(2) (described above), clause 888.242 requires an applicant for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Significant Investor stream to meet the requirements of subclause 888.242(3). This subclause requires that the applicant's spouse or de facto partner must have been in Australia on a Subclass 188 visa, granted on the basis that the applicant held a Subclass 188 visa in the Significant Investor Stream or the Significant Investor Extension stream, for the number of days specified in that subclause before a Subclass 888 visa may be granted to the applicant.

Subclause 888.242(4) provides that, in working out the number of days the applicant's spouse or de facto partner has been in Australia for the purposes of subclause 888.242(3), the spouse or de facto partner is taken to have been in Australia if the spouse or de facto partner was outside Australia during a concession period while holding a Subclass 188 visa granted on the basis that the applicant held a Subclass 188 visa in the Significant Investor Stream or the Significant Investor Extension stream and the applicant's Subclass 188 visa in the Significant Investor Stream was granted before 1 July 2019.

The amendment assists certain applicants to satisfy the criteria for grant of a Subclass 888 visa in the Significant Investor stream if their spouse or de facto partner was unable to be in Australia for the required number of days because of travel restrictions introduced as a result of the COVID-19 pandemic.

Item 31 – After subclause 888.261(1) of Schedule 2

This item inserts subclauses (1A) and (1B) in clause 888.261 of Schedule 2 to the Migration Regulations.

Clause 888.261 requires an applicant for a Subclass 888 (Business Innovation and Investment (Permanent)) visa in the Entrepreneur stream to hold a Subclass 188 (Business Innovation and Investment (Provisional)) visa in the Entrepreneur stream at the time of applying for a Subclass 888 visa, to have held the visa for a continuous period of at least four years, and to have resided in Australia for at least two of those four years.

Subclause 888.261(1A) provides that if an applicant was outside Australia during a concession period while holding a Subclass 188 visa in the Entrepreneur stream granted to the applicant before 1 July 2019 and that visa expired during the concession period, the applicant is taken to have satisfied the requirement to hold a Subclass 188 visa in the Entrepreneur stream at the time of application.



Subclause 888.261(1B) provides that if an applicant was outside Australia during a concession period while holding a Subclass 188 visa in the Entrepreneur stream that was granted to the applicant before 1 July 2019, then for the purposes of calculating the period during which the applicant has resided in Australia, a time during which the applicant was outside Australia during a concession period is to be counted.

The amendments assist an applicant to satisfy the criteria for a Subclass 888 visa in the Entrepreneur stream if the applicant held a Subclass 188 visa in the Entrepreneur stream granted before 1 July 2019 but was unable to comply with requirements to have held a Subclass 188 visa at the time of application or to have resided in Australia for a specified because of travel restrictions introduced as a result of the COVID-19 pandemic.

#### **Part 4 – Subclass 790 (Safe Haven Enterprise) visas**

##### ***Migration Regulations 1994***

##### **Item 32 – Paragraph 2.06AAB(2)(a)**

This item makes a technical amendment, consequential to the amendment made by item 33. The amendment makes paragraph 2.06AAB(2)(a) subject to subregulation 2.06AAB(4).

Subregulation 2.06AAB(2) sets out the requirements that a Subclass 790 (Safe Haven Enterprise) visa (SHEV) holder, or former SHEV holder, must satisfy in order to be eligible to apply for a range of other visas set out in subregulation 2.06AAB(1) ('the SHEV pathway'). The visas set out in subregulation 2.06AAB(1) ('the prescribed visas') include some permanent visas, but not a permanent protection visa.

Paragraph 2.06AAB(2)(a) sets out certain requirements in relation to employment, study or receipt of social security benefits. Alternatively, the SHEV holder or former SHEV holder can meet the family eligibility provision at paragraph 2.06AAB(2)(b).

Subregulation 2.06AAB(4), outlined below, creates exceptions to the requirements in paragraph 2.06AAB(2)(a) in certain circumstances involving a concession period. For the meaning of *concession period*, see Part 1 (COVID-19 concession period) of Schedule 1 to the COVID-19 Concessions Regulations, above.

The reason for the amendments is that the COVID-19 pandemic is having a negative impact on SHEV holders' ability to meet the SHEV pathway requirements, due to job losses and the need to access Special Benefit payments.

##### **Item 33 – At the end of regulation 2.06AAB**

This item adds subregulations 2.06AAB(4) and (5) to assist SHEV holders, and former SHEV holders, who are seeking to use the SHEV pathway, in circumstances where their capacity to do so may have been affected by the COVID-19 pandemic.

For example, the amendment assists SHEV holders undertaking the SHEV pathway in order to be eligible to apply for a Partner visa.

Prior to this amendment, access to the SHEV pathway requires that, for a total of 42 months, the person was the holder of a SHEV and:

- did not receive specified social security benefits (only Special Benefit payments have been specified for this purpose) and was employed in a regional area specified for the purposes of the SHEV program ('a SHEV regional area'); or
- was enrolled in full-time study in a SHEV regional area; or
- undertook a combination of both work and full-time study in a SHEV regional area.

Alternatively, a SHEV holder, or former holder, can apply for one of the prescribed visas if they are a member of the same family unit of someone who meets all of the above requirements (including holding a SHEV and non-receipt of Special Benefit), and they make a combined application for the relevant visa.

Meeting the SHEV pathway requirements is the first step towards being able to apply for one of the prescribed visas. It is important to note that, in order to be granted one of these visas, the applicant must also satisfy relevant visa criteria, including health, character, security and identity provisions.

Subregulation 2.06AAB(4) allows SHEV holders or former holders to count periods toward the 42 month requirement if, during a concession period, while holding a SHEV, the person:

- receives social security benefits determined under subregulation 2.06AAB(3) (paragraph 2.06AAB(4)(a)) – as mentioned above, only Special Benefit has been determined under that subregulation; or
- is unemployed (paragraph 2.06AAB(4)(b)); or
- is engaged in employment specified as an essential service by the Minister in a legislative instrument (paragraph 2.06AAB(4)(c)).

Paragraphs 2.06AAB(4)(a) and (b) provide a concession for SHEV holders who are not engaged in employment and/or who receive Special Benefit payments. Paragraph 2.06AAB(4)(c) provides a concession for SHEV holders who, during a concession period, work in an essential service in an area that is not a SHEV regional area (meaning that the work can be undertaken anywhere, including in a metropolitan area). Any period during which a SHEV holder undertakes work in a SHEV regional area would continue to count toward the 42 month requirement under current paragraph 2.06AAB(2)(a).

The periods that are counted towards the SHEV pathway in the initial concession period, which commenced on 1 February 2020, may be added to any periods in a subsequent concession period that are eligible to be counted in accordance with subregulation 2.06AAB(4) at that time. Alternatively, if no periods may be counted from the initial concession period, the periods could potentially be accrued in one or more future concession periods, if specified.

Subregulation 2.06AAB(5) allows the Minister to make a determination, in a legislative instrument, for the purpose of paragraph 2.06AAB(4)(c). The Minister may therefore determine, under paragraph 2.06AAB(4)(c), employment that is an essential service.

## Part 5 – Subclass 485 (Temporary Graduate) visas

### *Migration Regulations 1994*

#### Item 34 – Paragraph 1229(3)(g) of Schedule 1

This item repeals and substitutes paragraph 1229(3)(g) of Schedule 1 to the Migration Regulations. The paragraph previously had the effect that all primary applicants for the Subclass 485 (Temporary Graduate) visa, and any family members making a combined application with the primary applicant, were required to be in Australia to make the application. This reflects the purpose of the Subclass 485 visa as a temporary visa granted to international students following successful completion of study in Australia.

The effect of the paragraph is that, during a concession period, primary applicants and family members making a combined application may be in Australia or outside Australia. However, if the application is made in Australia, the applicants must not be in immigration clearance. For the meaning of *concession period*, see Part 1 (COVID-19 concession period) of Schedule 1 to the COVID-19 Concessions Regulations, above.

The amendments cater for former international students who intended to apply for Subclass 485 visas in Australia but have not been able to do so because of travel restrictions imposed in response to the COVID-19 pandemic. A significant number of international students who completed their studies in 2019 have been unable to return to Australia because of travel restrictions. This amendment allows those applications to be made and processed, in anticipation of the easing of travel restrictions. Subclass 485 visas will be granted to allow a period of stay in Australia which commences on the date of first entry, so there will be no disadvantage caused to visa holders if the travel restrictions remain in place for a further period.

#### Item 35 – Paragraph 1229(4)(a) of Schedule 1

This item amends paragraph 1229(4)(a) of Schedule 1 to the Migration Regulations. The effect of the paragraph is, in summary, that in order to make a valid application, an applicant seeking to satisfy the primary criteria is required to hold, or have held, an eligible student visa in the six months immediately before making the application. This reflects the intention that the Subclass 485 visa is only available to international students who have completed their studies within the previous six months.

The amendment provides that the requirement to apply within six months only applies to primary applicants who are in Australia when they make the application.

This supports the amendment at item 34 to allow applications to be made while outside Australia during a concession period. As applications from outside Australia are only possible from the commencement of the COVID-19 Concessions Regulations on 19 September 2020, it may be over six months since the expiry of student visas held by potential Subclass 485 applicants affected by the COVID-19 travel restrictions. The amendment removes the barrier to applications that might otherwise arise from paragraph 1229(4)(a).

The amendment should be read in conjunction with items 36 and 37 below, which allows the ‘Australian study requirement’ to be satisfied up to 12 months before the application is made.

### Item 36 – Clause 485.221 of Schedule 2

This item repeals and substitutes clause 485.221. The effect of clause 485.221 is that applicants for the grant of a Subclass 485 visa in the Graduate Work stream are required to satisfy the Australian study requirement (ASR) in the period of six months immediately before the application is made. The ASR, which is set out in regulation 1.15F of the Migration Regulations, is met when all academic requirements for the award are completed.

The effect of the substituted clause is that the requirement to satisfy the ASR, within six months immediately before making the Subclass 485 visa application, is qualified so that the requirement can be satisfied within 12 months immediately preceding the application if:

- the applicant was outside Australia for all or part of the period commencing on 1 February 2020 and ending on 19 September 2019; and
- the Minister is satisfied that the applicant was unable to apply within six months of satisfying the ASR because of that absence from Australia.

The amendment ensures that applicants who satisfied the ASR in late 2019 or early 2020 are able to satisfy clause 485.221 if they apply from outside Australia from 19 September 2020 and they were affected by COVID-19 travel restrictions. The clause refers to being outside Australia between specified dates (1 February 2020 to 19 September 2020), rather than referring to being outside Australia during a concession period, because the ASR concession does not need to operate in the future. From 19 September 2020, it is possible to apply for Subclass 485 visas from outside Australia during a concession period (see item 34 above). Accordingly, the enforced delay in applying for the Subclass 485 visa, which has occurred during 2020 because of the COVID-19 travel restrictions, will not occur after 19 September 2020. International students who may be affected by ongoing or future travel restrictions will be able to apply for Subclass 485 visas from outside Australia during a concession period, and will be required to do so within six months of satisfying the ASR.

### Item 37 – Subclause 485.231(3) of Schedule 2

This item repeals and substitutes subclause 485.231(3). The effect of subclause 485.231(3) is that applicants for the grant of a Subclass 485 visa in the Post-Study Work stream are required to satisfy the Australian study requirement (ASR) in the period of six months immediately before the application is made. The ASR, which is set out in regulation 1.15F of the Migration Regulations, is met when all academic requirements for the award are completed.

The effect and purpose of the amendment are the same as the amendment in item 36 above. Please refer to the description of the effect and purpose set out in that item.

### Item 38 – Subclauses 485.411(1) and (2) of Schedule 2

This item repeals subclauses 485.411(1) and (2) of Schedule 2, and substitutes subclause 485.411(1). The effect of clause 485.411 is that all primary applicants for the Subclass 485 (Temporary Graduate) visa, and any family members who make a combined application with the primary applicant, are required to be in Australia for the visa to be granted. Family members who apply later, to join a primary Subclass 485 visa holder, may be in Australia or outside Australia.

The effect of clause 485.411 as amended is that:

- if the visa is granted during a concession period, primary applicants may be in Australia or outside Australia, but not in immigration clearance;
- if the visa is applied for from outside Australia during a concession period, and the concession period has ended, primary applicants may be in Australia or outside Australia, but not in immigration clearance;
- in all other cases, the primary applicant must in Australia but not in immigration clearance; and
- in all cases (regardless of whether it is a concession period) family members who satisfy the secondary visa criteria may be in Australia or outside Australia, but not in immigration clearance.

The amendment retains the default position that the Subclass 485 visa is granted to international students in Australia following the completion of their studies, and also caters for international students who are outside Australia and are affected by COVID-19 travel restrictions. The amendments permitting visa grant to applicants who are outside Australia complement the amendments made by item 34 above, which allows the visa application to be made from outside Australia.

## **Part 6 – Application and transitional provisions**

### ***Migration Regulations 1994***

#### **Item 39 – In the appropriate position in Schedule 13**

This item inserts Part 91 (Amendments made by the Migration Amendment (COVID-19 Concessions) Regulations 2020) in Schedule 13 (Transitional Arrangements) to the Migration Regulations. Part 91 inserts application and transitional provisions related to the amendments made by the COVID-19 Concessions Regulations.

As a preliminary comment, it is noted that to the extent that any of the amendments made by the COVID-19 Concessions Regulations deal with matters occurring before the commencement of the regulations, this is appropriate and permissible under section 12 of the *Legislation Act 2003*. Subsections 12(1A) and 12(2) provide:

#### *Retrospective commencement*

*(1A) Despite any principle or rule of common law, a legislative instrument or notifiable instrument may provide that the instrument, or a provision of the instrument, commences before the instrument is registered.*

#### *Retrospective application*

*(2) However, if a legislative instrument or notifiable instrument, or a provision of such an instrument, commences before the instrument is registered, the instrument or provision does not apply in relation to a person (other than the Commonwealth or an authority of the Commonwealth) to the extent that as a result of that commencement:*

- (a) *the person's rights as at the time the instrument is registered 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 the instrument is registered.*

No provision in the COVID-19 Concessions Regulations commences before registration on the Federal Register of Legislation. To the extent the amendments deal with matters occurring before the commencement of the regulations, this is advantageous to any affected person. For example, many of the amendments refer to a concession period, which begins on 1 February 2020, for the purpose of assisting visa holders and former visa holders who may have been adversely affected by the economic conditions and travel restrictions resulting from the COVID-19 pandemic. For the meaning of *concession period*, see Part 1 (COVID-19 concession period) of Schedule 1 to the COVID-19 Concessions Regulations, above.

There is no disadvantageous impact on any person's rights and no liabilities are imposed on any person in respect of anything done or omitted to be done before the instrument is registered.

New Part 91 has two clauses as set out below.

### **9101 – Operation of Parts 2, 3 and 4 of Schedule 1**

Subclause 9101(1) provides that the amendments made by Part 2 (Subclass 887 (Skilled—Regional) visas), Part 3 (Subclass 888 (Business Innovation and Investment (Permanent)) visas), and Part 4 (Subclass 790 (Safe Haven Enterprise) visas) of Schedule 1 to the COVID-19 Concessions Regulations apply in relation to an application for a visa made on or after 19 September 2020.

In relation to Part 2 and Part 3, subclause 9101(1) is appropriate because the concessions provided by those items, in response to the COVID-19 pandemic, relate to visa application requirements and visa criteria that must be satisfied at the time of application. An applicant who applies before 19 September 2020 can only do so on the basis that they meet the relevant application requirements, and time of application visa criteria, which apply at the time the application is made.

In relation to Part 4, subclause 9101(1) is appropriate because, in accordance with section 46A of the Migration Act, a valid application can only be made after an applicant satisfies the prescribed employment, educational or social security benefit requirements. The fact that the concession period commenced on 1 February 2020 ensures that the circumstances of SHEV holders, and former holders, during the COVID-19 pandemic are taken into account in accordance with the amendments made by Part 4.

The purpose of the concessions is to assist applicants who are impacted by the COVID-19 pandemic and who apply for a visa from the commencement of the COVID-19 Concessions Regulations on 19 September 2020. The concessions reflect what has occurred during the pandemic, because the concession period is defined to commence on 1 February 2020, and the benefit of the concessions is available to all eligible applicants who apply from 19 September 2020.

Subclause 9101(2) provides that the amendment to regulation 5.19C (made by item 10 of Part 3 of Schedule 1 to these Regulations) is taken, for the purposes of paragraph (b) of visa

condition 8557, to have been in force when specified Subclass 188 (Business Innovation and Investment (Provisional)) visas were granted.

Paragraph (b) of visa condition 8557 provides that, if the visa was granted on the basis of a complying significant investment within the meaning of regulation 5.19C as in force at a particular time, the visa holder must hold a complying significant investment, within the meaning of regulation 5.19C as in force at that time, for the whole of the visa period.

Subclause 9101(2) ensures that a holder of a Subclass 188 visa in the Significant Investor stream or the Significant Investor Extension stream, that was granted before 1 July 2019, who withdraws or cancels part of an investment in accordance with the amendments to regulation 5.19C, is not thereby in breach of visa condition 8557. The amendment is necessary because visa condition 8557 operates on the basis of the meaning of regulation 5.19C as in force when the visa was granted.

The application of this amendment to investments held by the holder of a Subclass 188 visa in a relevant stream granted before 1 July 2019 is consistent with the amendments made by items 18 and 27, which amend the eligibility criteria for the grant of a Subclass 188 visa in the Significant Investor Extension stream and the Subclass 888 visa in the Significant Investor stream. As explained above, the concession is restricted to visa holders whose Subclass 188 visas were granted before 1 July 2019 because those visa holders have shown commitment to investing in Australia by retaining the full investment at least until the beginning of the concession period (1 February 2020).

## **9102 – Operation of Part 5 of Schedule 1**

Subclause 9102(1) provides that the amendments made by items 34 to 37 of Part 5 (Subclass 485 (Temporary Graduate) visas) of Schedule 1 to the COVID-19 Concessions Regulations apply in relation to an application for a visa made on or after 19 September 2020. This is appropriate because the concessions provided by those items, in response to the COVID-19 pandemic, relate to visa application requirements and visa criteria that must be satisfied at the time of application. An applicant who applies before 19 September 2020 can only do so on the basis that they meet the relevant application requirements, and time of application visa criteria, that apply at the time the application is made. The concessions are intended to assist applicants who are impacted by the COVID-19 pandemic travel restrictions and who apply for a visa from the commencement of the COVID-19 Concessions Regulations on 19 September 2020.

Subclause 9102(2) provides that the amendments made by item 38 of Part 5 (Subclass 485 (Temporary Graduate) visas) of Schedule 1 to the COVID-19 Concessions Regulations apply in relation to an application for a visa, whether made before, on, or after 19 September 2020. Item 38 amends clause 485.511 to allow for Subclass 485 visas to be granted to applicants who are outside Australia during a concession period, or after the concession period ends if the application was made during a concession period. It is appropriate to apply this amendment to visa applications made before the commencement date, because some applications may have been made in Australia by applicants who then travelled temporarily overseas and have not been able to return because of COVID-19 travel restrictions. Applying the amendment to this cohort is not a retrospective amendment, as it only applies to decisions to grant visas from 1 September 2019. The amendment provides a clear benefit to the applicants and is appropriate for that reason.