

**EXPLANATORY STATEMENT***Migration Regulations 1994***Migration (IMMI 17/045: Specification of Training Benchmarks and Training Requirements) Instrument 2017**

*(Paragraphs 2.59(d), 2.68(e), subregulations 2.87B(2), 2.87B(3))*

1. Instrument IMMI 17/045 is made under paragraphs 2.59(d), 2.68(e), and subregulations 2.87B(2) and 2.87B(3) of the *Migration Regulations 1994* (the Regulations).
2. The instrument operates to specify Training Benchmarks A and B which set out the training benchmarks and training requirements for the purposes of the provisions listed above. The instrument specifically provides:
  - a. for the purposes of Training Benchmark A, the requirements a training fund must meet, in particular excluding funds that offer commissions or refunds for failed visa applications;
  - b. the types of expenditure on training that are acceptable for the purposes of Training Benchmark B; and
  - c. the types of expenditure that are to be included when calculating payroll, including where contractors are used and where salaries are not paid to business owners.
3. The purpose of the instrument is to clarify policy settings for the training benchmarks and training requirements so that a nominator or sponsor has a clear understanding of those training requirements. The purpose is also to address integrity concerns with the training benchmarks and training requirements by amending the types of applicable expenditure. Those integrity changes include:
  - a. specifying in the instrument the types of expenditure that are to be included when calculating payroll;

- b. for the purposes of Training Benchmark A:
    - i. incorporating the types of training funds that may be used to meet the training benchmark requirement; and
    - ii. specifying that funds that offer commissions or refunds for failed immigration applications do not meet the requirements; and
  - c. for the purposes of Training Benchmark B:
    - i. clarifying that the payments for scholarships for non-employees is not acceptable expenditure; and
    - ii. providing that a trainer's salary is acceptable expenditure only when the person is engaged solely as a trainer and clarifying what type of on-the-job training is acceptable expenditure.
4. This instrument is prospective so it will only apply to nominations or standard business approvals lodged on or after commencement.
  5. The instrument specifies matters previously addressed in Migration (Specification of Training Benchmarks and Training Requirements) Instrument 2013 (IMMI 13/030) (F2013L01236). IMMI 13/030 is repealed by Migration (IMMI 17/075: Repeal of Training Benchmarks and Training Requirements) Instrument 2017 which commences on 1 July 2017. The matters in regard to 5.19(4)(h)(i)(B)(I) that were previously included in IMMI 13/030 are now provided for in Migration (IMMI 17/074: Specification of Training Requirements) Instrument 2017.
  6. No consultation was undertaken as the instrument incorporates existing policy guidance related to the previous instrument and addresses integrity concerns with the types of allowable expenditure. It is anticipated that this reform will be addressed in the future as part of stakeholder engagement about strengthening the integrity and quality of Australia's temporary and permanent employer sponsored skilled migration programmes.

7. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 21946).
8. Under section 42 of the *Legislation Act 2003*, the instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been provided.
9. The instrument commences on 1 July 2017.

## Statement of Compatibility with Human Rights

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

### Specification of Training Benchmarks and Training Requirements

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Legislative Instrument

Regulation 2.59 and 2.68 of the *Migration Regulations 1994* (the Regulations) require the standard business sponsor for a Subclass 457 (Temporary Work (Skilled)) visa (457 visa) to meet Training Benchmark A or Training Benchmark B. Clause 186.233 of Schedule 2 to the Regulations requires that an applicant for a visa under the direct entry stream of the Subclass 186 (Employer Nomination Scheme) visa was nominated in an application for approval that seeks to meet the requirements of subparagraph 5.19(4)(h)(i) of the Regulations. Subparagraph 5.19(4)(h)(i) includes the requirement to meet training benchmarks specified in a legislative instrument.

For the purposes of the subclass 457 and 186 visas, the training benchmarks are specified in legislative instrument IMMI 13/030 ‘Specification of Training Benchmarks and Training Requirements’. Instrument IMMI 13/030 is revoked by the new Migration (IMMI 17/075: Repeal of Training Benchmarks and Training Requirements) Instrument 2017’ and replaced by the new Migration (IMMI 17/045: ‘Specification of Training Benchmarks and Training Requirements) Instrument 2017’ and the new Migration (IMMI 17/074: ‘Specification of Training Requirements) Instrument 2017’.

Under the current legislative instrument, IMMI 13/030, Training Benchmark A is prescribed as:

Recent expenditure, by the business, to the equivalent of at least 2% of the payroll of the business, in payments allocated to an industry training fund that operates in the same industry as the business.

Training Benchmark B is prescribed as:

Recent expenditure, by the business, to the equivalent of at least 1% of the payroll of the business, in the provision of training to employees of the business.

Expenditure that can count towards this benchmark includes:

- paying for a formal course of study for the business’s employees who are Australian citizens and Australian permanent residents or for TAFE or University students, as part of the organisational training strategy
- funding a scholarship in a formal course of study approved under the Australian Qualifications Framework for the business’s employees who are Australian citizens and Australian permanent residents or, for TAFE or University students, as part of the organisational training strategy
- employment of apprentices, trainees or recent graduates on an ongoing basis in numbers proportionate to the size of the business

- employment of a person who trains the business's Australian employees who are Australian citizens and Australian permanent residents as a key part of their job
- evidence of payment of external providers to deliver training for Australian employees
- on-the-job training that is structured with a timeframe and clearly identified increase in the skills at each stage, and demonstrating:
  - the learning outcomes of the employee at each stage;
  - how the progress of the employee will be monitored and assessed;
  - how the program will provide additional and enhanced skills;
  - the use of qualified trainers to develop the program and set assessments; and
  - the number of people participating and their skill/occupation.

Expenditure that cannot count towards this benchmark includes training that is:

- delivered on-the-job, other than on the job training which meets the requirements outlined above under the heading 'expenditure that can count towards this benchmark'
- confined to only one or a few aspects of the businesses broader operations, unless the training is in the primary business activity
- only undertaken by persons who are not Australian citizens or permanent residents
- only undertaken by persons who are principals in the business or their family members
- only relating to a very low skill level having regard to the characteristic and size of the business.

The new Instrument IMMI 17/045 differs from Instrument 13/030 because it:

- incorporates policy guidelines from the Department of Immigration and Border Protection 'Procedural Instruction (PI) - Temporary Work (Skilled) visa (subclass 457) – sponsorships' concerning -
  - the definitions of payroll and recent expenditure;
  - the types of funds that may be used to meet the requirement of Training Benchmark A;
  - the types of expenditure that are not acceptable for the purposes of meeting Training Benchmark A;
- expands Training Benchmark A to cover industry training funds that operate in the same or a related industry as the business;
- amends the types of expenditure that are or are not acceptable for the purpose of Training Benchmark B by –

- clarifying that Training Benchmark B relates to training provided to employees;
- removing on-the-job-training as an acceptable type of expenditure;
- incorporating the policy guideline that the purchase of an eLearning platform or standalone training software is acceptable expenditure; and
- providing that expenditure on an employee who trains Australian citizen and permanent resident employees is acceptable where the trainer is engaged solely in that role rather than having training as a key role of their job.

### **Human rights implications**

This legislative amendment specifies the training that must be provided to Australian citizens and permanent residents by employers seeking to sponsor a foreign worker for a 457 visa or nominate a foreign worker for a 186 visa. Initiatives which improve training opportunities and outcomes for Australian citizens and permanent residents engage Articles 6.1 and 6.2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 6.1 of ICESCR recognizes:

*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 6.2 of ICESCR states that:

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

Australia recognises the ‘right to work’ under Article 6.1 in relation to Australian citizens and permanent residents. Making the training obligations to Australian citizens and permanent residents a part of the sponsorship and nomination framework is a mechanism that promotes training across a broad range of industries and occupations. The measure positively engages Articles 6.1 and 6.2 of the ICESCR as it is a mechanism for Australia to comply with these rights.

### **Conclusion**

The legislative instrument is compatible with human rights. It does not limit any of Australia’s human rights obligations and it promotes the training of Australian citizens and permanent residents in support of Article 6 of the ICESCR.

**The Hon. Peter Dutton MP, Minister for Immigration and Border Protection**