EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (Specification of Occupations) Regulations 2017

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 which are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act.

The *Migration Amendment (Specification of Occupations) Regulations 2017* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to:

- clarify the power of the Minister to specify, in a legislative instrument, the occupations which may be nominated, and the applicability of those occupations to identified persons, in relation to four visas: the Subclass 186 (Employer Nomination Scheme) visa, the Subclass 187 (Regional Sponsored Migration Scheme) visa, the Subclass 407 (Training) visa, and the Subclass 457 (Temporary Work) (Skilled) visa. The changes allow the specification of occupations, as well as the applicability of occupations to identified persons, to include reference to a wide range of matters including with respect to the nominator, the nominee, the occupation and to circumstances in which the occupation is undertaken; and

- provide that, in relation to an instrument made for the purpose of paragraph 2.72(10)(aa) of the Migration Regulations, which relates to nominations by standard business sponsors for the purpose of the Subclass 457 (Temporary Work) (Skilled) visa, a legislative instrument may specify that the instrument applies to nominations made on or after the day the instrument commences, or made and not finally determined before the day the instrument commences.

The Regulations are authorised by the provisions in the Migration Act listed at Attachment A.

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

Details of the Regulations are set out in Attachment C.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulations. No Regulation Impact Statement is required. The OBPR consultation reference is 21681.

No further consultation was undertaken because these amendments do not substantially alter existing arrangements. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act) which envisages consultations where appropriate and reasonably practicable. In addition, there have been extensive public consultations since 18 April 2017 in relation to the reform of the subclass 457 visa programme, and associated changes to occupation lists for the visas comprising the skilled migration programme.

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

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

The Regulations commence on 1 July 2017.

ATTACHMENT A

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 in the *Migration Act 1958* may be relevant:

- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;

- section 140E, which provides that the Minister must approve a person as a sponsor in relation to one or more prescribed classes if prescribed criteria are satisfied;

- subsection 140GB(1), which provides that an approved sponsor may nominate an applicant, or proposed applicant, for a visa of a prescribed kind in relation to the applicant or proposed applicant's proposed occupation or program or activity to be carried out;

- subsection 140GB(2), which provides that the Minister must approve an approved sponsor's nomination if prescribed criteria are satisfied; and

- Subsection 504(2), which provides that section 14 of the *Legislation Act 2003* does not prevent, and has not prevented, regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the commencement of the regulations.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Migration Amendment (Specification of Occupations) Regulations 2017

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 Legislative Instrument

The purpose of the *Migration Amendment (Specification of Occupations) Regulations 2017* is to amend the *Migration Regulations 1994* (the Migration Regulations) to clarify the power of the Minister to specify, in a legislative instrument, the occupations which may be nominated, and the applicability of those occupations to identified persons, in relation to four visas. These visas are the Subclass 186 (Employer Nomination Scheme) visa, the Subclass 187 (Regional Sponsored Migration Scheme) visa, the Subclass 407 (Training) visa, and the Subclass 457 (Temporary Work) (Skilled) visa. The changes allow the specification of occupations to be qualified by reference to a wide range of matters (that would be specified in the instrument), including the nature of the tasks to be undertaken by the visa holder and the size and location of the employing business.

The amendments will also provide that, in relation to nominations for the purpose of the Subclass 457 (Temporary Work) (Skilled) visa, a legislative instrument made pursuant to the expanded specification power may specify that the instrument applies to nominations made before or after the commencement date of the instrument.

Human rights implications

The proposed Legislative Instrument has been assessed against the seven core international human rights treaties. The amendments provide that the Minister for Immigration and Border Protection can specify occupations, and the applicability of those occupations to identified persons, for the purpose of nominations and applications for certain visas.

These amendments engage Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2 of the International Covenant on Economic, Social and Cultural rights (ICESCR) which set out the rights of equality and non-discrimination. They do so because they provide for different treatment on the basis of national origin, that is, on the basis that visa applicants are not Australian citizens.

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

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

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

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

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

> *The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*
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> *Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.*

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does so on the basis of reasonable and objective criteria. The aim of the skilled migration programme is to maximise the benefits of migration to the Australian economy. The aim of the Training (subclass 407) visa programme is to undertake workplace-based training or participate in a professional development training programme in Australia.

For those persons who are in Australia and who wish to apply for a Temporary Work (Skilled) (457), Employer Nomination Scheme (subclass 186) or Regional Sponsored Migration Scheme (subclass 187) visa while in Australia, the right to work may additionally be engaged. 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 to provide that the Minister may specify occupations, as well as the applicability of occupations to identified persons, for the purposes of nominations and visa applications, are reasonable and necessary because they allow the Minister the flexibility and precision required to regularly amend the occupation lists to reflect Australia's labour market needs. The ability to include greater detail in the legislative instrument will also support the integrity of the skilled visa programme by ensuring only those applicants and businesses who meet the necessary requirements will have access to these visas. The ability to adapt the occupations lists to Australia's labour market needs and maintain the integrity of the skilled migration programme is critical to the delivery of Australia's migration programme.

The amendments will not prevent any current visa holders of subclass 457, 407, 186 and 187 visas, from accessing work or impede their right to work because they will retain the current permission to work provided by their existing visa.

Conclusion

This Legislative Instrument is compatible with human rights. Where the amendments engage Australia's human rights obligations in relation to non-discrimination and the right to work, those limitations are reasonable, necessary, and proportionate to achieve the legitimate objectives. These objectives are to contribute to a prosperous Australian economy by maximising the economic benefit of the skilled migration programme, and to maintain the integrity of the Australian migration programme.

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

ATTACHMENT C

Details of the *Migration Amendment (Specification of Occupations) Regulations 2017*

Section 1 – Name

This section provides that the title of the Regulations is the *Migration Amendment (Specification of Occupations) Regulations 2017* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence on 1 July 2017.

The purpose of this section is to provide for when the amendments made by the Regulations commence.

Section 3 – Authority

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

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

Section 4 – Schedules

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

The effect of this section is that the *Migration Regulations 1994* (the Migration Regulations) are amended as set out in the applicable items in the Schedule to the Regulation.

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

Schedule 1 – Amendments

Migration Regulations 1994

Note: Some provisions in the Migration Regulations discussed below use the term 'instrument in writing' and other provisions use the term 'legislative instrument'. This reflects a change in drafting style. The current term is 'legislative instrument'. There is no difference in meaning between the terms as used in the Migration Regulations.

Items 1 and 2 – Paragraph 2.72(10)(AA); After subregulation 2.72(10)

Regulation 2.72 sets out the criteria for approval of nominations by employers, who are approved as 'standard business sponsors', for the purpose of applications for the Subclass 457 (Temporary Work) (Skilled) visa (Subclass 457). Standard business sponsors may nominate a

person in relation to an occupation specified in an instrument in writing made by the Minister under paragraph 2.72(10)(aa). The use of instruments for this purpose is authorised by subsection 504(2) of the Migration Act.

Items 1 and 2 amend regulation 2.72 of the Migration Regulations to ensure that the Minister has authority to specify the applicability of occupations to identified persons in a legislative instrument for the purpose of this regulation. These specifications of applicability of occupations have been described as 'caveats' in Departmental policy documents and communications.

A wide range of matters relating to the applicability of occupations to identified persons may be specified. The Minister is given complete flexibility to specify occupations subject to any qualifications he considers appropriate. This flexibility is required to preserve the integrity of the temporary skilled work programme and provide a calibrated response to the needs of the Australian labour market.

New sub regulation 2.72(10AAA) has the effect that the qualifications that may be imposed include, but are not limited to, qualifications dealing with the following matters:

- the person who nominated the occupation;
- the person identified in the nomination;
- the occupation;
- the position in which the identified person is to work;
- the circumstances in which the occupation is undertaken; and
- the circumstances in which the person is to be employed in the position.

Items 3 and 4 – After paragraph 2.72B(3)(b); After subregulation 2.72B(3)

These items mirror the amendments made in items 1 and 2, for the purpose of nominations of occupations for the Subclass 407 (Training) visa (Subclass 407).

The Subclass 407 visa caters for persons wishing to undertake occupational training in Australia, including approved programs of occupational training to enhance skills. Persons seeking a visa to undertake a program of occupational training must be nominated by a temporary activities sponsor. Sponsors may nominate a person in relation to an occupation specified in a legislative instrument made by the Minister under paragraph 2.72B(3)(b) of the Regulations.

The amendment ensures that the Minister has authority to specify the applicability of occupations to nominees in a legislative instrument for the purpose of this regulation.

New subregulation 2.72B(3A) has the effect that the matters for the purpose of specifying the applicability of occupations may include, but are not limited to, the following matters:

- the person who nominated the program of occupational training;
- the nominee;
- the occupation;
- the program of occupational training;
- the circumstances in which the occupation is undertaken; and

- the circumstances in which the program of occupational training is undertaken.

Items 5 – 7 – After sub-subparagraph 5.19(4)(h)(i)(A); After sub-subparagraph 5.19(4)(h)(ii)(D); After subregulation 5.19(4)

These items mirror the amendments made in items 1 and 2, for the purpose of nominations of occupations for the Direct Entry streams in the Subclass 186 (Employer Nomination Scheme) visa (Subclass 186) and the Subclass 187 (Regional Sponsored Migration Scheme) visa (Subclass 187).

The Subclass 186 and Subclass 187 visas are permanent visas for persons nominated by persons operating businesses in Australia. Subclass 186 implements the Employer Nomination Scheme. Subclass 187 caters for businesses in regional Australia and implements the Regional Sponsored Migration Scheme.

For Subclass 186, the tasks to be performed in the nominated position must correspond to the tasks of an occupation specified by the Minister in an instrument in writing under sub-subparagraph 5.19(4)(h)(i)(A).

For Subclass 187, the tasks to be performed in the nominated position must correspond to the tasks of an occupation specified by the Minister in an instrument in writing under sub-subparagraph 5.19(4)(h)(ii)(D).

There are separate specification powers as the specified occupation lists may be different, reflecting the different labour market needs of regional Australia.

The effect of the amendments is the same as noted above at items 1 and 2 in relation to Subclass 457. The amendments ensure that the Minister has a broad discretion to specify matters relating to the applicability of occupations to identified persons.

Item 8 – In the appropriate position in Schedule 13

This item inserts new Part 66 in Schedule 13 to the Migration Regulations. New clause 6601 has the effect that instruments made from 1 July 2017, to specify occupations for the purpose of nominations for Subclass 457 visas, may be expressed to apply to nominations made on or after the commencement date of the instrument, or to nominations made and not finally determined before the commencement date of the instrument, including in cases where there is a related visa application which was made before the instrument commenced.

The purpose of this amendment is to ensure that changes to the occupation list for the Subclass 457 visa may apply to all unfinalised nominations, whether these nominations are pending a decision by the Department or subject to merits review by the Administrative Appeals Tribunal. This reflects the need for the high volume Subclass 457 visa programme to be responsive to regular updates to the Government's assessment of employment needs and conditions in the Australian labour market. It enables the Government to prevent any further approval of nominations and related visa grants in cases where the identified occupation is no longer assessed as requiring overseas workers. The Migration Regulations provide for refunds of nomination fees and visa application charges in cases where a nomination or visa application cannot proceed because an occupation has been removed from the occupation list.