

EXPLANATORY STATEMENT

Migration Regulations 1994

Migration (IMMI 17/079: Repeal of Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 (IMMI 15/028)) Instrument 2017.

(subparagraph 2.72(10)(g)(iv), paragraph 457.223(4)(eb), paragraph 457.223(6)(a), subclause 457.223(11))

1. Instrument IMMI 17/079 is made under subparagraph 2.72(10)(g)(iv) of the *Migration Regulations 1994* (the Regulations), and paragraph 457.223(4)(eb), paragraph 457.223(6)(a), and subclause 457.223(11) of Schedule 2 to the Regulations.
2. The instrument repeals instrument repeals *Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 (IMMI 15/028)* (F2013L00563) in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the AIA). Subsection 33(3) of the AIA states that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
3. The matters previously addressed in IMMI 15/028 will now be addressed in Migration (IMMI 17/057: English Language Requirements for Subclass 457 visas) Instrument 2017 and Migration (IMMI 17/078: Time period for English language requirements for Subclass 457 nominations) Instrument 2017.
4. Instrument IMMI 17/057 will specify matters relating to the English language requirements for the Subclass 457 visa under paragraph 457.223(4)(eb), paragraph 457.223(6)(a), and subclause 457.223(11) of Schedule 2 to the Regulations. Instrument 17/078 will specify time periods for English language tests for the purpose of nominations, pursuant to subparagraph 2.72(10)(g)(iv) of the Regulations.
5. The purpose of IMMI 17/057 and IMMI 17/078 is to specify English language tests and scores, the time within which scores must be obtained, and the classes of persons who are exempt from the requirement to undertake English language tests.

6. No consultation was undertaken. IMMI 17/057 continues the previous policy settings, except that, for Subclass 457 visa applications made from 1 July 2017, there is no longer a general salary based exemption from English language testing. A limited exemption is provided for persons working in Australia for an overseas company or an associated entity of an overseas company, provided that the base salary is at least \$96,400.
7. IMMI 17/078 continues the previous policy setting in relation to the time period for obtaining required English language test scores.
8. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 21946).
9. Under section 10 of the *Legislation (Exemptions and other Matters) Regulation 2015*, the instrument making powers in paragraph 457.223(4)(eb), paragraph 457.223(6)(a), and subclause 457.223(11) of Schedule 2 to the Regulations are exempt from disallowance. The power under subparagraph 2.72(10)(g)(iv) of the Regulations is subject to disallowance under section 42 of the *Legislation Act 2003* and a Statement of Compatibility with Human Rights has been provided.
10. 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

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This disallowable 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

The *Migration Regulations 1994* ('the Regulations') set out the English language requirements for the grant of a Temporary Work (Skilled) (Subclass 457) visa ('subclass 457 visa').

The purpose of this Disallowable Legislative Instrument is to repeal Legislative Instrument *Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas 2015 (IMMI 15/028)*.

IMMI 15/028 will be replaced with *English Language Requirements for Subclass 457 visas (IMMI 17/057)* and *Time period for English language requirements for Subclass 457 nominations (IMMI 17/078)*.

The only change is the removal of the general salary based exemption to the English language requirement for subclass 457 visa applications made on and after 1 July 2017. Exemptions to the English language requirements will continue to apply for visa applicants who:

- have completed five years of consecutive full-time study in a secondary or tertiary institution where the instruction was delivered in English;
- hold a valid passport issued by the United Kingdom, the United States of America, Canada, New Zealand or the Republic of Ireland and are citizens of one of those countries;
- are nominated for an occupation that will be performed at a diplomatic or consular mission of another country or an Office of the Authorities of Taiwan located in Australia; or
- are working in Australia for an overseas company or an associated entity of an overseas company and will be paid a base salary of at least \$96,400.

Human rights implications

Article 6 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* is relevant. Article 6 provides:

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

Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

...only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in democratic society.

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

The [ICCPR] 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 [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

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

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 main objective of the English language requirement in the 457 visa criteria is to ensure that non-citizens seeking to live and work in Australia have minimum standards of English that will enable them to effectively perform the skilled work in relation to which they have been nominated for entry and stay in Australia.

The purpose of repealing the general salary based exemption to the English language requirements is to strengthen the integrity of the Subclass 457 programme and ensure that applicants have the required English language ability.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as, to the extent it may impact the ability of some non-citizens to obtain a temporary skilled work visa on the basis of language ability and hence work in Australia, those limitations are reasonable and objective and aimed at achieving purposes legitimate under the relevant treaties.