

EXPLANATORY STATEMENT

Migration Regulations 1994

**MIGRATION (IMMI 17/060: SPECIFICATION OF OCCUPATIONS – SUBCLASS
457 VISA) INSTRUMENT 2017**

(Paragraph 2.72(10)(aa))

1. Instrument IMMI 17/060 is made under paragraph 2.72(10)(aa) the *Migration Regulations 1994* (the Regulations).
2. The instrument IMMI 17/060 operates to specify occupations for the purposes of paragraph 2.72(10)(aa) in regard to the specification of occupations on the Medium and Long-term Strategic Skills List (MLTSSL) and the Short-term Skilled Occupation List (STSOL) for nominations that relate to a Subclass 457 – Temporary Work (Skilled) Visa (457 visa). Those occupations were previously specified in instrument IMMI 16/059.
3. The occupations that have been added to and removed from the MLTSSL and STSOL from the previous instrument IMMI 16/059 are based on the first regular review of occupations eligible for skilled visas. The changes made are a result of advice from Government departments and extensive consultation with industry. The amended occupation lists ensure that the entry of skilled foreign workers to Australia remains carefully calibrated to Australia's needs.
4. In addition, the instrument IMMI 17/060 provides for caveats, referred to as inapplicability conditions, in relation to specifications of those occupations limiting the breadth of the occupation specified for the purposes of satisfying the criteria for the relevant visa or nomination. The use of caveats has been expressly provided for in the *Migration Amendment (Specification of Occupations) Regulations 2017* which will amend the Regulations.
5. The effect of the application provision in section 9 of Part 3 of the instrument IMMI 17/060 is that it will apply in relation to nominations of occupations made on or after 1 July 2017 or made and not finalised before 1 July 2017. This is regardless of whether,

for a nomination in relation to an application for a 457 visa, the application was made before, on or after 1 July 2017. This provision is expressly provided for in *Migration Amendment (Specification of Occupations) Regulations 2017* and inserts regulation 6601 to the Regulations. It is noted that the Regulations provide for the refund of a fee in regard to a nomination in 2.73 and an application in 2.12F.

6. The instrument IMMI 16/059 (F2016C01004) is repealed by instrument IMMI 17/081. As mentioned above, instrument IMMI 16/059 previously specified matters for the purposes of 2.72(10)(aa).
7. Consultation was undertaken with the Department of Education and Training, the Department of Employment, the Department of Foreign Affairs and Trade, the Department of Industry, Innovation and Science, the Department of Health, the Department of Communications and the Arts, the Department of Infrastructure and Regional Development, the Department of Agriculture and Water Resources, the Australian Research Council and Austrade.
8. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference: 22495).
9. Under section 42 of the *Legislation Act 2003*, the instrument IMMI 17/060 is subject to disallowance and therefore a Statement of Compatibility with Human Rights is included at Attachment A.
10. This instrument commences on 1 July 2017.

Attachment A – Statement of Compatibility with Human Rights

Statement of Compatibility with Human Rights

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

Migration (IMMI 17/060: Specification of Occupations—Subclass 457 Visa) Instrument

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 Migration (IMMI 17/060: Specification of Occupations—Subclass 457 Visa) Instrument

The *Migration Regulations 1994* (‘the Migration Regulations’) set out requirements for the grant of a Temporary Work (Skilled) (Subclass 457) visa (‘subclass 457 visa’). One requirement is that the applicant be nominated by their employer. This Instrument (IMMI 17/060) specifies skilled occupations and Australian and New Zealand Standard Classification of Occupations (ANZSCO) codes for the assessment of nominations for skilled entry under the Migration Regulations.

The ANZSCO code is used by the Department of Immigration and Border Protection to ensure that applicants who wish to come to Australia as temporary skilled migrants nominate a skilled occupation for migration purposes.

This Instrument specifies the Medium and Long-term Strategic Skills List (MLTSSL) which provides eligible occupations and ANZSCO codes for the subclass 457 visa. Occupations on the MLTSSL are those identified by the Australian Government as being in shortage in the Australian labour market in the medium to long-term.

This Instrument also specifies the Short-term Skilled Occupation List (STSOL) which provides eligible occupations and ANZSCO codes for applicants who apply for the subclass 457 visa. Occupations on the STSOL are those identified by the Australian Government as being in critical demand in the Australian labour market, where suitably skilled Australian workers are in short supply.

The Instrument also includes qualifications (‘position caveats’) for certain occupations for the purpose of nominations and visa applications. A range of position caveats are specified to provide clarification for applicants, support regional Australia and ensure the integrity of this visa programme. These include, but are not limited to, caveats that limit the breadth of the occupation to certain industries, skills or tasks; require the position to be located in regional Australia; or specify a minimum salary. Position caveats are specified for the purposes of the

applicant satisfying the criteria for the visa or nomination and therefore ensuring that applicants are nominated for genuinely skilled positions.

Human rights implications

The Instrument has been assessed against the seven core international human rights treaties.

Neither the *International Covenant on Civil and Political Rights* (ICCPR) nor the *International Covenant on Economic, Social and Cultural Rights* (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.

Although there is a net increase in the number of skilled occupations available to subclass 457 visa applicants in this Instrument, 12 occupations have been removed. For those persons who are in Australia holding a subclass 457 visa working in one of those occupations, and who wish to apply for a subsequent subclass 457 visa while in Australia, the right to work may 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 removal of the 12 occupations does not prevent any current holder of a subclass 457 visa from accessing work or impede their right to work for the duration of that visa because they will retain the current permission to work provided by the existing visa. A subclass 457 visa holder who wishes to continue working in Australia in one of those 12 occupations upon the expiry of their visa may instead apply for any other visa with work rights for which they meet the requirements under the Migration Regulations.

It is reasonable and necessary that the Minister may amend the list of skilled occupations for the purposes of nominations and visa applications because it allows the Minister the flexibility and precision required to carefully tailor it to reflect Australia's labour market needs. The ability to tailor the occupations lists to Australia's labour market needs helps to meet the legitimate objective of strengthening Australia's economy through ensuring the integrity of Australia's migration programme.

The Instrument also specifies position caveats for certain occupations for applicants who apply for the subclass 457 visa. One position caveat specified in the Instrument excludes the nomination of positions for those certain occupations that are not located in regional Australia. This caveat is designed to support regional employers by providing access to occupations that reflect the labour demand and skills needs of regional economies.

This caveat engages Article 12 (1) of the International Covenant on Civil and Political Rights (ICCPR), which states:

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

Australia's international obligations mean that visa holders cannot be required to live or work in particular areas, but they may be encouraged to do so. Subclass 457 visa holders who choose to seek nomination by an employer in a regional area but do not wish to stay in that particular regional area may instead move to another regional area and continue to work for their nominating employer. In the case that they move to another regional area to work for a different nominating employer, the same process of re-nomination will apply as in any other case where a subclass 457 visa holder changes nominating employers. If a subclass 457 visa holder begins work in a regional area but subsequently wishes to work in an urban area, they are not prevented from doing so. A subclass 457 visa holder in this situation may instead apply for any other visa with work rights for which they meet the requirements under the Migration Regulations.

The regional Australia qualification is reasonable and necessary because it allows the Minister the flexibility and precision required to carefully tailor the occupation lists to reflect Australia's diverse labour market needs, which vary between regional and urban centres. The ability to tailor the occupation lists to Australia's labour market needs helps to meet the legitimate objective of contributing to Australia's overall economic prosperity.

Conclusion

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

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