

**EXPLANATORY STATEMENT***Migration Regulations 1994***MIGRATION (IMMI 18/004: SPECIFICATION OF OCCUPATIONS–SUBCLASS  
457 VISA) INSTRUMENT 2018***(Paragraph 2.72(10)(aa))*

1. Instrument IMMI 18/004 is made under paragraph 2.72(10)(aa) of the *Migration Regulations 1994* (the Regulations).
2. Instrument IMMI 18/004 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 17/060.
3. The occupations that have been added to and removed from the MLTSSL and STSOL compared to the previous instrument IMMI 17/060 and the changes to the ‘inapplicability conditions’ or caveats on these occupations, follow a regular six-monthly review by the Department of Jobs and Small Business of occupations eligible for skilled visas. The changes made are a result of advice from Government departments, labour market analysis and 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. This instrument is different from the instrument it replaces, IMMI 17/060, in the following respects:
  - The occupations of “horse breeder” (ANZSCO code 121316) and “management consultant” (ANZSCO code 224711) have been removed from the STSOL and added to the MLTSSL. A new inapplicability condition has been added to the occupation of “management consultant”. New condition 23 has been inserted in the table in section 9 of Part 2 of the instrument and provides that the position cannot have a nominated base salary of less than AUD90,000.

- The following inapplicability conditions have been added to the occupation of “management accountant” (ANZSCO code 221112): condition 6 (the position cannot be a clerical, bookkeeper or accounting clerk position); condition 19 (the position cannot be in a business that has an annual turnover of less than AUD1,000,000); and condition 21 (the position cannot be in a business that has fewer than 5 employees).
- The following inapplicability conditions have been added to the occupation of “taxation accountant” (ANZSCO code 221113): conditions 19 and 21.
- For the occupation of “supply and distribution manager” (ANZSCO code 133611), the inapplicability condition has changed from 19 to condition 20 (the position cannot be in a business that has an annual turnover of less than AUD1,000,000, and if the person is to be transferred to fill the position – the transfer is an intra-corporate transfer to which an international trade obligation applies).
- The following inapplicability condition has been added to the occupation of “accommodation and hospitality managers (nec)” (ANZSCO code 141999): condition 10 (the position cannot be located in regional Australia (within the meaning of subregulation 5.19(7) of the Regulations)).
- The occupations of “hair or beauty salon manager” (ANZSCO code 142114) and “building associate” (ANZSCO code 312112) have been removed from the STSOL. As a consequence, inapplicability condition 13 has been removed from the table in section 9 of Part 2 of the instrument as the only occupation to which it applied was the occupation of “hair or beauty salon manager”.
- The inapplicability condition 2 (the position cannot have a nominated base salary of less than AUD65,000) has been removed from the occupation of “recruitment consultant” (ANZSCO code 223112) and new condition 23 has been added, providing that the position cannot have a nominated base salary of less than AUD90,000.

- The occupations of “psychotherapist” (ANZSCO code 272314), “property manager” (ANZSCO code 612112) and “real estate representative” (ANZSCO code 612115) have been added to the STSOL. The occupations of “property manager” and “real estate representative” are subject to inapplicability conditions 2, 10, 19 and 21.
  - A typographical error has been corrected in item 12 of the table in section 9 of Part 2 of the instrument, providing at paragraph (d) that the occupation is inapplicable if the position is in a retail setting.
5. The effect of the application provision in section 10 of Part 3 of the instrument is that the instrument applies only in relation to nominations of occupations made on or after 17 January 2018.
  6. The instrument repeals the *Migration (IMMI 17/060: Specification of Occupations—Subclass 457 Visa) Instrument 2017* made under paragraph 2.72(10)(aa) of the Regulations and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act). Subsection 33(3) of the Acts Interpretation Act 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.
  7. The application provision in section 1 of Part 2 in Schedule 1 to the instrument provides that IMMI 17/060 will continue to apply in relation to a nomination of an occupation if the nomination is made before 17 January 2018. The effect of this provision is that IMMI 17/060 will be the instrument that applies to all visa applications (including those made on or after 17 January 2018) in those circumstances where the nomination of an occupation to which the visa application relates was made before 17 January 2018.
  8. The Department of Jobs and Small Business led this review, and consulted with the Department of Home Affairs as well as a number of other Government agencies, along with other stakeholders and industry representatives.

9. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference: 23086).
10. Under section 42 of the *Legislation Act 2003*, the instrument IMMI 18/004 is subject to disallowance and therefore a Statement of Compatibility with Human Rights is included at Attachment A.
11. This instrument commences on 17 January 2018.

**Attachment A****Statement of Compatibility with Human Rights**

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

**Migration (IMMI 18/004: Specification of Occupations—Subclass 457 Visa)  
Instrument 2018**

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 18/004: Specification of Occupations—Subclass 457 Visa)  
Instrument 2018**

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 18/004) repeals and replaces the previous instrument (IMMI 17/060) and specifies skilled occupations and Australian and New Zealand Standard Classification of Occupations (ANZSCO) codes for the assessment of applications under the relevant Migration Regulations.

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

The Short-term Skilled Occupation List (STSOL) and Medium and Long-term Strategic Skills List (MLTSSL) are designed to be dynamic and respond to changing labour market conditions. These lists are reviewed every six months by the Department of Jobs and Small Business (DJSB), based on labour market analysis and stakeholder consultation.

This instrument specifies the 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 has added two occupations to the MLTSSL from the STSOL as a result of the DJSB review: horse breeder (ANZSCO 121316) and management consultant (ANZSCO 224711).

This instrument also specifies the 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 shortage in the Australian labour market in the immediate to short-term. This instrument has added three occupations to the STSOL: psychotherapist (ANZSCO 272314), property manager (ANZSCO 612112) and real estate representative (ANZSCO 612115), and removed two occupations: hair or beauty salon manager (ANZSCO 142114) and building associate (ANZSCO 312112) from the STSOL as a result of the DJSB review.

The instrument also includes inapplicability conditions ('caveats') for certain occupations for the purpose of nominations. A range of caveats are specified to provide clarification for applicants and ensure the integrity of this visa program. These include, but are not limited to, caveats that limit the breadth of the occupation to certain industries, skills or tasks or specify a minimum salary. 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. This instrument adds one caveat specifying a minimum salary for recruitment consultant (ANZSCO 223112) and management consultant (ANZSCO 224711) and extends the application of other caveats to a number of occupations based on recommendations as a result of the DoE review as set out below:

- A new caveat has been added to the occupation of "management consultant" (ANZSCO 224711). New condition 23 has been inserted in the table in section 9 of Part 2 of the instrument and provides that the position cannot have a nominated base salary of less than AUD90,000;
- The following caveats have been added to the occupation of "management accountant" (ANZSCO 221112): condition 6 (the position cannot be a clerical, bookkeeper or accounting clerk position); condition 19 (the position cannot be in a business that has an annual turnover of less than AUD1,000,000); and condition 21 (the position cannot be in a business that has fewer than 5 employees);
- The following caveats have been added to the occupation of "taxation accountant" (ANZSCO 221113): conditions 19 and 21;
- For the occupation of "supply and distribution manager" (ANZSCO 133611), the caveat has changed from 19 to condition 20 (the position cannot be in a business that has an annual turnover of less than AUD1,000,000, and if the person is to be transferred to fill the position – the transfer is an intra-corporate transfer to which an international trade obligation applies);
- The following caveat has been added to the occupation of "accommodation and hospitality managers (nec)" (ANZSCO 141999): condition 10 (the position must be located in regional Australia (within the meaning of subregulation 5.19(7) of the Regulations));
- The occupations of "property manager" (ANZSCO 612112) and "real estate representative" are subject to caveats 2, 10, 19 and 21; and
- A typographical error has been corrected in item 12 of the table in section 9 of Part 2 of the instrument, providing at paragraph (d) that the occupation is inapplicable if the position is in a retail setting.

### **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 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, two 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 two 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 two 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 program.

The instrument also specifies caveats for certain occupations for applicants who apply for the subclass 457 visa. These caveats are reasonable and necessary because they allow the Minister the ability to tailor the occupation lists to Australia's labour market needs and help to meet the legitimate objective of contributing to Australia's overall economic prosperity.

One 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 Home Affairs and  
Minister for Immigration and Border Protection**