

EXPLANATORY STATEMENT*Migration Regulations 1994***MIGRATION (IMMI 18/033: SPECIFICATION OF INCOME THRESHOLD AND ANNUAL EARNINGS AND METHODOLOGY OF ANNUAL MARKET SALARY RATE) INSTRUMENT 2018**

(Subregulation 2.72(17), paragraphs 2.72(15)(b), 2.72(15)(d) and 2.79(1A)(b))

1. The instrument, IMMI 18/033 is made under the *Migration Regulations 1994* (the Regulations).
2. The instrument only applies to applications made on or after 18 March 2018.
3. The instrument operates to specify the minimum temporary skilled migration income threshold for the nominated occupation and the minimum annual earnings for the nominated occupation in relation to a holder of a Subclass 457 (Temporary Work (Skilled)) visa; a holder of a Subclass 482 (Temporary Skill Shortage) visa or an applicant or a proposed applicant for a Subclass 482 (Temporary Skill Shortage) Visa in the Short-term or Medium-term streams.
4. The instrument also operates to specify the method for determining the annual market salary rate for a nominated occupation under section 140GB of the *Migration Act 1958* or a nominated occupation under regulation 5.19 *Approval of nominated positions – Subclass 186 (Employer Nomination Scheme) visa and Subclass 187 (Regional Sponsored Migration Scheme) visa* of the Regulations.
5. The method for calculating the annual market salary rate depends on whether there is an Australian worker who is performing equivalent work for the relevant occupation. New section 7 provides the method for determining the annual market salary rate where an Australian worker is performing equivalent work. New section 8 provides the method of determining the annual market salary rate where there is not an Australian worker who is performing equivalent work.
6. The purpose of the instrument is to address changes to the Regulations by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*.

7. The Department of Home Affairs has engaged with external stakeholders since the announcement in developing the policy settings and considered feedback received. Some settings of the existing framework have been carried over to the Subclass 482 (Temporary Skill Shortage) visa without amendment, and have not been the subject of consultation.
8. These reforms were also informed by earlier reviews including: the 2014 Independent Review into the Integrity of the Subclass 457 programme; the 2016 Productivity Commission Inquiry Report: Migrant Intake into Australia; the 2016 Review of the Temporary Skilled Migration Income Threshold; and the 2016 Senate Inquiry A National Disgrace: The Exploitation of Temporary Work Visa Holders. These reviews were subject to extensive consultation processes, including: individuals; academics; bodies and businesses who use the employer sponsored skilled visa programs; migration agents; representatives of foreign governments; the Ministerial Advisory Council on Skilled Migration; and government departments and agencies. The consultation occurred well before the instrument was made. This accords with subsection 17(1) of the *Legislation Act 2003* which envisages consultations where appropriate and reasonably practicable.
9. A Regulation Impact Statement has been prepared in accordance with advice from the Office of Best Practice Regulation (OBPR). The OBPR Reference number is 21946.
10. 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.
11. The instrument commences on 18 March 2018.

Statement of Compatibility with Human Rights

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

Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) 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 Legislative Instrument

On 18 April 2017, the Government announced a range of changes to the employer sponsored temporary and permanent skilled work visa arrangements.

Pursuant to amendments to the *Migration Regulations 1994* (the Regulations), this instrument specifies new arrangements for ensuring visa applicants are provided with remuneration and employment conditions that are at least equivalent to what is, or would be, provided to an Australian worker performing the same work at the same location and repeals the current arrangements in instruments IMMI 13/028 and IMMI 09/113. The new arrangements will also extend to new visa subclasses.

This instrument specifies the temporary skilled migration income threshold (TSMIT) for the nominated occupation and the annual market salary rate (AMSR) for the nominated occupation in relation to an application for a:

- Temporary Skill Shortage (subclass 482) visa in the Short-term stream or Medium term stream; and
- Employer Nomination Scheme (subclass 186) visa; and
- Regional Skilled Migration Scheme (subclass 187) visa.

For an overseas worker nominated under section 140GB of the *Migration Act 1958* (the Act) or 5.19 of the Regulations, the AMSR and the nominee's guaranteed monetary earnings must be equal to or greater than the Temporary Skilled Migration Income Threshold (TSMIT). When the guaranteed monetary earnings are below TSMIT, there is the option to take into account non-monetary benefits where considered reasonable. Earnings has the same meaning under regulation 2.57A of the Regulations.

The method for calculating the annual market salary rate depends on whether there is an Australian worker who is performing equivalent work for the relevant occupation. Section 7 of this instrument provides the method for determining the annual market salary rate where an Australian worker is performing equivalent work. Section 8 provides the method of determining the annual market salary rate where there is not an Australian worker who is performing equivalent work.

The measures for the subclass 186 visa and the subclass 187 visa being implemented by schedule 1 to the Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 that relate to this instrument include:

- applying the AMSR framework, including the associated TSMIT to the Temporary Residence Transition and Direct Entry streams of the Subclass 186 and Subclass 187 visas. As per the recommendation of the May 2016 TSMIT review, this will address the discrepancy that exists between the temporary employer sponsored program and the Subclass 186 and 187 programs, and will ensure that permanent visa applicants must be provided with remuneration and employment conditions that are at least equivalent to what is, or would be, provided to an Australian worker performing the same work;
- provision to refuse a nomination if the decision maker is not satisfied that the business has the capacity to lawfully and actively operate for at least two years and employ the nominee for that period at no less than the AMSR;

The instrument also determines the income threshold, under regulation 2.72(15)(b) and 2.79(1A)(b) of the Regulations, for which an AMSR assessment is not required. This threshold is set at \$250,000 AUD. It is expected that persons being remunerated at this level are highly skilled and in high demand. As such, they are expected to be able to negotiate their own terms and conditions without additional oversight or intervention from the Department of Home Affairs, beyond ensuring that the nominated worker is actually in receipt of earnings to this level.

Human rights implications

The measures in the Legislative Instrument positively engage:

- the right to fair conditions of work under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- The right to an adequate standard of living under Article 11(1) of the ICESCR

Article 7 of the ICESCR provides:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

- (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
- (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;*

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

The instrument prescribes the manner in which the AMSR must be determined. This includes ensuring that the AMSR aligns with the remuneration of existing Australian workers in the same workplace, taking into account relevant fair work instruments, written advice from registered employer associations and/or unions, or reputable remuneration surveys. This ensures that an overseas worker's remuneration is at least equal to what is, or would be, provided to an Australian worker. By extension, this also helps to ensure that overseas workers are not undercutting the Australian labour market. This promotes the right to fair conditions of work for under Article 7 of the ICESCR for both overseas and Australian workers.

Article 11(1) of the ICESCR provides:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The instrument sets the TSMIT. The TSMIT is currently set at a level that is above the guaranteed minimum wage (in annual terms) for Australian workers in recognition that these skilled visa holders are unable to (in the case of subclass 482 visa holders), or have delayed (in the case of subclass 186 and 187 visa holders) access to the welfare system during their stay in Australia. This promotes the right to an adequate standard of living under Article 11(1) of the ICESCR for overseas workers.

To summarise, the TSMIT and the AMSR work in tandem to help ensure that

- overseas workers do not undercut the Australian labour market; and
- overseas workers are remunerated fairly; and
- overseas workers are remunerated sufficiently in order to maintain an adequate standard of living.

Conclusion

The Legislative Instrument is compatible with human rights because it promotes right to an adequate standard of living for overseas workers and the right to fair conditions at work for both overseas workers and Australian workers. The instrument does not limit any relevant human rights.

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Minister for Citizenship and Multicultural Affairs