

**EXPLANATORY STATEMENT**

*Migration Act 1958*

**MIGRATION (IMMI 18/058: SPECIFICATION OF OCCUPATIONS EXEMPT FROM LABOUR MARKET TESTING) REPEAL INSTRUMENT 2018**

*(Subsection 140GBC(4))*

1. The instrument, IMMI 18/058, is made under subsection 140GBC(4) of the *Migration Act 1958* (the Act).
2. The instrument repeals IMMI 13/137, *Specification Of Occupations Exempt From Labour Market Testing* (F2013l01952) under subsection 140GBC(4) of the Act, and in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (Interpretation Act). Subsection 33(3) of the 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.
3. The purpose of the instrument is to repeal IMMI 13/137 as it is no longer required.
4. The repeal of the instrument is part of a broad package of reforms for the employer sponsored skilled visa programs, announced by the Government on 18 April 2017. The reforms include replacing the Subclass 457 (Temporary Work (Skilled)) visa with the Subclass 482 (Temporary Skill Shortage) visa. 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 visa without amendment, and have not been the subject of consultation.
5. 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.
6. 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.

7. The instrument commences immediately after the commencement of the *Migration (IMMI 18/062: Amendment of IMMI 13/137) Instrument 2018*.

## Statement of Compatibility with Human Rights

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

### **Migration (IMMI 18/058: Specification of Occupations exempt from Labour Market Testing) Repeal 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**

This Legislative Instrument repeals IMMI 13/137. This repeal is part of a package of amendments announced on 18 April 2017 to the employer sponsored temporary and permanent skilled work visa arrangements. These visa arrangements allow sponsors (employers) to access genuine skilled overseas workers where an appropriately skilled Australian worker is unavailable by nominating their position for a visa. The broad purpose of the package of amendments is to:

- ensure that Australians have first priority for jobs in Australia;
- better meet Australia's skill needs;
- increase the quality and economic contribution of skilled migrants; and
- continue to support Australian businesses to access the critical skills they need if skilled Australian workers are not available.

Labour market testing (LMT), in relation to a nominated position, means testing of the Australian labour market to demonstrate whether a suitably qualified and experienced Australian citizen or Australian permanent resident is readily available to fill the position.

Currently, the *Migration Act 1958* requires that evidence of LMT must be provided with a nomination by a standard business sponsor unless:

- an exemption applies due to a major disaster;
- an exemption applies on the basis of the required skill level and occupation for a nominated position; or
- it would be inconsistent with Australia's international trade obligations.

The repeal of Legislative Instrument IMMI13/137 by this instrument means that occupations which are currently exempt from LMT on the basis of the required skill level and occupation for a nominated position, will be subject to the requirement to conduct LMT, for new nominations made after 18 March 2018. The other exemptions are unaffected.

#### **Human rights implications**

In requiring LMT for occupations which had previously been exempt from this requirement, this instrument engages the right to non-discrimination under 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), including as it relates to the right to work.

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 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.*

*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 on the basis of reasonable and objective criteria. The aim of the skilled entry program is to maximise the benefits of skilled entrants to the Australian economy. This includes channelling permanent skilled migrants into occupations that have been identified to be in the long-term strategic interest of the Australian economy, and restricting short-term temporary skilled migrants to occupations that are currently in shortage but for which there may not be a long-term requirement. Australia sets the requirements for the entry and conditions of stay for skilled migrants and temporary entrants on the basis of reasonable and objective criteria formulated through labour market analysis and stakeholder consultation.

Further, 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.*

The authority for the Government to grant work rights to non-citizens, and the authority to prescribe conditions or limitations on temporary non-citizens in respect of those work rights (such as requiring certain sponsors to conduct LMT before nominating a foreign worker

unless an exemption applies), are lawful as a matter of domestic law. The objective of these conditions and limitations is to ensure that Australian citizens and permanent residents have continued access to paid employment.

The limitations imposed by the labour market testing framework are legitimate and justified by Article 4, for the principal reason that they are for the "purpose of promoting the general welfare in a democratic society". In other words, the measure will ensure that persons who are in Australia permanently are given the opportunity to seek work before those seeking to work and live in Australia only on a temporary basis. Such a limitation, noting the discussion above, is permissible.

Similarly, for the reasons stated above, in order to give effect to Article 6 and Article 4 of ICESCR in relation to Australian citizens and permanent residents, the labour market testing framework is legitimate, reasonable and proportionate. Furthermore, it does not seek to preclude foreign nationals from entering and working temporarily in Australia, but rather conditions that ability with the reasonable and proportionate measures to ensure that employers first consider Australian workers for positions.

The measure in this Legislative Instrument is reasonable and proportionate to achieving the legitimate aims explained above and are therefore a permissible differentiation in the exercise of the right to work by certain non-citizens seeking to enter and work in Australia compared to Australian citizens and permanent residents.

## **Conclusion**

This instrument is compatible with human rights as it supports the right to work of Australian citizens and permanent residents. To the extent that it may limit the rights of certain foreign workers, the measure is legitimate, proportionate and reasonable.

**The Hon Alan Tudge MP, Minister for Citizenship and Multicultural Affairs**