

EXPLANATORY STATEMENT

Migration Regulations 1994

MIGRATION (IMMI 18/049: SPECIFICATION OF OCCUPATIONS AND ASSESSING AUTHORITIES FOR SUBCLASS 186 VISA) INSTRUMENT 2018

(Paragraph 5.19(8)(a), paragraph 5.19(8)(c), subregulation 5.19(11) and paragraph 186.234(2)(a))

1. The instrument, IMMI 18/049 is made under paragraph 5.19(8)(a), paragraph 5.19(8)(c), subregulation 5.19(11) and paragraph 186.234(2)(a) of Schedule 2 to the *Migration Regulations 1994* (the Regulations).
2. Regulation 5.19 of the Regulations provides, in part, for the nomination of positions for the purposes of applications for the Subclass 186 (Employer Nomination Scheme) visa. A nomination for the purpose of a Subclass 186 visa in the Temporary Residence Transition stream or the Direct Entry stream must identify an occupation that is specified in a legislative instrument at the time the nomination is made. Paragraph 186.234(2)(a) of Schedule 2 of the Regulations provides that an applicant for a Subclass 186 visa in the Direct Entry stream must, unless exempted, be assessed by an assessing authority specified in a legislative instrument as having skills that are suitable for the occupation.
3. Regulation 5.19 was repealed and substituted on 18 March 2018 by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*. The purpose of this legislative instrument is to specify occupations for the purposes of regulation 5.19 as in effect from 18 March 2018, and specify assessing authorities for the purpose of paragraph 186.234(2)(a).
4. Schedule 1 of this instrument repeals IMMI 18/005: *Migration (Specification of Occupations and Assessing Authorities—Subclass 186 Visa) Instrument 2018* (F2018L00045) in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*, which states 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.

5. Section 10 of this instrument provides that the instrument applies to applications for approval of nominations of positions made on or after 18 March 2018 and related Subclass 186 visa applications made on or after that date. The application provision in section 10 is complementary to, and consistent with, the transitional provisions for the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*, which are set out in clause 6705 of Part 67 of Schedule 13 to the Regulations. Subclause 6705(1) has the effect that regulation 5.19 as in effect prior to 18 March 2018, including instrument IMMI 18/005, continues to apply to applications for approval of nominations made prior to 18 March 2018. Corresponding provisions in the criteria for the Subclass 186 visa, as in effect prior to 18 March 2018, also continue to have effect for the purposes of those nominations (subclauses 6705(2) and 6705(3) of Part 67 of Schedule 13 to the Regulations).
6. In addition, section 11 of this instrument has the effect that IMMI 18/005 will continue to apply to nominations made between 17 January 2018, when that instrument came into effect, and 18 March 2018, and will apply to related visa applications. Section 11 overlaps with the subclauses of Part 67 of Schedule 13 to the Regulations noted above, however it serves the additional purpose of ensuring that the assessing authorities listed in IMMI 18/005 continue to be specified for the purpose of Subclass 186 visa applications linked to nominations made prior to 18 March 2018. That element of IMMI 18/005 is not saved by Part 67 of Schedule 13, because paragraph 186.234(2)(a) of Schedule 2 to the Regulations was not amended by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*. In addition, many of the assessing authorities are no longer listed in this instrument, because the corresponding occupations are no longer listed.
7. Compared with IMMI 18/005, this instrument:
 - a. applies the Medium and Long-term Strategic Skills List (MLTSSL) to both the Temporary Residence Transition stream and the Direct Entry stream. This ensures that temporary entrants who are seeking to migrate permanently to Australia hold an occupation that has been identified as required in Australia's labour market in the medium to long-term;
 - b. no longer provides access to occupations on the Short-term Skilled Occupation List or occupations previously available only for positions in regional Australia.

Occupations on the Short-term Skilled Occupation List are those identified as required in Australia's labour market only in the short-term. As part of the Government's reforms to skilled visas, from 18 March 2018 employers can only nominate workers in short-term occupations for temporary skilled visas;

- c. amends inapplicability conditions that referred to "base salary" to now refer to "annual earnings". The term "annual earnings" is used to reflect the introduction of a new framework for assessing the adequacy of the proposed remuneration of nominees for Subclass 186 visas. This framework is contained in paragraph 5.19(5)(o) and paragraph 5.19(9)(h) of the Regulations. The operation of the inapplicability conditions is unaffected by this change as 'base salary' (an undefined term) has the same meaning as 'annual earnings'. The definition of earnings in regulation 2.57A of the Regulations excludes amounts which cannot be determined in advance, such as non-guaranteed overtime, commissions and bonuses;
 - d. no longer applies inapplicability condition 1 concerning minimum work experience to any occupations in this instrument. This inapplicability condition is no longer required as all applicants for Subclass 186 visas are required to have three years of relevant work experience;
 - e. updates the meaning of the assessing authority "SPA" to "Speech Pathology Australia"; and
 - f. clarifies that the tasks of the specified occupation correspond to the tasks set out in ANZSCO.
8. The instrument notes in section 5 that ANZSCO is defined in the Regulations. Regulation 1.03 of the Regulations provides the following definition of ANZSCO: '*ANZSCO* has the meaning specified by the Minister in an instrument in writing for this definition.' The instrument made under 1.03 for the definition of ANZSCO is IMMI 18/051. Section 5 of IMMI 18/051 provides:

'For the purposes of regulation 1.03 of the Regulations, *ANZSCO* means the Australian and New Zealand Standard Classification of Occupations published by the Australian Bureau of Statistics, as in force on 18 March 2018.'

9. ANZSCO may be accessed on the Australian Bureau of Statistics website.
10. 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 Department of Home Affairs has engaged with external stakeholders since the announcement in developing the policy settings and considered feedback received.
11. 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 before the instrument was made. This accords with subsection 17(1) of the *Legislation Act 2003* which envisages consultations where appropriate and reasonably practicable.
12. A Regulation Impact statement has been prepared in accordance with advice from the Office of Best Practice Regulation (OBPR). The OBPR reference is 21946.
13. Under section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, the instrument is exempt from disallowance and therefore a Statement of Compatibility with Human Rights is not required.
14. The instrument commences on 18 March 2018.