

EXPLANATORY STATEMENT*Migration Regulations 1994***MIGRATION (LIN 19/050: SPECIFICATION OF OCCUPATIONS—SUBCLASS 407 VISA) INSTRUMENT 2019.***(Paragraph 2.72B(3)(b))*

1. The instrument is made under paragraph 2.72B(3)(b) to the *Migration Regulations 1994* (the Regulations).
2. The instrument repeals the *Migration (IMMI 18/050: Specification of Occupations – Subclass 407 Visa) Instrument 2018* (the old law) in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the AIA). Subsection 33(3) of the AIA 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 instrument operates to specify the skilled occupations applicable to an application, or proposed application, for a Subclass 407 (Training) visa (Subclass 407 visa). The specified occupations are allocated to three different lists being:
 - a. the Medium and Long-term Strategic Skills List (MLTSSL);
 - b. the Short-term Skilled Occupation List (STSOL); and
 - c. the Regional Occupation List (ROL).
4. The purpose of the instrument is to update the occupations included in the skilled occupations lists for the purposes of paragraph 2.72B(3)(b) of the Regulations. Specifically, changes from the old law in the instrument are as follows:
 - a. the following 27 occupations are no longer a part of the STSOL:
 - i. aquaculture farmer (ANZSCO code 121111);
 - ii. cotton grower (ANZSCO code 121211);
 - iii. fruit or nut grower (ANZSCO 121213);

- iv. grain, oilseed or pasture grower (Aus)/field crop grower (NZ) (ANZSCO code 121214);
- v. mixed crop farmer (ANZSCO code 121216);
- vi. sugar cane farmer (ANZSCO code 121217);
- vii. crop farmers (nec) (ANZSCO code 121299);
- viii. beef cattle farmer (ANZSCO code 121312);
- ix. dairy cattle farmer (ANZSCO code 121313);
- x. mixed livestock farmer (ANZSCO code 121317);
- xi. pig farmer (ANZSCO code 121318);
- xii. sheep farmer (ANZSCO code 121322);
- xiii. livestock farmers (nec) (ANZSCO code 121399);
- xiv. mixed crop and livestock farmer (ANZSCO code 121411);
- xv. arts administrator or manager (ANZSCO code 139911);
- xvi. dancer or choreographer (ANZSCO code 211112);
- xvii. music director (ANZSCO code 211212);
- xviii. visual arts and crafts professionals (nec) (ANZSCO code 211499);
- xix. artistic director (ANZSCO code 212111);
- xx. dentist (ANZSCO code 252312);
- xxi. anaesthetist (ANZSCO code 252312);
- xxii. textile, clothing and footwear mechanic (ANZSCO code 323215);
- xxiii. watch and clock maker and repairer (ANZSCO code 323316);
- xxiv. chemical plant operator (ANZSCO code 399211);
- xxv. library technician (ANZSCO code 399312);
- xxvi. tennis coach (ANZSCO code 452316); and
- xxvii. footballer (ANZSCO code 452411).

b. the following six occupations are added to the MLTSSL, and are no longer a part of the STSOL:

- i. arts administrator or manager (ANZSCO code 139911);
- ii. dancer or choreographer (ANZSCO code 211112);
- iii. music director (ANZSCO code 211211);
- iv. artistic director (ANZSCO code 212111);
- v. tennis coach (ANZSCO code 452411); and

- vi. footballer (ANZSCO code 452411).
- c. The following two occupations are added to the ROL:
- i. deer farmer (ANZSCO code 121314); and
 - ii. goat farmer (ANZSCO code 121315).
- d. The following 16 occupations are added to the ROL, and are no longer part of the STSOL:
- i. aquaculture farmer (ANZSCO code 121111);
 - ii. cotton grower (ANZSCO code 121211);
 - iii. fruit or nut grower (ANZSCO code 121213);
 - iv. grain, oilseed or pasture grower (ANZSCO code 121214);
 - v. mixed crop farmer (ANZSCO code 121216);
 - vi. sugar cane grower (ANZSCO code 121217);
 - vii. crop farmers (nec) (ANZSCO code 121299);
 - viii. beef cattle farmer (ANZSCO code 121312);
 - ix. dairy cattle farmer (ANZSCO code 121313);
 - x. mixed livestock farmer (ANZSCO code 121317);
 - xi. pig farmer (ANZSCO code 121318);
 - xii. sheep farmer (ANZSCO code 121322);
 - xiii. livestock farmers (nec) (ANZSCO code 121399);
 - xiv. mixed crop and livestock farmer (ANZSCO code 121411);
 - xv. dentist (ANZSCO code 252312); and
 - xvi. anaesthetist (ANZSCO code 253211).
5. The occupations are allocated after consideration of labour market advice from the Department of Jobs and Small Business. The changes to the occupation lists from the old law ensures that entry of skilled foreign workers to Australia remains carefully calibrated to Australia's needs.
6. While occupations on the ROL are not restricted to particular geographic areas for the 407 visa program, for administrative reasons the instrument ensures the ROL applicable to the Subclass 407 visa program continues to be aligned with the ROL applicable to other visa programs.

7. Paragraph 2.72B(3)(b) requires the occupation to be specified with its corresponding 6-digit code. This code is the ANZSCO code, set out in column two of each list. The instrument notes in section 4 that '[a] number of expressions used in this instrument are defined in the Regulations, including ANZSCO.' 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 regulation 1.03 for the definition of ANZSCO, as in force on the date of commencement of this instrument, is *Migration (LIN 19/051: Specification of Occupations and Assessing Authorities) Instrument 2019* (LIN 19/051). Section 5 of LIN 19/051 provides:

For the purpose of regulation 1.03 of the Regulations, ANZSCO means that Australian and New Zealand Standard Classification of Occupations published by the Australia Bureau of Statistics.

ANZSCO may be accessed on the Australian Bureau of Statistics website (<http://www.abs.gov.au/>).

8. The instrument applies to applications for approval of a nomination made on or after the day the instrument commences.
9. The application provision in section 2 of Schedule 1 to the instrument provides that the old law, as in force immediately before the date of commencement of the instrument, continues to apply in relation to an application for approval of a nomination made before the instrument commences.
10. Consultation was undertaken before the instrument was made with the Department of Jobs and Small Business, which conducted a review of the skilled migration occupation lists. The review included receiving public submissions, meetings with employers and industry peak bodies and inter-departmental committee meetings.
11. The Office of Best Practice Regulation (OBPR) have advised that a Regulatory Impact Statement is not required (OBPR Reference: 23806).

12. 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 at Attachment A.
13. The instrument commences on the day after registration on the Federal Register of Legislation.

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

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

Migration (LIN 19/050: Specification of Occupations – Subclass 407 Visa) Instrument 2019

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 (LIN 19/050: Specification of Occupations – Subclass 407 Visa) Instrument 2019

The Training (subclass 407) visa ('subclass 407 visa') aims to promote international goodwill by allowing organisations and government agencies to sponsor people to travel to Australia to participate in occupational training activities, including classroom-based professional development activities. It is for people who want to come to Australia on a temporary basis to undertake workplace-based training or professional development. It is not designed to fill labour shortages, and it is not an appropriate visa for people whose sole intention is to work. The 407 visa and related nomination requirements includes integrity measures to ensure that the visa is used only for genuine occupation training which does not adversely impact the Australian labour market.

The *Migration Regulations 1994* ('the Migration Regulations') set out requirements for the grant of a Training (subclass 407) visa ('subclass 407 visa'). One requirement is that the applicant be nominated by an approved sponsor of a program of occupational training. There are three nomination types:

- workplace-based training required for registration;
- structured workplace-based training to enhance skills in an eligible occupation;
- training that promotes capacity building overseas.

Unless the training is for registration or licensing purposes or for capacity building overseas, training visa applicants must be nominated under the 'enhance skills' nomination type, which requires the nominated occupation to be specified on a skilled occupations list. This instrument (LIN 19/050) repeals and replaces the previous instrument (IMMI 18/050) and specifies the eligible occupations and Australian and New Zealand Standard Classification of Occupations (ANZSCO) codes for this purpose.

The ANZSCO code is used by the Department of Home Affairs to ensure, for applicants who wish to come to Australia for occupational training purposes, that the training is related to an eligible occupation, and the training is necessary for the nominee to obtain registration, membership or licensing in Australia or in the home country of the nominee in relation to that occupation. The occupation lists are comprised of the Medium and Long-term Strategic Skills List (MLTSSL), Short-term Skilled Occupation List (STSOL) and Regional Occupation List (ROL). These lists are designed to be dynamic and respond to changing Australian labour market conditions. The Department of Jobs and Small Business (DJSB) regularly reviews eligible occupations for skilled migration, including occupations for the subclass 407 visa, based on data analysis and stakeholder consultation. 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. 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. The ROL lists additional occupations needed in regional Australia.

This instrument specifies the MLTSSL, STSOL and ROL, which together provide eligible occupations and ANZSCO codes, for the subclass 407 visa. This instrument makes the following changes to the occupation lists:

- An increase of 6 occupations on the MLTSSL from 210 to 216, which results from moving these occupations from the STSOL.
- A decrease in the number of occupations on the STSOL from 243 to 216, a reduction of 27 occupations – 6 that have been moved to the MLTSSL, 16 that have been moved to the ROL and 5 that have been removed completely.
- An increase in the number of occupations on the ROL from 59 to 77 occupations, a gain of 18 occupations – 16 which have been moved from the STSOL and 2 new occupations that have been added.

All of the above changes lead to an overall reduction of eligible occupations for the subclass 407 visa from 512 to 509 occupations (a reduction of 3 occupations).

Human rights implications

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

Article 6 of ICESCR provides that:

1. *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.*
2. *The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

Article 2(1) of the ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 of the ICESCR reflects the provision relating to discrimination on article 2(1) of the ICCPR.

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee, to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Specification of lists of occupations for which foreign workers may be nominated for entry and stay in Australia in this Legislative Instrument engage the above rights to non-discrimination, including, for those persons who are already in Australia, as they relate to the right to work and its realisation through technical and vocational guidance and training programmes (Article 6.2 of the ICESCR).

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 *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.

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 movement of occupations between the MLTSSL, STSOL and the ROL does not have human rights implications in relation to the subclass 407 visa as there is no practical difference for the subclass 407 visa whether the occupation is listed on the MLTSSL, STSOL and the ROL. These lists are also used for other visa subclasses where it can affect the duration of the visa and where the person is to work, however this is not the case for the subclass 407.

Therefore the main effect with human rights implications of repealing the previous instrument and replacing it with this one is that five occupations have been removed from the occupation lists completely.

The authority of the Australian Government to grant visas of a particular duration and the authority to place conditions and limitations on non-citizens in respect of those visas, including their work rights, is lawful as a matter of domestic law and has as its objectives ensuring the continued access of Australian citizens and permanent residents to paid employment and the continued integrity of

Australia's migration program. As noted earlier, the skills lists are determined by DJSB on the basis of data analysis and stakeholder consultation. The lists of eligible occupations in this Legislative Instrument are intended to ensure that persons who are already in Australia permanently are given the opportunity to seek work and occupational training opportunities before those seeking to enter Australia to undertake occupational training in Australia in order to enhance their skills. Providing Australians citizens and permanent residents with the first priority for jobs and training opportunities ensures that Australians are provided the opportunity to improve their standard of living and promotes their right to work. Broadly speaking, access to such opportunities promotes social stability. As such, these measures are for the "purpose of promoting the general welfare in a democratic society" and are justified in accordance with Article 4 of ICESCR and do not constitute impermissible discrimination in relation to the right to work.

Any subclass 407 holder who was granted a visa in relation to one of these occupations before it is removed from the occupations lists is entitled to continue working and training in their present location for the duration of their visa. Their right to work (including through training opportunities) for the duration of that visa is not impacted. Changes to the lists of occupations will only affect the person if they choose to apply for a subsequent visa and seek renomination by a different organisation. If the person's occupation has been removed from the occupations list, they may choose to apply for a subclass 407 visa if they wish to nominate for further training opportunities, but only if they can demonstrate they meet the required criteria, that is they must have recent experience in the identified occupation to which the training relates or for any other visa with work rights for which they meet the requirements under the Migration Regulations if they wish to continue working.. In addition, current visa applicants will not be impacted as the new lists will apply only to new nomination applications received after they come into effect.

The use of occupation lists including a regional list is reasonable and proportionate because it allows the Minister, based on advice from DJSB, the flexibility and precision required to carefully tailor the occupation lists to reflect Australia's diverse labour market needs. Where a non-citizen is being nominated for occupational training for the purpose of enhancing their skills, restricting training opportunities to certain occupations is reasonable and proportionate to ensure that the subclass 407 visa contributes to Australia's overall economic success and continues to give Australians first priority for workplace training programs. This does not unduly limit a non-citizen's right to work, including through participation in training programs.

Conclusion

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

The Hon David Coleman MP
Minister for Immigration, Citizenship and Multicultural Affairs