

EXPLANATORY STATEMENT

Migration Regulations 1994

Migration (Transitional operation of regulation 5.19 for certain 457 visa holders)

Amendment Instrument (LIN 20/190) 2020

(subregulation 5.19(6))

1. The instrument, LIN 20/190, is made under subregulation 5.19(6) of the *Migration Regulations 1994* (the Regulations).
2. In accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the AIA), the instrument amends the *Migration (IMMI 18/052: Transitional operation of regulation 5.19 for certain 457 visa holders) Instrument 2018* (F2018L00285). 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. IMMI 18/052 operates to:
 - provide that ‘specified person’ means a person who, on 18 April 2017, held a Subclass 457 (Temporary Work (Skilled)) visa (Subclass 457 visa), or was an applicant for a Subclass 457 visa that was subsequently granted; and
 - provide that these specified persons are specified for the purposes of subparagraph 5.19(5)(a)(iii) of the Regulations; and
 - determine different periods of time for the purposes of paragraphs 5.19(5)(e), (f) and (g) of the Regulations for specified persons; and
 - exempt specified persons from the operation of paragraph 5.19(5)(c) of the Regulations.

4. Paragraphs 5.19(5)(e), (f) and (g) of the Regulations set out the requirements for approval which must be met if the nomination relates to a visa in a Temporary Residence Transition stream, which are as follows:
 - during the period of 4 years immediately before the application is made, the person identified in the nomination application (the ‘identified person’) must have held a Subclass 457 visa or a Subclass 482 visa for at least 3 years (see paragraph 5.19(5)(e));
 - if paragraph 5.19(5)(f) applies to the identified person—the person must have been employed in the position in relation to which the relevant Subclass 457 or Subclass 482 visa was granted for at least 3 years (not including any periods of unpaid leave) during the period of 4 years immediately before the application is made;
 - if paragraph 5.19(5)(g) applies to the identified person—the person must have been employed in the occupation in relation to which the relevant Subclass 457 or Subclass 482 visa was granted for at least 3 years (not including any periods of unpaid leave) during the period of 4 years immediately before the application is made.
5. The purpose of LIN 20/190 is to amend IMMI 18/052 to determine different periods of time for the purposes of paragraphs 5.19(5)(f) and (g) of the Regulations, for new classes of persons who are specified for the purposes of these paragraphs. Subregulation 5.19(6) of the Regulations provides that the Minister may, by legislative instrument, determine different periods of time for the purposes of paragraph 5.19(5)(e), (f) and (g) for persons specified in the instrument.
6. Specifically, LIN 20/190 provides that:
 - for paragraph 5.19(5)(f) of the Regulation—in relation to a person who has had one or more ‘coronavirus reduced work periods’ during the ‘concession period’, that paragraph is applied as if a reference to a total period of at least 3 years were a reference to a total period of at least 3 years (or, if the persons is a ‘specified

person’, at least 2 years) less the total length of the ‘coronavirus reduced work periods’; and

- for paragraph 5.19(5)(g) of the Regulations—in relation to a person who has had one or more ‘coronavirus unpaid leave periods’ during the ‘concession period’, that paragraph is applied as if a reference to a total period of at least 4 years were a reference to a total period of at least 3 years (or, if the person is a ‘specified person’, at least 2 years) less the total length of the ‘coronavirus unpaid leave periods’.
7. The term ‘concession period’ means the concession period mentioned in subregulation 1.15N(1) of the Regulations. The concession period is defined in subregulation 1.15N(1) of the Regulations as the period that commences on 1 February 2020 and ends on a day specified by the Minister.
8. The terms ‘coronavirus reduced work period’ and ‘coronavirus unpaid leave period’ are defined in subsections 7A(3) and 7B(3) of LIN 20/190 respectively, and operate as outlined below.
- A person in relation to whom there are one or more ‘coronavirus reduced work periods’ is a person who has been placed on unpaid leave or has had their hours reduced due to the COVID-19 pandemic, during the period of 4 years (or, if the person is a ‘specified person’, of 3 years) immediately before their application for a nomination application was made.
 - A person in relation to whom there are one or more ‘coronavirus unpaid leave periods’ is a person who has been placed on unpaid leave due to the COVID-19 pandemic, during the period of 4 years (or, if the person is a ‘specified person’, of 3 years) immediately before their application for a nomination application was made.
9. The amendments in LIN 20/190 is in response to the COVID-19 pandemic, which has severely disrupted Australia’s labour market. Many workers who are employed by businesses operating within Australia have been stood down, have had their hours

reduced or have been required to take unpaid leave. In response to this, the Australian Government has decided to ensure that these persons are not disadvantaged by the fact that they were temporarily stood down or had their hours reduced, by recognising this period of time as time that they were employed and, for the purposes of paragraph 5.19(5)(f) of the Regulations, as on a full-time basis.

10. Furthermore, item 5 of LIN 20/190 inserts an application provision stating that the amendments made by items 2 to 4 of Schedule 1 to LIN 20/190 apply in relation to an application made on or after 1 February 2020. These amendments seek to ensure that all impacted Subclass 457 or Subclass 482 visa holders continue to be eligible to apply for permanent residence, even if they made their application for nomination prior to the commencement of the amendments. As such, the amendments do not apply to disadvantage applicants' rights, nor are any liabilities imposed as a result of the amendments made by LIN 20/190. The instrument does not contravene subsection 12(2) of the *Legislation Act 2003*.
11. In addition, item 1 of Schedule 1 to LIN 20/190 makes a change to the citation of IMMI 18/052. The name of IMMI 18/052 has been changed to reflect the updated content of IMMI 18/052 and the instrument is now cited as '*Migration (IMMI 18/052: Specified Persons and Periods of Time for Regulation 5.19) Instrument 2018*'.
12. Section 17 of the *Legislation Act 2003* requires consultations which are appropriate and reasonably practicable to be undertaken. Consultation was undertaken with a range of stakeholders and Commonwealth Departments as part of the whole of government response to the COVID-19 pandemic.
13. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 42656).
14. 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.

15. The instrument commences on the day after registration on the Federal Register of Legislation.