

EXPLANATORY STATEMENT

Migration Act 1958

SPECIFICATION OF OCCUPATIONS EXEMPT FROM LABOUR MARKET TESTING

(Section 140GBC)

1. This Instrument is made under section 140GBC of the *Migration Act 1958* ('the Act').
2. Section 140GBC of the Act provides skill and occupational exemptions in relation to labour market testing.
3. The purpose of the instrument is to specify occupations that are exempt from the labour market testing requirement.
4. The instrument operates to specify occupations that are classified in the ANZSCO (Australian and New Zealand Standard Classification of Occupations published by the Australian Bureau of Statistics) as Skill Level 1 or 2 that are exempt from the labour market testing requirement.
5. The footnotes have been included to draw readers' attention to the section of the Act which makes reference to "protected qualifications" and "protected experience", which has the effect of excluding certain occupations from being able to be exempted from the labour market testing requirement.
6. The following documents are incorporated in the instrument by reference:

ANZSCO means, under regulation 1.03 of the Regulations, the Australian and New Zealand Standard Classification of Occupations published by the Australian Bureau of Statistics.
6. Consultations with a broad range of stakeholders were conducted during late July and August 2013. A discussion paper that canvassed stakeholders' views on options for implementation of Labour Market Testing formed the basis for these consultations. Thirty five submissions were received from employer groups, unions, state and territory

governments, industry sector peak bodies, migration agents and the Law Council of Australia.

7. The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required (OBPR Reference 15006).
8. Under section 42 of the *Legislative Instruments Act 2003* the Instrument is subject to disallowance and therefore a Human Rights Statement of Compatibility has been provided (attached).
9. This Instrument, IMMI 13/137, commences on 23 November 2013, immediately after the commencement of the *Migrations Amendment (Temporary Sponsored Visas) Act 2013*.

Statement of Compatibility with Human Rights

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

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

An instrument is required to specify the occupations that are exempt from the Labour Market Testing (LMT) requirement under s140GBC(4) of the *Migration Amendment (Temporary Sponsored Visas) Act 2013*. This requirement applies to standard business sponsors nominating an occupation for the purposes of paragraph 140GB(1)(b), to whom paragraph 140GB(2)(a) applies.

The instrument will specify that for the purposes of paragraph 140GBC(4)(a) of the Migration Act, all occupations that are classified in the Australian and New Zealand Standard Classification of Occupations (ANZSCO) as Skill Level 1 will be exempt from conducting LMT.

The instrument will also specify that for the purposes of paragraph 140GBC(4)(b) of the Migration Act, all occupations that are classified in the ANZSCO as Skill Level 2 will be exempt from conducting LMT.

The instrument will specify for the purposes of regulation 1.03 of the Regulations that the definition of ANZSCO is the Australian and New Zealand Standard Classification of Occupations published by the Australian Bureau of Statistics and current as at 1 July 2013.

Human rights implications

This instrument seeks to exempt certain sponsors from the requirement to conduct LMT based on the skill level of the nominated occupation.

Article 6 and Article 4 of the ICESCR

The instrument will result in certain sponsors not being required to conduct LMT, if they are nominating occupations classified in the ANZSCO as either Skill Level 1 or 2. Unless otherwise exempt, those sponsors who wish to nominate non-citizens with any other ANZSCO Skill Level will continue to be required to conduct LMT. This then limits availability to the Australian labour market for those non-exempt sponsors. As such, consideration needs to be had to Article 6 of the ICESCR which relates to the right to work. Article 6 provides that:

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.

It is the long standing position of the Australian Government that an authority from the Government needs to be granted before a non-citizen is permitted to work. This authority and associated 'work rights' are attached to certain types of visas, including the Subclass 457 visa. A person is not permitted to work in Australia unless work rights have been granted, and merely arriving lawfully in Australia does not entitle a person to work rights.

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. 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 from the Government granting work rights and conditions or limitations placed on temporary non-citizens in respect of those work rights (such as requiring certain sponsors to conduct LMT before nominating an overseas worker) are lawful as a matter of domestic law and have as their objective the continued access of Australian citizens and permanent residents to paid employment. As such, the proposed amendments are justified in accordance with Article 4 of ICESCR.

Article 2 of ICESCR

Article 2.2 provides:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The instrument seeks to exempt sponsors from conducting LMT based on the skill level of the nominated occupation. It is clear that this exemption is not targeted towards any of the prohibited grounds, such as ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth’. The Committee on Economic, Social Council Rights, in its General Comment Number 20 (at 15) stated that the words “other status” indicate that this list is not exhaustive and other grounds may be incorporated in this category.

General Comments Number 20 lists other elements which could be classified as ‘other status’ (see paragraphs 28 to 35), and states that “these additional grounds are commonly recognized when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalization”. The elements listed include: disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation.

It is evident that the ground for exclusion in the measure, noting the reasoning provided in paragraph 27 of the General Comments Number 20, would not engage Article 2.2 as it does not seek to preclude foreign nationals from entering Australia. The instrument will reduce administrative and bureaucratic procedures for sponsors nominating positions in higher skill levels, in line with the government’s policy platform of simplification and deregulation. In other words, the exemption in the measure would not fall under ‘other status’ and consequently would not be considered discriminatory.

Conclusion

The instrument is compatible with human rights insofar as any limitations upon Article 6 of the ICESCR comply with limitation requirements in Article 4 of the ICESCR. Further, the amendment would not be considered discriminatory within the meaning of Article 2 of the ICESCR.

Senator The Hon Michaelia Cash

Assistant Minister for Immigration and Border Protection