

EXPLANATORY STATEMENT

Migration Regulations 1994

MIGRATION (IMMI 18/035: SPECIFICATION OF EXEMPT OCCUPATIONS) INSTRUMENT 2018 (Subregulation 2.72(13))

1. The instrument, IMMI 18/035, is made under subregulation 2.72(13) of the *Migration Regulations 1994* (the Regulations).
2. The instrument operates to specify exempt occupations for:
 - a. a nomination of a proposed occupation made under regulations 2.72 and 2.73 of the Regulations, on or after 18 March 2018;
 - b. obligations arising under regulation 2.86 of the Regulations on or after 18 March 2018;
 - c. applications for approval of a nomination of a position made, under regulation 5.19 of the Regulations, on or after 18 March 2018;
 - d. an application for a Subclass 482 (Temporary Skill Shortage) visa made on or after 18 March 2018; and
 - e. a Subclass 482 (Temporary Skill Shortage) visa granted on or after 18 March 2018.
3. The purpose of the instrument is to address changes to the Regulations by the *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018*.
4. The instrument notes in section 4 that ‘ANZSCO is defined in regulation 1.03 of 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 Australia Bureau of Statistics, as in force on 18 March 2018’.
5. ANZSCO may be accessed on the Australian Bureau of Statistics website.

6. The subject of this 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. 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.
7. These reforms were also informed by earlier reviews including: the 2014 Independent Review into the integrity of the 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 well before the instrument was made. This accords with subsection 17(1) of the *Legislation Act 2003* which envisages consultations where appropriate and reasonably practicable.
8. 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.
9. 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.
10. The Instrument commences on 18 March 2018.

Statement of Compatibility with Human Rights

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

Migration (IMMI 18/035: Specification of Exempt Occupations) **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

Pursuant to the *Migration Regulations 1994* (the Regulations), this Legislative Instrument lists the occupations that are not subject to the requirement in the Regulations for Temporary Skill Shortage (subclass 482) visa (TSS visa) holders to work directly for their sponsor. It replaces Legislative Instrument IMMI 13/067.

On 18 April 2017, the Government announced changes to the employer sponsored temporary and permanent skilled work visa arrangements, including replacing the Temporary Work (Skilled) (subclass 457) visa (subclass 457 visa) with the TSS visa.

Pursuant to the Regulations, Legislative Instrument IMMI 13/067 enabled subclass 457 visa holders, nominated for an occupation specified by IMMI 13/067, to work in a position other than in the business of the standard business sponsor, and/or an associated entity of the standard business sponsor. It also enabled this cohort of 457 visa holders to apply for the Employer Nominated Scheme (subclass 186) visa (ENS visa) or the Regional Sponsored Migration Scheme (subclass 187) visa (RSMS visa) under the Temporary Residence Transition (TRT) stream.

The effect of this Legislative Instrument is to enable, pursuant to the Regulations, TSS visa holders, nominated for an occupation specified by this Legislative Instrument, to work in a position other than with a business or an associated entity of the standard business sponsor. This Legislative Instrument also enables this cohort of TSS visa holders to apply for the ENS or RSMS visa under the TRT stream, even though they have not worked directly for their sponsor, unlike other TSS visa holders. The list of occupations in the new Legislative Instrument IMMI 18/035 is the same as those listed in Column 2 of IMMI 13/067 and is primarily composed of very senior company executives and medical practitioners and specialists. The reason that persons in these occupations are not required to work directly for their sponsor is to accommodate the flexible employment arrangements typically associated with certain occupations such as medical practitioners. The provision ensures that the sponsor will not breach the obligation if the visa holder or former visa holder is engaged as an independent contractor rather than as an employee in one of the specified occupations. The occupations outlined in Column 1 of IMMI 13/067 are not being applied to the subclass 482 visa, as these occupations only related to subclass 457 visa nominations made prior to 1 July 2010.

The change will apply to TSS, ENS and RSMS visa applications lodged on, or after, the revised legislative instrument comes into effect and will not affect any existing visa applicants or visa holders for the duration of their current visa.

Human rights implications

As this Instrument does not substantially change the policy for the employer sponsored temporary and permanent skilled work visa arrangements, it does not directly engage any of the human rights enunciated in the seven core international human rights treaties. More broadly, it will continue to assist in facilitating the right to work of foreign workers in Australia in the listed occupations.

Conclusion

This Legislative Instrument is compatible with human rights.

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