

## EXPLANATORY STATEMENT

Issued by authority of the Minister for Immigration, Citizenship and Multicultural Affairs

*Migration Act 1958*

### ***Migration (LIN 18/036: Period, manner and evidence of labour market testing) Amendment (LIN 23/072) Determination 2023***

- 1 The instrument, departmental reference LIN 23/072, is made under the *Migration Act 1958* (the Migration Act). The instrument is made under subsection 140GBA(5) of the Migration Act for the purposes of paragraph 140GBA(3)(aa) of the Act.
- 2 The instrument amends the principal instrument *Migration (LIN 18/036: Period, manner and evidence of labour market testing) Instrument 2018* (LIN 18/036). Subsection 33(3) of the *Acts Interpretation Act 1901* provides that a power to make a legislative instrument includes a power to amend or repeal that instrument in the same manner, and subject to the same conditions, as the power to make the instrument.
- 3 The instrument commences on the day after it is registered on the Federal Register of Legislation. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

#### ***Purpose***

- 4 Section 140GBA of the Migration Act requires a person who nominates a proposed occupation or an applicant for a visa of a prescribed kind under section 140GB to meet the labour market testing (LMT) conditions, unless the exemptions in sections 140GBB or 140GBC apply, or the Minister has determined under subsection 140GBA(2) it would be inconsistent with any international trade obligation.
- 5 The term *labour market testing* is defined in subsection 140GBA(7) of the Migration Act. It requires businesses to test the Australian labour market to demonstrate whether a position could be readily filled by a suitably qualified and experienced Australian citizen or permanent resident.
- 6 Paragraph 140GBA(3)(aa) of the Migration Act provides that the LMT condition is satisfied if the LMT in relation to the nominated position was undertaken in the manner determined under subsection 140GBA(5) of the Migration Act. Subsection 140GBA(5) of the Migration Act provides that the Minister may, by legislative instrument, determine the manner in which LMT must be undertaken in relation to a nominated position, including the language to be used for any advertising, the method of any such advertising, the period during which any advertising must occur, and the duration of any advertising.
- 7 The principal instrument LIN 18/036 operates to determine the following LMT conditions:
  - the period within which LMT is required in relation to a nominated position under subsection 140GBA(4) of the Migration Act for the purposes of paragraph 140GBA(3)(a) of the Migration Act; and

- the manner of LMT under subsection 140GBA(5) of the Migration Act for the purposes of paragraph 140GBA(3)(aa) of the Migration Act; and
  - evidence that LMT has occurred under subsection 140GBA(6A) of the Migration Act for the purposes of subparagraph 140GBA(3)(b)(i) of the Migration Act.
- 8 The purpose of LIN 23/072 is to amend LIN 18/036 to streamline the LMT requirements by updating the manner in which LMT in relation to a nominated position must be undertaken.
- 9 In particular, LIN 23/072 removes the requirement in current paragraph 8(3)(a) of the principal instrument to advertise the nominated position on the Workforce Australia website ([www.workforceaustralia.gov.au](http://www.workforceaustralia.gov.au)). The methods specified in current subparagraphs 3(b)(i)-(iv) are mirrored in new subsection 8(3) at paragraphs 8(3)(a)-(d).
- 10 LIN 23/072 also inserts new subsections 8(6) and (7) to clarify matters in relation to the duration of any advertising (paid or unpaid) of a nominated position, relevant to current subsection 8(5). Subsection 8(5) of LIN 18/036 allows for a period of at least four weeks where applications or expressions of interest for an advertised position may be received. The amendment in LIN 23/072, inserting new subsections 8(6) and (7), expressly clarifies that the principal instrument allows for LMT over two or more overlapping periods totalling a minimum duration of four weeks, consistent with subsection 140GBA(6A), which provides that a duration determined for the purposes of paragraph 140GBA(6)(d) must be at least 4 weeks. New subsections 8(6) and (7) make clear, in particular, that for subsection 8(5), two or more *overlapping* advertisements are acceptable, allowing for applications or expressions of interest to be received for a continuous (unbroken) duration of at least four weeks.
- 11 The amendments made by LIN 23/072 support implementation of the Government’s *Migration Strategy*, by streamlining the LMT requirements. By removing the requirement for an employer to advertise a position on the Workforce Australia website, and clarifying how the duration of advertising is determined, greater flexibility is provided for employers to advertise a nominated position. This approach responds to long-standing industry views about the compliance burden faced by employers in regard to complying with the requirements of the LMT advertising.
- 12 The amendment in item 3 of the Schedule to the instrument provides that the amendments of section 8 of the principal instrument apply in relation to a person’s nomination made in accordance with subsection 140GB(1) of the *Migration Act 1958*, which:
- is made on or after the commencement of this instrument; or
  - was made before the commencement of this instrument but has not been decided yet.
- 13 The amendments are beneficial for employers wishing to nominate employees from overseas. Applying the amendments prospectively, and also in relation to nominations made before the commencement of LIN23/072 (which have not been decided when LIN 23/072 commences), has a beneficial effect. To the extent that the instrument has any retrospective operation, this will be consistent with subsection 12(2) of the Legislation Act, as the instrument will have a beneficial effect for employers wishing to nominate employees from overseas whose nomination applications are awaiting a final decision.

## **Consultation**

- 14 The Office of Impact Analysis (OIA) was consulted. The OIA acknowledged the Department of Home Affairs' certification of the *Review of the Migration System* as an Impact Analysis Equivalent (IAE), having undertaken a process and analysis equivalent to an Impact Analysis (OBPR23-04044), and considers that no further detailed Impact Analysis is required for the instrument (OIA23-05907).
- 15 The amendment relating to removing the Workforce Australia website advertising requirement from the principal instrument has been informed by consultation undertaken to inform the *Review of the Migration System*. No specific consultation was undertaken in relation to the insertion of new subsections 8(6) and (7) in the principal instrument; however, the clarification provided by new subsections 8(6) and (7) in relation to current subsection 8(5), reflects guidance provided by the Department to stakeholders, including in the migration advice industry.

## **Details of the instrument**

- 16 Section 1 sets out the name of the instrument.
- 17 Section 2 provides that the instrument will commence on the day after the instrument is registered on the Federal Register of Legislation.
- 18 Section 3 provides that the instrument is made under the Migration Act.
- 19 Section 4 provides that the *Migration (LIN 18/036: Period, manner and evidence of labour market testing) Instrument 2018* is amended as set out in Schedule 1 to the instrument.
- 20 Item 1 of Schedule 1 to the instrument repeals and substitutes subsection 8(3) of LIN 18/036. It removes the mandatory requirement to advertise nominated positions on the Workforce Australia website ([www.workforceaustralia.gov.au](http://www.workforceaustralia.gov.au)).
- 21 Item 2 of Schedule 1 to the instrument amends LIN 18/036 to insert new subsections 8(6) and (7). It allows for a continuing length of time that LMT is being carried out and continues unbroken for a minimum four week period across two or more overlapping advertisements where applications or expressions of interests for an advertised position may be received. The instrument does not allow LMT over two or more consecutive (but not overlapping) or non-consecutive periods totalling a minimum of four weeks.
- 22 Item 3 of Schedule 1 to the instrument amends LIN 18/036 to insert new section 15 in Part 3 (Application, saving and transitional provisions) New section 15 provides that the amendments of section 8 of LIN 18/036 made by LIN 23/072 apply in relation to a person's nomination made under section 140GB of the Migration Act that:
  - is made on or after the commencement of this instrument; or
  - was made but not decided before the commencement of this instrument.

## **Parliamentary scrutiny etc.**

- 23 The instrument is exempt from disallowance under section 42 of the Legislation Act. This is because a legislative instrument made under Part 2 of the Migration Act is prescribed under section 10,

item 20(a), of the *Legislation (Exemptions and Other Matters) Regulation 2015* as an instrument not subject to disallowance.

- 24 The instrument is made by the Minister for Immigration, Citizenship and Multicultural Affairs, in accordance with subsection 140GBA(5) of the Migration Act for the purposes of paragraph 140GBA(3)(aa) of the Migration Act.