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Bringing you advantages

Second attempt at 457 Occupation Caveats: Is it valid now?

On 28 June 2017, a number of legislative instruments and amendments to the *Migration Regulations 1994* were introduced:

1. give the Minister for Immigration power to specify occupation caveats;
2. revise the skilled occupation lists applicable to the skilled migration programme and the subclass 457 and 407 visa programmes; and
3. changes to English requirement (including removal of many English exemptions) and lower the age requirement for subclass 186 ENS and 187 RSMS visa programmes.

Most of the occupation caveats that were introduced on 19 April 2017 for the 457 visa programme remain with some changes and the caveat system now also extends to the subclass 186 ENS visa programme. However, most interestingly is the government’s decision to specify the occupation caveats in these new legislative instruments in a completely different structure than the previous one made on 18 April 2017. In addition, it introduced Migration Amendment (Specification of Occupations) Regulations 2017 (“Amending Regulations) to amend the relevant provisions in the Migration Regulations 1994 to extend the Minister’s power to specify occupation. The extended power sought to allow the Minister to specify applicability of those occupations to a nominated person (i.e. occupation caveats). These changes appear to have been made in response to opinions expressed by a number of prominent immigration lawyers on the legal validity of the occupation caveats introduced in the last skilled occupation list which were said to be invalid by many.

What is happening here is the government having a 2nd attempt. The question is: is it now valid?

While undoubtedly much more thoughts were put in to this 2nd attempt by the government to ensure what it seeks to do is valid, but we think it is not fool prove and may still be found to be invalid by the Court. This is because the relevant provision amended by the Amending Regulations seeks to give the Minister power ‘without any limits’ to specify any matters relating to the applicability of a specified occupation to a nominated person. Such extension of power may arguably be allowing the Minister to exercise a legislative power instead of administrative power. If that is found to be the case by the Court, then the amended provisions and the legislative instrument may be declared as invalid. The other concern is the Amending Regulations, instead of the amended provisions, seek to validate legislative instrument made prior and give

power to the Minister to specify within new legislative instrument to apply retrospectively to application made before 1 July 2017, but not yet finalised. In our view, it may also be invalid.

Accordingly, it is far from clear as to whether this 2nd attempt at introducing occupation caveat can withstand judicial review. If you are affected by the occupation 'caveats' and believe these 'caveats' are wrong and unjust and wish to challenge them, please email our 457 Caveat Taskforce at 457caveat@proactivelegal.com.au.

Besides, the Amending Regulations is capable of being disallowed by the Australian Parliament within certain timeframe. For that reason, please consider expressing your concern to your local Member of Parliament if you feel giving "unlimited" power to the Minister of Immigration is inappropriate and/or unlawful.

For further information please contact us.

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