

ACTU submission to the review of the Temporary Skilled Migration Income Threshold (TSMIT)

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CONTENTS

Introduction	1
Overview of key policy recommendations	2
Background and context for the review.....	3
The future of the TSMIT – key policy and design issues	6

INTRODUCTION

The ACTU welcomes the opportunity to make this submission to the review of the Temporary Skilled Migration Income Threshold (TSMIT).

The ACTU is the peak body for Australian unions, made up of 46 affiliated unions. We represent more than 1.6 million working Australians and their families. The ACTU and affiliated unions have had a long and significant interest in the skilled migration program on behalf of our members and workers generally.

We have a particular interest in those parts of the program where temporary visa holders with work rights are involved, such as the 457 visa program. Our focus is always to ensure that Australian citizens and permanent residents have the first right and opportunity to fill Australian jobs, and that temporary overseas workers who are required to fill genuine shortages that cannot be filled by Australians are treated well and receive all their full entitlements and rights at work.

The TSMIT forms a key part of integrity measures introduced back in 2009 to help ensure the temporary 457 visa program operates in the best interests of all workers.

By providing a minimum wage floor below which no 457 visa worker can be paid, it has the aim of ensuring all 457 visa holders have sufficient income to independently provide for themselves in Australia. At the same time, it ensures the 457 visa program does not extend into the very lowest-paid sections of the labour market where the potential for exploitation of vulnerable workers and displacement of Australian workers is at its greatest. This is a critical protection in light of ongoing evidence of exploitation of temporary visa workers.

It is a matter of regret that the TSMIT has been left to languish since the current government came to office, frozen at \$53 990 per annum since July 2013. This review should take the opportunity now to reaffirm the critical role of the TSMIT under the 457 visa program and ensure that it remains relevant as a minimum wage benchmark.

In this submission, we set out the relevant background and context for the review and discuss the role and purpose of the TSMIT. We then address key design questions posed in the discussion paper, including the base level of the TSMIT, indexation, and the case for variations to the TSMIT. Our key policy recommendations are set out below.

OVERVIEW OF KEY POLICY RECOMMENDATIONS

The ACTU proposes the following recommendations for the review to provide in its final report to Government:

1. The TSMIT be recognised as an integral and ongoing element of the 457 visa program in safeguarding the interests of workers.
2. Without further delay, the TSMIT should be increased to \$57 000 (to catch-up for the two years of indexation increases not provided by the current Government).
3. Restore annual indexation of the TSMIT based on Average Weekly Earnings or the Consumer Price Inflation index, whichever is the higher, from 1 July each year.
4. The TSMIT should apply as a minimum base rate of pay, with no regional or other concessions available.
5. The TSMIT should be extended to labour agreements, DAMAs, IFAs and other such agreements.
6. Further work be commissioned to assess the adequacy of the TSMIT in meeting the cost of living needs of 457 visa holders. This should include a survey of 457 visa holders who are paid at or near the TSMIT to assess how they are faring with cost of living issues.
7. Consideration be given to extra loadings for the TSMIT based on additional family members and dependents, taking into account the value of benefits received and costs not borne by an equivalent Australian worker on the same income.
8. Consideration be given to whether the TSMIT should be increased further and set at the level of Average Weekly Earnings (approx. \$77 000 p.a).
9. The TSMIT, including annual indexation, should be in primary legislation, namely the Migration Act 1958. This would recognise the key, ongoing role of the TSMIT in providing a wage floor for the 457 visa program and help guard against it being removed or arbitrarily frozen again in the future.

10. Improved monitoring and enforcement, including random audits of employers and worker payslips to ensure the TSMIT is being paid. The results of any type of compliance activity should be publically available and form part of mandatory reporting requirements on a no less than quarterly basis.

BACKGROUND AND CONTEXT FOR THE REVIEW

Exploitation of temporary overseas workers

This review takes place against the backdrop of ongoing evidence of exploitation and mistreatment of temporary visa workers in Australia. The ACTU and affiliated unions have reported and documented countless cases of exploitation over a number of years. Recent media reports of temporary visa worker exploitation at 7-Eleven stores, in the farm sector, and elsewhere continue to keep this issue in the public eye. The Senate Inquiry into the temporary work visa program that is due to deliver its final report in coming weeks has heard evidence of systematic exploitation of vulnerable migrant workers.

There can no longer be any denial of the extent of the problem with the temporary work visa program. These cases of exploitation have been going on far too often and for far too long for them to be dismissed as a few isolated matters in an otherwise well-functioning program.

It is more important than ever now that existing protections to guard against exploitation and support the position of vulnerable overseas workers be retained and improved, and new, stronger protections be introduced where needed. The TSMIT is one of these key, existing protections in the temporary 457 visa program.

The purpose and value of the TSMIT

The TSMIT provides a floor under which no 457 visa worker can be paid.

It operates in conjunction with the obligation on sponsoring employers to pay market rates. This obligation means 457 visa holders are entitled to receive the same wages and conditions as the equivalent Australian workers in the same geographic area.

The requirement to pay market rates is the first obligation that must be met, but in cases where a properly determined market rate falls below the TSMIT, then the TSMIT applies.

In this way, the TSMIT is designed to ensure the 457 visa program does not operate at the lower-skilled, lower-paid end of the labour market where the potential for exploitation of vulnerable workers and displacement of Australian workers is at its greatest. This is consistent with the clear finding of the 457 visa review panel in 2014 that access to the standard 457 visa program should continue to be restricted to skilled occupations and should not be opened up to lower-skilled workers. The Panel found the TSMIT plays an important role in protecting the integrity of the program and supports the public perception that the 457 visa program is aimed at skilled and experienced workers. ¹

The 457 visa program was designed originally to fill shortage in high skill occupations and this original intent should be honoured. Otherwise, the 457 visa simply becomes yet another temporary visa for low-skill, low-paid work, and there are already enough problems caused by the operation of the working holiday and student visa programs, without creating another avenue for that to occur. Occupations that have market rates below the level of the TSMIT should not be part of the 457 visa program.

The TSMIT is also set at a level designed to ensure all temporary visa holders have sufficient income to independently provide for themselves in Australia – so that those workers are in a position where they do not impose undue costs on the Australian community or find themselves in circumstances which may put pressure on them to breach their visa conditions.

Having a TSMIT set at a reasonable level is particularly important given these workers do not have access to a range of government support available to Australian citizens and permanent residents, such as Medicare. As the discussion paper points out, 457 visa workers are largely responsible for their own private health insurance. In some states, temporary visa workers are required to pay a fee for their children to attend a state school. In some jurisdictions, this fee can be as much as \$14 000, although the information on the respective Department of Education websites is not always clear on what arrangements and exemptions apply. Our understanding is that temporary visa holders are also not eligible for family payments that would apply to Australians on the same income. Effectively, 457 visa holders do not have access to the same social wage benefits enjoyed by Australians, although they pay tax in the same way Australians do.

¹ Azarias, J., et. al, Robust New Foundations: An Independent Review into Integrity in the Subclass 457 Programme; September 2014.

The practical effect of the TSMIT in providing a wage floor for the 457 visa program can be seen in the Accommodation and Food Services sector, which is one of the largest users of 457 visas and where the average nominated base salary for applications granted in 2014-15 was \$58 300, barely above the TSMIT.² Given this is an average figure, this means there were likely to have been a large number of 457 visa holders who were paid exactly the TSMIT amount. Without the TSMIT, those workers could have been paid even less.

The Path to this Review

The TSMIT was introduced as part of the previous Labor Government's 2009 integrity reforms. From 2009-2013 it was indexed annually against average weekly ordinary time earnings for full-time employees, but the current Government has chosen to not increase it at all since coming to office in September 2013. It has remained frozen at \$53 990 p.a.

The Panel that reviewed the 457 visa program as a whole in 2014 considered abolishing the TSMIT but decided to retain it, with a recommendation that it not be increased again until it was reviewed within two years. The Government accepted this recommendation.

There had been no public sign of the promised review of TSMIT until it emerged out of the Government-Opposition negotiations over the China-Australia Free Trade Agreement implementing legislation in late 2015. As part of those negotiations, the Opposition had sought agreement to increase the TSMIT to \$57 000, restoring the indexation that had not been passed on since 2013. The Government rejected that proposal. The final outcome of those negotiations was for a review of TSMIT to be conducted, even though this was something the Government had already committed to do following the 457 visa review.

It is disappointing that the TSMIT has remained frozen, without any indexation, during this whole drawn-out process to get a review underway. A more appropriate course would have been to maintain the status quo, including annual indexation of the TSMIT, while a review process was completed.

² Subclass 457 State/Territory Summary Report 2012-13, p. 7

The terms of reference

As a final point, we wish to highlight the terms of reference for this review and note how they differ from the terms of reference that shaped the review of the 457 visa program as a whole in 2014.

This review is governed by terms of reference that, we are pleased to find, are more focused on the needs of workers than the terms of reference that guided the review panel in 2014. In particular, the findings of the TSMIT review are to be consistent with *'the Government's commitment to ensuring the 457 visa program acts as a supplement to and not a substitute for local workers, and the continued protection of potentially vulnerable foreign workers in Australia.'* This contrasts with the terms of reference for the 457 visa review in 2014 that were instead focused in large part on the scope for deregulating the program.

THE FUTURE OF THE TSMIT – KEY POLICY AND DESIGN ISSUES

The factors that should be taken into account when determining settings for the TSMIT

Our submission above and the Discussion Paper set out the purpose and rationale for the TSMIT.

Clearly, it has a twin purpose. First, by setting a salary threshold it serves as an indicator of which jobs and occupations should be part of the 457 visa program and which should not. Second, it provides a marker of the income that is required for visa holders to reasonably support themselves, and, in many cases, their partners and/or children. In both cases, the aim is to support the position of vulnerable workers at the lower end of the 457 visa labour market.

The TSMIT should be set with these two complementary aims in mind. In effect, they are the key factors that should be taken into account when determining settings for the TSMIT.

It follows, in our submission, that the TSMIT should not be allowed to decline in real terms. This would only shift the program into lower-paid sections of the labour market and onto lower wage levels that make it more difficult for visa holders to make ends meet.

On the question of income adequacy, as discussed, the TSMIT must have regard for the fact that visa holders are not in the same position as equivalent Australian workers. The TSMIT should continue to factor in the value of benefits that equivalent Australian workers receive and that 457 visa holders generally do not, such as family payments. Similarly, the setting of the TSMIT should take into account the fact that 457 visa holders relying on the TSMIT are left with costs such as the requirement to take out private health insurance that are not placed on equivalent Australian workers at that income level.

The setting of the TSMIT should also be informed by on-the ground evidence of how lower-paid 457 visa holders at or around the TSMIT are coping with cost of living pressures. An independent survey of 457 visa holders should be commissioned for this purpose. Depending on the findings, this could result in a reassessment of what constitutes a relevant TSMIT in terms of its role in ensuring visa holders have the capacity to support themselves (and their families) independently while in Australia.

As one option, consideration should be given to whether the TSMIT should be increased further and set at the level of Average Weekly Earnings (approx. \$77 000 p.a.). This would make the TSMIT more effective in reducing incentives for employers to overlook local workers and ensure it does not operate in lower-skilled, lower-paid sections of the labour market where workers are typically more vulnerable.

Indexation

It is essential that the TSMIT is maintained, if not increased, in real terms if it is to achieve its agreed purpose as a relevant minimum wage benchmark that reflects both cost of living needs and appropriate skill levels for 457 visa holders. To this end, we strongly recommend that annual indexation of the TSMIT be restored. The current TSMIT should also be readjusted to account for the two years of indexation the Government has failed to pass on. In our submission, this would see the TSMIT being raised to \$57 000, with annual indexation to follow from 1 July each year.

Up until 2013, indexation was pegged to average weekly earnings for a full-time employee. Tying the TSMIT to general wage movements in this way keeps it relevant as a wage benchmark, or floor, that acts as a proxy for the desired level of skill in the 457 visa program. It also maintains the relative position of the TSMIT along the overall wage distribution. That is, the 457 visa program should not become a low-wage, low skill visa, whether by default or design, and a properly indexed TSMIT is a key mechanism for making sure this does not occur. At the same time, there is also a logic to indexation based on CPI as the TSMIT is there in part as a bulwark

against undue cost of living pressures being placed on 457 visa holders. In our submission, to support the position of workers who rely on the protection of the TSMIT, indexation should be based on AWE or CPI, whichever is the higher.

Variations to the TSMIT

The discussion paper raises various options for varying the TSMIT, both up and down, to adjust for different circumstances.

In terms of any options to lower the TSMIT, our position has been clear and consistent. The 457 visa program should not be open to jobs and occupations where base rate rates of pay are below the current TSMIT. Employers must not be able to sponsor overseas workers who will be paid less than the TSMIT.

In our submission then, this review should reject calls from employer groups and others for the TSMIT to be lowered to enable lower skilled occupations to be filled through the 457 visa program. We do not believe the review should be focusing its efforts on ways to remove or lower key protections such as the TSMIT, and thereby lower the wages of overseas workers under the program.

Unions have a fundamental position of principle that the skilled migration program, as the name suggests, should be targeted at vacancies in skilled occupations in trades, professions and managerial occupations that cannot be met domestically.

Unions are therefore concerned with the growing push to expand the migration program to cover semi-skilled and lower-skilled occupations. Bringing in lower-skilled workers from overseas also creates greater potential for exploitation by unscrupulous employers because these workers are likely to have more limited bargaining power and often have lower English language skills.

The discussion paper airs the argument that current TSMIT settings may (or may not) impair industry's ability to employ skilled overseas workers (including in regional areas). There is no evidence provided of this, but in any event we do not consider reducing the TSMIT to be the answer. Occupations with market rates that fall below the TSMIT should be addressed in other ways, not least through the employment and training of Australians. In our assessment, most jobs at levels below the current TSMIT would not generally require much prior experience or long lead-in times for training. If workers are generally able to develop the skills required within a

shorter period of time or through on-the-job training, it is reasonable to expect that employers will obtain these workers from the local labour market.

Even if that is not the case, under current temporary visa settings, employers also already have access to a large supply of other temporary visa holders, particularly under the 417 visa and other programs such as the Seasonal Workers Program. We are conscious of the risk that if employers are not able to access the 457 visa program, they will turn to the less regulated 417 visa. However, the answer is to improve the operation of the temporary visa program as a whole, rather than further diluting the regulatory framework that does apply to the 457 visa program through measures such as reducing the TSMIT.

In our submission, the TSMIT should be extended beyond the standard 457 visa program and apply also to labour agreements, DAMAs , and IFAs. Concessions should not be available. Labour agreements have been a mechanism for accommodating downward variations to the TSMIT, but this has occurred without a meaningful consultation process that involves unions.

We note that the Panel in 2014 suggested the idea of a 10% lower TSMIT (i.e. \$48 510) for the purpose of determining the eligibility of the nominated occupation, but the full TSMIT of \$53 900 would be retained as the income floor - i.e. if the equivalent Australian worker was earning \$48 510 in that occupation the employer could access the 457 visa program. but the 457 visa worker would still have to receive at least the TSMIT of \$53 910.

There is some logic to this idea, but only to the extent that it recognises that the 457 visa workers should be paid 10% more because of the additional costs they face and/or fewer social wage benefits they receive. The purpose of the TSMIT is to keep lower-paid, lower skilled occupations out of the 457 visa program, not find ways to expand it to include more. We reject this proposal.

One area where we do see the case for adjusting the TSMIT, in a way that is in the interests of workers, is in relation to family responsibilities. At present, the TSMIT takes no account of different family sizes and the number of dependents that 457 workers have to support. The TSMIT for a single 457 visa holder with no dependents is the same as for a 457 visa worker with a dependent spouse and four children.

Further consideration of this issue would be assisted greatly by the survey of 457 visa holders that we recommended earlier in the submission. A survey of this sort would help provide a realistic assessment of the income actually needed by 457 visa holders in a variety of family situations to independently provide for themselves in Australia. On the basis of this evidence, consideration should be given to loadings on the TSMIT to reflect different family circumstances,

Enforcement and Compliance

The compliance and enforcement regime around the TSMIT is virtually non-existent and needs to be vastly improved. There are well documented instances of gross exploitation of overseas workers' wages and conditions, so the case for rigorous compliance arrangements is self-evident in our view.

We refer for example to the evidence obtained from the monitoring efforts of the FWO, as set in an internal monitoring report that was obtained under FOI by the Transport Workers' Union and reported in the media in late 2014. The first of these reports covered the period between 18 September 2013 and 30 June 2014. Of the more than 1800 sponsors the FWO investigated, around half of those involved 457 visa workers on reported salaries below the legal wage floor for the program – the TSMIT.

The examples included:

- A visa holder who was nominated as a customer service manager was found to be actually working as a cleaner for \$28,000 a year - \$25,000 below the TSMIT of \$53,900 a year.
- A registered nurse receiving just \$43,368 per annum - \$10 000 below the TSMIT.
- Electricians being engaged on salaries as low as \$40,000, well below the TSMIT, not to mention well below market rates for that occupation.
- Chefs and cooks brought in promised salaries of more than \$50,000 only being paid \$30,000 – more than \$20,000 below the TSMIT.
- A mechanical engineering technician found to be actually working as a construction rigger on \$42 576 per annum, \$10 000 below the TSMIT.

We note that DIBP has made the point that the FWO referrals are not findings of fact and are subject to further investigation and audit by the DIBP. However, if that is the case, it is incumbent on DIBP to explain any discrepancy between the results from FWO and the DIBP findings. If FWO has made a (preliminary) finding, presumably on the basis of evidence available to it, that a worker is not being paid what they should be paid, how then has DIBP come to a different conclusion? Does DIBP give sponsors time to comply and to rectify any transgressions? An explanation for this is important for community confidence in the integrity of the monitoring and enforcement framework.

In our submission, monitoring and enforcement needs to be improved to include, at a bare minimum, random audits of employers and worker payslips to ensure the TSMIT is being paid. The results of any type of compliance activity should be publically available and form part of mandatory reporting requirements on a no less than quarterly basis.

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