



# Discussion Paper

457 Programme – Temporary Skilled Migration  
Income Threshold (TSMIT)



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## Introduction

This discussion paper provides an overview of the Temporary Skilled Migration Income Threshold (TSMIT) and seeks your views to inform a review of the TSMIT (the TSMIT Review) by an external reviewer in accordance with the Terms of Reference.

This paper has been drafted by the Department of Immigration and Border Protection secretariat on behalf of the external reviewer.

## Purpose of the Review

This TSMIT Review is being undertaken in line with recommendations resulting from the Independent Review into Integrity in the Subclass 457 Programme (the 457 Integrity Review) in its report: *“Robust New Foundations – A Streamlined, Transparent and Responsive System for the 457 Programme”*, released 10 September 2014. The 457 Integrity Review recommended that the TSMIT be retained, and be frozen at \$53,900 until it is reviewed within two years.

Information about the 457 Integrity Review, including public submissions, the review report and implementation, is available on the Department’s website at: [www.border.gov.au/about/reports-publications/reviews-inquiries/independent-review-of-the-457-programme](http://www.border.gov.au/about/reports-publications/reviews-inquiries/independent-review-of-the-457-programme)

An extract from the 457 Integrity Review report on the TSMIT is at **Attachment C**.

On 21 October 2015 the Australian Government announced that the TSMIT Review would be brought forward as part of the agreement with the Opposition to ensure the passage through Parliament of the implementing legislation for the China-Australia Free Trade Agreement.

On 23 December 2015, the Hon Peter Dutton MP, Minister for Immigration and Border Protection announced that Mr John Azarias had been appointed to undertake the TSMIT Review.

The Terms of Reference for the TSMIT Review are at **Attachment A**. These Terms of Reference are consistent with the Government’s commitment to ensuring the 457 programme acts as a supplement to, and not a substitute for, local workers and the continued protection of potentially vulnerable foreign workers in Australia.

The Terms of Reference ask the reviewer to consider a range of issues, including factors that should determine the settings, the appropriate base level, indexation and regional concessions for TSMIT.

# Temporary Skilled Migration Income Threshold (TSMIT) – Overview and Context

## Background

The TSMIT is a salary threshold used by the 457 programme as an indicator that an occupation is skilled and to ensure that a visa holder has reasonable means of support whilst in Australia. The TSMIT was implemented on 14 September 2009 to replace the Minimum Salary Level and is specified in a Legislative Instrument.

The TSMIT recognises that, as temporary residents, 457 visa holders are generally ineligible for income support or taxation benefits, and may be required to meet other costs during their period of stay, such as costs associated with private health insurance coverage or public school fees.

The TSMIT is not prescribed by workplace relations legislation, and is not intended to have any bearing on the 'market rate' sponsors are obliged to pay visa holders. Rather, it is a 'floor' originally set with reference to average weekly earnings.

If the market salary rate for an occupation in Australia is below the TSMIT, an employer cannot nominate that occupation to be filled by a 457 visa holder. However, if the market base rate of pay is below TSMIT but the guaranteed annual earnings are above TSMIT then that position may be eligible for the 457 programme. This approach allows for non-salary related earnings to be taken into consideration, such as guaranteed allowances and fringe benefits.

## Indexation

The TSMIT was set at \$45,220 in 2009, based on the Minimum Salary Level used in the 457 programme at that time. Minimum Salary Level was a defined level of salary calculated in the way specified in a legislative instrument. It was based on a seasonally adjusted average of Average Weekly Ordinary Time Earnings (AWOTE) for all employees produced by the Australian Bureau of Statistics. TSMIT replaced Minimum Salary Levels, which were preserved for existing visa holders.

TSMIT has been indexed annually in accordance with increases in the average weekly earnings published by the Australian Bureau of Statistics, report 6302.0, to keep pace with the cost of living. On 1 July 2013 the TSMIT was indexed and set at \$53,900. In 2014, the Minister for Immigration and Border Protection used his discretion not to index TSMIT, as recommended by the 457 Integrity Review.

## Indicators that an Occupation is Skilled

The 457 programme uses the Australia and New Zealand Skilled Occupation (ANZSCO) list published by the Australian Bureau of Statistics (ABS) to classify occupations. Generally skill level is measured by the amount of formal education and training that a person may be required to have in order to be employed in that occupation in Australia. ANZSCO allows relevant experience to substitute for the formal qualifications. Based on ANZSCO skill level definitions, occupations with skill levels 1, 2 and 3 are considered sufficiently skilled for the purposes of employing a 457 visa holder.

The qualifications required for skill levels 1-3 ranges from a Certificate III including at least two years on-the-job training, to a bachelor or higher qualification.

Occupations with skill levels 4 and 5 are not eligible under the standard 457 programme because they are not considered to be sufficiently skilled, requiring between a Certificate I or a short period of on-the job training, to a Certificate II or one year relevant experience.

While ANZSCO is the primary indicator that a position is skilled, the duties listed for many occupations are open to interpretation, making it difficult for the Department to refuse nominations for low skill level positions that have been incorrectly classified as a higher skill level occupation. For example, there are multiple occupations that prepare and cook food including Chefs (skill level 2), Cooks (skill level 3), Fast Food Cooks (skill level 5) and Kitchenhands (skill level 5). Where positions are hybrid occupations consisting of duties from more than one of these occupations, this increases the complexity of determining the correct occupation. More information on the duties of Chef, Cook, Fast Food Cook and Kitchenhand is available at **Attachment B**.

A salary threshold provides an important secondary indicator that an occupation is sufficiently skilled to be eligible for the 457 programme. It is intended that TSMIT be commensurate with the salary paid to skilled workers in Australia.

The existing ANZSCO, TSMIT and market salary rate provisions are intended to discourage sponsors from artificially inflating the skill level of a position, which could result in visa holders being paid more than equivalent Australian workers and/or being employed in semi or unskilled occupations that might be adequately filled by training Australians. Despite this, some sponsors in the 457 programme seek to inflate the earnings of positions in order to meet visa requirements. The Department introduced the 'genuine position' requirement in July 2013 to address these issues, which requires that the position associated with the nominated occupation is genuine.


### Reasonable Means of Support

The TSMIT also aims to ensure that 457 visa holders are paid sufficient funds to provide a reasonable standard of living whilst in Australia. It is important to recognise that 457 visa holders may be subject to higher costs of living in Australia than Australian citizens and permanent residents, both when moving to Australia and in accessing social services. 457 visa holders are generally ineligible for income support or taxation benefits, and may be required to meet other costs during their period of stay, such as costs associated with private health insurance coverage or public school fees. They are also prohibited from secondary employment and may not have other income sources within their immediate family or broader family or social networks to rely on in times of financial stress. The current level of TSMIT does not take into account the number of dependant 457 visa holders nominated with a primary 457 visa applicant.

The basic premise is that if visa holders have reasonable means of support they will be less likely to breach visa conditions by working for employers other than their sponsor and are less vulnerable to mistreatment or exploitation by their sponsoring employer.

### Regional concessions

Regional concessions have previously been permitted for the subclass 457 visa. They were introduced in November 2002 as part of a broader range of measures aimed at supporting state and regional development strategies. At the time of their operation, regional concessions applied to most of Australia, with the exception of Sydney, Newcastle, Wollongong, Melbourne, the Gold Coast and Perth. Despite this large coverage, the proportion of 457 visas granted with regional concessions accounted for a small proportion of the total number of primary visas granted.



Regional concessions were removed in 2009 following the findings of the integrity review of the 457 visa undertaken by Ms Barbara Deegan. The concessions were the subject of criticism by stakeholders including some state governments and unions. Ms Deegan concluded that: 'Where a regime of market rates are mandated for payment of the visa holders there is no need for any specific regional concession [ . . . ]' and that regional considerations could be addressed through Labour Agreements. The 2014 457 Integrity Review also noted the market rate framework is a core component of the 457 programme and that Labour Agreements are an appropriate mechanism for providing concessions to the TSMIT.

Since the TSMIT was introduced in 2009, there have been no regional concessions, reflecting the broader aim of TSMIT to provide overseas workers with a reasonable standard of living without access to Government support.

The 457 Integrity Review recommended that the issue of regional concessions to the TSMIT be considered in limited circumstances and where evidence clearly supports such concession. The 457 Integrity Review also recommended that this should be informed by a comprehensive analysis of wage trends in regional labour markets.

## Issues for consideration

We seek your views on the issues raised by the Terms of Reference for the TSMIT Review:

### Key issues

What factors should be taken into account when determining the TSMIT;

- Whether a single TSMIT should apply to all circumstances (e.g. should it be affected by the specific occupation, location of the position or the number of dependent 457 family members nominated);
- If TSMIT should vary based on circumstances, how should these variations apply (e.g. should they operate to increase and/or decrease the TSMIT);
- How to calculate an evidence-based TSMIT;
- Whether and how to index the TSMIT (e.g. whether is it appropriate to use CPI, average earnings or other indicators for indexation purposes); and
- What is the appropriate legislative mechanism for specifying the TSMIT.

### Other relevant factors

- The extent to which the current TSMIT settings may (or may not) be impairing industry's ability to employ skilled overseas workers (including in regional areas);
- The extent to which allowances (e.g. meals and accommodation) might be factored into TSMIT;
- Whether Labour Agreements might effectively accommodate industries where the market salary rate is lower than TSMIT or whether this should be done through other means; and
- Public communication strategies relating to salary thresholds.

### Out of Scope

- Whilst the TSMIT Review acknowledges the relationship of TSMIT to market salary rates, ANZSCO skill levels and other legislative provisions, it will not assess the effectiveness of related provisions or consider alternatives that might more effectively, efficiently or appropriately achieve the same objectives. However, any reports or consultation on their effectiveness may be noted in the report for this review.
- While the TSMIT Review will consider the use of Labour Agreements and Designated Area Migration Agreements to accommodate lower salary thresholds it will not more generally evaluate their efficiency, effectiveness or appropriateness.

## Attachment A: TSMIT Review Terms of Reference

### Context

Since 2009 the Temporary Skilled Migration Income Threshold (TSMIT) has been used by the 457 programme as a salary threshold which indicates that an occupation is skilled and ensures that 457 visa holders have reasonable means of support whilst in Australia,

Originally the TSMIT was set at \$45 220, based on the amount of the minimum salary level that the 457 programme utilised in 2009. It has been indexed annually based on increases in the full-time adult average weekly earnings to keep pace with increases in the cost of living. On 1 July 2013 the TSMIT was indexed and set at \$53 900.

An Independent Review into Integrity in the 457 Programme conducted in 2014 made a range of recommendations in relation to the TSMIT, including retaining it at \$53 900 until a review of the TSMIT is undertaken.

### The Review

Consistent with the Government's commitment to ensuring that the Subclass 457 programme acts as a supplement to, and not a substitute for local workers, and the protection of potentially vulnerable foreign workers in Australia, the TSMIT review is to:

- consider and advise on the factors that should be taken into account when determining settings for the TSMIT;
- determine an appropriate base level for the TSMIT, which is supported by evidence;
- consider whether TSMIT should be indexed and if so, advise on the methodology for indexation of the TSMIT (e.g. whether is it appropriate to use CPI, Average Weekly Ordinary Time Earnings or other indicators for indexation purposes);
- determine whether a single income threshold should apply to all occupations, sectors and circumstances, such as regional locations;
- determine the appropriate legislative mechanism for specifying the level at which the TSMIT is set; and
- consider and advise on any other relevant factors.



## Attachment B: ANZSCO Duties

UNIT GROUP 3513 CHEFS	UNIT GROUP 3514 COOKS	UNIT GROUP 8511 FAST FOOD COOKS	UNIT GROUP 8513 KITCHENHANDS
<p>CHEFS plan and organise the preparation and cooking of food in dining and catering establishments.</p> <p><b>Indicative Skill Level 2</b> A level of skill commensurate with an AQF Associate Degree, Advanced Diploma or Diploma (ANZSCO Skill Level 2). At least three years of relevant experience may substitute for the formal qualifications listed above.</p> <p><b>Tasks Include:</b></p> <ul style="list-style-type: none"> <li>• planning menus, estimating food and labour costs, and ordering food supplies</li> <li>• monitoring quality of dishes at all stages of preparation and presentation</li> <li>• discussing food preparation issues with Managers, Dietitians and kitchen and waiting staff</li> <li>• demonstrating techniques and advising on cooking procedures</li> <li>• preparing and cooking food</li> <li>• explaining and enforcing hygiene regulations</li> <li>• may select and train staff</li> <li>• may freeze and preserve foods</li> </ul>	<p>COOKS prepare, season and cook food in dining and catering establishments.</p> <p><b>Indicative Skill Level 3</b> A level of skill commensurate with an AQF Certificate III including at least two years of on-the-job training, or AQF Certificate IV. At least three years of relevant experience may substitute for the formal qualifications listed above.</p> <p><b>Tasks Include:</b></p> <ul style="list-style-type: none"> <li>• examining foodstuffs to ensure quality</li> <li>• regulating temperatures of ovens, grills and other cooking equipment</li> <li>• preparing and cooking food</li> <li>• seasoning food during cooking</li> <li>• portioning food, placing it on plates, and adding gravies, sauces and garnishes</li> <li>• storing food in temperature controlled facilities</li> <li>• preparing food to meet special dietary requirements</li> <li>• may plan menus and estimate food requirements</li> <li>• may train other kitchen staff and apprentices</li> </ul>	<p>FAST FOOD COOKS prepare a restricted range of foods in fast food establishments.</p> <p><b>Indicative Skill Level 5</b> A level of skill commensurate with an AQF Certificate I, or compulsory secondary education. In some instances no formal qualification or on-the-job training may be required.</p> <p><b>Tasks Include:</b></p> <ul style="list-style-type: none"> <li>• taking and serving food and beverage orders, and receiving payment from customers</li> <li>• preparing food such as hamburgers, pizzas, fish and chips</li> <li>• washing, cutting, measuring and mixing foods for cooking</li> <li>• operating cooking equipment such as grills, microwaves and deep-fat fryers</li> <li>• cleaning food preparation areas, cooking surfaces and utensils</li> <li>• ordering and taking delivery of fast food ingredients</li> <li>• may arrange delivery of prepared food and beverages</li> </ul>	<p>KITCHENHANDS assist kitchen and service staff in preparing and serving food, and clean food preparation and service areas.</p> <p><b>Indicative Skill Level 5</b> A level of skill commensurate with an AQF Certificate I, or compulsory secondary education. In some instances no formal qualification or on-the-job training may be required.</p> <p><b>Tasks Include:</b></p> <ul style="list-style-type: none"> <li>• cleaning kitchens, food preparation areas and sculleries</li> <li>• cleaning cooking and general utensils used in kitchens and restaurants</li> <li>• transferring, weighing and checking supplies and equipment</li> <li>• assembling and preparing ingredients for cooking, and preparing salads, savouries and sandwiches</li> <li>• packing food and beverage trays for serving</li> <li>• cooking, toasting and heating simple food items</li> </ul>

## Attachment C: Extract from Robust New Foundations: A Streamlined, Transparent and Responsive System for the 457 Programme

### **Recommendation 5 (Temporary Skilled Migration Income Threshold – page 57)**

5.1 While there is an argument for abolishing the Temporary Skilled Migration Income Threshold, that it nevertheless be retained to allow for streamlining within the wider programme, and that concessions to the Temporary Skilled Migration Income Threshold be afforded under Labour Agreements, Enterprise Migration Agreements and Designated Area Migration Agreements, as appropriate.

5.2 That the current Temporary Skilled Migration Income Threshold be retained at \$53,900 p.a. but that it not undergo any further increases until it is reviewed within two years.

5.3 That the two roles currently performed by the Temporary Skilled Migration Income Threshold (that is, acting as a determination of the eligibility of occupations for access to the scheme and as an income floor) be more clearly articulated in the 457 programme, and that consideration be given to accepting the eligibility threshold as up to 10 per cent lower than the Temporary Skilled Migration Income Threshold.

5.4 That the government give further consideration to a regional concession to the Temporary Skilled Migration Income Threshold, but only in limited circumstances where evidence clearly supports such concession.

5.5 That in circumstances where the base rate of pay is below the Temporary Skilled Migration Income Threshold, the current flexible approach adopted by the department, taking into account guaranteed annual earnings to arrive at a rate that meets the minimum requirement of Temporary Skilled Migration Income Threshold be continued and made more visible to users of the programme and their professional advisors.

### **Temporary Skilled Migration Income Threshold (“TSMIT”) (pages 54-57)**

As it is generally understood, the TSMIT provides an income floor which is primarily designed to ensure that 457 visa holders are able to support themselves, and not breach their visa conditions by working for someone other than their approved sponsor, given that, as temporary residents, they are generally ineligible for income support, taxation benefits and other forms of support. In addition, the TSMIT can discourage sponsors from artificially inflating the skill level of a position. For example, a retail business that sought to disguise a sales assistant as a customer service manager would need to pay the nominee well above the prevailing rate for a sales assistant to meet the TSMIT.

Currently the TSMIT is \$53,900 p.a. It usually increases annually on 1 July in line with changes to average weekly earnings.

There are a number of aspects to the application of the TSMIT that are complex and opaque. For example, a substantial number of submissions expressed concern that due to the requirement to pay a guaranteed income on or above the TSMIT, pressure was put on employers to pay their Australian workers the equivalent rate to the one paid to the 457 visa holder, if the latter were receiving higher wages than their counterparts. These comments demonstrate a misunderstanding about the TSMIT, as the 457 programme is not available to those occupations and regions where the market rate for that occupation is below the TSMIT. Therefore, the TSMIT has two roles: as a threshold that assesses eligibility of a nomination, and as an income floor for visa holders.

An element of the TSMIT which is not well understood is that to address the considerable concerns raised that shortages in skilled occupations, particularly in regional areas or where award rates are closer to market rates cannot meet the threshold requirements of the TSMIT, an exception is permitted where “the Minister considers it reasonable to disregard” the TSMIT – this

is referred to as the TSMIT “out clause”. This does not change the need for the guaranteed minimum earnings to be above the TSMIT but it does change the assessment of eligibility of the nomination.

In order to access this “out clause” a sponsor needs to demonstrate that the equivalent Australian worker in a “typical working week” would receive not just a base rate of pay, but penalties, allowances and overtime which when included in a total salary would demonstrate that the occupation is eligible. This calculation is not unlike the process of calculating an annualised salary which is recognised in some industrial awards.

Views on the TSMIT were not unexpectedly divergent. While generally supportive of the market salary rates concept, industry groups have consistently raised the TSMIT as an issue of concern for businesses. Several, such as Restaurant and Catering Australia and the Australian Hotels Association (WA), called for the TSMIT to be replaced by the relevant award rate.

By contrast, the Australian Council of Trade Unions (“ACTU”), the ETU, and the MCA all supported the concept of the TSMIT. The ACTU, for example, noted that the TSMIT “helps to ensure that Subclass 457 visa holders 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” particularly as they are ineligible for a range of support available to Australian citizens and permanent residents, such as Medicare.

**Quotes from public submissions:**

*TSMIT is quite clear and specific and should be used as the base salary range...TSMIT should be based on the Australian award rate for employees, but this could be difficult to manage, therefore a minimum of \$48,000 should be the minimum TSMIT rate and indexed by the National Federal Wage Increase.*

**Australian Hotels Association (WA)**

*TSMIT...helps ensure that that all subclass 457 visa holders have sufficient income to independently provide for themselves and helps ensure the 457 visa program does not operate at the very lowest paid end of the labour market where the potential for exploitation of vulnerable workers is at its greatest...The ETU submits that the TSMIT should be kept and that it should not be amended in and such way that provides for a lessening of real wages.*

**Electrical Trade Union**

*The NFF considers the current Temporary Skilled Migration Income Threshold (TSMIT) framework to be overly prohibitive. The introduction of market salary rates and training benchmarks in 2009 created a barrier to use of the 457 visa programme for members in regional areas whose skilled workers are paid market salary rates below the TSMIT or the English Language Salary Exemption Threshold.*

**National Farmers’ Federation**

The MCA also noted that, unlike 457 visa holders, Australian citizens who receive award rates may also be eligible for different types of support, including “child support, single parent support, family tax benefits and various types of tax exemptions and rebates”. 457 visa holders must also hold private health insurance and in some states pay for public schools. Some groups raised concerns with the process for determining or indexing the TSMIT. The Master Builders’ Association, for example, argued that it “should be set through a more transparent mechanism that guarantees it is a genuine minimum salary that ensures a reasonable standard of living and is not a de-facto mechanism to restrict supply”.

Other submissions, including that from the NFF, have noted particular difficulties for employers in regional areas in meeting the TSMIT and suggested it be adjusted to take earnings differentials between metropolitan and regional labour markets into account.

After consideration, on balance we believe that the TSMIT currently plays an important role in protecting the integrity of the 457 programme, since:

- it is an actual dollar amount that is a simpler figure for compliance purposes;
- it aligns with the public perception of the 457 visa as a programme aimed at skilled and experienced workers;

- Labour Agreements and DAMAs, improved and properly implemented, will be a more responsive and appropriate mechanism of addressing issues specific to regions and/or occupations where the market rates are clearly below the TSMIT; and,
- with the recommended removal of the “one size fits all” approach to labour market testing, the retention of the TSMIT will assist in maintaining confidence with the scheme.

Given this role in the integrity of the scheme, we support the retention of the TSMIT at the current rate of \$53 900 with the following conditions:

- That the TSMIT stay at the current rate until such time as a full review is conducted within two years, by which time there will be an improved understanding of the labour market and the ability to undertake an analysis of the sufficiency of market rates paid to the visa holder in skilled occupations to meet minimum income needs of a skilled temporary migrant.
- Reflective of the additional costs that a temporary migrant has to bear, there is justification to have up to a 10 per cent lower threshold (i.e. \$48 510) for determining the eligibility of the nominated occupation, which could be known as the Skilled Occupation Eligibility Threshold. We believe it would not challenge the integrity of the scheme to recognise that the 457 visa holder could be paid up to 10 per cent more than their Australian counterparts at this minimum salary threshold range as they have additional costs and receive fewer benefits.

Importantly, taking into account the market salary rate requirement and the income threshold of the TSMIT, the sponsor would need to pay the nominee the market salary rate or the TSMIT, whichever is the greater. The proposed Skilled Occupation Eligibility Threshold (“SOET”) only relates to eligibility not to the role of the TSMIT as an income floor. In relation to the regional concerns, we acknowledge that, based on the evidence provided in many submissions, there may be merit in having a separate, lower TSMIT for nominations lodged for positions in regional areas. However, the panel has not had scope in this review to undertake a comprehensive market rate analysis, and is therefore not in a position to determine what the regional differential should be, particularly as it is likely that the regional market rates will vary.

The panel therefore recommends that the issue of regional concessions to the TSMIT be considered by government, and informed by a comprehensive analysis of wage trends in regional labour markets.