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Ms Catherine Schmitz  
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By email: [employerpolicy@border.gov.au](mailto:employerpolicy@border.gov.au)

Dear Ms Schmitz

**457 Programme – Temporary Skilled Migration Income Threshold (TSMIT)**

Thank you for the opportunity to comment on the Discussion Paper on the 457 Programme – Temporary Skilled Migration Income Threshold (TSMIT).

This submission, which has been prepared by the Migration Law Committee in the Law Council's Federal Litigation and Dispute Resolution Section, suggests that there are compelling public policy grounds for removing the TSMIT. These include that the TSMIT distorts market wages and pulls against the mechanisms in place for regulating and enforcing employment conditions under the *Fair Work Act 2009* (Cth), notwithstanding the refining and strengthening of the market salary provisions of the TSMIT in recent years. The TSMIT does not provide a remedy for an aggrieved employee, and could be removed in the interests of streamlining and deregulating employment requirements for temporary skilled employees, without negatively impacting their entitlements. Removal of the TSMIT will benefit small business and businesses in regional areas which are already subject to sufficient regulation, monitoring and compliance activities to safeguard employees, and that are currently heavily affected by the TSMIT.

The Law Council would welcome the opportunity to discuss this submission. Should you have any questions, in the first instance please contact the chair of the Migration Law Committee in the Federal Litigation and Dispute Resolution Section, Mr Erskine Rodan OAM T: 03 9329 8744, E: [e.rodan@erskinerodan.com.au](mailto:e.rodan@erskinerodan.com.au)

Yours sincerely

A handwritten signature in black ink, appearing to read "Michael Young", with a large, stylized flourish at the end.

**Michael Brett Young**  
Chief Executive Officer  
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## **Introduction**

- 1 The Law Council of Australia welcomes the opportunity to comment on the Discussion Paper on the 457 Programme – Temporary Skilled Migration Income Threshold (TSMIT).
- 2 The Migration Law Committee (MLC) in the Law Council’s Federal Litigation and Dispute Resolution Section has provided these comments. The MLC’s members are lawyers practising in immigration law, many of them Accredited specialists as well as Registered Migration Agents. The Law Council is the national peak body for the legal profession. Further information about the Law Council is at [Attachment A](#).
- 3 The MLC submits that:
  - all Subclass 457 visa applicants must be paid the “market salary rate” or be offered the same terms and conditions of employment which are no less favourable than those provided to an Australian employee performing equivalent work in that workplace’s regional locality. The TSMIT distorts this “market salary rate”.
  - The 457 Visa Programme includes a range of employee safeguards in the form of sponsor obligations, in addition to the current TSMIT, and Australian Government agencies have wide-ranging data-matching and enforcement powers to ensure that these are complied with.
  - The need for the TSMIT has been reduced because of the new focus on regulatory compliance in migration matters.

## **The market salary rate**

- 4 From 14 September 2009 all Subclass 457 Visa applicants must be paid the “market salary rate” and/or be offered the same terms and conditions of employment which are no less favourable than those provided to an Australian employee performing equivalent work to that workplace’s regional locality.
- 5 As noted in the Department’s Discussion Paper, the TSMIT was implemented as part of the 2009 reforms to the Subclass 457 visa programme.
- 6 The [Migration Regulations 1994](#) (the Regulations) require the provision of equivalent terms and conditions of employment to a nominated person, and what is required if there is no Australian performing equivalent work at that workplace’s regional locality (see for example r 2.72).
- 7 Those terms and conditions of employment must be no less favourable than those that are provided, or would be provided, to an Australian employee performing equivalent work at that workplace’s regional locality. Those equivalent terms and conditions are considered to be the “market salary rate” in that circumstance.
- 8 Market salary provisions were refined and strengthened from July 2013 through the legislative instrument [Specification of Income Threshold and Annual Earnings – IMMI 13/028](#).
- 9 Further, the base rate of pay under the “market salary rate” must be greater than the Temporary Skilled Migration Income Threshold (TSMIT) specified in the relevant Legislative Instrument.

- 10 The TSMIT is currently \$53,900 gross base per annum in addition to superannuation. This is indexed annually in accordance with ABS earnings data. The latest issue of 6302.0 Average Weekly Earnings, Australia issued by the [Australian Bureau of Statistics in November 2015](#) notes that in the 12 months to November 2015, Full Time Adult Average Weekly Ordinary Owed Time Earnings increased by 1.7% to \$1,499.30.
- 11 Overseas employees whose annual gross base salaries are \$250,000 or more are exempt from the market salary rate requirements. In June 2015 the Australian Senate disallowed the [Migration Regulations 1994 - Specification of Income Threshold and Annual Earnings 2015 - IMMI 15/050](#) which would have lowered the income threshold above which sponsors of 457 visa holders were exempt from market testing, from \$250,000 to \$180,000.
- 12 The market salary rate requirements work well in terms of ensuring that the remuneration offered to a 457 visa holder is fair and reasonable in the context of the particular position. Comparison with market salary means that the rate is dynamic and takes into account factors such as occupation, demand for that occupation, location, skill level, and what is an acceptable offer.
- 13 However, the cluster of nomination approvals at the level of the TSMIT, or just above that rate, demonstrates the limited efficacy of an artificially imposed threshold, and the integrity problems that it generates. TSMIT is a statistical average which has no connection to what is actually happening in the labour and salary market both regionally and in major cities in Australia. Setting a threshold in this way encourages either artificial inflation of wages up to TSMIT, or the driving down of wages to a level no higher than TSMIT.
- 14 Moreover, the *Migration Act 1958* (Cth) is not an appropriate vehicle for regulating terms and conditions of employment. Robust mechanisms are already in place for regulating and enforcing employment conditions under the *Fair Work Act 2009* (Cth) and through the Ombudsman, which provide avenues for remedies and compensation for employees. The Migration Act should not attempt to replicate or superimpose its own wages regulation system, particularly given that it does not lead to remedies for the employee concerned.
- 15 A further consideration is that the 457 visa programme is accessible by skilled employees who may be less vulnerable to labour market exploitation than unskilled employees. Skilled employees may also have other income-earners in their household who assist with payment of living costs.

## **Issues**

### **Regional Australia**

- 16 Regional concessions were abolished in 2009 when the TSMIT was introduced. In regional Australia, wages are often below those in large metropolitan areas, as evidenced by average weekly earnings data. For example, figures published by the Tasmanian Government on 25 February 2016 conclude with the statement:

*The estimated level of the Tasmanian AWOTE in November 2015 remains the lowest of all jurisdictions and was 87.8% of the national average level.*

- 17 Applying that percentage figure to the TSMIT in Tasmania it would be \$47,324.
- 18 In Tasmania, one of the main users of 457 visas is the hospitality industry. As at the end of February 2015, the Tasmanian Hospitality Association (THA) issued a press release, widely published in Tasmania, advising that there were 300 unfilled positions in hospitality sector in Tasmania. The number of 457 visa applications for those occupations is extremely low because employers cite the TSMIT as being a disincentive to employment.
- 19 The Hospitality Industry (General) Award 2010 shows the top level Cook Grade 5 (with full trade qualifications and some experience) earns minimum pay of \$834.60 per week, or \$43,399 per year. The THA refers to anecdotal evidence that most employees with those qualifications would be paid over the award, probably in the order of \$48,000.
- 20 Similar disconnects exist in other industry award wages, which are substantially less than the TSMIT.

#### Intra-corporate transfers

- 21 The MLC also submits that the TSMIT should be not be applied to transnational intra-corporate transfers where:
- the occupations tend to be in managerial and professional occupations with low risk of exploitation;
  - wages tend to be higher than TSMIT already; and
  - the corporate group is in effect its 'own' labour market and salary market, and international transfers can ensure that the employee is not disadvantaged .

#### Subclass 457 Sponsorship Obligations

- 22 The TSMIT must also be considered in the context of [r 2.72\(10\)\(c\)](#) which specifies that a sponsor must engage Subclass 457 visa holders on equivalent terms and conditions that are, or would be, provided to an equivalent Australian or permanent resident employee performing equivalent work in that workplace in that location.
- 23 If the employer does not employ an Australian in a nominated position, they must provide evidence that the nominated salary is commensurate with the relevant market salary rate for that locality.
- 24 If the market salary rate for the position is below the TSMIT, an employer cannot nominate this position to be filled by a Subclass 457 visa holder.
- 25 Sponsorship obligations apply to all approved sponsors and former approved sponsors and must include, but are not limited to the following :
- To ensure non-discriminatory employment practices
  - To cooperate with inspectors.
  - To ensure equivalent terms and conditions of employment (namely to pay the market salary rate however described) to the primary Subclass 457 visa holder.
  - To pay prescribed costs of the departure of the visa holder (or a former visa holder) from Australia.

- To pay prescribed costs to the Commonwealth in relation to locating the former visa holder, and removing the former visa holder from Australia.
- To keep records.
- To provide records and information to the Department.
- To notify the Department of prescribed changes in the circumstances of an approved sponsor, a former approved sponsor, visa holder or a former visa holder.
- To ensure that a visa holder works or participates in an occupation, program or activity nominated by an approved sponsor (including by preventing the on-hire of a visa holder).
- To require an approved sponsor or former approved sponsor not to recover, transfer or take actions that would result in another person paying for certain prescribed costs.
- To require an approved sponsor or former approved sponsor to meet prescribed training requirements.

26 The Act and the Regulations contain provisions relating to sponsorship obligations, the powers of the Department to ensure that all sponsors satisfy their obligations, and powers by the Department to penalise such sponsors who fail to comply with such obligations. Below is an illustration of one of the above obligations to explain the vigorous monitoring system that already exists in relation to the 457 Sponsorship obligations.

Records that must be kept in regard to equivalent terms and conditions of employment

- 27 Sponsors are required to keep:
- A record of money paid to the primary sponsored person;
  - A record of the money applied or dealt with in any way on the primary sponsored person's behalf or as the sponsored person directed;
  - A record of agreed non-monetary benefits provided to the primary sponsored person including the agreed value and the time at which, or the period over which, those benefits were provided;
  - A record of terms and conditions of employment of equivalent employees within the workplace;
  - A record of tasks performed by the primary sponsored person and the location(s) where the tasks were performed; and
  - A contract of employment signed by both parties under which the primary sponsored person is employed.
- 28 The following records must be maintained in a manner capable of being verified by an independent person:
- Records on how the sponsor complied with a request for payment of return travel costs;
  - Records of money paid to the primary sponsored person; and

- Records of the money applied or dealt with in any way on the primary sponsored person's behalf or as the primary sponsored person directed.
- 29 The Department's position is that cash payments are generally not capable of being verified by an independent person. If a sponsor chooses to pay sponsored persons in cash, the onus is on the sponsor to ensure that they keep records of such payments. To avoid any doubt, sponsors are strongly encouraged to use salary payment methods which clearly meet the requirements of Regulation 2.82, such as Electronic Funds Transfers.
- 30 The Department considers an independent person is a person who is free from influence or authority of the sponsor and who can establish the correctness of a record on the basis of the presented facts.
- 31 All of the records must be kept in a reproducible format. No record needs to be kept for more than five years.

Further requirements under the subclass 457 visa program which assist the Department to uphold the integrity of the program

- 32 On 1 July 2013 the following further requirements in regard to Subclass 457 visas program came into effect.

**Demonstrating a genuine skill need**

- 33 The decision-maker must now be satisfied that the nominated position is genuine and may refuse the application if:
- the tasks of the nominated occupation do not correspond to the tasks of an eligible occupation, or
  - the position associated with the nominated occupation is not genuine.
- 34 In most cases, the decision-maker can be satisfied that a position is genuine without further enquiry. However, the Departmental policy guidelines allow for consideration of a range of factors including whether:
- the nominee is a relative or personal associate of an officer of the sponsoring business;
  - Whether nominee is a director of the sponsoring business;
  - The salary level is inconsistent with other employees in the occupation (for example, if the nominated salary is significantly lower than industry standards for the nominated occupation);
  - Whether the tasks of the nominated position do not include a significant majority of the tasks of the nominated occupation as listed in the Australian and New Zealand Standard Classification of Occupations (**ANZSCO**) Dictionary;
  - If the position does not fit broadly within the scope of the activities and scale of the business; and
  - Whether the sponsor is an overseas business and the sponsor seeks to employ the visa holder with an associated entity in Australia.

- 35 This change has been significant and has seen in an increase in the number of refusals of nominations and visa applications since its introduction.

### **The broader regulatory context**

- 36 The operation of the TSMIT should also be assessed in the broader context of the new era of regulatory compliance. This includes:
- the merger of the Department of Immigration and Border Protection (**the Department**) with the Australian Customs and Border Protection Service and the establishment of the Australian Border Force as the operational enforcement arm came into effect on 1 July 2015.
  - The authority and reach of the Department has been expanded, and with the Australian Border Force as its operational enforcement arm, it is an enforcement agency (and a criminal enforcement agency).
  - The significant legislative changes which have come into effect since 1 July 2015 which reflect the significant shift in government policy including in respect of the Subclass 457 visa programme and the significant penalties and sanctions for breach.
  - The robust regulatory compliance environment including in the context of a whole of government approach and information sharing.

### **The integrated Department of Immigration and Border Protection and the Australian Border Force**

- 37 This new era of regulatory compliance also needs to be seen in the context of the raft of legislative reforms which have been implemented since the merger came into effect on 1 July 2015. The regulatory burden on all employers is substantial. Applicable legislation includes:
- *Australian Border Force Act 2015 (Cth)*
  - *Customs and Other Legislation Amendment (Australian Border Force) Act 2015 (Cth)*
  - *Proceeds of Crime Act 2002 (Cth)*
  - *Law Enforcement Integrity Commissioner Act 2006 (Cth)*
  - *Law Enforcement Legislation Amendment (Powers) Act 2015 (Cth)*
  - *Telecommunications (Interception and Access) Act 1979 (Cth)*
  - *Migration Amendment (Strengthening Biometrics Integrity) Act 2015 (Cth)*
  - *Privacy Act 1988 (Cth)*
  - *Data Matching Program, information sharing and a whole of government approach*
- 38 The Department and the Australian Border Force work collaboratively with a range of partners and agencies, both within Australia and overseas, to develop agreed processes, to share information and expertise and to share the burden of managing the border.

- 39 At a national level, a strong whole-of-government approach focuses on close liaison and cooperation with other national security agencies, and agencies with functions related to the border.

#### Data Matching Protocol

- 40 Increasingly the Government is amending legislation to enable the use and disclosure of personal information obtained under the Migration Act and the Regulations for the purposes of enforcing Australia's laws.
- 41 The sharing of information across Government agencies is reflected in the Temporary Working Visas and Data Matching Programme protocol (the Protocol) between the Department and the Australian Taxation Office (ATO). Under the Protocol, more than one million temporary visa holders' records held by the Department are matched with the ATO's taxation and registration systems annually. The Protocol aims to enable the enforcement and recovery of taxation revenue by the ATO and to assist in the maintenance of the integrity of the temporary visa programmes by the Department.
- 42 The Data Matching Program Protocol between the Department and the ATO are significant initiatives. These aim to match data so as to enable the "*enforcement and recovery of taxation revenue*" by the ATO and to assist the Department in maintaining the "*integrity of visa programs*" and compliance with the *Migration Act 1958 (Cth)*.
- 43 The Data Matching Program Protocols are part of a coordinated approach by government agencies including the Department and the ATO to access and share information so as to ensure compliance with Australia's laws and assist in compliance and enforcement operations.

#### Fair Work Inspectors as Inspectors under the Migration Act and exercise of powers for Migration Act purposes

- 44 There are now over 300 Fair Work Inspectors who investigate compliance with sponsorship obligations to ensure sponsored employees are working in their nominated occupation and being paid market salary rates.
- 45 The powers of Inspectors include investigating whether a sponsor who is required to satisfy sponsorship obligations has committed an offence, or contravened a civil penalty provision, under the Act.
- 46 Now, officers of the Sponsor Monitoring Unit who undertake Sponsor Monitoring are sworn, non-uniformed officers of the Australian Border Force, Immigration Compliance Branch of the Department.
- 47 The Australian Border Force is also responsible for locating and detaining unlawful non-citizens or persons in breach of visa conditions and detection and prevention of illegal work, and removal of unlawful non-citizens to their countries of citizenship.

#### Monitoring and sanctions

- 48 The Subclass 457 Visa Program provides streamlined entry requirements for approved sponsors needing to recruit skilled personnel from overseas on a temporary basis. The streamlined entry arrangements are supported by a robust monitoring, compliance and sanctions scheme.

- 49 The law and policy in regard to monitoring, compliance, enforcement and sanctions provisions is complex. They give considerable scope to Departmental officers as to the course of action to be taken in particular circumstances.
- 50 Sponsors are monitored by the Department to ensure that they comply with their obligations in relation to the sponsored person (including any sponsored family members). Sponsors can be monitored routinely while their sponsored persons are in Australia.
- 51 Sponsors are monitored by the Department through interviews and site visits, desk auditing using monitoring forms, referral to other agencies and/or other sections of the Department, as well as education and awareness raising activities.
- 52 The Act provides for significant monitoring arrangements and expanded investigative powers of the Department as part of the Sponsorship monitoring under the Subclass 457 visa programme.
- 53 It allows the entry to a place of business or other place without force where it is believed that there is information, documents or any other thing relevant to the purposes for which the monitoring and enforcement powers may be exercised.
- 54 The Act provides that once an inspector has entered a place he or she may:
- inspect any work, process or object;
  - interview any person;
  - require a person who has custody of, or access to, a document or record, relevant to the purpose for which the inspector is exercising the power, to produce the document to the inspector within a specified period or while the inspector is on the premises or at the place;
  - require a person to tell the inspector who has custody of, or access to, a document or record; and
  - inspect and make copies of any record or document that is kept on the premises or at the place or is accessible from a computer that is kept on the premises.
- 55 Site visits can be announced and unannounced (in industries of concern). Departmental inspectors can interview visa holders or others at site visits.
- 56 In addition to the significant powers to require a person to produce a document or thing and to provide information, even if doing so would incriminate the person or expose them to a penalty, the Act and the Regulations include significant powers in the event of contravention. These include civil penalty orders and other sanctions.
- 57 Relevantly, in conducting site visits and sponsorship monitoring, under the Act the information gathering power assists with the administration of the *Fair Work Act 2009*, the *Taxation Administration Act 1953*, the Act and the Regulations, and compliance with the law generally.
- 58 The imposition of sanctions is generally considered after the sponsor has been monitored or where a possible breach has been investigated.
- 59 The Act includes significant civil penalties that may apply to sponsors under the *Civil Penalty Provisions* in the Act including in the event of a breach of sponsorship obligations in the manner (if any) or within the period (if any) prescribed by the Regulations.

- 60 In addition, the Department has extensive compliance and enforcement powers to cancel for example Subclass 457 visa of the sponsored persons (and secondary visa holders) under Sections 109, 116, 128 and 140 of the Act. Visa cancellation is a substantial area of migration law.
- 61 The Subclass 457 visa programme is a highly effective and sophisticated programme which continues to be reviewed by the Department to ensure that it is a supplement and not a substitute for the Australian labour market, and that Australian conditions and standards of employment are safeguarded.
- 62 The review of TSMIT is timely, and in the context of the highly robust regulatory framework.
- 63 It is submitted that the TSMIT must be considered against this robust regulatory framework. The Subclass 457 visa programme, coupled with the significant expanded authority and reach of the Department and the Australian Border Force as its operational enforcement arm, should allay any concerns that the TSMIT needs to be retained in its present form. It is unnecessary and ineffective over-regulation.

#### **Recommendation**

The Law Council recommends that the TSMIT be removed.

#### **If an alternative view is taken**

- 64 If the TSMIT Review takes the alternative view that the TSMIT should be retained, the MLC recommends that the following amendments should be considered.

#### **Calculation and Indexation**

- 65 If TSMIT is retained as a salary benchmark, it must be responsive and timely to ensure fairness to employers and employees and that it does not operate artificially. Arguably, where an award applies, the Regulations should simply refer to the salary rates in that instrument (and the extensive Fair Work Act mechanisms to enforce it) as the 'TSMIT' that applies to that particular position. The market salary rate requirement would then adjust for the fact that in many cases Australians are paid above- award, as reflected in enterprise agreements or going rates across a group of employees with individual arrangements. This has the added benefit that employers are already familiar with those industrial instruments and the rates contained therein.
- 66 Any TSMIT threshold set in the Migration Act would then be limited in application to those positions not covered by an award or enterprise agreement. The methodology used and the resources used to inform the calculation of the TSMIT must be open and transparent.

#### **Concessions and differentiated TSMIT**

- 67 Perhaps the most compelling argument for a differentiated TSMIT comes from the concern of governments and employers in regional areas struggling to attract skilled employees. A comparison of living costs in regional areas compared to cities is not quite as simple as saying that regional areas are cheaper. While housing generally is more affordable, other costs such as food, utilities and petrol are often more expensive due to transportation costs. Differentiation in the manner set out in the Discussion

Paper is better achieved through the market salary rate requirement rather than by attempting to take account of cost of living factors.

- 68 To the extent that employers in regional areas do need assistance with attracting and retaining suitably skilled staff, there are adjustments that could be made elsewhere in the 457 programme that address those challenges better than retaining a TSMIT or introducing regional TSMIT concessions. For example, the current training benchmark could be modified for a small business in a regional area facing a skills shortage.
- 69 It is important that employment in regional areas is boosted to respond to market needs and to grow the economy sustainably. Employees should be given incentives to recruit skilled employees by a relaxation of the TSMIT requirements.

## **Attachment A**

### **Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.