

EXPLANATORY STATEMENT

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

Migration Regulations 1994

Migration (Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Amendment Instrument (LIN 23/045) 2023

- 1 The instrument, Departmental reference LIN 23/045, is made under paragraph 2.72(15)(d) of the *Migration Regulations 1994* (the Migration Regulations).
- 2 The instrument amends *Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018* (IMMI 18/033) in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. That subsection 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 1 July 2023, and is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

- 4 The purpose of this instrument is to amend IMMI 18/033, to increase the temporary skilled migration income threshold (TSMIT) to \$70,000. The TSMIT was introduced in 2009 and indexed annually until 2013, where it was set at \$53,900 and has not been increased since.
- 5 Section 140GB of the *Migration Act 1958* provides that a person who is an approved work sponsor or who is a party to negotiations for a work agreement may nominate a proposed occupation, program or activity; or an applicant for a visa of a prescribed kind in relation to the applicant's occupation or proposed occupation, or the program proposed to be undertaken by the applicant, or the activity to be carried out by the applicant. The Minister must approve the person's nomination if, among other things, the nomination satisfies the prescribed criteria.
- 6 Regulation 2.72 of the Migration Regulations sets out the criteria for approval of a nomination of a proposed occupation in relation to (relevantly) a holder of or applicant for a Subclass 482 (Temporary Skill Shortage) visa. Subregulation 2.72(15) provides that, subject to subregulation 2.72(16), if the occupation is nominated for a Subclass 482 visa in the Short-term or Medium-term streams, and the Minister is not satisfied that the nominee's annual earnings in relation to the occupation will be at least the amount specified by the Minister in an instrument in writing (currently IMMI 18/033), then a criterion for approval of the nomination is that the Minister is satisfied that the annual market salary rate, excluding any non-monetary benefits, for the occupation is not less than the TSMIT specified by the Minister in a legislative instrument in writing.
- 7 The amendments made by this instrument implement a commitment made before the 2022 federal election. The lifting of the TSMIT from \$53,900 to \$70,000 is the amount the TSMIT would have been, had it been indexed annually since 2013. The increase in the TSMIT is in line with the Government's policy intention, to ensure skilled migrant workers are able to

sufficiently support themselves while in Australia and to provide a safeguard against exploitation.

- 8 This instrument will also insert an application provision to ensure nomination applications lodged prior to 1 July 2023 but not finally determined will continue to be assessed against the TSMIT of \$53,900.

Consultation

- 9 The Department of Home Affairs has engaged with external stakeholders. The proposed increase to the TSMIT has been informed by the Jobs and Skills Summit in September 2022, and the Ministerial Advisory Council on Skilled Migration (MACSM) which was held in November 2022. All representatives supported increasing the TSMIT.
- 10 Further consultation was undertaken in March 2023 with the Australian Trade and Investment Commission; Department of the Prime Minister and Cabinet; Attorney General's Department; Department of Agriculture, Fisheries and Forestry; Department of Education; Department of Finance; Department of Foreign Affairs and Trade; Department of Health and Aged Care; Department of Industry, Science and Resources; Department of Infrastructure, Transport, Regional Development, Communications and the Arts; Digital Transformation Agency; and Treasury.
- 11 The Office of Impact Analysis (OIA) has advised that a Regulatory Impact Statement is not required. The OIA reference number is OIA23-04028.

Details of the instrument

- 12 Section 1 sets out the name of the instrument.
- 13 Section 2 provides for the commencement of the instrument on 1 July 2023.
- 14 Section 3 provides that *Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018* is amended as set out in Schedule 1 to the instrument.
- 15 Item 1 of Schedule 1 to the instrument amends section 6 of IMMI 18/033, to increase the TSMIT from \$53,900 to \$70,000.
- 16 Item 2 of Schedule 1 to the instrument inserts new section 10, which provides that the amendments made by Schedule 1 to the instrument apply to an application for approval of a nomination made after 30 June 2023. Any nomination application that is lodged prior to 1 July 2023 but not decided will be assessed against the TSMIT of \$53,900.

Parliamentary scrutiny etc.

- 17 The instrument is subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared in relation to the instrument, and provides that the instrument is compatible with human rights as it promotes the right to an adequate standard of living for skilled migrant workers and the right to fair conditions at work for both skilled migrant workers and Australian workers, and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate. The Statement is included at **Attachment A** to this explanatory statement.

- 18 The instrument was made by the Minister for Immigration, Citizenship and Multicultural Affairs in accordance with paragraph 2.72(15)(d) of the Migration Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration (Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Amendment Instrument (LIN 23/045) 2023

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The migration legislation includes mechanisms which are aimed at ensuring that visa applicants for certain skilled temporary and permanent visas are provided with remuneration and employment conditions that are at least equivalent to what is, or would be, provided to an Australian worker performing the same work at the same location.

In order to approve an employer's nomination of a non-citizen for one of these visas, the Minister must be satisfied that the monetary benefits for an equivalent Australian worker are at least the amount of the Temporary Skilled Migration Income Threshold (TSMIT), that the nominated skilled migrant worker (nominee) will be paid at least the same as an equivalent Australian worker, and that the nominee's guaranteed annual earnings, excluding any non-monetary benefits, will not be less than the TSMIT. In practice, this means that any non-monetary benefits included in the nominee's salary package (such as accommodation, clothing, meals, travel etc.) must be additional amounts, over and above the TSMIT.

This Disallowable Legislative Instrument, the *Migration (Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Amendment Instrument (LIN 23/045) 2023* amends the *Migration (IMMI 18/033: Specification of Income Threshold and Annual Earnings and Methodology of Annual Market Salary Rate) Instrument 2018* to raise the TSMIT to AUD\$70,000 for all new nominations lodged on or after 1 July 2023. All nominations lodged before 1 July 2023 will be assessed against the current TSMIT of AUD\$53,000.

Increasing the TSMIT received broad consensus at both the Jobs and Skills Summit in September 2022, and the Ministerial Advisory Council on Skilled Migration (MACSM) held in November 2022. Indications from all representatives were that TSMIT should be higher, with a single TSMIT providing clear messaging to all employers and migrants.

This measure directly aligns with the Government's priorities and commitments to increase Australia's place as a country and employer of choice for highly skilled migrants when competing on the world stage, by ensuring skilled migrant workers are able to support themselves in Australia, are less vulnerable to exploitation and do not find themselves in difficult financial circumstances.

Increasing the TSMIT ensures that the skilled visa program retains its original intent as being limited to skilled occupations. Raising the TSMIT is considered necessary to provide sufficient income for skilled migrant workers to better support themselves financially in Australia due to higher costs of living and to reduce vulnerability to exploitation. TSMIT increasing for skilled migrant workers is also necessary to keep pace with similar wage increases that have been announced for Australian workers, including to the aged care sector which sees a predominant number of lower paid female workers across that industry and a high reliance on skilled migrant workers.

Research of hospitality workers, shows that before TSMIT was frozen in 2013 (it was indexed annually), positive wage growth occurred, but after TSMIT was frozen, wages for Australian workers continued to increase while it flat lined for temporary skilled visa holders.¹

Options have been considered by various unions, industry sector leaders and migration and population experts as to the most appropriate level for TSMIT to be raised to, and which means of TSMIT indexation would be most appropriate. These levels have varied most greatly by Industry/Occupations, particularly the technical sectors (earnings over \$100,000) and the care and hospitality sectors (earnings at or below current TSMIT \$53,900) and predominantly of a lower skill level.

The figure of \$70,000 chosen for the increased TSMIT is close to the amount TSMIT would be from 1 July 2023 had it been indexed annually for the last ten years. The increase to \$70,000 maintains access to the skilled migration program for the majority of occupations, given 70 per cent of recent applicants were being paid above \$70,000 already. Access for lower salaried occupations via salary concessions remains available through Labour Agreements with some containing a 10% salary concession delivering a minimum salary of \$63,000. Further, the migration legislation provides some flexibility in assessing earnings where the total salary package is above the TSMIT and reflects the amount being paid to equivalent Australian workers.

If TSMIT was not raised to \$70,000 there would be a greater impact across the skilled migrant workforce in not allowing for skilled migrant wages to increase proportionately with cost of living expenses, and along with other wage increases across the Australian workforce. Therefore raising TSMIT to \$70,000 is seen as the best and least detrimental outcome for protecting skilled migrant workers from financial and related exploitative harm and in continuing to provide access to skilled migration programs for the maximum number of skilled workers possible.

Current labour market conditions, where skilled workers are in high demand with unemployment at 3.7 per cent in April 2023, means an increase to TSMIT shall not dampen demand for migrant workers. The National Skills Commission's Skills Priority List of October 2022 shows the number of occupations in national shortage has almost doubled, from 153 occupations in 2021 to 286 in 2022.

¹ Grattan Institute, *the Goldilocks wage threshold for temporary skilled migrants*

The skilled visa program is designed to be flexible and responsive to labour market conditions, and many industries have already started offering increased salaries to attract workers. Not raising the TSMIT would continue to put skilled migrants at risk of exploitation, through lack of wage growth and greater gaps between their wages and those of Australian workers. It would also lead to greater financial hardship for migrant workers, as the TSMIT has not been raised since 2013 resulting in ongoing decreases to real wage earnings for skilled workers.

Human rights implications

This Disallowable Legislative Instrument positively engages:

- the right to fair conditions of work under Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and
- the right to an adequate standard of living under Article 11(1) of the ICESCR.

This Disallowable Legislative instrument may also engage:

- the rights to equality and non-discrimination under Article 2(2) of the ICESCR and Article 26 of the International Covenant on Civil and Political Rights (ICCPR).

Fair conditions of work

Article 7 of the ICESCR provides:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) *Remuneration which provides all workers, as a minimum, with:*
- (i) *Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
 - (ii) *A decent living for themselves and their families in accordance with the provisions of the present Covenant;*
- (b) *Safe and healthy working conditions;*
- (c) *Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*
- (d) *Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.*

Raising the TSMIT is aimed at ensuring that skilled migrant workers are fairly remunerated for their work and to address the gaps in wages that have developed between Australian and skilled migrant workers. By extension, this also helps to ensure that migrant workers are not undercutting the Australian labour market. Addressing lack of wage growth for skilled migrant workers and ensuring employers commit to paying their workers at least the increased TSMIT also helps to address risks of worker exploitation. The measure in this Disallowable Legislative Instrument therefore promotes the right to fair conditions of work for under Article 7 of the ICESCR for both skilled migrant and Australian workers.

Adequate standard of living

Article 11(1) of the ICESCR provides:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Raising the TSMIT is also aimed at ensuring that skilled migrant workers are remunerated sufficiently by their employers in order to maintain an adequate standard of living, and to address the decreases to their real wage earnings. This helps promote the right to an adequate standard of living under Article 11(1) of the ICESCR for skilled migrant workers.

Equality and non-discrimination

Article 2(2) of the ICESCR states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In its General Comment 18, the UN Human Rights Committee (UNHRC) stated that:

The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].

Similarly, in its General Comment on Article 2 of the ICESCR, the UN Committee on Economic, Social and Cultural Rights has stated (at 13) that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

Neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking residence or employment. The UNHRC, in its General Comment 15 on the position of aliens under the ICCPR, stated that:

The [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR].

As such, Australia is able to set requirements for the entry of non-citizens into Australia, and does so on the basis of reasonable and objective criteria.

Raising the TSMIT may mean that some foreign workers who wish to come to Australia to work in lower paid jobs may not be successful in obtaining one of the skilled program visas which requires the nominating employer to meet the TSMIT requirement. As explained in the overview, there are mechanisms that allow some lower paid positions to be approved for a nomination. The measure affects new nominations made by employers on or after 1 July 2023 and does not apply to applications for nominations made before 1 July 2023.

Further, the ultimate aim of raising the TSMIT is to ensure fair remuneration of skilled migrant workers. Raising the TSMIT received broad support during stakeholder consultation and the new amount of TSMIT was set following consultations and is close to what it would have been had it been indexed annually over the last 10 years. As such, the measure in this Disallowable Legislative Instrument constitutes a reasonable, necessary and proportionate response to address the issues of wage gaps between Australian and skilled migrant workers and helping to ensure fair remuneration and conditions of work for all workers.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it promotes right to an adequate standard of living for skilled migrant workers and the right to fair conditions at work for both skilled migrant workers and Australian workers, and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon. Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs