

EXPLANATORY STATEMENT

Migration Regulations 1994

SPECIFICATION OF INCOME THRESHOLD AND ANNUAL EARNINGS

(Paragraphs 2.72(10)(cc) and 2.79(1A)(b) and subregulation 2.72(10AB))

1. This Instrument is made under paragraph 2.72(10)(cc), subregulation 2.72(10AB) of Division 2.17 of Part 2A and paragraph 2.79(1A)(b) of Division 2.19 of Part 2A of the *Migration Regulations 1994* ('the Regulations').
2. Paragraph 2.72(10)(cc) of the Regulations provides that the Minister must be satisfied that the base rate of pay (under the terms and conditions of employment mentioned in paragraph 2.72(10)(c)) that are provided, or would be provided, to an Australian citizen or an Australian permanent resident, will be greater than the temporary skilled migration income threshold specified by the Minister in an instrument in writing for this paragraph.
3. Subregulation 2.72(10AB) provides that paragraphs 2.72(10)(c) and 2.72(10)(cc) do not apply if the annual earnings of the person identified in the nomination are equal to or greater than the amount specified by the Minister in an instrument in writing for this subregulation.
4. Subregulation 2.79(1A) of the Regulations provides that regulation 2.79, that provides the obligation to ensure equivalent terms and conditions of employment, does not apply to a standard business sponsor of a primary sponsored person if:
 - either the primary sponsored person holds a Subclass 457 (Temporary Work (Skilled)) visa or the last substantive visa held by the primary sponsored person was a Subclass 457 (Temporary Work (Skilled)) visa; and
 - the annual earnings of the primary sponsored person are equal to or greater than the amount specified by the Minister in an instrument in writing for this paragraph.
5. The purpose of the instrument is to specify annual earnings of AUD 250,000 for the purposes of subregulation 2.72(10AB) of the Regulations and paragraph 2.79(1A)(b) of the Regulations. The instrument also specifies that the temporary skilled migration income threshold is AUD 53,900 for the purposes of 2.72(10)(cc).

6. The effect of paragraph 2.79(1A)(b) is that the primary business sponsor does not have to satisfy the obligation, provided the primary sponsored person holds a Subclass 457 (Temporary Work (Skilled)) visa, or their last substantive visa was a Subclass 457 (Temporary Work (Skilled)) visa and their annual earnings are equal to or greater than AUD 250,000.
7. Consultation was undertaken with the Ministerial Advisory Council on Skilled Migration, various Commonwealth agencies and internal stakeholders.
8. The Office of Best Practice Regulation has advised that a Regulatory Impact Statement is not required (OBPR Ref 2012/14563 and 2012/14634).
9. Under section 42 of the *Legislative Instruments Act 2003* the Instrument is subject to disallowance and therefore a Human Rights Statement of Compatibility has been provided (attached).
10. The Instrument IMMI 13/028 commences on 1 July 2013.

Statement of Compatibility with Human Rights

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

SPECIFICATION OF INCOME THRESHOLD AND ANNUAL EARNINGS

This 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 of the Legislative Instrument

Regulation 2.72(10)(c) of the *Migration Regulations 1994* (the Regulations) specifies that a sponsor must engage Temporary Work (Skilled) (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. If a sponsor does not employ an Australian in the nominated occupation, they must provide evidence that the nominated salary is commensurate with that which would be paid in the locality. This is referred to as the market salary rate.

Regulation 2.72(10AB) provides exemptions to the requirements of regulation 2.72(10)(c) if the annual earnings are greater than \$180,000, being the amount specified in paragraph 3 of the legislative instrument (F2012L01294 – IMMI 12/047).

The current salary level that exempts an assessment of market salary rates presents potential risks as some non-executive occupations are remunerated above this level, and there is a potential financial incentive for employers to source their labour from offshore where the market rate of pay exceeds the \$180,000 threshold.

It is proposed to amend the legislative instrument by increasing the market salary rate exemption from \$180,000 to \$250,000 which now means those earning between \$180,000 and \$250,000 will be able to access the market salary rate assessments.

The legislative instrument will also be amended by increasing the Temporary Skilled Migration Income Threshold (TSMIT).

The TSMIT was implemented as part of the 2009 reforms to the Subclass 457 visa program. If the market salary rate for a position is below the TSMIT, an employer cannot nominate this position to be filled by a Subclass 457 visa holder.

The TSMIT was initially set at \$45,220, based on research conducted by the Department of Immigration and Citizenship on the minimum salary necessary for visa holders to support themselves in Australia, considering they are generally not eligible for government benefits and support.

The other key purpose of the TSMIT is to ensure the Subclass 457 visa program is only used for positions requiring skilled and experienced workers, rather than entry-level positions. It is therefore important that TSMIT keep pace with wage growth across the Australian labour market.

The TSMIT figure is indexed annually (provided Ministerial approval is given) in accordance with the Average Weekly Earnings data released by the Australian Bureau of Statistics.

Human rights implications

This legislative instrument is relevant to Article 2.2 and Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 2.2 provides:

'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.'

As stated above, the proposed measure purports to exclude certain persons from the market salary requirements. It is therefore necessary to see whether this could amount to discrimination (differential treatment) for the purpose of Article 2.2 in relation to the rights under the ICESCR (most relevantly here is Article 7(a)).

The requisite elements of discriminatory conduct relate to attributes such as 'race, colour, sex, language, religion, political or other opinion, national or social origin, *property*, birth or other status.' (emphasis added) It appears that 'property' may be most relevant to this cohort. The Committee on Economic, Social Council Rights, in its General Comment Number 20 stated (at 24) that '[p]roperty status, as a prohibited ground of discrimination, is a broad concept and includes real property (e.g. land ownership or tenure) and personal property (e.g. intellectual property, goods and chattels, and *income*), or the lack of it.' (emphasis added)

The measure is aimed at ensuring that those who earning less than \$250,000 can rely on the market salary provisions (where as previously it was only those earning more than \$180,000), whilst those earning over \$250,000 there is a strong expectation that they will have the capacity to protect and advance their interests in employment negotiations and have well sought after skills in order to require such salaries. There is no concern that this cohort will have less advantageous terms and conditions of employment as Australians, as under the *Fair Work Act 2009*, all migrant workers are legislatively entitled to basic rights and protections, including minimum wages. (Clearly this cohort will have salaries well above the minimum wage level.) Further, this cohort will be in a position, given their highly sought after skills, to negotiate better terms and conditions if necessary. The only purpose of this measure is to prescribe a level to which market salary comparisons will not apply.

In noting that 'property' is a prohibited discriminatory ground, consideration will be had to whether the measure is consistent with Article 7 (fair remuneration). Relevantly, Article 7 provides that:

'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...'

The proposed legislative instrument engages and supports Article 7 of the ICESCR insofar as it assists the Department to ensure that Subclass 457 visa holders who are earning up to \$250,000 are remunerated to a value commensurate to the market salary rate. The measure does not put a ceiling

on the salary that can be paid, and it is expected that those people who earn more than \$250,000 will be able to negotiate a salary which is commensurate to their level, and that employers will pay salaries commensurate with employees with the skills they are trying to attract. Australia does not impose minimum and maximum salaries in relation to individual occupations. To the extent that the exemption could be used by employers to arbitrarily limit salaries to \$250,000, it is considered that the measure is reasonable, objective and proportional to cover the vast majority of Subclass 457 visa holders who would earn under \$250,000, whilst reflecting the fact that those earning more than \$250,000 have a clear capacity to defend their own financial interests.

The proposed legislative instrument also engages and supports Article 7 of the ICESCR insofar as it facilitates the indexation of the TSMIT for eligible Subclass 457 visa holders to a value commensurate to the market salary rate.

Conclusion

In relation to those Subclass 457 visa holders earning under \$250,000, the legislative instrument is compatible with human rights because it reflects and enhances the obligations under Article 7. In relation to those Subclass 457 visa holders earning over \$250,000, although it does engage Article 2.2 of the ICESCR inasmuch as it purports to limit the applicability of the market salary rate assessment based on 'property', it is reasonable, objective and proportional to the means it seeks to achieve.

In regards to the indexation of the TSMIT, the legislative instrument is compatible with human rights because it supports the right of eligible Subclass 457 visa holders to the enjoyment of just and favourable conditions of work pursuant to Article 7 of the International Covenant on Economic, Social and Cultural Rights.

The Hon. Brendan O'Connor MP, Minister for Immigration and Citizenship