EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958
Migration Amendment (Pathway to Permanent Residence for Retirees) Regulations 2018

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The *Migration Amendment (Pathway to Permanent Residence for Retirees) Regulations 2018* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to strengthen and update immigration policy and administrative practice. In particular, the Regulations amend the Migration Regulations to provide a pathway to permanent residence for certain non-citizens who are temporary residents of Australia and who have not previously had a suitable visa option to progress to permanent residence.

- The Regulations provide that certain holders or former holders of temporary retirement visas (retirees) are able to obtain permanent residence by meeting criteria in specified permanent visas. This change responds to concerns about the difficulties faced by retirees, including lack of access to health and other Government and community services, and disadvantage in relation to taxation and property issues.

- The Regulations target retirees who, at the time this change was announced in the Federal Budget on 8 May 2018, held a Subclass 405 (Investor Retirement) visa or a Subclass 410 (Retirement) visa, or who did not hold a substantive visa on that date and the last substantive visa held was one of those visas. In addition, the retiree must not have held a substantive visa, other than one of those visas, since 8 May 2018.

- The retirees may apply for a Subclass 103 (Parent) visa or a Subclass 143 (Contributory Parent) visa. Retirees must apply in Australia, maintain adequate health insurance until the permanent visa is granted, and meet the relevant health, character and other public interest criteria for the grant of the permanent visa.

The changes address concerns raised by retiree advocacy groups and were developed in consultation with the Departments of Health, Human Services, Social Services, Treasury and Finance.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at Attachment B.

Details of the Regulations are set out in Attachment C.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulations. The OBPR reference is 23128.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003.*

The Regulations commence on 17 November 2018.

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing all matters which by the Migration Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act.

In addition, the following provisions of the Migration Act may apply:

- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;

- subsection 40(1), which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;

- subsection 41(1), which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions; and

- subsection 46(3), which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Migration Amendment (Pathway to Permanent Residence for Retirees) Regulations 2018

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 of the Disallowable Legislative Instrument

This amendment establishes a pathway to permanently regularise the status of ageing and increasingly vulnerable long-term temporary residents, holders of Retirement (subclass 410) and Investor Retirement (subclass 405) visas (Retirees), by providing them with a pathway to obtain a permanent visa.

The Retirement visa was introduced more than 35 years ago to encourage self-supporting Retirees to bring overseas funds into the Australian economy and spend time in Australia as temporary residents at no cost to Australia's social and welfare system.

While these arrangements resulted in the temporary entry of financially independent Retirees, this is no longer the case for many Retirees particularly since the global financial crisis and due to the ageing nature of the cohort. While the majority of Retirees are from countries with Reciprocal Health Care Agreements (RHCA) with Australia, those who applied for their Retirement visa after 1 December 1998 are ineligible for Medicare under the RHCA.

The majority of Retirees have resided in Australia for a significant period with no eligibility for a permanent visa. The intent of this amendment is to address the issues associated with their temporary resident status. These include concerns about the lack of government-funded health care and social services, additional tax and duties imposed on foreigners purchasing properties and uncertainty about their future.

This measure will quarantine a portion of projected Parent migration places for Retirees. The amendment will allow Retirees to apply for a permanent visa while in Australia through the Parent (subclass 103) or Contributory Parent (subclass 143) visa. Retirement visa holders will be exempt from certain parent visa requirements that they would typically be unable to meet, such as having a family sponsor and the requirement to maintain an Assurance of Support, however must meet other requirements including health and character.

Human rights implications

This Disallowable Legislative Instrument positively engages applicable rights or freedoms, and where it limits rights, this limitation is reasonable and proportionate.

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The amendment positively affects the right to health as, if granted

permanent residence through the Pathway, Retirees will be eligible for Medicare which, as holders of Retirement or Investor Retirement visa, they are not currently eligible for.

Article 9 of the ICESCR recognises the right of everyone to social security, including social insurance. The amendment positively affects the right to social security as, if granted permanent residence through the Pathway, Retirees may be eligible for benefits that are not available to temporary residents.

Under the new arrangements, parents of Australian citizens and permanent residents will continue to have access to permanent residence under the Parent and Contributory Parent visa programs. The amendment means that a small number of existing Parent visa applicants will wait slightly longer to be granted permanent residence as some places are provided annually to Retirees. This is lawful as the Australian Government has the authority to grant visas and determine appropriate processing arrangements as a matter of domestic law. It is a reasonable and proportionate measure as the amendment targets vulnerable individuals who cannot currently meet the criteria for grant of a permanent visa, and may not have the ability to depart Australia and resettle in their home country, to regularise their immigration status.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it promotes human rights, and because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon David Coleman MP
Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT C

Details of the *Migration Amendment (Pathway to Permanent Residence for Retirees) Regulations 2018*

Item 1 – Name

This item provides that the name of the instrument is the *Migration Amendment (Pathway to Permanent Residence for Retirees) Regulations 2018*.

Item 2 – Commencement

This item provides that the instrument commences on 17 November 2018.

Item 3 – Authority

This item provides that the instrument is made under the *Migration Act 1958* (the Migration Act).

Item 4 – Schedules

This item provides for the effect of the Schedules to the instrument.

Schedule 1—Amendments

Migration Regulations 1994

Items 1 and 2 – visas prescribed for the purpose of section 48 of the Act

These items amend regulation 2.12 of the *Migration Regulations 1994* (the Migration Regulations). For the purpose of section 48 of the Migration Act, regulation 2.12 prescribes the visas that may be applied for by a non-citizen in Australia who does not hold a substantive visa and who has had a visa refused or cancelled since last entering Australia. The purpose of section 48 is to prevent non-citizens from remaining indefinitely in Australia by continuing to apply for further visas.

Item 2 includes the Retirement (Temporary) (Class TQ) visa (Subclass 410 (Retirement)) and the Investor Retirement (Class UY) visa (Subclass 405 (Investor Retirement)) in regulation 2.12. This will allow former holders of these visas (retirees) to apply for another retirement visa despite the refusal of a parent visa application. This regulation is providing a pathway to permanent residence for retirees via the Subclass 103 (Parent) visa or the Subclass 143 (Contributory Parent) visa. Applications for parent visas by some retirees may be refused. For example, the health criteria for the parent visas are more restrictive than the health criteria for the retirement visas. Without this amendment, the refusal of the parent visa application would mean that the retiree would not be able to apply for another retirement visa. The amendment ensures that retirees have the option of continuing to live in Australia on a retirement visa even if they are not able to proceed to permanent residence.

The inclusion of the retirement visas in regulation 2.12 does not mean that non-citizens who are not retirees can apply for a retirement visa. The retirement visas are closed to applicants other than current holders and former holders who have not held another substantive visa since the cessation of the retirement visa. The only remaining exception, for spouses and de facto partners of retirees who hold or held a Subclass 410 (Retirement) visa, is removed by items 7 to 9 below.

Items 3 to 4 – requirements to make a valid application for a Subclass 103 (Parent) visa

These items insert additional criteria into item 1124 of Schedule 1 to the Migration Regulations, which sets out requirements for making a valid application for a Subclass 103 (Parent) visa. The additional criteria apply to applicants who are seeking to satisfy the retiree pathway as a primary applicant or as a spouse or de facto partner of the primary applicant.

The effect of the amendments is that applicants:

- must be in Australia (but not in immigration clearance) to apply. The amendments are intended to assist retirees who are living in Australia and are adversely affected by lack of access to permanent residence. If eligible retirees are living outside Australia they will need to return to Australia to apply;

- must have held a Subclass 405 (Investor Retirement) visa or a Subclass 410 (Retirement) visa on 8 May 2018, or not have held any substantive visa on that date and the last substantive visa held prior to that date was one of those visas; and

- must not have held any substantive visa, other than a Subclass 405 (Investor Retirement) visa or a Subclass 410 (Retirement) visa, from 8 May 2018 to the date of the parent visa application.

The date 8 May 2018 was the date of the Federal Budget, which announced the pathway for retirees. The intention is to assist persons who held retirement visas at that time. Persons granted an initial retirement visa after 8 May 2018 do not require assistance and need to make their own assessment about whether long term temporary residence in Australia on a retirement visa is a viable option. The Subclass 405 (Investor Retirement) visa was closed to new applicants on 1 June 2018. The Subclass 410 (Retirement) visa has been closed to new applicants, other than spouses and de facto partners of existing holders, since 1 July 2005. The visa will be closed to all new applicants on 17 November 2018 (item 7 below).

The inclusion of these criteria in Schedule 1 to the Migration Regulations will prevent retirees from making futile visa applications. If the core requirements listed above are not met, the visa application will not be valid and the Department will advise the applicant accordingly and return the visa application charge (VAC).

Items 5 to 6 – requirements to make a valid application for a Subclass 143 (Contributory Parent) visa

These items insert additional criteria into item 1130 of Schedule 1 to the Migration Regulations, which sets out the requirements for making a valid application for a Subclass 143 (Contributory Parent) visa. The items mirror the effect of items 3 and 4 as described above.

The distinction between the Subclass 103 (Parent) visa and the Subclass 143 (Contributory Parent) visa is that the Subclass 143 visa has a higher VAC. The higher VAC offsets part of the future cost of health care and other services. The benefit to visa applicants is that the waiting time for the grant of the Subclass 143 visa is substantially less than the waiting time for the Subclass 103 visa. There is high demand for parent visas and grants are capped annually under section 85 of the Migration Act.

Retirees have a choice about whether to apply for the Subclass 103 (Parent) visa or the Subclass 143 (Contributory Parent) visa, or alternatively, continue living in Australia as a temporary resident on a retirement visa without applying for permanent residence.

Items 7 to 9 – closure of the Subclass 410 (Retirement) visa to new applicants

These items amend subitem 1217(3) of Schedule 1 to the Migration Regulations, to close the Subclass 410 (Retirement) visa to new applicants with effect from 17 November 2018. From that date, the only persons who will be able to apply for a Subclass 410 visa are persons who already hold a Subclass 410 visa or whose last substantive visa since last entering Australia was a Subclass 410 visa. This is already the position with the Subclass 405 (Investor Retirement) visa, which closed to new applicants on 1 June 2018.

The closure of Subclass 410 to new applicants will have minimal impact, as the only new applicants permitted since 1 July 2005 have been spouses and de facto partners of Subclass 410 holders. If a Subclass 410 holder or former holder obtains permanent residence, their spouse or de facto partner may be able to apply for and be granted a partner visa.

The closure of the Subclass 410 visa to new applicants is necessary because of the change made by items 1 to 2 above. The closure of the visa to new applicants ensures that the capacity to make repeat applications for retirement visas cannot be abused by other persons seeking to delay removal from Australia.

Items 10 to 15 – conditions on bridging visas

These items amend Schedule 2 to the Migration Regulations to specify the visa conditions that apply to bridging visas granted to retirees who are applicants for parent visas.

Retirees who are able to make a valid application for a Subclass 103 (Parent) visa or a Subclass 143 (Contributory Parent) visa will have access to a bridging visa to maintain their lawful status during the processing of the parent visa application. There are four bridging visas that are potentially relevant: Bridging visa A (item 10), B (item 11), C (items 12 to 14), and E (item 15).

Retirees must maintain adequate health insurance in Australia until permanent residence is granted (condition 8501). This condition is mandatory except on the Bridging E visa, where imposition of the condition is discretionary to cater for situations where the applicant cannot obtain health insurance.

Bridging visas will also be subject to condition 8303 if that condition applied to the retirement visa. Condition 8303 requires the visa holder to avoid involvement in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community.

Other visa conditions deal with work rights. Holders of Bridging A and Bridging B visas have the same work rights that applied to the retirement visa. Bridging C and Bridging E visas generally do not permit the holder to work, although there is some flexibility.

Items 16 to 39 – amendments to the Subclass 103 (Parent) visa

These items amend Part 103 of Schedule 2 to the Migration Regulations to confer eligibility for a Subclass 103 (Parent) visa on retirees who meet the prescribed criteria. The effect of the amendments is as follows:

- items 16 to 20; items 22 to 31; and items 33 to 36: these items quarantine existing criteria that apply to parents. Those criteria remain separate from the retiree criteria;

- item 21 inserts the primary criteria for retirees, which are the same as the criteria for making a valid application as described at items 3 to 4 above;

- item 32 inserts the secondary criteria for spouses and de facto partners of retirees who satisfy the primary criteria. A spouse or de facto partner can be included in a combined visa application, which reduces the amount of the VAC. However, primary and secondary applicants must meet the same requirements in relation to holding a retirement visa (as described at items 3 to 4 above). This also means that no other member of a family unit can be included in the Subclass 103 application, as the only family members who were eligible for retirement visas were spouses and de facto partners;

- items 37 to 38 amend clause 103.411, which deals with the location of the applicant when the Subclass 103 visa is granted. Applicants who satisfy the retiree criteria, including spouses and de facto partners, may be in Australia or outside Australia, but must not be in immigration clearance. Although they must be in Australia to apply for the Subclass 103 visa (see items 3 to 4 above), additional flexibility is allowed at the visa grant stage. This assists applicants and streamlines decision-making by avoiding the need to delay finalising an application until an applicant returns to Australia;

- item 39 amends clause 103.611 to provide that the visa condition requiring first entry to Australia by a specified date only applies if the person is outside Australia when the visa is granted. The amendment is necessary because most retirees will be in Australia when the visa is granted.

Items 40 to 76 – amendments to the Subclass 143 (Contributory Parent) visa

These items amend Part 143 of Schedule 2 to the Migration Regulations to confer eligibility for a Subclass 143 (Contributory Parent) visa on retirees who meet the prescribed criteria. The effect of the amendments is as follows:

- items 40 to 43; items 45 to 52; items 54 to 55, items 57 to 64; items 66 to 71; and items 73 to 74: these items quarantine existing criteria that apply to parents. Those criteria remain separate from the retiree criteria;

- item 44 inserts the primary criteria for retirees, which are the same as the criteria for making a valid application as described at items 3 to 4 above;

- item 53 inserts clause 143.225AA setting out public interest criteria that apply to applicants seeking to meet the primary criteria for retirees. These are the same as the exiting public interest criteria for parents. The criteria are also the same as the criteria in Subclass 103;

- item 56 inserts clause 143.225B, the effect of which is that a primary applicant seeking to satisfy the primary criteria for retirees cannot be approved if a spouse or de facto partner who is also an applicant does not meet specified public interest criteria and special return criteria. As with item 53, these are standard criteria;

- item 65 inserts the secondary criteria for spouses and de facto partners of retirees who satisfy the primary criteria. The effect is as noted for item 32 above;

- item 72 inserts new clause 143.324A, the effect of which is that an applicant seeking to satisfy the secondary criteria as the spouse or de facto partner of a primary applicant who meets the retiree criteria must satisfy specified public interest criteria. As with items 53 and 56, these are standard criteria;

- items 75 to 76 amend clause 143.411 which deals with the location of the applicant when the visa is granted. The position is as described above for items 37 to 38.

Item 77 – Operation of the amendments made by this regulation

This item inserts Part 78 into Schedule 13 to the Migration Regulations. Schedule 13 contains application and transitional provisions for amendments to the Migration Regulations. The effect of Part 78 is that the criteria for retirees apply to visa applications made on or after 17 November 2018, which is the commencement date of the Regulations.