EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Subclass 189 Visas – New Zealand Stream) Regulations 2022

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 (Subclass 189 Visas – New Zealand Stream) Regulations 2022* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to facilitate workers from New Zealand moving from temporary to permanent residence status to support Australia's post COVID-19 economic recovery.

The Regulations facilitate more efficient processing of on-hand permanent skilled visa applications for New Zealand citizens and their family members. These applicants have been living in Australia generally for a significant period of time and continued to work in Australia during the COVID-19 pandemic.

In particular, the amendments provide concessions to exempt New Zealand citizens from the requirements to meet certain residence and income thresholds as well as the health criterion. Applicants for these visas are already resident in Australia on a temporary visa providing labour during a period of national labour shortage. Global competition for skilled workers has been, and continues to be, fierce as the Australian economy recovers from the COVID-19 pandemic. These measures support workers from New Zealand living and working in Australia on a permanent visa to support economic recovery. Applicants are still required to meet public interest criteria, including those relating to character, national security and Australian values. The amendments also pause new applications from being made while the Government considers future arrangements for migration and citizenship pathways for New Zealand citizens in Australia.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to

effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

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.

The Office of Best Practice (OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation reference is OBPR22-03559.

Consultation has been undertaken with the Departments of Foreign Affairs and Trade, and Prime Minister and Cabinet. Public consultation was not considered necessary or appropriate as the amendments are entirely beneficial to visa applicants, there is no disadvantageous impact on visa applicant's rights, and no liabilities are imposed as a result of the concessions. This accords with section 17 of the *Legislation Act 2003* (the Legislation Act).

The amendments commence on 10 December 2022 to align with required IT systems changes.

Further details of the Regulations are set out in Attachment C.

The Regulations amend the Migration Regulations which are exempt from sunsetting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015.* The Migration Regulations are exempt from sunsetting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;
- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and
- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

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

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations 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, the following provisions of the Migration Act may also be relevant:

- subsection 31(1), which provides that the regulations may prescribe classes of visas;
- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- paragraph 46(1)(b), which provides that a visa application is valid if, and only if, it satisfies the criteria and requirements prescribed under section 46;
- 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; and
- paragraph 46(4)(a), which provides that, without limiting subsection 46(3), the regulations may prescribe the circumstances that must exist 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 (Subclass 189 visas – New Zealand Stream) Regulations 2022

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

New Zealand citizens who wish to live and work in Australia generally do so on a Subclass 444 (Special Category) visa which allows them to work without restriction and live in Australia indefinitely. However, as it is a temporary visa, it does not provide all of the benefits of permanent residence. The New Zealand stream of the Subclass 189 (Skilled – Independent) visa provides a permanent residence option for New Zealand citizens who have demonstrated commitment to Australia, through long term residence, and who have made and can continue to make, a strong economic contribution to Australia's future.

The *Migration Amendment (Subclass 189 visas – New Zealand Stream) Regulations 2022* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to:

- provide significant concessions to the existing visa criteria for on-hand applications for the Subclass 189 (Skilled – Independent) visa in the New Zealand stream; and
- pause new applications for this stream from the commencement of the Amendment Regulations (10 December 2022) until 1 July 2023 to provide time for the Government to consider future arrangements for New Zealand citizens.

In particular, the amendments made by the Amendment Regulations provide that for Subclass 189 (Skilled – Independent) visa applications made in the New Zealand stream by primary applicants, before commencement of these amendments (on-hand applications), those applicants are not required to satisfy the New Zealand stream specific criteria relating to a period of residence in Australia, minimum taxable income and health. In addition, family members of primary applicants who made a Subclass 189 (Skilled – Independent) visa application in the New Zealand stream prior to the commencement of the Amendment Regulations are also not required to satisfy the health criteria. Instead, the only criteria to be met by primary applicants (and their family members) with on-hand applications are the existing common criteria for the Subclass 189 (Skilled – Independent) visa which relate to public interest criteria such as character, security, and certain other matters.

The purpose of the amendments is to support faster visa processing of these on-hand applications for this cohort of New Zealand citizens (and their family members) who have been living in

Australia generally for a significant period of time and continued to work in Australia during the COVID-19 pandemic. The effect of the Amendment Regulations is that the criteria for Subclass 189 (Skilled – Independent) visa applications made in the New Zealand stream will revert to the previous (pre-10 December 2022) settings for new applications made on or after 1 July 2023 unless the Government decides to provide new beneficial arrangements for New Zealand citizens beforehand.

Human rights implications

The Amendment Regulations may engage the rights of equality and non-discrimination contained in Article 2(1) and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2(2) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). This is because the amendments only apply to New Zealand citizens and their family members, and only to those who applied for a Subclass 189 (Skilled – Independent) visa in the New Zealand stream prior to the commencement of the Amendment Regulations.

Article 2(1) of the ICCPR states:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 2(1) of ICCPR requires that Australia ensure the rights recognised in the ICCPR extend to all individuals (citizens, residents and non-citizens) within its territory and subject to its jurisdiction.

Article 26 of the ICCPR provides that:

> *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.*

Article 26 requires that all persons are to be treated equally before the law and no law shall discriminate any of the grounds listed in the article. The UN Human Rights Committee in General Comment No. 18 explains that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference on grounds such as nationality or other status.

Article 2(2) of the ICESCR provides that:

> *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.

However, in its General Comment 18, the UN Human Rights Committee 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 Covenant.

The ICCPR does not give a right for non-citizens to enter Australia for the purposes of seeking residence. The UN Human Rights Committee, in its General Comment 15 on the position of aliens under the Covenant, stated that:

The Covenant 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 Covenant 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 Covenant.

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), UNCESCR 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 Covenant 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.

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, including access to permanent residence, and does so on the basis of reasonable and objective criteria formulated through labour market analysis and stakeholder consultation.

Global competition for skilled workers has been, and continues to be fierce, as the Australian economy recovers from the COVID-19 pandemic. These measures benefit New Zealand citizens with on-hand applications for a Subclass 189 (Skilled – Independent) visa in the New Zealand stream by streamlining the relevant visa criteria, to support faster visa processing of this cohort who have been living in Australia for a significant period of time and continuing to work in Australia during the COVID-19 pandemic.

Whilst this targeted approach provides differential treatment to New Zealand citizens, it does not amount to prohibited discrimination on grounds of nationality, as it is necessary, reasonable and proportionate to achieving a legitimate objective. It reflects the long standing, close and special

bilateral relationship between Australia and New Zealand, including as a result of the Trans-Tasman Travel Arrangement.

This unique relationship explains why Australia has in the past established visa arrangements that are only available to New Zealand citizens, such as the Subclass 444 (Special Category) visa, a temporary visa which enables the holder to live indefinitely and work without restriction in Australia. Like the Subclass 444 (Special Category) visa, the New Zealand stream of the Subclass 189 (Skilled – Independent) visa is only available to New Zealand citizens. It provides New Zealand citizens with a dedicated pathway to permanent residence. Permanent residence provides visa holders with the ability to access the National Disability Insurance Scheme upon visa grant, and social security payments after mandatory waiting periods have been served.

It would not be appropriate that these amendments be more broadly applied to any passport holder, as these measures are specifically aimed at maintaining the close economic, political and social ties Australia has with New Zealand, promoting stability in the Pacific though this ongoing relationship. Further, the New Zealand stream of the Subclass 189 (Skilled – Independent) visa reflects that New Zealand citizen applicants will have already been living and working in Australia on an indefinite basis, unlike other temporary visa holders.

Importantly, it should be noted that the amendments do not adversely affect the existing arrangements for visa holders and applicants who hold other passports, who continue to be able to apply for a Subclass 189 (Skilled – Independent) visa in other streams, and other skilled migration visas.

In addition, the benefit of more streamlined visa criteria is being extended only to those New Zealand citizens and their family members who applied prior to the commencement of the Amendment Regulations. This differential treatment, as well as the closure of the stream to new applicants until 1 July 2023, is appropriate as the purpose of the amendments is to more quickly process the existing visa applications while the Government considers future arrangements for New Zealand citizens. As one of the previous criteria for the New Zealand stream of the Subclass 189 visa (Skilled – Independent) visa had been that the primary applicant needed to have commenced 5 years residence in Australia prior to 19 February 2016, it is not anticipated that there are significant numbers of persons in Australia who were intending to apply for a visa in this stream and had not yet done so. Further, any such New Zealand citizens will be able to remain living and working in Australia on their Subclass 444 (Special Category) visas (and their non New Zealand citizen family members on Subclass 461 (New Zealand Citizen Family Relationship (Temporary) visas)). As such, the temporary closure of the stream is not anticipated to have significant adverse impacts on the rights of New Zealand citizens in Australia.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to achieving a legitimate objective.

The Hon Andrew Giles MP

Minister for Immigration, Citizenship, and Multicultural Affairs

ATTACHMENT C

Details of the *Migration Amendment (Subclass 189 Visas – New Zealand Stream) Regulations 2022*

Section 1 - Name

This section provides that the name of the instrument is the *Migration Amendment (Subclass 189 Visas – New Zealand Stream) Regulations 2022*.

Section 2 - Commencement

This section provides for the commencement of the instrument.

Subsection 2(1) provides that each provision of the instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The effect of the table is that the instrument commences on 10 December 2022.

Section 3 - Authority

This section provides that the instrument is made under the *Migration Act 1958*.

Section 4 - Schedules

This section provides for how the amended regulations operate.

Schedule 1 – Amendments

Part 1 - Amendments

Migration Regulations 1994

Item [1] – After paragraph 1137(4G)(a) of Schedule 1

This item inserts a new paragraph 1137(4G)(aa) in item 1137 (Skilled – Independent (Permanent)(Class SI)) of Schedule 1 to the *Migration Regulations 1994* (the Migration Regulations).

Item 1137 sets outs the requirements for making a valid application for a Subclass 189 (Skilled – Independent) visa. New paragraph 1137(4G)(aa) applies to an applicant seeking to satisfy the primary criteria for a Subclass 189 (Skilled – Independent) visa in the New Zealand stream (a primary NZ applicant).New paragraph 1137(4G)(aa) provides that an application by a primary NZ applicant must be made before 10 December 2022 or on or after 1 July 2023.

The effect of this amendment is that an application by a primary NZ applicant must be made before 10 December 2022 or on or after 1 July 2023. No new applications may be made between those dates. New applications are being paused while the Government considers future arrangements for New Zealand citizens. Family members of a primary NZ applicant may still join a pending application on or after 10 December 2022.

Item [2] – Before clause 189.231 of Schedule 2

This item inserts new clauses 189.231A and 189.231B in Subclass 189 (Skilled – Independent) of Schedule 2 to the Migration Regulations.

New clause 189.231A requires a primary NZ applicant to satisfy either new clause 189.231B, or existing clauses 189.231, 189.232, 189.233 and 189.234.

New clause 189.231B provides that the application must be made before 10 December 2022. The effect of new clause 189.231B is that an applicant who met the clause, by having made the application before 10 December 2022, only needs to satisfy that requirement and does not have to satisfy the remaining New Zealand stream clauses. The remaining New Zealand stream clauses are to be satisfied by an applicant who applied on or after 10 December 2022.

Clause 189.231 requires the visa applicant to have usually been a resident in Australia for a continuous period of at least five years immediately before the date of the application and that continuous period of usual residence to have started on or before 19 February 2016.

Clause 189.232 requires the visa applicant to provide notices of assessment given to the applicant by the Commissioner of Taxation evidencing the applicant's income tax liability in relation to three income years ending during the period of five years ending immediately prior to the date of application. One of those income years must be the income year that ended most recently before the application date.

Clause 189.233 requires that for each of the three income years (mentioned in clause 189.232) for which the applicant has provided notices of assessment, the applicant's taxable income is no less than a minimum amount specified by the Minister for the year, unless the applicant provides evidence that the applicant is in a class of exempt applicants.

Clause 189.234 provides that the applicant and each member of their family unit, regardless of whether the member of the family unit is also an applicant for the visa, satisfies public interest criterion 4007 (PIC 4007), a health criterion.

The effect of this amendment is that the applicant must have applied before 10 December 2022, in which case the applicant is only be required to meet the common criteria in clauses 189.211 and 189.212 relating to public interest criteria, such as, character, national security, debts to the Commonwealth, fraud, child custody and Australian values, and special return criteria relating to deportation and removal from Australia, amongst other things. They are not required to satisfy the residence requirement in clause 189.231, the taxation notice requirement in clause 189.232, the income requirement in clause 189.233, or the PIC 4007 health requirement in clause 189.234.

Applicants who apply on or after 10 December 2022 are, however, required to satisfy the residence requirement in clause 189.231, the taxation notice requirement in clause 189.232, the income requirement in clause 189.233, and the PIC 4007 health requirement in clause 189.234.

As noted above, the effect of the amendment made by item 1 of this Schedule is that no further applications may be made on or after 10 December 2022 until 1 July 2023 by a primary NZ applicant.

The combined effect of the amendments made by items 1 and 2 of this Schedule are that applications by primary NZ applicants are paused between 10 December 2022 and 1 July 2023, and the criteria under which applications made before 10 December 2022 are to be processed are streamlined to facilitate efficient processing of on-hand applications.

Item [3] – Subclause 189.312(5) of Schedule 2

This item omits the words "the New Zealand stream or" from subclause 189.312(5) of Subclass 189 in Schedule 2 to the Migration Regulations.

Clause 189.312 prescribes the public interest criteria to be met by secondary applicants for a Subclass 189 (Skilled – Independent) visa. Previous subclause 189.312(5) required that secondary applicants who are members of the family unit of a primary applicant who holds a Subclass 189 (Skilled – Independent) visa in the New Zealand stream or the Hong Kong stream are to satisfy the PIC 4007 health criterion.

The effect of this amendment waives the requirement to satisfy PIC 4007 for secondary applicants where the primary applicant holds a Subclass 189 (Skilled – Independent) visa in the New Zealand stream and where the primary applicant applied for the visa before 10 December 2022. The requirement to satisfy PIC 4007 continues for secondary applicants of primary applicants who hold a Subclass 189 visa in the Hong Kong stream.

The effect is to place the secondary applicant of a primary New Zealand stream visa holder who applied before 10 December 2022 in the same position, with regard to not being required to satisfy the PIC 4007 health criterion.

Item [4] – At the end of clause 189.312 of Schedule 2

This item adds a new subclause 189.312(6) in clause 189.312 in Subclass 189 of Schedule 2 to the Migration Regulations.

New clause 189.312(6) specifies that, if the primary applicant holds a Subclass 189 (Skilled – Independent) visa in the New Zealand stream granted on the basis of an application made on or after 1 July 2023, the applicant is required to satisfy PIC 4007.

This amendment ensures that secondary applicants of primary applicants who hold a Subclass 189 visa in the New Zealand stream are required to satisfy PIC 4007 if the primary NZ applicant's visa was granted on the basis of an application made on or after 1 July 2023.

The effect of this amendment is to place the secondary applicant of a primary New Zealand stream visa holder who applied on or after 1 July 2023 in the same position, with regard to being required to satisfy the PIC 4007 health requirement.

Part 2 – Application of amendments

Migration Regulations 1994

Item [5] – In the appropriate position in Schedule 13

This item inserts a new Part 114 – Amendments made by the *Migration Amendment (Subclass 189 Visas – New Zealand Stream) Regulations 2022* in Schedule 13 (Transitional Arrangements) to the Migration Regulations.

Subclause (1) of clause 11401 – Operation of amendments – provides that the amendment made by item 2 of Part 1 of Schedule 1 to the *Migration Amendment (Subclass 189 Visas – New Zealand Stream) Regulations 2022* applies in relation to an application for a Subclass 189 (Skilled – Independent) visa made before 10 December 2022 if a decision has not been made to grant or refuse to grant the visa before that day.

The effect of this provision is that the amendment made by item 2, which exempts applications by primary NZ applicants made before 10 December 2022 from having to satisfy current clauses 189.231, 189.232, 189.233 and 189.234, applies to an application if no decision has been made to grant or refuse the application before 10 December 2022.

Subclause (2) of clause 11401 – Operation of amendments – provides that the amendment made by item 3 of Part 1 of Schedule 1 to the *Migration Amendment (Subclass 189 Visas – New Zealand Stream) Regulations 2022* applies in relation to an application for a Subclass 189 (Skilled – Independent) visa, whether made (or taken to be made) before, on or after 10 December 2022, if:

(a) the application is made by a person seeking to satisfy the secondary criteria for the grant of the visa as a member of the family unit of a person who applied for their visa (the primary visa) before 10 December 2022; and

(b) a decision has not been made to grant, or refuse to grant, the primary visa before that day.

The effect of this provision is that the amendment made by item 3, which removes the requirement for a secondary applicant of a primary NZ applicant to satisfy PIC 4007, applies to a secondary applicant if their Subclass 189 (Skilled – Independent) visa application was made or taken to have been made before, on, or after 10 December 2022, provided no decision has been made to grant or refuse to grant the application of the primary NZ applicant before 10 December 2022.