

## **EXPLANATORY STATEMENT**

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

*Migration Act 1958*

*Migration Amendment (Subclass 189 (Skilled—Independent) Visa in the New Zealand Stream) Regulations 2023*

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.

The *Migration Amendment (Subclass 189 (Skilled-Independent) Visa in the New Zealand Stream) Regulations 2023* (the Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to permanently close the Subclass 189 (Skilled – Independent) visa in the New Zealand Stream to new primary applications. Partners and dependants of primary applicants may still join an undecided application.

New Zealand citizens who wish to live and work in Australia may 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 provided a permanent residence option for New Zealand citizens who demonstrated commitment to Australia, including residence in Australia for at least five years.

From 1 July 2023, New Zealand citizens holding a Subclass 444 Special Category visa who arrived in Australia after 26 February 2001 and who have been living in Australia for four years or more will be eligible to apply directly for Australian citizenship by conferral. They will no longer need to hold a permanent visa, making the New Zealand stream of the Subclass 189 (Skilled – Independent) visa unnecessary.

On 10 December 2022, the permanent Subclass 189 New Zealand stream visa was temporarily closed to new applications from primary applicants from 10 December 2022 until 30 June 2023, while the Government considered options for New Zealand citizens. These amendments now permanently close the visa to new applications by primary applicants. Partners and dependants of primary applicants may still join an undecided application.

The Migration Act specifies no conditions that need to be satisfied before the power to make the regulations may be exercised.

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 listed in Attachment A. These include, for example, subsection 31(3), which provides that Regulations may prescribe criteria for a visa or visas of a specified class. The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. 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 Impact Analysis (OIA) has been consulted in relation to the amendments. No Impact Analysis is required. The OIA consultation reference is OIA23-04501.

Consultation has been undertaken with the Department of the Prime Minister and Cabinet. Public consultation was not considered necessary or appropriate as New Zealand citizens no longer require the grant of a permanent visa in order to be eligible for Australian citizenship and the changes are therefore beneficial and no liabilities are imposed. This accords with section 17 of the *Legislation Act 2003* (the Legislation Act).

The amendments commence on 1 July 2023 to align with changes to citizenship arrangements.

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

The Regulations amend the Migration Regulations, which are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. The Migration Regulations are exempt from sunseting 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.

**Statement of Compatibility with Human Rights**

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

**Migration Amendment (Subclass 189 (Skilled – Independent) Visa in the New Zealand Stream) Regulations 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 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.

On 10 December 2022, the permanent Subclass 189 New Zealand visa stream visa was temporarily closed to new applications from primary applicants from 10 December 2022 until 30 June 2023, while the Government considered options for New Zealand citizens.

On 22 April 2023, in recognition of the long standing, close and special bilateral relationship that exists between Australia and New Zealand, the Prime Minister, the Hon Anthony Albanese MP, announced a direct pathway to Australian citizenship for New Zealand citizens living in Australia. From 1 July 2023, New Zealand citizens holding a Special Category (subclass 444) visa (SCV) who arrived in Australia after 26 February 2001 and who have been living in Australia for four years or more will be eligible to apply directly for Australian citizenship by conferral. They will no longer need to first apply for and be granted a permanent visa, making the New Zealand stream of the Subclass 189 (Skilled – Independent) visa unnecessary.

The *Migration Amendment (Subclass 189 (Skilled – Independent) Visa in the New Zealand Stream) Regulations 2023* (the Amendment Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to permanently close the Subclass 189 (Skilled – Independent) visa in the New Zealand stream to new applications as they may now apply directly for citizenship.

Secondary applicants (partners and dependent children) of a New Zealand stream primary applicant will continue to be permitted to make an application for a Subclass 189 (Skilled – Independent) visa after 10 December 2022 provided the primary applicant's application remains on-hand awaiting decision by the Minister.

The amendments made by the Amendment Regulations also omit criteria relating to residence, income and health that do not apply to any on-hand applications as these criteria are now redundant.

Under the new scheme, whilst New Zealanders holding a SCV have a direct pathway to Australian citizenship, their non-New Zealand citizen family members will need to be sponsored for a permanent child or partner visa by the new Australian citizen in order to access permanent residence.

## **Human rights implications**

Discussion of human rights implications in this Statement of Compatibility is limited to the Amendment Regulations. The human rights implications of the new direct pathway to Australian citizenship for New Zealand citizens will be dealt with in the Statement of Compatibility associated with those legislative changes.

The Amendment Regulations do not engage any of the applicable rights or freedoms.

The New Zealand stream of the Subclass 189 (Skilled – Independent) visa is being permanently closed as it will no longer be required from 1 July 2023 when eligible New Zealand citizens holding a SCV who arrived in Australia after 26 February 2001 and who have been living in Australia for four years or more, will be eligible to apply directly for Australian citizenship by conferral.

The permanent closure of the New Zealand stream is not anticipated to have adverse impacts on the rights of New Zealand citizens in Australia as access to Australian citizenship is more beneficial than permanent residence. Citizenship will enhance New Zealanders' social and economic integration into the Australian community and provide additional opportunities, including increased access to social security benefits, voting rights and eligibility for employment in the Australian Public Service and Australian Defence Force. To the extent that New Zealand citizens holding a SCV do not wish to apply for Australian citizenship, other permanent residence visa options that are available to all non-citizens remain available.

New Zealand citizens who acquire Australian citizenship through the new direct pathway are able to sponsor their non-New Zealand citizen family members for a permanent partner or child visa to remain in Australia as permanent residents. This does not amount to differential treatment as it is consistent with existing arrangements for Australian citizens to sponsor non-citizen family members for a visa to remain in Australia.

The Amendment Regulations also do not adversely affect the existing arrangements for visa holders and applicants who hold passports other than a New Zealand passport, who continue to be able to apply for a Subclass 189 (Skilled – Independent) visa in other streams, and other skilled migration visas.

## **Conclusion**

The Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon Andrew Giles MP**

**Minister for Immigration, Citizenship, and Multicultural Affairs**

## **ATTACHMENT C**

### **Details of the *Migration Amendment (Subclass 189 (Skilled – Independent) Visa in the New Zealand Stream) Regulations 2023***

#### **Section 1 - Name**

This section provides that the name of the instrument is the *Migration Amendment (Subclass 189 (Skilled – Independent) Visa in the New Zealand Stream) Regulations 2023*.

#### **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 whole of the instrument commences on 1 July 2023.

#### **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 amendments made by the regulations operate.

### **Schedule 1 – Amendments**

#### ***Migration Regulations 1994***

##### **Item [1] – Paragraph 1137(4G)(aa) of Schedule 1**

This item repeals subparagraph 1137(4G)(aa) in item 1137 (Skilled – Independent (Permanent)(Class SI)) of Schedule 1 to the *Migration Regulations 1994* (the Migration Regulations) and substitutes it with new subparagraph 1137(4G)(aa).

New subparagraph 1137(4G)(aa) provides that an application by a primary NZ applicant must be made before 10 December 2022.

The effect of this amendment is that the Subclass 189 (Skilled – Independent) New Zealand Stream is permanently closed to all new applications from applicants seeking to satisfy the primary criteria from 10 December 2022. New applications for a Subclass 189 (Skilled – Independent) New Zealand Stream visa are no longer permitted to be made.

## **Item [2] – Clauses 189.231A and 189.231 to 189.234 of Schedule 2**

This item repeals clauses 189.231A and clauses 189.231 to 189.234.

Previous clause 189.231A required a primary NZ applicant to satisfy either clause 189.231B, or clauses 189.231, 189.232, 189.233 and 189.234.

Clause 189.231B provides that the application must be made before 10 December 2022. Clauses 189.231, 189.232, 189.233 and 189.234 were requirements relating to residence, income and health. These criteria related only to applications made on or after 10 December 2022. However the stream has been temporarily closed to applications from 10 December 2022 to 30 June 2023.

The amendments made by Item [1] permanently close the Subclass 189 (Skilled – Independent) New Zealand Stream visa from 1 July 2023 to all applications from applicants seeking to satisfy the primary criteria on or after 10 December 2022. Accordingly, clauses 189.231, 189.232, 189.233 and 189.234 are unnecessary.

## **Item [3] –Subclause 189.312(6) of Schedule 2**

This item repeals subclause 189.312(6).

Subclause 189.312(6) applied to members of the family unit seeking to meet the secondary criteria and provided that if the primary applicant held a Subclass 189 visa in the New Zealand stream granted on the basis of an application made on or after 1 July 2023, the secondary applicant must satisfy public interest criterion 4007 (the health requirement).

The amendments made by Item [1] permanently close the Subclass 189 (Skilled – Independent) New Zealand Stream visa from 1 July 2023 to all applications from applicants seeking to satisfy the primary criteria on or after 10 December 2022. Accordingly, subclause 189.312(6) is unnecessary.