

# **Migration Reform (Transitional Provisions) Regulations (Amendment) 1995 No. 135**

## **EXPLANATORY STATEMENT**

### **STATUTORY RULES 1995 No. 135**

Issued by the Authority of the Minister for Immigration and Ethnic Affairs

*Migration Act 1958*

*Migration Reform Act 1992*

Migration Reform (Transitional Provisions) Regulations (Amendment)

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

Section 42 of the *Migration Reform Act 1992* (the Reform Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Reform Act to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Reform Act.

The purpose of the Regulations is to amend the Migration Reform (Transitional Provisions) Regulations (the Transitional Regulations) to:

- provide that regulation 17 (which provides that certain New Zealanders are taken to hold special purpose visas on 1 September 1994) also applies to certain children of New Zealand citizens;
  - provide that the domestic violence criteria inserted into the Migration Regulations by Statutory Rules 1995 No. 117 also apply to applications for certain entry permits under the Migration (1989) Regulations and Migration (1993) Regulations;
  - provide that criteria relating to holding an interdependency (temporary) (code number 305) visa or entry permit or a Class 305 (interdependency (temporary)) visa or entry permit, inserted in clause 814.221(2) of the Migration Regulations by Statutory Rules 1995 No. 117 are inserted to the same effect into certain applications for entry permits under the Migration (1989) Regulations and Migration (1993) Regulations
- this will ensure that applications that are not finally determined on 3 July 1995 will be considered according to the same criteria whether the application was made under the Migration (1989) Regulations, the Migration (1993) Regulations or the Migration Regulations; and

- provide a concession for applicants for a retirement (code number 410) visa or entry permit under the Migration (1989) Regulations and applications for a Class 410 (retirement) visa or entry permit under the Migration (1993) Regulations where the application was not finally determined before 3 July 1995
- the concession allows applicants who are unable to satisfy the relevant health and/or financial criteria to satisfy relaxed criteria and be granted a visa for 2 years. This will ensure that applicants will be considered against the same relaxed criteria whether the application was made under the Migration (1989) Regulations, the Migration (1993) Regulations or the Migration Regulations.

Regulation 3 is retrospective to 1 September 1994. The effect of this regulation is beneficial to the persons concerned and will not be prejudicial to any person. Retrospectivity will not, therefore contravene subsection 48(2) of the Acts *Interpretation Act 1901*. The remainder of the Regulations commence on 3 July 1995.

Details of the Regulations are set out in the Attachment.

## ATTACHMENT

### Regulation 1 - Commencement

Subregulation 1.1 provides that regulation 3 is taken to have commenced on 1 September 1994. The effect of that regulation is beneficial to the persons concerned and will not be prejudicial to any person. Retrospectivity will not, therefore, contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Subregulation 1.2 provides that the remainder of these Regulations commence on 3 July 1995.

### Regulation 2 - Amendment

This regulation provides for the Migration Reform (Transitional Provisions) Regulations to be amended as set out in these Regulations.

### Regulation 3 - Regulation 17 (New Zealand citizens and certain children of New Zealand citizens)

Children born in Australia to New Zealand citizens on or after 20 August 1986 and before 1 September 1994 were exempt non-citizens under section 4 of the *Migration Act 1958*. Most of these children were also New Zealand citizens, by descent, at their birth. There may, however, be a small class of children who did not acquire New Zealand citizenship at their birth.

Regulation 17 of the Transitional Regulations specifically refers to New Zealand citizens in Australia. Children, born in Australia to New Zealand citizens, who are not New Zealand citizens are therefore not covered by this regulation. This omission was not intended.

Subregulation 3.1 makes a technical amendment to subregulation 17(1) of the Transitional Regulations.

Subregulation 3.2 inserts a new subregulation 17(1A) into the Transitional Regulations. This amendment is intended to provide for children who were born in Australia to New Zealand citizens on or after 20 August 1986 and before 1 September 1994, who are not New Zealand citizens on 1 September 1994 and who satisfy the criteria in paragraphs 17(1)(b), (c) and (d). The insertion of subregulation 17(1A) will result in these children being taken to have been granted a special category visa on 1 September 1994. The effect of this subregulation is beneficial to the persons concerned and will not be prejudicial to any person. Retrospectivity will not, therefore, contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Subregulation 3.3 makes a technical amendment to subregulation 17(2) of the Transitional Regulations to include reference to the new subregulation 17(1A) inserted by these Regulations.

#### Regulation 4 - New Part 5A

This regulation inserts a new Part 5A (Certain applications made under Migration (1989) Regulations and Migration (1993) Regulations) into the Transitional Regulations. The purpose of this Part is to provide that the new domestic violence provisions inserted into the Migration Regulations by the Statutory Rules 1995 No. 117 which apply to applications made after 1 September 1994 apply to the same effect to certain applications made under the Migration (1989) Regulations and Migration (1993) Regulations. The purpose of the new domestic violence provisions inserted in the Migration Regulations was to extend the forms of evidence of domestic violence for certain visa applications and extend the classes of visa to which the domestic violence provisions apply. The effect of domestic violence provisions is beneficial to the persons concerned and will not be prejudicial to any person.

The purpose of new Part 5A is also to provide a concession for applicants for a retirement (code number 410) visa or entry permit under the Migration (1989) Regulations and applicants for a Class 410 (retirement) visa or entry permit under the Migration (1993) Regulations where the application was not finally determined before 3 July 1995.

New regulation 23B (Interpretation) includes definitions of various terms referred to in these Regulations.

New subregulation 23B(1) provides that the term "the July 1995 amendments" means the amendments to the Migration Regulations made by Statutory Rules 1995 No. 117.

New subregulation 23B(2) inserts a definition of "finally determined" for the purposes of the new Part 5A. An application is to be regarded as finally determined if it has been finally determined within the meaning of subsection 5(9) of the Act; and if the application is no longer subject to review under the Part 8 of the Act; or if an application has been made for reconsideration under regulation 24 of the Transitional Regulations and a decision has been made following the reconsideration or when an application for reconsideration may no longer be made.

New subregulation 23B(3) provides that a reference in Part SA of the Transitional Regulations to a criterion relating to domestic violence is a reference to a criterion that a person has suffered domestic violence (within the meaning of regulation 1.22 of the Migration Regulations). Regulation 1.22 was part of the new domestic violence provisions inserted in the Migration Regulations by Statutory Rules 1995 No. 117.

New regulation 23C (Certain applications under the Migration (1989) Regulations - criteria related to domestic violence) is inserted into the *Transitional Regulations*.

Subregulation 23C(1) applies to an application under the Migration (1989) Regulations for certain classes of entry permit that was not finally determined before 3 July 1995. The classes which are specified are those which most closely reflect the Subclasses of visa in the Migration Regulations in which Statutory Rules 1995 No. 117 has inserted the new domestic violence provisions.

Subregulation 23C(2) provides, for the purposes of an application to which this regulation applies, that provisions to the same effect as Division 1.5 inserted into the Migration Regulations by the July 1995 amendments relating to domestic violence are inserted into the Migration (1989) Regulations. Division 1.5 of the Migration Regulations provides a scheme for establishing the existence of domestic violence for the purposes of the Migration Regulations. New subregulation 23C(2) also provides that criteria relating to domestic violence inserted into subclass 801, 805, 814, 820, 826 and 831 of the Migration Regulations is inserted to the same effect in the relevant regulations of the Migration (1989) Regulations. This will enable an applicant for certain specified entry permit classes whose application has not been finally determined at 3 July 1995 to take advantage of the new domestic violence provisions inserted into the Migration Regulations by Statutory Rules 1995 No. 117.

New regulation 23D (Certain applications under the Migration (1989) Regulations - criteria related to holding of interdependency (temporary) (code number 305) visa or entry permit) is inserted into the Transitional Regulations.

New subregulation 23D(1) applies to an application for an interdependency (permanent) (code number 814) entry permit under the Migration (1989) Regulations that has not been finally determined before 3 July 1995. An interdependency (permanent) (code number 814) entry permit is the equivalent of subclass 814 (interdependency) visa in the Migration Regulations.

New subregulation 23D(2) provides that for the purposes of an application to which this regulation applies, the Migration (1989) Regulations have effect as if a new paragraph (aa) had been inserted into Regulation 142D and that paragraph had been in force at all relevant times.

The new paragraph (aa) provides that at the time when the application for the entry permit is decided, the applicant:

- is nominated by the person who is an Australian citizen or Australian permanent resident and the applicant has a relationship with the nominator of a kind specified in subparagraph 130A(1)(a)(i);

- holds a valid extended eligibility (interdependency) (code number 826) entry permit, a criterion for the grant of which the applicant was nominated by the nominator;
- has held an interdependency (temporary) (code number 305) visa or entry permit for the grant of which the applicant was nominated by the nominator; and
- continues to be nominated for the grant of the entry permit by the nominator.

New regulation 23E (Certain applicants for retirement (code number 410) visas or entry permits under the Migration (1989) Regulations) is inserted into the Transitional Regulations.

New regulation 23E provides a concession for applicants for a retirement (code number 410) visa or entry permit under the Migration (1989) Regulations where the application was not finally determined before 3 July 1995. The purpose of new regulation 23E is to enable applicants to whom this regulation applies to satisfy either the criteria applicable to the visa or entry permit at the time of application or the criteria applicable to a rollover applicant (if he or she is a rollover applicant or the spouse of a rollover applicant) contained in Part 410 of Schedule 2 to the Migration Regulations as in force on and after 3 July 1995. Rollover applicant has the same meaning in new regulation 23E as in Part 410 of Schedule 2 of the Migration Regulations (as that Part is in force on and after 3 July 1995).

A person who satisfies the criteria which, at the time of application, applied to a retirement (code number 410) visa or entry permit under the Migration (1989) Regulations is to be granted a temporary visa permitting the person to travel to, enter and remain in Australia until a date specified by the Minister. A person who satisfies the criteria applicable to a rollover applicant contained in Part 410 of Schedule 2 to the Migration Regulations as in force on and after 3 July 1995 is to be granted a temporary visa permitting the person to travel to, enter and remain in Australia for a period of 2 years from the date of grant.

New regulation 23F (Certain applications under the Migration (1993) Regulations - criteria related to domestic violence) is inserted into the Transitional Regulations.

Subregulation 23F(1) applies to applications under the Migration (1993) Regulations for certain classes of entry permit that were not finally determined before 3 July 1995. The classes which are specified are those which most closely reflect the Subclasses of visa in the Migration Regulations in which Statutory Rules 1995 No. 117 has inserted the new domestic violence provisions.

Subregulation 23F(2) provides, for the purposes of an application to which this regulation applies, that provisions to the same effect as Division 1.5 inserted into the Migration Regulations by the July 1995 amendments relating to domestic violence are inserted into Migration (1993) Regulations. Division 1.5 of the Migration Regulations provides a scheme for establishing the existence of domestic violence for the purposes of the Migration Regulations. New subregulation 23F(2) also provides that criteria relating to domestic violence inserted into subclass 801, 805, 814, 820 and 826 of the Migration Regulations is inserted to the same effect in the relevant regulations of the Migration (1993) Regulations. This will enable applicants for certain specified entry permit classes whose applications have

not been finally determined at 3 July 1995 to take advantage of the new domestic violence provisions inserted into the Migration Regulations by Statutory Rules 1995 No. 117.

New regulation 23G (Certain applications under the Migration (1993) Regulations - criteria related to holding of Class 305 (interdependency (temporary)) visa or entry permit) is inserted into the Transitional Regulations.

New subregulation 23G(1) applies to an application for a Class 814 (interdependency (permanent)) entry permit under the Migration (1993) Regulations that was not finally determined before 3 July 1995. A Class 814 (interdependency (permanent)) entry permit is the equivalent of a subclass 814 (interdependency) visa in the Migration Regulations.

New subregulation 23G(2) provides that for the purposes of an application to which this regulation applies, the Migration (1993) Regulations have effect as if, before an application was made that a new clause (2A) were inserted in subclause 814.732(1) and that a new clause (2A) was inserted into clause 814.732 and as if those criteria had been in force at all relevant times.

The new subclause 814.732(2A) provides that the applicant meets the requirements of the subclause if:

- the applicant is the holder of a Class 826 (extended eligibility (interdependency)) entry permit;
- the applicant has held a Class 305 (interdependency (temporary)) visa or entry permit for the grant of which the applicant was nominated by the nominator, or an interdependency (temporary) (code number 305) visa or entry permit granted under the Migration (1989) Regulations;
- the applicant continues to be nominated for the Class 814 entry permit by the nominator;
- the applicant has a relationship with the nominator that is acknowledged by both and involves residing together, and being closely interdependent and having a continuing commitment to mutual emotional and financial support; and
- the relationship between the applicant and the nominator is both genuine and continuing.

New regulation 23H (Certain applications under the Migration (1993) Regulations - Class 410 (retirement) visa or entry permit) is inserted into the Transitional Regulations.

New regulation 23H provides a concession for applicants for a Class 410 (retirement) visa or entry permit under the Migration (1993) Regulations where the application was not finally determined before 3 July 1995. The purpose of new regulation 23H is to enable applicants to whom this regulation applies to satisfy either the criteria applicable to the visa or entry permit at the time of application or the criteria applicable to a rollover applicant (if he or she is a rollover applicant or the spouse of a rollover applicant) contained in Part 410 of Schedule 2 to the Migration Regulations as in force on and after 3 July 1995. Rollover

applicant has the same meaning in new regulation 23H as in Part 410 of Schedule 2 of the Migration Regulations (as that Part is in force on and after 3 July 1995).

A person who satisfies the criteria which, at the time of application, applied to Class 410 (retirement) visa or entry permit under the Migration (1993) Regulations is to be granted a temporary visa permitting the person to travel to, enter and remain in Australia until a date specified by the Minister. A person who satisfies the criteria applicable to a rollover applicant contained in Part 4 10 of Schedule 2 to the Migration Regulations as in force on and after 3 July 1995 is to be granted a temporary visa permitting the person to travel to, enter and remain in Australia for a period of 2 years from the date of grant.