

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Migration Act 1958

Migration Amendment (Subclass 189 Visas) Regulations 2021

This instrument amends the *Migration Regulations 1994* (the Migration Regulations), to make it easier for applicants for a Subclass 189 (Skilled – Independent) visa in the New Zealand stream to satisfy the annual income requirement. The New Zealand stream of the Subclass 189 visa provides a pathway to permanent residence for long-term New Zealand citizen residents who have demonstrated commitment to Australia, and who have made and can continue to make a strong economic contribution to Australia's future.

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 Visas) Regulations 2021* (the Regulations) amend the Migration Regulations to remove the requirement that an applicant for a Subclass 189 visa in the New Zealand stream must have earned an amount no less than the income threshold in the four most recently completed income years in the five years before the application was made. This requirement is replaced with a new requirement that the applicant has earned an amount no less than the income threshold in three income years in the five years immediately before they apply for the visa. One of those income years must be the income year that ended most recently before the date of the application.

Under the current requirements, if an applicant fails to reach the income threshold in one of the four relevant income years, they must wait until they earn an income at or above the income threshold for four consecutive income years before they are eligible for a Subclass 189 visa in the New Zealand stream, unless claiming an exemption. The amendments provide flexibility for applicants in these circumstances by lowering the number of years in which the income threshold must be met from four to three and removing the requirement that the income years be consecutive (although one of the years must be the most recent income year and the three income years must occur in the five years immediately before the visa application is made). The amendments also provide increased flexibility to applicants whose income has been adversely affected by the COVID-19 pandemic.

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 at [Attachment A](#). These include, for example, subsection 31(3), which provides that the 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 respond quickly to emerging situations such as the COVID-19 pandemic.

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 A](#).

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation reference is 25871.

Consultation was undertaken with the Department of the Prime Minister and Cabinet, the Department of Foreign Affairs and Trade, the Department of the Treasury and the Department of Finance. This accord with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act) which requires that appropriate and reasonably practicable consultation be undertaken.

The Regulations commence on 27 February 2021, to align with changes to Department of Home Affairs systems, and apply to applications for a Subclass 189 visa made on or after that date.

Further details of the Regulations are set out in [Attachment B](#).

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

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

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) Regulations 2021

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

The New Zealand pathway to permanent residence (the pathway) provides a concession to New Zealand citizens who have demonstrated commitment to Australia, and who have made and can continue to make a strong economic contribution to Australia's future. It is delivered as a stream of the subclass 189 (Skilled –Independent) visa.

Prior to this amendment, these applicants were required to have an income at or above a specified threshold (the income threshold) for the four most recently completed income years before the date of their visa application (during the period of five years immediately before that date), unless claiming an exemption. In practice, this required applicants to provide evidence of income at or above the threshold for four consecutive years, meaning New Zealanders who otherwise earned at or above the threshold for a majority of those four years but had their income temporarily drop became ineligible. These New Zealanders had to then start again and earn at or above the income threshold for four consecutive years before they were eligible to apply for the pathway.

The income requirement is amended to require applicants to demonstrate they had an income at or above the threshold for three income years in the five years immediately before the date the visa application is made. One of those income years must be the income year that ended most recently before the date of the application.

The change is intended to benefit New Zealanders who live and work in Australia by providing additional flexibility and reducing the documentation required to be provided with an application, while continuing to meet the policy intent of making the pathway available to New Zealand citizens who have made and continue to make a demonstrated economic contribution to Australia.

The existing income threshold amount remains unchanged.

Human rights implications

This Disallowable Legislative Instrument may engage the following rights as the amendments apply to New Zealand citizens only:

- The right to equality and non-discrimination under Article 2(1) and Article 26 of the International Covenant on Civil and Political Rights (ICCPR)

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 26 of the ICCPR states:

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.

Australia has a special bilateral relationship with New Zealand and, as part of this relationship, has established visa categories that are only available to New Zealand citizens. The *Migration Amendment (Subclass 189 Visas) Regulations 2021* promote this bilateral relationship by easing the income requirements for the existing pathway to permanent residence which is for New Zealand residents only. As such, the instrument may engage Articles 2(1) and 26 of the ICCPR.

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 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.

The amendment makes it easier for New Zealand residents to access the pathway by amending the income requirement from requiring the applicant to meet the income threshold for four consecutive income years, to requiring the applicant to meet the income threshold for three income years out of the five years before they apply for the visa, including the most recent tax year. This addresses the concern that some New Zealand residents, who were otherwise making a demonstrated economic contribution to Australia, were unable to access the pathway where their income dropped below the relevant threshold in just one year out of the relevant five year period. To the extent that the amendments discriminate because of nationality or other status (income and citizenship), this is necessary, reasonable and proportionate on the basis that it further promotes the existing special bilateral relationship between Australia and New Zealand and recognises the contribution of long-term New Zealand residents whose income may have dropped for one year.

Conclusion

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

**The Hon. Alex Hawke MP, Minister for Immigration, Citizenship, Migrant Services and
Multicultural Affairs**

ATTACHMENT B

Details of the *Migration Amendment (Subclass 189 Visas) Regulations 2021*

Section 1 – Name

This section provides that the name of the instrument is the *Migration Amendment (Subclass 189 Visa) Regulations 2021* (the Regulations).

Section 2 – Commencement

This section provides for the commencement of the instrument.

Section 3 – Authority

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

Section 4 – Schedules

This section provides for how the amendments in the Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Subclause 189.232(1) of Schedule 2

This item makes a technical amendment, consequential to the insertion of new subclause 189.232(1A) by item 3, below.

Item [2] – At the end of subclause 189.232(1) of Schedule 2

This item omits the words “the 4 most recently completed income years before the date of the application (during the period of 5 years immediately before that date)” in subclause 189.231(1) of Schedule 2 to the *Migration Regulations 1994* (Migration Regulations), and substitute the words “3 income years ending during the period of 5 years ending immediately before the date of the application”.

The New Zealand stream of the Subclass 189 (Skilled – Independent) visa provides a pathway to permanent residence for long-term New Zealand citizen residents who have demonstrated commitment to Australia, and who have made and can continue to make a strong economic contribution to Australia's future.

Subclause 189.232(1) requires that an applicant must have an annual income at or above a specified amount (the income threshold) over a specified number of years, unless the applicant comes within a class of persons who are exempt from this requirement. Currently, the income threshold is required to have been earned in the four most recently completed income years before the date of the application, during the period of five years immediately before that date.

This means that an applicant is required to earn an income of at least the income threshold in four consecutive income years. Failure to reach the income threshold in one of the four income years before the date of the application means that the applicant must wait until they earn an income at or above the income threshold for four consecutive income years before they are eligible for a Subclass 189 visa in the New Zealand stream.

The amendment provides increased flexibility to applicants by replacing the current income requirement with a requirement that applicants must have earned at least the income threshold for three income years in the five years ending immediately before the date of the application. This provision is subject to subclause 189.232(1A), discussed in further detail below, which requires that one of the income years must be the income year that ended most recently before the date of the application.

Item [3] – After subclause 189.232(1) of Schedule 2

This item inserts new subclause 189.232(1A), which provides that “One of the income years must be the income year that ended most recently before the date of the application”.

The effect of this amendment is that the applicant must have earned at or above the threshold in the income year immediately before the date of the application. Failure to reach the income threshold in the income year before the date of the application means that the applicant is ineligible for a Subclass 189 visa in the New Zealand stream.

Item [4] – Subclause 189.233(1) of Schedule 2

This item omits the words “4 completed” in subclause 189.233(1) of Schedule 2 to the Migration Regulations, and substitutes “3”.

This is a consequential amendment to align subclause 189.233(1) with the amendments to subclause 189.232, discussed above.

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

This item inserts a new Part 94 (Amendments made by the *Migration Amendment (Subclass 189 Visas) Regulations 2021*) in Schedule 13 (Transitional Arrangements) to the Migration Regulations. New Part 94 makes transitional and savings provisions in respect of the amendments made by these Regulations.

New Part 94 has one clause, 9401 – Operation of Schedule 1. Clause 9401 provides that the amendments made by Schedule 1 to these Regulations apply in relation to visa applications made on or after 27 February 2021.