EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Subclass 191 Visas—Waiver of Conditions) 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, subsection 41(2A) of the Migration Act provides that the Minister may, in prescribed circumstances, by writing, waive a condition of a kind described in paragraph (2)(a) to which a particular visa is subject under regulations made for the purposes of that paragraph or under subsection (3).

The *Migration Amendment (Subclass 191 Visas—Waiver of Conditions) Regulations 2022* (the Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to support family unity for skilled workers by enabling family members to join a Subclass 191 (Permanent Residence (Skilled Regional)) visa application without having to depart Australia.

The Subclass 191 (Permanent Residence (Skilled Regional)) visa is a permanent visa available to certain persons who have lived and worked in regional Australia who have held the relevant qualifying provisional 'pathway' visa beforehand. The pathway visas do not have any conditions that prevent further visa applications being made in Australia and hence an ability to waive such conditions is not needed to enable their holders to apply for a Subclass 191 visa in Australia. However, there may be impacted family members, for example, a spouse who is in Australia on a student visa with a 'No Further Stay' condition. These amendments ensure that such conditions may be waived in these circumstances to enable genuine family members to join the permanent visa application without having to depart 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 settings 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 provision. 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.

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A Statement of Compatibility with Human Rights 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 number is OBPR22-01719.

No consultation was undertaken as the amendment does not substantially alter existing arrangements and are beneficial to visa applicants. This accords with section 17 of the *Legislation Act 2003*.

The amendments commence on 12 November 2022 to align with required systems changes.

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

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 Department follows standard practices to notify clients about the Regulations, including updating its website and notifying peak bodies.

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.

ATTACHMENT A

Statement of Compatibility with Human Rights

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

Migration Amendment (Subclass 191 Visas—Waiver of Conditions) Regulations 2022

The *Migration Amendment (Subclass 191 Visas - Waiver of Conditions) Regulations 2022* (the Amendment Regulations) are 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

The Australian Government is committed to enabling the migration of skilled regional visa holders regardless of nationality as a skills-assessed, job-ready cohort. This is one of several measures to address regional skills gaps and labour shortages and provides additional economic and social benefits as it enables migrants to build ties and participate within regional communities. This includes access to permanent residence for skilled regional visa holders, including partners and dependents.

The *Migration Amendment (New Skilled Regional Visas) Regulations 2019* created the Skilled Work Regional (Provisional) (Subclass 491) and the Skilled Employer Sponsored Regional (Provisional) (Subclass 494) visas which commenced on 16 November 2019. These two visas provide a period of stay in designated regional areas of Australia of up to five years. The Permanent Residence (Skilled Regional) (Subclass 191) visa was also created at this time. The Subclass 191 visa has two streams – the Regional Provisional stream and the Hong Kong stream.

The Regional Provisional stream of the Subclass 191 visa commences on 16 November 2022 and is the permanent pathway for Skilled Regional Provisional (Subclass 491 and 494) visa holders. To be eligible for this stream, holders of either of the pathway Subclass 491 and Subclass 494 visas are required to demonstrate at least three years' continuous residence in a designated regional area of Australia while meeting other eligibility requirements. Once granted, the Subclass 191 visa in the Regional Provisional Stream allows the holder to live and work anywhere in Australia permanently.

The *Migration Legislation Amendment (Hong Kong) Regulations 2021* created a dedicated pathway to permanent residence from 5 March 2022 for Hong Kong and British National Overseas (BNO) passport holders that hold one of three eligible pathway visas namely:

- the Temporary Work (Skilled) (Subclass 457) visa,
- the Temporary Skill Shortage (Subclass 482) visa and
- the Temporary Graduate (Subclass 485) visa.

Holders of one of these pathway visas with at least three years' continuous residence in a designated regional area of Australia and who meet other eligibility requirements can apply for the Subclass 191 visa in the Hong Kong stream which, once granted, enables the holder to live and work anywhere in Australia permanently.

The Amendment Regulations amend the *Migration Regulations 1994* (the Migration Regulations) to provide for an ability to waive a No Further Stay visa condition for persons intending to apply for a Subclass 191 visa.

The *Migration Act 1958* (Migration Act) and the Migration Regulations set out the legislative basis for how a valid visa application is made and the conditions that apply to visas. Some visas have a No Further Stay condition which means that the holder of that visa cannot apply for most other temporary and permanent visas while they are in Australia. Under the Migration Regulations, a No Further Stay condition may be waived by the Minister or their delegate.

Primary applicants for the Subclass 191 visa must hold a "pathway visa" being:

- for applicants in the Regional Provisional stream: one of the Skilled Regional provisional visas (Subclass 491 or 494); or

- for applicants in the Hong Kong stream: a valid Temporary Work (Skilled) (Subclass 457) visa, a Temporary Skill Shortage (Subclass 482) visa, or a Temporary Graduate (Subclass 485) visa.

These pathway visas are not subject to having a No Further Stay condition imposed.

However, a secondary applicant (that is a member of the family unit) of a Subclass 191 visa applicant is not required to hold a "pathway visa" and may hold a different visa, such as a Student visa or other visa type, which could be subject to a No Further Stay condition. In this scenario, the member of the family unit of a Subclass 191 primary applicant would, without a waiver of their No Further Stay condition, be prevented from applying for the Subclass 191 visa in Australia and would need to depart and apply while outside Australia. Prior to these amendments, this waiver was not available for persons intending to apply for a Subclass 191 visa.

For other skilled visa subclasses - General Skilled Migration visa (Subclasses 189, 190, 489, 491), Employer Sponsored visa (Subclasses 186, 187, 482, 494), or Business Innovation and Investment (Provisional) visa (Subclass 188) the Migration Regulations provide that the Minister (or their delegate) may waive the No Further Stay condition if the holder of that visa has a genuine intention to apply for the relevant skilled visa.

To address the situation of certain Subclass 191 secondary applicants described above, the Amendment Regulations amend the Migration Regulations to prescribe a further circumstance in which the Minister may waive the No Further Stay condition, namely where

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the holder of the relevant visa has a genuine intention to apply for a Subclass 191 visa. The exercise of this waiver will allow members of the family unit of a Subclass 191 visa applicant, in the scenario where that family member holds a visa with a No Further Stay condition, to also apply for a Subclass 191 visa without having to leave Australia.

Human rights implications

This Legislative Instrument positively engages the following human rights:

- The right to protection of the family in Article 17 and 23 of the *International Covenant on Civil and Political Rights* (ICCPR).

Article 17 of ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23 of ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Similarly to Article 23 of the ICCPR, Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) requires States to recognise the widest possible protection and assistance to the family as the fundamental and natural unit of society, requiring the full protection of the state.

The Amendment Regulations assist families to remain together in Australia, by making provision for the waiver of the No Further Stay condition to allow an application for the Subclass 191 visa. The exercise of this waiver will enable a new member of the family unit who holds a visa with the No Further Stay condition to stay with the primary applicant, without having to leave Australia, to apply as a secondary applicant for the Subclass 191 visa.

Conclusion

The Amendment Regulations are compatible with human rights.

The Hon Andrew Giles MP,
Minister for Immigration, Citizenship and Multicultural Affairs

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ATTACHMENT B

Details of the *Migration Amendment (Subclass 191 Visas – Waiver of Conditions) Regulations 2022*

Section 1 - Name

This section provides that the name of the instrument is the *Migration Amendment (Subclass 191 Visas – Waiver of Conditions) Regulations 2022*.

Section 2 - Commencement

This section provides that the Regulations commence on 12 November 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 amendments made by the Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – After paragraph 2.05(4AA)(e)

This item inserts a new paragraph 2.05(4AA)(ea) in the Migration Regulations.

Subregulation 2.05(4AA) of the Migration Regulations prescribes circumstances for the purposes of subsection 41(2A) of the Migration Act under which visa condition 8503 may be waived. Subsection 41(2A) provides that the Minister may, in prescribed circumstances, waive a condition on a visa that provides that despite anything else in the Migration Act, the holder of the visa will not be entitled to be granted a substantive visa after entering Australia, other than a protection visa or a specified kind of temporary visa. Under paragraph 46(1A)(c) of the Migration Act a person who holds a visa subject to a condition of this kind cannot make a valid application for another visa in Australia unless the Minister has waived the condition under subsection 41(2A) of the Migration Act.

Visa condition 8503 provides that the holder will not, after entering Australia, be entitled to be granted a substantive visa, other than a protection visa, while the holder remains in Australia. New paragraph 2.05(4AA)(ea) prescribes a genuine intention to apply for a Subclass 191 visa as a further circumstance under which condition 8503 may be waived by the Minister. The provisional visas, Subclass 491 and Subclass 494 are not subject to a 'no further stay condition', however, applicants who are members of the family unit of a person seeking to satisfy the primary criteria may hold a different visa that is subject to a 'no further stay' condition, for instance the de-facto partner or spouse of the primary applicant. It is

intended that a ‘no further stay’ condition on the family member’s visa be waived to allow these applicants to make a combined application.

Item [2] – After subparagraph 2.05(5A)(b)(v)

This item inserts new subparagraph 2.05(5A)(b)(va) in the Migration Regulations.

Subregulation 2.05(5A) of the Migration Regulations prescribes circumstances for the purposes of subsection 41(2A) of the Migration Act under which condition 8534 may be waived. Under paragraph 46(1A)(c) of the Migration Act a person who holds a visa subject to a condition of this kind cannot make a valid application for another visa in Australia unless the Minister has waived the condition under subsection 41(2A) of the Migration Act.

Visa condition 8534 provides that the holder will not be entitled to be granted a substantive visa, other than a protection visa, a Subclass 485 (Temporary Graduate) visa or a Subclass 590 (Student Guardian) visa while in Australia. Condition 8534 is only placed on Student visas.

New subparagraph 2.05(5A)(b)(va) prescribes having completed the course for which the visa was granted and a genuine intention to apply for a Subclass 191 visa as a further circumstance under which condition 8534 may be waived by the Minister. It is intended that if the secondary applicant has completed their course of study and has a genuine intention to apply for a Subclass 191 visa, that a ‘no further stay’ condition be waived to allow these applicants to make a combined application with the primary applicant to meet the secondary criteria for a Subclass 191 visa.

Item [3] – After paragraphs 2.07AG(1)(e) and (2)(e)

This item inserts new paragraphs 2.07AG(1)(ea) and (2)(ea) in the Migration Regulations.

Regulation 2.07AG of the Migration Regulations prescribes the substantive visas a person, who has had condition 8503 or 8534 waived, may make an application for under section 46 of the Migration Act.

New paragraphs 2.07AG(1)(ea) and (2)(ea) insert a Subclass 191 as a substantive visa that for the purposes of section 46 of the Migration Act, a person could make a valid application for if they have had visa condition 8503 or 8534 waived. This allow a valid application to be made by a secondary applicant for a subclass 191 visa for whom condition 8503 or 8534 has been waived by the Minister under subregulation 2.05(4AA) or (5A).

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