EXPLANATORY MEMORANDUM TO

THE SOCIAL SECURITY (APPLICATION OF RECIPROCAL AGREEMENTS WITH AUSTRALIA, CANADA AND NEW ZEALAND) (EEA STATES AND SWITZERLAND) REGULATIONS 2015

2015 No. 349

1. This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument provides for the three statutory instruments which implement the reciprocal social security agreements with Australia, Canada and New Zealand (ANZAC) and Great Britain to have effect as if the agreements contained modifications. The result will be that persons who satisfy the cumulative conditions in the Regulations, and whose UK pension or widow's benefit or orphan's benefit would have been enhanced in accordance with the reciprocal agreement with the relevant country if they had been resident in the UK, will be able to benefit from the enhancement if they are resident in another State in the European Economic Area (EEA) or in Switzerland.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 The Regulations will implement a European Union (EU) obligation and so are made under section 2(2) of the European Communities Act 1972. Section 179 of the Social Security Administration Act 1992 under which each Order is made cannot be relied on as the proposed Regulations do not give effect to any reciprocal agreement with any of the three countries concerned.

5. Territorial Extent and Application

5.1 This instrument relates to England, Wales and Scotland. There is no provision specifying the territorial extent of the Regulations. This is because they operate to modify the Australia Order, Canada Order and New Zealand Order each of which expressly give effect to the reciprocal agreement concerned so far as each one relates to England, Wales and Scotland. It follows that these Regulations will have the same territorial extent as those Orders.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

What is being done and why

7.1 The pension schemes in Australia, New Zealand and Canada are essentially residence-based schemes. The UK's social security agreements with those countries allow for periods of residence in those countries to be treated as if they were UK national insurance contributions for both state pension and survivors' benefits. The UK will take those qualifying periods of residence in the ANZAC countries into consideration when awarding UK state pension[1]. Under the agreements, a UK pension is enhanced if the individual meets the residence condition in the UK when they apply, and the enhanced part of the UK pension is only payable while the claimant resides in the UK. Once the person ceases to be permanently resident in the UK, the ANZAC enhanced portion is no longer payable, only the UK portion is paid. In free movement terms this results in a person moving to an EEA country or Switzerland being treated differently from someone resident in the UK

7.2 The European Commission takes the position that this residence condition imposes a restriction on a citizen's free movement rights under Article 21 of the Treaty on the Functioning of the EU, governing the right to move freely within the Union. The UK has accepted this reasoning.

7.3 The Regulations are therefore being amended to remove the condition that a person who meets certain criteria must be resident in the UK when they apply for an enhanced pension, and allows them to retain their entitlement if they become resident in another EEA state. The residence condition still applies to those persons moving to a country outside the EEA. The cumulative conditions for a person to satisfy in order to have the benefit of the 3 agreements are: firstly, that they are an EEA or Swiss national, secondly that that they are habitually resident in an EEA State or Switzerland, thirdly that they have a genuine and sufficient link with the UK, and fourthly that they are subject to one of the EU social security coordination Regulations. Where those conditions are met the application of the agreements to that person are modified so that any reference to being "resident" in the UK is replaced by a reference to being "resident" in a territory comprising the EEA States and Switzerland in the way defined by the different agreements (for example - permanently resident for the Australia agreement).

7.4 The effect is that an EEA or Swiss national who has a genuine and sufficient link to the UK and is entitled to a UK pension can apply from another EEA State, or from Switzerland, and their periods of insurance or work in one of the three countries who have the benefit of the agreement, (or those of their spouse in relation to survivors' benefits) will be taken into account for the purposes of their UK pension or other benefit as provided for by the agreements. If they are in the UK when they become entitled to the benefit in question, they will be able to export that pension fully within the EEA and Switzerland and not lose any part of the pension based on insurance or work in one of the three States to which the agreements relate. Those who had the ANZAC agreement-enhanced portion of their benefit removed when they

[1] The Australia Order was terminated in 2001 with savings, and continues to have effect by virtue of section 299 of the Pensions Act 2004 to a limited extent. The effect is that only those who retired before it was terminated, or who were resident in the Australia before it was terminated can rely on the Australia Order.

went to live in another EEA state have had, or will have, their pension backdated to the date they ceased to reside in the UK, providing for a continuous claim.

7.5 These Regulations include the requirement that a person must be subject to one of the EU Social Security Regulations, which coordinate the rights of EEA and Swiss nationals moving within the EEA and Switzerland. The requirement that a person is subject to one of the Regulations prevents the overlapping of entitlement under different bilateral agreements.

7.6 The Department for Work and Pensions conducted a search to identify those people who might benefit from the amended Regulations, specifically those who had moved from the UK to an EEA state and had their pension reduced, or who already resided in another EEA state, and could not receive an ANZAC-enhanced pension. The search produced a very low number (three) who matched the criteria. A manual search was therefore conducted to check all 153 records with a current EEA address and a historic ANZAC residential address who might qualify. In addition the Department has taken corrective action in the small number of cases that have come forward as a result of publicity. The level of public interest has been low, possibly because of the small numbers involved.

Consolidation

7.7 Informal consolidation will be included in due course in the Department's "The
Law Relating to Social Security" (the Blue Volumes) which is available on the internet at no cost to the public. http://lawvolumes.dwp.gov.uk/the-law-relating-to-social-security/

8. Consultation outcome

8.1 These Regulations modify the effect of three bilateral social security agreements and affect a small number of people within the EEA. The changes relate only to the payment of basic state pension, survivor's benefit or in the case of the New Zealand Order, orphan's benefit. In the circumstances as the numbers are affected are so small and the impact on those affected is positive, it was decided it was proportionate not to undertake a formal consultation.

9. Guidance

9.1 A Decision Maker's memorandum will be published on the Department's internet site www.dwp.gov.uk once the Regulations receive parliamentary approval which will cover the meaning of "habitual residence" and "genuine and sufficient link".

10. Impact

10.1 The impact on business, charities or voluntary bodies is low.

10.2 The impact on the public sector is small. These changes affect a very small volume of people. The administrative burden is low since these people would have

made a claim to the UK state pension and/or survivor's benefits in any case. The new arrangements mean that pension and survivors' benefits are no longer subject to recalculation should the beneficiary choose to reside another EEA state or Switzerland, so reducing the administrative burden and cost.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 These changes implement an EU law obligation affecting a small number of people who fall within the scope of the EU social security coordination regulations. The Department will continue to monitor cases which may fall to be considered under these Regulations with a view to ensuring those who may benefit under the Regulations are identified.

13. Contact

Jonathan Piggins at the Department for Work and Pensions Tel: 020 7340 4344 or email: Jonathan.Piggins@dwp.gsi.gov.uk can answer any queries regarding the instrument.