Attachment A

DECISION RECORD

Request Details
FOI Request FA 14/10/01175
File Number ADF2014/38376

Scope of request

I seek access under the Freedom of Information Act 1982 to five documents prepared by the Department of Immigration and Border Protection between October 2013 and March 2014.

The documents are:
'Transitional arrangements for current permanent protection visa arrivals' – 08 October 2013

'Proposed amendment to Protection visa Regulations'- 04 December 2013

'Visa options for IMAs and UAAs who cannot be granted protection visas'- 11 December 2013

'Continuing to achieve the policy objective of no permanent protection visas grants to IMAs'- 15 January 2014

'Capping the Onshore Protection component of the Humanitarian Programme' - 04 March 2014

Documents in scope

1. Departmental submission: SM2013/03183 dated 10 October 2013 – containing 15 folios.
2. Departmental submission: SM2013/03752 dated 5 December 2013 – containing 26 folios.
3. Departmental submission: SM2013/03831 dated 12 December 2013 – containing 57 folios.
4. Departmental submission: SM2014/00106 dated 15 January 2015 – containing 42 folios
5. Departmental submission: SM2014/00554 dated 4 March 2014 – containing 6 folios

Authority to make decision
I am an officer authorised under section 23 of the FOI Act to make decisions in respect of requests to access documents or to amend or annotate departmental records.

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Information considered
In reaching my decision, I have considered the following:

- the *Freedom of Information Act 1982;*
- departmental documents (identified above);
- the Australian Information Commissioner's (AIC) guidelines relating to access to documents held by government;
- consultation with relevant business areas; and
- consultation with the Department of Prime Minister and Cabinet (PM&C).

Reasons for decision
I have considered the documents within the scope of your request and applied exemptions in part or in full to documents as detailed in the Schedule of Documents. You should read the schedule in conjunction with the exemptions below.

Section 22 of the FOI Act - Deletion of exempt or irrelevant material

Section 22(2) of the FOI Act provides that, where an agency reaches the view that a document contains exempt information or material that is irrelevant to the request **and** it is possible for the agency to prepare an edited copy of the document with the irrelevant or exempt material deleted, then the agency must prepare such a copy.

This edited copy must be provided to the applicant. Further, the decision maker must advise the applicant in writing that the edited copy of the document has been prepared and of the reason(s) for each of the deletions in the document (s.22(3) of the FOI Act).

Exempt material is deleted pursuant to s.22(1)(a)(i) and irrelevant material is deleted pursuant to s.22(1)(a)(ii) of the FOI Act.

In your email dated 24 November 2014 you agreed to exclude staff personal details from the scope of your request. This information has been deleted from documents under s.22(1)(a)(ii).

The attached Schedule of Documents identifies documents where material has either been deleted as exempt information under the FOI Act or deleted as irrelevant to the scope of the request.

Section 34 of the FOI Act - Cabinet documents

The Cabinet exemption in the FOI Act is designed to protect the confidentiality of the Cabinet and its process. Document SM2013/03183 contains information which is closely connected to Cabinet material and in accordance with the AIC guidelines the department consulted PM&C.

A document is exempt under s.34(1) of the FOI Act if, amongst other categories, it was prepared for the dominant purpose of briefing a minister on a Cabinet submission (s.34(1)(c)).

A document is also exempt to the extent that it is a copy or part of; or contains an extract from a document that would fall within the categories of s.34(1) (s.34(2)).

I am satisfied that document SM2013/03183 was prepared to inform the Immigration and Border Protection Minister on matters subject to a Cabinet submission and specific information within this document is subject to an exemption under s.34(1)(c).

Further, I am satisfied that specific information identified is a copy or part of; or contains an extract from a Cabinet submission.

Having regard to the nature of the information, identified within the document, I am satisfied that it is information which is exempt in part under s.34(1)(c) and s.34(2).

Section 42 of the FOI Act – Documents subject to legal professional privilege

A document is exempt under s.42(1) of the FOI Act if its release would be privileged from production in legal proceedings on the grounds of legal professional privilege.

The AIC guidelines identify four factors that a decision maker needs to take into consideration, including:

- *whether there is a legal adviser-client relationship*
- *whether the communication was for the purpose of giving or receiving legal advice, or use in connection with actual or anticipated litigation*
- *whether the advice given is independent*
- *whether the advice given is confidential*

In reaching my decision I have had regard to the nature of the information identified and the advice received from relevant business areas. I am satisfied that the information was obtained through a legal adviser-client relationship; that the advice was provided independently; and in confidence. Further, I am satisfied that the information was communicated for the purpose of giving / receiving legal advice and may be used in actual or anticipated litigation.

I am satisfied that the information identified in the documents is exempt under s.42(1) of the FOI Act.

Section 47C of the FOI Act – Public interest conditional exemption – deliberative process

A document is conditionally exempt under s.47C(1) of the FOI Act if its release would disclose deliberative matter including opinion, advice or recommendation that has been obtained, prepared or recorded, or the consultation / deliberation during a deliberative process. I note that a conditionally exempt document **must** be released under the FOI Act unless the release would be contrary to the public interest.

The documents requested are departmental submissions. These documents are prepared for the dominant purpose of providing the Immigration and Border Protection (IBP) Minister with opinion, advice and recommendations on a vast array of immigration portfolio matters, for which the IBP Minister may consider, consult and deliberate on. Having regard to this I consider the documents to be deliberative in nature.

I note the AIC guidelines have included advice on what information would not be considered deliberative matter. Information identified as purely factual; a decision taken; and information in the public domain has been released to you. All other information has been assessed against the public interest test.

I am satisfied that the information identified in the documents is conditionally exempt under s.47C(1) of the FOI Act. I must now turn my mind to whether the information would be contrary to the public interest. Please see below my decision with respect to s.11B of the FOI Act.

Section 47F of the FOI Act – Public interest conditional exemption – personal privacy

A document is conditionally exempt under s.47F(1) of the FOI Act if its release would involve the unreasonable disclosure of personal information about any person (including a deceased person). I note that a conditionally exempt document **must** be released under the FOI Act unless the release would be contrary to the public interest.

Document SM2014/00106, contains at Attachment C, a copy of 'Possible Ministerial intervention', this document details a client migration case. The document includes detailed personal information and events that would allow members of the community to identify the individual concerned. I am satisfied that the document is a document to which s.47F(1) applies.

The personal privacy exemption only applies if I am satisfied that the disclosure would involve unreasonable disclosure of a third party's personal information. The FOI Act states that, when deciding whether the disclosure of the personal information would be unreasonable, I must have regard to the factors set out in s.47F(2) of the FOI Act. I have considered each of these factors below.

(a) Extent to which the information is known

Having regard to the nature of the information I am satisfied that the information regarding the third party would only be known to a limited group of people.

(b) Whether the person to whom the information relates is known to be associated with the matters in the document

I am satisfied that the third party for which the information relates to is not known, to the wider community, to be associated with the matters discussed in the document.

(c)The availability of the information from publicly available sources

The information is not available from other public sources.

(d) Any other matters that the agency considers relevant

The department is committed to the protection of an individual's right to privacy.
The information is wholly that of a third party and it is not possible to prepare an edited copy of the document for release without breaching the third parties right to privacy.

I am satisfied that the information identified in the document is conditionally exempt under s.47F(1) of the FOI Act. I must now turn my mind to whether the information would be contrary to the public interest. Please see below my decision with respect to s.11B of the FOI Act.

Section 11B of the FOI Act - Public interest exemptions - factors

On finding documents conditionally exempt under s.47C and s.47F I must now consider the factors set out in the public interest test under s.11B(3) of the FOI Act.

The FOI Act sets out four factors that favour giving access to a document. I have considered each of these below.

(a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);

Providing access to documents subject to your request may promote the objects of the FOI Act. On balance I find that this would weigh in favour of release.

(b) inform debate on a matter of public importance;

The matters discussed within the documents may inform debate on a matter that was of general public importance. On balance I find that this would weigh in favour of release.

(c) promote effective oversight of public expenditure;

The release of these documents may provide information that was of a nature to 'promote effective oversight of public expenditure'. On balance I find that this would weigh in favour of release.

(d) allow a person to access his or her own personal information.

The documents subject to your request do not contain your personal information I am satisfied that providing access to the documents does not allow you to have access to your own personal information. On balance I find that this does not weigh in favour of release.

The AIC has issued guidelines that contain a list of factors weighing against disclosure which must be considered under s.11B(5) of the FOI Act. However, this is not an exhaustive list of factors that can be taken into consideration.

Factors against release for information identified as conditionally exempt under s.47C(1) include:

- where information is closely connected to Cabinet material the release would prejudice the confidentiality of the Cabinet process;
- release of the information identified as conditionally exempt would prejudice the deliberative process and the full canvassing of issues impacting the immigration portfolio; and
- prejudice the policy development process.

These documents were intended to inform the Minister regarding options available prior to making a decision, including information closely related to Cabinet material. Harm has been identified in the release of the information conditionally exempt under s.47C(1) as the information relates to proposed approaches that were not taken, or that required further deliberative process and consideration by the Minister. On balance, I have given this factor the greatest weight.

Factors against release for information identified as conditionally exempt under s.47F(1) include:

- could reasonably be expected to prejudice the protection of an individual's right to privacy; and
- could reasonably expected to prejudice the fair treatment of individuals.

The personal information conditionally exempt under s.47F(1) is information wholly about a third party and the department is committed to the protection of an individual's right to privacy. An individual has the right to expect that the department would take all reasonable steps to protect their personal information. On balance, I have given the greatest weight to an individual's right to maintain their privacy.

Having regard to these factors I am satisfied that, on balance, the release of the conditionally exempt information under s.47C(1) and s.47F(1) is 'contrary to the public interest'. Therefore, I am satisfied that this information as identified in the documents is conditionally exempt.

Authorised decision maker
Freedom of Information Section
Department of Immigration and Border Protection

Telephone
Email foi@immi.gov.au

11 March 2015

Attachment B

SCHEDULE OF DOCUMENTS TO DECISION RECORD

FOI Request FA 14/10/01175
File Number ADF2014/38376

1. **Department submission:** SM2013/03183 – dated 10 October 2013 – containing 15 folios

Folio	Description	Decision	Legislation
1	Recommendations	Exempt in part	s 47C(1)
2	Minister's Comments	Released in full	
3-5	Key Issues	Exempt in part	s 47C(1) s 34(1)(c) s 42(1)
6	Attachments Irrelevant material includes staff details	Exempt in part	s 34(2) s 22(1)(a)(ii)
7-11	Attachment A: Section 499 Direction No. 57…	Released in full	
12-15	Attachment B	Exempt in Full	s 34(1)(c)

2. **Department submission:** SM2013/03752 – dated 5 December 2013 – containing 26 folios

Folio	Description	Decision	Legislation
1	Recommendations	Exempt in part	s 47C(1)
2	Key Issues	Exempt in part	s 42(1)
3-4	Key Issues continued	Exempt in part	s 47C(1)
5	Irrelevant material includes staff details	Released in part	s 22(1)(a)(ii)
6	Attachment A: Letter to the Prime Minister seeking policy approval Irrelevant material includes staff details	Exempt in part	s 47C(1) s 42(1) s 22(1)(a)(ii)
7-12	Attachment B: Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013	Released in full	
13-17	Attachment C: Explanatory Memorandum	Released in full	
18	Attachment D: Minute Paper	Released in full	
19-26	Attachment E: Explanatory Statement	Released in full	

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3. **Department submission:** SM2013/03831 – dated 12 December 2013 – containing 57 folios

Folio	Description	Decision	Legislation
1	Recommendations	Exempt in part	s 47C(1)
2	Key Issues	Released in full	
3-8	Key Issues continued	Exempt in part	s 47C(1)
9	Irrelevant material includes staff details	Released in part	s 22(1)(a)(ii)
10	Attachment A: SM2013/03752 Recommendations	Exempt in part	s 47C(1)
11	Attachment A: SM2013/03752 continued Key Issues	Exempt in part	s 42(1)
12-13	Attachment A: SM2013/03752 continued Key Issues	Exempt in part	s 47C(1)
14	Attachment A: SM2013/03752 continued Irrelevant material includes staff details	Released in part	s 22(1)(a)(ii)
15	Attachment A: SM2013/03752 continued Letter to Prime Minister Irrelevant material includes staff details	Exempt in part	s 47C(1) s 42(1) s 22(1)(a)(ii)
16-35	Attachment A: SM2013/03752 continued	Released in full	
36-42	Attachment B: Regulations for TSH and THC visas	Released in full	
43-48	Attachment C: SM2013/03705	Exempt in part	s 47C(1)
49	Attachment C: SM2013/03705 continued Irrelevant material includes staff details	Released in part	s 22(1)(a)(ii)
50-53	Attachment C: SM2013/03705 continued Historical and current arrangements…	Exempt in part	s 47C(1)
54-56	Attachment C: SM2013/03705 continued	Exempt in full	s 47C(1)
57		Released in full	

4. **Department submission:** SM2014/00106 – dated 15 January 2014 – containing 42 folios

Folio	Description	Decision	Legislation
1-2	Recommendations	Exempt in part	s 47C(1)
2	Recommendations continued	Released in full	
3-10	Key Issues	Exempt in part	s 47C(1) s 42(1)
11	Key Issues continued	Released in full	
12	Attachments	Exempt in part	s 47C(1)
13	Irrelevant material includes staff details	Released in part	s 22(1)(a)(ii)

14		Released in full	
15	Attachment A: Possible TPV disallowance Responses	Released in full	
16	Attachment B: SM2013/03831 Recommendations	Exempt in part	s 47C(1)
17	Attachment B: SM2013/03831 continued	Released in full	
18-23	Attachment B: SM2013/03831 continued Key Issues	Exempt in part	s 47C(1)
24	Attachment B: SM2013/03831 continued Irrelevant material includes staff details	Released in part	s 22(1)(a)(ii)
25-33	Attachment C: Ministerial submission SM2013/03960	Exempt in Full	s 47F(1)
34-36	Attachment C: Ministerial submission SM2013/03960 continued: Attachments to the submission	Released in full	
37-38	Attachment D: Table of visa options…	Exempt in part	s 47C(1)
39-41	Attachment E	Exempt in Full	s 47C(1)
42		Released in full	

5. **Department submission:** SM2014/00554 – dated 4 March 2014 – containing 6 folios

Folio	Description	Decision	Legislation
1-2	Recommendations Key Issues	Released in full	
3-4	Key Issues continued Irrelevant material includes staff details	Exempt in part	s 47C(1) s 22(1)(a)(ii)
5-6	Attachment A Attachment B	Released in full	

Attachment C – Extract of relevant legislation

11B Public interest exemptions—factors

Scope

(1) This section applies for the purposes of working out whether access to a conditionally exempt document would, on balance, be contrary to the public interest under subsection 11A(5).

(2) This section does not limit subsection 11A(5).

Factors favouring access

(3) Factors favouring access to the document in the public interest include whether access to the document would do any of the following:
  (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);
  (b) inform debate on a matter of public importance;
  (c) promote effective oversight of public expenditure;
  (d) allow a person to access his or her own personal information.

Irrelevant factors

(4) The following factors must not be taken into account in deciding whether access to the document would, on balance, be contrary to the public interest:
  (a) access to the document could result in embarrassment to the Commonwealth Government, or cause a loss of confidence in the Commonwealth Government;
  (aa) access to the document could result in embarrassment to the Government of Norfolk Island or cause a loss of confidence in the Government of Norfolk Island;
  (b) access to the document could result in any person misinterpreting or misunderstanding the document;
  (c) the author of the document was (or is) of high seniority in the agency to which the request for access to the document was made;
  (d) access to the document could result in confusion or unnecessary debate.

Guidelines

(5) In working out whether access to the document would, on balance, be contrary to the public interest, an agency or Minister must have regard to any guidelines issued by the Information Commissioner for the purposes of this subsection under section 93A.

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

(1) This section applies if:
  (a) an agency or Minister decides:
    (i) to refuse to give access to an exempt document; or
    (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and

(b) it is possible for the agency or Minister to prepare a copy (an ***edited copy***) of the document, modified by deletions, ensuring that:

(i) access to the edited copy would be required to be given under section 11A (access to documents on request); and

(ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and

(c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:

(i) the nature and extent of the modification; and

(ii) the resources available to modify the document; and

(d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

Access to edited copy

(2) The agency or Minister must:

(a) prepare the edited copy as mentioned in paragraph (1)(b); and

(b) give the applicant access to the edited copy.

Notice to applicant

(3) The agency or Minister must give the applicant notice in writing:

(a) that the edited copy has been prepared; and

(b) of the grounds for the deletions; and

(c) if any matter deleted is exempt matter—that the matter deleted is exempt matter because of a specified provision of this Act.

(4) Section 26 (reasons for decision) does not apply to the decision to refuse access to the whole document unless the applicant requests the agency or Minister to give the applicant a notice in writing in accordance with that section.

23 Decisions to be made by authorised persons

(1) Subject to subsection (2), a decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, subject to the regulations, by an officer of the agency acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.

(2) A decision in respect of a request made to a court, or made to a tribunal, authority or body that is specified in Schedule 1, may be made on behalf of that court, tribunal, authority or body by the principal officer of that court, tribunal, authority or body or, subject to the regulations, by an officer of that court, tribunal, authority or body acting within the scope of authority exercisable by him or her in accordance with arrangements approved by the principal officer of that court, tribunal, authority or body.

26 Reasons and other particulars of decisions to be given

(1) Where, in relation to a request, a decision is made relating to a refusal to grant access to a document in accordance with the request or deferring provision of access to a document, the decision-maker shall cause the applicant to be given notice in writing of the decision, and the notice shall:

(a) state the findings on any material questions of fact, referring to the material on which those findings were based, and state the reasons for the decision; and

(aa) in the case of a decision to refuse to give access to a conditionally exempt document—include in those reasons the public interest factors taken into account in making the decision; and

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

(b) where the decision relates to a document of an agency, state the name and designation of the person giving the decision; and

(c) give to the applicant appropriate information concerning:

(i) his or her rights with respect to review of the decision;

(ii) his or her rights to make a complaint to the Information Commissioner in relation to the decision; and

(iii) the procedure for the exercise of the rights referred to in subparagraphs (i) and (ii);

including (where applicable) particulars of the manner in which an application for internal review (Part VI) and IC review (Part VII) may be made.

(1A) Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* does not apply to a decision referred to in subsection (1).

(2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

34 Cabinet documents

General rules

(1) A document is an exempt document if:

(a) both of the following are satisfied:

(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;

(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or

(b) it is an official record of the Cabinet; or

(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or

(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.

(2) A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.

(3) A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.

Exceptions

(4) A document is not an exempt document only because it is attached to a document to which subsection (1), (2) or (3) applies.

Note: However, the attachment itself may be an exempt document.

(5) A document by which a decision of the Cabinet is officially published is not an exempt document.

(6) Information in a document to which subsection (1), (2) or (3) applies is not exempt matter because of this section if the information consists of purely factual material, unless:

(a) the disclosure of the information would reveal a Cabinet deliberation or decision; and

(b) the existence of the deliberation or decision has not been officially disclosed.

42 Documents subject to legal professional privilege

(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege.

(2) A document is not an exempt document because of subsection (1) if the person entitled to claim legal professional privilege in relation to the production of the document in legal proceedings waives that claim.

(3) A document is not an exempt document under subsection (1) by reason only that:

(a) the document contains information that would (apart from this subsection) cause the document to be exempt under subsection (1); and

(b) the information is operational information of an agency.

Note: For ***operational information***, see section 8A.

47C Public interest conditional exemptions—deliberative processes

General rule

(1) A document is conditionally exempt if its disclosure under this Act would disclose matter (***deliberative matter***) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of:

(a) an agency; or

(b) a Minister; or

(c) the Government of the Commonwealth; or

(d) the Government of Norfolk Island.

Exceptions

(2) Deliberative matter does not include either of the following:

(a) operational information (see section 8A);

(b) purely factual material.

Note: An agency must publish its operational information (see section 8).

(3) This section does not apply to any of the following:

(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;

(b) reports of a body or organisation, prescribed by the regulations, that is established within an agency;

(c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

47F Public interest conditional exemptions—personal privacy

General rule

(1) A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

(2) In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

(a) the extent to which the information is well known;

(b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;

(c) the availability of the information from publicly accessible sources;

(d) any other matters that the agency or Minister considers relevant.

(3) Subject to subsection (5), subsection (1) does not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

Access given to qualified person instead

(4) Subsection (5) applies if:

(a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains information concerning the applicant, being information that was provided by a qualified person acting in his or her capacity as a qualified person; and

(b) it appears to the principal officer of the agency or to the Minister (as the case may be) that the disclosure of the information to the applicant might be detrimental to the applicant's physical or mental health, or well-being.

(5) The principal officer or Minister may, if access to the document would otherwise be given to the applicant, direct that access to the document, so far as it contains that information, is not to be given to the applicant but is to be given instead to a qualified person who:

(a) carries on the same occupation, of a kind mentioned in the definition of ***qualified person*** in subsection (7), as the first-mentioned qualified person; and

(b) is to be nominated by the applicant.

(6) The powers and functions of the principal officer of an agency under this section may be exercised by an officer of the agency acting within his or her scope of authority in accordance with arrangements referred to in section 23.

(7) In this section:

qualified person means a person who carries on, and is entitled to carry on, an occupation that involves the provision of care for the physical or mental health of people or for their well-being, and, without limiting the generality of the foregoing, includes any of the following:

(a) a medical practitioner;

(b) a psychiatrist;

(c) a psychologist;

(d) a counsellor;

(e) a social worker.

Note: Access must generally be given to a conditionally exempt document unless it would be contrary to the public interest (see section 11A).

Australian Government
Department of Immigration and Border Protection

Submission

For information

ExecCorro Reg.Number SM2013/03183

To **Minister for Immigration and Border Protection**

Subject **Transitional arrangements for current permanent Protection visa applicants**

Timing *Please action by 24 October 2013*

Recommendations

That you:

1. note that without legislative change there are risks that cannot be removed associated with achieving the Government policy that no IMA in the current backlog receives a permanent visa. — noted / please discuss

2. note that a small number of permanent Protection visas may need to be granted to IMAs who have met all the prescribed criteria for the visa grant prior to TPV transitional arrangements being implemented; — noted / please discuss

3. the number of people who may be in this group are subsets of those who have already had the application bar lifted, or who did not require the bar to be lifted and who are still in the refugee status determination process. This is potentially some 700 people; — noted / please discuss

s 47C(1) — noted / please discuss

[redacted]

Minister for Immigration and Border Protection

Signature.....

Date: 14/10/2013

s 47C(1)

[redacted]

Received
10 OCT 2013
Minister for Immigration and Border Protection

Minister's Comments

Rejected	Timely	Relevance	Length	Quality
Yes/No	Yes/No	☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	☐ Too long ☐ Right length ☐ Too brief	Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. Of some 30 000 IMAs who have not yet had a decision made on their protection claims, about 23 000 are subject to an application bar (under either s46A or s91K of the Act) preventing them from making a valid application. s 47C(1)

s 47C(1)

2. As at 30 August 2013, there are some 7 600 IMAs at various stages in the statutory refugee determination process who have either had the relevant application bar lifted, or were granted a bridging visa and were not barred from making an application, or who arrived directly to the Australian mainland prior to legislative changes effective from 1 June 2013 and therefore did not have any bar preventing a valid application. Within this group is a smaller cohort that have been refused a visa and is at merits or judicial review and, if successful, may also fall back into processing under the Act.

3. While many of the above are not at advanced stages of processing, it is estimated that some 1 700 IMAs have reached the point where they have been found to be owed protection obligations either at the primary decision or review stage, however most of these have further checks to be actioned prior to decision on visa grant. s 47C(1)

s 47C(1)

s 34(1)(c)

s 47C(1)

8. A new 'time of decision criterion' added to the permanent visa regulations will ensure that current applications for permanent Protection visas from unauthorised arrivals cannot meet the criteria for grant of a permanent visa s 47C(1)

s 47C(1) s 42(1)

s 42(1)

[redacted]

10. Under s65A you or your delegate are required to make a decision within 90 days starting on the day the applications was made or in the circumstances prescribed by the regulations. With the increase in application in recent years this timeframe is less frequently met; however there is some risk that pending the implementation of the amendments to the Migration Regulations a small number of IMAs will meet all the prescribed conditions for grant and be past the 90 days. Changing the regulations as soon as possible could mitigate this risk. Once policy authority has been given by Government for the regulations changes, they will be presented to the first available Executive Council in October or November.

s 47C(1)

[redacted]

11. The second strategy will be strengthening the procedural advice around Ministerial Direction No. 57 made under s499 of the Act. This directs all persons and bodies having powers under the Act, including the Refugee Review Tribunal and the Administrative Appeals Tribunal, to consider and dispose of applications for Protection visas in a particular order. Tighter implementation of Direction No. 57 on the order of processing will reduce the number of IMAs potentially becoming grant-ready. A copy of the Direction No. 57 is at Attachment A.

12. In effect, this direction requires the Department to consider non-IMA applications first when assessing claims and processing Protection visa applications. Procedural advice is being strengthened to require this direction to be more tightly applied at all stages of the protection process, including allocation to case officers, pending further changes to processing arising out of the rapid audit.

s 47C(1)

[redacted]

s 34(1)(c)

[redacted]

s 34(1)(c)

[redacted]

s 42(1)

[redacted]

s 42(1)

[redacted]

Background

16. IMAs who arrived on or after 19 July 2013 are subject to Regional Resettlement Arrangements. There as some 30 000 IMAs in Australia who arrived before 19 July 2013. An IMA cannot make a valid visa application while in Australia as an unlawful non-citizen (s46A). Section 47 makes it clear that an application that is not a valid application cannot be considered, and a decision that an application is not valid and cannot be considered is not a decision to refuse to grant the visa, therefore while the application bar remains in place, consideration of a PPV application cannot occur.

17. Some IMAs released into the community on Bridging Visas under the statutory process between 24 March 2012 and 12 August 2012 could apply for a PPV as the application bar had been lifted.

- Others were granted a Humanitarian Stay (Temporary) visa concurrently with a Bridging visa which imposed an application bar under s91K. This bar has been lifted for some 1300 IMAs who have made a valid PV application.
- Some 7 600 valid applications have been made by IMAs, and are at varying stages in the statutory refugee status determination process, of which:
    - some 70 have already met all requirements and are at final stages of quality assurance, Migration Alert List or other final pre-grant checks;
    - some 620 are close to meeting all legal requirements for Protection visa grant; and
    - others are pending merits or judicial review outcomes.

18. Of some 70 IMA applications which had had no outstanding checks as at 13 September 2013, fewer than 10 were in detention. s 47C(1)

s 47C(1)

Consultation – internal/external

Irregular Migration and Protection Policy Branch – policy implications of transitional arrangements.

Service delivery implications

Communications products are being developed to provide information to affected IMAs regarding TPVs.

IMAs, agents and advocates who are aware of the processing situation continue to press for a visa outcome.

Financial/systems/legislation implications

We are working with the Department of Finance and Deregulation to cost implementation of TPVs. You will be briefed on this at a later date.

Systems changes are currently being scoped and will be implemented as soon as possible.

Regulations changes are being discussed with your office. Future legislative change will be discussed in the context of the rapid audit.

Attachments

Attachment A Section 499 Direction No. 57 Order of consideration of Protection visas

Attachment B s 34(2)

Authorising Officer
s 22(1)(a)(ii) First Assistant Secretary Refugee, Humanitarian and International Policy Division 8/10/2013 Ph: s 22(1)(a)(ii)

Contact Officer s 22(1)(a)(ii) Assistant Secretary, Onshore Protection Branch,
Ph: s 22(1)(a)(ii)

Through s 22(1)(a)(ii) Deputy Secretary s 22(1)(a)(ii) 9/10/13

CC
Assistant Minister for Immigration and Border Protection
Secretary
Deputy Secretaries
Special Counsel
General Counsel
First Assistant Secretary, Border, Refugees and Onshore Services
Global Manager, Refugee and Humanitarian Visas

DIRECTION NO. 57

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Order of consideration of Protection visas

I, BRENDAN O'CONNOR, Minister for Immigration and Citizenship, give this Direction under section 499 of the *Migration Act 1958*.

Dated this 25th day of June 2013

Brendan O'Connor
Minister for Immigration and Citizenship

Note: Section 499(1) of the Act empowers the Minister to give to a person or body having functions or powers under the Act written directions not inconsistent with the Act or the Regulations, in accordance with which the person or body shall perform those functions and exercise those powers. The person or body must comply with the Direction.

Part 1 Preliminary

1. Name of Direction

This Direction is Direction No. 57 – Order of consideration for processing Protection visas.

It may be cited as Direction No. 57.

2. Commencement

This Direction commences on 1 July 2013.

3. Application

1) This Direction applies to all persons and bodies having powers under the Act, including the RRT and AAT, to consider and dispose of applications for Protection visas, and to review decisions pertaining to those applications.

2) Without intending to limit the scope of (1), this direction applies to:

   a. delegates performing functions or exercising powers under sections 51, 65, and 91 of the Act; and
   b. the RRT performing functions or exercising powers under sections 414 and 415.

3) This direction does not apply to:

   a. Applications where it is readily apparent that the criteria for grant of the visa would not be satisfied.

4. Preamble

This Direction directs delegates with respect to the performance of functions and exercise of powers under section 51 of the Act or section 91 of the Act to determine the order for considering and disposing of visa applications.

Note: Persons with delegated powers under the Act to consider Protection visa applications have power under section 51 of the Act to consider and dispose of visa applications as they consider appropriate. Further, section 91 of the Act provides if a determination under section 85 applies, or has applied, to visas of a class or classes, the Minister may consider or, subject to section 86, dispose of outstanding and further applications for such visas in such order as he or she considers appropriate.

This Direction also directs the RRT with respect to the performance of functions and exercise of powers under sections 414 and 415 of the Act in respect of decisions under review.

5. Interpretation

Note: Unless otherwise specified, terms used in this Direction have the same meaning as in the Act – see section 46 of the *Acts Interpretation Act 1901*.

Act means the *Migration Act 1958*.

Minister means the Minister who administers the Act.

Regulations means the *Migration Regulations 1994*.

RRT means the Refugee Review Tribunal.

AAT means the Administrative Appeals Tribunal.

RPC means Regional Processing Country.

Protection visa means a Protection (class XA) Subclass 866 visa.

Part 2 Directions

6. Protection visa processing by the Department of Immigration and Citizenship

The following processing priorities (with the highest priority listed first) should be applied to claims assessments and applications for Protection visas:

   a. applicants who are not unauthorised maritime arrivals or who did not otherwise enter Australia's migration zone without a valid visa and became an unlawful non-citizen because of that entry and who do not fall into category 6 (c) or (d) are to be processed in accordance with the following priorities:

i. applicants who have been assessed on a case by case basis to have compelling reasons for being prioritised;
ii. cases remitted by the RRT or the courts;
iii. applicants who have provided genuine identity documents or who have demonstrated cooperation in providing documents about their identity consistent with section 91W of the Act;
iv. applicants who comply with a request under section 91V of the Act and provide an oral statement, on oath or affirmation, to the effect the information provided in connection with their application is true;

b. applicants who are unauthorised maritime arrivals or who otherwise entered Australia's migration zone without a valid visa and became an unlawful non-citizen because of that entry are to be processed in accordance with the following priorities:
   i. applicants who have been assessed on a case by case basis to have compelling reasons for being prioritised;
   ii. cases remitted by the RRT or the courts;
   iii. applicants who have provided genuine identity documents or who have demonstrated cooperation in providing documents about their identity consistent with section 91W of the Act;
   iv. applicants who comply with a request under section 91V of the Act and provide an oral statement, on oath or affirmation, to the effect the information provided in connection with their application is true;
   v. applicants for whom I have determined under section 198AE that section 198AD does not apply;
   vi. applicants with the earliest date of arrival in Australia who do not fall into category 6 (c) or (d);
c. applicants who do not comply with a request under section 91V of the Act to provide an oral statement, on oath or affirmation, to the effect the information provided in connection with their application is true;
d. applicants who have been shown to have provided fraudulent identity or other documents or who have not cooperated in providing documents of identity in line with section 91W of the Act without plausible and compelling reasons for not doing so;
e. all other cases.

7. If a section 85 cap applies to the Department of Immigration and Citizenship

a. Applications for a Protection visa may be affected by a section 85 cap that allows processing to be conducted but prevents the grant of visas beyond a specified number in a specified financial year.
b. In deciding the order for considering and disposing of visa applications (or reviewing decisions pertaining to such applications) when affected by a section 85 cap, the applications to

which this Direction specifically applies should be given priority in the order as provided for under paragraph 6.

c. This Direction prevails over any other Directions made by me under section 499 of the Act that outline the order of consideration for Protection visa applications of the relevant cohort.

8. Protection visa processing by the RRT

Bearing in mind the need to ensure that the operations of the RRT are economical and as quick as practicable, and consistent with sections 425 and 426 of the Act, when advising applicants of their right to appear before the RRT to give it evidence, members should give due consideration to advising applicants that, in the absence of good cause for non-attendance at the time and place notified for any hearing, the RRT may proceed to a decision without further delay.

In order to reduce the delays associated with personal hearings and with the personal appearance of witnesses, and consistently with sections 425, 426, 427 and 428 of the Act, members should give due consideration to making greater use of alternative ways of obtaining evidence such as statutory declarations, written arguments and the use of authorised persons to take evidence

Members should give due regard to the desirability of making *ex tempore* decisions in the circumstances indicated by the Principal Member in any practice direction.

The following processing priorities (with the highest priority listed first) should be applied to claims assessments and applications for Protection visas:

a. applicants who are in immigration detention are, in line with written guidelines laid down by the Principal Member under section 460(3) and as required by section 460(4) of the Act, to be given priority over applications for review where the applicant is not in immigration detention.

b. Within each of these cohorts mentioned in 8 (a) (applicants in immigration detention and applicants who are not in immigration detention), applicants who are not unauthorised maritime arrivals or who did not otherwise enter Australia's migration zone without a valid visa and became an unlawful non-citizen because of that entry and who do not fall into category 8 (d) or (e) are to be processed in accordance with the following priorities:
    i. applicants who have been assessed on a case by case basis to have compelling reasons for being prioritised;
    ii. applicants who have provided genuine identity documents or who have demonstrated cooperation in providing documents about their identity consistent with section 91W of the Act;
    iii. applicants who comply with a request under section 91V of the Act and provide an oral statement, on oath or affirmation, to the effect the information provided in connection with their application is true;

c. applicants who are unauthorised maritime arrivals or who otherwise entered Australia's migration zone without a valid visa and became an unlawful non-citizen because of that entry are to be processed in accordance with the following priorities:
    i. applicants who have been assessed on a case by case basis to have compelling reasons for being prioritised;
    ii. applicants who have provided genuine identity documents or who have demonstrated cooperation in providing documents about their identity consistent with section 91W of the Act;
    iii. applicants who comply with a request under section 91V of the Act and provide an oral statement, on oath or affirmation, to the effect the information provided in connection with their application is true;
    iv. applicants for whom I have determined under section 198AE that section 198AD does not apply;
    v. applicants with the earliest date of arrival in Australia who do not fall into category 8 (d) or (e);
d. applicants who do not comply with a request under section 91V of the Act to provide an oral statement, on oath or affirmation, to the effect the information provided in connection with their application is true;
e. applicants who have been shown to have provided fraudulent identity or other documents or who have not cooperated in providing documents of identity in line with section 91W of the Act without plausible and compelling reasons for not doing so;
f. all other cases.

Dated this 24th day of June, 2013

Brendan O'Connor
Minister for Immigration and Citizenship

Australian Government
Department of Immigration and Border Protection

Submission
For decision

ExecCorro
Reg.Number

To **Minister for Immigration and Border Protection**

Subject **Proposed amendment to Protection visa Regulations**

Timing *Please action by 5 December 2013 (to enable the new Regulations to be presented to Executive Council on 12 Dec 2013)*

Recommendations

That you:

1. agree to amend the *Migration Regulations* 1994 to ensure that Subclass 866 (Protection) visas will not be granted to anyone who arrived in Australia as an unauthorised air arrival or Illegal Maritime Arrival ('IMAs'); — Agree / Not agree
2. sign the letter to the Prime Minister at Attachment A seeking policy approval for this amendment to the *Migration Regulations* 1994; — Signed / Not signed
3. s 47C(1) — Noted / Please discuss
4. approve the text of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*, explanatory memorandum, minute paper and explanatory statement at Attachment B, Attachment C, Attachment D and Attachment E; and — Approved / Not approved
5. initial (where indicated) the text of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*, explanatory memorandum and minute paper where indicated at Attachment B, Attachment C, Attachment D and Attachment E. — Initialled / Not initialled

Minister for Immigration and Border Protection

Signature.....

Date: 5/12/2013

Minister's Comments				

Rejected	Timely	Relevance	Length	Quality
Yes/No	Yes/No	☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	☐ Too long ☐ Right length ☐ Too brief	Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. On 2 December, the *Migration Amendment (Temporary Protection Visa) Regulation 2013* (TPV Regulation) which came into effect on 18 October 2013 was disallowed.

2. We understand that your key priority is to ensure no further grants of Subclass 866 (Protection) visa, 'permanent protection visa' (PPV) to illegal maritime arrivals (IMAs).

3. To achieve this, on 2 December, you signed an instrument 'capping' the onshore component of the 2013-14 Humanitarian Programme. The instrument will come into effect on 4 December 2013. However, while this will ensure no IMA is granted a PPV, it also has the effect of ceasing grants to non-IMAs for the rest of the programme year.

4. In order to enable the Department to continue granting visas to non-IMAs who engage Australia's protection obligations without also being obliged to grant PPVs to IMAs, it is proposed that the subclass *Migration Regulation 1994* be amended to ensure that any unauthorised arrival who has applied for a permanent protection visa and has an ongoing application would not meet the time of decision criteria for the grant of such a visa.

5. If a legislative instrument has been disallowed, the *Legislative Instruments Act 2003* prevents the making of any legislative instrument that is the same in substance as the instrument that had been disallowed within 6 months after the day of disallowance.

s 42(1)

6. We have included a letter for you to sign at Attachment A to the Prime Minister seeking policy approval to proceed with the regulation amendment as indicated in Recommendation 1.

7. Permission has been sought from the Federal Executive Council Secretariat for this proposed regulation change to be put forward to the 12 December Federal Executive Council meeting. If the proposed regulation is made by the Governor General at this meeting, then it is proposed for this regulation to come into effect on 14 December.

8. Should you agree to this amendment, in order to resume grants to non-IMAs, it would be necessary to remove the 'cap' on the onshore component of the 2013-14 Humanitarian programme after the new Regulation has come into effect. Visas could then be granted to non-IMAs who engage Australia's protection obligations until the government's target of 2750 onshore grants was met.

9. The proposed regulation change does not impact on an IMA's capacity to make a valid PV application as the relevant cohort can already only make a valid visa application if you lift the relevant bar and allow them to do so.

10. s 47C(1)

Risks and Sensitivities

11. There may be a motion to disallow this regulation. It can, however, be differentiated from the TPV Regulation both in substance (as it does not seek to create a new temporary visa class or convert current permanent visa applications into temporary visa applications) and in intent, which is to support the Government to grant Permanent visas to non-IMAs, even while continuing to deny the grant of PPVs to IMAs.

12. There may be court challenges to any refusals made under the proposed new Regulations s 47C(1) [redacted]

13. Further risks and sensitivities are included in the Statement of Compatibility with Human Rights (which is included in Attachment E). There may be reputational risks associated with this measure and that it will garner the attention of the Parliamentary Joint Committee on Human Rights.

Proposed Regulation Change

14. If you agree to give policy approval to amend the *Migration Regulation 1994*, we also seek your approval of the text of the proposed *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* and the accompanying explanatory material. The Amendment Regulation would give effect to the above policy changes by amending the Principal Regulations.

15. We have attached to this submission the following documents relating to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*, for your approval and initials (where indicated):

- *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Attachment B);
- Explanatory Memorandum (Attachment C);
- Minute Paper (Attachment D); and
- Explanatory Statement (Attachment E).

Consultation – internal/external

16. Onshore Protection Branch, Legal Framework Branch.

Client service implications

17. Non-IMA applicants who currently have visa processing on hold as a result of the 'cap' will be able to have their visas processed and granted where applicable, should the cap be lifted or increased once the Regulation is made.

Financial/systems/legislation implications

18. As the department is funded by application finalisation for visa processing, changes to the regulations which permit finalisation of the onhand IMA caseload will ensure the department is financially acquitted for the output it achieves this program year. This will reduce the need for rework and storage of applications pending Act changes slated for next program year.

19. There may be an increase in Refugee Review Tribunal applications if IMAs are refused a PPV when they would otherwise have been granted a TPV.

20. There are no systems implications associated with this change.

Attachments

Attachment A Letter to the Prime Minister seeking policy approval

Attachment B *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*

Attachment C Explanatory Memorandum

Attachment D Minute Paper

Attachment E Explanatory Statement (including Statement of Compatibility with Human Rights)

Authorising Officer
s 22(1)(a)(ii) First Assistant Secretary, Refugee, Humanitarian and International Policy 4/12/2013 s 22(1)(a)(ii)

Contact Officer s 22(1)(a)(ii) Director, Protection and Humanitarian Policy Section, s 22(1)(a)(ii)

Through s 22(1)(a)(ii) 4/12/13, Assistant Secretary, Legal Framework Branch
s 22(1)(a)(ii), General Counsel not available.
Secretary s 22(1)(a)(ii) 5/12/13 on behalf of secretary
Special Counsel s 22(1)(a)(ii) 4/12/13

CC Assistant Minister for Immigration and Border Protection
Deputy Secretaries

COPY

The Hon Scott Morrison MP

Minister for Immigration and Border Protection

The Hon Tony Abbott MP
Prime Minister
Parliament House
CANBERRA ACT 2066

Dear Prime Minister

Amendments to the *Migration Regulations 1994*

I am writing to seek your policy approval to amend the *Migration Regulations 1994* (the Regulations) to ensure that a Subclass 866 (Protection) visa (Protection visa) cannot be granted to an Unauthorised Maritime Arrival (UMA) or Unauthorised Air Arrival (UAA). This would be achieved by changing the time of decision criteria of that visa subclass.

s 47C(1)

If a legislative instrument is disallowed, the *Legislative Instruments Act 2003* prevents the introduction of any legislative instrument that is the same in substance as the instrument that had been disallowed within six months after the day of disallowance. For this reason I propose instead to proceed with the more contained amendment to the Regulations that would ensure that no further Protection visas will be granted to UMAs and UAAs. s 42(1)

s 42(1)

s 42(1) This regulation amendment will also allow me to lift the current cap on Protection visa grants, and to continue to be able to grant permanent protection visas to non-IMAs

The Office of Best Practice Regulation has been consulted on this amendment and they have advised that no Regulation Impact Statement is required.

Thank you for considering this proposal. The contact officer in my Department is s 22(1)(a)(ii) Director, Protection and Humanitarian Policy Section, Irregular Migration and Protection Policy Branch, who can be contacted on s 22(1)(a)(ii)

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
5 / 12/2013

Parliament House Canberra ACT 2600 Telephone (02) 6277 7860 Fax (02) 6273 4144

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Select Legislative Instrument No. , 2013

I, Quentin Bryce AC CVO, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Migration Act 1958*.

Dated 2013

Quentin Bryce
Governor-General

By Her Excellency's Command

Scott Morrison
Minister for Immigration and Border Protection

OPC60354 - B

Contents

1 Name of regulation

This regulation is the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*.

2 Commencement

This regulation commences on 14 December 2013.

3 Authority

This regulation is made under the *Migration Act 1958*.

4 Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Migration Regulations 1994

1 After clause 866.221 of Schedule 2

Insert:

866.222

The applicant:

(a) held a visa that was in effect on the applicant's last entry into Australia; and

(b) is not an unauthorised maritime arrival; and

(c) was immigration cleared on the applicant's last entry into Australia.

2 At the end of Schedule 13

Add:

Part 26—Amendments made by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

2601 Operation of Schedule 1

The amendments of these Regulations made by Schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* apply in relation to an application for a visa:

(a) made, but not finally determined, before 14 December 2013; or

(b) made on or after 14 December 2013.

EXPLANATORY MEMORANDUM

Minute No. 30 of 2013 - Minister for Immigration and Border Protection

Subject - *Migration Act 1958*

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, regulations may be made pursuant to the provisions of the Act in Attachment A.

On 2 December 2013, the *Migration Amendment (Temporary Protection Visa) Regulation 2013* was disallowed by the Senate. This Regulation reintroduced Subclass 785 (Temporary Protection) visas and stipulated that they would be the only type of protection visa available to people who arrive in Australia via unauthorised maritime means. It continues to be the Government's intention to ensure that persons who arrive in Australia without visas are not to be granted permanent protection via a Subclass 866 (Protection) visa ('Protection visa') in Australia. Given the disallowance of the *Migration Amendment (Temporary Protection Visa) Regulation 2013*, Protection visas could again be granted to both people who arrived in Australia with visas and people who arrived in Australia without visas.

As such, to implement the Government's policy intention, the purpose of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('the proposed Regulation') is to amend the *Migration Regulations 1994* ('the Principal Regulations') to introduce a new visa criterion so that a Protection visa can only to be granted to a person who:

- held a visa that was in effect on their last entry into Australia; and
- is not an unauthorised maritime arrival; and
- was immigration cleared on the applicant's last entry into Australia.

An 'unauthorised maritime arrival' is defined in section 5AA of the Act to be a person who:

- entered Australia by sea at an excised offshore place at any time after the excision time for that place or at any other place at any time on or after the commencement of the section; and
- became an unlawful non-citizen because of that entry; and
- is not an excluded maritime arrival.

Details of the proposed Regulation are set out in Attachment B.

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

The proposed Regulation would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The proposed Regulation would commence on the day after the proposed Regulation is registered.

The Minute recommends that the Regulation be made in the form proposed.

Authority: Subsection 504(1) of the *Migration Act 1958*

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions may apply:

- subsection 31(3), which provides that regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not section 33, 34, 35, 38 or 38A);

- subsection 31(4), which provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;

- subsection 36(1), which provides that there is a class of visas to be known as protection visas;

- subsection 40(1), which provides that the regulations may provide that visa or visas of specified class may only be granted in specified circumstances; and

- subsection 40(2), which provides that, without limiting subsection 40(1), the circumstances may be, or may include that when the person is granted the visa, the person:

    - is outside Australia; or
    - is in immigration clearance; or
    - has been refused immigration clearance and has not subsequently been immigration cleared; or
    - is in the migration zone and, on last entering Australia:

        - was immigration cleared; or
        - bypassed immigration clearance and had not subsequently been immigration cleared.

ATTACHMENT B

Details of the proposed *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*

Section 1 – Name of Regulation

This section would provide that the Regulation is the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('the proposed Regulation').

Section 2 – Commencement

This section would provide that the proposed Regulation commences on 14 December 2013.

The purpose of this section is to provide for when the amendments made by the proposed Regulation would commence.

Section 3 – Authority

This section would provide that this proposed Regulation is made under the *Migration Act 1958* ('the Act').

The purpose of this section is to set out the Act under which the proposed Regulation would be made.

Section 4 – Schedule(s)

This section would provide that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The purpose of this section is to provide for how the amendments in this proposed Regulation would operate.

Schedule 1 – Amendments

Item 1 – After clause 866.221

This item would insert new clause 866.222 after clause 866.221 in Schedule 2, which would introduce new criteria that all applicants for a Subclass 866 (Protection) visa ('Protection visa') must satisfy at the time of decision.

New clause 866.222 would provide that, to meet this criterion, the applicant:

- held a visa in effect on the applicant's last entry into Australia; and
- is not an unauthorised maritime arrival; and
- was immigration cleared on the applicant's last entry into Australia.

The effect of this clause would be to ensure that only applicants who were not unauthorised maritime arrivals, held a visa that was in effect on their last entry into Australia and were immigration cleared on their last entry into Australia, would be eligible for the grant of a Protection visa.

The purpose of this amendment is to implement the Government's policy intention to ensure that unauthorised maritime arrivals, people who did not hold a visa that was in effect on their last entry into Australia and were not immigration cleared on their last entry into Australia would not be granted permanent protection through the grant of a Protection visa in Australia.

Item 2 - At the end of Schedule 13

This amendment would add new Part 26 – *Amendments made by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*.

The title of new item 2601 would be 'Operation of Schedule 1'. This item would provide that the amendments of these Regulations made by Schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* apply in relation to an application for a visa:

- made, but not finally determined, before the day on which that regulation commences; or
- made on or after that day.

The purpose of item 2601 is to clarify to whom the amendments proposed in this Regulation would apply.

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Departmental No. 30

Executive Council Meeting

No. .....

Minute Paper for the Executive Council

Subject

Migration Act 1958

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Approved in Council

Recommended for the approval of Her Excellency the Governor-General in Council that she make a Regulation in the attached form.

.....
Quentin Bryce
Governor-General

Scott Morrison
Minister for Immigration and Border Protection

.....
Filed in the Records of the Council

.....
Secretary to the Executive Council

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No.

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, regulations may be made pursuant to the provisions of the Act in Attachment A.

On 2 December 2013, the *Migration Amendment (Temporary Protection Visa) Regulation 2013* was disallowed by the Senate. This Regulation reintroduced Subclass 785 (Temporary Protection) visas and stipulated that they would be the only type of protection visa available to people who arrive in Australia via unauthorised maritime means. It continues to be the Government's intention to ensure that persons who arrive in Australia without visas are not to be granted permanent protection via a Subclass 866 (Protection) visa ('Protection visa') in Australia. Given the disallowance of the *Migration Amendment (Temporary Protection Visa) Regulation 2013*, Protection visas could again be granted to both people who arrived in Australia with visas and people who arrived in Australia without visas.

As such, to implement the Government's policy intention, the purpose of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('the Amendment Regulation') is to amend the *Migration Regulations 1994* ('the Principal Regulations') to introduce a new visa criterion so that a Protection visa can only to be granted to a person who:

- held a visa that was in effect on their last entry into Australia; and
- is not an unauthorised maritime arrival; and
- was immigration cleared on the applicant's last entry into Australia.

An 'unauthorised maritime arrival' is defined in section 5AA of the Act to be a person who:

- entered Australia by sea at an excised offshore place at any time after the excision time for that place or at any other place at any time on or after the commencement of the section; and
- became an unlawful non-citizen because of that entry; and
- is not an excluded maritime arrival.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's overall assessment is that the measures in the Regulation are compatible with human rights as the Regulation does not raise any human rights issues. A copy of the Statement is at Attachment B.

Details of the Amendment Regulation are set out in Attachment C.

The Amendment Regulation commences on 14 December 2013.

The Office of Best Practice Regulation ('the OBPR') has been consulted in relation to amendments made by the Amendment Regulation. The OBPR considers that the amendments do not have a regulatory impact on the business or not-for-profit sector and, as such, no Regulatory Impact Statement is required.

Consultation for this Instrument has not occurred. *The Legislative Instruments Act 2003* provides that consultation may be unnecessary or inappropriate where an instrument is required as a matter of urgency. This Instrument is considered urgent as it is a priority of the Government and supports the implementation of a Government commitment.

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

The Amendment Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions may apply:

- subsection 31(3), which provides that regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not section 33, 34, 35, 38 or 38A);

- subsection 31(4), which provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;

- subsection 36(1), which provides that there is a class of visas to be known as protection visas;

- subsection 40(1), which provides that the regulations may provide that visa or visas of specified class may only be granted in specified circumstances; and

- subsection 40(2), which provides that, without limiting subsection 40(1), the circumstances may be, or may include that when the person is granted the visa, the person:

    - is outside Australia; or
    - is in immigration clearance; or
    - has been refused immigration clearance and has not subsequently been immigration cleared; or
    - is in the migration zone and, on last entering Australia:

        - was immigration cleared; or
        - bypassed immigration clearance and had not subsequently been immigration cleared.

Attachment B

Statement of Compatibility with Human Rights

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

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

This 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 Legislative Instrument

This Legislative Instrument seeks to amend Schedule 2 of the *Migration Regulations 1994* (the Regulations) to ensure that a Protection visa (Class XA) (a permanent protection visa) cannot be granted to an Unauthorised Maritime Arrival (UMA) or Unauthorised Air Arrival (UAA) by changing the time of decision criteria of that visa class. For the purposes of this Statement of Compatibility, a UAA is defined as a person who arrived by air without a valid visa and sought Australia's protection prior to being immigration cleared.

As a result of these amendments all Protection visa applications will be assessed however those applications made by UMAs and UAAs which are found to engage Australia's *non-refoulement* obligations will no longer be eligible for a grant of a Protection visa. It is the Government's intention to ensure that any *non-refoulement* obligations relating to these arrivals are met in other ways. Australia's *non-refoulement* obligations will not be removed in breach of those obligations.

The form of administrative arrangements in place to support Australia meeting its *non refoulement* obligations is a matter for the Government. It is expected that UMAs and UAAs who are found to engage Australia's protection obligations but who are affected by these amendments will continue to hold a Bridging visa with the same work rights and travel conditions that they currently hold.

Human rights implications

This amendment has been assessed against the seven core human rights treaties. The amendment engages the following human rights.

Non-refoulement

Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) – prohibition against return to torture

Article 3 of the CAT states the following:

No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Articles 6 and 7 of the International Covenant on Civil and Political Rights - arbitrary deprivation of life and prohibition on torture and cruel, inhuman or degrading treatment or punishment

Articles 6 and 7 of the ICCPR also impose on Australia an implied non-refoulement obligation. Article 6 of the ICCPR states that:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 7 of the ICCPR states the following:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

The amendment does not substantively alter the rights and interests of persons whom this amendment would affect as all of Australia's *non-refoulement* obligations will be assessed, ensuring that no person who engages *non-refoulement* obligations will be returned to the country from which they have sought protection. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government.

Non-discrimination

Article 26 of the International Covenant on Civil and Political Rights of the ICCPR provides that:

> *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.*

Under General Comment 18, the UN Human Rights Committee stated:

> *'the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable*

and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'

The UN Human Rights Committee has recognised in the ICCPR context that "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory [...] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment" (CCPR General Comment 15, 11 April 1986).To the extent that the amendment constitutes differential treatment, this treatment is based on reasonable and objective criteria and is aimed at a legitimate purpose, being the need to maintaining the integrity of Australia's migration system and protecting the national interest.

Rights of the Child

Article 3 of the Convention on the Rights of the Child (CRC) state that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

However, other considerations may also be primary considerations. While it may be in the best interests of unaccompanied minors (UAMs) to be reunited with their family, it is clearly not in the best interest of a minor, to be placed in the hands of people smugglers to take the dangerous journey by boat to Australia.

The decision to amend the Regulations to ensure that UAMs who or UMAs or UAAs are not eligible for a permanent Protection visa was made to discourage minors from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal is also a primary consideration, in addition to the need to maintain the integrity of Australia's migration system and protect the national interest. The Australian Government considers that on balance these and other primary considerations outweigh the best interests of the child. Therefore, the Australian Government considers that this Legislative Instrument is consistent with Article 3 of the CRC.

Conclusion

The Regulation amendment is compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon. Scott Morrison, Minister for Immigration and Border Protection

ATTACHMENT C

Details of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*

Section 1 – Name of Regulation

This section provides that the Regulation is the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('the Amendment Regulation').

Section 2 – Commencement

This section provides that the Amendment Regulation commences on 14 December 2013.

The purpose of this section is to provide for when the amendments made by the Amendment Regulation commence.

Section 3 – Authority

This section provides that this Amendment Regulation is made under the *Migration Act 1958* ('the Act').

The purpose of this section is to set out the Act under which the Amendment Regulation is made.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The purpose of this section is to provide for how the amendments in this Amendment Regulation operate.

Schedule 1 – Amendments

Item 1 – After clause 866.221

This item inserts new clause 866.222 after clause 866.221 in Schedule 2, which introduces new criteria that all applicants for a Subclass 866 (Protection) visa ('Protection visa') must satisfy at the time of decision.

New clause 866.222 provides that, to meet this criterion, the applicant:

- held a visa in effect on the applicant's last entry into Australia; and
- is not an unauthorised maritime arrival; and

- was immigration cleared on the applicant's last entry into Australia.

The effect of this clause is to ensure that only applicants who were not unauthorised maritime arrivals, held a visa that was in effect on their last entry into Australia and were immigration cleared on their last entry into Australia, are eligible for the grant of a Protection visa.

The purpose of this amendment is to implement the Government's policy intention to ensure that unauthorised maritime arrivals, people who did not hold a visa that was in effect on their last entry into Australia and were not immigration cleared on their last entry into Australia will not be granted permanent protection through the grant of a Protection visa in Australia.

Item 2 – At the end of Schedule 13

This amendment adds new Part 26 – *Amendments made by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*.

The title of new item 2601 is 'Operation of Schedule 1'. This item provides that the amendments of these Amendment Regulations made by Schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* apply in relation to an application for a visa:

- made, but not finally determined, before the day on which that regulation commences; or
- made on or after that day.

The purpose of item 2601 is to clarify to whom the amendments in this Amendment Regulation applies.

Australian Government
Department of Immigration and Border Protection

Submission
For decision

ExecCorro Reg.Number 3831

To **Minister for Immigration and Border Protection**

Subject **Visa options for IMAs and UAAs who cannot be granted Protection Visas**

Timing *Please action by 13 December 2013 (to enable new arrangements to be put in place shortly after the new PV Regulations come into effect on 14 December)*

Recommendations

That you:

s 47C(1) [redacted]

Agreed / Please discuss

Agreed / Please discuss

Agreed / Not agreed

Agreed / Not agreed

Concurrent/January

Minister for Immigration and Border Protection

Date:...../...../2013

Signature.....

Received
12 DEC 2013
Minister for Immigration and Border Protection

Minister's Comments
Please prepare amendment and application for those applications that have commenced.

Rejected	Timely	Relevance	Length	Quality
Yes/No	Yes/No	☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	☐ Too long ☐ Right length ☐ Too brief	Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. On 2 December 2013 you signed an instrument 'capping' the onshore component of the 2013-14 Humanitarian Programme. The instrument came into effect on 4 December 2013. While this ensures no IMA is granted a PPV, it also has the effect of preventing grants to non-IMAs for the rest of the programme year.

2. In order to enable the Department to continue granting visas to non-IMAs who engage Australia's protection obligations without also being obliged to grant PPVs to IMAs, on 5 December 2013 you agreed that the *Migration Regulations 1994* be amended to ensure that any unauthorised arrival who has applied for a PPV and has an ongoing application would not meet the time of decision criteria for the grant of a PPV. The new time of decision criteria provides that a person can only be granted a PPV if they arrived in Australia lawfully.

3. This regulation amendment will be made at the Federal Executive Council meeting on 12 December 2013 and will commence on Saturday 14 December 2013. Following the commencement of that Regulation you will receive a submission seeking your agreement to revoke the current 1650 cap on the onshore component of the Humanitarian Programme to replace the cap at the original planning level of 2750. The combination of these two actions will allow grants of PPVs to non-IMAs to recommence.

4. In submission SM2013/03752 (Attachment A), you noted that further information would be provided to you about options for resolving the status of IMAs and Unauthorised Air Arrivals (UAAs) in respect of whom Australia has protection obligations but who are unable to be granted a PPV due to the new Regulation.

5. s 47C(1) [redacted]

Option for IMAs and UAAs who are found not to engage protection obligations

6. The Department recommends that all IMAs in the 6000 pre-13 August 2012 backlog found not to be owed protection should have their current visa application for a PPV refused. This will enable removal action to commence, and sends a strong message about the Government's commitment to clearing the backlog, and ensuring that those who are not owed protection return home.

7. Refusal decisions will be able to be appealed to the RRT and/or judicial review. While the RRT may find an individual refused by the Department to be engage protection obligations, they will have no option but to affirm the Department's decision to refuse the visa due to the new PPV time of decision criterion. An applicant may also use the refusal of the PPV as a platform to challenge the validity of the new PPV time of decision criterion in court - this risk cannot be discounted.

s 47C(1) [redacted]

s 47C(1)

[redacted]

[1] The majority of BVEs granted to IMAs are time specific, not event-driven and would therefore not expire 28 days after a refusal.

s 47C(1)

Option 3 – Refuse primary applications and grant Temporary (Humanitarian concern) visas

22. An alternative is to refuse primary applications on the basis of the new time of decision criterion but to invite IMAs/UAAs (including detainees) who have been found to be owed protection to lodge an application for a subclass 786 Temporary (Humanitarian Concern) visa (THC) (Regulations at Attachment B).

23. The THC visa is a rarely used visa that was designed to provide temporary stay in Australia (for up to 3 years) for specific groups of non-citizens who have been displaced and have fears for their personal safety – it was used for the East Timorese emergency situation and for Kosovars who did not initially return home, for example. It is generally expected that people granted temporary humanitarian visas will return to their home country when it is safe to do so.

24. While the application and invitation process is quite complicated compared to other visas, it allows a high degree of control and the end product is a very good fit for current government policy. The visa:

    - can be granted for up to 3 years;
    - provides no right of re-entry if the holder departs Australia;
    - provides no pathway to permanent protection;
    - provides no family reunion; and
    - can be implemented in a way that provides no opportunity to apply for any other visa onshore without the application bar in section 91K being lifted.

25. The THC visa also provides ongoing support for the holders including unrestricted work rights, Medicare, Special Benefits, job matching, rent assistance, maternity allowance, family tax benefit, eligibility for the Early Health Assessment and the intervention element of DIBP HSS services (including torture and trauma counseling). These services are mainstream and could be funded by DSS in line with the arrangements that are being put in place for TPV holders.

s 47C(1)

s 47C(1)

[redacted]

Policy approval/financial implications

37. The Department of the Prime Minister and Cabinet have advised that the most appropriate process for proceeding with any of the options outlined in this submission is for you to write to the Prime Minister seeking his agreement to the proposed approach.

38. Each of the options outlined in this submission may have financial implications, s 47C(1) In accordance with normal Budget process, we will provide updated costings in line with your preferred option to the Department of Finance for agreement and inclusion in the letter to the Prime Minister.

Risks and Sensitivities

39. As no Regulation changes are needed to grant IMAs THCs, there is no risk of disallowance.

40. The risk of challenge to the grant of the Subclass 786 THC visa is assessed as low because in order to make a valid application for a Subclass 786 THC visa, the applicant needs first to have accepted the Australian Government's offer of a temporary stay in Australia. It would be incongruous for a person to have accepted the Australian Government's offer of a temporary stay as the basis for making a Subclass 786 THC visa application, and then challenge the granting of a Subclass 786 THC visa.

Consultation – internal/external

41. Onshore Protection Branch, Legal Framework Branch, Humanitarian Branch, Community Programs and Children Division and Compliance and Case Resolution Division.

42. General Counsel and Special Counsel have been consulted and cleared this submission.

Client service implications

43. Non-IMA applicants who are grant ready but affected by the 'cap' will be able to have their visas granted should the cap be increased once the new Regulation is made. IMAs who cannot currently be granted either a TPV or a PPV will be able to be granted a THC.

44. In light of the complicated application, invitation and grant processes for THC visas, further consideration will need to be given to how we manage the process as smoothly as possible, particularly for vulnerable clients.

Financial/systems/legislation implications

s 47C(1)

Attachments

Attachment A Proposed amendment to Protection visa Regulations SM2013/03752

Attachment B Regulations for TSH and THC visas

Attachment C SM2013/03705

Authorising Officer
s 22(1)(a)(ii) First Assistant Secretary, Refugee, Humanitarian and International Policy 11/12/2013 Ph: s 22(1)(a)(ii)

Contact Officer s 22(1)(a)(ii) Director, Protection and Humanitarian Policy Section, Ph: s 22(1)(a)(ii)

Through A/g Deputy Secretary s 22(1)(a)(ii) 11/12/13

CC Assistant Minister for Immigration and Border Protection
Secretary
Deputy Secretaries

Australian Government
Department of Immigration and Border Protection

Submission
For decision

ExecCorro
Reg.Number [redacted]

To Minister for Immigration and Border Protection

Subject Proposed amendment to Protection visa Regulations

Timing *Please action by 5 December 2013 (to enable the new Regulations to be presented to Executive Council on 12 Dec 2013)*

Recommendations

That you:

1. agree to amend the *Migration Regulations* 1994 to ensure that Subclass 866 (Protection) visas will not be granted to anyone who arrived in Australia as an unauthorised air arrival or Illegal Maritime Arrival ('IMAs'); — Agree / Not agree
2. sign the letter to the Prime Minister at Attachment A seeking policy approval for this amendment to the *Migration Regulations* 1994; — Signed/Not signed
3. s 47C(1) [redacted] — Noted/Please discuss
4. approve the text of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*, explanatory memorandum, minute paper and explanatory statement at Attachment B, Attachment C, Attachment D and Attachment E; and — Approved / Not approved
5. initial (where indicated) the text of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*, explanatory memorandum and minute paper where indicated at Attachment B, Attachment C, Attachment D and Attachment E. — Initialled / Not initialled

Minister for Immigration and Border Protection

Date:...../...../2013

Signature.....

Minister's Comments				
Rejected Yes/No	Timely Yes/No	Relevance ☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	Length ☐ Too long ☐ Right length ☐ Too brief	Quality Poor 1.....2.....3.....4.....5 Excellent Comments:

Key Issues

1. On 2 December, the *Migration Amendment (Temporary Protection Visa) Regulation 2013* (TPV Regulation) which came into effect on 18 October 2013 was disallowed.

2. We understand that your key priority is to ensure no further grants of Subclass 866 (Protection) visa, 'permanent protection visa' (PPV) to illegal maritime arrivals (IMAs).

3. To achieve this, on 2 December, you signed an instrument 'capping' the onshore component of the 2013-14 Humanitarian Programme. The instrument will come into effect on 4 December 2013. However, while this will ensure no IMA is granted a PPV, it also has the effect of ceasing grants to non-IMAs for the rest of the programme year.

4. In order to enable the Department to continue granting visas to non-IMAs who engage Australia's protection obligations without also being obliged to grant PPVs to IMAs, it is proposed that the subclass *Migration Regulation 1994* be amended to ensure that any unauthorised arrival who has applied for a permanent protection visa and has an ongoing application would not meet the time of decision criteria for the grant of such a visa.

5. If a legislative instrument has been disallowed, the *Legislative Instruments Act 2003* prevents the making of any legislative instrument that is the same in substance as the instrument that had been disallowed within 6 months after the day of disallowance.

s 42(1)

6. We have included a letter for you to sign at Attachment A to the Prime Minister seeking policy approval to proceed with the regulation amendment as indicated in Recommendation 1.

7. Permission has been sought from the Federal Executive Council Secretariat for this proposed regulation change to be put forward to the 12 December Federal Executive Council meeting. If the proposed regulation is made by the Governor General at this meeting, then it is proposed for this regulation to come into effect on 14 December.

8. Should you agree to this amendment, in order to resume grants to non-IMAs, it would be necessary to remove the 'cap' on the onshore component of the 2013-14 Humanitarian programme after the new Regulation has come into effect. Visas could then be granted to non-IMAs who engage Australia's protection obligations until the government's target of 2750 onshore grants was met.

9. The proposed regulation change does not impact on an IMA's capacity to make a valid PV application as the relevant cohort can already only make a valid visa application if you lift the relevant bar and allow them to do so.

s 47C(1)

Risks and Sensitivities

11. There may be a motion to disallow this regulation. It can, however, be differentiated from the TPV Regulation both in substance (as it does not seek to create a new temporary visa class or convert current permanent visa applications into temporary visa applications) and in intent, which is to support the Government to grant Permanent visas to non-IMAs, even while continuing to deny the grant of PPVs to IMAs.

12. There may be court challenges to any refusals made under the proposed new Regulations s 47C(1) [redacted]

13. Further risks and sensitivities are included in the Statement of Compatibility with Human Rights (which is included in Attachment E). There may be reputational risks associated with this measure and that it will garner the attention of the Parliamentary Joint Committee on Human Rights.

Proposed Regulation Change

14. If you agree to give policy approval to amend the *Migration Regulation 1994*, we also seek your approval of the text of the proposed *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* and the accompanying explanatory material. The Amendment Regulation would give effect to the above policy changes by amending the Principal Regulations.

15. We have attached to this submission the following documents relating to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*, for your approval and initials (where indicated):
    - *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Attachment B);
    - Explanatory Memorandum (Attachment C);
    - Minute Paper (Attachment D); and
    - Explanatory Statement (Attachment E).

Consultation – internal/external

16. Onshore Protection Branch, Legal Framework Branch.

Client service implications

17. Non-IMA applicants who currently have visa processing on hold as a result of the 'cap' will be able to have their visas processed and granted where applicable, should the cap be lifted or increased once the Regulation is made.

Financial/systems/legislation implications

18. As the department is funded by application finalisation for visa processing, changes to the regulations which permit finalisation of the onhand IMA caseload will ensure the department is financially acquitted for the output it achieves this program year. This will reduce the need for rework and storage of applications pending Act changes slated for next program year.

19. There may be an increase in Refugee Review Tribunal applications if IMAs are refused a PPV when they would otherwise have been granted a TPV.

20. There are no systems implications associated with this change.

Attachments

Attachment A	Letter to the Prime Minister seeking policy approval
Attachment B	*Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*
Attachment C	Explanatory Memorandum
Attachment D	Minute Paper
Attachment E	Explanatory Statement (including Statement of Compatibility with Human Rights)

Authorising Officer

s 22(1)(a)(ii)

First Assistant Secretary, Refugee, Humanitarian and International Policy

4/12/2013

Ph: s 22(1)(a)(ii)

Contact Officer s 22(1)(a)(ii) Director, Protection and Humanitarian Policy Section, Ph: s 22(1)(a)(ii)

Through s 22(1)(a)(ii) Assistant Secretary, Legal Framework Branch
s 22(1)(a)(ii) General Counsel not available.
Secretary s 22(1)(a)(ii) 5/12/13 on behalf of
Special Counsel s 22(1)(a)(ii) 4/12/13

CC Assistant Minister for Immigration and Border Protection
Deputy Secretaries

The Hon Scott Morrison MP
Minister for Immigration and Border Protection

The Hon Tony Abbott MP
Prime Minister
Parliament House
CANBERRA ACT 2066

Dear Prime Minister

Amendments to the *Migration Regulations 1994*

I am writing to seek your policy approval to amend the *Migration Regulations 1994* (the Regulations) to ensure that a Subclass 866 (Protection) visa (Protection visa) cannot be granted to an Unauthorised Maritime Arrival (UMA) or Unauthorised Air Arrival (UAA). This would be achieved by changing the time of decision criteria of that visa subclass.

s 47C(1)

If a legislative instrument is disallowed, the *Legislative Instruments Act 2003* prevents the introduction of any legislative instrument that is the same in substance as the instrument that had been disallowed within six months after the day of disallowance. For this reason I propose instead to proceed with the more contained amendment to the Regulations that would ensure that no further Protection visas will be granted to UMAs and UAAs. s 42(1)

s 42(1)

s 42(1) This regulation amendment will also allow me to lift the current cap on Protection visa grants, and to continue to be able to grant permanent protection visas to non-IMAs

The Office of Best Practice Regulation has been consulted on this amendment and they have advised that no Regulation Impact Statement is required.

Thank you for considering this proposal. The contact officer in my Department is s 22(1)(a)(ii) Director, Protection and Humanitarian Policy Section, Irregular Migration and Protection Policy Branch, who can be contacted on s 22(1)(a)(ii)

Yours sincerely

The Hon Scott Morrison MP
Minister for Immigration and Border Protection
/ /2013

Parliament House Canberra ACT 2600 Telephone (02) 6277 7860 Fax (02) 6273 4144

AUSTRALIA

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Select Legislative Instrument No. , 2013

I, Quentin Bryce AC CVO, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Migration Act 1958*.

Dated 2013

Quentin Bryce
Governor-General

By Her Excellency's Command

Scott Morrison
Minister for Immigration and Border Protection

OPC60354 - B

Contents

1 Name of regulation

This regulation is the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*.

2 Commencement

This regulation commences on 14 December 2013.

3 Authority

This regulation is made under the *Migration Act 1958*.

4 Schedule(s)

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Migration Regulations 1994

1 After clause 866.221 of Schedule 2

Insert:

866.222

The applicant:

(a) held a visa that was in effect on the applicant's last entry into Australia; and

(b) is not an unauthorised maritime arrival; and

(c) was immigration cleared on the applicant's last entry into Australia.

2 At the end of Schedule 13

Add:

Part 26—Amendments made by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

2601 Operation of Schedule 1

The amendments of these Regulations made by Schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* apply in relation to an application for a visa:

(a) made, but not finally determined, before 14 December 2013; or

(b) made on or after 14 December 2013.

EXPLANATORY MEMORANDUM

Minute No. 30 of 2013 - Minister for Immigration and Border Protection

Subject - *Migration Act 1958*

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, regulations may be made pursuant to the provisions of the Act in Attachment A.

On 2 December 2013, the *Migration Amendment (Temporary Protection Visa) Regulation 2013* was disallowed by the Senate. This Regulation reintroduced Subclass 785 (Temporary Protection) visas and stipulated that they would be the only type of protection visa available to people who arrive in Australia via unauthorised maritime means. It continues to be the Government's intention to ensure that persons who arrive in Australia without visas are not to be granted permanent protection via a Subclass 866 (Protection) visa ('Protection visa') in Australia. Given the disallowance of the *Migration Amendment (Temporary Protection Visa) Regulation 2013*, Protection visas could again be granted to both people who arrived in Australia with visas and people who arrived in Australia without visas.

As such, to implement the Government's policy intention, the purpose of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('the proposed Regulation') is to amend the *Migration Regulations 1994* ('the Principal Regulations') to introduce a new visa criterion so that a Protection visa can only to be granted to a person who:

- held a visa that was in effect on their last entry into Australia; and
- is not an unauthorised maritime arrival; and
- was immigration cleared on the applicant's last entry into Australia.

An 'unauthorised maritime arrival' is defined in section 5AA of the Act to be a person who:

- entered Australia by sea at an excised offshore place at any time after the excision time for that place or at any other place at any time on or after the commencement of the section; and
- became an unlawful non-citizen because of that entry; and
- is not an excluded maritime arrival.

Details of the proposed Regulation are set out in Attachment B.

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

The proposed Regulation would be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The proposed Regulation would commence on the day after the proposed Regulation is registered.

The Minute recommends that the Regulation be made in the form proposed.

Authority: Subsection 504(1) of the *Migration Act 1958*

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions may apply:

- subsection 31(3), which provides that regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not section 33, 34, 35, 38 or 38A);

- subsection 31(4), which provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;

- subsection 36(1), which provides that there is a class of visas to be known as protection visas;

- subsection 40(1), which provides that the regulations may provide that visa or visas of specified class may only be granted in specified circumstances; and

- subsection 40(2), which provides that, without limiting subsection 40(1), the circumstances may be, or may include that when the person is granted the visa, the person:

    - is outside Australia; or
    - is in immigration clearance; or
    - has been refused immigration clearance and has not subsequently been immigration cleared; or
    - is in the migration zone and, on last entering Australia:

        - was immigration cleared; or
        - bypassed immigration clearance and had not subsequently been immigration cleared;

ATTACHMENT B

Details of the proposed *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*

Section 1 – Name of Regulation

This section would provide that the Regulation is the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('the proposed Regulation').

Section 2 – Commencement

This section would provide that the proposed Regulation commences on 14 December 2013.

The purpose of this section is to provide for when the amendments made by the proposed Regulation would commence.

Section 3 – Authority

This section would provide that this proposed Regulation is made under the *Migration Act 1958* ('the Act').

The purpose of this section is to set out the Act under which the proposed Regulation would be made.

Section 4 – Schedule(s)

This section would provide that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The purpose of this section is to provide for how the amendments in this proposed Regulation would operate.

Schedule 1 – Amendments

Item 1 – After clause 866.221

This item would insert new clause 866.222 after clause 866.221 in Schedule 2, which would introduce new criteria that all applicants for a Subclass 866 (Protection) visa ('Protection visa') must satisfy at the time of decision.

New clause 866.222 would provide that, to meet this criterion, the applicant:

- held a visa in effect on the applicant's last entry into Australia; and
- is not an unauthorised maritime arrival; and
- was immigration cleared on the applicant's last entry into Australia.

The effect of this clause would be to ensure that only applicants who were not unauthorised maritime arrivals, held a visa that was in effect on their last entry into Australia and were immigration cleared on their last entry into Australia, would be eligible for the grant of a Protection visa.

The purpose of this amendment is to implement the Government's policy intention to ensure that unauthorised maritime arrivals, people who did not hold a visa that was in effect on their last entry into Australia and were not immigration cleared on their last entry into Australia would not be granted permanent protection through the grant of a Protection visa in Australia.

Item 2 - At the end of Schedule 13

This amendment would add new Part 26 - *Amendments made by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013.*

The title of new item 2601 would be 'Operation of Schedule 1'. This item would provide that the amendments of these Regulations made by Schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* apply in relation to an application for a visa:

- made, but not finally determined, before the day on which that regulation commences; or
- made on or after that day.

The purpose of item 2601 is to clarify to whom the amendments proposed in this Regulation would apply.

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Departmental No. 30

Executive Council Meeting

No. .....

Minute Paper for the Executive Council

Subject

Migration Act 1958

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Approved in Council

Recommended for the approval of Her Excellency the Governor-General in Council that she make a Regulation in the attached form.

.....
Quentin Bryce
Governor-General

Scott Morrison
Minister for Immigration and Border Protection

.....
Filed in the Records of the Council

.....
Secretary to the Executive Council

EXPLANATORY STATEMENT

Select Legislative Instrument 2013 No.

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, regulations may be made pursuant to the provisions of the Act in Attachment A.

On 2 December 2013, the *Migration Amendment (Temporary Protection Visa) Regulation 2013* was disallowed by the Senate. This Regulation reintroduced Subclass 785 (Temporary Protection) visas and stipulated that they would be the only type of protection visa available to people who arrive in Australia via unauthorised maritime means. It continues to be the Government's intention to ensure that persons who arrive in Australia without visas are not to be granted permanent protection via a Subclass 866 (Protection) visa ('Protection visa') in Australia. Given the disallowance of the *Migration Amendment (Temporary Protection Visa) Regulation 2013*, Protection visas could again be granted to both people who arrived in Australia with visas and people who arrived in Australia without visas.

As such, to implement the Government's policy intention, the purpose of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('the Amendment Regulation') is to amend the *Migration Regulations 1994* ('the Principal Regulations') to introduce a new visa criterion so that a Protection visa can only to be granted to a person who:

- held a visa that was in effect on their last entry into Australia; and
- is not an unauthorised maritime arrival; and
- was immigration cleared on the applicant's last entry into Australia.

An 'unauthorised maritime arrival' is defined in section 5AA of the Act to be a person who:

- entered Australia by sea at an excised offshore place at any time after the excision time for that place or at any other place at any time on or after the commencement of the section; and
- became an unlawful non-citizen because of that entry; and
- is not an excluded maritime arrival.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's overall assessment is that the measures in the Regulation are compatible with human rights as the Regulation does not raise any human rights issues. A copy of the Statement is at Attachment B.

Details of the Amendment Regulation are set out in Attachment C.

The Amendment Regulation commences on 14 December 2013.

The Office of Best Practice Regulation ('the OBPR') has been consulted in relation to amendments made by the Amendment Regulation. The OBPR considers that the amendments do not have a regulatory impact on the business or not-for-profit sector and, as such, no Regulatory Impact Statement is required.

Consultation for this Instrument has not occurred. *The Legislative Instruments Act 2003* provides that consultation may be unnecessary or inappropriate where an instrument is required as a matter of urgency. This Instrument is considered urgent as it is a priority of the Government and supports the implementation of a Government commitment.

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

The Amendment Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

ATTACHMENT A

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* ('the Act') provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions may apply:

- subsection 31(3), which provides that regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not section 33, 34, 35, 38 or 38A);

- subsection 31(4), which provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;

- subsection 36(1), which provides that there is a class of visas to be known as protection visas;

- subsection 40(1), which provides that the regulations may provide that visa or visas of specified class may only be granted in specified circumstances; and

- subsection 40(2), which provides that, without limiting subsection 40(1), the circumstances may be, or may include that when the person is granted the visa, the person:

    - is outside Australia; or
    - is in immigration clearance; or
    - has been refused immigration clearance and has not subsequently been immigration cleared; or
    - is in the migration zone and, on last entering Australia:

        - was immigration cleared; or
        - bypassed immigration clearance and had not subsequently been immigration cleared.

Attachment B

Statement of Compatibility with Human Rights

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

Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013

This 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 Legislative Instrument

This Legislative Instrument seeks to amend Schedule 2 of the *Migration Regulations 1994* (the Regulations) to ensure that a Protection visa (Class XA) (a permanent protection visa) cannot be granted to an Unauthorised Maritime Arrival (UMA) or Unauthorised Air Arrival (UAA) by changing the time of decision criteria of that visa class. For the purposes of this Statement of Compatibility, a UAA is defined as a person who arrived by air without a valid visa and sought Australia's protection prior to being immigration cleared.

As a result of these amendments all Protection visa applications will be assessed however those applications made by UMAs and UAAs which are found to engage Australia's *non-refoulement* obligations will no longer be eligible for a grant of a Protection visa. It is the Government's intention to ensure that any *non-refoulement* obligations relating to these arrivals are met in other ways. Australia's *non-refoulement* obligations will not be removed in breach of those obligations.

The form of administrative arrangements in place to support Australia meeting its *non refoulement* obligations is a matter for the Government. It is expected that UMAs and UAAs who are found to engage Australia's protection obligations but who are affected by these amendments will continue to hold a Bridging visa with the same work rights and travel conditions that they currently hold.

Human rights implications

This amendment has been assessed against the seven core human rights treaties. The amendment engages the following human rights.

Non-refoulement

Article 3 of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) – prohibition against return to torture

Article 3 of the CAT states the following:

No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Articles 6 and 7 of the International Covenant on Civil and Political Rights - arbitrary deprivation of life and prohibition on torture and cruel, inhuman or degrading treatment or punishment

Articles 6 and 7 of the ICCPR also impose on Australia an implied non-refoulement obligation. Article 6 of the ICCPR states that:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 7 of the ICCPR states the following:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

The amendment does not substantively alter the rights and interests of persons whom this amendment would affect as all of Australia's *non-refoulement* obligations will be assessed, ensuring that no person who engages *non-refoulement* obligations will be returned to the country from which they have sought protection. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government.

Non-discrimination

Article 26 of the International Covenant on Civil and Political Rights of the ICCPR provides that:

> *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.*

Under General Comment 18, the UN Human Rights Committee stated:

> *'the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable*

and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'

The UN Human Rights Committee has recognised in the ICCPR context that "The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory [...] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment" (CCPR General Comment 15, 11 April 1986).To the extent that the amendment constitutes differential treatment, this treatment is based on reasonable and objective criteria and is aimed at a legitimate purpose, being the need to maintaining the integrity of Australia's migration system and protecting the national interest.

Rights of the Child

Article 3 of the Convention on the Rights of the Child (CRC) state that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

However, other considerations may also be primary considerations. While it may be in the best interests of unaccompanied minors (UAMs) to be reunited with their family, it is clearly not in the best interest of a minor, to be placed in the hands of people smugglers to take the dangerous journey by boat to Australia.

The decision to amend the Regulations to ensure that UAMs who or UMAs or UAAs are not eligible for a permanent Protection visa was made to discourage minors from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal is also a primary consideration, in addition to the need to maintain the integrity of Australia's migration system and protect the national interest. The Australian Government considers that on balance these and other primary considerations outweigh the best interests of the child. Therefore, the Australian Government considers that this Legislative Instrument is consistent with Article 3 of the CRC.

Conclusion

The Regulation amendment is compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon. Scott Morrison, Minister for Immigration and Border Protection

ATTACHMENT C

Details of the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*

Section 1 – Name of Regulation

This section provides that the Regulation is the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* ('the Amendment Regulation').

Section 2 – Commencement

This section provides that the Amendment Regulation commences on 14 December 2013.

The purpose of this section is to provide for when the amendments made by the Amendment Regulation commence.

Section 3 – Authority

This section provides that this Amendment Regulation is made under the *Migration Act 1958* ('the Act').

The purpose of this section is to set out the Act under which the Amendment Regulation is made.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The purpose of this section is to provide for how the amendments in this Amendment Regulation operate.

Schedule 1 – Amendments

Item 1 – After clause 866.221

This item inserts new clause 866.222 after clause 866.221 in Schedule 2, which introduces new criteria that all applicants for a Subclass 866 (Protection) visa ('Protection visa') must satisfy at the time of decision.

New clause 866.222 provides that, to meet this criterion, the applicant:

- held a visa in effect on the applicant's last entry into Australia; and
- is not an unauthorised maritime arrival; and

- was immigration cleared on the applicant's last entry into Australia.

The effect of this clause is to ensure that only applicants who were not unauthorised maritime arrivals, held a visa that was in effect on their last entry into Australia and were immigration cleared on their last entry into Australia, are eligible for the grant of a Protection visa.

The purpose of this amendment is to implement the Government's policy intention to ensure that unauthorised maritime arrivals, people who did not hold a visa that was in effect on their last entry into Australia and were not immigration cleared on their last entry into Australia will not be granted permanent protection through the grant of a Protection visa in Australia.

Item 2 – At the end of Schedule 13

This amendment adds new Part 26 – *Amendments made by the Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013*.

The title of new item 2601 is 'Operation of Schedule 1'. This item provides that the amendments of these Amendment Regulations made by Schedule 1 to the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* apply in relation to an application for a visa:

- made, but not finally determined, before the day on which that regulation commences; or
- made on or after that day.

The purpose of item 2601 is to clarify to whom the amendments in this Amendment Regulation applies.

Subclass 449 - Humanitarian Stay (Temporary)

449.1 Interpretation

Note No interpretation provisions specific to this Part.

449.2 Primary criteria

Note The primary criteria must be satisfied by at least 1 member of a family unit. Other members of the family unit, or members of the immediate family of a person, who are applicants for a visa of this subclass need satisfy only the secondary criteria.

449.21 [No criteria to be satisfied at time of application]

449.22 Criteria to be satisfied at time of decision

449.221

(1) The applicant meets the requirements of subclause (2) or (3).

(2) The applicant meets the requirements of this subclause if:

(a) the applicant has been displaced from his or her place of residence, and:

(i) cannot reasonably return to that place of residence; and

(ii) is in grave fear of his or her personal safety because of the circumstances in which, or reasons why, he or she was displaced from that place of residence; or

(b) the applicant has not been displaced from his or her place of residence, but:

(i) there is a strong likelihood that the applicant will be displaced from that place of residence; and

(ii) the applicant is in grave fear of his or her personal safety because of the circumstances in which, or reasons why, the applicant may be displaced from that place of residence.

(3) The applicant meets the requirements of this subclause if the applicant:

(a) is a member of the immediate family of a holder of a Subclass 449 visa (**"the visa holder"**); and

(b) was a member of the visa holder's immediate family when the visa holder was first granted a Subclass 449 visa.

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[449.222 omitted by SR 1999, 198 with effect from 8/09/1999 - LEGEND note]

449.223

Grant of the visa would not result in either:

(a) the number of Subclass 449 visas granted in a financial year exceeding the maximum number of Subclass 449 visas, as determined by Gazette Notice, that may be granted in that financial year; or

(b) the number of visas of particular classes, including Subclass 449, granted in a financial year exceeding the maximum number of visas of those classes, as determined by Gazette Notice, that may be granted in that financial year.

449.224

(1) The applicant satisfies public interest criteria 4002 and 4003A.

(2) The applicant satisfies public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

449.3 Secondary criteria

Note These criteria must be satisfied by applicants who are members of the family unit, or members of the immediate family, of a person who satisfies the primary criteria.

449.31 [No criteria to be satisfied at time of application]

449.32 Criteria to be satisfied at time of decision

449.321

The applicant:

(a) is a member of the family unit of a person who, having met the requirements of subclause 449.221(2), is the holder of a Subclass 449 visa; or

(b) is a member of the immediate family of a person who, having met the requirements of subclause 449.221(3), is the holder of a Subclass 449 visa.

449.322

(1) The applicant satisfies public interest criteria 4002 and 4003A.

(2) The applicant satisfies public interest criterion 4007, unless the Minister is satisfied that it would be unreasonable to require the person to undergo assessment in relation to that criterion.

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449.323

If the applicant has not turned 18, public interest criteria 4017 and 4018 are satisfied in relation to the applicant.

449.4 Circumstances applicable to grant

449.411

If the application is made outside Australia, the applicant must be outside Australia at the time of grant.

449.412

If the application is made in Australia, the applicant must be in Australia at the time of grant.

449.5 When visa is in effect

[s5 of the Migration Act defines enter, enter Australia, entered, and entry , leave Australia and remain in Australia - see also s4 (object of the Act) and s6 (effect of limited meaning of certain expressions) - LEGEND note]

449.511

Temporary visa permitting the holder to travel to, enter and remain in Australia until a date specified by the Minister.

449.6 Conditions

449.611

Condition 8506.

449.612

Condition 8101 or 8104 may be imposed.

449.612A

Condition 8303 may be imposed.

449.613

If the Minister is satisfied that it would be unreasonable to require an applicant to undergo assessment in relation to criterion 4007, condition 8529.

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Note See subclauses 449.224(2) and 449.322(2)

[449.7 Way of giving evidence - 449.711 and 449.712 - omitted by SLI 2012, 256 with effect on and from 24/11/2012 - LEGEND note]

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Subclass 786 - Temporary (Humanitarian Concern)

786.1 Interpretation

Note No interpretation provisions specific to this Part.

786.2 Primary criteria

Note All applicants must satisfy the primary criteria.

786.21 Criteria to be satisfied at time of application

786.211

The applicant is the holder of a Temporary Safe Haven (Class UJ) visa.

786.22 Criteria to be satisfied at time of decision

786.221

The Minister is satisfied that, for reasons of humanitarian concern, the applicant should be permitted to remain in Australia for a further period.

[s5 of the Migration Act defines enter, enter Australia, entered, and entry , leave Australia and remain in Australia - see also s4 (object of the Act) and s6 (effect of limited meaning of certain expressions) - LEGEND note]

786.222

The applicant has undergone a medical examination carried out by any of the following (a **relevant medical practitioner**):

(a) a Medical Officer of the Commonwealth;

(b) a medical practitioner approved by the Minister for the purposes of this paragraph;

(c) a medical practitioner employed by an organisation approved by the Minister for the purposes of this paragraph.

786.223

(1) Subject to subclause (2), the applicant has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia.

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(2) Subclause (1) does not apply to an applicant if the applicant:

(a) is under 11 years of age and is not a person in respect of whom a Commonwealth Medical Officer has requested such an examination; or

(b) is a person:

(i) who is confirmed by a Commonwealth Medical Officer to be pregnant; and

(ii) who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and

(iii) who has signed an undertaking to place herself under the professional supervision of a health authority in a State or Territory and to undergo any necessary treatment; and

(iv) who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.

786.224

The applicant satisfies public interest criterion 4001 or, if the applicant is unable to satisfy that criterion because the appropriate inquiries have not been completed, the applicant declares in writing, to the satisfaction of the Minister, that the applicant:

(a) does not have a criminal record; and

(b) is not a terrorist; and

(c) has not engaged in crimes against humanity or war crimes; and

(d) will assist Immigration by attempting to obtain any relevant records relating to the applicant.

786.225

The applicant satisfies public interest criteria 4002 and 4003A.

786.3 Secondary criteria

Note All applicants must satisfy the primary criteria.

786.4 Circumstances applicable to grant

786.411

The applicant must be in Australia.

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786.5 When visa is in effect

[s5 of the Migration Act defines enter, enter Australia, entered, and entry , leave Australia and remain in Australia - see also s4 (object of the Act) and s6 (effect of limited meaning of certain expressions) - LEGEND note]

786.511

Temporary visa permitting the holder to remain in, but not re-enter, Australia until the earlier of:

(a) the end of 36 months from the date of grant of the visa; and

(b) the end of any shorter period determined in writing by the Minister from the date of grant of the visa.

786.6 Conditions

786.611

The holder must notify Immigration of any change in the holder's address at least 2 working days before the change.

786.612

The holder must not become involved in any disruptive activity, or violence, that may be a threat to the welfare of the Australian community or a group in the Australian community.

[786.7 Way of giving evidence - 786.711 and 786.712 - omitted by SLI 2012, 256 with effect on and from 24/11/2012 - LEGEND note]

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Australian Government
Department of Immigration and Border Protection

Submission
For decision

ExecCorro Reg.Number

To **Minister for Immigration and Border Protection**

Subject **Legislative change to more effectively manage illegal maritime arrivals in the community**

Timing *Please action by 13 December 2013.*

Recommendations

That you:

s 47C(1)

[redacted]

agreed / not agreed

agreed / not agreed

agreed / not agreed

agreed / not agreed

agreed / not agreed

Minister for Immigration and Border Protection

Signature..... **Date:...../...../2013**

Minister's Comments

Rejected	Timely	Relevance	Length	Quality
Yes/No	Yes/No	☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	☐ Too long ☐ Right length ☐ Too brief	Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. In recent years, in response to increasing pressure on detention centre capacities, Bridging E (subclass 050) visas (BVEs) have been used to release some illegal maritime arrivals (IMAs) into the community while awaiting assessment of their claims for protection. These releases were made after initial health, identity and security checks had been undertaken, and relied on the Minister's personal, non-compellable power under section 195A of the *Migration Act 1958* (the Act) to grant a visa to a person in immigration detention.

2. Your personal intervention is required to grant a visa to an IMA as migration legislation operates on the basis that most IMAs should remain in detention until they are either granted a substantive visa or they are removed from Australia. The release mechanisms used are administratively and logistically cumbersome, particularly as the intention for many of these IMAs has been to apply legislative barriers to control access to Protection visas or other substantive visas after they are released on BVEs. s 47C(1)

s 47C(1)

Permission to work

4. Government policy is that IMA BVE holders should not have permission to work. Under the previous Government's policies, IMAs who arrived on or after 13 August 2012 already have a 'no work' condition on their BVEs, but earlier IMAs do not (giving them permission to work). In some cases entitlement to permission to work is determined by regulations which are binding on the department and on you, even when you personally grant a visa under section 195A. In most cases, especially where you are using a personal power to grant a BVE, you can withhold permission to work. However, where the department is to grant visas, and where an IMA is able

to lodge a Temporary Protection visa (TPV) application, there are some opportunities for them to seek permission to work.

s 47C(1)

6. For IMAs who already have permission to work attached to their BVE, there is no way to lawfully impose a 'no work' condition while that visa remains valid. It is not possible to cancel a BVE in order to change the holder's visa conditions because visas can only be cancelled on prescribed grounds. IMAs currently holding permission to work will therefore continue to have permission to work until their current BVE ceases (either because it ceases at a date set at time of grant or because a ceasing event, such as the final determination of a Protection visa application, occurs).

Future management of grants of BVEs to IMAs in the community

7. IMAs are generally subject to a legislative bar at section 46A of the Act, preventing them from making valid applications for any visas (although other bars and restrictions may apply).[1] However, this bar does not apply when an IMA is lawful, including when they hold a BVE. The section 46A bar may be lifted by the Minister personally for a specific visa class and, once lifted, does not apply for that visa class again.

8. In order to prevent IMAs from lodging visa applications, the large majority of IMAs, those who arrived on and from 13 August 2012, were granted a short-term Humanitarian Stay (Temporary) visa (HSTV) at the same time as their initial BVE. The HSTV applies a bar (under section 91K of the Act) which prevents the recipient from lodging a valid visa application or from being granted a further visa by the department, even if the person is lawful. If a client becomes unlawful then the section 46A bar will operate in addition to the section 91K bar.

9. Grants of BVEs to IMAs in the community, regardless of cohort, were managed by waiting until they became unlawful, re-detaining them in a departmental office and coordinating this with the real-time use of the Minister's section 195A personal power to grant a further BVE. This process proved unsustainable as numbers of IMAs increased.

10. More recently, a process which does not rely on the re-detention of IMAs has been used to manage further grants of BVEs to these IMAs. A Ministerial power (section 91L of the Act) can lift the HSTV bar for a period of seven working days from the time, during which time the department can grant a further BVE, provided the section 46A bar is also lifted in respect of BVEs. This process can handle large numbers of cases in batches but does involve some risk that IMAs will make applications for other visas, such as for TPVs, during the seven days the HSTV bar

[1] Before strengthened excision arrangements came into effect on 1 June 2013, IMAs who arrived directly to the mainland were not subject to this bar.

remains lifted. This is because the section 91K bar can be only lifted in relation to all visa applications. This will only be a risk if section 46A also does not apply, either in that part of the seven day period after grant of the BVE where the person is lawful or in the rare instances where the section 46A bar has previously been lifted in respect of Protection visas.

s 47C(1)

s 47C(1)

[redacted]

Background

21. The BVE is a core tool used by Compliance officers to manage clients in the community who would otherwise be subject to immigration detention. The visa is used for a broad range of

clients, the majority of whom have become unlawful since arriving lawfully in Australia. One of the risks of making changes to BVEs is that it may have unintended consequences on the ability to manage the non-IMA cohort in the community.

Consultation – internal/external

22. Compliance Status Resolution Branch, IMA BVE Programme Branch, Complex Cases and Portal Support Branch, Legal and Assurance Division, Risk Fraud and Integrity Division, Status Resolution Services Division, Refugee, Humanitarian and International Policy Division, Borders, Refugees and Onshore Services Division and Financial Strategy and Services Division.

Client service implications

23. The management framework for IMAs on BVEs is complex and has undergone significant changes since IMAs were first released on BVEs in November 2011. Any further changes are likely to add to the complexity of the framework, and there are likely to be difficulties associated with communicating these changes to affected IMAs, to relevant stakeholders and to the Australian public generally. s 47C(1)

Proposed Regulation amendments

s 47C(1)

Proposed amendments to the Act

s 47C(1)

Financial/systems/legislation implications

27. The proposals outlined in this submission would require changes to the Act and the Regulations, which will require legislation and drafting resources. The changes will also have systems implications which, if you agree to the proposed amendments, will be assessed in further detail as part of the legislative drafting process.

28. A number of proposals have been put to you in this and other submissions which will have a significant unfunded impact on compliance resources. The proposals will also have financial implications. The extent of these implications will be assessed in greater detail once you have indicated which proposals should be progressed.

29. In the long-term the proposed Act changes may result in cost savings associated with more efficient arrangements to manage BVE grants to IMAs.

Attachments

Attachment A Historical and current arrangements for managing BVE grants to IMAs in the community

Attachment B Summary of proposed amendments

Authorising Officer
s 22(1)(a)(ii) A/g FAS Compliance and Case Resolution Division 28/11/2013 Ph: s 22(1)(a)(ii)

Contact Officer s 22(1)(a)(ii) A/g FAS Compliance and Case Resolution Division, Ph: s 22(1)(a)(ii)

Through Deputy Secretary s 22(1)(a)(ii) 28/11/13

CC
Assistant Minister for Immigration and Border Protection
Secretary
Deputy Secretaries
Chief Financial Officer
FAS Community Programmes and Children Division
FAS Legal and Assurance Division
FAS Refugee, Humanitarian and International Policy Division
FAS Status Resolution Services
AS Financial Strategy and Budgets
AS Compliance Status Resolution Branch
AS IMA BVE Programme Branch

Attachment A

Historical and current arrangements for managing BVE grants to IMAs in the community

1) Non-statutory protection assessment process (approximately 1012 IMAs)

This applies to IMAs released from detention from November 2011 until the commencement of statutory Protection visa processing (see below).

Visa grant/ re-grant arrangements:

- IMAs were released through simultaneous grant of a short-term HSTV and a BVE for at least six months.
- As a result of being granted a HSTV visa they are barred (by section 91K of the Act) from lodging a valid visa application or from being granted a further visa by the department.
- The Minister's intervention is therefore required for each grant of a further BVE.
- Grants of further BVEs to IMAs in the community, regardless of cohort, were managed by waiting until groups of IMAs became unlawful, administratively re-detaining them in a departmental office and coordinating this with the real time use of the Minister's section 195A personal power to grant a further BVE.
- Because these IMAs were barred from making an application for a PV (and now a TPV) their claims for protection have been assessed under a non-statutory assessment process.

Permission to work arrangements:

- These IMAs were given permission to work on their original BVE and on subsequent BVEs (all granted by the Minister using his personal powers).

s 47C(1)

2) *Statutory protection assessment process (approximately 3803 IMAs, excluding direct arrivals)*

This applies to IMAs who had a primary assessment interview on or after 24 March 2012, but arrived before 13 August 2012.

Visa grant/ re-grant arrangements:

- These IMAs were released into the community without a HSTV and were therefore not subject to the section 91K bar.
- Initially IMAs made an application for a Protection visa while in detention and the Minister granted a BVE in association with that application.
- From 11 October 2012 the Minister granted six week BVEs to IMAs so that they could apply for Protection visas in the community, following release from detention.
- To support these release arrangements amendments were made to the Regulations to allow the Department to manage BVE grants to these IMAs (by making them 'eligible non-citizens' under the Regulations and therefore eligible to apply for and be granted BVEs).

However these regulations were disallowed in November 2012 and further grants of BVEs require Ministerial intervention.

- BVEs granted to IMAs under the statutory protection assessment process are associated with IMAs' Protection visa applications and will not cease until that application is finally determined.

Permission to work arrangements:

- These IMAs were released with permission to work and hold permission to work on the BVE granted in association with their Protection visa.
- BVEs for these IMAs do not cease until final determination (post merits review) of their associated PV application. The conditions of their BVEs, including permission to work, are determined by the Regulations.
- s 47C(1), permission to work is determined by the Regulations for BVEs during judicial review of a refusal decision and on BVEs granted in association with a request for Ministerial intervention. s 47C(1)

Legislative Instrument IMMI 12/114

The purpose of legislative instrument IMMI 12/114 was to make permission to work available to IMAs who arrived before 13 August 2012 and were granted a BVE in association with a Protection visa application. The instrument explicitly excludes IMAs who arrived as offshore entry persons after 13 August 2012, and the 'no work' condition is therefore mandatory on BVEs granted to these IMAs in association with a TPV application.

In its current form, the instrument requires a technical amendment to ensure its terminology reflects changes made to the Act by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*, including the introduction of the term 'unauthorised maritime arrival' to replace 'offshore entry person'. s 47C(1)

s 47C(1)

3) *IMAs who arrived on and from 13 August 2012 (approximately 17 226 IMAs, excluding direct arrivals)*

Visa grant/ re-grant arrangements:

- IMAs who arrived as offshore entry persons between 13 August 2012 and 19 July 2013 and were released into the community were simultaneously granted a short-term HSTV and a BVE.
- As a result of being granted a HSTV visa they are barred (by section 91K of the Act) from lodging a valid visa application or from being granted a further visa by the department.
- Grants of further BVEs to IMAs in the community, regardless of cohort, were managed by waiting until groups of IMAs became unlawful, administratively re-detaining them in a departmental office and coordinating this with the real time use of the Minister's section 195A personal power to grant a further BVE. This process proved unsustainable as numbers of IMAs increased.
- More recently, a process which does not rely on the re-detention of IMAs has been used to manage further grants of BVEs to these IMAs. A Ministerial power (section 91L of the Act) can lift the bar for a period of seven working days, during which time the department may grant a further BVE.

s 47C(1)

[redacted]

4) *Direct arrivals (approximately 740 direct arrivals)*

There is a small cohort of IMAs who arrived as non-offshore entry persons (that is, arrived directly to the mainland) who have been granted BVEs with permission to work. s 47C(1)

s 47C(1)

Attachment B

s 47C(1)

[redacted]

s 47C(1)

s 47C(1)

Australian Government
Department of Immigration and Border Protection

Submission
For decision

ExecCorro Reg.Number SM2014/00106

Received
15 JAN 2014
Minister for Immigration and Border Protection

To **Minister for Immigration and Border Protection**

Subject **Continuing to achieve the policy objective of no permanent Protection visa grants to IMAs**

Timing *Please action by 17 January 2014 (to enable arrangements to be put in place as quickly as possible and to ensure accurate Defences can be lodged in the High Court)*

Recommendations

That you:

1. s 47C(1) — Noted / Please discuss
2. Noted/Please discuss
3. Agree that Illegal Maritime Arrivals (IMAs) and Unauthorised Air Arrivals (UAAs) with current applications on hand who do **not** engage Australia's protection obligations continue to be processed and refused; — Agreed / Not Agreed
4. Agree that IMAs who are 'grant-ready' have their PV application refused before issuing an alternative visa; — Agreed / Not Agreed
5. Decide that those IMAs mentioned in recommendation 4 be granted a:
   a) Temporary Humanitarian Concern visa (subclass 786); OR — (a) Agreed/Not Agreed
   b) Humanitarian Stay (Temporary) visa (subclass 449); OR — (b) Agreed/Not Agreed
   c) Removal Pending Bridging Visa (subclass 070); OR — (c) Agreed/Not Agreed
   d) Bridging visa E (subclass 050) with work rights and 100% services. — (d) Agreed/Not agreed
6. s 47C(1) — No process/non-statutory process
7. (a) Agreed/Not Agreed
   (b) Agreed/Not Agreed

subject ever

8. Indicate whether you wish to proceed with: a. All proposed Act amendments or a subset of Act amendments with broader non-IMA application (per Attachment D); b. The Act amendments agreed to in 8a: i. In Autumn; or ii. In Winter; c. None of the Act amendments at this time.	All / subset Autumn / Winter None
9. Note that further whole of Government consideration of these issues will be required.	Noted / Please discuss
10. Note that whichever arrangements you agree to will impact future costs and resources required to resolve the status of finally-determined IMAs who are not owed protection.	Noted / Please discuss
Minister for Immigration and Border Protection **Signature**.....	**Date**...../...../2014

Minister's Comments

Rejected	Timely	Relevance	Length	Quality
Yes/No	Yes/No	☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	☐ Too long ☐ Right length ☐ Too brief	Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. We understand that your key concern is to ensure that no-one who arrived illegally in Australia by air or sea (hereafter referred to as IMAs) is granted a permanent protection visa (PPV).

s 47C(1)

s 47C(1)

[redacted]

7. Given recent Government decisions to improve the robustness and integrity of protection visa decision-making following the Rapid Audit it is also necessary to decide, in the absence of TPVs, whether to:

   a. Proceed in Autumn or Winter 2014 with the suite of Act amendments as agreed;

   b. Proceed with a subset of the Act amendments (that has application broader than IMAs) in Autumn or Winter; or

   c. Defer introduction of all Act amendments.

8. The decisions you make in the above matters will have potentially significant cost implications for the ongoing management of IMAs, including impacts on the expected timeframes and numbers requiring status resolution through voluntary return or removal.

s 47C(1)

[redacted]

s 47C(1)

s 42(1)

s 47C(1)

s 47C(1)

[redacted]

16. Primary decision-makers and/or the RRT could be directed to consider or not consider the refugee aspects of cases before it that were affected by the current 14 December Regulation. Advising the RRT in this regard may be appropriate whether or not some or all of the current primary caseload is decided using the new criterion as all their current cases on hand are also affected by the new Regulation:

    a. Further advice to primary decision-makers and the RRT may also be useful to make sure it is exceptionally clear that you wish all non-IMA processing to occur ahead of that of IMAs;

    b. Current s499 Direction No 57 made by your predecessor does make this point but also contains redundant information relation to 'no advantage' principle;

    c. S499 Directions cannot be incompatible with the provisions of the Act (including s65A) but they are not disallowable instruments.

17. Consideration could also be given to whether a request from the Secretary may be more appropriate, depending on the circumstances.

Choosing a visa product in the absence of a TPV

18. s 47C(1)

19. Your decision is sought on a visa option for these 40 'grant-ready' IMAs (and for any other case that becomes 'grant-ready' in coming months). While there are only small numbers of IMAs in this situation, granting the same visa to all of them will enable the Department to manage this cohort in a consistent fashion.

20. It is important to note that the Plaintiff in M150, who has joined the High Court case S267, s 47C(1) While he will have to be refused a PPV under the 14 December Regulation, a visa option is necessary to release this client from detention.

21. In SM2013/03831, the Department recommended that IMAs who are 'grant-ready' be granted either a Bridging Visa E (BVE) with work rights or a subclass 786 Temporary Humanitarian Concern visa (see Attachment B).

22. In addition to these options, there are 2 further possibilities:

    - a Removal Pending Bridging visa (RPBV) (granted in conjunction with a subclass 449 Humanitarian Stay (Temporary) visa to ensure a bar is imposed on lodging other visa applications); or
    - a subclass 449 Humanitarian Stay (Temporary) visa.

23. You recently opted to grant a Humanitarian Stay (Temporary) (subclass 449) and RPBV (subclass 070) to a client in detention who had met all requirements (SM2013/03960 – see Attachment C).

24. While an RPBV is a useful visa in the circumstances as it allows IMAs to be released from detention, and it has work rights and many services attached to it, s 47C(1) [redacted]

25. For these reasons, it is not the Department's preferred option for issuing to people in respect of whom Australia has protection obligations.

26. A table listing the benefits and issues with each of the four visa options is at Attachment D. The table includes advice on the following:

    - range and readiness of services that can be provided to IMAs;
    - applicability of mutual obligations policy;
    - cost effectiveness;
    - risk of legal challenge; and
    - implementation complexity.

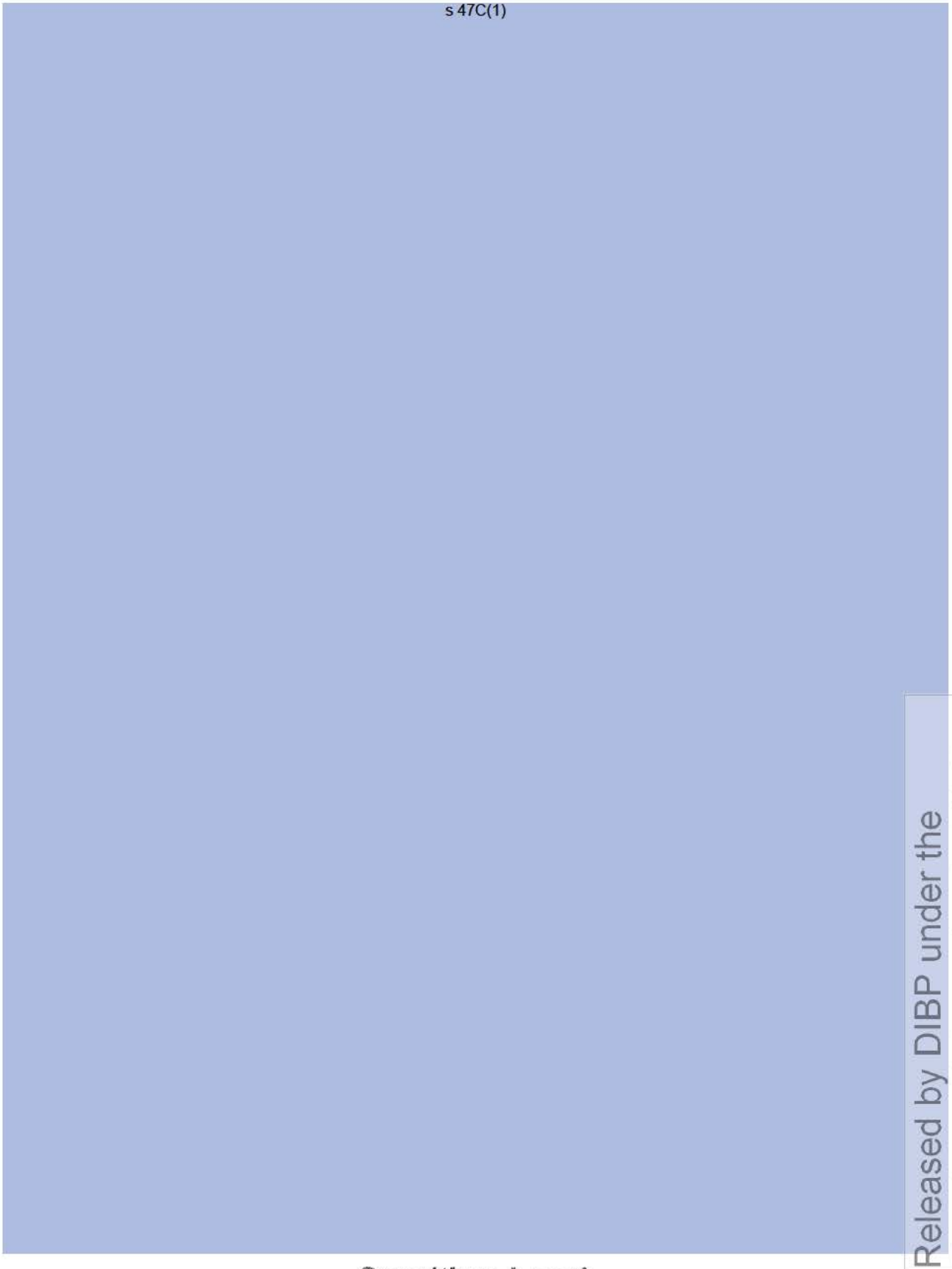
27. If the visa you decide to use for 'grant-ready' IMAs proves a workable solution, it would be possible to consider finalising the remaining IMA PPV applicants using this same visa solution as they become 'grant ready'. This would ensure consistency, and reduce the need to manage varying cohorts on different visa products. s 47C(1) [redacted]

28. Regardless of which option you choose, your decision is also sought on whether you wish the PPV application to also be refused prior to the grant of the alternative visa, as outlined in SM2013/03831 (see Attachment B). If we do not refuse applications under the new 14 December Regulations before granting one of the visas at Attachment D:

    - We would be contravening s65, under which there is an obligation to refuse a visa if satisfied that visa requirements are not met;
    - The Department is funded for PPV applications as they are finalised, so not refusing these may result in a shortfall of funding for the department;

- Leaving the PPV applications unfinalised would be problematic if the 14 December Regulation is disallowed or invalidated since there would be an obligation to finalise them; and
- Leaving PPV applications unfinalised would also cause problems for systems and reporting.

s 47C(1)



s 47C(1)

36. Given the relevant legislative drafting instructions are being issued now, and current planning is that all documentation be finalised by mid-February for a proposed introduction in the week of 24 February 2014, your decision on whether to proceed with some or all of the proposed amendments is required.

37. The options are:

s 47C(1)

i. Deferring introduction to Winter is an option and may enable drafting to be more finessed;

b. Introduce only those elements of the proposed Bill that are not IMA specific

s 47C(1)

or

i. Deferring introduction to Winter is a secondary option;

c. Defer introduction of all Act amendments s 47C(1) to a date to be determined.

38. Given whole of Government consideration of this, and many other issues raised in this submission, it is anticipated that further Government consideration of the approach to IMAs will be needed in the first quarter of 2014. The decisions you make in response to this submission would form the basis of that further consideration.

Background

39. On 2 December 2013, the *Migration Amendment (Temporary Protection Visa) Regulation 2013* (TPV Regulation) which came into effect on 18 October 2013 was disallowed.

40. On 2 December 2013 you signed an instrument 'capping' the onshore component of the 2013-14 Humanitarian Programme. The instrument came into effect on 4 December 2013.

41. On 14 December 2013 the *Migration Regulations 1994* were amended to ensure that any unauthorised arrival who has applied for a PPV and has an ongoing application would not meet the time of decision criteria for the grant of a PPV.

42. On 19 December 2013 you revoked the instrument that capped the Programme at 1650, with effect from 20 December 2013.

43. The combination of these two actions allowed grants of PPVs to non-IMAs to recommence. PPVs are currently not able to be granted to IMAs and UAAs.

Summary of HC challenge

44. Plaintiffs S297 and M150 are challenging the validity of *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (the 14 December 2013 Regulation) in the High Court. The 14 December 2013 Regulation prevents the grant of a PPV to UMAs and to persons who were not immigration cleared on their last entry into Australia. Both Plaintiffs were also originally challenging the use of the cap under s85, but once the cap was removed, this aspect of the Plaintiff's proceedings is no longer being pursued.

45. On 6 January 2014, a further proceeding, *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, was initiated in the High Court challenging the validity of the Regulation in the same manner. However, Plaintiff S4 also seeks to challenge the lawfulness of the Minister's public statements, characterised as a decision, made on 4 December 2013, not to exercise his personal non-compellable power to lift the bar to allow any person who had arrived in Australia illegally by boat to lodge a valid application for a protection visa. You indicated publically that you would not lift the bar for illegal maritime arrivals until temporary protection visas are available to boat arrivals. S4 is a UMA who was assessed under the non-statutory 'Protection Obligations Determination' process and is currently in detention. He has been found to engage Australia's protection obligations, but his security checking has not yet been finalised, so the you have not yet been asked if you would lift the bar.

Consultation – internal/external

46. Onshore Protection Branch, Legal Framework Branch, Humanitarian Branch, Community Programs and Children Division and Compliance and Case Resolution Division. Cleared through A/g General Counsel

Client service implications

47. It is likely that using any of the options listed in the Table at Attachment C will attract criticism from stakeholders. However, the THC (s/c786) or TSHV (s/c449) may attract less criticism as they are visas designed to offer protection and safe haven to people in need. The RPBV in particular is likely to attract criticism as the visa implies the holder is on a removal pathway, which is also likely to be confusing for visa holders and prospective employers. It may also lead to criticism that mental health issues among IMAs are likely to be exacerbated.

48. Using BVEs will create different cohorts of IMAs with different conditions, making it confusing for both visa holders and prospective employers.

49. The THC and TSHV visas are the visas that best meet Refugee Convention obligations for those who are 'grant ready'.

Financial/systems/legislation implications

50. As the department is funded by application finalisation for visa processing, grants of the visa types in the Table at Attachment D may be able to be accommodated within the demand driven funding model.

51. Services for BVE holders and TSHV (subclass 449) holders would be funded by the Department, under the demand driven funding model.

52. Services for THC holders and RPBV holders are provided by mainstream agencies. Costings for potential TPV holders could apply to THC holders instead, but this will require negotiation. The Department recommends that you write to the Prime Minister requesting that he write to relevant Ministers to facilitate this discussion if you decide to use this visa.

53. Any visas granted to minors who are also under your care as their Guardian would have additional services, which is funded separately.

54. There are minor systems implications associated with this option, as the visas in Attachment C already exist in ICSE.

Attachments

Attachment A	Table of possible TPV disallowance responses
Attachment B	Ministerial Submission SM2013/03831
Attachment C	Ministerial Submission SM2013/03960
Attachment D	Table of Visa Options for IMAs and UAAs found to engage Australia's protection obligations
Attachment E	s 47C(1)

Authorising Officer
s 22(1)(a)(ii) A/g Deputy Secretary 15 / 1 / 2014 Ph: s 22(1)(a)(ii)

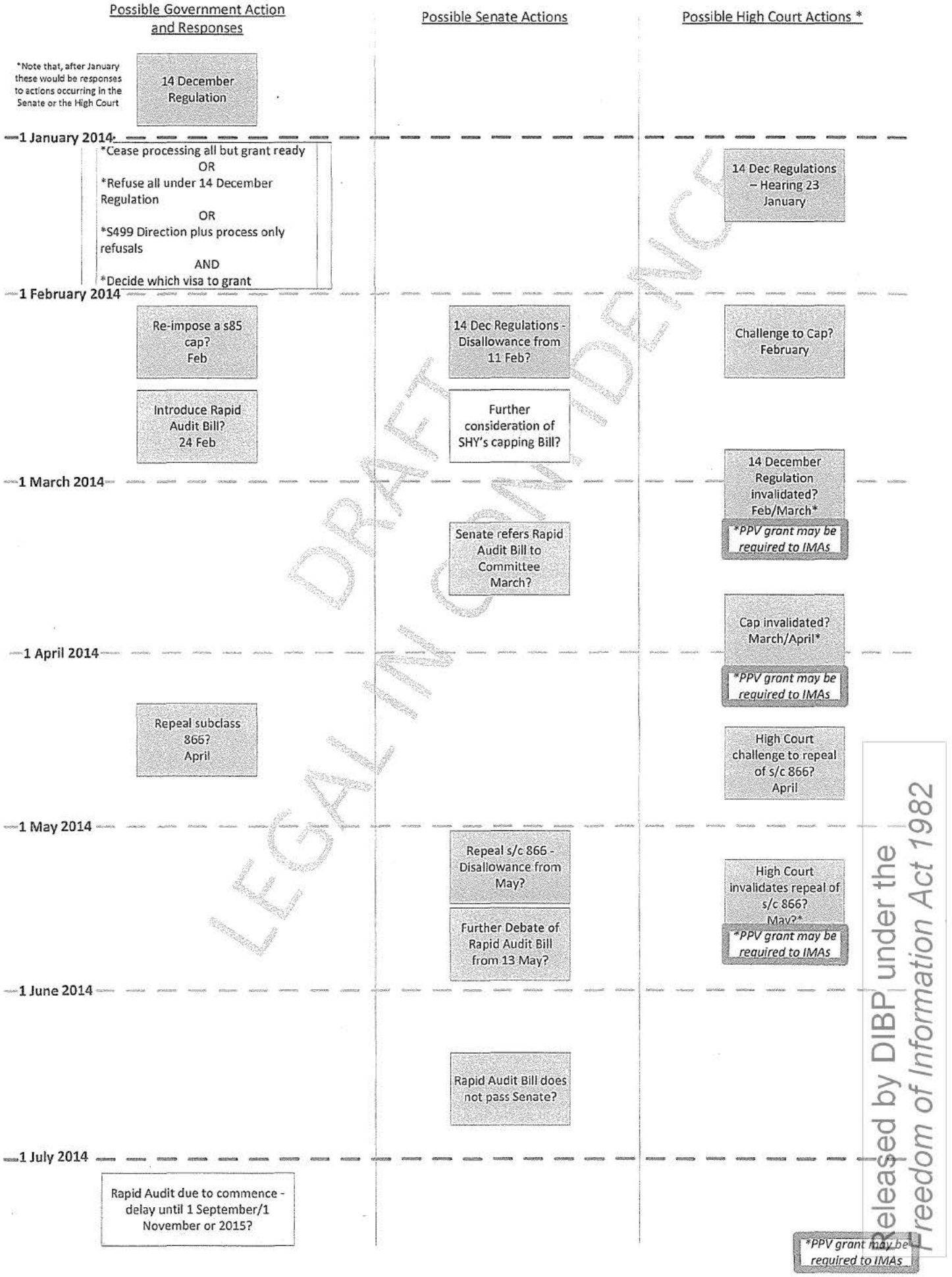
Contact Officer s 22(1)(a)(ii) Director, Protection and Humanitarian Policy Section, Ph: s 22(1)(a)(ii)

CC

Assistant Minister for Immigration and Border Protection
A/g Secretary
Deputy Secretaries
FAS CCRD, s 22(1)(a)(ii)
Special Counsel
A/g General Counsel

ATTACHMENT A

Possible TPV disallowance Responses
'Best Case' Scenario – High Court may do the unexpected



B

Sensitive: Legal

Australian Government
Department of Immigration and Border Protection

Submission
For decision

ExecCorro Reg.Number

To **Minister for Immigration and Border Protection**

Subject **Visa options for IMAs and UAAs who cannot be granted Protection Visas**

Timing *Please action by 13 December 2013 (to enable new arrangements to be put in place shortly after the new PV Regulations come into effect on 14 December)*

Recommendations

That you:

s 47C(1) [redacted]

Agreed / Please discuss

Agreed / Please discuss

Agreed / Not agreed

Agreed / Not agreed

Concurrent/January

Minister for Immigration and Border Protection

Date:...../...../2013

Signature.....

Received
12 DEC 2013
Minister for Immigration and Border Protection

Minister's Comments
Please ensure amendments to application for those applications that have commenced.

Rejected	Timely	Relevance	Length	Quality
Yes/No	Yes/No	☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	☐ Too long ☐ Right length ☐ Too brief	Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. On 2 December 2013 you signed an instrument 'capping' the onshore component of the 2013-14 Humanitarian Programme. The instrument came into effect on 4 December 2013. While this ensures no IMA is granted a PPV, it also has the effect of preventing grants to non-IMAs for the rest of the programme year.

2. In order to enable the Department to continue granting visas to non-IMAs who engage Australia's protection obligations without also being obliged to grant PPVs to IMAs, on 5 December 2013 you agreed that the *Migration Regulations 1994* be amended to ensure that any unauthorised arrival who has applied for a PPV and has an ongoing application would not meet the time of decision criteria for the grant of a PPV. The new time of decision criteria provides that a person can only be granted a PPV if they arrived in Australia lawfully.

3. This regulation amendment will be made at the Federal Executive Council meeting on 12 December 2013 and will commence on Saturday 14 December 2013. Following the commencement of that Regulation you will receive a submission seeking your agreement to revoke the current 1650 cap on the onshore component of the Humanitarian Programme to replace the cap at the original planning level of 2750. The combination of these two actions will allow grants of PPVs to non-IMAs to recommence.

4. In submission SM2013/03752 (Attachment A), you noted that further information would be provided to you about options for resolving the status of IMAs and Unauthorised Air Arrivals (UAAs) in respect of whom Australia has protection obligations but who are unable to be granted a PPV due to the new Regulation.

5. s 47C(1) [redacted]

Option for IMAs and UAAs who are <u>found not to engage</u> protection obligations

6. The Department recommends that all IMAs in the 6000 pre-13 August 2012 backlog found not to be owed protection should have their current visa application for a PPV refused. This will enable removal action to commence, and sends a strong message about the Government's commitment to clearing the backlog, and ensuring that those who are not owed protection return home.

7. Refusal decisions will be able to be appealed to the RRT and/or judicial review. While the RRT may find an individual refused by the Department to be engage protection obligations, they will have no option but to affirm the Department's decision to refuse the visa due to the new PPV time of decision criterion. An applicant may also use the refusal of the PPV as a platform to challenge the validity of the new PPV time of decision criterion in court - this risk cannot be discounted.

s 47C(1) [redacted]

s 47C(1)

[redacted]

[1] The majority of BVEs granted to IMAs are time specific, not event-driven and would therefore not expire 28 days after a refusal.

s 47C(1)

[redacted]

Option 3 – Refuse primary applications and grant Temporary (Humanitarian concern) visas

22. An alternative is to refuse primary applications on the basis of the new time of decision criterion but to invite IMAs/UAAs (including detainees) who have been found to be owed protection to lodge an application for a subclass 786 Temporary (Humanitarian Concern) visa (THC) (Regulations at Attachment B).

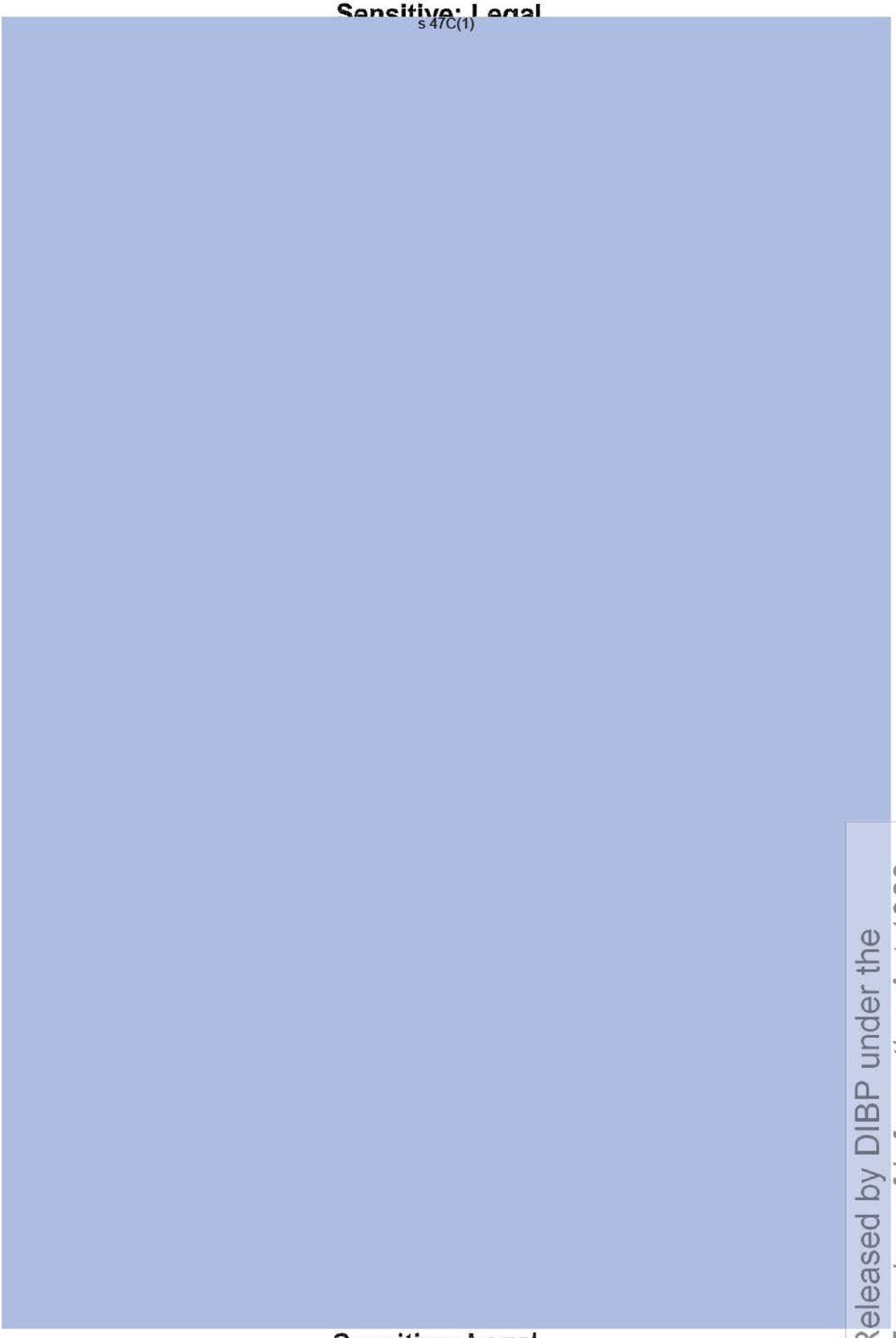
23. The THC visa is a rarely used visa that was designed to provide temporary stay in Australia (for up to 3 years) for specific groups of non-citizens who have been displaced and have fears for their personal safety – it was used for the East Timorese emergency situation and for Kosovars who did not initially return home, for example. It is generally expected that people granted temporary humanitarian visas will return to their home country when it is safe to do so.

24. While the application and invitation process is quite complicated compared to other visas, it allows a high degree of control and the end product is a very good fit for current government policy. The visa:

- can be granted for up to 3 years;
- provides no right of re-entry if the holder departs Australia;
- provides no pathway to permanent protection;
- provides no family reunion; and
- can be implemented in a way that provides no opportunity to apply for any other visa onshore without the application bar in section 91K being lifted.

25. The THC visa also provides ongoing support for the holders including unrestricted work rights, Medicare, Special Benefits, job matching, rent assistance, maternity allowance, family tax benefit, eligibility for the Early Health Assessment and the intervention element of DIBP HSS services (including torture and trauma counseling). These services are mainstream and could be funded by DSS in line with the arrangements that are being put in place for TPV holders.

s 47C(1)



s 47C(1)

[redacted]

Policy approval/financial implications

37. The Department of the Prime Minister and Cabinet have advised that the most appropriate process for proceeding with any of the options outlined in this submission is for you to write to the Prime Minister seeking his agreement to the proposed approach.

38. Each of the options outlined in this submission may have financial implications, s 47C(1) In accordance with normal Budget process, we will provide updated costings in line with your preferred option to the Department of Finance for agreement and inclusion in the letter to the Prime Minister.

Risks and Sensitivities

39. As no Regulation changes are needed to grant IMAs THCs, there is no risk of disallowance.

40. The risk of challenge to the grant of the Subclass 786 THC visa is assessed as low because in order to make a valid application for a Subclass 786 THC visa, the applicant needs first to have accepted the Australian Government's offer of a temporary stay in Australia. It would be incongruous for a person to have accepted the Australian Government's offer of a temporary stay as the basis for making a Subclass 786 THC visa application, and then challenge the granting of a Subclass 786 THC visa.

Consultation – internal/external

41. Onshore Protection Branch, Legal Framework Branch, Humanitarian Branch, Community Programs and Children Division and Compliance and Case Resolution Division.

42. General Counsel and Special Counsel have been consulted and cleared this submission.

Client service implications

43. Non-IMA applicants who are grant ready but affected by the 'cap' will be able to have their visas granted should the cap be increased once the new Regulation is made. IMAs who cannot currently be granted either a TPV or a PPV will be able to be granted a THC.

44. In light of the complicated application, invitation and grant processes for THC visas, further consideration will need to be given to how we manage the process as smoothly as possible, particularly for vulnerable clients.

Financial/systems/legislation implications

s 47C(1)

Attachments

Attachment A Proposed amendment to Protection visa Regulations SM2013/03752

Attachment B Regulations for TSH and THC visas

Attachment C SM2013/03705

Authorising Officer
s 22(1)(a)(ii) First Assistant Secretary, Refugee, Humanitarian and International Policy 11/12/2013 Ph s 22(1)(a)(ii)

Contact Officer s 22(1)(a)(ii) Director, Protection and Humanitarian Policy Section, Ph: s 22(1)(a)(ii)

Through A/g Deputy Secretary s 22(1)(a)(ii) 11/12/13

CC Assistant Minister for Immigration and Border Protection
Secretary
Deputy Secretaries

s 47F(1)

s 47F(1)

Removal Pending Bridging (subclass 070) Visa Entitlements

Employment
Work rights
Job Network*
Health
Medicare (including mental health and general counselling service)
Low income health care card*
Maternity immunisation allowance* (Linked to Centrelink)
Education
Public education (school aged)
Higher Education Loan Program (HELP)
Centrelink Income Support
Special Benefit*
Rent Assistance (as part of Special Benefit)*
Family Tax Benefit*
Child Care Benefit*
Community Assistance Support program
6 Weeks Transitional Support: including income support and emergency accommodation (including case worker assistance)
CAS Ongoing Support (torture and trauma counselling only)
Case Worker Assistance

*Eligibility is assessed on an 'as needs' basis

Conditions

There are a number of mandatory conditions that are attached to the RPBV and by which holders are required to abide.

The mandatory conditions are:

8303 – The holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community.

8401 – The holder must report:

- (a) at a time or times
  and
- (b) at a place

specified by the minister for the purpose.

8506 – The holder must notify the department at least two working days in advance of any change in the holder's address.

8513 – The holder must notify the department of his or her residential address within five working days of the grant.

8514 – During the visa period there must be no material change in the circumstances on the basis of which it was granted.

8541 – The holder:

- (a) must do everything possible to facilitate his or her removal from Australia
  and
- (b) must not attempt to obstruct efforts to arrange and effect his or her removal from Australia.

8542 – The holder must make himself or herself available for removal from Australia in accordance with instructions given to the holder by the department for the purpose of that removal.

8543 – The holder must attend at a place, date and time specified by immigration in order to facilitate efforts to arrange and effect his or her removal from Australia.

Conditions

There are a number of conditions that are granted to illegal maritime arrival Bridging E (subclass 050) visa holder, by which they are required to abide.

The mandatory conditions are:

8506 - The holder must notify Immigration at least 2 working days in advance of any change in the holder's address.

8401 - The holder must report:
(a) at a time or times; and
(b) at a place;
specified by the Minister for the purpose.

8564 - The holder must not engage in criminal conduct.

Optional:

8566 - If the person to whom the visa is granted has signed a code of behaviour that is in effect for the visa, the holder must not breach the code.

ATTACHMENT D

VISA OPTIONS FOR IMAS AND UAAS WITH NO PATHWAY TO PPV/TPV WHEN THEY ARE PEOPLE IN RESPECT OF WHOM AUSTRALIA HAS PROTECTION OBLIGATIONS				
Issue	**Option 1 – THC (786)**	**Option 2 – HST (449)**	**Option 3 - RPBV**	**Option 4 - BVE**
Regulation change required	NO	NO	NO	NO
1A met clients are highly countable / identifiable and readily able to be converted to TPV when available	YES	YES (but not as easily as Option 1)	NO	NO
Code of Behaviour applicable?	No – but clause786.612 is a mandatory condition in the same terms as condition 8303[1]	NO – but Condition 8303 can be applied[1]	NO – but Condition 8303[1] can be applied	Mandatory visa condition and public interest criterion (noting problems with Code of Behaviour and Refs Con).
Refugees Convention obligations are clearly met re access to services	YES	YES – but won't be equal to full range of TPV services	YES	NO – 89%(unless amended to 100% but still won't be equal to full range of TPV services)
Services are funded by:	DSS (see Sub – letter to PM/Cabinet required)	DIBP-IMA demand driven	DSS (see Sub – letter to PM/Cabinet required)	DIBP-IMA demand driven
Mutual obligations policy?	YES	Mainstream – needs to be negotiated across government via cabinet process	YES	YES
Suitable for short term (ie sml cohort or less than 6 mths grant)	NO	YES	YES	YES

[1] The holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community.

Suitable for longer term (ie lge cohort or more than 6 mth grant)	YES	YES	YES	NO
Provides certainty to IMA	YES – if granted for more than 12 mths	YES – if granted for more than 12 mths	YES – if granted for more than 12 mths	SOME
Provides certainty to employers	YES – if granted for more than 12 mths	YES – if granted for more than 12 mths	YES – if granted for more than 12 mths	NO
Likely level of stakeholder concern	STILL HIGH but less than 3 and 4	STILL HIGH but less than 3 and 4	VERY HIGH	HIGH
	s 47C(1)			
Application process administratively complex for DIBP and IMAs	YES	NO	NO	YES
Permission to work	YES	Optional (would need to be YES in order to meet Refs Con obligations)	YES	Optional (would need to be YES in order to meet Refs Con obligations)

ATTACHMENT E1

s 47C(1)

ATTACHMENT E2

s 47C(1)

ATTACHMENT E3

s 47C(1)

Australian Government
Department of Immigration and Border Protection

Submission
For decision

ExecCorro
Reg.Number SM2014/00554

To	**Minister for Immigration and Border Protection**
Subject	**Capping the Onshore Protection component of the Humanitarian Programme**
Timing	*Please action by 4 March 2014 (to enable the Department to register the capping instrument on 5 March 2014)*

Recommendations

That you:

1. Note that the onshore component of the Humanitarian Programme is likely to be met in the coming days, with grant of 2750 PVs; — Noted / Please discuss
2. Advise whether you wish to re-cap the onshore component of the 2013-14 Humanitarian programme at 2773; and — Yes / No
3. If you wish to cap the programme, sign the attached Legislative Instrument. — Yes / No

Minister for Immigration and Border Protection

Signature.....

Date: 4/3/2014

Minister's Comments				
Rejected Yes/No	**Timely** Yes/No	**Relevance** ☐ Highly relevant ☐ Significantly relevant ☐ Not relevant	**Length** ☐ Too long ☐ Right length ☐ Too brief	**Quality** Poor 1.....2.....3.....4.....5 Excellent **Comments:**

Key Issues

1. On 5 December 2013 the Government agreed that the 2013–14 Humanitarian Programme would be set at 13 750 places. As part of this process, the onshore component planning level was set at 2750 places. As at 2 March 2014, 2686 Permanent Protection visas (PPV) had been granted under the onshore component of the Programme.

2. Noting that there are some four months remaining in the 2013–14 Humanitarian Programme, it is recommended that the onshore component be capped to minimise the risk of exceeding the 2750 place planning level with further PPV grants. Based on current on-hand applications, it is likely that the full 2750 grants will be made in the next 2 days. Should the onshore component planning level be exceeded, there will be costing impacts for the department and a range of other agencies with programmes and services associated with the Humanitarian Programme.

3. If you agree, legislative instrument that would cap the 2013-14 onshore component of the Humanitarian Programme at 2773 is at Attachment A, for your signature. The accompanying Explanatory Statement is at Attachment B.

4. The figure of 2773 includes the 23 TPVs granted (this includes one child born to a TPV holder and subsequently granted a TPV). Although they are not counted in the Humanitarian Programme, TPVs are of the same class of visa as PPVs and therefore must be included in the cap.

5. The legislative instrument used to 'cap' the program is not disallowable but needs to be registered, and would take effect on the day after registration ie 6 March 2014.

6. The s85 power is regularly used to 'cap' other visa classes in the Migration Programme (for example, to limit the number of Parent visas granted each year). However before December 2013 it had not been used in the Humanitarian Programme.

7. It has not been necessary to cap in previous years because the Humanitarian Programme has been structured differently. Prior to 2012-13, onshore places were not fixed, and any visas granted over and above a nominal target resulted in a commensurate reduction in offshore places (in the Special Humanitarian Programme). In 2012-13, the former Government changed this approach, but set the onshore component of the programme at 7500 visas, which was not met until June 2013. A table summarizing onshore v offshore grants in previous years is below.

Year	Refugee grants	SHP grants	Onshore Grants	Total
2008–09	6,446	4,471	2,497	13,414
2009–10	5,988	3,234	4,534	13,756
2010–11	5,998	2,973	4,828	13,799
2011–12	6,004	714	7,041	13,759
2012-13	12,012	503	7,504	20,019

Risks and Sensitivities

8. As previously advised in SM2013/03894 there are risks associated with capping. Following your decision to cap the programme on 2 December 2013 a challenge was immediately lodged in the High Court. s 47C(1) [redacted]

Interaction between s 85 and the current 90 day processing requirement (s 65A)

9. Under s 65A of the Act, there is an obligation to make a decision on a Protection visa application within 90 days starting on the day on which the application was made or overturned following review ("remitted") or on another date if prescribed by the Regulations (ss 65A(1)(d)). Currently no relevant alternative dates are prescribed by the Regulations.

s 47C(1) [redacted]

s 47C(1)

Consultation – internal/external

12. Onshore Protection Branch, Legal Framework Branch.

Client service implications

13. Once the cap is reached, no further grants of protection visas will be able to occur in the 2013-14 programme year to IMAs or non-IMAs.

Financial/systems/legislation implications

14. Financial implications detailed above. If you decide to cap, a legislative instrument is required. There are minor systems implications associated with implementing the cap.

Attachments

Attachment A Granting of Protection class XA visas in 2013/2014 Financial year (Section 85) Instrument

Attachment B Explanatory Statement

Authorising Officer
s 22(1)(a)(ii) First Assistant Secretary, Refugee, Humanitarian and International Policy 4 / 8 / 2014 Ph: s 22(1)(a)(ii)

Contact Officer s 22(1)(a)(ii) Director, Protection and Humanitarian Policy Section, Ph: s 22(1)(a)(ii)

Through Deputy Secretary s 22(1)(a)(ii) 4/8/14

CC Assistant Minister for Immigration and Border Protection
Secretary
Deputy Secretaries
General Counsel
Special Counsel

IMMI 14/026

Commonwealth of Australia

Migration Act 1958

GRANTING OF PROTECTION CLASS XA VISAS IN 2013/2014 FINANCIAL YEAR

(Section 85)

I, *SCOTT MORRISON*, Minister for Immigration and Border Protection, acting under section 85 of the *Migration Act 1958* ('the Act') DETERMINE that the maximum number of Protection (Class XA) visas that may be granted in the financial year 1 July 2013 to 30 June 2014 is **2773**.

This instrument, IMMI 14/026, commences on the day after registration on the Federal Register of Legislative Instruments.

Dated 4 . 3 . 2014

Minister for Immigration and Border Protection

9. The Office of Best Practice Regulation has been consulted and has advised that a Regulatory Impact Statement is not required (OBPR reference 16700).

10. Consultation about the size and composition of the Protection, Humanitarian and Refugee Program is undertaken each year by the Department of Immigration and Border Protection.

11. The Instrument, IMMI 14/026, commences on the day after registration on the Federal Register of Legislative Instruments.