Refugee Law timeline: Legal changes and changes to processing procedures affecting asylum seekers

Prior to August 2012:

Irregular Maritime Arrivals (IMA) screened in were unable to make a protection visa application because of the bar in 46A(1). Following an entry interview, the Department commenced a Protection Obligations Determination (POD).

Where the Department agreed the person was owed protection obligations, a recommendation was made that the Minister lift the bar pursuant to s 46A(2) and the person would make and in the usual course be granted a protection visa, subject to security.

Where the Department did not find protection obligations owed, the person had the right to seek de novo review by an Independent Protection Assessment (IPA) (previously Independent Merits Review IMR).

Initially the IPA and IMA were not subject to judicial review, however this changed after about November 2010. If successful then their matter was remitted to the Department.

In about 2012, the process changed and the Department began allowing asylum seekers to lodge protection visa applications by lifting s46A bar earlier than was previously the case. This cohort of asylum seekers were given access to the Refugee Division of AAT where they were unsuccessful at the Department level and to judicial review.

Asylum seekers who arrived by boat before 13.8.12 and were released into the community on bridging visas were generally granted work rights and ought to continue to hold work rights on their bridging visas.

13 August 2012:

The regional processing legislation (i.e, processing of refugee claims on Nauru and Manus Island) is introduced for all unauthorised maritime arrivals who arrived on or after 13 August 2012. As the number of boat arrivals far exceeded the capacity of Nauru and Manus Island detention centres, the vast majority of these asylum seekers remained in Australia.

Introduction of the current arrangements for maritime arrivals in Australia: release from detention and issue of a temporary safe haven visa. As non-citizens who have not left Australia since previously holding a temporary safe haven visa, they are then unable to make valid applications for any kinds of visas under s 91K (unless the Minister provides consent in his discretion).

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	No work rights were issued to maritime arrivals in the community on bridging visas for arrivals after 13 August 2012 as a matter of policy.
1 July 2013	Ministerial direction 57 of 2013[1] mandates that the Refugee Division of the AAT must process protection visa applicants in the following order: • in immigration detention; • came on a valid visa; • boat arrivals. Preference within this order is to be given to those who have genuine identity documents. This Ministerial direction continues to affect boat arrival asylum seekers who remain subject to lengthy delays before the Refugee Division of the AAT
19 July 2013:	Regional Settlement Agreement between Australia and PNG: all asylum seekers arriving by boat on and from 19 July 2013 will be transferred to PNG not only for processing of their protection claims (as was the case from 13 August 2012) but also for settlement in PNG. This arrangement has now been extended to Nauru. Those held in detention were brought to Australia and released into the community on Bridging Visas.
18 October 2013	Introduction of Temporary Protection Visas (TPVs) in Australia for those who arrived without a valid visa (either by boat or plane) or are not immigration cleared upon arrival.
2 December 2013	Disallowance of Temporary Protection Visas by the Senate. 22 temporary protection visas were granted between 18 October 2013 and 2 December 2013 and those people continue to hold those temporary protection visas.
4 December 2013	The maximum number of protection (class XA) visas capped at effectively zero until 1 July 2014. The Minister indicates no lifting on the bar until TPVs become law. Indicates “no exceptions” to transfer for post 19 July 2013 boat arrivals in relation to being transferred to a regional processing country (i.e., Nauru or Manus Island).
14 December 2013	The qualification criteria for a permanent protection visa is amended to include a requirement that a person must have held a visa in effect on last entry into Australia, not be an unauthorised maritime arrival, and have been immigration cleared on last entry to Australia: 866.222 An enforceable code of behaviour came into effect for bridging visa E holders[2]. To be eligible for a bridging visa E applicants are required to sign a code of behaviour. The condition (PIC 4022) applies for all applicants for BVEs who are over 18 and who hold or previously held a BVE granted by the Minister under s 195A. Anyone who has had a BVE cancelled due to criminal

[1] Accessible at: http://www.mrt-rrt.gov.au/CMSPages/GetFile.aspx?guid=cf4f7579-b79e-476d-848e-fe0547bad9bc.
[2] http://www.comlaw.gov.au/Details/F2013L02102/Download

conduct or a breach of the code of behaviour is prevented from applying for a further bridging visa.

19 December 2013 — Family stream visa applications for sponsors who entered Australia by boat are directed to be processed as lowest priority under Direction 62. What this means is that family reunion applications for permanent residents who came to Australia by boat are likely to take an incredibly lengthy time before a visa is granted.

20 December 2013 — The legislative instrument imposing the cap on permanent protection visas is revoked.

3 February 2014 — From 3 February 2014 some people who came by boat to Australia have had their applications for an 866 permanent protection visa refused on the grounds of Migration Regulation 866.222. Many of these also simultaneously received letters advising that they may have been assessed as engaging Australia's protection obligations.

Some were invited to an interview with a view to consideration to the grant of a Humanitarian Stay (Temporary) (Subclass 449) visa in combination with a Temporary (Humanitarian Concern) Subclass 786 visa. Some asylum seekers accepted these visas, and some advised the Department they did not wish to be considered for an offer.

4 March 2014 — Under the *Migration Act 1958 – Determination of Protection Class XA Visas in 2013/2014 Financial Year IMMI 14/026*[3] the maximum number of Class XA protection visas to be granted in the 2013/2014 financial year was capped at 2773, the number already granted as at that date. This meant that no grants of onshore protection visas were possible for any protection visa applicants, regardless of mode of arrival, from 4 March 2014.

27 March 2014 — Disallowance of the regulation introducing 866.222 (requiring that to qualify for an 866 visa a person must have held a visa in effect on last entry into Australia, not be an unauthorised maritime arrival, and have been immigration cleared on last entry to Australia. A number of asylum seekers who arrived by boat who received refusal decisions between 14.12.13 and 27.3.14 remain affected by those decisions. Some have appealed the refusal to the Refugee Division of the AAT some have accepted temporary safe haven visas, and some have done both.
RACS is not aware of any temporary safe haven visa offers that occurred after the disallowance of 866.222 on 27 March 2014.

2 June 2014 — Cessation of several family reunion visa types

- Parent (Migrant) (Class AX); Subclass 103
- Aged Parent (Residence) (Class BP); Subclass 804
- Other Family (Migrant) (Class BO); Subclass 114, 115 and 116
- Other Family (Residence) (Class BU); Subclass 835, 836 and 838

From 2 June 2014[4] it became not possible to apply for Non-contributory Parent, Remaining Relative, Carer and Aged Dependent visas, affecting

[3] Accessible at: http://www.comlaw.gov.au/Details/F2014L00224.
[4] Pursuant to the Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014, accessible at:

	those who hold permanent visas including permanent refugee visas wanting to bring their relatives to Australia. From 2 June 2014 it was not possible for refugees to apply to bring their relatives here other than through a child, a spouse visa application or a parent application at high cost.
20 June 2014	The High Court delivered judgment in two cases: *Plaintiff M150 of 2013 v Minister for Immigration and Border Protection* [2014] HCA 25[5] and *Plaintiff S297-2013 v Minister for Immigration and Border Protection* [2014] HCA 24[6] In these cases, the High Court held that the cap on protection visas previously imposed by the Minister for Immigration was invalid and the effect of these cases was to remove the cap imposed on 4 March 2014.
3 July 2014	The Department advised that asylum seekers who came by boat and who are found to engage Australia's protection obligations will be referred to the Minister for his personal consideration of a permanent protection visa under the existing 866.226 "national interest" regulation, which allows the Minister to refuse to grant a protection visa if he is not satisfied that the grant of the visa is in the national interest. The term "national interest" is not defined. Those who are refused permanent protection visas on the national interest basis but who have been found to be owed protection obligations will not be removed from Australia, but will be offered some form of temporary visa and will be issued with a "conclusive certificate" pursuant to section 411(3) of the *Migration Act 1958* (Cth). A conclusive certificate is a document which says that the Minister's decision cannot be reviewed by the Refugee Division of the AAT It remains possible to seek judicial review in relation to this decision.
11 September 2014	Offers and grants of temporary safe haven visas from detention found unlawful in the High Court case of Plaintiff *S4/2014 v Minister for Immigration and Border Protection* [2014] HCA 34[7]
25 September 2014	The Migration Amendment (Repeal of certain Visa Classes) Regulation disallowed - Non-contributory Parent, Remaining Relative, Carer and Aged Dependent visas become available again to refugees wanting to bring their family members to Australia.
9 December 2014	*Plaintiff S297 v Minister for Immigration and Border Protection & Anor* [2014] HCA Trans276[8] is heard before the High Court, this time challenging the lawfulness of the national interest test application to maritime arrivals.
15 December 2014	*The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act*[9] was assented to and meant that only temporary visas (either a Temporary Protection Visa or TPV or a Safe Haven Enterprise Visa or SHEV) would be possible for those asylum seekers coming or who've come by boat, regardless of date of arrival. Removed access to the Refugee Division of the AAT for boat arrivals. Work rights granted to asylum seekers who arrived by boat as a matter of policy under a reported deal.

http://www.comlaw.gov.au/Details/F2014L00622.

[5] Available at: http://www.austlii.edu.au/au/cases/cth/HCA/2014/25.html

[6] Available at: http://www.austlii.edu.au/au/cases/cth/HCA/2014/24.html

[7] http://www.austlii.edu.au/au/cases/cth/HCA/2014/34.html

[8] http://www.austlii.edu.au/au/cases/cth/HCATrans/2014/276.html

[9] http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5346

16 December 2014	Is now a significant date being the day after assent. Applications for a protection visa made on or after 16 December 2014 are assessed against new definitions of what it means to be a refugee / complementary protection.
11 February 2015	Judgment in *S297 v Minister for Immigration and Border Protection* [2015] HCA 3[10] - the decision to refuse a protection visa on the national interest test was not made according to law.
25 March 2015	*Migration (Protection and Other Measures) Act 2015* passes both Houses: • Burden of proof in relation to establishing protection obligations rests with the asylum seeker; • Unfavourable inference to be drawn where new claims or evidence introduced at the review stage; • Heightened significance of identity documents and fraudulent documents in the assessment of protection visa applications – Minister required to refuse if the person does not provide evidence of their identity when requested, provides a bogus document, or has caused documentary evidence of their identity, nationality or citizenship to be destroyed without a reasonable explanation; • Removal of grounds for protection on the basis of being a member of the family unit of an existing protection visa holder; • Reduced standard of probability for complementary protection from "real risk" to "more likely than not"; • Refugee Division of the AAT Principal Member can made a guidance decision to be followed unless the facts can be distinguished; an application can be dismissed if you don't attend; oral reasons may be given.
13 April 2015	Date of assent for the *Migration (Protection and Other Measures) Act 2015*
18 April 2015	Date of commencement of parts of *Migration (Protection and Other Measures) Act 2015* and the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.* Refugee Division of the AAT changes above apply to any application notified of hearing before 18.4.15. If notified prior to 18.4.15: not affected.
18 April 2015	Applications for protection visas lodged after 18 April 2015 now receive an acknowledgement letter which also includes a 91W request to "please provide certified copies of any documentary evidence of your identity nationality or citizenship", and a warning that refusing or failing to comply, or producing a bogus document will result in refusal of the grant of the visa.
May 2015	Commencement of bar-lifting for asylum seekers who arrived by boat on or after 13 August 2012 and before 1 January 2014, and have never been to Nauru or Manus Island. Applications are requested within 28 days but the bar lift period is indefinite.
19 May 2015	Department indicates 17 TPVs have been granted since 16.12.14 to the pre 13.8.12 cohort; confirms bar lift period is indefinite.
15 June 2015	Legislative instrument IMMI15/075 declares postcodes in NSW as regional areas for the purposes of satisfying the work / study test on a Safe Haven Enterprise Visa.

[10] http://www.austlii.edu.au/au/cases/cth/HCA/2015/3.html

1 July 2015	The Refugee Review Tribunal amalgamates into the Administrative Appeals Tribunal (AAT). Departmental email addresses change from "immi" to "borders".
10 October 2015	Legislative instrument IMMI15/122 declares all of Tasmania as a regional area for the purposes of satisfying the work / study test on a Safe Haven Enterprise Visa.
24 March 2016	Legislative instrument IMMI16/010 provides that a person may be a fast track applicant if they are: • a baby born in Australia on or after 6 November 2013 and before 5 December 2014 to a parent who arrived on or after 19 July 2013 and was taken to Nauru where the Minister has lifted the legislative application bar to allow them to make a valid application for a protection visa. • the parent of this baby who came to Australia on or after 19 July 2013, was previously taken to Nauru and where the Minister has lifted the legislative application bar to allow them to make a valid application for a protection visa. • the siblings of this baby (younger or older) who came by boat to Australia and where the Minister has lifted the legislative application bar to allow them to make a valid application for a protection visa.
1 April 2016	Legislative instrument IMMI16/008 provides that people taken to Nauru or Manus during the period 13 August 2012 until 19 July 2013 who are now in Australia may become fast track applicants.
May 2016	Departmental policy changes to allow decisions to be made not to interview protection visa applicants from Malaysia, India, Nepal, South Korea and Tonga where their claims are not supported by country information.
7 May 2016	Legislative instrument IMMI16/049 provides that children born in Australia on or after 1 January 2014 to a fast track applicant can become fast track applicants.