



Australian Government  
Department of Immigration  
and Citizenship

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MINISTER FOR  
IMMIGRATION  
AND CITIZENSHIP  
- 8 JUL 2013  
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Submission  
For decision

TB 2013/02373

To Minister for Immigration, Multicultural Affairs and Citizenship

Subject Sustainability issues associated with Irregular Maritime Arrival releases

Timing Please action by 19 July 2013

Recommendations

That you:

- 1. note our concerns about the sustainability of arrangements for releasing irregular maritime arrivals introduced in November 2012 which apply a bar preventing them from making valid visa applications;
- 2. agree to manage re-grants of Bridging E visas to irregular maritime arrivals in the community by lifting the relevant bar to allow the department to grant visas (see paragraphs 5 to 8); and
- 3. agree to grant Bridging E visas for 12 months to irregular maritime arrivals in future (see paragraphs 9 to 11).

noted / please discuss

agreed / not agreed

agreed / not agreed

Minister for Immigration, Multicultural Affairs and Citizenship

Signature *Tony Burke*

Date: 16/7/2013

Minister's Comments

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## Key Issues

1. On 21 November 2012 the then Minister for Immigration and Citizenship, the Hon Chris Bowen MP, announced that irregular maritime arrivals who arrived in Australia after 13 August 2012 would be subject to the 'no advantage' principle.
2. To apply this principle to irregular maritime arrivals who are released into the community, they have been granted both a short-term Humanitarian Stay (Temporary) visa and a six-month Bridging E visa by the Minister. The Humanitarian Stay (Temporary) visa creates an enduring bar which prevents them from making a valid application for a visa, including a Protection visa (this bar is known as the section 91K bar). The bar can only be lifted by you using your non-compellable discretionary power under the *Migration Act 1958*. This arrangement allows a 'no advantage' delay to be applied by preventing access to the Protection visa process but it means the department cannot grant new Bridging E visas as the original Bridging visas expire. Instead, the department must wait until the clients become unlawful, arrange to administratively re-detain them (usually in the department's offices), and coordinate a time with your office for you to grant a further Bridging E visa using your personal powers under the Migration Act.
3. This Bridging visa re-grant arrangement would have been sustainable if it had been followed by a significant and sustained drop in the rate of irregular maritime arrivals. The re-grant process consumes substantial resources and significantly impacts on the department's capacity to do other compliance work and is inconvenient for you and your office. Bottlenecks in logistics and our capacity to detain large groups during the re-grant process mean it is unlikely that we can sustain processing at the scale required to meet the rate at which irregular maritime arrivals are now becoming unlawful.
4. The initial Bridging E visas granted to irregular maritime arrivals under the above release arrangements have now begun to expire at a rate of some 1000 per month. There are currently 1350 irregular maritime arrivals who have already become unlawful as a result of these re-grant issues. We expect that this number will grow as the year progresses. The reporting or change of address notification obligations which apply to Bridging E visa holders do not apply when a person is unlawful, nor is there continued access to Medicare.

### Bar lift to allow department to manage re-grants of Bridging E visas

5. We propose a new and more sustainable approach to re-granting Bridging E visas. This involves you lifting the section 91K bar for post 13 August 2012 irregular maritime arrivals whose Bridging E visas are due to expire. This would give the department a seven day window to grant a further Bridging E visa and would avoid having to re-detain individuals for you to personally grant visas to these clients. The department anticipates that this model could avoid clients spending protracted periods in the community as unlawful non-citizens (as is currently occurring).
6. Lifting the bar to allow the department to re-grant Bridging E visas would also allow the irregular maritime arrivals to lodge Protection visa applications within the seven day window. However, under the arrangements now being implemented to allow these irregular maritime arrivals to apply for Protection visas, you would need to lift the bar in any event when the department is ready for clients to make an application for a Protection visa (see further at paragraphs 14 to 15 below).

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7. It is possible that at least some clients will be able to apply for a Protection visa when the bar is lifted to allow the Bridging E visa grant, and before the department has assigned them to a departmentally-funded migration agent for preparation of their Protection visa application. However, this is not a significant risk given that:
- the bar will only remain lifted for seven days;
  - clients will not have access to a departmentally-funded migration agent during the seven days the bar remains lifted; and
  - the department can employ other strategies to ensure that applications are still processed by date of arrival, rather than date of application.
8. If you agree to this model for managing Bridging E visa re-grants the department will closely monitor and review its implementation in order to manage the risks described above.

### Grants of longer-term Bridging E visas

9. If you granted Bridging E visas for 12 months (instead of six months) to irregular maritime arrivals being released from detention, this would ease future Bridging E visa re-grant pressures on you, your office and the department. A similar reduction in future pressures would be achieved through increasing the term of re-granted Bridging E visas from six months to 12 months. Together these measures would give more scope to manage the flow of irregular maritime arrivals into the Protection visa process without the need for multiple bar-lifting and Bridging E visa re-grants.
10. Recent amendments to the *Migration Regulations 1994* have strengthened the power to cancel a Bridging E visa where the holder engages in criminal conduct, or is the subject of criminal charges, Interpol warning notices or investigations by Australian law enforcement or security agencies. These amendments give the department a greater capacity to respond effectively where criminality or security concerns arise during the term of the Bridging E visa.
11. Given the resourcing impacts of re-grants, we recommend that, in future, you agree to grant Bridging E visas to irregular maritime arrivals for 12 months.

### Background

#### Use of the section 91K bar for the 'no advantage' caseload

12. The department briefed the former Minister, the Hon Brendan O'Connor MP, on 27 May 2013 on the Bridging E visa management issues described in this submission in the context of a pending decision in the High Court case *M79* (which challenged the use of the section 91K bar) (BO2013/01833 refers). The submission proposed moving to a sustainable model of releasing irregular maritime arrivals on Bridging E visa regardless of the High Court's decision. No decision was made in relation to that submission.
13. In response to an earlier submission in relation to *M79* (BO2013/00950) Minister O'Connor indicated his preference to release irregular maritime arrivals without using the section 91K bar and to manage the 'no advantage' principle in the statutory Protection visa process. Minister O'Connor also wrote to the former Prime Minister on 23 May 2013 regarding onshore processing arrangements for the post-13 August 2012 irregular maritime arrival cohort.

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### Implementation of 'no advantage' with access to the Protection Visa process

14. On 1 July 2013 the department commenced statutory Protection visa processing for post-13 August 2012 irregular maritime arrivals, as agreed by Government. The department has commenced initial allocations of post-13 August 2012 irregular maritime arrivals to migration agents under the Immigration Advice and Application Assistance Scheme. Once clients have had an interview with a migration agent and a valid application for a Protection visa is prepared, the department will ask you to lift the section 91K bar in relation to these clients in order for the Protection visa application to be lodged. The bar will remain lifted for seven days, during which time clients may also be able to apply for other visas. Access to the statutory Protection visa process can be managed in an orderly fashion, with clients progressively referred to a migration agent based roughly on their date of arrival. Once clients are allowed into the statutory process they will remain on a new Bridging E visa until their claims are finally determined (which includes merits review by the Refugee Review Tribunal).
15. It is unclear how long it will take to move all clients on Bridging E visas already in the community into the statutory Protection visa process. This process may be prolonged by the limited availability of migration agents, and interpreters in particular. This will result in the following risks:
- that the process of transitioning clients into the statutory Protection visa process is likely to involve lengthy delays (the contractors who deliver migration agent services have indicated that they can potentially interview more than 3000 clients per month, but this has not been tested against the availability of migration agents and interpreters or against the demands of other irregular maritime arrival processing activities, and it is possible that this target will not be achieved);
  - the department may not "catch up" with the rate of new releases, meaning that we do not transition to the new model until some considerable time in the future (unless arrivals significantly reduce); and
  - if the resourcing pressures created by the need to re-grant Bridging E visas to clients subject to the bar are not addressed, that large numbers of clients will fall unlawful and will remain unlawfully in the community for protracted periods of time.

### Sustainable model for future Bridging E visa releases

16. While the department is managing the initial stages of the transition to the statutory Protection visa process, we recommend maintaining the use of the section 91K bar for new releases. However, in the longer term, we do not recommend maintaining continued use of the 91K bar as part of the release arrangements because of the extra workload for you, your office and the department associated with managing clients subject to the section 91K bar.
17. The bar would need to be lifted multiple times through the visa processing 'life' of an irregular maritime arrival. This extra workload will in the future include those clients who receive a negative Protection visa decision at merits review and who must be managed by the department through any period of judicial review until their immigration status is resolved by removal or grant of a permanent visa. It is likely that the impacts of releasing clients subject to the section 91K bar will be felt by the department and the Minister's office for years to come.
18. We will provide a further brief on the long-term model for future Bridging E visa releases based on our experience with the Bridging E visa and Protection visa arrangements in coming months.

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## Consultation – internal/external

19. Onshore Protection Branch, Community Support and Children Branch, Onshore Processing Implementation Branch, Status Resolution Services Division, Regional Manager East, Governance and Legal Division, Special Counsel and Compliance and Case Resolution Division Branches.

## Client service implications

20. The proposed arrangements would allow clients subject to the 'no advantage' principle to continue to be released from immigration detention and enable continued, staged access to the Protection visa process.

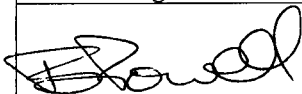
## Financial/systems/legislation implications

21. The costs associated with maintaining a person on a Bridging E visa are less than those of someone in held detention.

22. A continuation of current release arrangements (that is Bridging E visa grants made by you personally) would have significant implications to the compliance network as it would involve managing ever-increasing numbers of detention and grants that would increasingly limit the other work of the network and would become unsustainable in the short term.

23. It is anticipated that the proposed changes would have minimal systems impacts.

### Authorising Officer



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5/7/2013  
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**Through** Acting FAS Compliance and Case Resolution 5/7  
Deputy Secretary Southern 5/7/13

**CC** Minister for Multicultural Affairs  
Parliamentary Secretary for Multicultural Affairs  
Secretary  
Deputy Secretaries  
Chief Lawyer  
First Assistant Secretary, Refugee, Humanitarian and International Policy  
First Assistant Secretary, Status Resolution Services  
First Assistant Secretary, Community Programs and Children  
Assistant Secretary, Onshore Protection  
Assistant Secretary, Compliance Status Resolution

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