

## Temporary protection visas

On 18 October 2013, the Minister for Immigration introduced temporary protection (sub-class 785) visas (**TPVs**) under the *Migration Amendment (Temporary Protection Visas) Regulation 2013* which amends the *Migration Regulations 1994*.<sup>1</sup>

### **At a glance:**

- *Asylum seekers who arrive in Australia by boat or plane without a valid visa to enter Australia will not be eligible for a permanent protection visa. They will only be eligible for a temporary protection visa where they are found to be in need of protection.*
- *Temporary protection visas apply to this group of asylum seekers who have already lodged protection visa applications which had not been finalised before 18 October 2013 (regardless of when they arrived in Australia or when they lodged the application), as well as asylum seekers who have not yet lodged a protection visa application.*
- *People who enter Australia with a valid visa and claim protection continue to be eligible for permanent protection visas.*
- *Temporary protection visas are valid for up to 3 years. Permanent protection visas grant immediate permanent residence in Australia.*

### **What are TPVs?**

TPVs are a new type of visa for people seeking protection in Australia. There are now two types of protection (class XA) visas that can be granted to asylum seekers found to be in need of protection in Australia:

- TPV (sub-class 785) which lasts up to 3 years; and
- permanent protection (sub-class 866) visa (**Permanent PV**) which grant permanent residence in Australia.

The main difference between TPVs and Permanent PVs is the duration of the visa. TPVs allow refugees to remain in Australia temporarily whereas Permanent PVs allow refugees to remain in Australia indefinitely.

### **Who does TPVs apply to?**

Asylum seekers who arrive in Australia without a valid visa to enter Australia will only be eligible for a TPV. Asylum seekers who arrive by boat are the main group that will be affected by the introduction of TPVs.

TPVs will apply to asylum seekers who:

- arrive by boat without a valid Australian visa (i.e., unauthorised maritime arrivals);
- were not immigration cleared when they last entered Australia (eg., unauthorised plane arrivals); and
- asylum seekers who did not have a valid visa which was in effect on last entry to Australia.

<sup>1</sup> Note: the *Migration Amendment (Temporary Protection Visas) Regulation 2013* can be disallowed by Parliament within a set timeframe pursuant to the *Legislative Instruments Act 2003 (Cth)*.

People who arrive in Australia with a valid visa and subsequently claim protection will continue to be eligible for the grant of a Permanent PV. This generally applies to people who arrive with a valid Australian visa by plane, such as a tourist, business or student visa, and subsequently apply for a protection visa in Australia.

### **When do TPVs apply from?**

TPVs were introduced on 18 October 2013, but they apply retrospectively.

TPVs apply to the above group of asylum seekers who:

- have already applied for a protection visa (sub-class 866) in Australia which had **not been finalised** before 18 October 2013 (irrespective of the date of arrival or the date the application was lodged); or
- have not yet made an application for a protection visa in Australia.

This means that TPVs may apply to an asylum seeker in this group who:

- has not yet lodged a protection visa application in Australia;
- has lodged a protection visa (sub-class 866) application and is awaiting a protection assessment interview with the Department of Immigration;
- has had their protection assessment interview with the Department of Immigration and is awaiting a decision;
- has had their protection visa application refused by the Department of Immigration and have applied, or will apply, to the Refugee Review Tribunal (**RRT**); or
- has been recognised as being owed protection obligations in Australia but is still awaiting security clearance.

Asylum seekers who have been granted a permanent PV before 18 October 2013 will remain permanent residents in Australia and will **not** have their permanent PVs replaced with TPVs.

### **How do TPVs work?**

TPVs are valid for up to 3 years unless a shorter period of time is specified in the visa. TPV holders who leave Australia do not have permission to return.

TPV holders are not eligible to sponsor their family members to join them in Australia as only permanent residents in Australia have access to family reunion.

TPV holders will be able to apply for a subsequent TPV at the end of the expiry period of their present TPV. A subsequent TPV will again be valid for up to 3 years. According to Government announcements, an application for a subsequent TPV will be assessed on the merits of the case at that time, including the latest circumstances in the refugee's country of origin.<sup>2</sup> TPV holders are not entitled to be granted any other type of substantive visa in Australia.

TPVs are subject to the following conditions:

- TPV holders must not engage in criminal conduct; and
- TPV holders must report a change of address to the Department of Immigration within 14 days.

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<sup>2</sup> 'The Coalition's Policy to Clear Labor's 30,000 Border Failure Backlog', August 2013, <http://paweb-static.s3.amazonaws.com/Policies/ClearLabor30000BorderFailureBacklog.pdf>

A TPV could be cancelled where the above conditions are not followed.

**Can TPV holders apply for a permanent PV in Australia?**

At this stage, TPV holders are not eligible to apply for a permanent PV in Australia. However, the Australian government previously announced that while a permanent PV may not be provided to a TPV holder within 5 years of the TPV holder first receiving a TPV, this restriction may be set aside through a non-compellable intervention power of the Minister.<sup>3</sup> However, this has not been provided for in the new laws at this stage.

**What is the criteria for been granted TPVs and is it different to permanent PVs?**

The criteria for assessment as to whether Australia owes protection obligations to an asylum seeker is the same for TPVs and PVs. This criteria has remained the same and has not been changed by the new laws.

In summary, both Permanent PVs and TPVs may be granted to asylum seekers who are found to be owed protection obligations in Australia:

- as ‘refugees’ who have a well-founded fear of persecution in their country of origin for one of the five reasons set out in the Refugees Convention (i.e., religion, race, nationality, political opinion, membership of a particular social group); or
- where there is a real risk of ‘significant harm’ in their country of origin under complementary protection in section 36 of the *Migration Act 1958* (Cth).

Asylum seekers eligible for TPVs and PVs will still need to undergo medical examinations and satisfy the public interest criteria.

**What are the differences between TPVs and permanent PVs?**

Set out below is a table summarising the differences between TPVs and permanent PVs:

	<b>TPVs</b>	<b>Permanent PVs</b>
<b>Duration</b>	Valid for up to 3 years; allowing for an application for a subsequent TPV upon expiry of the first TPV.	Immediate permanent residency in Australia.
<b>Family reunion</b>	No rights to family reunion / family sponsorship.	Access to family reunion / family sponsorship.
<b>Overseas travel</b>	Cannot depart and re-enter into Australia on a TPV.	Can leave and re-enter Australia, other than to the refugee’s country of feared persecution. For travel and re-entry five years after their visa grant a person should first become a citizen.
<b>Citizenship</b>	No right to apply for citizenship while a TPV holder.	Right to apply for citizenship after 12 months permanent residence and 4 years lawful presence in Australia (subject to certain conditions).
<b>Visa conditions</b>	<ul style="list-style-type: none"> <li>• Must report change of address to the Department of Immigration within 14 days.</li> <li>• Must not engage in criminal conduct.</li> </ul>	Restrictions on travelling to the country where the refugee fears persecution.

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<sup>3</sup> Ibid

	<ul style="list-style-type: none"> <li>Barred from being granted any substantive visas (other than a protection visa*).</li> </ul>	
<b>Work rights</b>	Right to work.	Right to work.
<b>Health care</b>	Access a Medicare.	Access to Medicare.
<b>Income support</b>	Access to income support set at the government's discretion, but this may be subject to a requirement to undertake work in return for accessing these benefits. <sup>4</sup>	Access to full range of income support and social security benefits.
<b>Education</b>	No restrictions on study or training, but fee requirements unclear.	Same access to education as any other permanent resident.

\* any protection visa application a TPV holder makes is legislated to be "taken to be" an application for another temporary TPV.

### **What about humanitarian visas for asylum seekers overseas?**

The new TPV laws do not affect the humanitarian visa options available to refugees applying for protection from outside of Australia. The TPVs only apply to asylum seekers applying for protection while in Australia.

### **What is the difference between a bridging visa and a TPV?**

A bridging visa is a temporary visa that allows asylum seekers to live in the Australian community while they are awaiting assessment of their claims for protection. Some bridging visas allow asylum seekers to work, while other bridging visas can have work restrictions attached to them. This will depend on each asylum seekers' bridging visa conditions.

However, a TPV is a temporary visa granted to asylum seekers who are found to be in need of protection in Australia (i.e., are recognised as refugees) and who have undergone health examinations and satisfied the public interest criteria.

### **Can I make an application for a TPV?**

Asylum seekers who lodged a valid application for a protection visa (sub-class 866) before 18 October 2013, but are now only eligible for a TPV, are not required to lodge another application with the Department of Immigration. The existing protection visa application will be considered by the Department of Immigration to be an application for a TPV. Asylum seekers who arrived by boat before 13 August 2012 who have lodged a valid protection visa application (which was not finally determined) before 18 October 2013, will not need to lodge another application. These applications will be taken to be applications for a TPV.

Asylum seekers who arrived by boat (i.e., unauthorised maritime arrivals) on or after 13 August 2012 will only be able to lodge a valid application for protection with the Department of Immigration once they receive permission from the Minister. There remains some uncertainty about how the Australian government will treat asylum seekers who arrived by boat on or after 13 August 2012 and are currently residing in Australia. It remains unknown whether the Australian government will "lift the bar"

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<sup>4</sup> ibid

and allow an application for protection in Australia or refer the protection application to be processed elsewhere.

### **Will a TPV apply to me?**

If you would like advice, you can call the Refugee Advice and Casework Service during our telephone advice hours between 10am to 12pm on Tuesday and Thursday on (02) 9114-1600.

Set out below are some case examples as a guide for you, a friend or a client.

#### **Case example 1 – asylum seeker who arrived by boat before 13 August 2012 and has applied for a permanent PV which was not finalised before 18 October 2013**

**Question:** I arrived by boat to Christmas Island in early 2012. I applied for a protection visa (sub-class 866) with the help of a lawyer / migration agent in late 2012 and had my protection assessment interview with the Department of Immigration in early 2013. I have not got a decision yet, but I was told that I was undergoing security checks and once this was finished I would get a permanent PV. Will I still get a permanent PV?

**Answer:** You will only be eligible for the grant of a TPV as you arrived by boat with no Australian visa and were not granted a permanent PV prior to 18 October 2013.

#### **Case example 2 – asylum seeker who has been granted a permanent PV already**

**Question:** I arrived by boat to Christmas Island in early 2012 and applied for a protection visa (sub-class 866). I had my protection assessment interview with the Department of Immigration and was found to be a refugee. After I finished going through the security check process, I was granted a permanent PV in August 2013. Will this now be replaced with a TPV?

**Answer:** No, you are a holder of a permanent PV and you will remain a holder of a permanent PV. The new TPV laws do not impact upon you. You have access to family reunion and have the right to apply for citizenship after 12 months permanent residence and 4 years lawful presence in Australia (subject to certain conditions).

#### **Case example 3 – asylum seeker who arrived after 13 August 2012 who has seen a lawyer**

**Question:** I arrived by boat to Christmas Island in early September 2012. A lawyer / migration agent helped me fill out forms. I have not had a protection assessment interview with the Department of Immigration yet. Will I only be eligible for a TPV?

**Answer:** There remains some uncertainty about how the Australian government will treat people in your situation. It remains unknown whether Australia will “lift the bar” and allow your application for protection or refer your application to be processed elsewhere. If the Minister allows you to apply for protection in Australia, you will only be eligible for a TPV if you are found to be in need of protection in Australia. Even though the new laws were introduced on 18 October 2013, TPVs apply to anyone who has not had a protection visa application finalised or has not yet lodged a protection visa application in Australia.

**Case example 4 – asylum seeker who arrived after 13 August 2012 who has not seen a lawyer**

**Question:** I arrived by boat to Christmas Island in mid-2013. I am still waiting. I haven't seen a lawyer/migration agent or filled out any forms. I have not lodged a protection visa application yet. Will I only be eligible for a TPV?

**Answer:** There remains some uncertainty about how the Australian government will treat people in your situation. It remains unknown whether Australia will "lift the bar" and allow your application for protection or refer your application to be processed elsewhere. If the Minister allows you to apply for protection in Australia, you will only be eligible for a TPV if you are found to be in need of protection in Australia. Even though the new laws were introduced on 18 October 2013, TPVs apply to anyone who has not had a protection visa application finalised or has not yet lodged a protection visa application in Australia.

**Case example 5 – asylum seeker who has been recognised as a refugee by the RRT**

**Question:** I arrived by boat to Christmas Island in late 2011. I applied for a protection visa (sub-class 866) application, but was not accepted as a refugee by the Department of Immigration. I applied to the RRT who recognised that I am a refugee. I have been waiting for security checks to be finalised and for my protection visa to be granted. I was told by my lawyer when I applied for a protection visa that I would be getting a permanent PV. Will I still be eligible for a permanent PV?

**Answer:** You will only be eligible for the grant of a TPV as you arrived by boat with no Australian visa and you were not granted a permanent PV prior to 18 October 2013.

**Case example 6 – asylum seeker who arrived by plane who has lodged a protection visa application**

**Question:** I arrived by plane late last year to Australia on a tourist visa. I lodged a protection visa (sub-class 866) earlier this year. Will I be eligible for a permanent PV?

**Answer:** Yes, you are eligible for a permanent PV if you are found to be in need of protection in Australia and subject to satisfying the public interest criteria. The new TPV laws do not apply to you as you arrived in Australia with a valid visa to enter Australia.

**Case example 7 – asylum seeker who arrived by plane and hasn't lodged a protection visa application yet**

**Question:** I arrived by plane in mid-2013 to Australia on a business visa. I have not yet lodged a protection visa application, but I would like to shortly. Will I be eligible for a permanent PV?

**Answer:** Yes, you are eligible for a permanent PV if you are found to be in need of protection in Australia and subject to satisfying the public interest criteria. The new TPV laws do not apply to you as you arrived in Australia with a valid visa to enter Australia.

**Case example 8 – asylum seeker who arrived by plane with no valid visa**

**Question:** I arrived by plane in 2012 with no valid visa to enter Australia. I did not go through Australian customs at the airport as I did not have a visa, but was taken straight to an immigration detention centre by the Australian authorities. I lodged a protection visa (sub-class 866) application and was told that I was applying for a permanent PV. I have had my protection assessment interview with the Department of Immigration, but am still waiting for a decision. Am I still eligible for a permanent PV?

**Answer:** It sounds like you arrived by plane in Australia with no valid visa to enter Australia and was not immigration cleared. If this is correct, you will only be eligible for a TPV as you were not immigration cleared on your last entry into Australia. However, we would recommend you seek further advice in these circumstances.

**Disclaimer:** This fact sheet is general. It does not constitute, and should be not relied on as, legal advice. Refugee Advice and Casework Service recommends seeking advice from a qualified lawyer on the legal issues affecting you before acting on any legal matter. Refugee Advice and Casework Service is the author of this publication and accepts responsibility for the information. This factsheet applies to people who live in, or are affected by, the law as it applies in Australia. The information in this fact sheet is current at 25 October 2013.