



Law Council
OF AUSTRALIA

Office of the President

30 August 2018

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator

Migration (Validation of Port Appointment) Bill 2018

1. The Law Council welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee in relation to its inquiry into the provisions of the Migration (Validation of Port Appointment) Bill 2018 (**the Bill**).
2. The Bill was introduced to the House of Representatives on 18 June 2018, and has the purpose of retrospectively confirming the validity of an Instrument appointing a proclaimed port in the Territory of Ashmore and Cartier Islands, by:
 - clarifying the geographical coordinates of the area of waters within the Territory of Ashmore and Cartier Islands specified in the appointment;
 - ensuring that there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times; and
 - ensuring the validity of things done under the *Migration Act 1958* (Cth) (**Migration Act**) which relied directly or indirectly on the terms of the appointment.
3. The Law Council understands that the Bill has been introduced following the decision of Judge Justin Smith in *DBC16 v Minister for Immigration & Border Protection* [2018] FCCA 1802. In this decision, his Honour found that the Instrument which appointed the Territory of Ashmore and Cartier Islands an excised offshore place was invalid for the following reasons (at [56]-[57]):

... accepting for the present purposes that the Instrument was sufficiently clear to be valid, the area described in the Instrument was not a “port” within the meaning of the Act. As the Minister only had power to designate a “port” as a “proclaimed port”, the Instrument was beyond the Minister’s power and so was invalid.

As I have explained, the consequence of the invalidity of the Instrument is that the decision of the delegate was not reviewable under pt.7AA of the Act and there has been no notification of that decision. There will be an order for a writ of certiorari quashing the IAA’s decision and a declaration as to the lack of notice.

4. The effect of the Instrument had been to bar any asylum seeker who entered Australia through Ashmore Reef from making a claim for permanent protection. For this group, once the Minister had personally lifted the bar under section 46A of the Migration Act, which acted to stop a valid visa application from being made, this cohort was only allowed to apply for either a temporary subclass 790 Safe Haven Enterprise visa or a 785 Temporary Protection visa. Further, upon refusal, those claims were diverted through the Immigration Assessment Authority (**IAA**) under Part 7AA of the Migration Act rather than heard at the Migration and Refugee Division of the Administrative Appeals Tribunal (**AAT**) under Part 7 of the Migration Act. As a result of the above decision, it is estimated that the claims of 1,600 asylum seekers may be affected.¹
5. It is significant to note that the IAA under Part 7AA of the Migration Act provides a significantly more limited form of review than that before the AAT under Part 7 of the Migration Act as there is no right to a hearing, and new information and evidence can only be considered in exceptional circumstances. This truncated form of review purposefully provides limited procedural fairness and highly restricted opportunities in which applicants are able to present their claims. The Law Council holds strong concerns in relation to the fairness of this process and the significant risks it creates for an extremely vulnerable cohort of applicants.
6. The Law Council notes the comments of the Senate Standing Committee for the Scrutiny of Bills (**Scrutiny Committee**) in relation to the Bill, where it expressed its concern with the retrospective nature of the Bill in the following terms:

The committee considers that, in seeking to retrospectively validate the 2002 appointment, the bill is apt to adversely affect any person who seeks to challenge an act or decision under the Migration Act on the basis that the impugned action or decision is invalid under the 2002 appointment. The committee expects that legislation which adversely affects individuals through its retrospective operation should be thoroughly justified in the explanatory memorandum. Such legislation can undermine values associated with the rule of law. One such value is that persons should be able to order their affairs on the basis of the law as it stands. Retrospective legislation is often thought to be particularly problematic when affected persons have relied to their detriment on a reasonable expectation that the law on which they have based their decisions will not be altered retrospectively. Another important rule of law principle is that the governors are, like the governed, bound by the law and cannot exceed their legal authority. Retrospective validation of government decisions and actions can undermine this principle.²

7. On the basis of these concerns, the Scrutiny Committee requested that the Minister for Home Affairs provide detailed advice as to:
 - the basis of the legal challenges to the validity of the 2002 appointment and the general arguments raised by the applicants in those cases;

¹ Doherty, Ben, '1,600 asylum claims could be reopened due to poorly drafted regulation' *The Guardian* (21 July 2018), available at <www.theguardian.com/australia-news/2018/jul/21/1600-asylum-claims-could-be-reopened-due-to-poorly-drafted-regulation>.

² Senate Standing Committee for the Scrutiny of Bills: Scrutiny Digest 7 of 2018 (27 June 2018), at 1.6.

- the number of persons who entered the relevant waters of the Territory of Ashmore and Cartier Islands since 23 January 2002 to date. In particular, how many of these people, if any:
 - are yet to have their asylum applications finally determined;
 - have been granted a protection visa;
 - are in offshore detention;
 - have had their applications refused but remain in Australia;
 - how the persons in each of the categories above would have been treated if the 2002 appointment had not been made, and the extent of any detriment such persons may suffer if the 2002 appointment is retrospectively validated; and
 - the fairness of applying the bill to persons who have instituted proceedings but where judgment is not delivered before commencement of the Act (noting that such persons may be liable to an adverse costs order).
8. The Minister duly provided a response to the Scrutiny Committee's request on 23 July 2018 which was tabled on 15 August 2018.³ In that response, the Minister did not explicitly address the Scrutiny Committee's question as to the number of persons who entered the relevant waters since 23 January 2002, and as the Scrutiny Committee notes in its report, the response 'fails to articulate how many such persons, if any, are yet to have asylum applications finally determined, have been granted a protection visa, are in offshore detention, or have had asylum applications refused but remain in Australia'.⁴
9. In relation to the Scrutiny Committee's question on the extent of any detriment that may be suffered by the relevant cohort of asylum seekers should the 2002 appointment be retrospectively validated, the Minister responded as follows:

No persons will suffer a detriment if the validity of the Appointment is confirmed by passage of the Bill. Enactment of the Bill will merely confirm that the actions taken in relation to persons who entered the waters of the proclaimed port, by reference to their status as UMAs, were valid and effective.

The Appointment is critical to determining the status of persons as UMAs under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013. In addition, those who became UMAs by reason of having entered the proclaimed port between 13 August 2012 and 1 June 2013, also became 'fast track applicants' under the Act.

Subject to any appeal, the successful challenge to the Appointment means that the affected persons did not enter Australia at an excised offshore place and are not therefore, UMAs under the Act. For some, this also means that they are not fast track applicants under the Act. However, the affected persons still entered Australia without a visa that was in effect, thereupon becoming unlawful non-citizens subject to immigration detention.

By reinstating the validity of the Appointment, the Bill does not impose any new obligations or detriment on affected persons. Instead, it maintains the status quo in

³ Senate Standing Committee for the Scrutiny of Bills: Scrutiny Digest 8 of 2018 (15 August 2018).

⁴ Ibid, page 46.

*relation to the processing of UMAs and, where relevant, fast track applicants under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.*⁵

10. The Law Council notes that the interests of individuals affected by the 2002 Instrument have been very significantly affected, in that but for that Instrument this cohort would have been able to seek permanent protection from Australia and, if that application were refused, have access to full merits review under Part 7A of the Act.
11. As noted by the Scrutiny Committee, the retrospective validation of the 2002 appointment would substantially limit affected persons' ability to challenge their classification as an 'unauthorised maritime arrival'. This classification is of significance to how an asylum seeker's rights and obligations are to be determined and how their applications may be processed. Consequently, the Scrutiny Committee concluded that to retrospectively alter the 2002 appointment, even if only to reflect its original policy intent, has the potential to undermine the rule of law and, as outlined above, may cause detriment to a number of affected persons.⁶
12. Noting that a key objective of the Law Council is to maintain and promote the rule of law, the Law Council expresses its concern with Bill's attempt to retrospectively validate the 2002 appointment, particularly in light of the impact such a measure will have on a significant number of asylum seekers. It is submitted that there has been insufficient justification for such retrospectivity when consideration is given to the considerable legal and procedural effects of the proposed measures on the lives of those that have been affected by the 2002 Instrument.
13. The Law Council therefore opposes the Bill on the basis that there is insufficient justification for the retrospective validation of the 2002 appointment, and that such an attempt has the potential to undermine the values associated with the rule of law.

Thank you for the opportunity to provide these comments. The Law Council would be pleased to elaborate on the above issues, if required.

Please contact Dr Natasha Molt, Director of Policy, Policy Division (02 6246 3754 or at natasha.molt@lawcouncil.asn.au), in the first instance should you require further information or clarification on this position.

Yours sincerely



Morry Bailes
President

⁵ Minister of Home Affairs, Response to the Senate Standing Committee for the Scrutiny of Bills (19/07/2018), available at: <www.aph.gov.au/senate_scrutiny_digest>.

⁶ Ibid, pages 46-47.