THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/DHvk:1573055

10 August 2018

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: nathan.macdonald@lawcouncil.asn.au

Dear Mr Smithers,

Migration (Validation of Port Appointment) Bill 2018

It has come to the attention of the Law Society of NSW that the Migration (Validation of Port Appointment) Bill 2018 ("Bill") is currently before the House of Representatives.

The purpose of the Bill is to retrospectively confirm the validity of the appointment of 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 that things done under the Migration Act 1958 which relied directly or indirectly on the terms of the appointment are valid and effective.

We understand that the Government introduced this Bill following the decision of Judge Justin Smith in *DBC16 v Minister for Immigration & Border Protection* [2018] FCCA 1802 (decision is attached). 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:

> 56. For those reasons, 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.
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> 57. 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.

As a result of this decision, it is estimated that the claims of 1600 asylum seekers may be affected.[1] The effect of the Instrument had been to bar any asylum seeker who entered Australia

[1] Ben Doherty, "1600 asylum claims could be reopened due to poorly drafted regulation", *The Guardian*, 21 July 2018, available at: https://www.theguardian.com/australia-news/2018/jul/21/1600-asylum-claims-could-be-reopened-due-to-poorly-drafted-regulation.

through Ashmore Reef from making a claim for permanent protection. Those claims were diverted through to the Immigration Assessment Authority (IAA) rather than heard in the AAT. Further, those asylum seekers who were taken to the detention centres at Nauru and Manus Island may have a claim in respect of unlawful detention.

We note that the Standing Committee for the Scrutiny of Bills has commented on the Bill, and has expressed concerns as follows:

> 1.6 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]

That Committee has requested the Minister's 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;
- 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).

The Law Society opposes this Bill as a rule of law matter. We also note the Rule of Law Institute's view that the principle of legality "sets its face against retrospectivity."[3]

We request that the Law Council advocate to oppose the Bill. Questions may be directed at first instance to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Doug Humphreys OAM
President

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[2] Senate Standing Committee for the Scrutiny of Bills; Scrutiny Digest 7 of 2018, available here: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6134

[3] The Rule of Law Institute, *The principle of legality,* 2 September 2016, available here: https://www.ruleoflaw.org.au/the-principle-of-legality/