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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

30 August 2018

Dear Committee Secretary,

Inquiry into the Migration (Validation of Port) Bill 2018 ('the Bill')

Thank you for the opportunity to make a submission. We do so in our capacity as members of the Andrew & Renata Kaldor Centre for International Refugee Law and the Gilbert + Tobin Centre of Public Law at UNSW Law. We are solely responsible for the views and content in this submission.

1. Context

On 21 December 2001, the then-Minister for Immigration and Multicultural and Indigenous affairs purported to exercise his powers under s 5(5) of the *Migration Act 1958* (Cth) ('*Migration Act*') to appoint an area of waters within the Territory of Ashmore and Cartier Islands as a 'proclaimed port'. The intended effect of this was to bring persons who entered Australia by sea via the Ashmore and Cartier Islands within the definition of 'offshore entry person' (now 'unauthorised maritime arrival' (UMA)) under the *Migration Act 1958* (Cth).[1]

The Bill was introduced to the Parliament in anticipation of the decision by the Federal Circuit Court in *DBC16 v Minister for Immigration & Anor* [2018] FCCA 1802. This case involved a challenge to the validity of the appointment of Ashmore and Cartier Islands as a 'proclaimed port'. On 11 July 2018, Smith J handed down a decision finding that the appointment was invalid, on the basis that Ashmore Reef and Cartier Island did not fall within the definition of 'port' for the purposes of the *Migration Act 1958* (Cth). The effect of

[1] See Senate Standing Committee for the Scrutiny of Bills (Parliament of Australia), Scrutiny Digest 7 of 2018, (27 June 2018) [1.2].

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this was that persons who arrived in Ashmore Reef and Cartier Island prior to July 2013 did not, and currently do not, qualify as UMAs under the *Migration Act*.

2. The Bill

Clause 3 of the Bill purports to validate the appointment of Ashmore Reef and Cartier Island as ports both going forward as well as retrospectively. Clause 4 authorises decisions made under the *Migration Act* reliant on the nomination of Ashmore Reef and Cartier Islands as ports. In practice, what this means is that government decisions made on the basis that asylum seekers who entered Australia by sea via Ashmore Reef were 'unauthorised maritime arrivals' ('UMAs') will be deemed retrospectively to be valid, even though at the time that these decisions were made, asylum seekers in this category did *not* qualify as UMAs. This has a significant impact on all affected asylum seekers. As the Senate Standing Committee for the Scrutiny of Bills noted in its inquiry into the Bill:

> The question of whether a person is or is not a UMA is of great significance with respect to how a person's rights and obligations under the *Migration Act* should be determined and how their applications should have proceeded.

For example, asylum seekers who entered Australia via Ashmore Reef were excluded from making claims for permanent protection on the basis that they were UMAs. In some cases, asylum seekers were also held in detention for significant periods of time on this basis.

Clause 5 of the Bill purports to block any current or future proceedings that rely on the invalidity of the port declaration. This would, in effect, prevent asylum seekers who entered Australia through Ashmore Reef from exercising any rights that may flow from the fact that they were incorrectly treated as UMAs.

3. Principles relating to retrospective legislation

It is constitutionally permissible for the Commonwealth Parliament to pass retrospective legislation. However, it is often said that retrospective legislation undermines the rule of law.[2] This is because an element of the rule of law is that the law should be accessible and, as far as possible, certain, intelligible, clear and predictable.[3] It is a fundamental rule of law principle that people should be capable of knowing what the law requires of them at any given time, and retrospective legislation undermines this by altering legal rights and obligations with backdated effect.

The government's own policy guidance at the Commonwealth level recommends that retrospective legislation that adversely affects rights or imposes liabilities should not be made

[2] See eg, Rule of Law Institute of Australia, 'Retrospective Legislation and the Rule of Law', 30 September 2015, <http://www.ruleoflaw.org.au/retrospective-legislation-and-the-rule-of-law/>; Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129 (2 March 2016), [13.15] <http://www.alrc.gov.au/publications/common-law-principle-10>.

[3] See eg The Rt. Hon Lord Bingham of Cornhill KG, 'The Rule of Law' (Speech delivered at the 6th Sir David Williams Lecture, University of Cambridge Centre for Public Law, 16 November 2006) <https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures2006-rule-law/rule-law-text-transcript>.

except in 'exceptional circumstances' and with adequate justification.[4] As an indication of what adequate justification requires, the Department of Prime Minister and Cabinet's *Legislation Handbook* states that the Explanatory Memorandum for legislation with retrospective effect should:

> 'set out whether, and why, retrospective application of the Act would adversely affect any person other than the Commonwealth and, if applicable, include an assurance that no person would be disadvantaged by the retrospective application of the Act'.[5]

The justifications for the Bill provided in the Minister's second reading speech and the Explanatory Memorandum fall well short of this standard. The Explanatory Memorandum does not explain why the Bill is necessary or explain the impact that it would have on the asylum seekers that it affects. On the contrary, the Statement of Compatibility with Human Rights attached to the Explanatory Memorandum states that no applicable human rights are engaged because '[t]he Bill reconfirms a legal position of the Australian Government that has been in place since 2002'.[6] In a similar vein, the Explanatory Memorandum claims that the Bill 'confirms the validity of the appointment of a proclaimed port in the Territory of Ashmore and Cartier Islands'[7], and the Minister's second reading speech states that the Bill seeks to 'confirm the validity of the Appointment to ensure that there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times; and ensure that things done under the act (such as actions taken or decisions made) which relied directly or indirectly on the terms of the Appointment are valid and effective'.[8]

These statements are misleading. The Bill does not confirm the validity of the appointment of a port at Ashmore and Cartier Islands and consequent government decisions. On the contrary, it seeks to retrospectively authorise government actions that the Federal Circuit court has found to be *unlawful* in the recent *DBC16* case. The effect of this would have a significant impact on the affected asylum seekers, by deeming them to be UMAs when they otherwise would not be. The consequences of this for affected persons include the retrospective authorisation of exclusion from permanent protection pathways, the retrospective authorisation of detention that would not otherwise be valid and the exclusion of the right to challenge decisions made pursuant to a power that did not exist at the time these decisions were made.

In its examination of the Bill, the Senate Standing Committee for the Scrutiny of Bills concluded that the retrospective application of the Bill significantly affected rights and liabilities and had not been sufficiently justified. The committee stated that:

> The committee expects that legislation which adversely affects individuals through its retrospective operation should be thoroughly justified in the explanatory memorandum … The committee notes [the Minister's] explanations as to why it is considered necessary to retrospectively validate the 2002 appointment. However, … a successful legal challenge to the 2002 appointment could mean that affected persons did not enter Australia at an excised offshore

[4] Department of Prime Minister and Cabinet (Cth), *Legislation Handbook* (2017) [5.19]-[5.20].
[5] Ibid [7.29](c).
[6] Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Cth) 6.
[7] Ibid, 2.
[8] Parliament of Australia, *Parliamentary Debates*, House of Representatives, 20 June 2018, (Peter Dutton MP) 8.

> place and therefore are not UMAs under the Migration Act. The question of whether a person is or is not a UMA is of great significance with respect to how a person's rights and obligations under the Migration Act should be determined and how their applications should have proceeded. The committee therefore considers the explanatory materials do not provide a sufficiently comprehensive justification for the retrospective validation of the 2002 appointment.[9]

In light of the above, our strong recommendation is that this Bill should not be passed. We reiterate our thanks to the committee for this opportunity to raise our concerns about the Bill.

Yours sincerely,

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[9] Senate Standing Committee for the Scrutiny of Bills (Parliament of Australia), Scrutiny Digest 7 of 2018, (27 JUne 2018) [1.6]-[1.8].