Australian Government
Department of Home Affairs

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

Senate Legal and Constitutional Affairs Legislation Committee

Table of Contents

Introduction

The Department of Home Affairs (the Department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the *Migration (Validation of Port Appointment) Bill 2018* (the Bill), following the passing of the Bill in the House of Representatives on 16 August 2018.

This submission explains the key measures in, and the purpose of, the Bill.

Measures in the Bill

The Bill, as introduced in the House of Representatives on 20 June 2018, confirms the validity of the appointment of a proclaimed port in the Territory of Ashmore and Cartier Islands contained in the Commonwealth of Australia Gazette No. GN 3, 23 January 2002 (the Appointment).

Specifically, the Bill:

- clarifies the geographical coordinates of the area of waters within the Territory of Ashmore and Cartier Islands specified in the Appointment;
- confirms there was a properly proclaimed port at the Territory of Ashmore and Cartier Islands at all relevant times; and
- confirms the validity of things done under the *Migration Act 1958* (such as actions taken or decisions made), which relied on the terms of the Appointment, before the commencement of the Bill.

Proposed Amendments to the Bill

The Government intends to move minor amendments to the Bill in response to recent decisions of the Federal Circuit Court (FCC) and the Federal Court (FC), which declared the Appointment to be invalid.

On 11 July, the FCC handed down judgments in *DBC16 v Minister for Immigration & Anor* [2018] FCCA 1802 and *DBD16 v Minister for Immigration & Anor* [2018] FCCA 1801, declaring the Appointment invalid. Further, on 6 August 2018, the FC ruled the Appointment invalid in the matter *DBB16 v Minister for Immigration and Border Protection* – NSD354/2017. The FC has not yet published written reasons for its decision.

The FCC upheld the Minister's argument that minor and inadvertent omissions in the geographical coordinates specified in the Appointment did not render the Appointment invalid. However, the FCC went on to find that the word 'port' in its ordinary meaning is a place with infrastructure to facilitate the movement of goods and/or passengers between vessels on the water and the land. Consequently, the FCC found that the area described in the Appointment

was not a 'port', as it lacked infrastructure, and therefore the Appointment was invalid. The Minister appealed these decisions on 1 August 2018.

The proposed amendments to the Bill would address the FCC's reasoning in its decisions by:

- defining the term 'appointment' to put beyond doubt that the Appointment referred to in the Bill includes a purported appointment. This is because the Appointment is currently declared invalid by a Court;
- removing the reference to a thing done under the *Migration Act 1958* being invalid or ineffective either directly or indirectly because of the terms of the Appointment; and
- providing that the doing of a thing under the *Migration Act 1958* will not be invalid or ineffective if it relied, directly or indirectly, on the validity of the Appointment generally.

Reason for referral

The Bill was referred to the Legal and Constitutional Affairs Legislation Committee by a motion of the Senate on 21 August 2018.

Portfolio submission

Context

The Bill was introduced in the House of Representatives on 20 June 2018 in response to the proceedings before the FCC, in which the validity of the Appointment was being challenged. Applicants to those court proceedings contended that the Appointment did not adequately define the area of the proclaimed port (due to minor and inadvertent omissions in the geographical coordinates specified in the Appointment) and that consequently the Appointment was invalid.

In its decisions of 11 July 2018 the FCC dismissed this ground. The FCC found that the area described in the Appointment was not a 'port' as it lacked infrastructure, and therefore declared the Appointment invalid.

The Appointment was an important element of the border protection arrangements designed to address unauthorised boat arrivals. It was designed to ensure that unauthorised boat arrivals who entered certain waters of the Territory of Ashmore and Cartier Islands, an 'excised offshore place' for the purposes of the *Migration Act 1958*, would thereby become 'offshore entry persons', now 'unauthorised maritime arrivals' (UMAs) under the *Migration Act 1958*. Their entry to Australia as unauthorised maritime arrivals, in particular between 13 August 2012 and 1 June 2013, was also relevant to determining their status as fast track applicants under the Act.

Without the Appointment, persons who entered Australia via the Territory of Ashmore and Cartier Islands before 1 June 2013 would not have been determined to be UMAs under the *Migration Act 1958*. Some of these people would also not be fast track applicants under the *Migration Act 1958*. However, the affected persons still entered Australia without a valid visa and therefore were unlawful non-citizens subject to immigration detention.

Necessity of the Bill and proposed amendments

The Bill with the proposed amendments confirms the validity of the Appointment and any thing done under the *Migration Act 1958* in reliance on the Appointment.

The provisions of the Bill will apply in particular to persons who entered Australia via the proclaimed port in the Territory of Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013. The effect of the Bill will maintain the status

quo for the way in which UMAs and, where relevant, fast track applicants, were processed under the *Migration Act 1958* as a result of entering Australia via this proclaimed port.

The Bill, with the proposed amendments, does not remove the rights of individuals who passed through the Territory of Ashmore and Cartier Islands to seek protection, or to have their claims comprehensively assessed on their merits. These individuals have been and will still be able to seek merits review and judicial review. For fast track applicants, the High Court held in *Plaintiff M174 v Minister for Immigration and Border Protection – High Court – M174/2016* that the merits review process in the Immigration Assessment Authority took the form of a 'de novo' hearing – that is, the applicant's claims would be assessed afresh.

The Bill, with the proposed amendments, confirms the validity of the Appointment by providing that:

- there is, and at all relevant times has been, a properly proclaimed port in the Territory of Ashmore and Cartier Islands; and
- actions taken or decisions made will not be invalid or ineffective if they relied, directly or indirectly, on the validity of the Appointment.

If the Bill with the proposed amendments is not passed it would mean that individuals who entered Australia via the Territory of Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013 did not enter Australia by sea at an excised offshore place and are therefore not UMAs under the *Migration Act 1958*. For some, it would also mean that they are not fast track applicants under the *Migration Act 1958*.

This would have consequences for the way in which affected persons have been processed under the *Migration Act 1958.* This would have a negative impact upon the integrity of Australia's migration system and on public confidence in Australia's border protection regime.

Compatibility with Australia's human rights obligations

All of the persons affected by this Bill have had the opportunity to seek protection and have their claims assessed. The passage of the Bill will not change this.

Enactment of the Bill will 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 Bill is compatible with human rights and freedoms because it does not engage any obligations under relevant human rights treaties.

Review rights and effective remedy

The Department of Home Affairs is committed to efficiently assessing each protection claim, on its individual merits, on a case-by-case basis, with reference to up-to-date information on conditions in the asylum-seeker's home country. Principles of procedural fairness apply at all stages of visa decision making.

All fast track applicants, like other non-citizens seeking Australia's protection, receive a full and comprehensive assessment of their claims for protection.

Most fast track applicants who are found to not engage Australia's protection obligations are automatically referred to the Immigration Assessment Authority (IAA) within the Administrative Appeals Tribunal for an independent and impartial merits review.

While the IAA generally conducts a merits review based on information provided by the applicant as part of their protection visa application, it has the discretion to consider new information and conduct an interview in exceptional circumstances, for example, where there is a change in circumstances or new information which suggests that there is an increased risk to the applicant.

In *Plaintiff M174 v Minister for Immigration and Border Protection – High Court – M174/2016*, the High Court confirmed the robustness of the fast track process. It affirmed that the IAA, "when conducting a review of a fast track reviewable

decision, is not concerned with the correction of error on the part of the Minister or delegate but is engaged in a *de novo* consideration of the merits of the decision that has been referred to it". The IAA considers "the application for a protection visa afresh and to determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met."

Following a robust and fair assessment of their protection claims, all fast track applicants have the ability to seek judicial review.

The Bill with its proposed amendments confirms that the Appointment is, and has always been valid. However, to address a risk of impermissible interference with judicial power in relation to legal challenges to the validity of the Appointment, the Bill will explicitly not apply to cases where judgment has been delivered by a court before these provisions commence, and:

- the validity of the Appointment was at issue in the proceedings; and
- the judgment either set aside or declared the Appointment to be invalid.

This includes the two persons whose FCC cases and one person whose FC case were recently decided in their favour.