

**Migration (Validation of Port Appointment) Bill 2018**  
**Questions on notice, Public Hearing 10 September 2018**

**1. Department's response to the table entitled "Practical Effects of the Migration (Validation of Port Appointment) Bill 2018 on the Visas of Different Cohorts of Persons Arriving in Australia via the Territory of Ashmore and Cartier Islands Prior to 1 June 2015"**

The purpose of the Bill is to ensure 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) has always had the legal effect that was intended and that it was thought to have had, and on which actions were based and decisions made, at all relevant times.

All affected individuals have had the opportunity to make claims for protection and to have any claims for protection assessed by the Department; reviewed by an independent body (unless excluded); and to access judicial review of those assessments.

- Children born to an individual who has been assessed as being owed protection and been granted a visa, hold that same visa.
- Children born to an individual who is undergoing an assessment for a temporary protection visa or safe haven enterprise visa are included as applicants for that visa.

The Department does not accept that the Immigration Assessment Authority (IAA) process is a deficient form of review. The IAA conducts an independent, robust, de novo assessment of claims. This was affirmed by the High Court in *Plaintiff M174 v Minister for Immigration and Border Protection M174/2016*.

- The IAA's focussed caseload and code of procedure allows for matters to be considered and for applicants to be given certainty more quickly than processes in the AAT.
- Fast Track applicants are not eligible for s417 Ministerial Intervention but may seek intervention under other Ministerial Intervention powers in the Act on compelling and compassionate grounds.

The Department does not accept that the Fast Track process increases risks of *refoulement* because it includes the same full assessment of protection obligation claims at each level as the non-Fast Track process with shortened timeframes for responses.

The **Attachment** overleaf provides the Department's response to the views of the Asylum Seeker Resource Centre (ASRC) and the Refugee Council of Australia (RCOA) about how the groups of potentially affected individuals would be impacted if the Bill is passed.

However we note in relation to the last column that the effects would depend on the outcome of any Special Leave Application sought by the Minister in relation to DBB16. As the Full Federal Court has not yet handed down its reasons for decision the Minister has not yet decided whether to pursue an Application for Special to the High Court.

**2. Departmental records indicate that 49 persons who may be affected by the Bill were taken to a regional processing country (RPC) - what is their current status.**

As at 11 September 2018, Departmental records indicate all were returned to Australia and:

- 42 individuals are onshore and lawful
- 7 individuals have since returned to their home country.

Of the 42 individuals remaining in Australia:

- 19 protection visa applications are on hand before the Department
- 11 individuals have been granted a protection visa
- 5 applications have been refused and are at merits review
- 6 applications have been refused, and after merits review, are now at judicial review
- 1 application has been remitted following judicial review

The following table provides the views of the ASRC and the RCOA on the practical effects of the Migration (Validation of Port Appointment) Bill 2018 on the visas of different cohorts of persons arriving in Australia via the Territory of Ashmore and Cartier Islands Prior to 1 June 2013, and the responses by the Department of Home Affairs.

Case stage	Practical visa effects if Bill is passed	Practical visa effects if Bill is not passed
Persons arriving before 13 August 2012 who never received a 'bar lift' to apply for a visa	<ul style="list-style-type: none"> <li>Applicants lose the right to apply for a protection visa unless the Minister intervenes.</li> <li>Increased risk of refoulement.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>Applicants have had the opportunity to have claims assessed through a non-statutory process or if there was a bar lift, a visa application, with access to merits and judicial review.</li> <li>Outcomes of that assessment stands.</li> <li>No increased risk of refoulement.</li> </ul>	<ul style="list-style-type: none"> <li>Applicants able to make a valid application for a protection visa and have their claims assessed.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>Affected individuals found not to be owed protection and are now not regarded as Unauthorised Maritime Arrivals, may be able to make a fresh application for a temporary protection or safe haven enterprise visa.</li> </ul>
Primary TPV or SHEV application currently before Department (as a purported Fast Track applicant)	<ul style="list-style-type: none"> <li>Applicants lose full merits review before the AAT.</li> <li>Applicants refused a visa have their applications reviewed according to the deficient form of review offered by the IAA, or excluded from IAA review. Some may be wrongly found to be ineligible for protection as a result of the inadequacies of this process.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>Applications continue to be assessed under Fast Track process, which includes the same full assessment of protection obligation claims at each level as the non-Fast Track process with shortened timeframes for responses.</li> <li>If application refused automatic referral to IAA for review unless they are determined to be an excluded fast track review applicant.</li> </ul>	<ul style="list-style-type: none"> <li>Applicants retain full merits review before the AAT.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>Applications continue assessment under non-Fast Track process which includes the same full assessment of protection obligation claims.</li> <li>If application refused, may seek review by AAT.</li> </ul>

<p>Excluded Fast Track review applicants (EFTRA) (found to have made manifestly unfounded claims, provided bogus documents, previously been refused protection in another country) ** of more than 14,000 Fast Track decisions 50 have been found to be EFTRA</p>	<ul style="list-style-type: none"> <li>• Denied access to any merits review body including the IAA.</li> <li>• Increased risk of refoulement.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>No access to merits review.</b></li> <li>• <b>Access to judicial review.</b></li> <li>• <b>No increased risk of refoulement</b></li> </ul>	<p><input type="checkbox"/> Department continues to re-notify relevant applicants of refusal decision enabling lodgement of application for full merits review to the AAT.</p> <p><input type="checkbox"/> Department re notifies applicants of refusal decision enabling lodgement of application for full merits review to the AAT.</p> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>Department would renotify affected applicants of refusal decision advising may seek review by the AAT</b></li> </ul>
<p>Ongoing merits review before the IAA</p>	<ul style="list-style-type: none"> <li>• IAA does not currently have jurisdiction, but regains jurisdiction.</li> <li>• Applicants at the IAA continue with deficient IAA review and lose right to full AAT review.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>IAA review continues.</b></li> <li>• <b>Department does not accept that the IAA process is a deficient form of review.</b></li> </ul>	<ul style="list-style-type: none"> <li>• IAA continues to have no jurisdiction to review relevant decisions.</li> <li>• Department continues to re-notify relevant applicants of refusal decision enabling lodgement of application for full merits review to the AAT.</li> <li>• If temporary protection visa granted, will not be considered Fast Track applicant when required to apply for renewal in 3 or 5 years time.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>Department would re-notify affected applicants of refusal decision advising may seek review to the AAT.</b></li> </ul>

<p>Ongoing merits review before the AAT</p>	<ul style="list-style-type: none"> <li>• AAT loses jurisdiction. Cases are probably re-referred to the IAA. Legal confusion as to status of new information presented to AAT prior to re-referral to IAA.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• The Department has not renotified applicants affected by the decision in DBB16 as the reasons for decision have not yet been given by the Full Federal Court. When the reasons for decision are handed down the Minister will consider whether to seek Special Leave to Appeal the decision to the High Court. No re-notifications will occur ahead of that decision. Therefore there would be no one in the affected caseload with ongoing merits review before the AAT and no legal confusion would exist.</li> </ul>	<ul style="list-style-type: none"> <li>• Cases currently at the AAT continue</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• The Department has not renotified applicants affected by the decision in DBB16 as the reasons for decision have not yet been given by the Full Federal Court. When the reasons for decision are handed down the Minister will consider whether to seek Special Leave to Appeal the decision to the High Court. No re-notifications will occur ahead of that decision. Therefore there would be no one in the affected caseload with ongoing merits review before the AAT.</li> </ul>
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<p>Refused by the IAA, has applied for judicial review and sought a court order in accordance with the transitional provisions, but has not yet received judgment</p>	<ul style="list-style-type: none"> <li>• Ongoing court case will be interfered with.</li> <li>• Despite having applied for relief and raised the issue of the invalid port appointment before a court, will be denied relief for this issue if Bill is passed prior to judgment.</li> <li>• Court applicant may be subject to adverse costs order.</li> <li>• Loses right to full AAT review.</li> <li>• No access to Ministerial intervention on compassionate grounds under s 417.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>The court could not find the IAA decision invalid on the basis of lack of jurisdiction due to invalidity of the appointment.</b></li> <li>• <b>May continue other grounds for review.</b></li> <li>• <b>Adverse costs order unlikely from a court's rejection of challenge to the validity of the Appointment alone. In practice, this issue is likely to be one of several grounds raised in proceedings so in the event that an adverse costs order is made, there are likely to be a number of other factors which would contribute to the making of such an order.</b></li> <li>• <b>Access to Ministerial Intervention other than under s417 remains.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Court cases continue without interference.</li> <li>• If successful at court on this issue, Department must re-notify applicant of refusal decision enabling lodgement of application for full merits review to the AAT.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>Judicial review continues. In the event that the Minister does not seek Special Leave to Appeal to the High Court, or if he does and is not successful, consistent with the Minister's Model Litigant Obligations, he will concede any matters that are squarely affected by the decision in DBB16 and renotify applicants of refusal decisions advising may seek review to the AAT.</b></li> </ul>
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<p>Refused by the IAA, has applied for judicial review on other grounds</p>	<ul style="list-style-type: none"> <li>• The issue of the port validity and status as an unauthorised maritime arrival will no longer need to be raised by the Minister's lawyers and considered.</li> <li>• If court sets aside IAA decision on a different ground, case will be remitted to IAA for reconsideration under a deficient process.</li> <li>• Loses right to full AAT review.</li> <li>• No access to Ministerial intervention on compassionate grounds under s 417.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>Judicial review continues and the Minister will not need to raise the issue with the Court as he has been doing in every matter than has come to hearing.</b></li> <li>• <b>If the court sets aside the IAA decision on a different ground, the case will be remitted to the IAA.</b></li> <li>• <b>Department does not accept that the IAA process is a deficient form of review.</b></li> <li>• <b>Access to Ministerial Intervention other than under s417 remains.</b></li> </ul>	<ul style="list-style-type: none"> <li>• The issue of the port validity and status as an unauthorised maritime arrival may be raised by the Minister's lawyers under the model litigant guidelines and considered.</li> <li>• Court cases continue without interference.</li> <li>• Department re-notifies applicant of refusal decision enabling lodgement of application for full merits review to the AAT.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>Judicial review continues. In the event that the Minister does not seek Special Leave to Appeal to the High Court, or if he does and is not successful, consistent with the Minister's Model Litigant Obligations, he will concede any matters that are squarely affected by the decision in DBB16 and renotify applicants of refusal decisions advising may seek review to the AAT.</b></li> </ul>
<p>Refused by the IAA, with no further applications on foot</p>	<ul style="list-style-type: none"> <li>• Will lose the right to full merits review at the AAT.</li> <li>• No access to Ministerial intervention on compassionate grounds under s417</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>No changes to pre-existing arrangements, including right to seek judicial review of IAA decision.</b></li> <li>• <b>Department does not accept that the IAA process is a deficient form of review.</b></li> <li>• <b>Access to Ministerial Intervention other than under s417 remains.</b></li> </ul>	<ul style="list-style-type: none"> <li>• Department re-notifies applicant of refusal decision enabling lodgement of application for full merits review to the AAT.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li>• <b>Department would re-notify affected applicants of refusal decision advising may seek review to the AAT.</b></li> </ul>

Has been granted TPV or SHEV as a purported Fast Track applicant	<ul style="list-style-type: none"> <li>Will again be subject to Fast Track process when required to apply for renewal in less than 3 or 5 years time. This includes concerns such as being subject to deficient IAA merits review, 'excluded fast track applicant' provisions, and no access to Ministerial intervention on compassionate grounds under s 417.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li><b>Hold visa and required to reapply in 3 or 5 years.</b></li> <li><b>Children born while parents hold visa become visa holders.</b></li> </ul>	<ul style="list-style-type: none"> <li>As the person is not a Fast Track applicant, if the visa application is refused by the Department when the person applies for a TPV or SHEV in the future, the person will be entitled to full merits review before AAT.</li> <li>Children born in Australia will be able to apply for TPVs or SHEVs.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li><b>Hold visa and required to reapply in 3 or 5 years.</b></li> <li><b>Children born while parents hold visa become visa holders.</b></li> </ul>
Child of affected person born in Australia	<ul style="list-style-type: none"> <li>Children born in Australia to unauthorised maritime arrivals are barred from lodging protection visa applications unless Minister exercises personal non-compellable power and would then be treated as Fast Track applicants if they apply for a TPV or SHEV.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li><b>Children born while parents hold visa become visa holders.</b></li> <li><b>Children born while parents are applicants become applicants for same visa.</b></li> </ul>	<ul style="list-style-type: none"> <li>Children born to unauthorised maritime arrivals in Australia are able to apply for a TPV or SHEV, and any other visa they may be eligible for.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li><b>Children born while parents hold visa become visa holders.</b></li> <li><b>Children born while parents are applicants become applicants for same visa.</b></li> <li><b>Children born to parents whose claims have been assessed and refused may be eligible to lodge subsequent protection visa.</b></li> </ul>
Persons transferred to a Regional Processing Country and later returned to Australia and processed as Fast Track	<ul style="list-style-type: none"> <li>Impacts would be legally identical to those at a similar stage of Fast Track processing, as outlined above.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li><b>Agreed.</b></li> </ul>	<ul style="list-style-type: none"> <li>Impacts would be legally identical to those at a similar stage of Fast Track processing, as outlined above.</li> </ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"> <li><b>Agreed.</b></li> </ul>



Persons transferred to a Regional Processing Country	<ul style="list-style-type: none"><li>• Person remains in Regional Processing Country.</li></ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"><li>• Departmental records indicate there are no affected persons in a Regional Processing Country.</li></ul>	<ul style="list-style-type: none"><li>• Commonwealth to consider how it will remedy the unlawful transfer.</li></ul> <p><u>Department's response</u></p> <ul style="list-style-type: none"><li>• Departmental records indicate there are no affected persons in a Regional Processing Country.</li></ul>
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