Legal Effects of *Migration (Validation of Port Appointment) Bill 2018* on different cohorts of persons arriving in Australia via Ashmore Reef

Summary:

The Asylum Seeker Resource Centre and the Refugee Council of Australia provide the following information comprised of this submission and an accompanying table, in response to a question taken on notice from the Honourable Senator Watt during the Senate Legal and Constitutional Affairs Committee hearing on 3 September 2018. Senator Watt requested a summary of the different types of people affected by the Bill, depending on the date that they arrived, and the practical consequences for those people of the Bill passing or not passing.

As was established in the course of the Committee hearing, the Government has proposed this Bill without identifying the number of people potentially affected by it, nor the rights at stake for those people. The failure of the Department of Home Affairs (the **Department**) to provide even the most basic information, despite being requested to do so by both the Scrutiny of Bills Committee and the Senate Legal and Constitutional Affairs Committee, demonstrates a callous disregard for the lives of the persons affected by the Bill, as well as a disturbing lack of respect for – even potential contempt of - Parliamentary processes. The Department must remedy this situation by furnishing to the Committee the full details of the number and current situation of all persons whose rights have been affected by the invalid appointment of the Territory of Ashmore and Cartier Islands (**Ashmore Reef**) as a port, so that the Committee is able to fulfil its role to make an informed recommendation to the Parliament regarding this Bill.

One notable exception to this information lacuna is that the Department, according to its evidence, has managed to identify 165 matters currently before the courts which are brought by persons who entered Australia at Ashmore Reef. This is despite the Department's claim that it does not have a list of boats that arrived at Ashmore Reef. Of those 165 applicants, 148 have not yet raised claims relating to the invalid appointment. The Minister has failed to notify those 148 applicants of the issue and has failed to concede these matters to which, under the current law, the Minister has no reasonable defence. By failing to alert either the courts or the affected applicants, the Minister seeks to take advantage of the applicants' lack of knowledge or legal representation so that they miss their chance to preserve their rights under the transitional provisions. We submit that this conduct is likely in breach of the Minister's model litigant obligations.

The evidence provided to the Committee by numerous witnesses, including the Department's representatives, established that the intended legal effect of this Bill is to retrospectively remove the rights of a finite group of approximately 1600 people who arrived in Australia via Ashmore Reef between the dates of 23 January 2002 and 31 May 2013.

The excision of the entire Australian mainland from the Australian migration zone from 1 June 2013 prevents any potential expansion of the affected group of persons, except for children born to members of the existing affected group. When pressed, the evidence given by the Department was that rejection of this Bill would in no way legally weaken Australia's borders or make Ashmore Reef a 'soft target' or create a 'pull factor' for future boat arrivals.

The invalid appointment of Ashmore Reef as a 'port' resulted in this finite group of people being incorrectly classified as 'offshore entry persons', and subsequently 'unauthorised maritime arrivals' (**UMA**s). This incorrect classification had both immediate negative effects upon all members of the group, as well as ongoing and likely future negative effects for the many group members yet to secure access to durable protection.

The immediate effects were that some members of the group were likely (and may still be) subject to serious human rights abuses by being unlawfully transferred to an offshore Regional Processing Centre (**RPC**) and denied their legal right to apply for protection in Australia. Only those persons deemed UMAs were liable to be transferred to RPCs. Some of the affected persons may still be on Nauru or Manus Island, left to perish.[1] Those who were transferred back to Australia were prevented from applying for permanent Protection Visas in Australia and were, or are, incorrectly subjected to 'Fast Track' processing of their cases.

In addition, all members of the affected group lost the opportunity to have their applications for asylum processed under the relevant laws at that time, which aligned more closely with international legal standards under the Refugees Convention. Had their applications been granted prior to 16 December 2014 (when the rights of boat arrivals to be granted permanent visas were retrospectively removed), many could already have been granted permanent protection, enjoyed reunion with family members and become Australian citizens.

Aside from denying affected persons the chance of securing permanent protection in Australia, the incorrect classification as an UMA also resulted in persons being unlawfully subject to the 'Fast Track' process. The Fast Track process denies applicants basic procedural fairness safeguards and proper merits review. This limited form of review, which is more likely to result in wrong decisions, may have already resulted in refoulement of individuals whose cases have been finally determined and who have since been removed from Australia to countries where they may face persecution. All Fast Track applicants, whether still being processed or now holding temporary visas, are at higher risk of future refoulement on account of the flawed system. The Ashmore Reef affected individuals should not be a part of the Fast Track cohort and should not be exposed to this risk.

[1] We note the evidence of Ms Ringi that 'her understanding' is that there are no affected persons in offshore detention. This does not mean there are no affected persons left on Manus Island or Nauru. Ms Ringi was not able to advise how that understanding was arrived at by the Department.

The sections below discuss the more particularised impacts on different cohorts within the overall class of persons whose rights will be negatively affected if this Bill is passed.

Those arriving via Ashmore Reef between 21 January 2002 – December 2007

- This time frame spans the dates between the invalid appointment of Ashmore Reef as a 'port' on 21 January 2002 and the end of the policy known as the 'Pacific Solution'.
- Under the Pacific Solution policy, the Department had the discretion to take offshore entry persons (who arrived at an excised offshore place) to a declared country (Nauru or Manus Island) for processing.
- Persons who arrived via Ashmore Reef during this time should not have been transferred to a declared country because they were not offshore entry persons.
- Those who were classified as offshore entry persons but remained in Australia were barred from applying for any visa in Australia until the Minister personally exercised the discretionary power to allow an application.[2] This resulted in longer periods of immigration detention.
- Persons who arrived via Ashmore Reef during this time were still subject to onshore immigration detention because they arrived in Australia without a valid visa.

Those arriving via Ashmore Reef between December 2007 - 12/17 August 2012

- The legal relevance of this time frame is that it spans the time between the end of the Pacific Solution and the commencement of legislation which re-introduced offshore processing, and the retrospective establishment of the Fast Track system (discussed below).
- Persons arriving via Ashmore Reef during this time were invalidly classified as offshore entry persons and subject to the bar on visa applications noted above. They were required to satisfy a non-statutory assessment of their protection claims as a pre-cursor to obtaining a bar lift. Many were subject to an assessment process which the High Court held to be unlawful in 2010 for lack of procedural fairness.[3]
- Persons who arrived via Ashmore Reef during this period were still subject to onshore immigration detention because they arrived in Australia without a valid visa. However, if they had not been classified as offshore entry persons, they may have spent less time in immigration detention and would have been able to lodge a valid application for a permanent protection visa, leading, if granted, to permanent residence, family reunion rights and a pathway to Australian citizenship.

Those arriving via Ashmore Reef between 13/18 August 2012 - 31 May 2013

- The time frame spans the period between the commencement of the Fast Track process and regional processing, and the excision of the entire Australian mainland which rendered the invalid appointment of Ashmore Reef as a 'port' largely irrelevant.

[2] *Migration Act 1958* (Cth) s 46A, introduced by the *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth).

[3] The 'Refugee Status Assessment' and 'Independent Merits Review' systems were replaced by further non-statutory assessment processes which continued until March 2012.

- Persons who arrived via Ashmore Reef from 13 August were invalidly classified as offshore entry persons / UMAs and were subject to the Fast Track process, including Immigration Assessment Authority review.[4]
- From 18 August 2012, the Department again had the discretion to transfer offshore entry persons to Regional Processing Centres.[5]
- Persons who arrived via Ashmore Reef during this time should not have been transferred to RPCs because they were not offshore entry persons.
- Persons classified as offshore entry persons who remained in Australia were barred from applying for any visa in Australia until the Minister personally exercised the discretionary power to allow an application.[6]
- Persons who arrived via Ashmore Reef during this time were still subject to onshore immigration detention because they arrived in Australia without a valid visa.

Overall, the legal consequence of the invalid appointment of Ashmore Reef as a 'port' for those arriving within these dates is that they were incorrectly classified as 'offshore entry persons', known since 1 June 2013 as unauthorised maritime arrivals, which had the following effects:

- Some were unlawfully forcibly transferred to RPCs without the Commonwealth having any legal power to do so.
- All persons affected were unlawfully denied the opportunity to immediately apply for a permanent protection visa in Australia, which could have been granted up until 16 December 2014 (when undecided applications were retrospectively converted to applications for temporary visas).[7]
- Aside from losing their right to apply for a permanent protection visa, the processing of unauthorised maritime arrivals was frozen for a number of years under the 'no advantage' policy, causing great personal suffering and leaving people in protracted 'limbo'. It was only in May 2016 that the Minister announced an intention to 'lift the bar' and commenced inviting tranches of the group to make applications for Temporary Protection Visas via the Fast Track system.
- Those who arrived prior to August 2012 and were processed under the previous non-statutory assessment methods were even worse off than the Fast Track cohort, as they were not included in the 'bar lift' announcement of May 2016 and some were only invited to apply for Temporary Protection Visas as late as August 2018. For some, this legal limbo has lasted for more than 10 years since their arrival in Australia. It is particularly galling that after all of that time, they have now been given only 28 days to lodge their applications.

Effects of retrospective changes from 16 December 2014 onwards

[4] Relevant dates for 'Fast Track' process being for arrivals between 13 August 2013-1 January 2014 (with Temporary Protection Visas coming into effect from 16 December 2014).
[5] Migration Act s 198AD, introduced by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth).
[6] *Migration Act 1958* (Cth) s 46A, introduced by the *Migration Amendment (Excision from Migration Zone) Act* 2001 (Cth).
[7] *The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), the 'Legacy Caseload' Act.

- Those who arrived via Ashmore Reef within the dates 13 August 2012 - 31 May 2013 have also had their rights negatively affected by the retrospective application of the Legacy Caseload Act, which made 'immigration clearance' and the holding of a valid visa upon entry to Australia additional requirements for lodging a valid application for a permanent protection visa and also converted existing undecided applications for permanent Protection Visas, into Temporary Protection Visa applications.
- Had members of the affected group been treated according to law from the outset and not excluded from applying for permanent Protection Visas in 2012 and 2013, a large portion would likely have secured permanent protection before 16 December 2014 (when implementation of Temporary Protection Visas was retrospectively commenced).
- Some would not have been unlawfully transferred to an RPC where they may still languish. Those who were transferred from an RPC back to Australia between 2013-2015, became eligible only for temporary protection and subject to the Fast Track process.

Those arriving via Ashmore Reef from 1 June 2013 onwards

- On 1 June 2013, the Australian mainland was excised from the migration zone.[8] One legal consequence was that all persons arriving by boat anywhere in Australia after this date were considered unauthorised maritime arrivals, and became transferable to offshore processing in a RPC. Any arrivals from 1 June 2013 are not affected by the Bill.

Conclusion

We reiterate our earlier submission that there is no justification for the passing of this Bill, which will remove the rights of a finite group of people, many of whom have already suffered gross injustice due to incorrect classification as unauthorised maritime arrivals. Through its retrospective application, this Bill would weaken the rule of law itself, which is clearly against the interests of all Australians. The Committee should recommend that this Bill not be passed in any form.

[8] *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth).

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

Endorsed by the Asylum Seeker Resource Centre (ASRC), Refugee Council of Australia (RCOA, Refugee Advice and Casework Services (RACS) and Australian Lawyers for Human Rights (ALHR)

This table sets out several categories of people who will be affected by the Bill and a description of the consequences of the Bill passing or not passing. We note that the complete range of consequences the Bill's interference with existing and accrued rights is complex and cannot be exhaustively anticipated. It is essential that the Committee and the Senate seek, and are provided with, comprehensive information in relation to the number of individuals affected, and a breakdown of their current circumstances.

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	• Applicants lose the right to apply for a protection visa unless the Minister intervenes. • Increased risk of refoulement.	• Applicants able to make a valid application for a protection visa and have their claims assessed. •
Primary TPV or SHEV application currently before Department (as a purported Fast Track applicant)	• Applicants lose full merits review before the AAT. • 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.	• Applicants retain full merits review before the AAT.
Excluded Fast Track review applicants	• Denied access to any merits review body including the IAA. • Increased risk of refoulement.	• Department continues to re-notify relevant applicants of refusal decision enabling lodgement of application for full merits review to the AAT. • Department re notifies applicants of refusal decision enabling lodgement of application for full merits review to the AAT.

Ongoing merits review before the IAA	• IAA does not currently have jurisdiction, but regains jurisdiction. • Applicants at the IAA continue with deficient IAA review and lose right to full AAT review.	• IAA continues to have no jurisdiction to review relevant decisions. • Department continues to re-notify relevant applicants of refusal decision enabling lodgement of application for full merits review to the AAT. • If temporary protection visa granted, will not be considered Fast Track applicant when required to apply for renewal in 3 or 5 years time.
Ongoing merits review before the AAT	• 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.	• Cases currently at the AAT continue.
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	• Ongoing court case will be interfered with. • 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. • Court applicant may be subject to adverse costs order. • Loses right to full AAT review. • No access to Ministerial intervention on compassionate grounds under s 417.	• Court cases continue without interference. • 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.
Refused by the IAA, has applied for judicial review on other grounds	• 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. • If court sets aside IAA decision on a different ground, case will be remitted to IAA for reconsideration under a deficient process. • Loses right to full AAT review. • No access to Ministerial intervention on compassionate grounds under s 417.	• 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. • Court cases continue without interference. • Department re-notifies applicant of refusal decision enabling lodgement of application for full merits review to the AAT.
Refused by the IAA, with no further	• Will lose the right to full merits review at the AAT. • No access to Ministerial intervention on	• Department re-notifies applicant of refusal decision enabling lodgement of application for full merits review to

applications on foot	compassionate grounds under s 417.	the AAT.
Has been granted TPV or SHEV as a purported Fast Track applicant	• 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.	• 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. • Children born in Australia will be able to apply for TPVs or SHEVs.
Child of affected person born in Australia	• 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.	• 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.
Persons transferred to a Regional Processing Country and later returned to Australia and processed as Fast Track	• Impacts would be legally identical to those at a similar stage of Fast Track processing, as outlined above.	• Impacts would be legally identical to those at a similar stage of Fast Track processing, as outlined above.
Persons transferred to a Regional Processing Country	• Person remains in Regional Processing Country.	• Commonwealth to consider how it will remedy the unlawful transfer.