

5 September 2018

Senator the Hon Ian Macdonald
Chair, Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: <mailto:legcon.sen@aph.gov.au>

Dear Senator

Response to question on notice: Inquiry into the Migration (Validation of Port Appointment) Bill 2018

Thank you for the opportunity for Law Council representatives to appear before the Senate Legal and Constitutional Affairs Committee in relation to the inquiry into the Migration (Validation of Port Appointment) Bill 2018 (**the Bill**) on 3 September 2018.

In the course of providing evidence, the Law Council was asked for its view on whether it is content with the concept of making the Territory of Ashmore and Cartier Islands a port in the future. The Hansard transcript of this exchange reads as follows:

Senator HUME: Is the Law Council recommending that the bill be passed with amendments or is the Law Council recommending that the bill not pass?

Mr MacDonald: The Law Council does not support the bill in its current form. We would require further details from the department as to the necessity of the measures, in particular acknowledging the detriment and human rights concerns that the measures give rise to. That is particularly because of the retrospectivity.

Senator HUME: But the Law Council is content with the concept of making Ashmore, and therefore the Cartier Islands, a port in the future?

Mr MacDonald: I'm not in a position to answer that. I can certainly take it on notice.

Senator HUME: Thank you.

Noting that the Senator's question relates to the broader policy of excising territories for the purposes of Australia's migration zone, the Law Council does not feel it is appropriate to comment on whether the territory in question could or should be declared a port in the future, as this will ultimately be a matter of policy for the Government, nor is it the focus of our submission which is concentrated on the retrospective nature of the Bill.

The Law Council does, however, point to the decision of *DBC16 v Minister for Immigration & Anor* [2018] FCCA 1802 in which it was clarified that due to the absence of infrastructure

and utilisation for the transfer of goods or passengers from vessels in the relevant area, the Territory of Ashmore and Cartier Islands could not meet the definition of 'port' for the purposes of the *Migration Act 1958* (Cth) and as such the instrument proclaiming the area as a port was declared invalid. The Law Council respects this decision and suggests it has continuing relevance to any future attempts to declare the area in question a port.

Please contact Nathan MacDonald, Senior Policy Lawyer on _____ or at _____ in the first instance should you require further information or clarification on this position.

Yours sincerely

Jonathan Smithers
CHIEF EXECUTIVE OFFICER