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Committee Secretariat
Senate Legal and Constitutional Affairs Legislation Committee
Parliament House
Canberra ACT 2600

Dear Secretariat

Migration (Validation of Port Appointment Bill) 2018

1. Thank you for the invitation dated 30 August 2018 to provide written submissions to the Legal and Constitutional Affairs Legislation Committee in relation to the Migration (Validation of Port Appointment) Bill 2018.

2. I am a migration agent and barrister at the Victorian Bar with an extensive practice in migration law. My practice includes advising and appearing at every level of the immigration process, from interactions with the Department of Home Affairs (as it now is) in relation to visa applications, merits review processes at the Administrative Appeals Tribunal (**AAT**) and Immigration Assessment Authority (**IAA**), and all stages of judicial review, from the Federal Circuit Court through to the High Court.

3. I understand that other submissions made to the Committee in relation to the Bill deal with broader political policy issues. I do not wish to provide any submissions in that regard, and instead confine my submissions to technical aspects of the Bill.

4. For the following reasons, in my opinion the Bill is technically flawed and should not be passed.

The Bill's retrospectivity is inconsistent with the rule of law

5. The Bill is expressed to have retrospective effect. While it is within Parliament's powers to enact retrospective legislation, the Committee will be aware that retrospectivity is highly unusual. I also note that the Scrutiny of Legislation Committee has previously expressed concerns about the retrospective nature of the Bill and its inconsistency with the rule of law.[1]

6. The reason why there is, legally, a presumption against retrospectivity, is that retrospectivity offends the principle that people should be able to have certainty as to how the law will treat them, in accordance with the law as it exists at the time they so act. This is a rule that is well-established in the Australian legal system.

[1] Standing Committee for the Scrutiny of Bills, Scrutiny Digest 7 of 2018, [1.6].

7. The presumption against retrospectivity is a fundamental aspect of the rule of law. As our High Court has explained, in a not dissimilar context, retrospectivity is 'abhorrent to those who are concerned to maintain a just society governed by the rule of law'.[2] Desirability of the rule of law should be self-evident. No compelling reason has been articulated for why the Bill should be retrospective.

The Bill is not 'technical' nor does it seek to 'simply maintain the status quo'

8. The now-former Minister's characterisation of the Bill as merely technical and to 'simply maintain the status quo' is not accurate.[3] The Federal Circuit Court has repeatedly ruled that the port appointment was invalid, not because the appointing instrument failed to include parts of the co-ordinates of the so-called 'port' or because the appointing instrument had some other technical defect, but because it was never legally possible to appoint as a 'port' an area of waters that was never physically capable of being called a 'port'. The consequence of the Federal Circuit Court's reasoning has been confirmed by the Full Federal Court.

9. If it was simply a matter of a drafting defect in the appointing instrument, the former Minister's characterisation of the Bill as merely technical may have been accurate—although that would also mean that clause 3 of the Bill would be unnecessary since a properly-drafted appointing instrument would suffice. Accordingly, the Bill itself undermines the proposition that it is to correct a technicality.

10. The courts have now repeatedly found that the invalidity of the appointment was not because of a mere technicality, but because it was never possible for any instrument, correctly-drafted or otherwise, to declare the waters a 'port'. Ashmore Island has never had any notable infrastructure, let alone infrastructure that could have supported a port.[4] Further, unlike 'ports' that are actually ports, there has never been any stationing of immigration officials on the Island.[5]

11. The effect of the purported appointment was literally to create the legal fiction that certain waters around Ashmore Island constituted a 'port'. The creation and maintenance of such a fiction, including in the Bill, undermines public confidence in the *Migration Act 1958*—whatever normative positions may be taken in relation to immigration policy—and the legislative process more generally.

12. There is no question of the Bill preserving the 'status quo'; the effect of the courts' reasoning is that the port appointment was never and has never been valid. Properly understood, the Bill in fact seeks to achieve the opposite of preserving the status quo. This is confirmed by the Bill's retrospective intent; had it merely been seeking to preserve the status quo, there would be no need for retrospectivity.

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[2] *University of Wollongong v Metwally* (1984) 158 CLR 447, 472.
[3] Commonwealth, *Hansard*, House of Representatives, 20 June 2018, 8 (Peter Dutton, Minister for Home Affairs); Explanatory Memorandum, Migration (Validation of Port Appointment) Bill 2018, 5 [3]; Standing Committee for the Scrutiny of Bills, Scrutiny Digest 8 of 2018, 45.
[4] See eg 'Ashmore Reef Marine National Nature Reserve and Cartier Island Marine Reserve Management Plans' which constitute a legislative instrument (F2007B00982), created pursuant to the *Environmental Protection and Biodiversity Conservation Act 2004* (Cth), s 371.
[5] *DBC16 v Minister for Immigration and Border Protection* [2017] FCCA 1802, [38], [49].

13. Similarly, the now-former Minister advised the Scrutiny of Bills Committee that '[n]o persons will suffer a detriment' if the Bill is passed.[6] This again is not factually correct. The immediate consequence of the Bill being passed is that many persons will have their merits review conducted by the IAA rather than the AAT, and that others will be shut out of AAT review despite their entitlement under current precedent. This means these persons will be subject to the IAA process, being one which has had procedural fairness legislatively removed and one in which new information may be lawfully ignored by the IAA even if such information is highly pertinent to the correct assessment of the person's claims to be a refugee.[7] None of those limitations apply in the AAT.[8] Whatever policy position might be taken in favour or against such a situation, the proposition that the Bill will not create any detriment is objectively incorrect.

The Bill will have unintended consequences, including on Australian citizens

14. The Bill is poorly drafted and will likely create unintended consequences.

15. One of those unintended consequences is the potential for Australian citizens to be put in immigration detention. The reason why this is so is due to the interaction of the provisions in the *Migration Act 1958* concerning 'immigration clearance',[9] and the provisions concerning when a person is subject to mandatory immigration detention.[10]

16. In short, the Bill means that an Australian citizen returning to the country via Ashmore Island would be entering a 'port', and yet be in a position where it would be physically impossible to become 'immigration cleared', because there would be no immigration officers there to clear the citizen. This means the person will be taken to have 'bypassed immigration clearance' despite having no means to become 'immigration cleared'. Under the *Migration Act 1958* as it stands now, the bypassing of immigration clearance is enough to justify the immigration detention of the person—even if the person is a citizen.[11]

17. A similar potential exists for persons holding legitimate visas to enter the country. A visa is a 'permission for the holder to enter Australia … at a port'.[12] However, it will be physically impossible for any visa-holder entering Australia at the 'port' to become 'immigration cleared' for the same reason as above. Accordingly, the person's legitimate visa will be cancelled by operation of the law, even though it was entirely beyond that person's control to avoid 'bypassing immigration clearance'. That person will then be subject to mandatory immigration detention, despite entering the country with a valid visa at a 'port', exactly as he or she was required to do.[13]

[6] Standing Committee for the Scrutiny of Bills, Scrutiny Digest 8 of 2018, 45.
[7] *Migration Act 1958* (Cth), ss 473DA-DD.
[8] *Migration Act 1958* (Cth), s 425; contrast s 423A with 473DD.
[9] *Migration Act 1958* (Cth), ss 189-190.
[10] *Migration Act 1958* (Cth), ss 165-174.
[11] *Migration Act 1958* (Cth), ss 166, 167, 172, 189, 190(1).
[12] *Migration Act 1958* (Cth), s 41(1)(a).
[13] *Migration Act 1958* (Cth), ss 166, 167, 172, 174, 189, 190(1).

There does not appear to have been any consideration of potential impact on international relations

18. Australia is party to an agreement with Indonesia under which Australia recognises Indonesian traditional fishing rights around the Ashmore Islands, including the area which the Bill seeks to make a 'port'.[14] There does not appear to be any analysis in relation to whether the Bill may affect Australia's relations with Indonesia. Prima facie, the *Fisheries Management Act 1991* would mean that traditional foreign fishermen entering the 'port' which the Bill seeks to validate, would be committing an offence, even though they may only be going about their traditional activities.[15] The agreement between Australia and Indonesia appears to suggest that Australia will 'refrain' from enforcing its fisheries laws against traditional Indonesian fishermen but it is a 'memorandum of understanding' with uncertain legal significance, if any, in Australian law. Plainly, any ambiguity in relation to the status of the activities Indonesian nationals is undesirable.

The Bill's constitutional validity may be doubtful

19. It is not immediately obvious that the retrospective nature of the Bill will be constitutionally valid.

20. One source of doubts over the constitutionality of the Bill arises from the consequence that the port validation would seek to render past activities of traditional Indonesian fishermen illegal.[16] Whether retrospectivity is constitutional is not necessarily straightforward. In particular, there is continuing controversy as to whether the rendering of activities retrospectively illegal is constitutional.[17]

21. Plainly, it is undesirable for Parliament to pursue legislation the constitutionality of which is open to doubt, not least of all because implementation of policy should only occur through means which are certain. Otherwise, there would be the potential for erosion of public confidence in the executive government, as well as the potential for later litigation to frustrate the implementation of policy.

Passage of the Bill may come at considerable cost to the taxpayer

22. The Explanatory Memorandum asserts that the Bill has no financial impact. This is not accurate, for several reasons.

23. First, the Scrutiny of Legislation Committee has previously raised the question of fairness in relation to the transitional provision found in clause 5 of the Bill.[18] That Committee specifically asked the now-former Minister to advise in relation to the

[14] *Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia regarding the Operations of Indonesian Traditional Fishermen in areas of the Australian Exclusive Fishing Zone and Continental Shelf*, Australia-Indonesia, signed 7 November 1974.
[15] *Fisheries Management Act 1991* (Cth), s 102.
[16] See [18] above.
[17] A full discourse of why this is so is beyond the scope of these submissions but see eg *The Laws of Australia* (as at 2 September 2018) 9 Criminal Law Principles, '1 The Criminal Laws' [9.1.90].
[18] Standing Committee for the Scrutiny of Bills, Scrutiny Digest 7 of 2018, [1.9].

fairness of potential adverse costs orders that would apply to persons who have instituted court challenges to their visa refusals on the basis of previous legal precedent, but do not obtain judgment prior to any passage of the Bill.

24. The response provided by the Minister, suggesting that it is 'highly unlikely' that such persons would face adverse costs orders, is unconvincing. This is because it fundamentally overlooks the nature of the interlocutory applications that have been brought in the courts based on current legal precedent. Contrary to the Minister's response to the Committee, it cannot be confidently said that in the event of passage of the Bill, adverse costs orders will not be made against persons who have sought relief and would have otherwise been entitled to it. Not least of all, this is because 'costs typically follow the event', and the relevant 'event' would be the applicant failing in his or her application for relief because of it being rendered futile by the passage of the Bill.

25. Further, even if no adverse costs orders are made against persons who might find themselves in this position as a result of any passage of the Bill, those persons are nonetheless likely to have incurred solicitor-own client costs, which would be several thousands of dollars. Those costs would likely have to be borne by them, even though their legal proceedings faced no reasonable prospect of being defeated. However, the analysis does not end there: many persons have brought proceedings with legal aid funding because they are impecunious. Ultimately, the costs associated with pursuing these persons' cases will be borne by the taxpayer.

26. Second, as described above, the pendency of the Bill has created a multiplicity of individual court proceedings in which visa applicants have been challenging the lawfulness of IAA decisions made against them. Where properly brought, the courts have upheld these challenges without exception, and in the process, typically made adverse costs orders against the Minister the value of which is in the order of several thousands of dollars per occasion. In the process of defending these matters, the Minister is likely to have incurred his solicitor-own client costs as well, in excess of costs awarded against him by the courts.

27. It is notable that despite the Scrutiny of Bills Committee's request, the now-former Minister did not provide any information as to the number of people likely to be affected. Together with the cognate refusal of the Department to provide information on the numbers of people affected, the ultimate taxpayer exposure as a result of the pendency of the Bill is not publicly known. Estimates from migration agents and lawyers however, suggest that around 1600 people may be affected. Even if only a fraction of these people bring (or have brought) proceedings of the kind described above, the cost to the taxpayer is substantial.

28. It is important to appreciate that this cumulative cost, as a result of the invalid port appointment, has come about as a direct result of the prospect of the Bill's passage. None of these costs will be recoverable to the Minister and ultimately the Commonwealth, even if the Bill is passed.

29. Third, the latest publicly-available statistics show the rate at which judicial review is sought in relation to IAA decisions is almost double that in relation to AAT decisions.

Judicial review is a costly exercise for the Minister to defend, even if he is ultimately successful. That in turn is ultimately a cost borne by the taxpayer. By keeping people on a 'fast track' merits review process, the taxpayer will be exposed to a 79% chance of an unsuccessful applicant seeking expensive merits review. On the other hand, an applicant who is afforded an AAT review but is unsuccessful will only have a 45% likelihood of seeking judicial review.[19] Again, using the estimate of 1600 above—in the absence of any information from the Department or Minister as to the number of people affected—the cost associated with the increased likelihood of judicial review by keeping people on the IAA process rather than permitting them to have access to AAT review, could be more than $4 million.

30. Accordingly, the suggestion from the Explanatory Memorandum that the Bill has no financial impact is not accurate.

31. The preferable question is not what is the financial impact of the Bill, but rather, what is the financial impact of the invalidity of the appointment, and what remedial option would be the lowest cost to the taxpayer. It is apparent from the above that rejecting the Bill, and instead permitting the affected cohort access to the AAT (as is the natural consequence of what the Full Federal Court has declared) could directly and indirectly save the taxpayer a significant amount of money.

The Bill does not further the policy positions of either the Coalition or the ALP

32. Perhaps most critically, the Bill will not achieve the desired policy outcome.

33. The Coalition's policy in relation to the subject-matter of the Bill is to maintain a limited and 'fast track' system of merits review for the so-called 'legacy caseload' of asylum seekers. The way which the Coalition has previously sought to implement this policy objective is by creating a procedurally-truncated form of merits review for this 'legacy caseload', conducted by the IAA, which was established for that purpose. The Coalition intended that IAA review was to be completed expeditiously, so that the backlog could be quickly reduced.

34. After several years of operation, the IAA review process has turned out to be far from expeditious. The Authority's own benchmark for completing reviews is 6 weeks,[20] but its latest annual report shows that the median time for completing reviews is almost double that, at 11 weeks.[21] The latest published data, from June 2018, shows that the current median time is even worse, at more than 3 times, or over 18 weeks.[22]

35. The Bill seeks to retrospectively validate the port appointment, and by doing so, seek to keep certain applicants in the IAA's 'fast track' process. However, as the IAA's own performance data shows, the process is not 'fast'. Further, as explained above, persons who are put on the IAA pathway are much more likely to seek judicial review,

[19] These percentages are obtained by calculating the number of judicial review proceedings filed as a proportion of all negative decisions, using information from the AAT's 2016-17 annual report.
[20] http://www.iaa.gov.au/IAA/media/IAA/Files/Fact%20Sheets/What-you-need-to-know-about-the-IAA.pdf.
[21] Administrative Appeals Tribunal, 2016-17 Annual Report, 60.
[22] www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2017-18.pdf.

thereby increasing costs and prolonging the stay of the applicant in the country. Accordingly, the Bill does little to further the Coalition's policy objective.

36. The ALP's policy appears to be to seek to abolish the IAA and the associated 'fast track' review process.[23] At the time the legislation setting up the IAA was being debated, Labor expressed its opposition to the 'fast track' process on the basis that, amongst other things, procedural fairness would be explicitly excluded. Indeed, the legislation establishing the IAA has been recognised by the courts as explicitly excluding procedural fairness.[24]

37. If the Bill is passed, only for Labor to later abolish the IAA should it win government, that later abolition would not be of any significance to the applicants whose applications will have already been determined by the IAA. Already, several thousands of applicants have had their cases dealt with by the IAA, including a sizeable proportion of the cohort that would be affected by the Bill. None of these applicants would be assisted by any subsequent abolition of the IAA.

38. Accordingly, the Bill does not further the ALP's policy objective either.

Conclusion

39. Aside from whatever normative or policy views might be held in relation to the Bill's subject matter, the technical deficiencies in the Bill mean it should not be passed.

40. I thank the Committee for the invitation to provide this written submission.

Yours sincerely

Min Guo

[23] See eg Commonwealth, *Hansard*, House of Representatives, 22 October 2014, 11573 (Richard Marles), 11583 (Andrew Giles).
[24] See eg *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475 (special leave refused).