Chapter 1

Introduction

1.1 On 21 August 2018, the Senate referred the Migration (Validation of Port Appointment) Bill 2018 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 10 September 2018.[1] On 10 September 2018, the Senate granted the committee an extension to report by 12 September 2018.[2]

1.2 The bill 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).

1.3 As outlined in the Explanatory Memorandum, the provisions of the bill would:

- clarify the geographical coordinates of the area of waters within the Territory of Ashmore and Cartier Islands specified in the appointment;
- confirm that there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times; and
- confirm the validity of things done under the *Migration Act 1958* (Migration Act), such as actions taken or decisions made which relied directly or indirectly on the terms of the appointment, before the commencement of this Act.[3]

1.4 The bill also clarifies that the proposed Act does not affect certain rights or liabilities.[4] These proposed changes are explained in more detail later in this chapter.

Background and purpose of the bill

1.5 The Appointment, which was gazetted in 2002 by the then Minister for Immigration and Multicultural and Indigenous Affairs, the Hon Phillip Ruddock MP, was designed to ensure that illegal maritime arrivals who entered certain waters of the territory of Ashmore and Cartier Islands, an 'excised offshore place' for the purposes of the Migration Act, would thereby become 'offshore entry persons', now referred to as 'unauthorised maritime arrivals' (UMAs).[5] However, it has since become apparent that the Appointment was not correctly drafted and was missing necessary details to ensure its effectiveness.

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1 *Journals of the Senate*, No. 111, 21 August 2018, p. 3556.

2 *Journals of the Senate*, No. 114, 10 September 2018, p. 3654.

3 Explanatory Memorandum, p. 2.

4 Explanatory Memorandum, p. 4.

5 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *House of Representatives Hansard*, 20 June 2018, p. 8.

1.6 The Appointment was critical to determining the status of persons who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013—that is, deeming them to be UMAs.

1.7 Further, illegal maritime arrivals, who became UMAs by reason of having entered the proclaimed port at Ashmore and Cartier Islands between 13 August 2012 and 1 June 2013[6], also became 'fast-track applicants' under the Act.

1.8 Generally, fast-track applicants are individuals who arrived on or after 13 August 2012 and before 1 January 2014, and are assessed using the Fast Track Assessment process. This process uses a review body called the Immigration Assessment Authority (IAA) that is a separate office within the Administrative Appeals Tribunal.[7]

1.9 The process was introduced in 2014, to assist in processing a backlog of approximately 30,000 cases of individuals who arrived in Australia by boat.

1.10 The Department of Home Affairs' (the department) website explains:

> The Fast Track Assessment process allows protection claims to be assessed efficiently by introducing shorter timeframes for applicants to respond to requests for further information or to respond to adverse information. This means we can make sure our protection visa application process for these asylum seekers is more efficient and effective.[8]

1.11 Under the Fast Track Assessment process, applicants do not have access to a full administrative review by the Migration and Refugee Division of the Administrative Appeals Tribunal.[9]

Challenges to the validity of the Appointment

1.12 The validity of the Appointment made in 2002 has been challenged in the Federal Circuit Court and the Federal Court.

1.13 On 11 July 2018, the Federal Circuit Court (the Court) handed down two decisions regarding the following matters:

- DBC16 v Minister for Immigration and Border Protection & Anor [2018]; and
- DBD16 v Minister for Immigration and Border Protection & Anor [2018]

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6 From 1 June 2013, people who arrived by boat without a visa at any location in Australia—not only at Ashmore and Cartier Islands—were subject to a statutory bar on applying for a visa.

7 Department of Home Affairs, Fast Track Assessment process, https://www.homeaffairs.gov.au/Refugeeandhumanitarian/Pages/assessment-process.aspx (accessed 30 August 2018).

8 Department of Home Affairs, Fast Track Assessment process, https://www.homeaffairs.gov.au/Refugeeandhumanitarian/Pages/assessment-process.aspx (accessed 30 August 2018).

9 Department of Home Affairs, Fast Track Assessment process, https://www.homeaffairs.gov.au/Refugeeandhumanitarian/Pages/assessment-process.aspx (accessed 30 August 2018).

1.14 In both cases, the Court found the 2002 Appointment to be invalid and also found that the applicant in the case is not a UMA:

> (1) A declaration that the purported appointment of a port, as a proclaimed port, an area of waters within the Territory of Ashmore and Cartier Islands by notice published in the Commonwealth of Australia Gazette No GN 3 on 23 January 2002 is invalid.
>
> (2) A declaration that the applicant is not an 'unauthorised maritime arrival' within the meaning of s.5AA of the *Migration Act 1958 (Cth)*.[10]

1.15 Any further challenges to the Appointment may also find that affected persons did not enter Australia at an excised offshore place and are therefore not UMAs under the Migration Act. Further challenges may also find that some affected persons do not qualify as 'fast-track applicants' under the Migration Act.

1.16 In justifying his judgement on DBC16 v Minister for Immigration and Border Protection & Anor [2018], Judge Justin Smith commented:

> These facts clearly establish that the relevant area was not a 'port'. The area was an area of water within a reef. It was, it seems, navigable, but it was not disputed that the area was not, and could not be, used for the transfer of goods or passengers from vessels unless that transfer was to another vessel.
>
> For those reasons, accepting for the present purposes that the Instrument was sufficiently clear to be valid, the area described in the Instrument was not a 'port' within the meaning of the Act. As the Minister only had power to designate a 'port' as a 'proclaimed port', the Instrument was beyond the Minister's power and so was invalid.
>
> As I have explained, the consequence of the invalidity of the Instrument is that the decision of the delegate was not reviewable under pt.7AA of the Act and there has been no notification of that decision. There will be an order for a writ of certiorari quashing the IAA's decision and a declaration as to the lack of notice.[11]

1.17 In summary, the Federal Circuit Court's finding demonstrated that the Appointment is invalid, not due to the missing geographical coordinates, but rather due to the fact that the area set out in the Appointment was not a port, and therefore could not become a proclaimed port.

1.18 This judgement has been interpreted by some critics of the broader policy of offshore detention to mean that asylum seekers may have been denied the right to apply for permanent protection, wider review rights, as well as being unlawfully detained, by the invalid appointment.

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10 DBC16 v Minister for Immigration and Border Protection & Anor [2018], http://classic.austlii.edu.au/au/cases/cth/FCCA/2018/1802.html (accessed 28 August 2018); and DBD16 v Minister for Immigration and Border Protection & Anor [2018], http://classic.austlii.edu.au/au/cases/cth/FCCA/2018/1801.html (accessed 28 August 2018).

11 DBC16 v Minister for Immigration and Border Protection & Anor [2018], http://classic.austlii.edu.au/au/cases/cth/FCCA/2018/1802.html (accessed 29 August 2018).

1.19 Further, on 6 August 2018, the Federal Court ruled the Appointment invalid in the matter DBB16 v Minister for Immigration and Border Protection – NSD354/2017. The Federal Court has not yet published written reasons for its decision.[12]

1.20 The bill is intended to address the risk that further cases might challenge the validity of the Appointment, by confirming it to ensure:

- there was a properly proclaimed port at Ashmore and Cartier Islands at all relevant times;
- things done under the Act (such as actions taken or decisions made) which relied directly or indirectly on the terms of the Appointment are valid and effective.[13]

1.21 In his second reading speech, the Minister for Immigration and Border Protection, the Hon Peter Dutton MP, noted that the bill 'reiterates the government's original intention that the Appointment is, and always has been, valid'.[14]

1.22 No consultation process was conducted for this bill.

Key provisions

Validation of appointment of an area of water within the Territory of Ashmore and Cartier Islands as a port

1.23 Clause 3 of the bill amends the wording of the Appointment. The original Appointment inadvertently omitted a number of specific details relating to the geographical coordinates of the area of waters within the Territory of Ashmore and Cartier Islands. The proposed new Appointment will set out these coordinates as follows:

> [T]he area of waters within the Territory of Ashmore and Cartier Islands commencing at a point on the Mean Low Water (MLW) line closest to Latitude 12 degrees 13.2 minutes South, Longitude 122 degrees 59.0 minutes East, then following the line of MLW in an anticlockwise direction so as to enclose a bay by bridging across islands of MLW at the entrance to the bay to close back to the point of commencement.[15]

1.24 The Explanatory Memorandum stated that this change is consistent with the intention of the original appointment.[16]

12 Department of Home Affairs, *Submission 13*, pp. 3–4.

13 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *House of Representatives Hansard*, 20 June 2018, p. 8.

14 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *House of Representatives Hansard*, 20 June 2018, p. 8.

15 Explanatory Memorandum, p. 3.

16 Explanatory Memorandum, p. 4.

Validation of things done under the Migration Act 1958

1.25 The Explanatory Memorandum sets out that Clause 4 of the bill confirms the validity of things done (such as actions taken or decisions made) under the Migration Act which relied directly or indirectly on the terms of the Appointment, before the commencement of this Act.[17]

1.26 The practical effect of this clause means that a 'thing done' is considered to have been valid and effective and will remain so, despite the proposed change to the Appointment.

The Act does not affect certain rights or liabilities

1.27 The purpose of Clause 5 is to confirm that, upon Royal Assent, the new Act 'will not apply to cases where judgment has been delivered by a court before the commencement of this Act but only if the validity of the appointment was at issue in the proceedings and the judgment set aside the appointment or declared it to be invalid'.[18] It 'preserves any such decision of a court prior to the commencement of the new Act'.[19]

Proposed Amendments to the Bill

1.28 The Department of Home Affairs' written submission to the inquiry indicated that the government intends to move minor amendments to the bill in response to the recent decisions of the Federal Circuit Court and the Federal Court, which declared the Appointment to be invalid:

> 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.[20]

1.29 The proposed amendments to the Bill would address the Federal Circuit Court'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;

17 Explanatory Memorandum, p. 4.

18 Explanatory Memorandum, p. 4.

19 Explanatory Memorandum, p. 4.

20 Department of Home Affairs, *Submission 13*, pp. 3–4.

- removing the reference to a thing done under the Migration Act 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 will not be invalid or ineffective if it relied, directly or indirectly, on the validity of the Appointment generally.[21]

Conduct of the inquiry

1.30 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 30 August 2018. The committee also wrote directly to some individuals and organisations inviting them to make submissions.

1.31 The committee received 16 submissions, which are listed at Appendix 1. All submissions are available in full on the committee's website.

1.32 The committee held public hearings on 3 September 2018 in Melbourne, and on 10 September 2018 in Canberra.

Financial implications

1.33 The Explanatory Memorandum states that the amendments in the bill 'will have no financial impact'.[22]

Legislative scrutiny

1.34 The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) raised concerns regarding the retrospective nature of the bill:

> [I]n seeking to retrospectively validate the 2002 appointment, the bill is apt to adversely affect any person who seeks to challenge an act or decision under the Migration Act on the basis that the impugned action or decision is invalid under the 2002 appointment.[23]

1.35 The Scrutiny of Bills Committee requested clarification from the Minister as to how the bill might affect any persons if the Appointment is retrospectively validated, to which the Minister responded:

> No persons will suffer a detriment if the validity of the Appointment is confirmed by passage of the Bill. Enactment of the Bill will merely 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.[24]

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21 Department of Home Affairs, *Submission 13*, pp. 3–4.

22 Explanatory Memorandum, p. 2.

23 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No.7 of 2018*, p. 2.

24 The Hon. Peter Dutton MP, Minister for Home Affairs and Minister for Immigration and Border Protection, *Response to the Standing Committee for the Scrutiny of Bills*, 19 July 2018, p. 2.

1.36 The comments made by the Scrutiny of Bills Committee in the Scrutiny Digest, as well as the Minister's response, are addressed in Chapter 2 of this report.

Human Rights Compatibility

1.37 According to the Explanatory Memorandum, the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[25] These rights and freedoms include:

- the right to freedom of movement: Article 12(1) of the International Covenant on Civil and Political Rights (ICCPR); and
- Australia's non-refoulement obligations: Articles 6 and 7 of the ICCPR and Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[26]

1.38 In examining the bill, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered that the bill engaged the following human rights: non-refoulement, liberty, fair hearing, not to be expelled without due process, and effective remedy.[27]

1.39 The Human Rights Committee noted that it has previously considered the fast-track applicant process, and believes it to be 'incompatible with Australia's obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture'.[28]

1.40 The Human Rights Committee has requested advice from the Minister on the other matters raised in its report.[29]

1.41 The Human Rights engaged by the bill are discussed in more detail in Chapter 2 of this report.

Structure of this report

1.42 This report consists of two chapters including this introductory chapter.

1.43 Chapter 2 considers issues raised by participants in the inquiry and sets out the committee's views and recommendation.

Acknowledgements

1.44 The committee thanks all organisations and individuals that made submissions to this inquiry, as well as those that gave further evidence at public hearings.

25 Explanatory Memorandum—Attachment A, pp. 5–6.

26 Explanatory Memorandum—Attachment A, p. 6.

27 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, p. 15.

28 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, pp. 18–19.

29 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, pp. 15–22.