Chapter 2

Key issues

2.1 This chapter outlines the key issues raised in written submissions and in evidence provided at the public hearings on 3 and 10 September 2018.

2.2 As explained in Chapter 1, the bill retrospectively confirms the validity of the appointment of a proclaimed port in the territory of Ashmore and Cartier Islands from 23 January 2002.

2.3 The majority of participants in the inquiry opposed the bill, expressing concerns about its retrospective nature. Concerns were also raised regarding the compatibility of the bill with human rights, and its specific impact on those individuals who arrived at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013. The committee also received evidence in relation to potential unintended consequences of the bill.

2.4 However, the Department of Home Affairs (the department) advised the committee that the bill would simply preserve the status quo for individuals who arrived at Ashmore and Cartier Islands, and confirm that they are unauthorised maritime arrivals (UMAs), as had been understood and accepted at the time of their respective arrivals.

2.5 This chapter summarises these competing views, and in turn sets out the committee's views and recommendation.

Retrospectivity

2.6 The Scrutiny of Bills Committee raised concerns regarding the retrospective nature of the bill, commenting that 'such legislation can undermine the rule of law'.[1] A number of inquiry participants indicated that they agreed with the Scrutiny of Bills Committee's assessment.[2] For example, Andrew and Renata Kaldor Centre for International Refugee Law (Kaldor Centre) submitted that:

> …an element of the rule of law is that the law should be accessible and, as far as possible, certain, intelligible, clear and predictable. It is a fundamental rule of law principle that people should be capable of knowing what the law requires of them at any given time, and retrospective legislation undermines this by altering legal rights and obligations with backdated effect.[3]

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

2 See for example:; Refugee Advice and Casework Service, *Submission 3*; Australian Lawyers for Human Rights, *Submission 4*; Asylum Seeker Resource Centre, *Submission 8*; Law Council of Australia, *Submission 10*.

3 Andrew and Renata Kaldor Centre for International Refugee Law, *Submission 9*, p. 2.

2.7 Mr Min Guo, Barrister at The List G Lawyers, emphasised that the 'presumption against retrospectivity' is well-established in the Australian legal system, and further explained:

> 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.[4]

2.8 The Law Council of Australia (LCA) considered that 'there has been insufficient justification for such retrospectivity, when consideration is given to the considerable legal and procedural effects of the proposed measures on the lives of those who have been affected by the 2002 instrument'.[5] The LCA also contended that 'even if only to reflect the original policy intent, the validation of the 2002 Appointment has the potential to undermine the rule of law'.[6]

2.9 In his second reading speech, the Minister noted that the bill 'reiterates the government's original intention that the Appointment is, and always has been, valid'.[7]

2.10 The department acknowledged in evidence to the committee that the bill's effect is retrospective, however also noted that the bill was important for ensuring certainty in Australia's border protection regime:

> In terms of the broader border protection architecture, certainty is absolutely essential. If there's any perception that different elements of the border protection regime can be litigated out of existence and not reaffirmed, if you like, by the parliament, that may have some impact.[8]

2.11 The department also considered that not passing the bill 'would have a negative impact upon the integrity of Australia's migration system and on public confidence in Australia's border protection regime'.[9]

2.12 The department noted that retrospective legislation had been used previously to validate decisions made under the *Migration Act 1958*. The department pointed, in particular, to the *Migration Amendment (Validation of Decisions) Act 2017* (MAVD Act) as an example of similar legislation. The purpose of the MAVD Act is to validate past decisions in the event that a Court were to make a relevant declaration of invalidity. The department also noted that this legislation was introduced in similar

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4 Mr Min Guo, *Submission 15*, pp. 1–2.

5 Ms Carina Ford, Deputy Chair, Migration Law Committee, Law Council of Australia, *Committee Hansard*, 3 September 2018, p. 22.

6 Law Council of Australia, *Submission 10*, p. 4.

7 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.

8 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 10 September 2018, pp. 9–10.

9 Department of Home Affairs, *Submission 13*, p. 5.

circumstances to the bill under inquiry—that is, following litigation in the High Court.[10]

Compatibility with human rights

2.13 As noted in Chapter 1, 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*.[11] These rights and freedoms include:

- 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 (CAT) and Other Cruel, Inhuman or Degrading Treatment or Punishment.[12]

2.14 However, as noted in the previous chapter, the Parliamentary Joint Committee on Human Rights (Human Rights Committee) considered that the bill did engage certain human rights.

Human rights implications of confirming the Appointment

2.15 In its assessment of the bill, the Human Rights Committee set out that the Federal Circuit Court's finding that the Appointment was invalidly made would have a range of consequences:

> Specifically, the effect of the 2002 appointment being invalid may be that persons who entered the area of waters within the Territory of Ashmore and Cartier Islands without a valid visa may not have been correctly classified as 'offshore entry persons' (now UMAs).
>
> The classification of a person as an UMA significantly affects how their rights and obligations under the Migration Act are to be determined and how their applications for a visa may be processed. For example, persons who entered the area of waters within the Territory of Ashmore and Cartier Islands between 13 August 2012 and 1 June 2013 without a valid visa and were classified as UMAs became 'fast track applicants' under the Migration Act. This would have resulted in the 'fast track' process applying to the assessment and review of their claims for refugee status and applications for protection visas.[13]

2.16 The ALHR agreed with this assessment, noting that in classifying a person as a UMA the bill would also 'retrospectively authorise a range of forms of treatment that have consistently been shown to raise serious human rights concerns':

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10 Department of Home Affairs, answers to questions on notice (3 September 2018), received 7 September 2018.

11 Explanatory Memorandum–Attachment A, pp. 5–6.

12 Explanatory Memorandum–Attachment A, p. 6.

13 Parliamentary Joint Committee on Human Rights, *Report 7 of 2018*, p. 17.

> This treatment includes unnecessarily lengthy periods of open-ended detention and liability to be transferred to detention in Nauru or Papua New Guinea. People who are affected by violations of human rights have a legal entitlement to an effective remedy. This right is protected by article 2 of the International Covenant on Civil and Political Rights. By interfering with the ability of affected people to seek legal remedies, the Bill infringes upon this right.[14]

2.17 However, when asked about the bill's engagement of the principle of non-refoulement, Department officials commented that the bill does not directly engage this principle:

> The processes that are used to assess refugee status, the decision-making that goes into that and the actual processes leading up to removal of somebody, obviously, directly engage that principle. But I don't see how the bill itself directly engages that.[15]

Fast-track assessment process

2.18 Submitters also commented specifically on the human rights implications of the fast-track assessment process, noting that some individuals affected by the bill may be (re)classified as fast-track applicants.

2.19 The ALHR argued that the fast-track assessment process falls short of international human rights standards, and highlighted findings of the Human Rights Committee, UN High Commissioner for Refugees and the UN Human Rights Committee in this regard.[16]

2.20 In its submission to the inquiry, the department maintained that the bill complies with Australia's human rights obligations, and does not remove the rights of affected persons to seek protection and have their claims properly assessed:

> All of the persons affected by this Bill have had the opportunity to seek protection and have their claims assessed. The passage of the Bill will not change this.
>
> Enactment of the Bill will 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. The Bill is compatible with human rights and freedoms because it does not engage any obligations under relevant human rights treaties.[17]

2.21 It should also be emphasised that the committee is not inquiring here into the merits or otherwise of the fast-track assessment process.

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14 Australian Lawyers for Human Rights, *Submission 4*, p. 2.

15 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 12.

16 Australian Lawyers Human Rights, *Submission 4*, p. 2.

17 Department of Home Affairs, *Submission 13*, p. 5.

Implications for individuals who arrived at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013

2.22 As noted previously, the bill, if passed, will have implications for those individuals who arrived at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013. These implications stem from the Federal Circuit Court's decisions.

2.23 The Federal Circuit Court's findings in relation to cases DBC16 and DBD16 v Minister for Immigration and Border Protection & Anor [2018], confirmed the 2002 Appointment to be invalid and also found that the applicant in each case is not a UMA.

2.24 An important implication of these findings is that currently, those individuals who arrived at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013 can bring their own cases to the Federal Court or Federal Circuit Court, and, in keeping with the Court's previous findings, would likely be found not to be UMAs. In some cases, these individuals may also be found not to be subject to the fast-track application process.

2.25 Representatives of the ASRC explained that it was their understanding that at the time the affected individuals arrived at Ashmore and Cartier Islands, individuals ought to have been considered to be 'direct entry persons' as opposed to UMAs, and therefore would not have been subject to transfer to offshore processing:

> They would still be technically an unlawful arrival in the sense that they arrived in Australia without a visa, so we're not saying that it magically transforms their status into being lawful boat arrivals, and they would still be subject to the immigration clearance provisions. However, they wouldn't be unauthorised maritime arrivals as defined under the act, which is the trigger for the lawful transfer of persons to offshore processing centres.[18]

2.26 The department confirmed this:

> If the Bill with the proposed amendments is not passed it would mean that individuals who entered Australia via the Territory of Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013 did not enter Australia by sea at an excised offshore place and are therefore not UMAs under the *Migration Act 1958*. For some, it would also mean that they are not fast track applicants under the *Migration Act 1958*. This would have consequences for the way in which affected persons have been processed under the *Migration Act 1958*.[19]

2.27 In evidence to the committee, AHRC explained that the bill could negatively affect this group of individuals in a number of ways:

> First, the bill would affect whether this group was entitled to apply for protection visas when they arrived in Australia. Many in this group were prevented from applying for any kind of protection visa for many years.

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18 Dr Carolyn Graydon, Principal Solicitor, Asylum Seeker Resource Centre, *Committee Hansard*, 3 September 2018, p. 13.

19 Department of Home Affairs, *Submission 13*, p. 5.

> When they were eventually allowed to apply for protection, many were permitted to apply only for temporary protection visas, TPVs, rather than permanent protection visas. Some people might be denied the right to apply for protection at all if this is passed. The second point we make is that many in this group were invalidly taken to regional processing centres offshore. The commission has expressed human rights concerns about regional processing for many years. The bill would retrospectively authorise the act of taking these people to Nauru and Manus Island. Third, people in this group who were allowed to apply for protection in Australia and had their applications refused can access only limited merits review in the Immigration Assessment Authority. Some people may still be waiting for a decision on their protection applications. As the law stands today, these people should be entitled to full merits review in the AAT in respect of any negative decision, and this bill would remove that right. Fourth, if this bill is passed, some in this group who arrived many years ago and are now permanent residents will have a lower processing priority in any family reunion visa application.[20]

2.28 Mr Graeme Edgerton, Deputy General Counsel from AHRC confirmed that it was also AHCR's understanding that these individuals should have been able to apply for a permanent protection visa when they arrived.[21]

2.29 The department acknowledged this:

> Without the Appointment, persons who entered Australia via the Territory of Ashmore and Cartier Islands before 1 June 2013 would not have been determined to be UMAs under the *Migration Act 1958*. Some of these people would also not be fast track applicants under the *Migration Act 1958*. However, the affected persons still entered Australia without a valid visa and therefore were unlawful non-citizens subject to immigration detention.[22]

2.30 However, departmental officials also stressed that whether individuals were assessed by the IAA or the Administrative Appeals Tribunal (AAT), 'it's still a merits review process as determined by the High Court'.[23] Officials further noted that whether an individual's case was assessed by the IAA or AAT would not change their access to protection. Individuals would still be eligible for a temporary protection visa or a safe haven enterprise visa.[24]

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20 Mr Edward Santow, Human Rights Commissioner, Australian Human Rights Commission, *Committee Hansard*, 3 September 2018, p.18.

21 Mr Graeme Edgerton, Deputy General Counsel, Australian Human Rights Commission, *Committee Hansard*, 3 September 2018, p. 20.

22 Department of Home Affairs, *Submission 13*, p. 4.

23 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 8.

24 Ms Miranda Lauman, Assistant Secretary, Humanitarian Program Capability Branch, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 9.

2.31 It might also be noted here that in response to a request for advice from the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee), the Minister explained that the bill does not impose any new obligations or detriment on affected persons:

> Instead, it maintains the status quo in relation to the processing of UMAs and, where relevant, fast track applicants under the Act who entered Australia via this proclaimed port between 23 January 2002 and 1 June 2013.[25]

Number of individuals potentially affected by the bill

2.32 At the public hearing in Melbourne, the committee sought advice in relation to the number of individuals who might be affected by the bill—that is, the number of individuals who passed through Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013, and were subsequently determined to be UMAs. It should be noted here that 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. As such, the validity of the Appointment is not relevant for persons who arrived at Ashmore and Cartier Islands from 1 June 2013 onward.

2.33 The ALHR noted that the group of people who would be affected by the bill is 'finite in number, and comprised of noncitizens who entered Australia by boat via the relevant territory prior to June 2013':

> It is not possible for this group to grow. Opportunities for this closed with the commencement of the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013*. The Bill is therefore concerned with the historical and ongoing legal rights of a limited number of people.[26]

2.34 No witnesses were able to provide an exact figure. However, several organisations, including the department, suggested that approximately 1600 individuals would be affected by the bill.[27] In answers to questions on notice, the department confirmed its estimate that between 1600 and 1800 individuals would be affected by the bill.[28]

2.35 The department put forward that it was likely that 'most, if not all, of the people who entered the relevant waters before 13 August 2012 have already had their

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25 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. 3.

26 Australian Lawyers for Human Rights, *Submission 4*, p. 1.

27 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 3 September 2018, p. 28.

28 Department of Home Affairs, answers to questions on notice (3 September 2018), received 7 September 2018.

protection obligations and asylum applications processed'.[29] This would mean that the majority of individuals who would be affected by the bill are likely to have arrived between 13 August 2012 and 1 June 2013, and may be subject to the fast-track assessment process. The department also advised the committee that it understood no individuals affected by the bill were currently in an offshore processing centre.[30]

Transitional arrangements

2.36 Clause 5 of the bill provides that the new Act 'does not affect rights or liabilities arising between parties to proceedings in which judgement has been delivered by a court before the commencement of this Act'.[31]

2.37 However, the new Act would affect any cases where judgement has not yet been delivered or that are yet to be brought before a court. As such, some submitters suggested that the transitional arrangements proposed in Clause 5 of the bill were unfair to those applicants who have pending cases before the courts. For example, Mr Guo argued the transitional arrangements created an 'unprincipled' distinction between those who have already commenced proceedings, and those who have not:

> We're coming down entirely to when a person files a proceeding and when the court is able to accommodate them. In my submission, that is not a principled way to give some people the benefit of the transition provision and deny it to others.[32]

2.38 RACS recommended that the transitional arrangements be extended to include those who had cases pending at court.[33]

2.39 The Refugee Council of Australia agreed, suggesting that 'the Government should minimise the confusion it has created by protecting the expectations of those who are already midway through the processes of review or decision'.[34]

2.40 RACS recommended that the transitional provisions in the bill should protect people that have filed a case at the MRD to allow the MRD to continue to have jurisdiction to finalise the review.

2.41 However, Mr Bruck from RACS considered that the bill did provide some protections for those people whose cases had been assessed and who had been granted a form of protection visa:

> I think the only appropriate part of this bill is to not retract people's visas where they've already been granted a safe haven enterprise visa for five

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29 Department of Home Affairs, answers to questions on notice (3 September 2018), received 7 September 2018.

30 Mr Ian Deane, Special Counsel, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 4.

31 Explanatory Memorandum, p. 4.

32 Mr Min Guo, *Committee Hansard*, 3 September 2018, p. 5.

33 Refugee Advice and Casework Service, *Submission 3*, p. 3.

34 Refugee Council of Australia, *Submission 11*, p. 3.

> years or a temporary protection visas for three years. Ultimately, those people should have been allowed to apply for permanent protection. We still maintain that that is the most appropriate view. But, in terms of the legal issues, those people should not be removed from their existing granted TPVs and SHEVs.[35]

2.42 The department advised the committee that the bill did not remove the rights of affected individuals to either a merits reviews or a judicial review:

> The Bill, with the proposed amendments, does not remove the rights of individuals who passed through the Territory of Ashmore and Cartier Islands to seek protection, or to have their claims comprehensively assessed on their merits. These individuals have been and will still be able to seek merits review and judicial review.[36]

2.43 In answers to questions on notice, the department also considered that the impact of retrospectively validating the Appointment, in relation to the affected persons, would be:

> …that they would not be able to obtain a court declaration that they are not an unauthorised maritime arrival; if they have been to the IAA they would not be able to obtain a court declaration quashing the IAA's decision for lack of jurisdiction; and they would not be able to seek review by the AAT of a refusal decision (rather, their application will be reviewed by the IAA unless the person is an excluded fast track review applicant).

2.44 Departmental officials also noted that in drafting the bill, consideration was given to 'ensuring that the bill did not impermissibly interfere with judicial power':

> The department's position was that the carve-out that has been included in the bill ensures that that is the case: that there is no impermissible interference with the judicial power. But, in the department's position, that was sufficient in order to ensure that.[37]

Other matters raised

Unintended consequences

2.45 Mr Guo's submission raised a number of concerns about the bill, commenting that it is 'poorly drafted and will likely create unintended consequences'.[38] Mr Guo particularly noted the difficulties that the bill would pose for Australian citizens and legitimate Australian visa holders should they return to Australia through Ashmore Island. He explained:

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35 Mr Simon Bruck, Senior Solicitor, Refugee Advice and Casework Service, *Committee Hansard*, 3 September 2018, p. 12.

36 Department of Home Affairs, *Submission 13*, p. 5.

37 Ms Heimura Ringi, Assistant Secretary, Legislation Branch, Department of Home Affairs, *Committee Hansard*, 10 September 2018, p. 8.

38 Mr Min Guo, *Submission 15*, p. 3.

> 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.[39]

2.46 The department responded to Mr Guo's concerns in written answers to questions on notice. The department commented that the bill would not negatively impact Australian citizens or Australian visa holders. In relation to Australian citizens the Department noted:

> There would be no question of an Australian citizen who complies with immigration clearance requirements at an "on-port" being taken into immigration detention merely because they had entered the waters of the Territory of Ashmore and Cartier Islands at an earlier point.[40]

Committee view

2.47 The committee believes that the protection of Australia's borders is crucial to the integrity of Australia's migration system. In considering the bill, the committee notes that the Appointment made in 2002 was critical to determining the status of persons who entered Australia via the proclaimed port at Ashmore and Cartier Islands between 23 January 2002 and 1 June 2013. These individuals were found to be unauthorised maritime arrivals (UMAs), and some also became fast-track applicants. The bill also validates any action taken or decision made under the Migration Act, which relied on the Appointment.

2.48 The committee is aware of the recent Federal Circuit Court decisions which found the 2002 Appointment to be invalid because of the description of what was a 'port', and that the two applicants were not UMAs. However, the committee considers that the bill reiterates the government's original intention that the Appointment is, and always has been, valid.

2.49 The committee notes the Explanatory Memorandum of the bill, which states that 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*.

2.50 In confirming the validity of the Appointment, the committee is of the view that the law is not imposing new obligations. The purpose of this bill is to ensure the law had the effect it was thought to have at the time, and to maintain the validity of

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39 Mr Min Guo, *Submission 15*, p. 3.

40 Department of Home Affairs, answers to questions on notice (3 September 2018), received 7 September 2018.

actions taken on the basis of what was thought to be the law when the action was taken.

2.51 The committee considers that not passing the bill would have a negative impact on the integrity of Australia's migration system and on public confidence in Australia's border protection regime.

Recommendation 1

2.52 The committee recommends that the bill be passed.

Senator the Hon Ian Macdonald

Chair