

DRAFT SECOND READING SPEECH

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Statutory Appointments (Validation) Bill 2016

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Madam Speaker, during recent work within the Department of Justice to standardise and clarify appointment procedures for statutory officers, it became apparent that over a number of years there may have inadvertently been either the appointment of persons to statutory offices who failed to meet the statutory appointment criteria, or the invalid constitution of Tribunals or Boards.

The problems stem from the replacement of the *Legal Profession Act 1993* with the *Legal Profession Act 2007*, which changed definitions relating to members of the legal profession.

Under the 1993 Act, a “legal practitioner” was defined as “a person admitted and enrolled as a barrister and solicitor under this Act...” and did not require that the person held a practicing certificate.

Under the 2007 Act, the phrase “Australian legal practitioner” is defined as a person entitled to practice: that is, both admitted to the legal profession and in possession of a practicing certificate.

Consequential amendments at the time of the 2007 Act substituted phrases referring to members of the legal profession in many Acts, including in statutes that require persons who are lawyers to be appointed as members of Boards, Tribunals or other statutory offices.

However, since the 2007 Act commenced it has not necessarily been appreciated that the new term “Australian legal practitioner” has brought with it a requirement that the person appointed be in possession of a practising certificate at the time of appointment.

There are common law doctrines, such as the “*de facto* public officer doctrine” that could be relied upon to support any decision made by an invalidly appointed person.

In short, this doctrine basically provides that if a statutory officer acts in a legally recognised role that they and others believe they have been properly appointed to, their exercise of power will remain valid despite any errors or irregularities in their appointment process.

However this doctrine also requires action to be taken to remedy the defect once the problem is known.

The government has therefore decided that the best way to proceed is to draft legislation to retrospectively validate decisions made by Commissioners, Boards or Tribunals notwithstanding that at the time the decision or action was taken there was a defect in the appointment of a

Commissioner or member of a Board or Tribunal or where a Board or Tribunal had been improperly constituted.

As the problems arise from the commencement of the *Legal Profession Act 2007* the retrospective effect of the provision will be to the date of commencement of that Act.

Several Acts already contain provisions to prevent decisions being overturned on the basis of an invalid appointment. Boards or Tribunals created by statutes containing such provisions have not been included in this Bill.

It would take considerable time and resources to review every statutory appointment and any decisions made by any potentially affected person over the nine years since the commencement of the *Legal Profession Act 2007*.

So that this Bill can proceed expeditiously it has been drafted with a “belt and braces” approach, that is that the decision of any statutory office holder whose appointment might be called into question be validated.

The statutory officers, Boards or Tribunals included in the Bill meet three criteria. Firstly the relevant Act requires that a person appointed be an Australian legal practitioner; secondly the statutory officer, either alone or as a member of a Board or Tribunal, has a decision making function; and thirdly the relevant Act does not include a provision validating a decision despite the fact of later discovery of an invalid appointment.

This broad approach is the safest, notwithstanding that most of the statutory officers and members of Boards and Tribunals will have been validly appointed and the Tribunals and Boards validly constituted.

This Bill does not intend to call into question the professionalism or expertise of the statutory officers or members of a Board or Tribunal who have made the decisions that are now potentially invalid.

The potential invalidity arises as the result of a failure to appreciate the effect a change of terminology in one piece of legislation had on other Acts that have been consequentially amended to use that particular phrase. It does not in any way reflect on the valuable work done by the statutory officers, Boards and Tribunals included in the Bill.

The Department of Justice has embarked on a thorough review of statutory appointment criteria to ensure that they are appropriate and reflect the reality of the flexible modern workplace. Any amendments required as a result of this review will be tabled in due course.

Until the review is completed, the Department has taken steps to ensure that all persons appointed to statutory offices comply with the current appointment criteria to guard against any further need for validation.

Madam Speaker, I commend the Bill to the House.