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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee

Global Mobility Immigration Lawyers (GloMo) welcomes the opportunity to comment on the proposed *Migration Amendment (Clarification of Jurisdiction) Bill* 2018 (Cth) *("Clarification of Jurisdiction Bill")*.

Global Mobility Immigration Lawyers

Global Mobility Immigration Lawyers is a firm of immigration lawyers and registered migration agents based in Melbourne. We are committed to giving our clients a voice in their dealings with decision making bodies, and share their concerns in relation to any attempts to frustrate their recourse to such bodies. You can read more about Global Mobility Immigration Lawyers here: https://glomo.com.au/about/

Clarification of Jurisdiction Bill

The *Clarification of Jurisdiction Bill* seeks to amend the *Migration Act* 1958 (Cth) ("*Migration Act*") to clarify that a *purported non-privative clause decision* and a *purported AAT Act migration decision* are *migration decisions* for the purposes of the *Migration Act*.

The Bill is a response to the decision of the full Federal Court in *Minister for Immigration and Border Protection v ARJ17*[1] ("*ARJ17*"), and is aimed at bringing all migration decisions under the same judicial review scheme.

The Federal Court's Decision in ARJ17

The majority in *ARJ17* held that a migration decision does not include a *purported non-privative clause decision*, and thus the Federal Court of Australia had jurisdiction to review the decision in that case.

[1] *Minister for Immigration and Border Protection and Others v ARJ17* [2017] FCAFC 125.

The proceedings were brought by an individual as the representative of a group of persons in immigration detention, arguing that s252 of the *Migration Act* does not allow the confiscation of the mobile phones and SIM cards of persons detained in immigration detention.[2] It was argued by the Minister's immigration lawyers that the Federal Court had no jurisdiction to hear the matter, and that the proper venue was the Federal Circuit Court.[3]

The Full Court of the Federal Court concluded that the jurisdiction of the Federal Court had not been excluded in respect of *purported non-privative clause decisions*, including decisions under s252, and dismissed the appeal. [4]

Use of privative clauses in Australian migration law

The proposed amendments to the *Migration Act*, through the introduction of the *Migration Amendment (Clarification of Jurisdiction) Bill 2018*, should be viewed within the wider context of a creeping limitation on rights of review in the migration law space.

In Australia, privative clauses were first introduced in 2001 as part of 'a package of migration measures.'[5] The *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) ("the Judicial Review Act") repealed and replaced Part 8 of the *Migration Act*[6] and inserted s474.[7] These amendments attempted to exclude privative clause decisions from review by the courts.

In *Plaintiff S157 v Commonwealth* the High Court held that s474 was only valid to the extent that it did not attempt to exclude the original jurisdiction of the High Court. That is, the High Court's jurisdiction to grant relief under s75(v) of the Constitution in relation to a decision that has been infected by jurisdictional error is constitutionally entrenched.[8]

Part 8 of the *Migration Act* was further amended with the introduction of the *Reform Act* which intended 'to stream certain matters either to the Federal Court or the (then) Federal Magistrates Court.'[9]

It was argued on behalf of the Department in *ARJ17* that although these amendments did not alter the substantive content of sections 474(4) and (5),[10] they nevertheless resulted in a change in the meaning of a "decision", to bring *purported privative clause decisions* into the class of decisions that were excluded from review by the Federal Court of Australia.[11] This

[2] *ARJ17* [2017] FCAFC 125, [28].
[3] Ibid, [32].
[4] Ibid, [68].
[5] *ARJ17* [2017] FCAFC 125, [87].
[6] *ARJ17* [2017] FCAFC 125, [87].
[7] *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth).
[8] *ARJ17* [2017] FCAFC 125, per Kerr J, [104].
[9] *ARJ17* [2017] FCAFC 125, [131].
[10] *Migration Act* 1958 (Cth).
[11] Ibid, [145].

argument was not accepted by the Federal Court, and was not supported by the text of the *Migration Act*. [12]

According to the Australian Law Reform Commission ("ALRC"), the chief objection to privative clauses is rooted in our notion 'of a free and democratic society protected by the rule of law.' [13] The ARLC concluded that '[t]o remove or significantly restrict judicial oversight allows governmental power without restriction, and is at odds with Australia's constitutional and Westminster traditions.'[14]

Rights of detainees in immigration detention

It is our submission that consideration should be given to the nature of decisions

that fall within the class of *non-privative clause decisions*. As was highlighted in *ARJ17, non-privative clause decisions* are prone to affect rights and freedoms of detainees in immigration detention.[15]

Ambiguity of jurisdiction

We submit that although the *Clarification of Jurisdiction Bill* is aimed at clarifying the 'uniform judicial review scheme' that 'clearly applies' to migration decisions,[16] it does not lessen the complexity of Part 8 of the *Migration Act*.

The lack of clarity in the *Migration Act* as to which is the appropriate venue to initiate proceedings was raised by the Full Court of the Federal Court in *ARJ17*. The Court commented that the law in this area is 'a morass of confusion'[17] and due to an accretion of changes and amendments, the law had 'become impenetrably dense.'[18]

This complexity is particularly unfortunate in an area of law where litigants are often not in a position to be represented by immigration lawyers, and are themselves equipped with limited English. Even those who have significant legal experience and knowledge can find it difficult to ascertain the jurisdictional issues, as evidenced by the fact that the decision of the Federal Court in *ARJ17* was brought into question by the respondents' immigration lawyers (at first instance).[19]

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[12] Ibid, [151].
[13] Australian Law Reform Commission, above n 5, [18.60].
[14] Australian Law Reform Commission, above n 5, [18.60].
[15] *ARJ17* [2017] FCAFC 125, [25].
[16] Commonwealth, *Parliamentary* Debates, Senate, 14 February 2018 (Mitchell Hawke, Assistant Minister for Home Affairs).
[17] *ARJ17* [2017] FCAFC 125, [38] (Flick J).
[18] Ibid, [177] (Kerr J).
[19] *ARJ17* [2017] FCAFC 125, [38].

It is our submission that the *Clarification of Jurisdiction Bill* does not in fact bring clarity to the jurisdictional issues in Part 8 of the *Migration Act*. In the words of Flick J:

> '*If the Commonwealth Legislature by these provisions is seeking to promote access to justice by a readily comprehensible identification of the Court in which a proceeding should be commenced, it has failed*.'[20]

The numerous changes to the *Migration Act* and successive layers of provisions this has created, particularly by the *Judicial Review Act*, the *Reform Act*, and now the *Clarification of Jurisdiction Bill* presently under consideration, have resulted in a highly complex scheme. We would echo the comments from the Federal Court in *ARJ17* 'whether the existing legislative allocation of jurisdiction between the Courts can be more simply expressed'[21]

In short, we submit that consideration should be given to a simplification of the *Migration Act*.

Alternatives to exclusion from review

We concur with The Administrative Review Council[22] that rather than continuing attempts to exclude migration decisions from judicial review, better mechanisms for relieving the heavy case load in this area would include the provision of legal assistance by immigration lawyers (noting migration agents aka immigration agents are not permitted to provide legal advice) to applicants as well as the introduction of case management solutions to create more streamlined processes. In this respect, there is much to be learned from the models and efficiencies established by community legal centres, for example Refugee Legal and the Asylum Seeker Resource Centre in Melbourne, whose immigration lawyers provide free legal assistance, but whose budgets necessarily limit the number and range of clients they can assist.

Global Mobility Immigration Lawyers thanks the Legal and Constitutional Affairs Legislation Committee for its consideration, and remains at its service in relation to this Inquiry.

Your faithfully

[sent electronically without signature]

Ariel Brott
Accredited Specialist Immigration Lawyer

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[20] Ibid, [52].
[21] *ARJ17* [2017] FCAFC 125, [38] (Flick J).
[22] Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012) [B.60]; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Migration Legislation Amendment (Judicial Review) Bill 1998* (1999), rec 2, [1.70].

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