



**Australian
Human Rights
Commission**

Migration Amendment (Clarification of Jurisdiction) Bill 2018

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE SENATE LEGAL AND
CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (Cth) (Bill) introduced by the Australian Government.

2 Summary

2. This Bill proposes to amend Part 8 of the *Migration Act 1958* (Cth) (Migration Act) which deals with judicial review of migration decisions. Judicial review is the process by which individuals and businesses can challenge the legality of executive action. It is a crucial method of ensuring that decisions by the executive branch of government are accountable and do not exceed the powers that are granted to it by Parliament.
3. This Bill has been introduced in response to the decision of the Full Court of the Federal Court in *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 125 (*MIBP v ARJ17*). While the Bill seeks to address a narrow jurisdictional point decided in that case, it does not respond to the more substantive issues raised by the appeal judges. The appeal judges describe the unnecessary complexity of Part 8 of the Migration Act and the difficulty faced by people affected by migration decisions in seeking to have those decisions reviewed by a court.
4. It is appropriate when complex legislation is being amended to consider whether it could be simplified and made more accessible. Such consideration is necessary here because, as identified by the Full Court of the Federal Court, the complexity of Part 8 of the Migration Act raises significant access to justice issues.
5. In particular, it is not clear to a person seeking review of a migration decision in which court a proceeding should be commenced, or the grounds of review that are available. The primary recommendation of the Commission is that more substantial amendments are required than those contained in the present Bill to provide clarity about these issues.
6. Further, the Commission identifies how Part 8 can be made both clearer and fairer. These recommendations build on recent work done by the Australian Law Reform Commission (ALRC) in its report on the encroachments by Commonwealth laws on traditional rights and freedoms, and earlier work by the then Administrative Review Council (ARC) on federal judicial review. The Commission recommends that the privative clause in s 474 of the Migration Act be repealed and that the grounds of judicial review of migration decisions be aligned with the grounds of review in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).
7. The effect of these changes would be to ensure that applicants seeking judicial review of migration decisions would have substantially the same rights as applicants seeking judicial review of most other Commonwealth administrative decisions.

8. These changes could be made relatively easily while retaining, for the present, other case management requirements in Parts 8, 8A and 8B of the Migration Act that the Department of Home Affairs (Department) has identified as important for efficient processing of high volumes of migration decisions. While the Commission continues to have concerns about some of these requirements, the Commission does not make submissions about them here. A targeted amendment focused on the grounds of review would mean that judicial review of migration decisions could be made fairer without compromising the efficiency of the system. At the same time, the Commission recommends that the Government task an appropriate body to consider how to transition judicial review under the Migration Act to the general statutory review process under the ADJR Act.
9. Finally, the Commission identifies two additional ways in which the overall processing of migration decisions could be made more efficient. A high proportion of migration decisions that are reviewed in the courts are decisions to refuse to grant a person a protection visa. It can be expected that there will be an increase in judicial review of these decisions as the Government processes the applications of the approximately 30,000 asylum seekers described as the 'legacy caseload' who arrived in Australia between 13 August 2012 and 31 December 2013 and who have made applications for protection.
10. As at October 2017, the Department said that it had 16,000 of these applications on hand to work through. The Commission encourages the Department to promptly finalise its primary decisions on the outstanding applications. This will have a significant impact on the overall rate of case resolution because approximately 70% of those processed to date have been granted protection visas.
11. The Commission also recommends that the Government restore funding for legal advice to this cohort. In addition to assisting vulnerable individuals to protect their legal rights, the availability of legal advice leads to better decision making and a more efficient process. This is a cohort of people that should be a high priority for legal funding if they are unable to afford a lawyer themselves because the personal consequences for them of the Government making a wrong decision about a claim for protection from persecution in another country are grave. If a person is wrongly assessed as not being owed protection, they are at risk of return to a situation of persecution.

3 Recommendations

12. The Australian Human Rights Commission makes the following recommendations.

Recommendation 1

The Commission recommends that, at a minimum, Part 8 of the Migration Act be amended to identify clearly, in language that an ordinary member of the community can understand:

- (i) the Court in which a person can seek judicial review of migration decisions; and

- (ii) the grounds on which a person may seek judicial review of migration decisions.

Recommendation 2

The Commission recommends that the privative clause in s 474(1) of the Migration Act be repealed.

Recommendation 3

The Commission recommends that the Migration Act be amended to align the grounds of judicial review of migration decisions with the grounds of review in the ADJR Act.

Recommendation 4

The Commission recommends that the Australian Government task an appropriate body to inquire into how to transition judicial review under the Migration Act to the general statutory review process under the ADJR Act.

Recommendation 5

The Commission encourages the Department of Home Affairs to promptly finalise its primary decisions on the outstanding applications for protection visas from asylum seekers who arrived in Australia by boat between 13 August 2012 and 31 December 2013.

Recommendation 6

The Commission recommends that the Government restore funding for legal advice to asylum seekers in Australia who are:

- dealing with the Department of Home Affairs in relation to an application for a protection visa
- subject to the ‘fast track’ assessment process at the Immigration Assessment Authority, or
- considering judicial review from a decision of the Immigration Assessment Authority.

4 Response to judgment in *MIBP v ARJ17*

13. As noted above, this Bill is a legislative response to the decision of the Full Court of the Federal Court in *MIBP v ARJ17*. The case began as a challenge to a policy of the Department that prohibited the possession of mobile phones and SIM cards in immigration detention. However, the focus of the appeal was on the respective scope of the jurisdiction of the Federal Court of Australia and the Federal Circuit Court of Australia to hear challenges to decisions under the Migration Act.

14. Before turning to the legal issue on the appeal, it is useful to provide some context about how the case came about.

4.1 Factual and procedural background

15. On 21 November 2016, the Commonwealth announced a new policy that would apply to people in immigration detention.¹ The Commonwealth would confiscate all mobile phones and SIM cards in the possession of:
 - a. all persons entering immigration detention from 21 November 2016; and
 - b. all persons already in immigration detention after 19 February 2017.
16. The Detention Services Manual produced by the Department was amended to incorporate this change in policy.²
17. One person affected by the new policy, referred to as SZSZM, commenced proceedings in the Federal Circuit Court seeking: a declaration that the decision reflected in the policy was invalid; and an injunction preventing the implementation of the policy. On 16 February 2017, the Federal Circuit Court granted an interlocutory injunction in favour of SZSZM pending a final hearing; however, the injunction was limited in its scope.³ The injunction applied to prevent the confiscation of the mobile phone of SZSZM but it did not prevent the implementation of the policy more generally.
18. On 19 February 2017, the day before the policy was due to take effect in relation to all people in detention, a person referred to as ARJ17 brought an application in the Federal Court for an urgent injunction that was broader in scope.
19. ARJ17 was also an immigration detainee and brought the application as a representative proceeding under Part IVA of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) on behalf of a group of immigration detainees. The procedure of commencing a representative proceeding on behalf of a class of people is available in the Federal Court but not in the Federal Circuit Court. At the time the representative proceeding was commenced, some of the people in the group had already had their mobile phones and SIM cards taken, while ARJ17 and others anticipated that this would happen on 20 February 2017.⁴
20. In the Federal Court at first instance, Rares J granted an urgent interlocutory injunction on 19 February 2017 restraining the Commonwealth from implementing the policy. Again, this injunction applied only pending a final hearing. The interlocutory injunction prevented the respondents from taking any step to seize mobile phones and SIM cards in the possession of all persons in immigration detention.⁵
21. On 2 March 2017, Rares J heard argument on a preliminary jurisdictional question. The Commonwealth argued that the Federal Court did not have original jurisdiction to hear the application brought by ARJ17. It argued that because of provisions in Part 8 of the Migration Act, an application of this kind could not be brought in the Federal Court but instead should have been

brought in the Federal Circuit Court, where it could only be brought by an individual applicant and not as a representative proceeding.⁶ Justice Rares did not accept that submission and on 17 March 2017 held that the Federal Court did have jurisdiction to hear the application. The Minister's appeal against this decision was dismissed by the Full Court of the Federal Court on 17 August 2017. The reasons for this are summarised in section 4.2 below. It is this appeal judgment that the present Bill seeks to respond to.

22. The application by SZSZM was heard by Smith J in the Federal Circuit Court on 9 March 2017, after the first instance Federal Court hearing in *ARJ17 v MIBP*. Judge Smith accepted additional submissions and took into account the reasons of Rares J on jurisdiction after they were published. Ultimately, Smith J found that the decision to search for and retain mobile phones in accordance with the policy was a valid decision under ss 252 or 273 of the Migration Act and that the Federal Circuit Court had jurisdiction in relation to it. As a result of these findings, his Honour dissolved the interlocutory injunction he had previously made to prevent the confiscation of the mobile phone of SZSZM. The interlocutory injunction granted by Rares J remained in force.
23. The challenges to the mobile phone policy in these two proceedings have yet to be finalised. SZSZM has appealed the decision of Smith J. Justice Rares has reserved a question of law for consideration by the Full Court of the Federal Court that would finally determine the application by ARJ17. These matters were heard together by the Full Court on 28 February 2018. Judgment is reserved.
24. The Australian Government has also taken steps to amend the Migration Act to give the Minister greater powers to prohibit certain things, including mobile phones, in immigration detention. On 13 September 2017 the Government introduced the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017 (Cth). That Bill proposes to insert a new s 251A into the Migration Act which would enable the Minister to determine by legislative instrument things to be prohibited in relation to a person in immigration detention or in relation to an immigration detention facility. The Minister said that 'these things will include ... things that might be a risk to immigration detention facilities such as mobile phones and SIM cards'.⁷ The Senate Legal and Constitutional Affairs Legislation Committee inquired into the provisions of that Bill and reported on 16 November 2017.⁸ The Commission made a submission to that inquiry.⁹ That Bill is currently before the Senate.

4.2 Impact of appeal judgment and proposed response

25. The legal issue considered by the Full Court of the Federal Court in *MIBP v ARJ17* concerned the allocation of jurisdiction between the Federal Court and the Federal Circuit Court as a result of Part 8 of the Migration Act.
26. The Full Court unanimously dismissed the appeal by the Minister and found that the Federal Court had original jurisdiction to review purported non-privative clause decisions. This jurisdiction was not excluded by s 476A of the

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Migration Act. The result of this decision was that the application by ARJ17 could be heard and determined by Rares J in the Federal Court.

27. The effect of the present Bill is to change this outcome to provide that the Federal Court does not have original jurisdiction over decisions of this kind and that they are to be heard first in the Federal Circuit Court.
28. This section of the Commission's submission briefly summarises Part 8 of the Migration Act and the Full Court's reasons for reaching its decision. Before doing so, it is important to acknowledge the difficulty in interpreting Part 8 of the Migration Act. At first instance, Rares J described the provisions in Part 8 of the Migration Act as 'complex'.¹⁰ On appeal, Flick J said that '[t]he jurisdiction entrusted to one or other of these Courts is a morass of confusion'.¹¹ Also on appeal, Kerr J said that the resolution of the case 'requires analysis of some of the less intuitively comprehensible expressions of statutory drafting to be found in Australian law'.¹²
29. As described in more detail in section 5 below, the complex nature of Part 8 raises significant access to justice issues. That is why the Commission has recommended, at a minimum, that Part 8 be redrafted in order to make it clear to a non-lawyer which court they should apply to for judicial review of a migration decision and what grounds of review are available.
 - (a) *Migration decisions*
30. Part 8 of the Migration Act is headed 'Judicial review'. In this context, that means review by a court of certain kinds of legal error in certain kinds of administrative decisions made under the Migration Act and the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act).
31. The kinds of decisions dealt with in Part 8 are described as migration decisions. 'Migration decision' is defined in s 5 as:
 - a. a privative clause decision; or
 - b. a purported privative clause decision; or
 - c. a non-privative clause decision; or
 - d. an AAT Act migration decision.
32. Each of these terms is separately defined. How to distinguish between these kinds of decisions is discussed in paragraphs 42 to 46 below.
33. Significantly, the definition of 'migration decision' does not include a 'purported non-privative clause decision'. The absence of such a reference was the reason why the Minister was unsuccessful in *MIBP v ARJ17*. Such decisions were not governed by the judicial review regime in Part 8 of the Migration Act and could be reviewed by the Federal Court as part of its ordinary jurisdiction under s 39B of the *Judiciary Act 1903* (Cth).

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34. The effect of clause 1 of Schedule 1 to the present Bill is to repeal and substitute the definition of ‘migration decision’ to include ‘a purported non-privative clause decision’ and ‘a purported AAT Act migration decision’. Clauses 2 and 3 define each of these new terms.
- (b) *Relevant court*
35. Part 8 of the Migration Act allocates jurisdiction to various courts to hear particular types of migration decisions.
36. Only the High Court, the Federal Court and the Federal Circuit Court have jurisdiction in relation to migration decisions (s 484).
37. Subject to the exceptions described in s 476, the Federal Circuit Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution (s 476(1)). The Federal Court only has original jurisdiction in relation to a migration decision if one of the criteria in s 476A(1)(a), (b), (c) or (d) is satisfied.
38. There are therefore a number of things to be assessed before deciding where to commence judicial review proceedings in relation to a decision made under the Migration Act, namely:
- a. Is the decision a ‘migration decision’?
 - b. If so, which type of migration decision is it? This requires navigation of some complex provisions in ss 474 and 474A.
 - c. Is the decision one that falls within an exception described in s 476(2)(a), (b), (c) or (d) so that it is not reviewable by the Federal Circuit Court but instead by the Administrative Appeals Tribunal, the Federal Court or the High Court?
 - d. Is the decision one that falls within the limited class described in s 476A(1)(a), (b), (c) or (d) so that it is reviewable by the Federal Court?
39. These are not straightforward questions to answer.
- (c) *Grounds of review*
40. The Migration Act no longer identifies the grounds of judicial review that are available to challenge migration decisions. Section 6.2 of this submission describes the narrowing over time of the available grounds of review for decisions made under the Migration Act.
41. The available grounds of review now depend upon whether or not a decision is a ‘privative clause decision’, a ‘purported privative clause decision’, a ‘non-privative clause decision’ or an ‘AAT Act migration decision’. For present purposes, we will leave decisions under the AAT Act to one side.
42. A ‘non-privative clause decision’ is a decision made under one of the sections of the Migration Act set out in the table in s 474(4) or in regulations made

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under s 474(5).¹³ Other administrative decisions made under the Migration Act are ‘privative clause decisions’.¹⁴

43. Non-privative clause decisions can be reviewed by the Federal Circuit Court using ordinary principles of administrative law under the ADJR Act.¹⁵ Section 5 of the ADJR Act sets out the grounds of review available. On the other hand, privative clause decisions and purported privative clause decisions are excluded from review under the ADJR Act.¹⁶
44. The ‘privative clause’ to which privative clause decisions relate is s 474(1) of the Act. On a plain reading of the section, it appears to say that these decisions are unreviewable. Section 474(1) provides:

A privative clause decision:

 - (a) is final and conclusive; and
 - (b) must not be challenged, appealed against, quashed or called into question in any court; and
 - (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
45. These are strong words but, as the High Court held in *Plaintiff S157/2002 v Commonwealth*, the clause is not effective to prevent the review of decisions ‘purportedly’ made under the Migration Act but that involve either a failure to exercise jurisdiction or an excess of the jurisdiction conferred by the Act.¹⁷ The High Court said that such ‘purported’ decisions were not decisions made under the Migration Act and therefore not ‘privative clause decisions’. The result was that the privative clause remained valid but had a more limited operation than it appeared. It was not possible for the privative clause to prevent review of decisions involving jurisdictional error because the High Court has an entrenched jurisdiction under s 75(v) of the Constitution to grant remedies where there has been jurisdictional error by an officer of the Commonwealth. This constitutional jurisdiction cannot be removed by statute.
46. Following *Plaintiff S157*, the definition of ‘migration decision’ was amended to include a ‘purported privative clause decision’. This was defined, relevantly, as ‘a decision purportedly made ... under [the Migration Act] ... that would be a privative clause decision if there were not: (a) a failure to exercise jurisdiction; or (b) an excess of jurisdiction; in the making of the decision’.¹⁸ This amendment meant that challenges to privative clause decisions on the basis that they involved a jurisdictional error would still fall within the judicial review scheme of Part 8 of the Migration Act. No equivalent amendment was made at the time to include ‘purported non-privative clause decisions’ within the scope of ‘migration decisions’.
47. The effect of *Plaintiff S157* is that, contrary to the ordinary meaning of the words in s 474(1), a privative clause decision can be challenged but the challenge will only be successful if the applicant can demonstrate that the decision maker made a jurisdictional error. The Migration Act does not set out the grounds on which such a challenge would be successful. Instead, applicants are required to rely on a detailed body of case law about the nature

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of 'jurisdictional error'. The Migration Act assumes that a person seeking to challenge a privative clause decision:

- a. knows that s 474(1) does not mean what it says; and
- b. is familiar with the case law about jurisdictional error and can frame their challenge in accordance with the substantial body of decided cases.

48. In the case of unrepresented applicants, it is difficult to justify these assumptions.

(d) *Result of MIBP v ARJ17*

49. In *MIBP v ARJ17*, Flick J on appeal set out seven steps that the applicant would have had to take in order to discover which court to commence proceedings in.¹⁹ Prior to taking any of these steps, an applicant would first have to know that the policy decision to confiscate mobile phones and SIM cards from people in immigration detention was sought to be authorised by the Commonwealth under s 252 of the Migration Act relating to 'searches of persons'. This fact was not contained in the Department's policy announcement. Paraphrasing the judgment, these seven steps were:

- a. a decision made under s 252 is not a privative clause decision (s 474(2)) because it is a decision 'referred to' in the table in s 474(4)
- b. a decision made under s 252 is therefore also not a 'purported privative clause decision' (ss 5(1), 5E and s 474(4))
- c. a decision made under s 252 would be a 'non-privative clause decision' (s 5(1) and s 474(6)) because it is a decision 'mentioned' in s 474(4)
- d. the Federal Court does not have jurisdiction to review a decision made under s 252 because it is not a decision that falls within the limited class described in s 476A(1)(a), (b), (c) or (d)
- e. however, the Federal Court retains jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) in relation to decisions that are not 'migration decisions'
- f. a decision purportedly made under s 252, but that involved either a failure to exercise jurisdiction or an excess of the jurisdiction conferred by the Migration Act, would properly be characterised as a 'purported non-privative clause decision'
- g. a 'purported non-privative clause decision' is not included in the definition of 'migration decision' in s 5 of the Migration Act.

50. The result was that 'non-privative clause decisions' involving jurisdictional error could be reviewed by the Federal Court. The Bill seeks to change this result so that such decisions are reviewed instead by the Federal Circuit Court.

5 Access to justice

51. It is important that laws are clear and are capable of being understood by the people that they apply to. This is a fundamental aspect of the rule of law.²⁰

52. The Attorney-General's Department has provided guidance on reducing the complexity of legislation generally. It says:

Complex legislation can create uncertainties about the law. This can impose unnecessary burdens on business and restrict the ability of those affected by the law to understand their legal rights and obligations. ...

Legislation should be regularly reviewed for readability, usability, ease of administration and policy desirability. This should include testing the legislation for continuing relevance, consistent with the Government's focus on reducing red tape.

A review should be done both as a stand-alone process and when existing legislation is being amended.²¹

53. Given that this Bill seeks to amend Part 8 of the Migration Act, it is appropriate to review whether Part 8 is functioning properly.

54. This Bill is titled the Migration Amendment (Clarification of Jurisdiction) Bill 2018 (Cth). The title is somewhat inapt because, while the Bill seeks to address the narrow issue decided by the Full Court in *MIBP v ARJ17*, it does little to clarify the jurisdictional confusion that Part 8 of the Migration Act engenders in many lawyers experienced in this specific area of legal practice, let alone in non-lawyers who are subject to the operation of the Act.

55. Two of the appeal judges in *MIBP v ARJ17* identified that Part 8, in its current form, created barriers to justice for unrepresented litigants. Although this issue was clearly identified in the judgment, and although both the Second Reading Speech²² and the Explanatory Memorandum²³ for this Bill make clear that the purpose of this Bill is to respond to that judgment, the Bill fails to address this key issue highlighted by two of the judges.

56. Justice Flick said:

To an applicant seeking to invoke the jurisdiction of this Court, especially those not fluent in English, it would be difficult to devise a greater barrier to an informed decision being made as to the selection of the Court with jurisdiction to resolve the claim. ...

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.²⁴

57. Justice Kerr said:

... a number of the key provisions of the Migration Act have become impenetrably dense. Definitions have been built on definitions. Core concepts such as what is meant by a purported privative clause decision defy the understanding of any ordinary reader. I respectfully endorse Flick J's

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concerns regarding the problems that that must present for unrepresented litigants.²⁵

58. Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) provides due process guarantees in relation to legal proceedings. It relevantly provides:

All persons shall be equal before the courts and tribunals. In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

59. The right of access to courts and tribunals and equality before them, is not limited to citizens. The United Nations Human Rights Committee has said that it must also be available to all individuals, regardless of nationality or statelessness who find themselves in the territory of a state and includes asylum seekers and refugees.²⁶ The concept of 'suit at law' encompasses judicial procedures aimed at determining civil rights and obligations as well as equivalent notions in the area of administrative law.²⁷
60. In order to obtain a fair hearing, it is necessary that people are able to understand what remedies are available to them and are able to understand how to access those remedies. In the case of judicial review, two fundamental questions that potential litigants need to have answered are: 'Which court can I apply to for a remedy?' and 'What grounds of review are available to me?'
61. The United Nations Human Rights Council has recognised that:
- Access to administration of justice must effectively be guaranteed ... to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. ... A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated *de jure* or *de facto* runs counter to the guarantee of article 14, paragraph 1, first sentence.²⁸
62. That is, creating unreasonable barriers in obtaining access to justice deprives people of equality before courts and tribunals.
63. Moreover, there are real constitutional limits in how far Parliament may go in creating such barriers. The High Court has affirmed that Parliament can *regulate* access to judicial review, but it cannot go beyond regulation to prevent practical access to the courts. For example, in *Plaintiff S157*, Callinan J said: 'Parliament may ... regulate the procedure by which proceedings for relief under s 75(v) [of the Constitution] may be sought and obtained. But the regulation must be truly that and not in substance a prohibition'.²⁹
64. In the context of a previous provision of the Migration Act that restricted the time within which certain applicants could apply for judicial review, Callinan J took judicial notice of matters that were relevant in considering such restrictions, including 'that the persons seeking the remedies may be incapable of speaking English, and will often be living or detained in places remote from lawyers'.³⁰ These comments are apt also in the present context, because this Bill, and Part 8 of the Migration Act more broadly, present real

practical barriers to affected persons exercising their constitutional right to judicial review.

65. The Commission recommends that, at a minimum, Part 8 of the Migration Act should be amended to clearly identify, in language that an ordinary member of the community can understand: (i) the Court in which a person can seek judicial review of migration decisions; and (ii) the grounds on which a person may seek judicial review of migration decisions.
66. Information on how to improve the clarity of Commonwealth laws has been published by the Office of Parliamentary Counsel³¹ and the Attorney-General's Department.³²
67. Section 6 below sets out the case for more substantive change to judicial review of migration decisions.

Recommendation 1

The Commission recommends that, at a minimum, Part 8 of the Migration Act be amended to identify clearly, in language that an ordinary member of the community can understand:

- (i) the Court in which a person can seek judicial review of migration decisions; and
- (ii) the grounds on which a person may seek judicial review of migration decisions.

6 Judicial Review

68. Beyond the need for increased clarity, there are two more fundamental problems with the judicial review regime in Part 8 of the Migration Act. In recent years, these problems have been highlighted by the ALRC as part of its inquiry into *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*³³ and by the ARC in its inquiry into *Federal Judicial Review in Australia*.³⁴
69. In broad terms, the problems relate to:
 - a. the use of the privative clause in s 474 of the Migration Act; and
 - b. the existence of a separate statutory scheme for judicial review of migration decisions.
70. These problems are interrelated. In amending the Bill to provide the necessary clarity and improve access to justice, it is possible to address these issues in a way that makes the system of judicial review fairer.

6.1 Privative clauses

71. Privative clauses are legislative provisions that purport to restrict or completely preclude judicial review of administrative decisions. These clauses can take a

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variety of forms. As noted above, s 474(1) of the Migration Act provides that if a decision meets the description of a 'privative clause decision' then it:

- (a) is final and conclusive; and
- (b) must not be challenged, appealed against, reviewed, quashed or called into question in any court; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

72. The Attorney-General's Department has identified privative clauses as a 'policy trigger' that engages fair trial and fair hearing rights under article 14 of the ICCPR because they restrict the ability of courts to review administrative decisions.³⁵
73. Privative clauses are problematic for two reasons. First, they contravene the rule of law requirement that laws are clear and intelligible so that those subject to the laws may act consistently with them. Secondly, privative clauses insulate some decisions from being challenged on the grounds of certain kinds of legal error. They inhibit the ability of courts to perform a 'quality control' function to ensure that decisions are not legally flawed. Section 474 of the Migration Act, for example, is aimed at preventing review of migration decisions on all grounds not protected by the Constitution.
74. Despite the wide language of clauses such as s 474, it is not possible for Commonwealth legislation to remove the High Court's entrenched judicial review jurisdiction under s 75(v) of the Constitution to grant remedies against officers of the Commonwealth.
75. As the Australian Government acknowledged when enacting s 474, the section does not mean what it says. The Explanatory Memorandum for the Bill that introduced s 474 said: 'A privative clause is a provision which, although on its face purports to oust all judicial review, in operation, by altering the substantive law, limits review by the courts to certain grounds'.³⁶
76. The Government anticipated that s 474 would not prevent all privative clause decisions from being judicially reviewed, but argued that it would 'enlarge[] the powers of decision-makers so that their decisions are valid so long as they comply with the three *Hickman* provisos'.³⁷ That is, a decision would be valid and unreviewable provided that it was 'a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power'.³⁸ Ultimately, the High Court disagreed with this argument and read down the definition of 'privative clause decision' so that 'a decision ... made ... under this Act' did not include a 'purported' decision that was affected by jurisdictional error.³⁹ While this permitted a broader scope for review than suggested by the Government, it was still limited to the scope of judicial review entrenched in the Constitution.
77. The result is that while most other administrative decisions made by Commonwealth officers can be challenged on the ordinary grounds of administrative law found in s 5 of the ADJR Act, privative clause decisions by

Commonwealth officers under the Migration Act can only be challenged if they involve a jurisdictional error. This is a narrower basis for review.

78. In December 2013, the former Attorney-General, the Hon George Brandis QC, asked the ALRC to review Commonwealth legislation to identify provisions that unjustifiably encroach upon traditional rights, freedoms and privileges.⁴⁰
79. Chapter 15 of the ALRC report dealt with judicial review of administrative action. The primary recommendation of that chapter was that the Australian Government should consider a review of privative clauses in Commonwealth laws.⁴¹ The privative clause in the Migration Act was highlighted for special attention as a law that ‘restricts access to the courts’.⁴²
80. The ALRC noted that access to the courts for the purpose of judicial review is an important common law right.⁴³ Wide-ranging reforms to administrative law in the 1970s included the introduction of the ADJR Act which established a single, simple, procedure for judicial review,⁴⁴ based on long-standing common law principles governing judicial review. However, since that time, a number of Commonwealth laws have been introduced that restrict access to the courts in particular areas. The primary example given by the ALRC of laws that restricted access to the courts was the series of amendments to the Migration Act that had been made since 1992. Of these, the most significant was the insertion of the privative clause in s 474.⁴⁵
81. The problems inherent in privative clauses identified in paragraph 73 above were recognised at the time that the proposed introduction of s 474 was considered by this Committee. In relation to the first problem of clarity, the Senate Legal and Constitutional Affairs Committee said that ‘it may be more appropriate to set out clearly the bounds of reviewability’ rather than ‘adopting a privative clause and in so doing, leaving it to the courts to effectively “reclaim” their jurisdiction by reading down the privative clause’.⁴⁶
82. In relation to the second problem, of more restrictive review grounds, this Committee heard evidence from a range of organisations on the impact that this would likely have. The Refugee Council of Australia said:

Unlike any other area of administrative law, an incorrect decision in refugee determination can, quite literally, cost a refugee his/her life. Surely the checks and safeguards in this jurisdiction should be far more rigorous than in an area where the stakes are far lower.⁴⁷
83. The Commission considers that these are powerful arguments telling against the retention of the privative clause. As part of the clarification process identified in Recommendation 1, the Commission recommends that the privative clause be repealed.

Recommendation 2

The Commission recommends that the privative clause in s 474(1) of the Migration Act be repealed.

6.2 Separate statutory regime for judicial review of migration decisions

84. Administrative law allows individuals and businesses to seek review of decisions made by government. The purposes of administrative law are to enable people to test the legality and merits of decisions that affect them and thereby to improve the quality, efficiency and effectiveness of government decision making generally.⁴⁸ Judicial review, in particular, is about the lawfulness of decisions. As Brennan J said in *Church of Scientology v Woodward*:

Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.⁴⁹

85. The ADJR Act commenced in 1977 and largely codified the common law grounds for judicial review of administrative action. This had significant benefits of clarity and accessibility of judicial review.

86. There have been many changes to the process for making immigration decisions and the process of reviewing those decisions over time.⁵⁰ Before 1994, decisions made under the Migration Act were subject to ordinary administrative law review under the ADJR Act. Since 1994, there has been a separate statutory regime for judicial review of migration decisions.⁵¹

87. Importantly, the regime introduced in Part 8 of the Migration Act narrowed the grounds upon which a decision could be reviewed. This meant that people seeking review of migration decisions had fewer grounds of review available to them than people seeking review of other Commonwealth administrative decisions under the ADJR Act. Migration decisions were protected against certain kinds of legal errors. As the Department (then called the Department of Immigration and Citizenship) put it in 2011:

Historically, separate statutory review regimes were developed by successive governments endeavouring to reduce the grounds of judicial review.⁵²

88. The grounds of review available in 1994 were set out in s 476 of the Migration Act in language similar to the ADJR Act. However, only some of the ADJR Act grounds were included. The Migration Act explicitly provided that the following standard grounds of judicial review contained in the ADJR Act would not be available in reviewing decisions made under the Migration Act:

- a. a breach of the rules of natural justice (although a decision was reviewable if actual bias could be shown)
- b. unreasonableness
- c. taking into account irrelevant considerations
- d. failing to take into account relevant considerations
- e. bad faith.

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89. In 2001, Part 8 of the Migration Act was repealed and replaced with the privative clause regime discussed above. In 2002, the Australian Government amended the Migration Act to exclude the operation of common law rules in relation to procedural fairness.⁵³
90. When the proposal to include the privative clause was being considered, this Committee identified the key underlying assumptions by the Government as being that ‘there is currently a problem in the amount of litigation occurring in relation to migration and refugee applications, which is costing too much, and taking up too much time’.⁵⁴ It was assumed by Government that, if the privative clause was introduced, this would make it harder for applicants to succeed and therefore discourage litigation by them.
91. While the privative clause in s 474 of the Migration Act has made it more difficult to challenge certain migration decisions, it does not appear to have reduced the volume of migration litigation. The significance of decisions about protection visas for the lives of individual applicants provides a strong incentive to seek review of refusal decisions. In circumstances where applicants do not have access to independent legal advice about their prospects of success, this incentive to seek review is likely to remain high even for applicants who do not have strong prospects of success on review. The result has been a reduction in review rights without any demonstrated systemic efficiency benefit.
92. At the time that the privative clause was being debated, a range of bodies — including the ARC and the Law Council of Australia — argued that migration decisions should be subject to ‘full and unfettered judicial review’ under the ADJR Act, combined with a clear power for courts to strike out unmeritorious proceedings at an early stage.⁵⁵ It was argued that this would ensure that migration decisions were subject to the same judicial scrutiny as other administrative decisions, while dealing quickly and efficiently with claims that were obviously lacking in substance. Broad powers to allow federal courts to summarily dismiss migration proceedings (and other proceedings) that had no reasonable prospect of success were introduced in 2005.⁵⁶
93. More recently, the Department has argued in favour of returning to a system where the grounds of review for migration decisions were clearly set out in legislation (rather than relying on a privative clause). In 2011, the Department recognised that it was difficult for people seeking to challenge migration decisions to understand what grounds of review were available. In a submission to the ARC’s inquiry into *Judicial Review in Australia*, the Department said:

A new, clearer statutory system that includes migration litigation could address some stakeholder concerns about the largest part of administrative law litigation being exempt from the Commonwealth standard for administrative law review.⁵⁷

And:

One of the key potential benefits of a new judicial review scheme would be the possibility of assisting clients to better understand the judicial review process

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and assist them to make more informed decisions. ... [S]implified and codified grounds of review may assist this purpose.⁵⁸

94. In this context, the Department considered that the codified grounds of review should be limited to those available under constitutional review for jurisdictional error.⁵⁹ That is, the Department said that it would support a codification of the existing regime.
95. However, the same advantages of clarity and simplicity would be achieved if the grounds of review for migration decisions were aligned with those in the ADJR Act. Further, if the grounds of review under the Migration Act were the same as those under the ADJR Act:
- a. courts would be able to take advantage of a settled body of case law that has been developed under the ADJR Act over many years
 - b. the requirements for valid decision making in migration cases would be made consistent with the rules governing other Commonwealth decision making
 - c. applicants seeking judicial review of migration decisions would have substantially the same rights as applicants seeking judicial review of most other Commonwealth administrative decisions.
96. The then Migration Review Tribunal-Refugee Review Tribunal (MRT-RRT) submitted that the privative clause should be repealed and migration and refugee decision making should be reviewed under the ADJR Act. This is significant because the MRT-RRT was the body whose decisions would be subject to this review, and it was well placed to understand the issues likely to arise in migration decision making. In a submission to the ARC's inquiry in 2011, the MRT-RRT said:
- The decisions which the Tribunals make, although made in a very high volume decision making environment ..., are final decisions which critically affect the lives of individuals and families in Australia and the operations of companies in Australia. ...
- Given the high stakes, it is appropriate that there be a facility for judicial review of Tribunal decisions. Judicial review provides an essential safety net, enabling the correction of legal error which will sometimes occur in such a high volume merits review decision making environment. ...
- [T]he steps taken in the attempt to restrict judicial review have had the result of returning judicial review to the complexity associated with the prerogative writs – a complexity which the reforms introduced by the [ADJR Act] had overcome – ...
- In the Tribunal's view, the time is right for the procedural code relating to the putting of adverse information to the applicant to be abolished, for the privative clause to be repealed and for migration and refugee decision making to be brought back under the umbrella of the ADJR Act.⁶⁰
97. As a result of its review in 2012, the ARC recommended that the long-term objective of the Government should be to bring migration litigation back into a

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general statutory review scheme, such as the ADJR Act.⁶¹ The ARC recognised that, in the short to medium term, any change would involve transaction costs — including the potential for a temporary increase in litigation testing the parameters of the new regime. It appears that the ARC was influenced in this assessment by the potential impact of removing the case management aspects of Parts 8, 8A and 8B of the Migration Act. The Commission considers that, in order to achieve the long-term objective identified by the ARC, it is necessary for some steps to be taken now.

98. The Department had submitted to the ARC that there were a number of procedural advantages of the current system of judicial review that ‘facilitate the efficient handling of migration litigation and ensure the removal of unnecessary delays in the review process’.⁶² These procedural aspects included:
- a. a requirement that first instance judicial review applications are heard in the Federal Circuit Court rather than the Federal Court
 - b. the ability of single judge hearings of appeals from the Federal Circuit Court in the Federal Court
 - c. time limits for the lodgement of applications
 - d. limitations on standing
 - e. a prohibition against class actions
 - f. court powers for summary dismissal
 - g. the requirement for lawyers acting for applicants in migration cases to certify that an application has reasonable prospects of success
 - h. the availability of costs orders against lawyers personally where they have encouraged unmeritorious litigation.⁶³
99. The Commission does not comment in this submission on whether all of these procedural requirements are necessary or appropriate. The Commission provided submissions on many of these issues when they were first proposed.⁶⁴ However, it is clear that the grounds of review for decisions made under the Migration Act could be aligned with the grounds in the ADJR Act as an initial step in the process of reforming judicial review of migration decisions. This would have the benefits of clarity, certainty and consistency identified above, while retaining measures that the Department has identified as being necessary to deal with the high volume of decisions in the migration jurisdiction.
100. The Commission considers that addressing the grounds of review for migration decisions should be the first step in the process identified by the ARC of ‘bringing migration back into the general statutory review scheme’. It is a change that would substantially increase the fairness of the judicial review system without compromising the efficiency of the system. Other changes to process to achieve the long-term objective identified by the ARC should be subject to further inquiry.

Recommendation 3

The Commission recommends that the Migration Act be amended to align the grounds of judicial review of migration decisions with the grounds of review in the ADJR Act.

Recommendation 4

The Commission recommends that the Australian Government task an appropriate body to inquire into how to transition judicial review under the Migration Act to the general statutory review process under the ADJR Act.

7 Additional ways to increase efficiency

101. A common claim by the Government is that the volume and cost of migration litigation is too high and that some applicants seek to take advantage of the system to delay their removal from Australia.⁶⁵ The Department has said that the timely resolution of cases is the key to minimising the risk that the system itself could encourage unmeritorious applications for review.⁶⁶
102. This submission considers two ways to increase the efficiency of migration decision making and the review of those decisions (both merits and judicial review). These increased efficiencies can be achieved while also addressing some of the problems that stem from the current unique system of judicial review under the Migration Act as discussed in earlier sections of this submission.

7.1 Ensure primary decisions are made promptly

103. In order to reduce delays it is important that people are allowed to apply for protection and that primary decisions in relation to these applications are made promptly.
104. A high proportion of migration decisions that are reviewed in the courts relate to applications for protection by asylum seekers. Section 46A of the Migration Act prevents asylum seekers who arrived in Australia by boat from applying for a visa without written authorisation from the Minister. In September 2014, the Government introduced legislation to reintroduce Temporary Protection Visas (TPVs) and establish a new 'fast track' assessment process for review of decisions to refuse the grant of a TPV.⁶⁷ The then Minister said that this new regime was targeted at a cohort of more than 30,000 asylum seekers who had arrived in Australia by boat between 13 August 2012 and 31 December 2013 and had not yet been permitted to apply for protection. The Minister said that, once this legislation was passed, the Government would 'commence processing asylum claims' of this group.⁶⁸ By 25 May 2015, the Minister had 'lifted the bar' under s 46A of the Migration Act for 602 asylum seekers in this cohort and permitted them to make an application for protection.⁶⁹ The Department said that it intended to process the whole caseload of 30,500 people (including both primary assessment and 'fast track' review by the new Immigration Assessment Authority (IAA)) by the end of 2018.⁷⁰

105. It was not until early 2017 that the first step in the process had been completed. In February 2017, the Department said that the Minister had lifted the bar for ‘virtually the whole cohort of 30,000’.⁷¹ By that time, this cohort had been in Australia for up to 4 and a half years. The delay in being permitted to apply for protection has been the single most significant reason to date for the time taken to process the claims of asylum seekers who arrived in Australia by boat after 13 August 2012.
106. On 21 May 2017, the Minister announced that if people in this cohort failed to apply for protection by 1 October 2017, they would again be barred from applying for protection.⁷² By 1 October 2017, only 71 people remaining in the cohort had not lodged an application for protection.⁷³ This represented a substantial completion of the second step in the process. The remaining steps are:
- a. processing of applications by the Department
 - b. referral of visa refusal decisions to the IAA
 - c. judicial review of decisions by the IAA affirming visa refusal decisions.
107. The Department has been processing applications for protection progressively since applications were first permitted in around May 2015. By October 2017, the Department had processed almost half of the initial applications for protection visas.⁷⁴ Approximately 70% of these applications were approved and 30% were refused.⁷⁵
108. Referrals of visa refusal decisions to the IAA commenced in October 2015. By 30 June 2017, 2,928 cases had been referred to the IAA and the IAA had finalised 1,734 of these referrals. The IAA affirmed approximately 82% of decisions by the Department and remitted 17% to the Department to consider again.⁷⁶
109. By 30 June 2017, there had been 1,094 applications to the Federal Circuit Court for judicial review of decisions of the IAA affirming a refusal to grant a protection visa. The Federal Circuit Court had finalised 115 of these judicial review applications. In 25 cases, the matter was remitted to the IAA for reconsideration. In 56 cases either the Minister or the applicant had appealed the decision of the Federal Circuit Court to a higher court.⁷⁷
110. As the ‘legacy caseload’ of around 30,000 asylum seekers is processed, there will be an increase in both the number of IAA decisions and the number of applications for judicial review. The Commission has previously expressed concerns to this Committee about the new ‘fast track’ system of merits review in the IAA.⁷⁸ This submission does not repeat those matters. The Commission expects that a range of issues are likely to be raised by applicants seeking judicial review of decisions by the IAA, including: the scope of the 2014 amendments that sought to narrow Australia’s protection obligations; and whether the application of the fast track process in the circumstances of individual cases provides procedural fairness.⁷⁹

111. It can be seen that the major administrative step still to be taken is for the Department to finalise the processing of protection visa applications. As at October 2017, the Department said that it still had 16,000 applications 'on hand to work through'.⁸⁰ A significant majority of applicants already processed have been found to be entitled to protection. Ensuring that the remaining applications are processed promptly is likely to have the greatest impact in ensuring that these cases are resolved in a timely way.

Recommendation 5

The Commission encourages the Department of Home Affairs to promptly finalise its primary decisions on the outstanding applications for protection visas from asylum seekers who arrived in Australia by boat between 13 August 2012 and 31 December 2013.

7.2 Provide legal assistance to asylum seekers

112. People who are refused protection visas should be able to access free, independent legal advice about the decision and whether or not there are any grounds for review of the decision. The consequences of making a wrong decision about whether to grant a protection visa can be grave. It is vitally important that such decisions are accurate and based on the best available information. The availability of legal advice leads to better decision making and a more efficient process.
113. The Productivity Commission has considered the benefits that flow to both individuals and to society as a whole from the provision of legal assistance to those who cannot afford it. As a matter of principle, the Productivity Commission said that priority in the provision of legal assistance should be given to the most disadvantaged, and that resources should be focused on legal issues that impact significantly on the lives of individuals.⁸¹ While the Productivity Commission did not consider legal assistance in relation to migration law specifically, on each of these measures there are strong arguments for the provision of legal assistance for people applying for protection visas and seeking review of protection visa decisions.
114. Prior to 31 March 2014, the Government provided funding to a panel of migration agents to help asylum seekers in immigration detention and disadvantaged applicants for protection visas in the community with professionally qualified application assistance, including interpreters and attendance at a visa interview.⁸² This program was known as the Immigration Advice and Application Assistance Scheme (IAAAS). IAAAS providers would help their clients complete protection visa applications, liaise with the Department, provide advice on immigration matters, explain the outcomes of applications and provide information and advice on further options available in the event of a refusal decision. IAAAS assistance was also available for merits review of visa refusals. The cost of the scheme was approximately \$25 million per year.
115. On 31 March 2014, the Government announced that it would no longer provide access to the IAAAS for people who arrived in Australia without a visa,

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including unlawful maritime arrivals. The then Minister for Immigration and Border Protection said:

From today people who arrived illegally by boat, as well as illegally by air, will no longer receive taxpayer funded immigration advice and assistance under the [IAAAS]. ... If people choose to violate how Australia chooses to run our refugee and humanitarian programme, they should not presume upon the support and assistance that is provided to those who seek to come the right way.⁸³

116. After IAAAS funding was withdrawn, the Government continued to provide a Primary Application Information Service (PAIS) to ‘a small percentage of protection visa applicants’ who were either unaccompanied minors or assessed as being ‘exceptionally vulnerable’.⁸⁴ In almost all cases, this service was only available to assist with making an initial application to the Department for protection. Only unaccompanied minors under the guardianship of the Minister were entitled to assistance at the merits review stage. No assistance was provided through this scheme for judicial review.

117. Most applicants lodge visa applications without assistance.⁸⁵ The Refugee Advice and Casework Service (RACS) has said:

From our experience with clients who lodged their protection visa applications unrepresented, we can confirm that legal representation makes a significant difference in a decision-maker’s ability to quickly grasp and assess a person’s claims for protection, allowing quicker and less costly decision-making. ...

RACS solicitors currently play a crucial role in early intervention in the refugee jurisdiction. RACS solicitors are able to effectively present an asylum seeker’s claims in the form in which they are most efficiently able to be processed by the Department of Immigration.⁸⁶

118. RACS cites a number of international studies that identify a range of benefits from providing legal assistance to asylum seekers, including:

- a. increased efficiency of immigration proceedings, leading to costs savings for the tribunal and for the government
- b. faster and more sustainable primary decisions, leading to fewer appeals
- c. better expectations management of clients
- d. increased likelihood of complying with hearing requirements
- e. increased compliance of immigration and detention systems with human rights standards
- f. practical help to individuals navigating a complex system.⁸⁷

119. Legal representation also means that applicants with strong review claims are more likely to be able to successfully present their case. At the merits review stage, the last annual report produced by the MRT-RRT (prior to their amalgamation into the AAT in July 2015) showed that represented applicants

were successful in having a decision to refuse a protection visa set aside or remitted in 27% of cases. Unrepresented applicants were successful in only 9% of cases.⁸⁸

120. For the above reasons, the Commission considers that free legal assistance should be provided to asylum seekers to make applications for protection, and to obtain advice about the merits of judicial review of such decisions. For the cohort of people who are subject to the new ‘fast track’ process, virtually all of them have already made applications for protection visas. The real need for legal advice now is in relation to the interaction with the Department for the 16,000 or so applications still to be processed, and for advice about judicial review for those in the broader cohort who are refused protection visas.

Recommendation 6

The Commission recommends that the Government restore funding for legal advice to asylum seekers in Australia who are:

- dealing with the Department of Home Affairs in relation to an application for a protection visa
- subject to the ‘fast track’ process at the Immigration Assessment Authority, or
- considering judicial review from a decision of the Immigration Assessment Authority.

¹ *SZSZM v Minister for Immigration and Border Protection* [2017] FCCA 819 at [2] and [52].

² *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263 at [2].

³ *SZSZM v Minister for Immigration and Border Protection* [2017] FCCA 819 at [5].

⁴ *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263 at [2].

⁵ *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263 at [2]; see also *SZSZM v Minister for Immigration and Border Protection* [2017] FCCA 819 at [6].

⁶ *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263 at [86]. The Commonwealth also argued that if the Federal Court lacked jurisdiction to hear the application, it also lacked jurisdiction under s 32AB(1) of the FCA Act to transfer the application to the Federal Circuit Court: *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263 at [10].

⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 September 2017, p 10,181 (the Hon Peter Dutton, Minister for Immigration and Border Protection, second reading speech for the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fb1ad2176-9f81-43ce-ae76-04b6b025fb43%2F0020%22> (viewed 6 March 2018). See also the note to proposed s 251A in the Bill.

⁸ Senate Legal and Constitutional Affairs Legislation Committee, *Report into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017* (16 November 2017). At

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/ImmigrationDetentionFac/Report (viewed 6 March 2018).

⁹ Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017*. At <https://www.aph.gov.au/DocumentStore.ashx?id=61c0977b-b52e-4aa0-9f6f-dc536474f922&subId=560939> (viewed 6 March 2018).

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- ¹⁰ *ARJ17 v Minister for Immigration and Border Protection* [2017] FCA 263 at [11].
- ¹¹ *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 263 at [38] (Flick J).
- ¹² *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 263 at [86] (Kerr J).
- ¹³ Migration Act, s 474(6).
- ¹⁴ Migration Act, s 474(2).
- ¹⁵ Migration Act, s 476(3).
- ¹⁶ ADJR Act, Sch 1, items (da) and (db).
- ¹⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
- ¹⁸ Migration Act, s 5E.
- ¹⁹ *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 263 at [53] (Flick J).
- ²⁰ Joseph Raz, *The Authority of Law* (2009), pp 214-218 (originally published as 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195); Tom Bingham, *The Rule of Law* (2011), p 37.
- ²¹ Commonwealth, Attorney-General's Department, *Reducing the complexity of legislation*. At <https://www.ag.gov.au/LegalSystem/ReducingTheComplexityOfLegislation/Pages/default.aspx> (viewed 9 March 2018).
- ²² Commonwealth, *Parliamentary Debates*, House of Representatives, 14 February 2018, p 12 (the Hon Alex Hawke MP, Assistant Minister for Home Affairs, second reading speech for the Migration Amendment (Clarification of Jurisdiction) Bill 2018). At <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F39bf6e71-561a-493e-a0e3-ad1c932ff1f4%2F0024%22> (viewed 6 March 2018).
- ²³ Explanatory Memorandum, Migration Amendment (Clarification of Jurisdiction) Bill 2018, p 4 [12].
- ²⁴ *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 263 at [51]-[52] (Flick J).
- ²⁵ *Minister for Immigration and Border Protection v ARJ17* [2017] FCAFC 263 at [177] (Kerr J).
- ²⁶ Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 9. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en (viewed 6 March 2018).
- ²⁷ Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 16. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en (viewed 6 March 2018).
- ²⁸ Human Rights Committee, *General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) para 9. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f32&Lang=en (viewed 6 March 2018).
- ²⁹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [173].
- ³⁰ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [174].
- ³¹ Office of Parliamentary Counsel, *Clearer Commonwealth Law*. At <http://www.opc.gov.au/clearer/index.htm> (viewed 12 March 2018).
- ³² Commonwealth, Attorney-General's Department, *Reducing the complexity of legislation*. At <https://www.ag.gov.au/LegalSystem/ReducingTheComplexityOfLegislation/Pages/default.aspx> (viewed 9 March 2018).
- ³³ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, ALRC Report 129 (2015). At <https://www.alrc.gov.au/publications/freedoms-alrc129> (viewed 9 March 2018).
- ³⁴ Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012). At <https://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo50.aspx> (viewed 9 March 2018).
- ³⁵ Commonwealth, Attorney-General's Department, *Tools for assessing compatibility with Human Rights*. At <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/Pages/assessing-compatibility-tools.aspx> (viewed 12 March 2018).
- ³⁶ Revised Explanatory Memorandum, Migration Legislation Amendment (Judicial Review) Bill 2001 (Cth), p 5.
- ³⁷ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 502 [62] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
- ³⁸ *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615 (Dixon J).
- ³⁹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
- ⁴⁰ Senator the Hon George Brandis QC, Attorney-General, 'New Australian law reform inquiry to focus on freedoms', Media release, 11 December 2013. At

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- <http://pandora.nla.gov.au/pan/21248/20171220-1246/www.attorneygeneral.gov.au/Mediareleases/Pages/2013/Fourth%20quarter/11December2013-NewAustralianLawReformInquiryToFocusOnFreedoms.html> (viewed 9 March 2018).
- 41 Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, ALRC Report 129 (2015), p 414 [15.6]. At <https://www.alrc.gov.au/publications/freedoms-alrc129> (viewed 9 March 2018).
- 42 Ibid, p 424 [15.42]-[15.48].
- 43 Ibid, p 414 [15.7].
- 44 Ibid, pp 416-417 [15.14].
- 45 Ibid, pp 423-425 [15.37], [15.42]-[15.48].
- 46 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment (Judicial Review) Bill 1998*, p 33 [2.48].
- 47 Ibid, p 33 [2.49].
- 48 Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012), p 41 [2.63]. At <https://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo50.aspx> (viewed 9 March 2018).
- 49 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.
- 50 A detailed description of these changes up to 2002 can be found in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at 397-410 (French J).
- 51 *Migration Reform Act 1992* (Cth), the changes introducing Part 8 came into effect on 1 September 1994.
- 52 Department of Immigration and Citizenship, *Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia* (2011), p 2. At [https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20\(DIAC\)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF](https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20(DIAC)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF) (viewed 9 March 2018).
- 53 *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).
- 54 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment (Judicial Review) Bill 1998*, p 5 [1.1].
- 55 Senate Legal and Constitutional Affairs Legislation Committee, *Migration Legislation Amendment (Judicial Review) Bill 1998*, p 43 [3.3].
- 56 *Judiciary Act 1903* (Cth), s 25A; *Federal Court of Australia Act 1976* (Cth), s 31A; *Federal Circuit Court of Australia Act 1999* (Cth), s 17A; each introduced by the *Migration Litigation Reform Act 2005* (Cth).
- 57 Department of Immigration and Citizenship, *Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia* (2011), p 10. At [https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20\(DIAC\)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF](https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20(DIAC)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF) (viewed 9 March 2018).
- 58 Department of Immigration and Citizenship, *Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia* (2011), p 6. At [https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20\(DIAC\)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF](https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20(DIAC)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF) (viewed 9 March 2018).
- 59 Ibid, p 5.
- 60 Migration Review Tribunal-Refugee Review Tribunal, *Submission in response to the Administrative Review Council Consultation Paper on Judicial Review in Australia* (2011). At <https://www.arc.ag.gov.au/Documents/MRT-RRT%20-%20Submission%20to%20ARC%20judicial%20review%20inquiry%20pdf.PDF> (viewed 13 March 2018).
- 61 Administrative Review Council, *Federal Judicial Review in Australia*, Report No. 50 (2012), p 119 [6.19]. At <https://www.arc.ag.gov.au/Publications/Reports/Pages/Reportfiles/ReportNo50.aspx> (viewed 9 March 2018).
- 62 Department of Immigration and Citizenship, *Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia* (2011), pp 9-10. At [https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20\(DIAC\)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF](https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20(DIAC)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF) (viewed 9 March 2018).
- 63 Many of these changes were introduced by the *Migration Litigation Reform Act 2005* (Cth).
- 64 Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration Litigation Reform Bill 2005*. At

- <http://www.humanrights.gov.au/submission-migration-litigation-reform-bill-2005> (viewed 13 March 2018).
- ⁶⁵ See, for example, Explanatory Memorandum to the Migration Litigation Reform Bill 2005, p 1. At <https://www.legislation.gov.au/Details/C2005B00031/Explanatory%20Memorandum/Text> (viewed 14 March 2018).
- ⁶⁶ Department of Immigration and Citizenship, *Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia* (2011), p 9. At [https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20\(DIAC\)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF](https://www.arc.ag.gov.au/Documents/Department%20of%20Immigration%20and%20Citizenship%20(DIAC)%20-%20Submission%20to%20ARC%20Judicial%20Review%20inquiry%20-%202011%20-.PDF) (viewed 9 March 2018).
- ⁶⁷ Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).
- ⁶⁸ The Hon Scott Morrison MP, Minister for Immigration and Border Protection, 'Restoring TPVs to resolve labor's legacy caseload', Media release 25 September 2014. At <http://pandora.nla.gov.au/pan/143035/20141222-1032/www.minister.immi.gov.au/media/sm/2014/sm218127.htm> (viewed 15 March 2018).
- ⁶⁹ Senate Legal and Constitutional Affairs Legislation Committee, Estimates, *Official Committee Hansard*, 25 May 2015, p 66 (Mr Michael Manthorpe PSM, Deputy Secretary, Visa and Citizenship Management). At http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee%202015%2005%2025%203493%20Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/0000%22 (viewed 15 March 2018).
- ⁷⁰ *Ibid.*
- ⁷¹ Senate Legal and Constitutional Affairs Legislation Committee, Estimates, *Official Committee Hansard*, 27 February 2017, p 105 (Mr Michael Manthorpe PSM, Deputy Secretary, Visa and Citizenship Services). At http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/ac9b833f-cd57-4b33-9926-9b4e27fe5733/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee%202017%2002%2027%204792%20Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/ac9b833f-cd57-4b33-9926-9b4e27fe5733/0000%22 (viewed 15 March 2018).
- ⁷² The Hon Peter Dutton MP, Minister for Immigration and Border Protection, 'Lodge or leave – Deadline for illegal maritime arrivals to claim protection', *Media release*, 21 May 2017. At <http://minister.homeaffairs.gov.au/peterdutton/2017/Pages/deadline-for-illegal-maritime-arrivals-to-claim-protection.aspx> (viewed 15 March 2018).
- ⁷³ The Hon Peter Dutton MP, Minister for Immigration and Border Protection, Interview with Ray Hadley, Radio 2GB-4BC, 12 October 2017. At <http://minister.homeaffairs.gov.au/peterdutton/Pages/hadley.aspx> (viewed 15 March 2018).
- ⁷⁴ Senate Legal and Constitutional Affairs Legislation Committee, Estimates, *Official Committee Hansard*, 23 October 2017, p 195 (Ms Malisa Golightly PSM, Deputy Secretary, Visa and Citizenship Services). At http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/3a32f9b8-b53d-4251-a739-7e12e1fc506e/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee%202017%2010%2023%205658%20Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/3a32f9b8-b53d-4251-a739-7e12e1fc506e/0001%22 (viewed 15 March 2018).
- ⁷⁵ *Ibid.*, p 196.
- ⁷⁶ Administrative Appeals Tribunal, *Annual Report 2016-17*, pp 59-60. At <http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-Annual-Report-2016-17.pdf> (viewed 15 March 2018).
- ⁷⁷ Administrative Appeals Tribunal, *Annual Report 2016-17*, p 60. At <http://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201617/AAT-Annual-Report-2016-17.pdf> (viewed 15 March 2018).
- ⁷⁸ Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, pp 24-29 [111]-[140]. At <http://www.humanrights.gov.au/submissions/migration-and-maritime-powers-legislation-amendment-resolving-asylum-legacy-caseload> (viewed 20 March 2018).
- ⁷⁹ *Ibid.*, pp 11-17 [35]-[68]; pp 24-29 [111]-[140].
- ⁸⁰ Senate Legal and Constitutional Affairs Legislation Committee, Estimates, *Official Committee Hansard*, 23 October 2017, p 195 (Ms Malisa Golightly PSM, Deputy Secretary, Visa and Citizenship Services). At

Australian Human Rights Commission
Migration Amendment (Clarification of Jurisdiction) Bill 2018, Senate Inquiry – April 2018

- http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/3a32f9b8-b53d-4251-a739-7e12e1fc506e/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2017_10_23_5658_Official.pdf;fileType=application%2Fpdf#search=%22committees/estimate/3a32f9b8-b53d-4251-a739-7e12e1fc506e/0001%22 (viewed 15 March 2018).
- ⁸¹ Productivity Commission, *Access to Justice Arrangements*, Report No. 72 (2014), pp 720 and 723. At <https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume2.pdf> (viewed 14 March 2018).
- ⁸² Department of Immigration and Citizenship, *Annual Report 2011-12*, p 121; Department of Immigration and Citizenship, *Annual Report 2012-13*, p 116.
- ⁸³ The Hon Scott Morrison MP, Minister for Immigration and Border Protection, Media Release, 'End of taxpayer funded immigration advice to illegal boat arrivals saves \$100 million' (31 March 2014). At <http://pandora.nla.gov.au/pan/143035/20140402-1303/www.minister.immi.gov.au/media/sm/2014/sm213047.htm> (viewed 15 March 2018).
- ⁸⁴ Australian Government, Department of Immigration and Border Protection, The Primary Application Information Service (May 2016). At <https://www.asrc.org.au/wp-content/uploads/2013/07/PAIS-Fact-Sheet-May-2016.pdf> (viewed on the website of the Asylum Seeker Resource Centre on 14 March 2018)
- ⁸⁵ Australian Government, Department of Immigration and Border Protection, 'Fact sheet - Immigration Advice and Application Assistance Scheme (IAAAS)' (March 2014). At <https://www.homeaffairs.gov.au/about/corporate/information/fact-sheets/63advice#> (viewed 14 March 2018).
- ⁸⁶ Refugee Advice and Casework Service, Submission to the Productivity Commission inquiry into Access to Justice Arrangements, 4 November 2013, pp 6 and 8. At <https://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub047-access-justice.pdf> (viewed 14 March 2018).
- ⁸⁷ Refugee Advice and Casework Service, Submission to the Productivity Commission inquiry into Access to Justice Arrangements, 4 November 2013, p 9. At <https://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test/submission-counter/sub047-access-justice.pdf> (viewed 14 March 2018).
- ⁸⁸ Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2014-15*, p 22. At <http://www.aat.gov.au/aat/files/MRDAnnualReports/MRTRRTAR201415.pdf> (viewed 14 March 2018).