

Dissenting report from Labor Senators

Impeding scrutiny and review

1.1 The current Chief Justice of the Federal Court has said that the 'importance and effect' of the Federal Court's original jurisdiction is 'difficult to overstate'.¹ There is no need to clarify that jurisdiction—clarity was achieved by the decision in *ARJ17 v Minister for Immigration and Border Protection* [2017] 250 FCR 474 (ARJ17), the very decision this Bill now seeks to overturn.

1.2 While the Bill purports to 'clarify' jurisdiction, its true effect is to deny jurisdiction and to further inoculate important government decisions from scrutiny and review by the Federal Court.

1.3 ARJ17 confirmed that the Federal Court of Australia currently has jurisdiction to hear challenges to decisions described in s 474(4) of the Migration Act. Those are decisions relating to, for example, searches of people in detention, seizure of their items and the operation of detention centres generally. The Federal Court emphasised that the kinds of decisions which can be challenged directly in the Federal Court are those 'likely to affect the rights and freedoms of detainees'. The primary effect of this Bill is to remove the Federal Court's jurisdiction to deal with these important matters.

Denying representative claims and forcing people back to the Federal Circuit Court

1.4 There are a number of reasons why it is desirable for challenges to decisions affecting the rights and freedoms of people in detention to be able to be commenced in the Federal Court.

1.5 The Federal Court, unlike the Federal Circuit Court, allows for representative proceedings in which one person can bring a claim on behalf of many others. Representative proceedings are essential to access to justice. They help ensure that the result of a single case can have the necessary and appropriate systemic effect without requiring each and every person affected by an unlawful decision to bring a separate case. The Federal Circuit Court, however, does not have jurisdiction to hear representative actions.

1.6 The Federal Court is also a superior court of record. Federal Court judges are, outside the High Court, the most senior judges in the federal judicial system. A decision of the Federal Court speaks with a louder voice than a decision of the Federal Circuit Court. It is more likely to prompt government to correct decisions and practices that are unlawful and beyond power.

1 J. Allsop, 'An Introduction to the Jurisdiction of the Federal Court of Australia' [2007] *FedJSchol* 15, p. 10.

1.7 The diversion of cases to the Federal Circuit Court also adds an extra layer of decision-making, because the next layer of appeal from the Federal Circuit Court is the Federal Court. This will prolong cases, increase costs to the government and exacerbate the already notorious backlog of cases in the Federal Circuit Court.

Recommendation 1

1.8 Labor Senators recommend that the bill not be passed.

Senator Louise Pratt

Senator for Western Australia