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TABLE OF CONTENTS

GETTING ON BOARD ABOVEBOARD

In May 2007 a small team of undergraduate and postgraduate students at the Australian National University in Canberra facilitated the inaugural AboveBoard Public Accountability Forum. The event featured an expert panel of Government officials, Parliamentarians, journalists and academics discussing the ambit of accountability within these broad topics:

- Law enforcement;
- Administrative review;
- Defence and security;
- Ministerial and parliamentary; and
- International affairs.

The Commonwealth Ombudsman and then Acting Commissioner of the Australian Commission for Law Enforcement Integrity (ACLEI), Professor John McMillan, delivered the keynote address entitled 'Accountability of Government', the full text of which may be viewed at: http://www.ombudsman.gov.au/commonwealth/publish.nsf/Content/speeches_20 07_02.

Following the Ombudsman's address, the attendees, being approximately 60 students, broke out into small groups of 10-12 to concentrate on one of the abovementioned topics, guided by two of the most relevant experts. We are planning to host the event again in May this year and other participants are invited.

Law undergraduates or recent graduates are invited to attend the event which will take place between on Saturday 12 May at the John Curtin School of Medical Research at ANU, comprising of several guest speakers, followed by the panel discussions and small group analysis. National security and Ministerial responsibility will remain prominently on the agenda, with an added focus area of environmental accountability and climate change, and the organisers are open to other suggestions.

For more information contact Matt Stevens, ph 0403 757 151:
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PROCEDURAL FAIRNESS – ITS SCOPE AND PRACTICAL APPLICATION

Dr Kristina Stern*

Introduction

The requirements of procedural fairness, or natural justice (in this paper I use the terms interchangeably), have recently been likened to a last meal before the hanging (Prof John McMillan - *Natural Justice – Too Much, Too Little or Just Right?* delivered at the AIAL 2007 Forum. They do not affect the substance of a decision, but they can have a significant impact on matters of substance and policy in requiring time consuming, expensive, and sometimes simply impracticable, steps to be taken prior to the taking of (sometimes only preliminary) administrative decisions. There is little point, for example, in introducing summary procedures for resolving certain matters, if such procedures will, to be lawful, have to incorporate elaborate procedural mechanisms for disclosure, hearings, and the giving of reasons.

Australian courts have in recent years increasingly granted relief in judicial review claims based upon a breach of the requirements of procedural fairness. This development stands in stark contrast to the repeated reiterations of the limits of the scope of judicial review of administrative action, and of the reluctance of Australian courts to usurp the role of the executive, thereby expanding the rule of law. Indeed, unusually, one sees repeated criticisms of the expanding notion of procedural fairness in academic commentaries, on the basis that courts have become too formulaic and rigid in their adherence to precepts of procedural fairness (see, for example, David Bennett AO QC, *Is Natural Justice becoming more rigid than Traditional Justice AIAL, 3rd National Lecture Series 2006)*, rather than focussing upon the justice of the individual case, set against the background of the relevant statutory, administrative, or governmental framework.

In large measure the increasing focus upon procedural fairness can be explained by reference to the constraints preventing Australian courts from trespassing in any way upon the merits of administrative decision-making. Where, in such circumstances, the court feels a concern about a particular decision, there is some attraction in instead granting relief based upon a ground which, by definition, does not trespass upon the merits of a particular decision. For this reason, no case should ever be relied upon as establishing a 'principle' of procedural fairness without ensuring that this reliance is accompanied by proper recognition of the precise factual and legislative context in which it arose. Many procedural fairness cases are properly understood only with a recognition that the court clearly felt that something really had gone wrong which required judicial intervention.

Further, whilst to some extent constrained in the bases upon which relief can be granted by reference to more substantive bases for seeking judicial review,[1] courts have no similar constraint as regards the ground of procedural fairness. It therefore permits of a flexibility of interpretation denied in other administrative law contexts.

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These two matters probably explain the main thesis of this paper, that there is relatively little principled analysis available of the nature, scope or function of the rules of procedural fairness. Advocates and courts are required in many cases simply to fall back on an intuitive assessment that something was, or was not, fair. This, however, leads to the danger of claims succeeding where, on a true construction, the complaint is one of substantive and not procedural fairness, and to the further danger of impermissibly broadening the scope of the principle, leaving it somewhat amorphous and undefined. The conclusion 'it was not fair' becomes also the process of reasoning.

For this reason, in order properly to understand the practical application of the requirements of procedural fairness it is necessary to go back to the cases which establish the fundamental principles upon which this ground for seeking relief is based, and to understand the proper scope and purposes of those principles. Such analysis reveals the fallacy of treating procedural fairness as giving rise to a blanket entitlement to all persons to make representations in advance of all decisions which they regard as adverse. Rather, the entitlement to be heard properly understood is a very focussed and specific entitlement, which relates to particular aspects of particular decisions and only in particular circumstances.

Further, it is vital to guard against an unquestioning assumption that there is a right to be heard as to every adverse decision and that that includes a right to make submissions or present evidence or an account of events prior to the decision being made. Any such assumption ignores the many subtleties which appear from a careful reading of the primary cases from which the principles of natural justice, as currently applied, derive. It also ignores:

(a) the many layers of decision-making which may arise before a final administrative decision is taken;

(b) the variety of factors which may be at play in any particular administrative decision; and

(c) the focus upon actual, practical, unfairness.

In seeking to address this topic I propose first to consider how procedural fairness has been defined, then consider the leading cases on the topic, I identify the guiding principles in the application of the principle, and then consider some examples in a variety of different contexts.

Definition of procedural fairness

The fundamental requirements of procedural fairness are that there should be a fair hearing, and it the decision- maker should be free from bias. I consider only the former in this paper. Fleshing out these requirements somewhat, *Professor S A de Smith, Judicial Review of Administrative Action, 2nd ed.,* 180-181 has stated

> Natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed, so that they may be in a position: (a) to make representations on their own behalf; or (b) to appear at a hearing or inquiry (if one is to be held); and (c) effectively to prepare their own case and to answer the case (if any) they have to meet.

This definition identifies:

(a) that natural justice only applies to persons who are directly affected by proposed administrative acts – that, obviously begs the question of what is meant by direct or affected, and what is an administrative act;

(b) such persons must be given adequate notice of what is proposed – but it is not clear what amounts to adequate notice, and whether or not this also comprehends the reasons why something is proposed; and

(c) the purpose of the imposition of any rules of natural justice is to enable someone to attend, represent, prepare and present their case.

Leading cases

The leading cases on procedural fairness establish a basic framework against which individual claims can be tested. Indeed, between a number of leading cases, it is possible to identify a blueprint against which the later cases can be explained.

Leading UK cases

The birth of the modern notion of procedural fairness/natural justice can probably be traced to the speeches of the House of Lords in *Ridge v Baldwin*[2]. Their Lordships held that the rules of natural justice applied to the dismissal of a police constable for misconduct by a watch committee. In that case and the following principles emerge from it:

(a) Attention must be given to the great difference between the various kinds of case in which it is sought to apply the principles of natural justice (Lord Reid at p 64).

(b) It is very doubtful whether the argument that 'it could have made no difference' could be used as an excuse for not complying with the rules of natural justice (Lord Reid at p 68).

(c) The rules of natural justice may apply differently to ministerial or departmental decisions because in respect of some ministerial decisions the primary focus of the Minister will be with the public interest and not with the damage to an individual's interest, and because a Minister has to rely upon departmental information gathering and 'no individual can complain if the ordinary accepted methods of carrying on public business do not give him as good protection as would be given by the principles of natural justice in a different kind of case ' (Lord Reid at p 72).

In three further seminal English cases the requirements of natural justice have been further considered.

In *Wiseman v. Borneman* [3] in which it was held that compliance with the statutory procedure of enabling the taxpayer to put material before the Commissioner but not to see material provided to the Commissioner in response was fair where the determination was of a prima facie case. Their Lordships held:

(a) It is not possible to reduce natural justice to a series of rules, rather, the question was whether in the particular circumstances of this case the tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded (Lord Morris at p 309).

(b) An important consideration in this question was the limited nature of the task of the tribunal, namely to decide whether or not a prima facie case existed, although it must also be recognised that even that decision had practical adverse consequences (Lord Morris at p 309).

(c) Whilst legislation should not be read as absolving the tribunal from the obligations of fairness, ' it is, I think, a positive consideration that Parliament has indicated what it is

that the tribunal must do and has set out' a prescribed procedure to that end (Lord Morris at p 310).

(d) Before additional power are to be implied it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the purpose of the legislation (Lord Reid at p 308).

In *Re Pergamon Press Ltd*[4], the Court of Appeal considered the application of principles of procedural fairness to inspectors operating under the Companies Act seeking evidence from company directors. The background to the concern of Pergamon Press was that they were concerned that any interim report by the inspectors may be used against it in American litigation arising out of the same matter. The directors of Pergamon Press sought assurances that before any report would be written they would be given the opportunity to read the transcripts of evidence, meet any allegations by oral evidence and make written submissions. The inspectors agreed that they would be told the substance of any allegations against them and be able to make submissions, but would not agree that they could read the transcript. Lord Denning MR held that the rules of natural justice applied to the work of the inspectors because:

> They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, and be used itself as material for the winding up: *see In re S.B.A. Properties Ltd.* [1967] 1 W.L.R. 799. Even before the inspectors make their report, they may inform the Board of Trade of facts which tend to show that an offence has been committed: see section 41 of the Act of 1967. When they do make their report, the Board are bound to send a copy of it to the company; and the board may, in their discretion, publish it, if they think fit, to the public at large.

(e) However, there was no breach on the facts as it was sufficient to give the directors an outline of the charge for comment.

In *R v Panel on Take-Overs and Mergers, ex parte Guinness PLC* [5] the English Court of Appeal held that there was no unfairness in a refusal of an adjournment in the context of an inquiry by the Panel on Take-Overs and Mergers. Lord Donaldson confirmed that natural justice was not to be tested by reference to a *Wednesbury* test, but rather by the Court's view of the general situation, and that the test for intervention was whether or not something had gone wrong of a nature and degree which required the intervention of the Court (at p178). The context included the nature of the powers of the Panel and the conduct of Guinness leading up to the hearing.

Australian leading cases

One of the earlier cases to consider the application of the rules of natural justice is *FAI v Winneke*[6] which concerned a decision whether or not to renew an approval of an insurer for the purposes of the *Workers Compensation Act 1958* (Vic). The High Court held that company that would be affected by a refusal to grant a renewal of an approval should be given an opportunity to be heard before a decision is made unless that rule is excluded by statute (at p 348). Elaborating upon why that was so, Mason J held as follows:

(a) The fundamental rule is that a statutory authority having power to affect the rights, interests or privileges, or legitimate expectations of a person is bound to hear him before exercising a power (at p 360).

(b) This would cover the revocation of a licence where this affects the right to carry on a financially rewarding activity, although it may not apply in the circumstances of an initial grant of a licence as in such circumstances, the issues are not clearly defined, they often involve policy issues, and they do not often generate allegations of past misconduct (at pp 360-361). Aickin J similarly held that it required most unusual circumstances to warrant the view that upon an initial application for a licence which is not one which the relevant authority must issue as of course there is a duty to provide a hearing (at p 377).

(c) An applicant for renewal generally has a legitimate expectation that his licence will be renewed when the statutory power is entrusted to a statutory authority (at p 362).

(d) His finding that in this case there was a right to be heard was based upon his assessment of what had been the central questions in the decision not to renew, ie whether the applicant was a fit and proper person (at p 369).

The judgment of Gibbs J also supports a qualified principle, which has regard to the circumstances of the case. Thus, at p 349, he states that it was not necessary for him to decide whether, if a refusal of a renewal was based purely on grounds of policy, fairness would require that the company affected be given an opportunity to be heard.

Aickin J gave more substance to the nature of the distinction to be drawn between an initial application and a renewal. For him it was the presence of the legitimate expectation of the applicant that the licence would be renewed absent any disqualifying circumstance.

The Court was clear that if the rules of natural justice applied, the nature of the hearing to which a person affected is entitled must always depend upon the circumstances of the case (at p 359). Aickin J listed relevant factors as the nature of the activity for which a licence was required, the nature of the authority, the nature of the applicant's conduct, and the nature of any complaints relied upon (at p 378).

Brennan J's description of the rules of natural justice is indicative of his particular view that they arise from statutory implication, based upon an inference of legislative intention that the principles of natural justice should apply, rather than as a matter of common law (at pp 407-8). In his view, legislative intention is the foundation upon which a requirement to apply the principles of natural justice rests (at p 409). Critically, therefore, an understanding of the requirements of natural justice requires the usual process of statutory interpretation. By way of legitimate aid to that process, he relied upon matters identified in earlier cases (which he recognised not to be exhaustive), namely:

(a) the statutory text;

(b) the interests affected by the statute; and

(c) the repository of the power.

In his view expectations could not be relevant to whether or not the legislative intended the principles of natural justice to apply, but could be relevant to the content of the obligation in a particular case (at p 412).

All members of the High Court were clear that the application of the rules of natural justice were not to be overridden (if they would otherwise apply) save by a clear indication of that intention.

The principles as set out in *FAI v. Winneke* were elaborated upon in *Kioa v West* [7]which concerned deportation orders made against two Tongan citizens. Their infant daughter was also an applicant in the judicial review proceedings, albeit that no deportation order had been made against her. The delegate relied upon a number of factors including breach of undertakings made by the applicant parents and deliberate remaining in Australia as prohibited immigrants. The critical consideration relied upon by Mason J in departing from earlier authority was that as legislation required the Minister to give reasons for the decision if requested to do so, it could no longer be suggested that the existence of an obligation to comply with the requirements of procedural fairness was inconsistent with the statutory framework of that it would entail administrative inconvenience which was destructive of the statutory objects (at p 586).

The case is most often recognised for establishing that there is a common law duty to act fairly in the making of administrative decisions which affect rights, interests, and legitimate expectations subject only to the clear manifestation of a contrary statutory intention (at p 584 *per* Mason J).

Mason J set out what has come to be the guiding principles of natural justice:

> It is a fundamental rule of the common law doctrine of natural justice … that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given the opportunity of replying to it. … The reference to "right or interest" in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests.
>
> And
>
> The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations. (at p 585)

However, the duty does not attach to every decision of an administrative character as many such decisions do not affect the rights, interests and expectations of the individual citizen in a direct and immediate way (at p 584). The example Mason J used was a decision to impose a rate or general charge for services which indirectly affects the rights, interests or expectations of citizens generally but does not attract the duty to act fairly because it affects the individuals merely as a member of the public or a class of the public, and it is truly a policy or political decision.

Thus, following *Kioa v West*, the critical question is generally not whether the rules of natural justice apply, but what they require in the circumstances of the particular case.

Of critical significance to any understanding of the significance of *Kioa* is Mason J's statement that procedural fairness would not in all cases require notice in advance of a deportation order and of the grounds on which it is to be made. He described that as going too far (at p 586). Rather, that would serve only to facilitate evasion and frustrate the objects of the statute where the order is to be made in respect of a prohibited immigrant. Thus, where the reason for the making of the order is that the person is a prohibited immigrant, the dictates of natural justice do not require the giving of any advance notice of the proposed making of the order (at p 586). The situation is different, however where the reasons relate to reasons that are personal to the person concerned, ie relate to his conduct, health or associations.

Similarly, generally fairness does not require the giving of any opportunity to be heard in relation to a refusal of a further entry permit. However, where the decision-maker intends to reject the application relying upon information from another source which has not been dealt with by the applicant in his application there may be a case for saying that procedural fairness requires that he be given an opportunity of responding to the matter. Similarly, such obligation may be owed where there is a refusal in circumstances materially similar to earlier circumstances in which a permit had been granted (at p 587). And if a refusal is to be attended by the making of a deportation order, the case for holding that an opportunity to be heard be given is unquestionably stronger. Mason J held that there were only two matters in respect of which fairness required that the applicant have an entitlement to be heard, but there was no right to be heard in respect of other material which consisted of policy, comment and undisputed statements of fact (at p 588).

Brennan J reiterated his earlier expressed view that review on the basis of breach of natural justice depends upon the legislature's intention that the observance of the principles of natural justice, as appropriate to the circumstances of a particular case, be a condition of the valid exercise of the power, and there is no common law right to be accorded natural justice independently of statute. That view must be treated with some caution in the light of later cases applying the rules of natural justice to common law powers.

Brennan J described the principles of natural justice as having a flexible quality which chameleon-like evokes a different response from the repository of a statutory power according to the circumstances in which the repository is to exercise the power (at p 612).

(a) The statute must first be construed, in part to ascertain whether the rules of natural justice apply, and if so, whether there are any special procedural steps which, being prescribed by statute, extend or restrict what the principles of natural justice would otherwise require (at p 614).

(b) Another factor of significance is whether or not the power is apt to affect the interests of an individual alone, or in a way that is substantially different from the way in which it is apt to affect the interests of the public at large (in which case there may be a presumption that the rules of natural justice would apply, subject to being displaced by, for example, the administrative framework created by the statute within which the power is to be exercised).

(c) Factors of relevance will be the limited interest affected, and any statutory provision giving an entitlement at a later stage to raise a challenge. This is of particular relevance to preliminary decisions, or steps prior to a decision (at p 620).

(d) But a repository of power is not bound to give a hearing to an individual whose interests are affected where the repository is not bound to, and does not propose to, have regard to those interests in exercising the power (at p 620).

(e) The question of standing may also be relevant (at p 621). Thus, the question may be whether or not the individual has a special interest in the subject matter of the litigation.

(f) The requirements of the principles of natural justice in a particular case must be tested by reference to what the repository of power knew at the time of the exercise of power, or what he would have known if he had adopted a reasonable and fair procedures (at p 627). This is because the court must place itself in the shoes of the repository of power.

(g) Whether there is anything in the administrative framework, for example a need for speed or secrecy in making the decision, which would make it unreasonable to provide an opportunity to be heard (at p 629).

(h) Where the repository of power is bound or is entitled to have regard to the interests of an individual, it may be presumed that the observance of the principles of natural justice conditions the exercise of the power in relation to that person (at p 619).

Critically, the requirements of natural justice may range from a full-blown trial into nothingness (at p 615). This recognition has become critical in future cases. Brennan J. specifically recognises that the requirements of natural justice may be diminished even to nothingness to avoid frustrating the purpose for which the power was conferred (at p 615).

On the facts of the case, Brennan J held that there was only a failure to accord natural justice only in respect of one allegation that had not been put to the applicants, but not more generally. Moreover, the delegate's failure to rely upon this matter in his reasons did not prevent it being a relevant matter upon which the applicants had a right to be heard (at p 628). Provided it was credible relevant and significant to the decision to be made, then the opportunity to deal with it should have been given (at p 629).

In *Annetts v McCann* [8] the High Court held that the parents of a child who had died had a common law right to be heard in opposition to any potential adverse finding in relation to themselves or their son at a Coroner's inquest, but had no right to make submissions on the general subject matter of the inquest. The Coroner's decision refusing to hear submission from counsel representing the parents was quashed. This finding was based upon:

(a) the fact that the Coroner had granted the parents representation at the inquest. That was held to create a legitimate expectation that the Coroner would not make any finding adverse to the parents' interest without first given them the opportunity to be heard in opposition to that finding; and

(b) their interests included the interest in protecting the reputation of themselves and their son.

(c) The Coroner could not lawfully make any finding adverse findings against them personally or against their son without first giving them the opportunity to make submissions against the making of such a finding.

The limit on the scope of submissions which the court held the parents were entitled to make is indicative of the very precise nature of the identification of the interests which gave rise to such entitlement. Whilst it was obviously the case that any findings in relation to the death of their son would impact upon the parents, their rights to procedural fairness were limited to matters upon which adverse findings might be made.

In *Ainsworth v Criminal Justice Commission* [9] the High Court found that the rules of natural justice applied to the Criminal Justice Commission in respect of report tabled in Parliament which it made which made a number of adverse findings in relation to persons involved in the poker machine industry. This was so even thought the Commission's powers were only to make recommendations, and not to implement its findings as the relevant interests affected were those in reputation. The High Court recognised that not all investigative steps or reports had to be exercised with procedural fairness, but they did if they aversely affected a legal right, interest, or legitimate expectation.

The High Court recognised that the question of procedural fairness must be tested by reference to a decision-making process as a whole. Thus, 'where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if the decision-making process, viewed in its entirety, entails procedural fairness.' However, that requires a proper analysis of the purpose and role of the particular

report. In this case it was the final step in the discharge of the Commission's functions and responsibilities. And subsequent Parliamentary processes were in truth separate and distinct and served a quite different purpose.

Moreover, the functions and responsibilities of the Commission and of the Parliamentary Committee are separate and distinct and serve quite different purposes.

In *Minister for Immigration and Multicultural Affairs ex parte Lam* [10] the High Court considered the role of legitimate expectation in procedural fairness in the context of a case concerning cancellation of an immigrant's visa on character grounds. The issue was whether a representation that the department wished to contact the carers of the applicant's children gave rise to an obligation as a matter of procedural fairness not to cancel his visa without having made contact with the children's carers. The High Court held that there was no denial of procedural fairness and very much curtailed the role of legitimate expectation in determining the precise content of the obligations of procedural fairness.

Gleeson CJ held that the content of the obligation of procedural fairness may be affected by what is said or done in the course of the decision making process, and by developments in the course of that process, including representations made as to the procedure to be followed. However, the ultimate question must in every case be whether or not there has been unfairness, not whether an expectation has been disappointed (at p 510). The concern of the law is to avoid practical injustice (at p 511). Here the applicant could show neither a subjective expectation in consequence of which he did or failed to do anything, nor any loss of an opportunity to put information or argument to the decision-maker (at p 511).

McHugh and Gummow J held that the rules of procedural fairness require that a person's attention is drawn to the critical issue or factor on which the administrative decision is likely to turn so that he may have an opportunity of dealing with it. If that approach is adopted, there is no need to have recourse to the doctrine of legitimate expectation (at 522).

In Commissioner for ACT Revenue v *Alphaone* [11] the Full Court of the Federal Court considered whether or not there was a breach of the requirements of procedural fairness in having had regard to the fact that the company was trading in x-rated videos without a licence when deciding that it was not a fit and proper person to hold a licence. The company had admitted that it had done so. Thus, there was no breach of the requirements of procedural fairness as there was no right to make submission beyond the original application in those circumstances. There was no unfairness in the decision that it was not a fit and proper person to hold a licence. This was so even though the Commissioner had relied in his decision upon substantial evidence that the company had been selling x-rated videos without a licence.

In a passage which has been frequently relied upon in subsequent cases, the Court held (at pp 591-2) that:

> Where the exercise of a statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources, which are put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

Following these cases the following principles emerge:

(a) The burden of establishing a breach of procedural fairness is always upon the applicant.

(b) The rules of natural justice will be implied into legislation unless they are clearly excluded. But:

  (i) that is subject to the rules of natural justice per se not frustrating the legislative purpose.

  (ii) Construction of the legislation may, in an appropriate case, indicate that the rules of natural justice will not apply.

(c) In a multi-tiered decision-making process the requirements of procedural fairness will be tested by reference to the decision-making process as a whole. However, this requires a careful assessment of what is, or is not, part of the same decision-making process.

(d) In the vast majority of cases the question is not whether the rules of natural justice apply, but whether they can be availed of by the individual involved, and what the content of the rules are.

(e) The concern of the law is with avoiding practical injustice. This may require specific evidence of detriment in appropriate cases.

(f) The requirements of natural justice may properly range between a full-blown trial, and nothingness.

(g) That depends upon the precise circumstances of the individual case.

(h) It also depends upon an assessment of competing concerns which can be construed as part of the statutory purpose, such as speed or secrecy.

(i) Individuals are only entitled to natural justice:

  (i) where their interests are directly affected and/or they are sufficiently interested. This may cover rights, interests, and legitimate expectations;

  (ii) it covers the right to reputation, and may cover reputation of family members in limited circumstances;

  (iii) these tests will have an inevitable, but not necessarily complete, overlap with the rules for standing;

  (iv) where they are personally affected in a manner different from the public at large or a class of the public.

(j) The requirements of natural justice may be expanded or limited by reference to the precise statutory provisions, and by reference to the administrative mechanisms, applicable. The relevant legislative scheme, if any, should always be the starting point in an analysis of the requirements of natural justice.

(k) There is no general right to be heard in relation to all decisions which directly affect individuals in a personal capacity. It only applies in relation to material relied upon by a decision-maker which is adverse to the interests of the individual, which is credible, relevant and significant, and upon which he or she has not yet had a right to be heard as part of the decision-making process. Thus, an individual may only have a right to be heard in relation to certain specified matters relevant to the decision.

(l) Natural justice will ordinarily not give rise to a right to be heard in relation to questions of policy or general application.

(m) Natural justice will not ordinarily give rise to rights which frustrate the purpose for which power is conferred.

(n) In an appropriate case, the requirement is that the person's attention is brought to the critical issue of factor on which a decision is likely to turn, and he is given an opportunity of dealing with it. This may also involve being given the opportunity, in an appropriate case, of dealing with evidence that is credible, relevant and significant.

(o) In general terms, beyond this, the requirements of natural justice will depend upon:

(i) The nature of the right, interest or expectation affected,

(ii) The nature of the decision-maker, and

(iii) The question for the decision-maker and the factors relevant thereto.

(p) Whilst this is not absolutely clear, the weight of authority is that the requirements of procedural fairness should ordinarily be tested by reference to the knowledge of the decision-maker at the time of the decision. However, this should not be misinterpreted as important a reasonable test for procedural fairness. The question is always – is the procedure fair.

Practical examples of the requirements of procedural fairness

Legitimate expectation

In *Attorney General (NSW) v Quin* [12] the High Court considered the relevance of expectations created by a decision-maker to the precise requirements of procedural fairness in the context of the appointment of stipendiary magistrates to on the basis of a failure to comply with the requirements of natural justice. By this time the procedure for the appointment had altered, and a new test applied. The applicant sought to compel the older test to be applied to the reconsideration of his appointment. He was unsuccessful on the basis that the new policy was not ultra vires and he could not therefore require the Attorney-General to consider his case other than by reference to the then applicable policy. This case shows the clear divide between procedural, and substantive, fairness.

In *Attorney General (HK) v NG Yuen Shiu*[13] an illegal entrant challenged a removal order on the basis that his case had not been considered on its merits contrary to the announced policy of the government that each removal case would be determined on its merits. Given that representation, it was held not to be fair to not follow the promised procedure in making the decision. This represents a principle which is somewhat removed from the hearing rule set out above, and strays towards a substantive entitlement to a particular form of treatment. The only reason why a hearing was required was because the Government said that it would conduct a hearing.

A similar approach has been adopted in relation to representations by public bodies that they will conduct an independent, impartial and thorough assessment treating all relevant interested parties in the same way in *Century Metals v. Yeomans* [14] which concerned in inquiry by a Government Minister into a proposal to reopen mining in Christmas Island. That case has been further relied upon in cases concerning tenders for Government contracts.

The importance of the legislative context

The role of the legislative context in effectively expanding the requirements of procedural fairness can be seen by the High Court in the case of *SZBEL v MIMIA*[15]. In that case the legislation purported exhaustively to state the requirements of procedural fairness. However, the High Court construed the requirement under s 425 of the Migration Act that the individual be invited to attend a hearing to 'give evidence and present arguments relating to the issues arising in relation to the decision under review' as requiring that the individual be specifically informed of issues which the tribunal believed to arise, in circumstances where the individual applicant was entitled to assume that the only 'issues arising in relation to the review' were those identified by the delegate when refusing his application at first instance. Thus, it was a breach of the requirements of that section to find against him on the basis of a rejection of the plausibility of parts of his account, when he had not been specifically informed that the plausibility of those accounts were live issues before the tribunal (no point as to them having been taken below). This was because the applicant was entitled to assume that the reasons given by the delegate identified the issues that arose in relation to the decision, for the purposes of s 425.

Natural justice reduced to nothingness

At the other end of the spectrum, in two reported cases the rules of natural justice have been reduced to nothingness.

In the context of national security, the Federal Court recently considered the case of *Leghaie v*[1] *Director General of Security* [16] (Tamberlin, Stone and Jacobson JJ). In that case a visa had been cancelled on the basis of an adverse security assessment made by ASIO that the visa holder had been assessed as being directly or indirectly a risk to Australian national security. The Minister was, indeed, under the relevant legislation bound to cancel a residency visa if the holder was assessed by ASIO to be directly or indirectly a risk to Australia's national security.

Madgwick J at first instance noted that the security services were no less prone to mistakes than other decision-makers and thus the requirements of procedural fairness had not been excluded. Thus, there was an obligation as a matter of procedural fairness to consider what information could be provided to the individual without unduly detracting from national security. However, having considered confidential material provided by the Director-General of Security, Madgwick J concluded that the Director-General had given consideration to the possibility of disclosure and had appropriately balanced that against the requirements of national security. In the circumstances, the content of procedural fairness in relation to Leghaie's case was reduced to nothingness. Madgwick J stated that 'genuine consideration having been given by the Director-General to the question of disclosure, and in the absence of countervailing evidence, the balance was to be struck on the side of non-disclosure [65].'

On appeal the decision was affirmed. The issues were defined as the requirements of procedural fairness when considerations of national security intervene, and upon the weight to be given to the opinion of the Director-General as to the potential prejudice to national security. It was recognised that reasons of national security may make it impossible to disclose the grounds on which the executive proposes to act. In determining this, the Court recognised that it was ill-equipped itself to evaluate pieces of evidence obtained by ASIO, nor was it charged with that responsibility. The trial judge had been correct to find that in the absence of countervailing expert evidence, he was not in a position to form an opinion contrary to that stated by the Director-General. The court, however, satisfied itself that the Director-General had given personal, genuine consideration to the question of whether

disclosure would be contrary to the national interest. Thus, the balance was to be struck on the side of non-disclosure even where the consequence was to risk serious unfairness to the individual.

Another example of non-disclosure on the basis of the balancing of interests, albeit in a different context, can be found in the case of *Nicopoulos v. Commissioner for Corrective Services*[17] where evidence in the form of a confidential affidavit was taken into account in order that the court could determine what, on the facts, the requirements of natural justice were. This case concerned a criminal law solicitor who had been excluded from prison and could thereby not feasibly continue his career which relied upon taking instructions from prisoners. The court held that, bearing in mind the confidential affidavits to which it had regard, the requirements of natural justice had in that case been elided to nothing. At [98] the Court held that the public interest in not admitting the confidential affidavits into evidence was outweighed by the public interest in preserving their secrecy or confidentiality – thereby modifying, indirectly by reference to s 130 of the *Evidence Act 1995*, the usual balance conducted in respect of a PII claim between non-admission and admission.

Some tax cases blurring the distinction between procedural and substantive unfairness

In *Pickering v DCT*[18] it was held that there was arguably a duty of fairness which required like cases to be treated alike, breach of which would entitle the court to quash the Deputy Commissioner of Taxation's decision and obtain an order that he exercise his discretion according to law.

In *Bellinz v FCT* [19] the Full Federal Court accepted that 'where a decision-maker, including the Commissioner of Taxation, has a discretion, a principle of fairness will require that that discretion be exercised in a way that does not discriminate against taxpayers: cf *Pickering v FCT* 97 ATC 4893 and, in another context, *New South Wales Aboriginal Land Council v Aboriginal and Torres Strait Island Commission* (1995) 59 FCR 369 at 387–8; 131 ALR 559. The same principle may be said to permit judicial review in matters of administration or procedure where a decision-maker acts unfairly by discriminating between different categories of persons.' However, that principle had no application where the Commissioner was applying a statute and had no discretion.

In *Daihatsu Australia and DCT* [20] Lehane J considered the earlier cases had been inclined to treat discriminatory treatment for which no reason or justification is advanced as a form of irrational decision-making. He saw a real difficulty in extending any claim based upon fairness beyond the scope of the case of *Sunshine Coast Broadcasters v Duncan* [21] and that of *Pickering v FCT* [22] in which Cooper J found that it was arguable (so as to defeat summary dismissal) that a duty of fairness could require that a discretion … be exercised in the favour of three applicants if they were truly in the like situation to the two other comparators against which discriminatory treatment was alleged, so as to lead to a quashing of the decision.

Conclusion

There is little to be gained towards understanding the practical requirements of procedural fairness from an analysis of outcome between different cases. The best one can do is to seek to identify the governing principles, and then to apply them in the precise circumstances of the case. However, as with other tests based upon impression rather than a checklist, in any individual case the precise scope of the obligation may be difficult to discern. It appears, however, that the courts have remained at root true to the originating principles, albeit that there are some cases which are difficult to explain save by reference to the clear impression that the court had that some intervention was necessary in the particular case.

There is also a great need for caution between reasoning from cases involving fundamental rights, towards cases with a more commercial leaning. There is a great need for caution because underlying all cases in the context of migration, criminal law, and detention, is a real concern for the rights of the subject. Similar concerns simply are not motivating factors in many other contexts, where the reality is that the applicant is seeking to further his own economic interests.

Thus, it is necessary in all cases to subject claims to entitlements as a matter of procedural fairness to close scrutiny. There should be no assumption of a particular entitlement, nor should such cases be allowed to go through on the basis of broad assertions rather than careful analysis of all relevant factors. For in this area, there are no absolutes. There is merely a balancing of factors, in a flexible approach, seeking to ensure that there is no practical unfairness in the way in which a decision is made.

Endnotes

1 In order not to offend against the constraints set out by Brennan J in *A-G (NSW) v. Quin* (1990) 170 CLR 1 at 35-6.
2 [1964] 1 AC 40
3 [1971] AC 297
4 [1971] 1 Ch 388
5 [1990] 1 QB 146
6 (1981-2) 151 CLR 342
7 (1985) 159 CLR 550
8 [1990] 170 CLR 596
9 (1991) 175 CLR 564
10 (2003) 195 ALR 502
11 (1994) 49 FCR 576 at 590-1
12 (1990) 170 CLR 1
13 [1983] 2 AC 629
14 (1989) 40 FCR 564
15 (2006) 81 ALJR 515. SZBEL was applied by Buchanan J in *SZILQ v. Minister for Immigration & Citizenship* [2007] FCA 942 (it is understood that special leave to appeal has been granted) to require the RRT to hold a further hearing where, subsequent to the initial hearing (leading to a decision which was quashed) information relating to the applicant's claimed practice of Christianity in Australia was put before the RRT Buchanan J. found that the burden in relation to motivation for conduct in Australia was on the appellant (s 91R(3)) and that there was no requirement to put such allegation to the appellant. Buchanan J. held that the appellant had not been invited to appear and make submissions and give evidence about one of the issues which were relevant in the case and had thus failed to comply with s 425. The denial of procedural fairness was the denial to the appellant of the opportunity to satisfy the statutory test in s 91R(3).
16 23 March 2007, [2007] FCAFC 37
17 [2004] NSWSC 562
18 (Cooper J, Federal Court – BC 9704089
19 (1998) 155 ALR 220 at 232-3
20 (2000) 182 ALR 239
21 (1990) 92 ALR 93
22 (1997) 97 ATC 4893

EXERCISE OF POWERS UNDER SECTION 20 OF THE PUBIC SERVICE ACT 1999 (Cth)

Dennis Pearce*

Introduction

When the new Commonwealth *Public Service Act* was made in 1999 much emphasis was placed in the Parliamentary speeches and in the Explanatory Memorandum (EM) on the need to bring public service employment conditions and practices into line with the private sector. Clause 3 of the EM said:

> The Government considers that the APS [Australian Public Service] should operate, to the maximum extent consistent with its public responsibilities, under the same industrial relations and employment arrangements as apply to the rest of the Australian workforce.

It was said that agency heads were to be able to act as if they were the employer of their officers. To achieve this end s 20 was included in the Act. It reads:

> **20 Employer powers etc. of Agency Head**
>
> (1) An Agency Head, on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of APS employees in the Agency.
>
> (2) Without limiting subsection (1), an Agency Head has, in respect of APS employees in the Agency, the rights, duties and powers that are prescribed by the regulations.

The EM relating to this section said:

> *Clause 20 - Employer powers etc. of Agency Heads*
>
> 4.1. An Agency Head will, on behalf of the Commonwealth, have all the rights, duties and powers of an employer (Bill s-cl.20(1) - cf NZ State Sector Act 1988 s-sec.59(2)). Because, constitutionally, the ultimate employer of any APS employee is the Crown in right of the Commonwealth, the Agency Head will be given 'the rights, duties and powers' of, but will not be described as, 'the employer'.
>
> 4.2. This will change the basis of the current system where many of the current staffing powers are exercised by Agency Heads, but only by delegation from the Public Service Commissioner. This change will ensure that at law an Agency Head will have all the powers of an ordinary employer recognising that the employment laws for the APS are to be aligned as far as possible with the private sector.
>
> 4.3. These general powers will enable an Agency Head to do the following without separate statutory authority

- establish appropriate employment and management arrangements that best support the functions of the Agency, while having due regard to the needs of employees;

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- create administrative positions if these are needed (creation of positions where these are needed to achieve certainty of delegation is dealt with in Bill cl.77);
- determine any arrangements in relation to the resignation of APS employees;
- require APS employees not to engage in employment outside the Agency without permission;
- deal with underperformance - including to reduce remuneration for poor performance where this is expressly provided for in AWAs, certified agreements, or other arrangements with an employee (reduction in classification following misconduct proceedings is covered in Bill cl.15 - see also Bill cl.24 dealing with determination-making power); at common law it is not possible to reduce remuneration unless this is an express term of the contract of employment; and
- re-engage a person who has ceased to be an APS employee (cf 1922 PSA s.47B) - the Commissioner's Direction on Merit in Employment will allow re-engagement in certain circumstances without a full merit selection process.

There are many questions that arise from s 20 of the Australian *Public Service Act 1999* (PS Act). It is proposed here to discuss just two – and they are to some extent inter-related. First, what is the nature of the relationship that is created between an Agency Head and APS employees by the operation of the section. Secondly, can an Agency Head delegate to another person the exercise of 'all the rights, duties and powers of an employer' that the section places on the Head.

Agency Head – APS employee relationship

The private sector employer – employee relationship is governed by the common law, primarily the law of contract. However, the nature and terms of such a contract are subject to many statutory limitations. These relate to such things as workers' compensation, long service and other forms of leave, unfair dismissal, discrimination, etc. The *Workplace Relations Act 1996* imposes significant controls over the employment contract. The days have long gone when a private sector employer could itself determine all the terms on which it employed a person.

By equating public sector employment with private sector employment, s 20 does not have the effect of removing the public sector from whatever controls might be imposed by legislation. Just as legislation has displaced a number of aspects of the common law in the private sector, so it does in relation to APS employment. Accordingly, to determine the nature of the APS employer – employee relationship it is necessary to look beyond the common law basis of the employment relationship. The common law has effect subject to statutory limitations so it is only if there is no statutory requirement applicable to the relevant aspect of the employment relationship that s 20 will apply to determine the terms of the APS relationship.

Clauses 4.2 and 4.3 of the EM which are set out above seemed to contemplate that many of the basic elements of the APS employment relationship would be dealt with by common law rules. While recognising that the Commonwealth is the employer of APS employees, cl 4.2 says that s 20 'will ensure that at law an Agency Head will have all the powers of an ordinary employer recognising that the employment laws for the APS are to be aligned as far as possible with the private sector'. The Agency Head is to be able to do the things listed 'without separate statutory authority' (cl 4.3).

However, the apparent scope of the section is markedly diminished by the other provisions of the PS Act and Regulations. Specific provisions are included to deal with many of the significant elements of the employer – employee relationship: engagement and classification (ss 22, 23); remuneration and conditions (s 24); movement between positions (ss 26, 27); discipline (ss 15, 28, 29) to name but some. These provisions vest power of action in the Agency Head but they are stand alone powers and are not dependent upon the relationship

created by s 20. Nor is it said that these express powers are to be exercised having regard to the principle enunciated in s 20.

It would appear that there is still some room for the operation of s 20 as not all aspects of an APS employee's position are dealt with in legislation. However, rather than being the leading provision determining the APS employer-employee relationship, it provides a fall back role. If a matter is not dealt with in the PS Act or Regulations or in other legislation, eg the Safety Rehabilitation and Compensation Act, the Long Service Leave Act, the Maternity Leave Act, the Superannuation Act, etc, the Agency Head can deal with it in the way open to a private employer. There are some topics that will fall within this description, eg while provision is made in relation to the holders of specific offices, there do not appear to be general provisions relating to the resignation of an APS employee. However, the important point to bear in mind is that, in relation to the matters that are dealt with by legislation, s 20 has no room to operate.

For the sake of completeness it should be noted that the regulation-making power in subs 20(2) has been used to make regulations relating to health clearances, medical examinations and skills schemes for non-ongoing employees (regs 3.1-3.3). It has thus not been used as a major source of power to manage the APS.

From this summary of the place of s 20 in the functioning of the APS, it can be seen that it has not assumed the significant role that a reading of the second reading speeches and the EM would have led one to expect. Its function seems to be to authorise an Agency Head to fill in around the edges of the legislation that is the principal determinant of the APS employer – employee relationship.

Many aspects of the management of that relationship are, of necessity, dealt with by officers acting on behalf of an Agency Head. This invites consideration of the capacity of a Head to pass on his or her management powers and responsibilities to others.

Delegations and authorisations

It is not practicable for the heads of major entities to exercise personally all the powers involved in the management of that entity. Hence the law has recognised that other persons may be authorised to exercise those powers on behalf of the person in whom the powers are legally vested. When a power is exercised by another person in this way, that person is acting as the agent of the person in whom the power is legally vested. However, the latter remains the repository of the power and continues to be responsible for the way in which it has been exercised by the agent pursuant to the authorisation.

A second approach to decision-making is commonly taken where the power to be exercised is included in legislation. The legislation may permit the repository of the power to delegate the exercise of that power to another. A right of delegation must be provided expressly in the legislation for it to exist. It is not a right recognised at common law. For this reason, the concept of delegation is seldom relevant to decision-making in the private sector. It is a gift of statute. While it is possible for powers to be vested in private sector entities by legislation, this seldom occurs. The more usual occurrence is for private sector entities to have responsibilities or duties imposed on them by legislation.

In contrast, public sector officials from the Minister down in status are entrusted with many legislative powers.

Before turning to the specific issue of delegation under s 20 of the PS Act, it is useful to note some general principles relating to delegation and authorisation, particularly as affected by the PS Act and the *Acts Interpretation Act 1901* (Cth) (AIA).

Section 78 of the PS Act provides for the delegation of powers vested in persons under that Act. In respect of Agency Heads, s 78(7) permits the delegation to another person any of the Agency Head's 'powers or functions' under the Act. There are like provisions in associated public service legislation.

A delegation may be made either generally or as otherwise provided by the instrument of delegation: AIA s 34AB(a). From this it can be said that an Agency Head can choose the powers that he or she wishes to delegate.

A repository of a power who is permitted to delegate that power cannot limit the discretion of his or her delegate. Once the power has been delegated, the discretion to make a decision and the content of that decision becomes the responsibility of the delegate. However, an Agency Head can attach directions to a delegation under the PS Act: s 78(11). It would seem that any such directions must be general in nature rather than concerned with the exercise of the delegation in relation to a particular instance.

As a general rule, a power that has been delegated cannot, in the absence of express authority, be delegated further: AIA s 34AB(b). Section 78(9) of the PS Act qualifies this general principle by expressly permitting delegation to a second delegate. However, the general rule prevents the second delegate from delegating the power further. The second delegate can have no greater power than the first delegate. Accordingly, if the power delegated to the first delegate is subject to directions, those directions will apply also to the second delegate: PS Act s 78(9).

A person to whom a power has been delegated exercises that power in their own right as distinct from being an agent of the delegator: AIA s 34AB(c); *Re Reference under s 11 of the Ombudsman Act 1976; ex parte Director-General of Social Services*[1]; *Forest Marsh Pty Ltd v Resource Planning and Development Commission*[2]. This is the principal distinction between delegation and authorisation.

The delegation of a power does not prevent the exercise of the power by the delegator: AIA s 34AB(d). However, once the power has been exercised by the delegate in particular circumstances, that decision cannot be revisited by the delegator as it has become the decision in the matter[3]. It would seem also that the delegator cannot review the decision of the delegate as the delegate's decision is the operative decision.

Delegation instruments are strictly construed: *Perpetual Trustee Co (Canberra) Ltd v Commissioner for ACT Revenue*[4].

As noted previously, the delegation of a power is not the only way in which a person may be empowered to act on behalf of another person. A senior government official may, in the ordinary course, authorise a person to act on his or her behalf: *Carltona Ltd v Commissioners of Works*[5]. This will not be possible where the legislation indicates that the power is to be exercised personally. Such a proscription on authorisation may be implied from the nature of the power itself. In addition, *Carltona* noted that the authority to exercise the power must be given to a person of a level or status appropriate to exercise the power. The authorisation of an inappropriate person may lead to the decision being open to challenge as 'unreasonable'.

The right of an official to authorise a person to act on his or her behalf applies even though the official concerned has a power of delegation unless again it is apparent that the legislation intended that only a delegate should exercise the power: *O'Reilly v State Bank of Victoria*[6].

Where a person is authorised to act on behalf of a senior official, the decision taken is that of the official, not the authorised person. Accordingly, the official continues to have responsibility for the decision and, unless its making renders the agency functus officio, presumably the official may revisit the decision[7].

It is unlikely that a delegate would be able to exercise a power that has been delegated to him or her as if he or she were authorised to exercise the power. The fact of delegation displaces any authorisation[8].

The foregoing propositions indicate that, in most cases, little practical difference in result arises from whether a power has been exercised under a delegation or pursuant to an authorisation (or agency). However, the power in s 78(9) of the PS Act permitting a sub-delegation of a power or function vested in an Agency Head under the Act is significant in terms of the management of an agency. It allows an officer lower in rank to the Agency Head to whom a delegation has been given to pass the exercise of a power further down the line of office holders. This permits line officers (the second delegate) to exercise a power that has been vested in the Agency Head but allows oversight of the exercise of the power by officers below the level of Head (the first delegate).

It is significant that this management of the exercise of a power is not available in respect of an authorisation of a person to exercise the power. The second delegate approach is applicable only to delegations of power.

Delegation under section 20

How do these general principles operate in respect of the vesting by s 20 of the 'rights, duties and powers of an employer' in an Agency Head?

Two matters stand out. First, these rights, etc, are vested in an Agency Head 'on behalf of the Commonwealth'. It is the Commonwealth which continues to be the employer of the APS employees in the agency. Secondly, there is a significant difference in language between s 20 and s 78(7). An Agency Head 'has the rights, duties and powers of an employer'. The power to delegate is of the Agency Head's 'powers and functions' under the PS Act.

I suggest that the correct way to view s 20 is as a statement of responsibility and not a power as such. The section leaves the relationship of APS employee and the Commonwealth as employer intact – as it must as the Agency Head is not the employer. However, it requires the Agency Head to assume responsibility for the implementation of that relationship.

This indicates that the statutory responsibility given by s 20 of the PS Act to exercise the rights, powers and duties of an employer on behalf of the Commonwealth cannot be delegated by an Agency Head. This responsibility is expressly stated as having to be exercised 'on behalf of the Commonwealth'. The nature of the authority given to the Head is such that it must be considered doubtful whether it can be passed on to another person to exercise. The Agency Head must retain the responsibility of acting on behalf of the Commonwealth. The status of the person carrying out this function is significant. It should not be open to a Head to pass it on to another person of the Head's choosing. Under s 78(9) of the PS Act, that person could in turn delegate the task further. This does not seem to accord with the significance of the responsibility given by the section to the Agency Head.

However, a distinction can be drawn between this statutory responsibility and the exercise of the common law and statutory powers that are applicable to the implementation of the rights, duties and powers that are vested in an employer. A person does not cease to carry out these rights, duties and powers by giving another person responsibility for, for example,

making appointments to an office or granting leave. These are powers that are a necessary part of the implementation of the rights, duties and powers that are vested in an employer at law but they can properly be seen as distinct from those rights, duties and powers.

This conclusion is supported by the comparison of the wording of s 20 and subs 78(7) of the PS Act referred to above. Section 20 refers to 'rights, duties and powers of an employer' being exercised by an Agency Head. Subsection 78(7) refers to the delegation of an Agency Head's 'powers or functions under this Act'. The change in language is significant. The reference in subs 78(7) is to powers whose source is the PS Act. The powers that are to be exercised to implement the obligation placed on an Agency Head by s 20 arise from the powers that a private sector employer has in regard to an employee.

A comparison can be made with the cases relating to the meaning of 'decision under an enactment' under the *Administrative Decisions (Judicial Review) Act 1977*. The courts have drawn a distinction between decisions which are authorised by an Act and decisions made under, for example, a contract that is authorised by the Act but which exists independently of the Act. The source of power in the latter case is the contract, not the Act.[9]

As has been noted above, delegation is not a concept recognised as applicable to common law powers. Rather the doctrine of agency or authorisation founds the basis for permitting another person to act on behalf of a person making a common law decision.

Accordingly, it would be possible for the powers that accrue to an Agency Head to carry out his or her responsibility under s 20 to be managed through authorisations as they are clearly not activities that the Agency Head could be expected to perform[10].

As suggested previously, the powers to be exercised under s 20 in order to implement the employer-employee relationship will either flow from the common law or will involve a mix of common law and statutory powers. It is not appropriate to talk of delegating common law powers. Delegation is limited to statutory powers. A person exercises common law powers as an agent of, that is to say, as authorised by, another person.

If this reasoning is correct, it means that care must be taken in drafting delegations under the PS Act. It is permissible to delegate and then sub-delegate those many powers and functions that are expressly vested in an Agency Head by the PS Act. However, there should not be a purported delegation of the 'rights, duties and powers' referred to in s 20. It is permissible for an Agency Head to authorise the performance of powers necessary for a Head to carry out the responsibilities vested in him or her by s 20. However, that responsibility is such that he or she cannot pass it on to another officer in its totality. Nor can an officer authorised to perform functions on behalf of an Agency Head under s 20 authorise another officer to perform those functions on that officer's behalf.

Endnotes

1 (1979) 2 ALD 86.
2 [2007] Tas SC 50.
3 *Forest Marsh*, above n 2.
4 (1994) 123 ACTR 17.
5 [1943] 2 All ER 560.
6 (1983) 153 CLR 1.
7 *Reference under s 11*, above n 1.
8 Ibid.
9 *Griffith University v Tang* (2005) 221 CLR 99.
10 *O'Reilly v State Bank of Victoria,* above n 6.

THE CODIFICATION OF *WEDNESBURY* UNREASONABLENESS – A RETARDATION OF THE COMMON LAW GROUND OF JUDICIAL REVIEW IN AUSTRALIA?

Jason G Pennell and Yi Hui Shi*

In the 1960s and 1970s, the Federal Government enacted the *Administrative Decisions Judicial Review Act* ('ADJR Act') which codified most if not all of the common law grounds of judicial review under the prerogative writs system. The codification was welcomed at first as it provided a statutory alternative to applicants for judicial review which involved a much simpler application procedure. The benefits of the codification also lay in its simplicity and accessibility for administrators and courts alike.[1]

However, it has been suggested that the codification of the grounds of review in the ADJR Act has retarded and arrested the development of the common law grounds of review.[2] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*, Kirby J lamented the failure of Australian Courts to develop the common law in the same way and direction as it has been developed in England in more recent years. Consequently, it has been suggested that Australia has lagged behind other jurisdictions in the development of the common law grounds of judicial review.

This article will evaluate this point through the codification of the *Wednesbury* unreasonableness ground of review particularly in relation to its application in the ADJR Act. It will first outline Lord Greene's formulation of 'unreasonableness' and the various criticisms of that formulation. It will then discuss the current Australian position, including any development since the *Wednesbury* decision, in relation to this ground of review and the relative positions and developments in the UK, South Africa and Hong Kong. The article will conclude by an analysis of the consequences of Australia lagging behind.

1. Unreasonableness as a separate ground of review

The concept of unreasonableness as an independent ground of review was defined by Lord Greene in the UK Court of Appeal decision in *Associated Provincial Picture House v Wednesbury* [1948] 1 KB 223. Essentially, it subjects to review, decisions that are 'so unreasonable that no reasonable authority could ever have come to [them]'.[3] This ground of review was envisaged by Lord Greene as a safety net, which operated to catch those decisions that were manifestly absurd but might escape review on the other more specific grounds.[4] Alternatively, it has been suggested that the ground was to serve as an 'umbrella', under which to gather related themes and principles applying in judicial review, or as a 'springboard', from which to define new (or adapted) legal standards to guard against executive abuse.[5]

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1.1 Criticisms of the Wednesbury unreasonableness

The concept of *Wednesbury* unreasonableness as a ground of review raises concerns as to the extent to which both constitutional and practical limitations of judicial power are maintained. It has been suggested that the courts, when reviewing decisions under this ground, essentially look at the substance result of the decision rather than the process by which the decision is made. By holding that an actual decision reached by an administrative body is deficient on its face rather than considering the way in which the decision was made, the courts are arguably usurping the power of Parliament.

Moreover, the test has been criticized as not only complex and confusing but also incoherent and circular. Lord Cooke in *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* [6](*'ITF'*) regarded *Wednesbury* as a 'briefly considered' case which might not be decided the same way today and criticized Lord Greene's formulation of 'unreasonableness' as an unnecessary 'admonitory circumlocution' to judges. Consequently, the court adopted a simple test used (for unreasonableness) in *Secretary of State for Education and Science v Tameside Metropolitan Borough*[7]: 'whether the decision in question was one which a reasonable authority could reach'.

This attempt to simplify the *Wednesbury* test was mirrored in the South African decision *Bato Star Fishing (Pty) Ltd v Minister for the Environmental Affairs* [8](*'Bato Star'*) where O'Regan J held that the reasonableness of a decision depended on the circumstances of each case. Subsequently, his Honour gave a non-exhaustive list of the relevant factors a court may take into account in determining the reasonableness of the decision in question. The list includes 'the nature of the decision, the identity and expertise of the decision-maker, the range of factor relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well being of those affected'.[9]

The *Wednesbury* test has also been criticised for its strictness. Although there is a high volume of cases that have raised and discussed this ground; there are few reported instances of a decision being declared invalid on the basis that it is *Wednesbury* unreasonable. Even where a decision is held to be invalid on this ground, it is usually invalid on other grounds too or the courts will have regard to whether the decision also conflicts with certain substantive principles which exist independent of statute, such as lack of a plausible justification[10] and duty of inquiry[11]. Consequently, Lord Cooke in *R (Daly) v Secretary of State for the Home Department*[12] has attacked the *Wednesbury* decision as 'unfortunate and retrogressive' due to the narrow scope of the *Wednesbury* test.

2. The development of the Wednesbury unreasonableness in Australia

The *Wednesbury* unreasonableness ground of review received statutory recognition through the enactment of s 5(2)(g) of the ADJR Act. Subsequently, while other jurisdictions have attempted to expand or simplify Lord Greene's formulation of unreasonableness, Australian courts have continued to adopt his Lordship's definition by reason of the statutory regime and subjected the ground to a much more limited application than Lord Greene has initially envisaged. In other words, codification has restricted the development of this ground of review in Australia when compared to other Commonwealth jurisdictions.

In *Minister for Immigration and Multi Cultural Affairs v Eshetu*[13], the Full Federal Court precluded an applicant from seeking judicial review of a decision under the unreasonableness ground of review on the basis that the applicant merely disagreed with the decision-maker's reasoning. In doing so, the Court prescribed limited boundaries for unreasonableness, insisting that it be used only in the most extreme circumstances, such as where the evidence could only indicate one possible conclusion and not be supportive of any

other possible conclusions. The Court's decision was affirmed in *Minister for Immigration and Multi Cultural Affairs; Ex Parte Applicant S20/2002* where Gleeson J held that unreasonableness could not be used merely because there was a divergence of opinion.[14]

Thus, the application of *Wednesbury* unreasonableness in Australia is narrow and extremely confined[15] with cases that meet the stringent standard of *Wednesbury* unreasonableness being rare.[16]

3. The development of the Wednesbury unreasonableness in other common law jurisdictions

Lord Greene's formulation of unreasonableness has not fallen in favour with the UK and the South African courts. Apart from the above-mentioned attempts by the UK and the South African courts to simplify the *Wednesbury* test, there have also been attempts to broaden the scope of the *Wednesbury* test and move away from the language of unreasonableness in an effort to provide greater clarity and consistency in reviewing administrative discretion.

In *ITF* and *Bato Star*, the courts defined unreasonableness in a simpler way, by holding that the reasonableness of a particular decision was to be considered in light of all its circumstances, including the nature of the decisions and the expertise of the decision-maker. This was acknowledged by Lord Cooke in *R (Daly)* in which he considered that the 'depth of the judicial review and the deference due to administrative discretion vary with the subject matter'. Consequently, a mere finding that a decision under review is not capricious or absurd would not necessarily exclude it from being unreasonable in all the circumstances.[17]

In Australia the narrow interpretation of the *Wednesbury* unreasonableness and its codification in the ADJR Act has meant that Australian courts must always defer to the decision-maker, save for where the decision is manifestly absurd, regardless of the nature of the subject matter or the qualification and experience of the decision-maker. In other words, a decision will be *Wednesbury* unreasonable only if it is manifestly absurd. Where a decision is not manifestly absurd, its reasonableness is to be determined independent of the subject matter of the decision and the expertise of the decision-maker.

3.1 Principle of proportionality

An attempt to broaden the *Wednesbury* test in other common law jurisdictions has been the introduction of a test of proportionality.[18] The concept of proportionality originated in Europe[19] and was introduced into the English law by Lord Diplock in *Council of Civil Services Unions v Minister for the Civil Service*[20]. The principle essentially requires the means employed by the decision-maker to be 'no more than is reasonably necessary' to achieve his legitimate aims.[21] That is, the means adopted by the decision-maker to achieve his legitimate objectives must not be excessive.

Consequently, when applying the principle in judicial review cases, courts are required to engage in a balancing process which involves the courts having regard to both the means adopted and the ends achieved by the decision-maker. This corresponds with O'Regan J's comments in *Bato Star* where his Honour has held that where a power identifies a goal to be achieved but is silent on the route to be followed, courts should pay due respect to the route selected by the decision-maker in determining the reasonableness of the decision.[22]

The rationale of this 'broadening' of the *Wednesbury* test is to be found in the increasing influence of human rights in some jurisdictions. The proportionality test acknowledges the central role of the courts in ensuring that administrative discretion cannot be exercised in a way that undermines human rights. It highlights that in reviewing any administrative decision the courts will require the decision maker to accord due weight to human rights

considerations in balancing competing interests. Consequently, following the enactment of the *Human Rights Act 1998* in the UK and the introduction of the *Bill of Rights Ordinance 1990* and Basic Law in Hong Kong, proportionality has been firmly established as the test for cases where human rights are involved.

However, there remains the question of whether proportionality constitutes a ground of review for cases other than those involving human rights. Although at the moment, neither English courts nor Hong Kong courts have accepted this proposition; it is argued that given the support of the Human Rights Acts, it is only a matter of time until proportionality will be accepted in English administrative law.[23]

Australia, on the other hand, only sees proportionality as a tool for determining if there has been unreasonableness in the *Wednesbury* sense. In *Prasad*, the court only held the decision to be *Wednesbury* unreasonable because the efforts put in by the decision-maker before making the decision were disproportionate to the grave impact of the decision subsequently made.[24] Moreover, the court qualified the application of the principle to strictly limited circumstances.[25]

It has been suggested that the introduction of *Human Rights Act 2004* (ACT) and the Charter of Human Rights and Responsibilities Bill 2006 (Vic) may force the courts in the future to widen the *Wednesbury* test to incorporate proportionality as a ground of review in light of human rights considerations. However, the effect of the Bill and the Act upon judicial review at the federal level is questionable as both the Act and the Bill are introduced at Territory and State levels.

3.2 Sliding scale of intensity of scrutiny

Another attempt to widen the scope of the *Wednesbury* unreasonableness is the introduction of the sliding scale of intensity of scrutiny concept. This concept essentially recognizes a continuum of intensity of review that is dependent on the nature of the subject matter.[26] According to the concept, where the subject matter of an administrative decision impacts upon human rights, the more substantial its inference with human rights, the more intense courts will scrutinise that decision. In other words, more substantial justification is required before the courts can be satisfied that the decision is reasonable in the sense that it is not beyond the range of responses open to a reasonable decision-maker.[27]

This corresponds with the suggestion that *Wednesbury* unreasonableness should operate as a 'springboard'[28] or a 'spring'. That is the more the exercise of public power presses down on the constitutional or fundamental rights, the more the laws' resistance increases, requiring cogent reasons for the limitation before giving way.[29]

This concept of sliding scale was introduced into English law by Sir Thomas Bingham MR in *R v Ministry of Defence; exp Smith*[30]. It was picked up by Law LJ in *R (Mahmood) v Secretary of State for the Home Department* [31]and applied in the UK House of Lords' decision *A and Others v Secretary of State for the Home Department*[32] where Lord Bingham of Cornhill held that to defer to the Attoney General's decision would be excessive in a case involving the indefinite detention of individuals, without charge or trial.[33]

In Australia, there is no such varying degree of scrutiny by Australian courts with respect to the nature of the subject matter of the decision. Australian courts are required to defer to the decision-maker totally, save for where the decision is manifestly absurd, regardless of the nature of the subject matter or the qualification and experience of the decision-maker.

However, the sliding scale concept faces the same problem as the principle of proportionality in that it is uncertain if the concept applies to decisions outside the human rights context.

However, in two recent cases in Hong Kong the courts[34] have shown their willingness to accept the sliding scale of intensity of scrutiny outside the human rights context. The cases concerned a challenge to the decision of the Town Planning Board not to reduce the extent of a proposed reclamation of certain areas of the Harbour along the waterfront from Central to Causeway Bay to provide land for a Central-Wanchai Bypass and to ease traffic congestion in the Central District and to improve the existing waterfront by making it more pedestrian-friendly and easily accessible by the public, after hearing 770 objections to the original plan. The Court in these cases accepted the sliding scale of intensity of scrutiny as a valid approach to determine the standard of judicial review required.

The concept of a sliding scale can also be regarded as an attempt to reconcile the *Wednesbury* unreasonableness test and the principle of proportionality at least in the human rights context. The concept recognises that the degree of intensity could vary from the traditional *Wednesbury* test to the intermediate heightened degree of scrutiny to the more stringent test of proportionality.[35] However, under a sliding scale test, the *Wednesbury* test seems to have been accorded a looser application compared with that of the test of proportionality.

4. Consequences of Australia lagging behind

The narrow application of *Wednesbury* unreasonableness in Australia has resulted in Australian courts having to use other review grounds, such as legitimate expectation, to justify their decisions to review unreasonableness decisions rather than relying on the unreasonableness ground in the other common law jurisdictions.

In *Baker v Canada (Minister of Citizenship and Immigration)*[36], the Supreme Court of Canada held that the decision to deport the applicant by the Minister pursuant to the *Immigration Act RSC 1985* was unreasonable in light of the expertise of the decision maker, the nature of the decision being made and the language of the empowering provision and the surrounding legislation. L'Heureux-Dube J noted that in reviewing discretionary decisions, courts must give considerable deference to the decision makers' jurisdiction and the manner in which the discretion was exercised.[37] This was consistent with the approach adopted by O'Regan J in *Bato Star*.

In *Minister for Immigration and Ethnic Affairs v Teoh* [38]the Australian High Court resisted the opportunity to expand the *Wednesbury* unreasonableness test. The court looked to the ground of legitimate expectation to justify its decision to review the administrative panel's decision that the hardship of a deportation order on the applicant's wife and children did not outweigh the policy against serious criminal offending. The Court's decision in *Teoh* is controversial as it essentially forced a legitimate expectation onto the applicant. The court justified this imposition by finding that the act by the Executive government to ratify an international convention was a positive statement by the Executive to the world and to the Australian people that it would act in accordance with the convention, and the applicant need not to have been aware of that convention or have personally entertained the expectation.[39] Subsequent case, however, have criticised *Teoh* in this aspect, suggesting the decision in *Teoh* was highly artificial and the extent to which there could be an expectation where it was not actually held by an applicant being very limited.[40]

Conclusion

Based on the recent developments in relation to the *Wednesbury* unreasonableness ground of review, it appears that the codification of the *Wednesbury* test in Australia has potentially restrained the development of this ground of review at common law, despite the fact that the codification was not intended to replace the common law system of prerogative writs in any way. This has resulted in the Australia courts having to look to other grounds of review to

incorporate its obligations under international treaties into the domestic law. This has lead to somewhat strained reasoning in achieving similar results that may have been achieved by adopting a more flexible approach to the reasonableness standard currently adopted.

Consequently, in light of the development sin other common law countries around the world, it may be time for Australia to move away form its narrow interpretation of the *Wednesbury* unreasonableness and embrace the trend to a broader approach. Perhaps the introduction at the State and Territory levels of *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Bill 2006 (Vic)* may encourage the High Court in the future to widen its *Wednesbury* test to in light of human rights considerations.

Bibliography

Caron Beaton-Wells, 'Australia's ADJR Act: Reform or Repeal?'[41], Australian Administrative Law Forum 30 June & 1 July 2005

Creyke, R & McMillan, J, Control of Government Action, Text, Cases and Commentary, LexisNexis Butterworths, 2005

David Dyzenhaus, Murray Hunt & Michael Taggart, 'The Principles of Legality in Administrative Law: Internationalization as Constitutionalisation" (2001) 1(1) *Oxford University Commonwealth Law Journal* 19.

Johannes Chan, 'A Sliding Scale of Reasonableness in Judicial Review' (2006) *University of Hong Kong* 4

Jowell J & Lester, A 'Beyond *Wednesbury*: Substantive Principles of Administrative Law" (1987) PL 368, at 375.

Naomi Sidebottom, "Judicial Review: Is There Still a Role for Unreasonableness', Murdoch University Electronic Journal of Law, Vol 8, No 1 (March 2001), at p 11.

Shivaji Filix, 'Engaging Unreasonableness in Judicial Review' (2006) *Acta Juridica*, forthcoming, p 11.

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Endnotes

1 Caron Beaton-Wells, "Australia's ADJR Act: Reform or Repeal?", Australian Administrative Law Forum 30 June & 1 July 2005, p16.
2 Kirby J, *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59, at pp 157, 166.
3 *Wednesbury*, at 230
4 Ibid
5 Creyke, R & McMillan, J, Control of Government Action, Text, Cases and Commentary, LexisNexis Butterworths, 2005, pp 725-26.
6 [1999] 1 All ER 129
7 [1976] 3 All ER 665 [1977] AC 1014
8 2004 (4) SA 490
9 *Bato Star*, at 512.
10 Eg *Parramatta City Council v Prestell* (1972) 128 CLR 305.
11 Eg *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155; 65 ALR 549; 7 ALN N 79.
12 [2001] 1 AC 532
13 (1999) 162 ALR 577
14 *Minister for Immigration and Multi Cultural Affairs; Ex Parte S202002*, p 61.
15 *Attorney General v Quinn* (1990) 170 CLR 1, per Brennan J at p 36.

16 *A v Pelekanakis* (1999) FCR 70, per Weinburg J.
17 *R (Daly)*, at p 549.
18 Naomi Sidebottom, "Judicial Review: Is There Still a Role for Unreasonableness", Murdoch University Electronic Journal of Law, Vol 8, No 1 (March 2001), at p 11.
19 Shivaji Filix, 'Engaging Unreasonableness in Judicial Review' (2006) *Acta Juridica*, forthcoming, p 11.
20 [1985] AC 374
21 Jowell J & Lester, A "Beyond *Wednesbury*: Substantive Principles of Administrative Law" (1987) PL 368, at 375.
22 *Bato Star*, pp 514-515.
23 Johannes Chan, 'A Sliding Scale of Reasonableness in Judicial Review' (2006) *University of Hong Kong* 4, at p 8.
24 *Prasad*, pp 169-170.
25 Ibid.
26 Chan, p 8.
27 *R v Ministry of Defence; exp Smith* [1996] QB 517, at p 554.
28 Creyke & McMillan, p 726.
29 David Dyzenhaus, Murray Hunt & Michael Taggart, 'The Principles of Legality in Administrative Law: Internationalization as Constitutionalisation" (2001) 1(1) *Oxford University Commonwealth Law Journal* 19.
30 [1996] QB 517
31 [2001] 1 WLR 840
32 [2004] UKHL 56
33 *A and Others v Secretary of State for the Home Department* [2004] UKHL 56, at p 29.
34 *Town Planning Board v The Society for the Protection of Harbour* [2004] 1 HKLRD 396 and *The Society for the Protection of Harbour v Chief Executive in Council* [2003] 3 HKLRD 960.
35 Chan, p 8.
36 [1999] 2 SCR 87
37 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, at p 75.
38 (1995) 183 CLR 273
39 *Teoh*, per Toohey J at p 301 and per Mason CJ & Deane J at p 291.
40 Eg the judges in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502.

HOW SHOULD COURTS CONSTRUE PRIVATIVE CLAUSES?

Katherine Reimers*

Privative clauses have played a controversial role in limiting judicial review, particularly in recent years in the migration area. The question of how they should be construed by the courts is a complex one. It involves looking at the unusual history of the operation of the clauses, and the complicated concepts of the proper limits of executive power, the notion of 'parliamentary supremacy', the role of the judiciary and the importance of the public law values underlying judicial review. This paper will look at why the Commonwealth parliament and the executive government have used the clauses and how the courts have interpreted them to date. It will show some options for how the clauses *could* be construed, and ultimately tries to answer the very difficult question of how the clauses *should* be construed.

This discussion will be limited to Commonwealth privative clauses in the federal system.[1]

The administrative law system and the importance of judicial review

Australia has an extensive federal system of review of administrative decisions made by the Commonwealth government and its agencies.[2] This system was put in place in the 1970s[3] to assure Australians that the government and its agencies would be accountable for their administrative decisions, that decision making processes would be transparent, and that people would be able to challenge these decisions and have them corrected if necessary.

From a general perspective, the primary purposes of administrative law are to 'keep the powers of government within their legal bounds'[4] and to 'improve the quality, efficiency and effectiveness of government decision-making and to enable individuals to test the lawfulness and merits of decisions which affect them.[5] From the Commonwealth government's perspective, the Attorney-General, the Hon Philip Ruddock MP, has described the importance of the administrative law system as: '[I]n a liberal democracy like Australia, administrative law helps to ensure that governments – and their bureaucracies – deal honestly, fairly and openly with the public.'[6]

Two of the key elements of the federal administrative law system are

- judicial review of the actions of Commonwealth officers by the High Court under s 75(v) of the Constitution[7] and by the Federal Court under s 39B of the *Judiciary Act 1903* (Cth) (the Judiciary Act), and

- judicial review of the lawfulness of statutory administrative decisions by the Federal Court and the Federal Magistrates Court (FMC) under the statutory review scheme in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act).

The system is also comprised of a number of non-judicial review mechanisms,[8] including merits review of decisions by tribunals.[9] Together they make what seems to be a very comprehensive system of review of administrative decisions. The role played by judicial

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review in this system is important for many reasons. In 1994, the then Chief Justice of the High Court of Australia, Sir Anthony Mason, encapsulated the heart of the reason for its importance: 'Because government is the source of many benefits claimed by the citizen, an individual's right to review of government decisions is as important as the entitlement to bring an action in the courts to enforce a right against a fellow citizen.'[10]

He has also made an important observation about the importance of judicial review in relation to the role of ministerial responsibility in safeguarding individual's rights:

> [T]he doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.[11]

The view that judicial review is important because it plays a significant role in safeguarding the rights and interests of the individual is also advocated by many.[12]

The classic statement of the scope and nature of judicial review was espoused by a former Chief Justice of the High Court, Sir Gerard Brennan:

> The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government… The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.[13]

In other words, the function of the court in carrying out judicial review is to ensure the decisions is lawful. Its role is not 'to substitute its own decision for that of the administrator by exercising a discretion which the legislator has vested in the administrator'.[14] This is the function of merits review.[15] Thus, when reviewing an administrative decision, if a court finds the decision has been made unlawfully its powers are generally confined to setting the decision aside and remitting the matter to the decision maker for reconsideration according to law.[16]

Underlying the concept of judicial review are important public law values that 'engender community confidence in the standards generally applicable to decision making that affect the interests of individuals'[17]:

- the rule of law
- the safeguarding of individual rights
- accountability, and
- consistency and certainty in the administration of legislation.[18]

Australia's legal system is predicated on the rule of law. In general terms, the rule of law stands for the proposition that no one is above the law.[19] It means the exercise of governmental power is subject to the control of the courts – and thus that judicial review of administrative decisions is an important element in maintaining the rule of law.[20] Sir Anthony Mason has outlined the four propositions associated with the rule of law:[21]

> (1) What Parliament enacts as law within the limits of the powers committed to it by the *Constitution* must be respected and applied by the courts. The responsibility of the courts to give effect to laws validly enacted by Parliament is a central element of the rule of law;

> (2) The courts and the courts alone, under our system of government have the jurisdiction and authority to make an authoritative determination of what the law is;
>
> (3) The rule of law presupposes that the individual has a right of access to the courts for the determination of his or her rights; the proposition is expressed in the presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily implied;[22] and
>
> (4) [J]udicial review is the means by which the administrative decision-maker is prevented from exceeding the powers and functions conferred by law, with the consequence that individual interests are protected accordingly.[23]

Significantly, the limitations on the rule of law in judicial review as stated by the current Chief Justice of the High Court, the Hon Murray Gleeson, are that: 'the rule of law is concerned with the lawfulness of official conduct – not whether the laws are wise or fair', or whether 'decisions are wise, or humane, or in the public interest.'[24] Further, he has said that 'the rule of law is not maintained by subverting the democratic process…[and] [t]he Constitution…has not substituted general judicial review for political accountability'.[25]

A related public law value – the safeguarding of individual rights – which is reflected in Sir Anthony Mason's outline of the propositions associated with the rule of law, is upheld by allowing people access to judicial review proceedings because this allows them to enforce or protect their interests.[26] Maintaining the accountability of decision makers through judicial review proceedings is also important. Review ensures that decision makers are not above the law, and encourages them to take responsibility for making lawful decisions in the knowledge they are reviewable.[27] The last public law value – consistency and certainty in the administration of legislation – is met to a degree by judicial review proceedings as they can create precedents to guide and provide some certainty on the interpretation of legislation that may affect a range of other people.[28]

As indicated above, the jurisdiction for federal courts to undertake judicial review comes from a number of sources. The High Court's original jurisdiction derives from s 75(v) of the Constitution,[29] which gives the Court the power to determine all matters in which a writ of mandamus[30] or a writ of prohibition[31] or an injunction[32] is sought against an 'officer of the Commonwealth'[33]. This jurisdiction is particularly important because it cannot be removed by an Act of Parliament.[34] As stated simply by Sir Owen Dixon, s 75(v) was written into the Constitution 'to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power'.[35] Gleeson CJ has discussed s 75(v) in terms of the rule of law, saying that '[s]ection 75(v)…secures a basic element of the rule of law',[36] and '[u]nder s 75(v)…the Court is empowered, in the exercise of its responsibility to maintain the rule of law, to make orders…aimed at ensuring observance of the law by officers of the Commonwealth'.[37]

In addition, Parliament has exercised its legislative power to extend judicial review (beyond that expressed in the Constitution) in the Judiciary Act and the ADJR Act. This power, unlike that derived from the Constitution, can be used not only to give courts jurisdiction to conduct judicial review, but also to limit or remove jurisdiction. Under subsec 39B(1) of the Judiciary Act[38] the Federal Court has judicial review powers identical to the High Court's jurisdiction under s 75(v), with some limited exceptions.[39] The ADJR Act gives the Federal Court and the FMC judicial review powers[40] that are, for the most part, modelled on the common law. The common law espousal[41] of the now well-known grounds of judicial review are codified in s 5 of the ADJR Act:

> 5(1) A person who is aggrieved by a decision to which this Act applies that is made after the commencement of this Act may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the decision on any one or more of the following grounds:

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that procedures that were required by law to be observed in connection with the making of the decision were not observed;

(c) that the person who purported to make the decision did not have jurisdiction to make the decision;

(d) that the decision was not authorized by the enactment in pursuance of which it was purported to be made;

(e) that the making of the decision was an improper exercise of the power conferred by the enactment in pursuance of which it was purported to be made; [42]

(f) that the decision involved an error of law, whether or not the error appears on the record of the decision;

(g) that the decision was induced or affected by fraud;

(h) that there was no evidence or other material to justify the making of the decision; [43]

(j) that the decision was otherwise contrary to law.

The review available under the ADJR Act does not apply to all administrative decisions. Some decisions are exempt from being decisions subject to judicial review under the Act,[44] and the grounds of review only apply to decisions 'to which this Act applies'.[45] An example[46] of an exempted decision are 'privative clause decisions'[47] or 'purported privative clause decisions'[48] under the *Migration Act 1958* (Cth) (the Migration Act).[49] Some decisions that are not captured by the ADJR Act are covered by the common law.[50] Further in some areas, parliament has enacted separate statutory schemes for judicial review, most notably in the migration area. Under the Migration Act,[51] the FMC has the same original jurisdiction as the High Court under section 75(v), with some exceptions.[52]

Privative clauses

A. What are they and what is their purpose?

Broadly speaking, privative clauses, also known as ouster clauses, are legislative provisions that purport to prevent certain administrative decisions from being subject to judicial review.[53] They are said to be the 'most comprehensive means by which Parliament has sought to limit the scope of judicial review'.[54] They are controversial because they are essentially an attempt by parliament and the executive government to stifle powers bestowed on the judiciary under the Constitution. Parliament does not need to use privative clauses to remove the jurisdiction for judicial review derived under the ADJR Act, Judiciary Act and Migration Act. This can be done by simple legislative amendment. Privative clauses are used with the intention of limiting the constitutional conferral of power on the High Court in its original jurisdiction so far as decisions of Commonwealth officers are concerned.

Privative clauses have an uneasy relationship with the rule of law. An interesting way to describe this relationship is of 'an irresistible force meet[ing] an immovable object' where parliamentary supremacy is the irresistible force and the rule of law is the immovable object.[55] By parliamentary supremacy it is meant that – '[h]owever imprudent, unwise or even unjust Parliament's actions might appear to a given individual, so long as it stays within the Constitution, Parliament can make or unmake whatever law it likes'.[56] Privative clauses are part of parliament's supremacy because they are used by parliament to put certain administrative decisions (power for which has also been conferred on the decision maker by parliament) beyond challenge in the courts and apparently within the limits of the Constitution.

Privative clauses have been included in a variety of Commonwealth legislation, particularly that dealing with industrial, conciliation and arbitration, and taxation matters, and more recently migration matters.[57] There are four types of clauses generally regarded as privative clauses:

- those seeking to make orders, awards or other determinations final
- those forbidding courts granting the traditional judicial review remedies
- those stating that judicial review lies only on stipulated grounds, and
- those prescribing time limits on applying for judicial review.[58]

The first and second types are those traditionally thought of as privative clauses. They raise questions of statutory construction: on the one hand, an Act may purport to set limits on the exercise of certain powers by a decision maker, but on the other hand the privative clause purports to remove judicial review from giving any practical effect to those limits. A well-known example is the clause in the 1945 High Court case of *R v Hickman; Ex parte Fox and Clinton*[59] (*Hickman*). In *Hickman*, a Commonwealth Regulation purported to provide that the decisions of a statutory board, which had the authority to make awards in relation to the coal mining industry and settle disputes between employers and employees, 'shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus, or injunction, in any court on any account whatever.'[60] A more recent example is s 474 of the Migration Act.[61] It purports to oust any 'privative clause decisions' from the jurisdiction of the courts by providing that such a decision:

> 474(1)(a) is final and conclusive; and
>
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
>
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

A 'privative clause decision'[62] essentially covers most decisions made under the Migration Act, including all decisions on visas,[63] decisions of the Refugee Review Tribunal (RRT), Migration Review Tribunal (MRT) and Administrative Appeals Tribunal (AAT).[64]

Another example of the first two types of privative clauses is found in s 150 of the *Workplace Relations Act 1966* (Cth),[65] which is identical to s 60 of the former *Conciliation and Arbitration Act 1904* (Cth) (Conciliation and Arbitration Act):[66]

> 150(1) Subject to this Act, an award (including an award made on appeal):
>
> (a) is final and conclusive;
>
> (b) shall not be challenged, appealed against, reviewed, quashed or called in question in any court; and
>
> (c) is not subject to prohibition, mandamus or injunction in any court on any account.

An example of the third type of privative clause, forbidding judicial review except on certain specified grounds, is s 5 of the ADJR Act (see text above), though the grounds of review in s 5 are quite expansive. Another example is the 'old Part 8' of the Migration Act,[67] which contained the statutory scheme for reviewing migration decisions, and did not allow review on certain grounds.[68]

An example of the fourth type of clause, which excludes review after a certain time limit has passed, is ss 11(3) of the ADJR Act. It provides a 28 day time limit within which an application for an order of review to the Federal Court and FMC must be lodged. Another example is s 486A of the Migration Act[69]:

> 486A(1) An application to the High Court for a remedy to be granted in exercise of the court's original jurisdiction in relation to a migration decision must be made to the court within 28 days of the actual…notification of the decision.

This limit may be extended by a further 56 days if the court is satisfied it is 'in the interests of the administration of justice to do so'.[70]

B. The government's reasons for using privative clauses in the migration area

Originally, the Commonwealth parliament used privative clauses like that in *Hickman* in the industrial context to 'prevent judicial intrusion into the work of the Commonwealth Conciliation and Arbitration Commission and related tribunals'.[71] It now uses privative clauses in the migration jurisdiction, an area that in the last decade is said to have 'been dominated by [the government's] attempts to restrict judicial review of decision making'.[72]

Both broad and specific policy reasons have been advanced by the government for its position. When the Liberal government came to power in 1996, its migration platform was that the existing avenues for administrative review of migration decisions, in light of the already expanded merits review system, were adequate.[73] This general policy position has not changed in the last decade. Nor has the government's position that access to the courts for further review should be restricted 'in all but exceptional circumstances'.[74] This seems to have stemmed from a long-held government concern that the majority of applications for judicial review are far from 'exceptional'. In 1997, the then Minister for Immigration and Multicultural Affairs, Mr Ruddock, said the government was aware that a substantial number of non-citizens were using the judicial review process purely as a means to prolong their stay in Australia.[75] He has also expressed concern about the 'abuse of the onshore refugee/asylum application process' by those who 'seek to claim refugee status in Australia merely to enable them to gain work rights or access to Medicare'.[76] Concerns about unmeritorious applications were also articulated by the previous Labor government when it enacted the *Migration Reform Act 1992* (Cth).[77]

In addition to these concerns, the government has also been mindful of the continual increase in the number and cost of migration review applications,[78] the high number of unsuccessful applications, and the impact on the workload of the High Court[79]:

> The Government is very concerned about the large increases in the number of migration cases in the federal courts in recent years and the very low success rate of this litigation. … In recent years, the Government has won over 90% of all migration cases decided at hearing. Unsuccessful cases are not necessarily unmeritorious. However, the very high failure rate reflects concerns raised, including by the courts, about high levels of unmeritorious migration litigation.
>
> The large volume of judicial review proceedings, unmeritorious litigation and delays are very costly and are placing strains on the courts and the migration system more generally. Extended waiting times in courts have been taken advantage of by some applicants using the court process simply to delay their removal from Australia and prolong their stay in the community. These delays impact on applicants with genuine claims who are waiting to have their cases considered.[80]

The government's opinion is that judicial review in migration matters is 'an ongoing process of properly balancing the interests of individuals with the interests of the wider community…[and] reducing judicial review of migration decision-making achieves that goal'.[81]

In summary, Mr Ruddock has said that, since coming to power, 'the government's aim in the migration law field has remained constant: to ensure that genuine applicants have access to fair review processes, and to deter those with unmeritorious cases who would clog the courts and play the system for ulterior motives.'[82]

In relation to the specific privative clauses inserted by the government in the Migration Act, when the government introduced the s 474 privative clause in 2001,[83] it seems it had all of these factors in mind. So how did it intend that the clause be interpreted by the courts? It is clear from Mr Ruddock's[84] Second Reading Speech to parliament that the government intended that s 474 would be interpreted in the same way as the privative clause in *Hickman*:

> The privative clause in the bill is based on a very similar clause in *Hickman's case*…. Members [of parliament] may be aware that the effect of a privative clause such as that used in *Hickman's case* is to expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for the decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently.[85]

In addition, to achieve its aims in the migration area, the government has also used the less traditional privative clauses to restrict the time within which review applications can be made. The now Attorney-General, Mr Ruddock, has said the revised time limits for applications to the High Court, inserted in 2005 in s 486A,[86] are intended to result in 'a balance between applicants having the opportunity to seek judicial review of migration decisions and ensuring timely handling of these applications…[and ensuring] that more people in the wider community will have speedier access to the courts.'[87] It has also introduced the concept of 'purported privative clause decisions' to ensure that these time limits apply in cases affected by jurisdictional error.[88]

C. How the courts have interpreted privative clauses

The government's views on the need to restrict judicial review in the migration area are not shared by the courts. However, this has not always been the case, particularly for privative clauses in the industrial area.

The industrial law case of *Hickman* is cited as the 'classical' and 'authoritative'[89] principle of the interpretation of privative clauses. It has been upheld by many later High Court cases,[90] and is said to have 'governed the operation of such clauses in the industrial area for more than half a century'.[91] In *Hickman*, Dixon J (as he then was) said that a privative clause should be interpreted as meaning:

> …no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority.[92]

The result was that the Court upheld the validity of the privative clause (see text above) by 'construing it as defining the extent of a decision-maker's power, rather than as seeking to remove the High Court's jurisdiction to grant relief [under]…the Constitution.'[93] In reaching this decision, Dixon J said the interpretation of a privative clause 'becomes a question of interpretation of the whole legislative instrument'.[94] He set out a rule of construction by which the two contradictory provisions could be read together, thus allowing a reconciliation of the apparent contradiction between a provision that granted a limited jurisdiction to a decision maker and a privative clause stating that the decision was not to be challenged.[95] Rather than interpreting the clause as seeking to remove the High Court's constitutional jurisdiction, *Hickman* allows a privative clause to protect a decision made in excess of a decision maker's statutory powers by expanding the area of valid decision-making.[96] It must

also be noted that this interpretation is subject to the *Hickman* conditions, also set out by Dixon J, which provide that a privative clause will only cure jurisdictional error if the decision:

- is a bona fide attempt to exercise the power
- relates to the subject matter of the legislation, and
- is reasonably capable of reference to the power given to the body.[97]

The first condition is thought to require a decision maker to act in good faith. If they act out of 'malice, spite, dishonesty, or some other improper motivation', then the decision will not be protected by a privative clause.[98] The second and third constraints are thought to be virtually the same, though there is no clear High Court direction about what they amount to.[99] Generally, the second constraint is thought to mean that a privative clause will not protect a decision if the decision-maker strays from the subject matter of the legislation under which the decision is being made.[100] The third constraint seems to mean that the decision must not, on its face, exceed the authority of the decision-maker.[101] For example, if a public servant does not have the relevant delegation to make a decision, it will not be saved. In later years, an additional condition appears to have been added,[102] so that a decision may not be protected if a decision maker fails to discharge 'imperative duties' or goes beyond 'inviolable limitations or restraints'.[103] This is explained as 'not breach[ing] a statutory constraint regarded as being so important as to be unprotected *in any way* by the operation of the [privative] clause'.[104]

There is said to have been a period following *Hickman* during which it received 'no more than lip service' and was only used to cure jurisdictional error in a handful of cases.[105] Despite this, later High Court cases revived Dixon J's *Hickman* principle,[106] and confirmed that the implicit effect of a *Hickman* clause is that 'the area of valid decision-making is expanded.'[107] For instance, in relation to the privative clause in s 60 of the former Conciliation and Arbitration Act (see text above), in 1991 a High Court decision[108] confirmed the revival of *Hickman* and upheld the validity of s 60 by reading down the clause as amounting to an enlargement of the decision maker's statutory jurisdiction.

Generally, it seems that in the cases in the first five decades after *Hickman*, in other than the migration area, the interpretation given to privative clauses by the Australian courts resulted in a restriction of access to the courts.[109] In the industrial relations context this was relatively uncontroversial. It is thought this is because the original use of the clauses attracted a level of sympathy from the courts. This sympathy arose because of the 'notorious…hair-splitting points of contention' and the fact the government had set up specialist bodies with specialised knowledge, such as the Commonwealth Conciliation and Arbitration Commission, to deal with such cases.[110]

However, when the High Court came to interpret privative clauses in the migration context, entirely different considerations became relevant. Unlike the industrial area, the migration area is a field where the court thinks of itself as having special responsibilities because of the vulnerability of most applicants, and because it does not have full confidence in the departmental and tribunal decision-makers.[111] Further, it is a jurisdiction in which human rights issues are likely to arise, including issues of personal liberty, safety and even life or death.[112]

Thus, in 2002 when the High Court came to consider the application of the *Hickman* principle in the migration jurisdiction – in the case of *Plaintiff S157/2002 v Commonwealth of Australia*[113] (*Plaintiff S157*) – a very different result emerged. Generally speaking, the decision was 'a major victory for applicants because it reopened the doors of the courts to judicial review.'[114]

In *Plaintiff S157*, the court was required to consider the effect of the privative clause in s 474 of the Migration Act (see text above). The decision is complex and confusing. Although s 474 was held not to apply because the decision in question was not a decision made under the Migration Act but a decision *purportedly* made under the Act, the Court upheld the *Hickman* principle and the validity of s 474. However, it re-examined the construction of privative clauses in such a way as to render the ban on judicial review in s 474 largely ineffective. It did this by redefining the *Hickman* principle as 'simply a rule of construction allowing for the reconciliation of apparently conflicting statutory provisions',[115] saying that:

> Once this is accepted, as it must be, it follows that there can be no general rule as to the meaning or effect of privative clauses. Rather, the meaning of a privative clause must be ascertained from its terms; and if that meaning appears to conflict with the provision pursuant to which some action has been taken or some decision made, its effect will depend entirely on the outcome of its reconciliation with that other provisions.[116]

However, the court provided little guidance about how to reconcile privative clauses with other statutory provisions.[117]

Significantly, the Court also held that privative clauses do not have the effect, contended by the Commonwealth in the case, of expanding the authority of the decision maker and thus curing jurisdictional error.[118] It said that a decision affected by a jurisdictional error had to be 'regarded, in law, as no decision at all'.[119] But it also provided little guidance about what errors constitute 'jurisdictional errors'.[120] Since *Plaintiff S157*, however, the courts have favoured such a broad definition that jurisdictional error now seems to resemble the broad grounds of review available under common law and s 5 of the ADJR Act,[121] meaning that privative clauses are virtually ineffective in limiting judicial review.

In addition, the High Court went further than required. It indicated there would be a real question about the constitutional validity of s 474 if it were to apply to decisions tainted by jurisdictional error[122] (which it didn't in this case because the decision was held not to be a decision made under the Migration Act). It said that any legislation that takes away the High Court's power under s 75(v) of the Constitution would also contravene the separation of powers doctrine implicit in the Constitution that prevents a non-judicial body, such as a tribunal, being the final arbiter of whether its decisions are legal.[123]

In summary, the result of the decision in *Plaintiff S157* seems to be that federal courts will not be prevented, by a privative clause of the *Hickman* type, from reviewing decisions affected by 'jurisdictional error',[124] for which there is a very wide definition. As seen above, this was far from the interpretation intended by the government when it presented the s 474 amendment to parliament in 2001.

In terms of the less traditional type of privative clause, that prescribes time limits beyond which no judicial review is available, the court seems to have held such limits to be valid provided they are reasonable.[125] In *Plaintiff S157*, Callinan J[126] accepted that parliament could prescribe time limits in relation to judicial review provided such limits are not a prohibition to review, in which case 'any constitutional right of recourse [would be] virtually illusory'.[127] He also indicated that a time limit would be invalid unless it was accompanied by a discretion for the court to extend the time.[128] On this basis, he said the then s 486A of the Migration Act was invalid. The new s 486A[129] has gone some way to address the concerns expressed by Callinan J, though it sets a time limit on any extension granted by the court.[130] This new section is yet to be interpreted by the courts, as is the government's attempt to have such time limits apply to cases like *Plaintiff S157* by introducing the concept of a 'purported privative clause'.[131]

D. Conclusion – do the clauses work?

As discussed above, privative clauses are used by parliament and the Executive government for the purpose of exempting certain administrative decisions from judicial review. However, in recent years in the migration area, courts have refused to interpret the clauses in a way that gives effect to this legislative intention. Although it is difficult to predict the effect of *Plaintiff S157* outside the migration area, such as in industrial legislation where privative clauses have been less controversial, the High Court has effectively deemed privative clauses in migration legislation useless as a means for parliament to achieve its intentions.

Options for how courts should construe privative clauses

In light of the government's purposes and the court's current interpretation, what are the main options for how courts could construe privative clauses?

A. A literal interpretation

A literal reading of *Hickman* clauses results in a very different meaning to that given to the clauses by the courts, and probably even that intended by parliament. It puts a decision-maker's powers beyond judicial control and thus makes them 'absolutely unlimited'.[132] An extreme example of this is that used by the Commonwealth Solicitor-General, David Bennett, of the hypothetical dog licensing Act.[133] The example is of an Act that confers limited powers on dog inspectors to fine dog owners who do not have dog licences and that also contains a privative clause protecting the actions of the inspectors from every kind of legal challenge. Interpreted literally, such a clause would allow inspectors to, for example, fine cat-owners, or exempt family members and friends from the fines, or '[m]ore extremely, one might purport to grant a divorce'.[134] In terms of s 474 of the Migration Act, if it were to be taken at face value it would prevent the court from issuing a constitutional writ to remedy decisions made without jurisdiction or in excess of jurisdiction.[135] However, the result of such a literal interpretation is that because it directly takes away the High Court's power to issue the constitutional writs under s 75(v) of the Constitution, the clause can be construed as unconstitutional and struck out.[136]

The constitutional framework for judicial review is important because it has regard to important public law values, including the rule of law, the safeguarding of individual rights and executive accountability.[137] The right of access to the courts for a determination of legal rights has been called 'a fundamental right' on which the Constitution is based and a central element in the rule of law – which conflicts with the basic reason for privative clauses.[138] There is also a basic presumption underlying the constitutional separation of powers doctrine that only courts can conclusively determine whether a law of the parliament has been contravened. In addition to these constitutional concerns, if a privative clause were read as infinitely expanding the powers of a decision maker, this would result in 'the bulk of the words of the statute count[ing] for nothing and the statute…[being] reduced to self-contradiction and nonsense.'[139]

However, despite the fact that a literal interpretation can result in the clauses being invalid on the ground they are in direct conflict with the Constitution, the court has never made an authoritative ruling that a privative clause should be struck out.[140]

B. The 'High Court's way' - following the Plaintiff S157 interpretation

The 'better' option chosen by the High Court in relation to migration matters was the *Plaintiff S157* option. Without striking out the clause, and thus risking being accused of 'judicial activism'[141] and upsetting the delicate balance between the judiciary, and the parliament and

executive government (and the concept of 'parliamentary supremacy'), the Court instead told the government that privative clauses are the wrong way to go about expanding the scope of validity of administrative decision-making. Thus, although *Plaintiff S157* could be seen by some as a missed opportunity to strike out the clauses, arguably this is what the High Court did in a fashion by interpreting it in such a way as to leave it with 'having little or nothing to do'.[142]

The decision in *Plaintiff S157* was welcomed by some as upholding the public law values underlying judicial review. For instance, it has been said that by 'achieving a result which preserved access to judicial review, the decision maintained the rule of law and protected the interests of individuals'.[143] The decision has also been said to emphasise the 'High Court's commitment to the fundamental principles of the rule of law'.[144] The result is the 'entrenchment' of judicial review of migration decisions under s 75(v) of the Constitution,[145] thus 'assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them'.[146]

However, the decision is ultimately complex and confusing and reliant on a broad definition being given to 'jurisdictional error'. It is also a very technical exercise in statutory construction, and a rather restricted approach to the interpretation of privative clauses.[147] In addition, the *Plaintiff S157* interpretation does not allow any room for the reasons advanced by the government for it being necessary to limit judicial review of migration decisions. At the expense of strictly upholding the rule of law and other pubic law values, is there a 'better' alternative?

C. The 'government's way' – the Hickman interpretation and other ways

The Court's interpretation of privative clauses in *Hickman* is sometimes referred to as a 'High Court compromise'[148] between Parliamentary supremacy and the rule of law.[149] It effectively balances privative clauses and the rule of law in a way that results in '[b]oth of them giv[ing] a little in the face of the other'.[150] Expanding the powers of decision-makers is perhaps the only interpretation that can be given to the plain words of the privative clause in order to reconcile the clauses with the Constitution,[151] and stop the decision-maker from being able to subvert the purpose of the legislation they are administering.[152]

On Dixon J's *Hickman* analysis the clause remains valid and applies to administrative decisions, subject to certain conditions being met. If the *Hickman* principle had been applied to s 474 of the Migration Act as the government had intended, the Court would be prevented from reviewing visa decisions of the RRT, MRT and AAT that are reasonably referable to the tribunals' statutory power under the Act and are made as part of an attempt, undertaken in good faith, to apply the power.[153] Decisions that do not meet these conditions would be subject to judicial review.

However, it seems that the *Hickman* conditions have been difficult to interpret and apply. There is also the argument that Dixon J's analysis is only obiter and has never been authoritatively accepted without significant clarification and qualification.[154] Further, the way in which the High Court dealt with *Hickman* in *Plaintiff S157* was to essentially reduce it to merely 'the result of applying well-established principles of statutory construction' in order to reconcile two competing provisions.[155] This leads to the conclusion that both the original and current interpretations of *Hickman* have problems. But it may be that the old interpretation of *Hickman* is still useful to a degree. The advantage of that interpretation is that it found a way around the constitutional problem associated with limiting judicial review. So perhaps if judicial review were to be limited in some form, the basic premise of *Hickman* could be revived and used with other limitations that the court either cannot override or is happy to leave intact. In other words, an approach that balances the government's concerns with the public law values underlying our administrative law system.

In considering this option it must be kept in mind that 'the rule of law is not a panacea for Parliamentary oppression'.[156] If Parliament, in fulfilling its constitutional role of identifying the content of the law, removes rights of review by express language, then what room is there for the court, in fulfilling its role of applying the law, to ignore that law, providing of course that constitutional constraints are not breached.[157] Indeed, even in *Plaintiff S157* the court 'made it clear that Parliament could exclude or limit procedural fairness…by using unmistakenly clear language'.[158] The government has started to do this by amending the Migration Act to set out the requirements a decision-maker must comply with to fulfil the hearing rule of natural justice, thus narrowing the ambit of procedural fairness and the grounds on which review can be sought.[159] Presumably then, this principle could be more broadly applied and other limitations on administrative discretion can also be excluded by clear language.[160]

So what limitations might be appropriate? It has recently been recognised by the Administrative Review Council (ARC) that there are a range of situations in which limiting review 'might be relevant in the public interest', and that 'in some limited circumstances…[public law] values can be advanced by means other than judicial review and…there are other important legal and governmental values that might at times conflict with those underlying judicial review.'[161]

In terms of types of decisions for which judicial review could appropriately be limited, the ARC has said that limiting review on grounds of unreasonableness or procedural unfairness is justifiable 'sometimes', but not in all cases because there is a risk some applicants may be disadvantaged.[162] In terms of decisions that are not final or operative, which can often be the case with decisions in the migration process, the ARC's view is that limiting review of such decisions is also 'sometimes justifiable' on the basis that if every step in the administrative process is reviewable, the process would be frustrated and fragmented.[163]

Further, in relation to decisions where there is a particular need for certainty, which is also the case because of the very nature of the migration and refugee matters, the ARC supports the position that 'sometimes' limiting review is justifiable because of the adverse impact of review on people affected by the decision, including third parties.[164] It suggests that legislation that gives effect to the validity of the decision after a reasonable period of time has passed, during which the decision can be challenged, may be an effective way to achieve this result without directly seeking to limit review.[165] The government has done this through the time limits for review in the Migration Act.

It is also possible there are some justifications for decisions about policy having limited judicial review options. The reason advanced by the ARC for this is that the Executive is in the best position to determine policy matters. This is certainly the opinion of the government in relation to its migration policy. However, the ARC says that as a general proposition this argument 'carries little weight' because it is possible a decision-maker may not consider or may misconstrue government policy, or the policy itself could be unlawful.[166] It contends the 'proper role of the court is to determine whether the policies that have been developed and applied are lawful'.[167]

In relation to unmeritorious applications and cases where people use review as a delay tactic, the government has clearly used this as a justification for limiting review of migration decisions. However, the ARC does not support the contention that there are strong public policy grounds, such as an unwarranted burden on the courts or unnecessary costs to the public, to justify limiting review of unmeritorious cases.[168] It says a blanket removal of all judicial review would adversely affect meritorious applications as well. It suggests that the appropriate way to deal with unmeritorious applications is to give the courts powers to dispose of such applications at an early stage of the proceedings.

The government recently introduced procedural reforms[169] aimed at deterring unmeritorious applications by allowing the High Court, Federal Court and FMC to dispose of matters summarily on their own initiative if satisfied there is no reasonable prospect of success.[170] It also inserted a provision into the Migration Act requiring applicants, when commencing proceedings, to provide details of any previous applications for judicial review in any court in relation to that decision, saying that this is intended to 'discourage applicants from attempting to re-litigate these matters, including as a means to delay their removal from Australia.'[171] It further introduced amendments to prohibit lawyers, migration agents and others from encouraging unmeritorious migration litigation, with the penalty being a personal costs order.[172] It is yet to be seen whether these provisions will achieve their intended purpose, but it is significant to note that the government is trying to solve the problems surrounding migration litigation by means other than privative clauses.

In addition, the ARC has also suggested that it is perhaps justifiable to limit judicial review of decisions where adequate alternative remedies are available. This could include, for example, merits review by a specialist body or tribunal. In general terms, merits review of statutory decisions made by agencies is conducted by independent tribunals such as the AAT, RRT, MRT and the Social Security Appeals Tribunal. Merits review requires the tribunal to stand in the shoes of the original decision maker and either affirm or vary the original decision. It typically involves a review of all the facts that support the original decision. A person may apply for merits review by a tribunal where this is permitted by the legislation under which the original decision was made.[173] For instance, in the case of migration cases, a person who has been refused a visa to stay in Australia can, depending on the nature of their case, appeal to the MRT, RRT or AAT.[174]

Significantly, perhaps one of the reasons privative clauses in industrial legislation have been relatively uncontroversial is that statutory decisions in this area are generally subject to extensive alternative regimes for merits review and statutory appeal rights.[175] It is thus conceivable that an argument could be advanced that if there is an appropriate range of statutory appeal and non-judicial review means available to challenge administrative decisions, that an additional right to judicial review is not necessary. However, this could not be a blanket proviso – it would depend on the specific accountability, review and appeal mechanisms available for each type of decision.

D. Conclusion – which is the best option?

Debate about the proper construction of privative clauses highlights the inherent tension that exists between the parliament and executive government on the one hand, who seek to use the clauses to restrict judicial review, and the judiciary on the other, whose role it is to interpret the legal effect of the clauses. The answer to what is the best way to construe privative clauses depends on the view taken on issues such as 'parliamentary supremacy' and the importance of the rule of law and other public law values underlying judicial review.

If the purpose of judicial review is strictly seen as ensuring the executive is appropriately controlled and kept in check from abusing its powers, it is easy to support the court's interpretation of the clauses, which essentially renders them ineffective. However, there are some situations in which limiting judicial review might be appropriate and which might go some way to ameliorating the government's concerns in the migration area (although it is also noted that the government has started implementing other measures to achieve their purposes). It is possible that if the government goes about drafting such limitations in the right way, this may result in a 'better' interpretation of privative clauses for the government. However, it is difficult to support the view that there should ever be a 'blanket' approach to limiting review, as this defies the important public law values underlying the Constitution and our administrative law system.

Endnotes

1 For the purposes of this paper, the general assumption that different principles apply in respect of State privative clauses is accepted. This assumption is essentially based on the fact that the federal parliament is bound by constitutional provisions to retain a form of judicial review, that there is no equivalent constitutional requirement on State parliaments, and thus that State privative clauses are affected by different considerations. For a discussion of the differences see Michael Sexton & Julia Quilter, 'Privative Clauses and State Constitutions' (2003) 5(4) Constitutional Law and Policy Review 69 at 72-3; Sir Anthony Mason, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (1994) 1(1) AJ Human Rights 3 at 3; compare generally Denise Meyerson, 'State and Federal Privative Clauses: Not so different after all' (2005) 16(1) PLR 39, who argues the differences are minimal.
2 Any reference to 'agency' is a reference to Commonwealth government departments and agencies.
3 As a result mainly of the recommendations made in the Report of the Commonwealth Administrative Review Committee, 'Report August 1971', *Parliamentary Paper No 144*, 1971 (the Kerr Committee report). The Kerr Committee was established by the then Attorney-General, Sir Nigel Bowen, to examine the grounds and procedures for the review of administrative decisions. At the time of the report, the only way to seek a review of the vast majority of government decisions was through judicial remedies or parliamentary oversight. After the Kerr Committee, two further committees were established – the Bland and Ellicott Committees – and their reports also contributed to the redefining of Australia's administrative law system.
4 H W R Wade and C F Forsyth, *Administrative Law* (7th ed, 1994) at 4.
5 See www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Overview_Details_Overview (at 18 May 2006).
6 Philip Ruddock, 'Opening Address', paper presented at the Administrative Law Forum at Canberra, 30 June 2005.
7 *Constitution of Australia*, 1901.
8 The others include: (1) Investigation of complaints about agencies' administrative actions by the Commonwealth Ombudsman; (2) An obligation imposed by s 13 of the ADJR Act that a decision maker must, where requested, provide a written statement of the findings on material questions of fact, the material on which those findings were based and the reasons for the decision. This requirement is said to be a 'distinct advance in arming the citizen with effective remedies designed to ensure administrative justice' (Mason, 'The Importance of Judicial Review', above n1 at 7) and is particularly important given the High Court has held there is no general common law duty to give reasons: *Public Service Board of NSW v Osmond* (1986) 159 CLR 656); and (3) Rights provided under the *Freedom of Information Act 1982* (Cth), *Privacy Act 1988* (Cth) and *Archives Act 1983* (Cth) that aim to ensure the lawfulness and accountability of decision making by enabling people to obtain government-held personal documents and information about government administrative processes.
9 See discussion below about the role of merits review.
10 Mason, 'The Importance of Judicial Review…', above n1 at 3.
11 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 222 per Mason J (as he then was).
12 See, for example, Mason 'The Importance of Judicial Review', above n1 at 11; see generally ARC Report, below n17.
13 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-6 per Brennan J (as he then was).
14 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-1 per Mason J (as he then was), citing *Wednesbury Corporation* [1948] 1 KB 228.
15 See discussion below on merits review of administrative decisions by tribunals.
16 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 578-9, 598-600. Section 16 of the ADJR Act gives the Federal Court and FMC the power to set aside a decision and refer it back to the decision maker for further consideration. Sections 15 and 15A also give these courts the power to suspend the operation of a decision and order a stay of proceedings.
17 Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney-General* Report no. 47 (April 2006) at 31.
18 ARC Report, above n17 at vii, 30 and 55.
19 Gavin Loughton, 'Privative Clauses and the Commonwealth Constitution: A primer', paper presented at the Australian Government Solicitor's Constitutional Law Forum at Canberra, 23 October 2002 at 3.
20 Ibid.
21 Sir Anthony Mason, 'The Tension between Legislative Supremacy and Judicial Review' (2003) 77 ALJ 803 at 805.
22 *Public Service Association (SA) v Federated Clerk's Union* (1991) 173 CLR 132 at 160.
23 *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.
24 *Re Minister for Immigration and Multicultural Affairs; Ex parte Fejzullahu* [2000] HCA 23 (*Fejzullahu*) per Gleeson CJ.
25 Ibid.
26 ARC Report, above n17 at 31.
27 Ibid.
28 Ibid.
29 Original jurisdiction for judicial review may also be conferred on the High Court under s 75(iii), though the ambit of this section as a source of jurisdiction has not been the subject of extensive analysis in the High Court, so it is not discussed in this paper.

30 Writs of mandamus compel the performance of a lawful public duty.
31 Writs of prohibition restrain a person from performing or continuing to perform an unlawful act.
32 Injunctions protect statutory rights and enforce the statutory obligations of decision makers.
33 'Officer of the Commonwealth' is not limited to Commonwealth public service members and would extend to members of bodies such as the Australian Competition and Consumer Commission.
34 This is supported by extensive authority, including *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 (*O'Toole*) at 251-252, 292, 308; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 36-7, 41, 68; *Deputy Commissioner for Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 (*Richard Walter*) at 178-9, 192, 204-5, 232.
35 *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J (as he then was).
36 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 (*Plaintiff S157*) at 482.
37 *Fejzullahu*, above n24.
38 Subsection 39B(1A) also confers jurisdiction on the Federal Court for any matter in which the Commonwealth is seeking an injunction or declaration, or which arises under the Constitution or involves its interpretation, or a matter other than a criminal matter that arises under the laws made by parliament.
39 See exemptions in subsec 39B(1B), (1C) and (2).
40 Section 8 of the ADJR Act.
41 *Anisminic v Foreign Compensation Commission* [1968] 2 AC 147, where the House of Lords, per Lord Reid, listed most of the types of administrative error now well-known, and which have been accepted by the High Court (*Craig v South Australia* (1995) 184 CLR 163 (*Craig*) at 176-80).
42 The meaning of improper exercise of power is expanded in subsection 5(2) of the ADJR Act.
43 The meaning of this is expanded in subsection 5(3) of the ADJR Act.
44 See section 19 of the ADJR Act and the *ADJR Regulations 1985* (Cth).
45 Section 3 defines 'decision to which this Act applies' as a decision of an administrative character made, proposed to be made, or required to be made under an enactment other than, for instance, a decision included in the list of exemptions in Schedule 1 of the Act.
46 Others examples include decisions under the *Workplace Relations Act 1996* (Cth), *Australian Security Intelligence Organisation Act 1956* (Cth), *Telecommunications (Interception) Act 1979* (Cth).
47 Defined in ss 474(2) of the Migration Act as 'a decision of an administrative character made, proposed to be made, or required to be made…under this Act or under a regulation or other instrument made under this Act …other than a decision referred to in ss (4) or (5).'
48 Defined in s 5E of the Migration Act, it covers decisions purportedly made under the Act that would be a 'privative clause decision' if there were not a failure to exercise jurisdiction or an excess of jurisdiction in the making of the decision. This section was inserted by the *Migration Litigation Reform Act 2005* (Cth) (the 2005 Migration Reform Act), which was introduced in the House of Representatives on 10 March 2005, passed the Senate on 7 July 2005, and received the Royal Assent on 15 November 2005.
49 See exemptions in paras (da) and (db) in Schedule 1 of the ADJR Act.
50 Including, for example, decisions not made 'under an enactment'.
51 Following amendments made by the 2005 Migration Reform Act.
52 See generally Part 8 of the Migration Act (below n67); and ss 476(1) and exceptions in ss 476(2) of the Migration Act. The Federal Court has limited original jurisdiction in migration matters (under s 476A of the Migration Act). Its jurisdiction under that Act and Judiciary Act were further limited by the 2005 Migration Reform Act.
53 They are distinct from 'finality clauses', which the High Court has held can remove statutory appeal rights but have no effect on judicial review (*Hockey v Yelland* (1984) 157 CLR 124; *O'Toole*, above n34 at 271). An appeal is a right that does not exist if it is not created by statute, and if an Act contains a finality clause that provides that decisions of a court or tribunal are final and not appellable, this is effective to repeal or modify an earlier statutory grant of those appeal rights (see Mark Aronson & Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000) at 678).
54 ARC Report, above n17 at 16.
55 Loughton, above n19 at 1-5; see also David Bennett, 'Privative Clauses – An update on the latest developments' (2003) 37 *AIAL Forum* 20 at 21.
56 Loughton, above n19 at 2.
57 John Basten, 'Ouster Clauses: Recent developments' (2002) 22(3) Aust Bar Rev 217 at 217.
58 Administrative Review Council, *The Scope of Judicial Review: Discussion Paper* (2003) at 160.
59 (1945) 70 CLR 598.
60 Regulation 17 *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth).
61 Inserted by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) (2001 Migration Reform Act), which was introduced in the Senate on 2 December 1998, passed the House of Representatives on 27 September 2001, and received the Royal Assent on 27 September 2001.
62 Defined in subsection 474(2), see above n47. Also, ss 474(4), (5) and reg 5.35AA of the *Migration Regulations 1994* set out decisions that are 'non-privative clause decisions', and thus not exempted from judicial review. Subsection 474(7) lists a number of decisions that will be 'privative clause decisions'.
63 Commonwealth Parliamentary Library, 'Migration Litigation Reform Bill 2005' Bills Digest (2005-06) No. 9, 4 August 2005 at 6.
64 Arthur Glass & Ron Kessels, 'The Privative Clause and Judicial Review' (2002) (1) Immigration Review 10 at 10.

65 Section 150 is part of Division 6 of the Act, relating to awards made by the Australian Industrial Relations Commission.
66 Repealed by the *Industrial Relations (Consequential Provisions) Act 1988* (Cth).
67 The 'old Part 8' operated between 1 September 1994 and 1 October 2001.
68 The scheme did not allow for review of migration decisions on grounds such as apprehended bias, a denial of natural justice, unreasonableness, or failure to take account of relevant considerations. See Glass & Kessels, above n64 at 13.
69 Inserted by the 2005 Migration Reform Act. Note that the time limits in ss 486 (High Court), 477 (FMC) and 477A (Federal Court) apply to any decision either actually or purportedly made under the Migration Act.
70 Subsection 486(1A). The same time restrictions apply to applications in the Federal Court and FMC under ss 477 and 477A of the Migration Act.
71 John Basten, 'Revival of Procedural Fairness for Asylum Seekers' (2003) 28(3) Alt LJ 114 at 115.
72 Id at 114.
73 Ruddock, 2005, above n6; Sarah Ford, 'Judicial Review of Migration Decisions: Ousting the *Hickman* Privative Clause?' (2002) 26(3) Melbourne University LR 537 at 538. These reforms were introduced by the *Migration Reform Act 1992* (Cth), which commenced operation on 1 September 1994. The then Minister for Immigration and Ethnic Affairs, Mr Gerry Hand, who introduced the Bill, said the reforms were intended to provide a 'fair and certain process with which both applicant and decision maker [could] be confident' (Gerry Hand, Cth, House of Representatives, *Parliamentary Debates (Hansard)*, 4 November 1992 at 2621). The reforms included the creation of the RRT, as part of expanding merits review, to provide review of refugee detention determinations.
74 Ruddock, 2005; see also the 2001 reiteration of this position :The Hon Philip Ruddock MP, Cth, House of Representatives, *Parliamentary Debates (Hansard)*, 26 September 2001 at 31560; and the 1997 reiteration: The Hon Philip Ruddock MP, Cth, House of Representatives, *Parliamentary Debates (Hansard)*, 3 September 1997 at 7338.
75 The Hon Philip Ruddock MP, Cth, House of Representatives, *Parliamentary Debates (Hansard)*, 26 September 2001 at 31559; see also Philip Ruddock, 'Narrowing of Judicial Review in the Migration Context' (1997) 15 *AIAL Forum* 13 at 14.
76 Ruddock, 'Narrowing of Judicial Review', above n75 at 13.
77 Migration Litigation Reform Bill 2005, Bills Digest, above n63 at 3.
78 For instance, in comparison to the approximately 400 applications for judicial review that were made in 1994-5, in 2000-01 there were over 1600 applications, costing the Department of Immigration over $19 million (see Ruddock, 2005, above n6).
79 For instance, whereas in 1997-98 only 21 per cent of the matters filed in the High Court's original jurisdiction were migration matters, by 2001-02 this had risen to 84 per cent, and by 2002-03 it was 97 per cent (see Ruddock, 2005, above n6).
80 Explanatory Memorandum accompanying the Migration Litigation Reform Bill 2005 at 1, tabled in the House of Representatives on 10 March 2005.
81 Ruddock, 'Narrowing of Judicial Review', above n75 at 20.
82 Ruddock, 2005, above n6.
83 Inserted by the 2001 Migration Reform Act.
84 Then the Minister for Immigration and Multicultural Affairs.
85 The Hon Philip Ruddock MP, Cth, House of Representatives, *Parliamentary Debates (Hansard)*, 26 September 2001 at 31560-1.
86 Inserted by the 2005 Migration Reform Act.
87 Ruddock, 2005, above n6.
88 'Purported privative clause decision' is defined in section 5E of the Migration Act, see above n48.
89 Menzies J described the *Hickman* principle as having 'come to be regarded as classical' in *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 455. McHugh J described it as 'authoritative' in *Richard Walter*, above n34 at 240.
90 Including *O'Toole*, above n34; *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 (*Darling Casino*); *Abebe v Commonwealth* (1999) 162 ALR 1; *Richard Walter*, above n34.
91 Basten, 'Revival of Procedural Fairness', above n71 at 115.
92 *Hickman*, above n59 at 615 per Dixon J.
93 ARC Report, above n17 at 17.
94 *Hickman*, above n59 at 616 per Dixon J.
95 Mason, 'The Tension between Legislative Supremacy and Judicial Review', above n21 at 807.
96 Aronson & Dyer, above n53 at 691; ARC Report, above n17 at 17.
97 *Hickman*, above n59 at 615.
98 Loughton, above n19 at 6.
99 Ibid.
100 Ibid.
101 See *O'Toole*, above n34 at 287 per Deane, Gaudron and McHugh JJ; *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208 (*Metal Trades*) at 249 per Dixon J.
102 Some think this fourth condition may be implicit in Dixon J's second and third constraints in *Hickman* (see, for example, Loughton, above n19 at 7).

103 *Metal Trades*, above n101 at 248; *R v Coldham; Ex parte Australian Workers' Union* (1983) 49 ALR 259 (*Coldham*); *Richard Walter*, above n34. See also Mason, 'The Tension between Legislative Supremacy and Judicial Review', above n21 at 807; Loughton, above n19 at 7; Sir Anthony Mason, 'The Foundations and the Limitations of Judicial Review', lecture given as part of Lecture 1, AIAL Lecture Series at Perth, 2001 at 18.
104 See Aronson & Dyer, above n53 at 691.
105 Id at 692. Following *Hickman*, some State cases also elided the decision with Hthe older approach to the interpretation of privative clauses: that they are effective to oust review for non-jurisdictional error, but no privative clause cures jurisdictional error. For instance, in *Ex parte Wurth; Re Tully* (1954) 55 SR (NSW) 47 at 53-4, Street J said that if parliament didn't intend the court to review something, it shouldn't, except if the decision maker did not have the power to make the decision.
106 For example, *Coldham*, above n103 at 418-9; *Darling Casino*, above n90. In these cases, the High Court held that a comprehensive privative clause is effective to oust review, even in the case of jurisdictional error, if the *Hickman* conditions are satisfied.
107 *O'Toole*, above n34 at 275 per Brennan J; *Richard Walter*, above n34 at 194.
108 *O'Toole*, above n34.
109 Mason, 'The Foundations and the Limitations of Judicial Review', above n103 at 20.
110 For example, see *Coldham*, above n103 at 423 per Mason J (as he then was), who said, in relation to section 60 of the Conciliation and Arbitration Act, that 'Parliament clearly intended that demarcation disputes, which have been notorious for their hair-splitting points of contention should be dealt with by a specialist body.' See also Basten, 'Ouster Clauses', above n57 at 218; Basten, 'Revival of Procedural Fairness', above n71 at 115.
111 Glass & Kessels, above n64 at 12.
112 Ford, above n73 at 552. This is particularly so in the refugee area, where asylum seekers may fear persecution on returning home for reasons of race, religion, political opinion, etc.
113 Above n36. The facts of the case were that the plaintiff had been denied a protection visa under the Migration Act and the decision had been confirmed by the RRT. More than 35 days after being notified of the decision, proceedings were commenced in the High Court for relief on the grounds of procedural fairness on the argument that ss 474 and 486A of the Act were invalid.
114 Basten, 'Revival of Procedural Fairness', above n71 at 115.
115 *Plaintiff S157* at 501, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
116 Ibid.
117 Ruddock, 2005, above n6.
118 Bennett, 'Privative Clauses – An update', above n55 at 27; Mason, 'The Tension between Legislative Supremacy and Judicial Review', above n21 at 807.
119 *Plaintiff S157*, above n36 at 506.
120 Ruddock, 2005, above n6; Bennett 'Privative Clauses – An update', above n55 at 29; see also Simon Evans, 'Privative Clauses and Time Limits in the High Court' (2003) 5(4) Constitutional Law and Policy Review 61 at 64.
121 This broad definition is in line with the principles set out in *Craig*, above n41 and *Minister for Multicultural Affairs v Yusuf* (2001) 206 CLR 323.
122 *Plaintiff S157*, above n36 at 482 per Gleeson CJ.
123 *Plaintiff S157*, above n36 at 484 per Gleeson CJ, and at 505 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
124 Chris Yuen, 'Judicial Review of Migration Decisions in the Federal Magistrates Court' (2006) 44(3) Law Society Journal 66 at 67; Evans, above n120 at 65.
125 See *Yong Jun Qin v MIMA* (1997) 144 ALR 695; *Hong v MIMA* (1998) 82 FCR 468.
126 The majority did not need to consider the validity of s 486A, because s 486A purported to apply only to 'privative clause decisions', so on the facts of the case, there was no privative clause decision and the time limit could therefore not apply (per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
127 *Plaintiff S157*, above n36 at 69.
128 Ibid; see also Evans, above n120 at 64.
129 See above n69.
130 See text above and above n69 and 70.
131 See above n48.
132 *R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361 at 369 per Latham CJ, Dixon J, in which Dixon J reaffirmed his earlier analysis of privative clauses in the *Hickman* case and said that a privative clause cannot be construed as intending to provide that a decision-maker's powers are 'absolutely unlimited'.
133 David Bennett, 'Privative Clauses – Latest developments' (2002) 34 AIAL *Forum* 11 at 14; Bennett, 'Privative Clauses – An update', above n55 at 22.
134 Bennett, 'Privative Clauses – Latest Developments', above n133 at 14; Bennett, 'Privative Clauses – An update', above n55 at 22.
135 Glass & Kessels, above n64 at 10.
136 There is extensive authority to support this - see above nX; see also *Plaintiff S157*, above n36 in which counsel argued the privative clause was 'directly textually inconsistent with the Constitution' and thus that that was the end of the matter.

137 *Plaintiff S157*, above n36 per Gleeson J; *ARC Report*, above n17 at 2.
138 Mason, 'The Foundations and the Limitations of Judicial Review', above n103 at 7, 20.
139 Loughton, above n19 at 8.
140 Aronson & Dyer, above n53 at 684.
141 Duncan Kerr, 'Deflating the *Hickman* myth: Judicial review after *Plaintiff S157/2002 v The Commonwealth*' (2003) 37 AIAL Forum 1 at 15.
142 Loughton, above n19 at 11.
143 Mason 'The Tension…', above n21 at 807.
144 Kerr, above n141 at 1.
145 *Plaintiff S157*, above n36 at 103 per Gaudron, Mc Hugh, Gummow, Kirby, Hayne JJ; Kerr, above n141 at 1, 11, 15.
146 *Plaintiff S157*, above n36 at 104 per Gaudron, Mc Hugh, Gummow, Kirby, Hayne JJ.
147 Basten, 'Revival of Procedural Fairness', above n71 at 116.
148 As Sir Anthony Mason said: '[t]he Hickman principle…is an artificial rule of construction designed to achieve a compromise which will give some effect to a privative clause but certainly not the effect which the legislature intended' (see Mason, 'The Foundations and the Limitations of Judicial Review', above n103 at 20).
149 Loughton, above n19 at 7.
150 Id at 5.
151 Loughton, above n19 at 9. This is given weight by Dixon J's reference to s 75(v) in close proximity to his 'classical' analysis: '[it is clear that a privative clause] cannot, under the Constitution, affect the jurisdiction of this Court to grant a writ of prohibition against officers of the Commonwealth when the legal situation requires that remedy' (*Hickman*, above n59 at 614, per Dixon J).
152 See Bennett, 'Privative Clauses – Latest Developments', above n133 at 14; Loughton, above n19 at 8; Compare *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at paras 69-70 per McHugh, Gummow, Kirby and Hayne JJ.
153 Glass & Kessels, above n64 at 11-2; see above n97.
154 See *Plaintiff S157*, above n36.
155 Basten, 'Revival of Procedural Fairness', above n71 at 115.
156 Id at 116.
157 Ibid.
158 Bennett, 'Privative Clauses – An update', above n55 at 31.
159 Amendments made by *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth).
160 Bennett, 'Privative Clauses – Latest Developments', above n133 at 31.
161 *ARC Report*, above n17 at 55.
162 Id.
163 Ibid at 44-5, 58.
164 Ibid at 45-6, 57.
165 Id.
166 Ibid at 40.
167 Ibid at 40-1, 58.
168 Ibid at 42-4, 58.
169 Amendments inserted by the 2005 Migration Reform Act.
170 See new s 31A of the *Federal Court of Australia Act 1976*, inserted by the 2005 Migration Reform Act.
171 Section 486D of the Migration Act, inserted by the 2005 Migration Reform Act. See Explanatory Memorandum accompanying the Migration Litigation Reform Bill 2005 at 18.
172 New Part 8B of the Migration Act.
173 For example, the AAT has jurisdiction to review decisions under about 400 Acts. See list at www.aat.gov.au/LegislationAndJurisdiction/JurisdictionList.htm (at 18 May 2006). Also, it is worth noting that prior to a tribunal hearing, merits review may also be conducted internally by the department responsible for the decision. This is usually done by a more senior departmental officer, who may affirm the original decision or substitute a new decision if the previous decision is found to be defective on matters of law, the merits, or administrative process. In some instances, an internal review can be a prerequisite to appealing the original decision to a tribunal.
174 Migration Litigation Reform Bill 2005, Bills Digest, above n63 at 5.
175 ARC Report, above n17 at 18; Basten, 'Ouster Clauses', above n57 at 219.

BIBLIOGRAPHY

Administrative Review Council, *The Scope of Judicial Review: Report to the Attorney-General* Report no. 47 (April 2006).

Administrative Review Council, *The Scope of Judicial Review: Discussion Paper* (2003).

Anne Ardagh, *Administrative Law* (2nd ed, 1999).

Mark Aronson & Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed, 2000).

John Basten, 'Revival of Procedural Fairness for Asylum Seekers' (2003) 28(3) Alt LJ 114.

John Basten, 'Ouster Clauses: Recent developments' (2002) 22(3) Aust Bar Rev 217.

David Bennett, 'Privative Clauses – An update on the latest developments' (2003) 37 AIAL Forum 20.

David Bennett, 'Privative Clauses – Latest Developments' (2002) 34 AIAL Forum 11.

Gerrard Brennan, 'The Parliament, the Executive and the Courts: Roles and Immunities' (1997) 9 Bond LR 137.

Commonwealth Parliamentary Library, 'Migration Litigation Reform Bill 2005' Bills Digest (2005-06) No. 9, 4 August 2005.

Simon Evans, 'Privative Clauses and Time Limits in the High Court' (2003) 5(4) Constitutional Law and Policy Review 61.

Sarah Ford, 'Judicial Review of Migration Decisions: Ousting the *Hickman* Privative Clause?' (2002) 26(3) Melbourne University LR 537.

Arthur Glass & Ron Kessels, 'The Privative Clause and Judicial Review' (2002) (1) Immigration Review 10.

Duncan Kerr, 'Deflating the *Hickman* myth: Judicial review after *Plaintiff S157/2002 v The Commonwealth*' (2003) 37 AIAL Forum 1.

Gavin Loughton, 'Privative Clauses and the Commonwealth Constitution: A primer', paper presented at the Australian Government Solicitor's Constitutional Law Forum at Canberra, 23 October 2002.

Sir Anthony Mason, 'The Foundations and the Limitations of Judicial Review', lecture given as part of Lecture 1, AIAL Lecture Series at Perth, 2001.

Sir Anthony Mason, 'The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights' (1994) 1(1) AJ Human Rights 3.

Sir Anthony Mason, 'The Tension between Legislative Supremacy and Judicial Review' (2003) 77 ALJ 803.

Denise Meyerson, 'State and Federal Privative Clauses: Not so different after all' (2005) 16(1) PLR 39.

Philip Ruddock, 'Narrowing of Judicial Review in the Migration Context' (1997) 15 AIAL Forum 13.

Philip Ruddock, 'Opening Address', paper presented at the Administrative Law Forum at Canberra, 30 June 2005.

Michael Sexton & Julia Quilter, 'Privative Clauses and State Constitutions' (2003) 5(4) Constitutional Law and Policy Review 69.

H W R Wade and C F Forsyth, *Administrative Law* (7th ed, 1994).

Chris Yuen, 'Judicial Review of Migration Decisions in the Federal Magistrates Court' (2006) 44(3) Law Society Journal 66.

PRIVATIVE CLAUSES: A UNIVERSAL APPROACH AND ITS UNDERPINNINGS

Stuart Brady*

We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it
Lord Reid[1]

Introduction

The genesis of this essay lies in the wide discrepancies in reasoning between various judicial approaches toward privative clauses, especially between State and Federal levels, in Australia. The aim of this essay is to provide a set of steps in the correct approach to be taken toward a privative clause. To this end I draw from the case law on the subject of privative clauses the pertinent cases and distil from them common and logical principles. It is also a discursive essay on privative clauses in Australia generally.

The privative clause is a concept that has been well known to administrative law for several centuries.[2] The term privative clause is used to describe a legislative provision whereby the Parliament has sought to restrict judicial review of the decisions of a statutory authority, [3] whose power to make certain decisions is usually included within the same legislative instrument as the privative clause.

The proposition seems simple enough. However, the application of a privative clause is made difficult by the inherent tension a privative clause creates within any legislative instrument. It can be seen clearly when stated in this simplified form: a statutory body is given certain authority which has limitations; the intention in imposing such limitations is that any excess by the body of these limitations in exercising its authority will lead to invalidity – how is this invalidity to be exposed if not by judicial review? The privative clause thus acts contrary to the grant of limited authority upon any statutory body and reconciliation must be achieved between these two competing factors.

In Australia there are constitutionally entrenched limits on the effectiveness of a privative clause when enacted by the federal Parliament. A privative clause is unable to oust the original jurisdiction of the High Court to review administrative actions under s 75(v) of the Australian Constitution. At State level, however, there is arguably no entrenched jurisdiction given to the Supreme Courts. This has led to the question of whether a privative clause enacted by an Australian State Parliament, lacking this and other Federal constitutional limits, could virtually immunise all actions of the statutory body from judicial review.[4] It is my thesis that this is not a valid proposition.

My thesis is that the inherent tensions within any statutory instrument created by a privative clause must be reconciled on a case by case analysis of any instrument and relying upon

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relevant rules of statutory interpretation. The relevant rules are proposed in general terms by the decision of *Plaintiff S157/2002 v Commonwealth*[5] which draws upon the reasoning of Dixon J, in the seminal case of *The King v Hickman; Ex parte Fox and Clinton*[6]. Once this is done, the further specifically federal considerations such as constitutional limitations should be assessed.

The structure of this essay will be as follows: I will initially analyse the case of *Hickman*, to draw from it the reasoning of Dixon J on the approach to be taken toward a privative clause. Expanding on this approach, I will analyse the more recent case of *S157*. I will then consider the decision of *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)*[7] and argue it was flawed in its approach toward the privative clause contained in the *Industrial Relations Act 1996* (NSW). Finally, I will discuss the fundamental underpinnings of all judicial approaches to privative clauses and in doing so reveal my reasoning as to why the proposition that a privative clause at State level could protect all actions of the decision maker from judicial review is fallacious.

The case of Hickman

The concept of a privative clause is well known at law and has been among the subjects of consideration of the courts for several centuries. However, for the purposes of this essay, I shall start by considering *Hickman*, a decision of the High Court which has been applied repeatedly in the consideration of privative clauses in Australia.[8] It is also a case which facilitates a brief survey of the history of decisions regarding privative clauses in English and early Australian jurisdictions.

A Facts

The Local (Mechanics) Reference Board (Southern District NSW) was empowered by the *National Security (Coal Mining Industry Employment) Regulations 1941* (Cth) to settle disputes as to any local matter likely to affect the amicable relations of employers and employees in the coal mining industry. Regulation 17 provided that decisions of the Board 'shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever.'

Fox and Clinton were haulage contractors who carted predominantly coal. Both were the subject of orders by the Board which was constituted under the regulations. Mr Hickman was the chairman of the Board. There had been an application made to the Board on behalf of an industrial union of employees for determination of a dispute.

The two orders made by the Board against Fox and Clinton were, in terms, a finding that both were engaged in the Coal Mining Industry and as such, they were required to grant their employees who drove lorries the minimum award rate of wage, under the Mechanics (Coal Mining Industry) Awards.

B The decision

Of the five High Court Justices who decided *Hickman*, it is the judgment of Dixon J which has survived to be applied in subsequent cases dealing with privative clauses. The other four Justices made their decision to grant prohibition on the basis that the regulations could not oust the jurisdiction of the High Court under s 75(v) of the Australian Constitution. For this reason I will only consider the judgment of Dixon J. However, all members of the Court agreed that the facts did not suggest that Fox or Clinton were engaged in the coal mining industry.

Dixon J initially stated that regulation 17 could not affect the jurisdiction of the High Court under s 75(v) of the Australian Constitution. His Honour went on to state that privative clauses are not interpreted as meaning to 'set at large' the courts or decision makers to whose decision they relate, but rather they restrict review of the decisions of those bodies 'provided always that its decision is 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 given to the body.'[9] In stating that the power of the bodies is not 'set at large', his Honour meant that the tribunal is not immune from review, in that it is not free and it is still bound to be supervised judicially. Essentially, the tribunal is not freed from its statutory limits. It is this statement perhaps that has given rise to *the expanded jurisdiction theory of privative clauses*, that is, that rather than the privative clause restricting the scope for judicial review of decisions, the privative clause expands the scope of valid decisions which can be made. I will address this issue when discussing the majority judgment in the case of *S157*. The three provisos listed by Dixon J above have become known as the three *Hickman* provisos.

His Honour stated that it is impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Australian Constitution. Obviously this is only a Federal consideration.[10]

Dixon J went on to say that it is equally impossible for the Parliament to impose limits upon the quasi-judicial authority of a body which is set up with the intention that any excess of authority means invalidity, and yet at the same time deprive superior courts of the authority to restrain any invalid actions.[11] This conflict is another possible source of the expanded jurisdiction theory of privative clauses as an easy solution to the conflict is to characterise the privative clause as expanding the jurisdiction of the decision maker at the expense of the limitations within the statute. However, as Dixon J pointed out, where the Parliament confers authority subject to limitations and at the same time enacts a privative clause to prevent review of actions made under that authority, it becomes a question of interpretation of the whole legislative instrument. When dealing with such tension or contradiction between statutory provisions, his Honour stated that an attempt should be made to reconcile them, and then, at federal level, any opposition between the Australian Constitution and the provisions should be resolved by adopting any interpretation of the provision that is fairly open.[12]

His Honour made a clear distinction between the general interpretation of privative clauses and the specific interpretation of privative clauses at Federal level in light of constitutional limitations. He sets the *Hickman* provisos as a threshold limit which must be met before even considering whether or not a transgression of the limits of a statutory power will necessarily spell invalidity.

In this instance his Honour went on to say that the application of these principles to the Regulations in question meant that decisions given by a Local Reference Board 'should not be considered invalid if they do not upon their face exceed the Board's authority and if they do amount to a bona fide attempt to exercise the powers of the Board and relate to the subject matter of the Regulations.'[13] His Honour only applied the first stage of his proposed interpretation method because he did not need to go further in his analysis of the privative clause.

Dixon J considered the decision in *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd*,[14] and approved the statement that if in any legislative instrument,

> in one provision it is said that certain conditions shall be observed, and in a later provision of the same instrument that, notwithstanding that they are not observed, what is done is not to be challenged, there

> then arises a contradiction and effect must be given to the whole legislative instrument by a process of reconciliation.[15]

His Honour referred to the joint judgment of Isaacs and Rich JJ in this case, where they discussed the interpretation of privative clauses generally. Isaacs and Rich JJ had agreed with the statement of principles made by the court in *Clancy v Butchers Shop Employees Union*.[16] There, Griffiths CJ stated that privative clauses which

> tak[e] away the right to *certiorari* and other remedies have always been construed as not extending to cases in which a Court with limited jurisdiction has exceeded its jurisdiction. It has often been held that where the legislature uses words in this well-known form they must always be taken to have intended the enactment to be subject to the rule I have mentioned. The other answer is that where different parts of a Statute are apparently contradictory, such a construction must, if possible, be put upon them as will render them all consistent with one another.[17]

Thus, the form of reconciliation which Dixon J proposed was not novel but one which had been used since the 19th century. Another example is *The Colonial Bank of Australasia and John Turner v Robert Willan*.[18]

The principles which can be drawn from the judgment of Dixon J and the cases cited by his Honour are as follows:

- Apply the threshold limit, the three '*Hickman* provisos', to any impugned decision; if they are fulfilled, then
- Consider any constitutional limitations and any construction that is fairly open in accordance with the *Australian Constitution* should be adopted; then
- In light of the conflict or tension, read the statute as a whole and determine whether any transgression of the limits of power was of such a nature as to render the decision invalid.

In the result in *Hickman*, Dixon J decided that the decision had been made by the Board without jurisdiction to do so, thus the decision was not protected by the privative clause and prohibition should issue.

This decision set the benchmark for future decisions on privative clauses. Dixon J also wrote several other judgments which were also influential in the clarification of this matter. I will make reference to these decisions in my analysis of the judgment in *S157*.

The case of S157

A Facts

The plaintiff, a citizen of Bangladesh, arrived in Australia in 1997 and applied for a protection visa which was refused by a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs. The Refugee Review Tribunal affirmed the original decision in 2000. In 2002 the Federal Court remitted the decision by consent back to the Tribunal. In the same year, the Tribunal reaffirmed the original decision. The plaintiff then wished to challenge the decision in the High Court, in its original jurisdiction under s 75(v) of the Australian Constitution, on the grounds that it had been made in breach of the rules of procedural fairness. However, the privative clause provisions, ss 474 and 486A of the *Migration Act 1958* (Cth) ostensibly prevented such a challenge.

Proceedings were thus initiated in the High Court for declarations that both ss 474 and 486A were invalid due to conflict with s 75(v) of the Australian Constitution.

Section 474 provides:

> (1) A privative clause decision:
> (a) is final and conclusive: and
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
> (2) In this section:
> Privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

Sub-section (3) then described the actions to which the term 'decision' referred. Sub-section (4) sets out certain decisions which are not privative clause decisions and ss (5) permits the making of regulations specifying that particular decisions are not privative clause decisions. For the purposes of the decision, neither ss (4) nor (5) had any application.

B The decision

There were three judgments delivered in this matter. The majority written judgment was delivered by Gaudron, McHugh, Gummow, Kirby and Hayne JJ and is the judgment of central concern to this essay.

Gleeson CJ wrote a judgment which had several points in common with the joint judgment and which reached the same conclusions. His Honour quoted Denning LJ that 'if tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end'.[19]. His Honour then discussed the importance of statutory construction in determining the scope of a privative clause before having regard to any specific limitations applicable at Federal level. His Honour turned to the judgments of Dixon J in several cases,[20] but specifically to *Hickman*. His Honour went on to say that the characterisation of the exercise as one of construction means that any principles formulated by Dixon J cannot be taken as comprehensive and that the way is open for the application of other principles as well.[21] His Honour then listed five relevant principles of statutory interpretation. [22] Using these principles Gleeson CJ considered the expanded jurisdiction theory of privative clauses which was submitted in argument by the Commonwealth. His Honour characterised it as relying on the theory that a privative clause controls the meaning of the remainder of the statute. His Honour dismissed the submission as incorrect.

It is interesting to note that while Gleeson CJ stated at the outset of his judgment '[f]or the reasons that follow, I agree with the answers proposed in the joint judgment',[23] his Honour did not base his reasoning upon the use of the *Hickman* provisos. Rather, his Honour based his reasoning upon the rules of statutory construction which he listed. In this the majority agreed to a statutory interpretation approach, but recognised the importance of the *Hickman* provisos to a greater extent.

I will not consider the final judgment, that of Callinan J. Though he did consider the question of general statutory interpretative principles to be applied to a privative clause, his reasoning in the case focussed predominantly on the constitutional question.

1 Gaudron, McHugh, Gummow, Kirby and Hayne JJ

Their Honours first considered the judgment of Dixon J in *Hickman*. The '*Hickman* principle' of reconciliation was stated by their Honours to be a simple rule of construction allowing for the reconciliation of apparently conflicting statutory provisions and that this necessarily implied that there could be no general rule as to the meaning of privative clauses.[24]

Their Honours then addressed the proposition of the Commonwealth that the privative clause enlarges the powers of the decision-maker to the extent that their decision is valid so long as they comply with the three *Hickman* provisos. Their Honours rejected the view that a privative clause enlarges the powers of a decision maker generally: 'contrary to the submissions for the Commonwealth, it is inaccurate to describe the outcome in a situation where the provisos are satisfied as an "expansion" or "extension" of the powers of the decision makers in question.'[25] At the end of the joint judgment their Honours considered further this expanded jurisdiction theory of privative clauses.

Their Honours found that the protection which the privative clause purports to afford will only be applicable if the three *Hickman* provisos are satisfied, but that the satisfaction of the three provisos does not then imply that the decision will then go on to be protected by the privative clause. The privative clause itself must be delineated in scope.[26] To determine the scope of protection of the privative clause it is necessary to have regard first to the terms of the clause in question and then to the statute as a whole.

Their Honours early in the judgment adverted to the fact that the case of *Hickman* was referred to in the second reading speech of the Bill that became the amending Act which introduced s 474. Due to this it was held that there could be no possibility of finding an intention of Parliament for the courts to interpret the privative clause outside of the bounds of the decision of *Hickman*.[27] The terms of the privative clause, as with other privative clauses, limit access to the courts. They do not repeal the statutory limitations or restraints imposed upon a decision maker.

Their Honours decided that if reliance is placed upon a privative clause, the first step must be to ascertain its meaning or 'the protection it purports to afford'[28] and that two principles of construction apply to privative clauses, as follows.

The first, only applicable at Federal level, is that if there is opposition between the Australian Constitution and any provision, it should be resolved by adopting an interpretation consistent with the Australian Constitution that is fairly open.[29]

The second, of general application, is that it is presumed that Parliament does not intend to cut down the jurisdiction of the courts except to the extent that it is expressly stated or necessarily implied in a statute. That is, 'privative clauses are strictly construed'[30]

As noted above, Gleeson CJ applied far more principles of construction in his consideration of the privative clause. It can reasonably be assumed that their Honours in this judgment did not look further than the two principles listed because they had no need to refer to others for their purposes of determining the constitutional validity of the clause. Their Honours then dealt with the two constitutional issues which needed to be considered for the purposes of the first principle of construction.

Their Honours found that in interpreting the privative clause in conformity with s 75(v) of the Australian Constitution the expression 'decision[s] … made under this Act' must be read so as to refer to 'decisions' which involve neither a failure to exercise jurisdiction nor an excess of jurisdiction.

However, their Honours also held that it was a matter of general principle that an administrative decision which involves jurisdictional error is 'regarded, at law, as no decision at all'.[31] Their Honours earlier had given the example that if there had been a jurisdictional error due to a failure to discharge 'imperative duties'[32] or to observe 'inviolable limitations or restraints'[33] the decision in question cannot properly be described as a 'decision … made under this Act'. Thus any decision made which is tainted by jurisdictional error is not

protected by the privative clause, such errors rendering decisions incapable of being described as 'decision[s] … made under this Act'. However, errors such as a non-jurisdictional error on the face of the record, which obviously is not of a jurisdictional nature, are still protected by the privative clause.

The reasoning on a privative clause in any given judgment necessarily only has future application in either the strict interpretation of the privative clause itself in isolation from the rest of the statute, as was the case in *S157*, or the consideration of the exact same errors or class of errors as occurred in the matter.

Their Honours did not go on to define what would constitute a jurisdictional error other than to say that it may be necessary to engage in the reconciliation process to ascertain whether or not any given decision is tainted by jurisdictional error. Thus 'the effect of [the privative clause] is to require an examination of limitations and restraints found in the Act'.[34]

Their Honours pointed out that the proposition that the three *Hickman* provisos qualify the power of a decision maker rather than qualify the protection which the privative clause affords cannot be correct at federal level,[35] because Chapter III of the Australian Constitution prevents the Parliament from giving a non-judicial body the power to decide the limits of its own jurisdiction. However their Honours also gave another reason of general application: that the proposition 'assumes that the Act on its true construction provides no other jurisdictional limitation on the relevant decision making or other power'.[36] It is obvious that any Act providing for an administrative decision making power always provides jurisdictional limitation on the relevant decision making power. A plenipotent administrative officer under Australian legislation is unheard of and would in any case require the delegation of something other than mere legislative power.[37] This seems to be an argument themed upon the rule of law argument proposed by Gleeson CJ in his third principle of statutory construction, which I shall consider in the fifth chapter.

C *The proposed approach*

Thus the steps in considering a privative clause which can be drawn from the majority judgment are:

1. Is there indeed an error?[38] (of practical significance)

2. Is the impugned decision made in accordance with the three *Hickman* provisos?[39]

3. Determine the extent of the protection the privative clause 'purports to afford'.[40] This is done in two parts:

    3.1. The determination of the extent of the privative clause must be done by first analysing the text of the privative clause by itself. In *S157* it would not protect an action which was not a 'decision under the Act' thus the privative clause will only protect decisions which are within the jurisdiction of the Tribunal, that is that they conform with the imperative duties[41] and inviolable limitations[42] imposed by the Act. In considering the constitutionality of the clause their Honours did not need to venture any further through these steps.

    3.2. The determination of the extent of the privative clause must next be done with reference to the rest of the Act. Due to the conflicting concepts within the Act, this must be done by way of 'reconciliation' between the privative clause and the other sections of the Act which provides limits to power. This could be characterised as determining the specific requirements and inviolable limitations and restraints placed upon the decision maker,[43] which are essential to valid action.

The question to be asked at each step is whether the administrative action, which exhibits an error, falls within the protective scope of the privative clause?

The case of Mitchforce

I have chosen the case of *Mitchforce* to analyse and shall consider it in light of my analysis of *S157* and *Hickman*. The decision in *Mitchforce* is reached by reasoning which conflicts with the principles I have drawn from the case of *S157* and *Hickman*. I shall analyse *Mitchforce* in light of this.[44]

A Facts

A tavern was leased by the plaintiff *Mitchforce* to Sherwood Trading Pty Ltd for a ten year term from 1989. The lease was transferred to Mr and Mrs Starkey in 1990. The lease was granted in boom conditions and as such had a high rate of increase. The Starkeys, experiencing difficulties in paying the increasing rent, commenced proceedings in the Industrial Relations Commission, claiming relief under s 106 of the *Industrial Relations Act 1996* (NSW) on the basis that their contract with the landlord was unfair.

Section 106 provides:

> The Commission may make an order declaring wholly or partly void, or varying, any contract whereby a person performs work in any industry, if the Commission finds that the contract is an unfair contract.

The Commission asserted its jurisdiction to hear the matter and held that the contract fell within s 106 and had become unfair, and orders for relief were made. Importantly, the amount of increase was reduced and orders 11 and 12 of the Commission bound the landlord to prepare a new lease for a term of 10 years. The Full Bench of the Commission refused the landlord leave to appeal and the landlord subsequently commenced proceedings for prerogative relief in the Supreme Court of New South Wales, claiming that the Commission had exceeded its jurisdiction. The contentious matter was whether such relief could be granted due to the privative clause in s 179 of the Act, which provides:

(1) Subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law, a decision or purported decision of the Commission (however constituted):
  (a) is final, and
  (b) may not be appealed against, reviewed, quashed or called in question by any court or tribunal (whether on an issue of fact, law, jurisdiction or otherwise).
(2) A judgment or order that, but for this section, might be given or made in order to grant a relief or remedy (whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise) may not be given or made in relation to a decision or purported decision of the Commission, however constituted.
(3) To avoid doubt, this section extends to any decision or purported decision of the Commission, including an award or order of the Commission.

The decision was reached against the background of the long history of cases heard by the Commission which have been reviewed by the New South Wales Supreme Court,[45] the empowering legislation of which contains a privative clause which has been evolving for over half a century.[46]

B The decision

Spigelman CJ, Mason P and Handley JA each delivered separate judgments. I will not consider the judgment of Handley JA as his Honour found that the contract was one whereby work was conducted in any industry.[47] The other two justices initially considered whether the lease agreement under consideration is a contract or arrangement 'whereby a person performs work in any industry'. Having decided that the lease agreement was not of such a character,[48] their Honours went on to consider the operation of the privative clause.

1 Spigelman CJ

His Honour first made an analysis of the relevant principles as set out in *S157*. It is necessary to note at this point that I do not take issue with the main part of his Honour's analysis at p 229 where his Honour lists several rules of statutory interpretation of relevance. However, his Honour drew attention to the proposition 'one provision, including the privative provision, cannot be construed as controlling the meaning of the remainder of the Act' which his Honour has not quite explained in its entirety. Gleeson CJ, who is cited as the source of the proposition, only raised it in rebuttal of the submission made by the Commonwealth in *S157*, the submission being that a privative clause expands the jurisdiction of the decision maker within the bounds of the *Hickman* provisos. The principle of statutory interpretation which Spigelman CJ refers to above is still relevant, despite the fact that it seems his Honour did not consider it again once it had been stated.

Spigelman CJ then considered the extension of the scope of this privative clause to 'purported decisions'. He held that this extension was intended to protect decisions of the Commission where there is jurisdictional error, to a substantial degree.[49] His Honour considered that the decisions of the Commission which had been reviewed in the past for jurisdictional error had generally been made in purported pursuance of s 106 and had concerned the jurisdictional reach of the phrase 'whereby a person performs work in any industry'. The introduction of the term 'purported decision' was intended to remedy this.

Spigelman CJ placed great weight upon the apparent motivation behind this recent insertion of the word 'purported'. The amount of weight was disproportionate to the other considerations applicable to a privative clause. His Honour thus concluded that the jurisdictional fact of whether the contract was one whereby a person performs work in any industry was one to be left to the Commission alone. In support of this conclusion his Honour cited Barwick CJ in *Stevenson v Barham*[50] who said: '[t]he legislature has apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being exploited.' Barwick CJ was not making the same point at all, but was referring to the *extensive discretion* of the old Industrial Commission, which is now replaced by the Industrial Relations Commission, *within its limited jurisdiction* under s 88F(1)(d) of the *Industrial Arbitration Act 1940* (NSW). Section 88F(1)(d) relevantly provided that the Industrial Commission had jurisdiction to alter a contract where that contract 'provides or has provided a total remuneration less than a person performing the work would have received as an employee performing such work'. Barwick CJ was referring to a completely different discretion. There is no indication that the jurisdiction of the Commission should be thus unbridled.

In the recent decision of *Batterham v QSR Limited*,[51] the High Court also considered the term 'purported decision' within the same privative clause. The majority held that the term was inserted for more abundant caution only and that it makes explicit what would have otherwise been the necessary reading of the provision, thus it was of no additional effect. The decision in *Batterham v QSR Limited* is exactly *contra* the approach taken by Spigelman CJ.

Spigelman CJ went on to announce his doubt that the *Hickman* principle, as coined by the majority judgment of *S157* to refer to the strict construction of privative clauses generally as a result of the reconciliation process, is really a hard and fast concept at State level.

> If their Honours [in the majority judgment of *S157*] intended the reference to the *Hickman* principle to prevent a State Parliament expressing a "clear intention" that not even that principle should be applicable, then only an implication from the Commonwealth Constitution could supply the jurisprudential basis for such a conclusion.[52]

This assertion ignores two issues of fundamental importance: first, that the rule of law is equally as applicable at State level as at federal level; second, the process of statutory reconciliation generally. His Honour affirmed that the rule of law was given strict guarantee under the Australian Constitution,[53] but did not consider that it was a constitutional principle applicable at State level.

His Honour adopted the approach of Gaudron and Gummow JJ in *Darling Casino Ltd v New South Wales Casino Control Authority*[54] and held that:

> Section 179 should be construed so as not to protect from review a "purported decision" which fails to satisfy the threefold *Hickman* principle or, if it be a separate proposition, which fails to observe an inviolable restriction or restraint. However, jurisdictional error that cannot be so categorised is exempt from review.[55]

His Honour here is alluding to the overarching theme of statutory construction which is, as his Honour stated in his analysis of *S157*, the very root of all these approaches or steps. However, his Honour came to the conclusion that the approach to privative clauses is one which can be encapsulated in the three *Hickman* provisos.[56] After holding that the *Hickman* provisos apply, his Honour then failed to explain why they are applicable. If his Honour had done so he may have concluded that if the *Hickman* provisos are to be applicable then the rationale for their application also applies to the general reconciliation process and the other steps I have proposed to be followed thereunder.

His Honour then went on to state that the three *Hickman* provisos were satisfied and that in turn the jurisdictional fact, that is 'whereby a person performs work in any industry', was not intended to be an inviolable restriction.[57] These conclusions could be categorised as simply the result of the application of less than the required principles at this stage of my analysis. Indeed I do not agree with the reasoning of his Honour even when restricted to just that on the three *Hickman* provisos.

2 Mason P

Mason P agreed substantially with the decision of Spigelman CJ. However his Honour does seem to have adopted entirely the expanded jurisdiction theory of privative clauses.[58] He observes that 'a privative clause like s 179 is treated in the final analysis as expanding the validity of the acts of the repository of the power exercised or purportedly exercised.'[59] Mason P bases the adoption of this theory primarily on a passage by Brennan J, who wrote the minority judgment, in the case of *Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd*[60] and stated that 'the validity of acts done by the repository is expanded'.[61] The passage which Mason P quotes is incomplete and gives a misleading impression. The full passage is: '[i]n so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded.'[62] This conclusion relates to the privative clause contained in s 175 of the *Income Tax Assessment Act 1936* (Cth) which states: 'The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.'

An interesting point in his Honour's judgment is the invitation he extends to the Full Bench of the Industrial Relations Commission to revisit the matter, after having refused the previous appeal, in light of the reasons of the Court of Appeal.[63] Spigelman CJ also encouraged the Full Bench of the Commission to consider the position in the light of his reasoning.[64] These urgings were effective as the Full Bench of the Commission subsequently did reconsider its earlier refusal of the Starkeys' appeal and then allowed it in almost the same words as those of Spigelman CJ.[65] The Industrial Relations Commission noted that, although the privative clause meant it was not compelled to remediate any deficiency of jurisdiction, in the interests of comity and indeed the fact that '[c]onsistency and uniformity in decision making is a fundamental ingredient of the maintenance of the rule of law',[66] it would do so. This reversal of the original decision constitutes an effective piece of judicial review, despite the privative clause.[67]

C Principal flaw

Each of their Honours held that the minimum effect of a privative clause at State level is the requirement of satisfaction of the three *Hickman* provisos. Their Honours based this reasoning variously upon the arguments submitted by both counsel for the appellant and counsel for the respondent advocating for nothing less,[68] upon the expanded jurisdiction theory of privative clauses[69] and upon the direct approach to privative clauses generally.[70]

However, their Honours have avoided stating the rationale behind applying the *Hickman* provisos at all. Why should the approach to privative clauses stop here and not go further? Indeed why should the approach go this far at all? The words of the statute are plain in cutting off all judicial review. The most common reason for applying the *Hickman* provisos is that they are the result of the reconciliation which must be undertaken between the conflicting intent of the limitations on jurisdiction and the privative clause itself. However, as Spigelman CJ pointed out, the conflict or 'inconsistency requiring reconciliation is simply more acute where both provisions have to be regarded as manifesting a similarly forceful expression of parliamentary intention.'[71] The logical extension of this point exposes the flaw in this approach: if Parliament were to draft an Act which provides for extremely vague and broad powers and a sufficiently strict privative clause,[72] the conflict falls away and so does the rationale for the application of the three *Hickman* provisos.

In this instance the only remaining reason for applying the *Hickman* provisos at all is, as Handley JA pointed out, that it would simply be in the Parliament's interests to have the protection of the privative clause remain subject to the three *Hickman* provisos, due to the huge jurisdictional possibilities afforded to decision makers without such a minimum safeguard.[73] This is obviously not convincing in the face of such legislative drafting.

Thus the extension of this approach is that there will be instances where a privative clause has no minimum effect at State level. I argue in the next chapter that this cannot be a viable conclusion.

Fundamental underpinnings applicable at State level

> In England, and in the countries which … derive their civilization from English sources, the system of administrative law and the very principles upon which it rests are in truth unknown.
>
> Dicey[74]

The correct approach to be taken toward privative clauses can be drawn from *S157* and *Hickman*. I have listed the steps which have developed out of this approach in the previous chapters. Similar approaches can be found in many decisions regarding privative clauses in Australia.[75] However, the legitimacy of the approach has not been overly analysed. There is an assumption that the courts must be able to enter into consideration of decisions made

despite a privative clause. The epitome of this approach is the conceptualisation of the *Hickman* provisos as the starting point (and possible finish point)[76] for the review of actions supposedly encompassed by a privative clause. Why should not the Parliament be able to legislate to exclude all judicial review of actions with a privative clause? At Federal level the Australian Constitution provides an entrenched minimum provision of judicial review, at State level however, the same guarantee does not apply.[77] The question at State level is thus: 'What power does a court have to even enter into consideration of these administrative actions?'[78]

I begin by reiterating the fact that the addition of a privative clause to a statute is not an act whereby the jurisdiction of that decision maker is expanded, in other words the scope of valid actions to be taken by that decision maker is not increased; it is merely one whereby supervisory jurisdiction is sought to be reduced. This is mainly due to the wording of privative clauses, for example the classic Australian formulation:

> Any decision is final and conclusive: and must not be challenged, appealed against, reviewed, quashed or called in question in any court; and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.79

As I have shown above, the clause removes the possibility of review; it does not specify that all actions are to be rendered valid by the clause.

Thus the actions of a tribunal made in purported pursuance of a statutory power will still be invalid despite the privative clause. However, the ability of the courts to grant prerogative relief or declare that action invalid is reduced. It is a situation akin to that of diplomatic immunity at international law.[80] This concept removes any foreign diplomatic agent from judicial or administrative action by the host country,[81] while requiring them to respect the laws of the host country.[82] However, should that diplomatic agent commit an act which constitutes a crime, it is still a criminal act. It is simply beyond the jurisdiction of the courts to hear it or the police to act upon it. The only possible recourse to be had is held by the receiving country's government: that person may be declared *persona non grata*, following which the sending country must either recall the person concerned or terminate their function with the mission.[83]

The proposition is thus that when a court's supervisory jurisdiction is limited by statute, the action for which review is restricted remains invalid, despite the fact that it is not declared to be so by a court.

However, unlike the analogy to the concept of diplomatic immunity, the supervisory jurisdictions of courts are inherent by reference to the principles of the rule of law and the unified system of common law, for both legal and practical reasons.[84]

A The rule of law

The rule of law under the Westminster system of government mandates that administrative actions be subject to the scrutiny of the courts. To demonstrate this I draw on one of the formalistic[85] approaches to the rule of law.

The fundamental necessity for the rule of law as proposed by Dicey is the requirement that all acts be done in accordance with the law, that is 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power'.[86] This is the principle of legality and is a basic requirement of all formalistic conceptions of the rule of law. As assurance of this fundamental, all acts must be amenable to review by a Court of law. If this review process is cut off, then there can be no more rule of law. Any action taken by an

administrative decision maker must be subject to review to prevent excess or abuse of legal powers.

This requirement also prevents the grant of unlimited administrative power. As Dicey says of the supremacy of the regular law, it 'excludes the existence of arbitrariness, of prerogative, or *even of wide discretionary authority*'.[87] Dicey announces that under the English constitutional system there is no body, other than Parliament, which can invalidate an Act of Parliament,[88] the fundamental necessity for the rule of law is to be taken as of paramount concern as it predicates parliamentary supremacy generally. The requirement that the executive, even when armed with the widest authority under an Act of Parliament, be amenable to the supervision of the judiciary and subject to the limitations of the Act, as interpreted by the courts, can be seen as an absolute requirement of the rule of law.[89]

As Dicey says, '[t]he constitution being based on the rule of law, the suspension of the constitution, as far as such a thing can be conceived possible, would mean with us nothing less than a revolution.'[90] The destruction of the constitutional system can be equated to a destruction of the very legitimacy of the supremacy to which parliament has claim.

The separation of powers under the Westminster system, as inherited from the English legal system, requires three arms of government. It must be noted Parliamentary supremacy, at the pinnacle, must not detract from the separate roles of the legislature and the Executive. This is the ideal won almost 400 years ago by the efforts of Oliver Cromwell with the swing of the axe over Charles I's head.

The other arm, roughly, is a judiciary to try criminals, provide legal remedies, promulgate case law and interpret the Acts of Parliament. The judiciary is described as subservient to Parliamentary supremacy.[91] This argument is the strongest proposed by those who claim a privative clause can completely restrict the supervisory jurisdiction of the courts.[92] However, the very supremacy which Parliament holds is obviously contingent upon the existence of the other arm supporting and supported by the rule of law. For instance if Parliament were to legislate to destroy the judiciary or to grant unlimited power to the executive, it would be a self-invalidating act. The very authority by which the Parliament can make Acts would be eroded. The rule of law cannot be achieved through the adoption of dictatorial power, leading to the artificial result that all acts may be said to be done according to law.

Likewise, a deep inroad into the jurisdiction of the courts, such as that effected by a privative clause, is a significant act which cannot but undermine the rule of law. The jurisdiction I speak of is not just that to supervise administrative action, a role which has been enjoyed for centuries by the courts, but also the more fundamental jurisdiction of the courts to interpret the statutes of the Parliament. If a privative clause is to be read as restricting the jurisdiction of the courts to enter into consideration of the jurisdiction of an administrative body, as contained in statute, then this statute is then effectively beyond the interpretation of the court generally.

Such an act has been put in such strong terms as: '[t]o exempt a public authority from the jurisdiction of the courts of law is, to that extent, to grant dictatorial power. It is no exaggeration, therefore, to describe this as an abuse of power of Parliament, speaking constitutionally.'[93] Thus the courts' supervisory jurisdiction can never be completely extinguished if the rule of law is to be maintained to any degree and without fundamental change to our system of government. To this end 'judges have a duty to maintain the common law constitution'[94] and the fact that a privative clause claims by its words to prohibit review of all decisions etc., is not to be read in a vacuum. There is the competing factor of the necessary limitations placed upon the jurisdiction of the tribunal itself to be considered.

B Practical consideration

The pursuit of just decision making under the common law system cannot be allowed to end with inferior tribunals, if it is to maintain its consistency. If inferior tribunals have the power to define their own power and supervise their own decision-making, it raises serious questions as to comity, *stare decisis*, quality of decision-making and commonality generally within the common law.[95] If the tribunal may define its own jurisdiction then two branches of case law emerge, from the 'superior' courts and from the 'inferior court' immunised from review. Which shall prevail and which is to be the correct forum?

The very same problem was one of the factors that led to the unification of the English court system from 1858 to 1873.[96] No longer was there the problem of deciding jurisdiction, correct venue, forms, etc between an array of courts such as the Assizes, Ecclesiastes, Admiralty, Probate and Divorce.

Another practical concern is that any intention of Parliament to prevent review of a tribunal is to be balanced by the equal intent, if unspoken, to ensure that there are means by which to prevent this tribunal from becoming a behemoth which swallows all jurisdictions and finds itself competent to decide on criminal and constitutional matters.[97] Any intention to be manifested against this would have to be more than mere words in a privative clause. The instrument would have to emplace an entire new (yet not novel) scheme by which the tribunal may be supervised. If this is not put in place then the intention is to put the supervision of the tribunal's jurisdiction in the hands of the courts which have always exercised such jurisdiction. The privative clause is something of a stop gap which does not take into account the necessities for supervision of courts. The easy example of this need is the very strange review undertaken in *Mitchforce*, whereby it was decided by the New South Wales Court of Appeal that the decision of the tribunal was made without jurisdiction, but that the privative clause protected it. The Industrial Relations Commission then reviewed the decision to make it consonant with the judgment of the New South Wales Court of Appeal. This, in my opinion, is a rather circuitous form of supervision, potentially an unspoken form of prerogative writ. I would submit that it is merely the judicial system adapting to the rigors of a privative clause and the havoc it can play with the integrated system of common law and judicial supervision.

C The current High Court approach

Another chain of reasoning which leads to the conclusion that a privative clause cannot protect all decisions made in purported pursuance of jurisdiction granted under statutory instrument, is one which has its roots in a judgment of Lord Coke delivered while on the Kings Bench almost 400 years ago. In *The Case of The Marshalsea*[98] his Lordship found that a decision made in want of jurisdiction of the cause made the whole proceeding *coram non judice* and thus void.[99] Such a decision is treated by his Lordship as never having existed.

This was followed by Dixon J in the case of *Parisienne Basket Shoes Pty Ltd v Whyte*.[100] There his Honour held that a decision made in want of jurisdiction was as if the proceedings were as nothing. That is, they are void, not voidable. Thus any statute restricting the jurisdiction of a supervisory court to review decisions of administrative decision makers cannot restrict review of non-existent decisions.

The incorporation of words to the effect that even purported decisions are to be protected by a privative clause is not to be read as including within the protective purview of the privative clause decisions which are void for want of jurisdiction. This has recently been decided by the High Court in *Batterham v QSR Limited* where it was held that the term 'purported' was inserted into the *Industrial Relations Act 1996* (NSW) *ex abundanti cautela* only.[101] The

majority in this case relied upon the decision of *O'Toole v Charles David Pty Ltd*[102] where it was held by Dean, Gaudron and McHugh JJ that in the privative clause in s 60 of the *Conciliation and Arbitration Act 1904* (Cth) the term 'award' on its true construction referred at least to some purported awards, otherwise the privative clause would not have had any work to do. It was thus assumed by their Honours that the reference in a privative clause to 'decisions', 'awards' or any other action which is authorised by the relevant instrument will always include some 'purported decisions' and 'purported awards'. The use of the term 'purported' in the *Industrial Relations Act 1996* (NSW) therefore made explicit what would have otherwise been the necessary reading of the provision.[103] Correct decisions made according to law, actual 'decisions', do not need the protection of a privative clause.

D The result

For all of these reasons the process of 'reconciliation' between two provisions must still be undertaken. The granting of a limited jurisdiction which is detailed within a statutory instrument cannot be rendered unenforceable by a privative clause. The simplest enunciation of this is in the judgment of Dixon J who stated that there are three provisos which must be satisfied before a privative clause can do any work. This is taking the direct or blunt approach to privative clauses and there have been cases throughout the centuries when courts have done just this. However, the more complex the drafting employed in privative clauses, the more the need for statutory interpretation to take precedence grows. This blunt approach to privative clauses is seen as the comprehensive approach toward reconciliation whereas it is merely the product of the over-arching approach of statutory interpretation and the need to reconcile the competing legislative provisions.[104] The *Hickman* provisos should be considered as the beginning in the enquiry into the protection of a privative clause rather than as the closing statement. It is the simplest preliminary test to apply before having to undertake the sometimes arduous task of interpreting the entire Act with specific regard to jurisdictional limitations manifested against the tribunal and the supervising judicial body. If one accepts the rationale for the application of the three *Hickman* provisos, then the same rationale applies to the more extensive process of reconciliation.

The further reconciliation can be packaged into what has been referred to as the fourth proviso: that any imperative duties or inviolable limitations or restraints to power must be complied with. This is merely another way of phrasing the basic outcome of the application of statutory interpretation, but one which does not necessarily obviate a later need for deeper analysis of limitations on the tribunal's power. In other words, the satisfaction of the fourth proviso does not necessarily constitute a closing statement in the enquiry into the protection of a privative clause, any more than that of the three *Hickman* provisos does. The fourth proviso too is a simplified approach to the reconciliation process, which can and should be taken further if necessary. However, one should not embark upon a detailed analysis of the statutory instrument if it seems clear upon its face that a minor error which is being claimed is not enough to outweigh the privative clause.

Each appeal of a decision made in purported pursuance of an Act containing a privative clause will be different and no one judicial decision can comprehensively enumerate those acts which will lead to invalidity of a variety which is not protected by the privative clause. Once an appeal has been successful, then the path is already mapped for judicial review of any decision which exhibits the same error. In a novel case, however, the same steps in reasoning must be taken to determine whether the error complained of is such as to be within the jurisdiction of the supervisory judicial body, with regard to the privative clause.[105]

Conclusion

> It may truly now be said that we have a developed system of administrative law.
>
> Lord Denning MR[106]

The scope of a privative clause is clearly not something which can be determined solely by reference to the words of the clause itself. The competing factors which I have outlined above necessitate a broader consideration of the general scheme of judicial review when dealing with a privative clause. There is currently uncertainty in this area of administrative law, the best example of which is the divergence of opinion on the effect of privative clauses within Australia and indeed between most Commonwealth countries.[107]

My above reasoning leads to the conclusion that the soundest approach is that which I have drawn from *Hickman* and *S157*. This is not just due to the well accepted nature of the *Hickman* provisos nor to the weight of authority vested in the majority High Court decision of *S157*; it is also due to the fundamental underpinnings of our administrative law system and system of government generally. These fundamental underpinnings support the universal application of one approach to privative clauses at both federal and State levels in Australia. Federal constitutional principles only arise at a later stage in the consideration of a privative clause. This approach obviously guarantees a certain minimum level of judicial review of administrative actions, as required under the rule of law and our Australian system of government.

Endnotes

1 *Ridge v Baldwin* [1963] 2 All ER 66, 76 (Lord Reid).
2 See generally: *Act for the Better Local Management of the Metropolis 1856*, 18 &19 Vict c. 120, section 230 removed the remedy of *certiorari*; *Gold Fields Act 1865* (Vic), section 127 removed the remedy of *certiorari* from the Supreme Court of the Colony of Victoria.
3 It will become apparent during the course of this essay that the word "decision" is one of controversy when discussing privative clauses. Thus I shall use the word "action" wherever the word "decision" can be replaced in order to avoid confusion.
4 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ).
5 (2003) 211 CLR 476. I will refer to this case simply as "*S157*" throughout my essay.
6 (1945) 70 CLR 598. I will refer to this case simply as "*Hickman*" throughout my essay.
7 (2003) 57 NSWLR 212. I will refer to this case simply as "*Mitchforce*" throughout my essay.
8 Robin Creyke, John McMillan, *Control of Government Action* (2005) LexisNexis Butterworths, Australia, 774-7, Mark Aronson, Bruce Dyer, Matthew Groves, *Judicial Review of Administrative Action* (3rd Ed, 2004) Lawbook Co, Australia, 831.
9 *Hickman*, 615.
10 *Hickman,* 616.
11 *Hickman*, 616. NB, his Honour did not delve into the question of why it is an impossibility; however, I address this point in my chapter on fundamental underpinnings.
12 *Hickman*, 616.
13 *Hickman*, 617.
14 (1924) 34 CLR 482.
15 *Hickman*, 617.
16 (1904) 1 CLR 181, *Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd* (1924) 34 CLR 482, 523.
17 *Clancy v Butchers Shop Employés Union* (1904) 1 CLR 18, 196-7.
18 (1874) 5 LRPC 417, 442. See also *The Queen v The Board of Works for the District of St Olave's Southwark* (1857) 8 E.& B. 529; (1857) 120 ER 198, *The Queen v Bolton* (1841) 1 Adol. & El.N.S. 66; (1841) 113 ER 1054.
19 *S157*, 483 referred to *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 All ER 796.
20 *S157*, 488-9 referred to *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248, *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399-400.

21 *S157*, 491.
22 *S157*, 492-3.
23 *S157*, 482.
24 *S157*, 501.
25 *S157*, 502.
26 *S157*, 502.
27 The reference to the second reading speech is in my opinion unnecessary as the *Hickman* provisos act as a first point of reference and not as solid rules in themselves, as was decided by the majority in this case. Thus this particular privative clause and privative clauses generally could not repeal statutory limitations or restraints upon the exercise of power or the making of a decision. Parliamentary intention may be necessary in the interpretation of Statutes generally, but in this instance was not necessary and clouds the issue at hand.
28 *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J).
29 *S157*, 504, paraphrased *Hickman*, 616.
30 *S157*, 505.
31 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614-5.
32 *S157*, 503, quoting *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248.
33 *S157*, 503, quoting *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419.
34 *S157*, 506-7.
35 *S157*, 512.
36 Ibid.
37 S157, 513.
38 *S157*, 507.
39 *S157*, 502.
40 As it was called in *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J).
41 *S157*, 506, referred to, *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J).
42 *S157*, 506, referred to, *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Dixon J).
43 *S157*, 503 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), referred to, *R v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 (Dixon J), *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415.
44 There are many examples of State Supreme Courts applying privative clauses in a most literal manner and without proper regard for *S157* or *Hickman*. See for example *Carey v President of the Industrial Court Queensland* [2004] 2 Qd R 359, *Re Harley White; Ex parte Hutt* [2004] WASC 46 (Unreported, Le Miere J, 22 March 2004), *Re Harley White; Ex parte Hutt* [2005] WASC 32 (Unreported, Templeman, Miller and McKechnie JJ, 4 March 2005), *Sealanes (1985) Pty Ltd v The Western Australian Industrial Relations Commission* (2005) 144 IR 52, *McGee v Gilchrist-Humphrey* (2005) 92 SASR 100, *Craig v Workers Compensation Tribunal* (2004) 90 SASR 490, *Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd (as agent for WorkCover Corporation)* (2004) 88 SASR 311, *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 136 LGERA 288.
45 Louise Clegg, 'Another Instalment in the Showdown between the Court of Appeal and the Industrial Relations Commission' (2004) 2 *Bar News: Journal of the NSW Bar Association* 39.
46 *Industrial Arbitration Act 1940* (NSW), *Industrial Relations Act 1991* (NSW), *Industrial Relations Act 1996* (NSW).
47 *Mitchforce*, 250. His Honour came to that conclusion by reasoning that, when the rent in arrears became such that all of the earnings from the hotel went to paying the arrears, then the Starkeys were essentially working for their landlord. Neither of the other two Justices came to the same conclusion.
48 *Mitchforce*, 216-227 (Spigelman CJ), 239-240 (Mason P).
49 *Mitchforce*, 228.
50 (1977) 136 CLR 190, 192.
51 (2006) 80 ALJR 995; (2006) 227 ALR 212.
52 *Mitchforce*, 230.
53 *Mitchforce*, 237, his Honour dealt with the question of the rule of law when later discussing whether the removal of jurisdiction from a Supreme Court could have federal constitutional implications in that it would constrict the inherent appellate jurisdiction of the High Court under s 73(ii) of the *Australian Constitution*. While this highly novel argument could prove to be of significance in addressing privative clauses at State level, it does not fall within the scope of this essay.
54 (1997) 191 CLR 602, 634.
55 *Mitchforce*, 233.
56 In other words the direct or blunt approach to privative clauses was adopted. I shall explain the description of this approach as 'blunt' in my next chapter.
57 *Mitchforce*, 233.
58 The expanded jurisdiction theory of privative clauses was avoided by Spigelman CJ, who neither accepted it nor rejected it.
59 *Mitchforce*, 241.
60 (1995) 183 CLR 168.

61 Ibid. 194.
62 Ibid.
63 *Mitchforce*, 242.
64 *Mitchforce*, 239.
65 *Mitchforce Pty Ltd v Starkey (No 2)* (2003) 130 IR 378, [24] to [25], [145] (Wright and Walton JJ).
66 Ibid [17].
67 For this reason the decision was not appealed to the High Court. However, there have been three notable cases which have proceeded to the High Court from decisions of the Industrial Commission via the New South Wales Court of Appeal which have been decided in 2006: *Fish v Solution 6 Holdings Limited* (2006) 80 ALJR 959; (2006) 227 ALR 190, *Batterham v QSR Limited* (2006) 80 ALJR 995; (2006) 227 ALR 212, *Old UGC Inc v Industrial Relations Commission of New South Wales in Court Session* (2006) 80 ALJR 1019; (2006) 227 ALR 241.
68 *Mitchforce*, 252 (Handley JA).
69 *Mitchforce*, 240 (Mason P).
70 *Mitchforce*, 232 (Spigelman CJ).
71 *Mitchforce*, 232-233.
72 As is progressively happening with the *Industrial Relations Act 1996* (NSW) and the *Migration Act 1958* (Cth).
73 *Mitchforce*, 252.
74 A V Dicey, *Law of the Constitution* (1885) England, 180, quoted in Stephen Gageler 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303, 304.
75 As indeed can there be found wildly different approaches.
76 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ), *Mitchforce* generally.
77 *S157*, 513 (Gaudron, McHugh, Gummow, Kirby and Hayne). The State Constitutions, where they grant or continue the jurisdiction of the Supreme Courts from that inherited from the English courts, are not as immovable as the *Australian Constitution*. Indeed in some States the jurisdiction of the Supreme Court is granted by normal legislation, such as by the Supreme Court Acts of New South Wales, South Australia and Western Australia, in Queensland, jurisdiction to hear cases of judicial review is contained in the *Judicial Review Act 1991* (Qld) much like in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
78 As argued in Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303, the underpinnings of judicial review of administrative action is difficult to define. See also, Bradley Selway QC 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 218, where he argues that the foundation is to be found solely within the *Australian Constitution*.
79 Eg. *Industrial Relations Act 1996* (NSW), the slightly more brief *National Security (Coal Mining Industry Employment) Regulations1941* (Cth), the slightly more verbose *Migration Act 1958* (Cth), and *Royal Commissions Act 1917* (SA). However it is also the case in other formulations such as the *Income Tax Assessment Act 1936* (Cth).
80 See generally, DJ Harris, *Cases and Materials on International Law* (6th Ed 2004) Thomson Sweet & Maxwell, London, 361-71, Donald Anton, Penelope Mathew and Wayne Morgan, *International Law Cases and Materials* (2005) Oxford University Press, Hong Kong, 78-81.
81 *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 95 (entered into force 24 April 1964), arts 29, 30,
82 Ibid art 41.
83 Ibid art 9.
84 An alternative argument, though essentially finding its legitimacy from the same source, is the rights-based approach to administrative law as is prevalent in the United Kingdom. See Denise Meyersen, 'State and Federal Privative Clauses: Not So Different After All', (2005) 16 *Public Law Review* 39.
85 See generally, Paul Craig 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467.
86 A V Dicey, *An Introduction to the Study of the Law of the Constitution* (10th Ed, 1959) The Pitman Press, Bath, 202
87 Ibid. (emphasis added). Indeed in the language of Coke "[a] good caveat to parliaments to leave all causes to be measured by the golden and streight metwand of the law, and not to the incertain and crooked cord of discretion" 4 Inst. 41. This discussion however does not fall within the limits of this essay.
88 A V Dicey, above n 86, 92.
89 See generally, A. V. Dicey, above n 86, Chapter XIII. Gleeson CJ made two references to the rule of law in his Honour's judgment in *S157*, 483, 492 and the integral part of the rule of law which judicial review forms.
90 A V Dicey, above n 86, 202.
91 See generally, A V Dicey, above n 86.
92 Ross Anderson, 'Parliament v. Court: The Effect of Legislative Attempts to Restrict the Control of Supreme Courts over Administrative Tribunals though the Prerogative Writs' (1950) 1 *University of Queensland Law Journal* 39, 50.
93 William Wade, *Constitutional Fundamentals* (1980), Stevens & Sons, London, 66.

94 David Dyzenhaus, 'An unfortunate Outburst of Anglo-Saxon Parochialism' (2005) 68 *The Modern Law Review* 673, 676. See also David Dyzenhaus, *The Constitution of Law* (2006) Cambridge University Press, Cambridge.

95 As referred to in *Mitchforce Pty Ltd v Starkey* (No 2) (2003) 130 IR 378, [17]. Another argument is that the High Court insists on a uniform body of common law, Enid Campbell, Matthew Groves, 'Privative Clauses and the Australian Constitution', (2004) 4 *Oxford University Commonwealth Law Journal* 59, 74.

96 *Supreme Court of Judicature Act 1873*, 35 & 36 Vict, c. 77, as amended by the *Supreme Court of Judicature (Amendment) Act1875*, 38 & 39 Vict, c. 77.

97 As mooted by Griffith CJ in *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 131.

98 (1612) 10 Co. Rep. 68b; (1612) 77 ER 1027.

99 *The Case of The Marshalsea* (1612) 10 Co. Rep. 68b, 76a-77b; (1612) 77 ER 1027, 1038-1041.

100 (1938) 59 CLR 369, 389.

101 *Batterham v QSR Limited* (2006) 80 ALJR 995; (2006) 227 ALR 212, [26] (Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ).

102 (1991) 171 CLR, 232.

103 It is interesting to note that the privative clause in the *Migration Act 1958* (Cth) has been altered to include the same term 'purported decision' by the *Migration Litigation Reform Act 2005* (Cth) which was intended to make the privative clause effective, see generally, Caron Beaton-Wells: 'Judicial Review of Migration Decisions: Life After S157' (2005) 33 *Federal Law Review* 141.

104 Instances where it has been considered to be the only approach are *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ), and *Mitchforce*, 233, 252.

105 It has been argued that a privative clause addresses the question of finality or validity of the decision from the wrong end of the problem. If the instrument granting jurisdiction to the tribunal were phrased, at all stages, to stipulate that breach of specified provisions shall not result in invalidity, (as suggested in Mark Aronson, 'Nullity' 40 *AIAL Forum* 19, 25-27; see also John Basten QC, 'Revival of procedural fairness for asylum seekers' (2003) 28 *Alternative Law Journal* 114) then there would arguably be no grounds for review with regard to the principles of the Judgment in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355. However, there is the persuasive argument put forward in William Wade, *Constitutional Fundamentals* (2nd Ed 1989) Stevens & Sons, London, that the intent is the same and that the courts should treat such abuse of legislative power as attempts to deprive them of their proper function in the same way as they deal with a privative clause. This argument is developed further in William Wade, Christopher Forsyth, *Administrative Law* (9th Ed 2004) Oxford University Press, England. Another possibility, as considered by the majority in *S157*, is whereby a decision maker is given completely unrestrained jurisdiction. As I have pointed out, the majority did not believe that this grant of unlimited power was possible, see also, David Dyzenhaus 'Intimations of legality amid the clash of arms' 2 *International Journal of Constitutional Law* 244. This discussion, while related to the subject matter of this essay, does not fall within its compass.

106 *Breen v Amalgamated Engineering Union* [1971] 1 All ER 1148, 1153 (Lord Denning MR). The quotes at the start of my Introduction and Conclusion were initially quoted in editions of Garner's *Administrative Law*.

107 See, William Wade, Christopher Forsyth, *Administrative Law* (9th Ed 2004) Oxford University Press, England, 706-714.

BIBLIOGRAPHY

Articles/Books/Reports

Anderson, Ross, 'Parliament v. Court: The Effect of Legislative Attempts to Restrict the Control of Supreme Courts over Administrative Tribunals though the Prerogative Writs' (1950) 1 *University of Queensland Law Journal* 39.

Anton, Donald, Mathew, Penelope, Morgan, Wayne, *International Law Cases and Materials* (2005) Oxford University Press, Hong Kong.

Aronson, Mark, 'Nullity' 40 *AIAL Forum* 19.

Aronson, Mark, Dyer, Bruce, Groves, Matthew, *Judicial Review of Administrative Action* (3rd Ed, 2004) Lawbook Co, Australia.

Basten QC, John, 'Revival of procedural fairness for asylum seekers' (2003) 28 *Alternative Law Journal* 114.

Beaton-Wells, Caron, 'Judicial Review of Migration Decisions: Life After S157' (2005) 33 *Federal Law Review* 141.

Campbell, Enid, Groves, Matthew, 'Privative Clauses and the Australian Constitution', (2004) 4 *Oxford University Commonwealth Law Journal* 59.

Clegg, Louise, 'Another Instalment in the Showdown between the Court of Appeal and the Industrial Relations Commission' (2004) 2 *Bar News: Journal of the NSW Bar Association* 39.

Coke, Edwardo, *The Fourth Part of the Institutes of the Laws of England; Concerning the Jurisdiction of Courts* (first published 1644, 1817) W. Clarke and Sons, London.

Craig, Paul, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467.

Creyke, Robin, McMillan, John, *Control of Government Action* (2005) LexisNexis Butterworths, Australia.

Dicey, A V, *An Introduction to the Study of the Law of the Constitution* (10th Ed, 1959) The Pitman Press, Bath.

Dicey, A V, *Law of the Constitution* (1885) England.

Dyzenhaus, David, 'An unfortunate Outburst of Anglo-Saxon Parochialism' (2005) 68 *The Modern Law Review* 673.

Dyzenhaus, David, 'Intimations of legality amid the clash of arms' 2 *International Journal of Constitutional Law* 244.

Dyzenhaus, David, *The Constitution of Law* (2006) Cambridge University Press, Cambridge.

Gageler, Stephen, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303.

Garner, J F, *Administrative Law* (5th Ed, 1979) Butterworths, London.

Harris, D J, *Cases and Materials on International Law* (6th Ed 2004) Thomson Sweet & Maxwell, London.

Meyersen, Denise, 'State and Federal Privative Clauses: Not So Different After All' (2005) 16 *Public Law Review* 39.

Selway QC, Bradley, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 218.

Wade, William, *Constitutional Fundamentals* (1980) Stevens & Sons, London.

Wade, William, *Constitutional Fundamentals* (2nd Ed 1989) Stevens & Sons, London.

Wade, William, Forsyth, Christopher, *Administrative Law* (9th Ed 2004) Oxford University Press, England.

Case law

Batterham v QSR Limited (2006) 80 ALJR 995; (2006) 227 ALR 212.

Baxter v New South Wales Clickers' Association (1909) 10 CLR 114.

Breen v Amalgamated Engineering Union [1971] 1 All ER 1148.

Carey v President of the Industrial Court Queensland [2004] 2 Qd R 359.

Clancy v Butchers Shop Employés Union (1904) 1 CLR 181.

Darling Casino Ltd v New South Wales Casino Control Authority (1997) 191 CLR 602.

Deputy Federal Commissioner of Taxation v Richard Walter Pty Ltd (1995) 183 CLR 168.

Fish v Solution 6 Holdings Limited (2006) 80 ALJR 959; (2006) 227 ALR 190.

McGee v Gilchrist-Humphrey (2005) 92 SASR 100, *Craig v Workers Compensation Tribunal* (2004) 90 SASR 490.

Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597.

Mitchforce Pty Ltd v Industrial Relations Commission (NSW) (2003) 57 NSWLR 212.

Mitchforce Pty Ltd v Starkey (No 2) (2003) 130 IR 378.

O'Toole v Charles David Pty Ltd (1991) 171 CLR.

Old UGC Inc v Industrial Relations Commission of New South Wales in Court Session (2006) 80 ALJR 1019; (2006) 227 ALR 241.

Parisienne Basket Shoes Pty Ltd v Whyte (1938) 59 CLR 369.

Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476.

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355.

R v Coldham; Ex parte Australian Workers' Union (1983) 153 CLR 415.

R v Medical Appeal Tribunal; Ex parte Gilmore [1957] 1 All ER 796.

R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section (1951) 82 CLR 208.

R v Murray; Ex parte Proctor (1949) 77 CLR 387.

Re Harley White; Ex parte Hutt [2004] WASC 46 (Unreported, Le Miere J, 22 March 2004).

Re Harley White; Ex parte Hutt [2005] WASC 32 (Unreported, Templeman, Miller and McKechnie JJ, 4 March 2005).

Ridge v Baldwin [1963] 2 All ER 66.

Sealanes (1985) Pty Ltd v The Western Australian Industrial Relations Commission (2005) 144 IR 52.

Stevenson v Barham (1977) 136 CLR 190.

The Case of The Marshalsea (1612) 10 Co. Rep. 68b; (1612) 77 ER 1027.

The Colonial Bank of Australasia and John Turner v Robert Willan [107] (1874) 5 LRPC 417.

The King v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598.

The Queen v Bolton (1841) 1 Adol. & El.N.S. 66; (1841) 113 ER 1054.

The Queen v The Board of Works for the District of St Olave's Southwark (1857) 8 E.& B. 529; (1857) 120 ER 198.

Tsimpinos v Allianz (Australia) Workers' Compensation (SA) Pty Ltd (as agent for WorkCover Corporation) (2004) 88 SASR 311.

Waterside Workers' Federation of Australia v Gilchrist, Watt & Sanderson Ltd (1924) 34 CLR 482.

Woolworths Ltd v Pallas Newco Pty Ltd (2004) 136 LGERA 288.

Legislation

Act for the Better Local Management of the Metropolis 1856, 18 &19 Vict c. 120.

Administrative Decisions (Judicial Review) Act 1977 (Cth).

Australian Constitution.

Conciliation and Arbitration Act 1904 (Cth).

Gold Fields Act 1865 (Vic).

Income Tax Assessment Act 1936 (Cth).

Industrial Arbitration Act 1940 (NSW).

Industrial Relations Act 1991 (NSW).

Industrial Relations Act 1996 (NSW).

Judicial Review Act 1991 (Qld).

Migration Act 1958 (Cth).

Migration Litigation Reform Act 2005 (Cth).

National Security (Coal Mining Industry Employment) Regulations 1941 (Cth).

Royal Commissions Act 1917 (SA).

Supreme Court Act 1935 (SA).

Supreme Court Act 1970 (NSW).

Supreme Court Act 1986 (Vic).

Supreme Court of Judicature (Amendment) Act 1875, 38 & 39 Vict, c. 77.

Supreme Court of Judicature Act 1873, 35 & 36 Vict, c. 77.

Treaties

Vienna Convention on Diplomatic Relations, opened for signature 18 April 1961, 500 UNTS 95, (entered into force 24 April 1964).