

**DEFLATING THE *HICKMAN* MYTH:
JUDICIAL REVIEW AFTER *PLAINTIFF S157/2002*
*V THE COMMONWEALTH***

*Hon Duncan Kerr MP**

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Sections 474 and 486A of the *Migration Act 1958* (Cth) originated as separate Bills but were aspects of a single overarching policy. That policy was to restrict access to judicial review of migration decisions¹. The validity and meaning of both s474 (the privative clause) and s486A (an absolute time limit on bringing applications for constitutional remedies) came before the High Court by way of a case stated in *Plaintiff S157/2002 v Commonwealth of Australia (Plaintiff S157/2002)*.² The decision in *Plaintiff S157/2002* emphasises the High Court's continuing commitment to fundamental principles of the rule of law.

The judgment entrenched, as a constitutional entitlement, the right of any person affected by a decision made by an 'officer of the Commonwealth' to apply to the High Court in its original jurisdiction for judicial review for jurisdictional error³. It exploded the '*Hickman*⁴ myth'—the argument, pressed by the Commonwealth as its view as to the effect of that decision, that a privative clause expands the jurisdiction of an administrative decision-maker or validates an otherwise invalid decision. It explained and distinguished *Hickman*, unanimously preferring the approach articulated by Gaudron and Gummow JJ in *Darling Casino*⁵ to that advanced by the Commonwealth. This means that the only effect a privative clause can have is that the clause may be referred to (alongside all other indicia contained within the Act) to assist determine whether any express or implied provision in a statute is mandatory (that is essential to validity), or directory⁶. It prohibited some, and limited other, measures that the Australian government might otherwise have contemplated taking as alternatives to the failed strategy of removing judicial review. It sustained the validity of the impugned provisions--but only by denying to them any relevance to the proceedings intended to be brought by Mr Sayed (the plaintiff in *Plaintiff S157/2002*) under s 75(v) of the Constitution.

The Legislation

Section 474(1) of the *Migration Act 1958* provided:

* *Barrister; Counsel for Plaintiff (with George Williams) in Plaintiff S157/2002.*

474 Decisions under Act are final

- (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.

Subsections (2)-(5) defined the term ‘privative clause decision’. It can be summarised as encompassing every decision of an administrative character made under the *Migration Act*, except for a very limited class explicitly excluded by subsection (4) or specified by regulations under subsection (5).

Section 486A of the Act provided:

486A Time limit on applications to the High Court for judicial review

- (1) An application to the High Court for a writ of mandamus, prohibition or certiorari or an injunction or a declaration in respect of a privative clause decision must be made to the High Court within 35 days of the actual (as opposed to deemed) notification of the decision.
- (2) The High Court must not make an order allowing, or which has the effect of allowing, an applicant to make an application mentioned in subsection (1) outside that 35 day period.
- (3) The regulations may prescribe the way of notifying a person of a decision for the purposes of this section.

The words in s 486A(1), ‘privative clause decision,’ referred to the class of decisions affected by section 474.⁷

The contentions of the parties

The plaintiff’s case

The plaintiff submitted that no statute might bar an applicant from seeking, or remove or limit, the High Court’s right to grant, relief under s 75 (v) or the Constitution. The plaintiff argued that the High Court possessed a constitutionally entrenched power to:

- require officers of the Commonwealth to act lawfully and comply with the common law and any relevant legislation; and
- prevent the Commonwealth from removing or restricting the right of the High Court to supervise the lawfulness of the conduct of Commonwealth officers.

The plaintiff sought declarations that ss 474 and 486A were invalid on the grounds that, whether a literal or purposive approach to their interpretation was adopted, both were ouster clauses⁸.

As to the facts in issue, counsel submitted that the High Court did not need to finally resolve the scope of review under s 75(v) of the Constitution (in the same way that

the *Communist Party Case*⁹ did not set out all of the available grounds of review of legislative action). It was submitted that it was sufficient for the Court to hold that the scope of review entrenched by the Constitution extended to breaches of natural justice of the type alleged to have been made by the Refugee Review Tribunal in Mr Sayed's instance (that is, a failure to accord a hearing on materials adverse to a person whose rights had been affected). Counsel submitted that inclusion of this ground in the entrenched scope of review was clearly supported by decisions of the High Court relating to s 75(v)¹⁰.

The plaintiff contended that, provided it was within a constitutionally conferred head of power, it remained open to Parliament, by plain and express language, to authorise executive action in wide discretionary terms or to narrowly prescribe it--but submitted that neither could an unbounded power be conferred¹¹ nor could the grounds of entrenched review be limited or abrogated by statute.

As well as contending that s75 (v) was included by the framers of the Constitution with the explicit intention of conferring a supervisory jurisdiction over acts of the executive, the plaintiff argued that judicial review was also implicit from the vesting of judicial power in Ch III of the Constitution and the opening words of s 71¹².

That argument built on Dixon J's statement in the *Communist Party Case*, that the Constitution 'is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed'. He continued: 'Among these I think that it may fairly be said that the rule of law forms an assumption'¹³. Counsel for the plaintiff submitted that an important aspect of the rule of law is that decision-makers exercising public power are constrained by law. For this to make sense, they must be constrained by law in the sense that a judicial (and hence non legislative or executive) body exists with the power to enforce those limits¹⁴.

The plaintiff dealt with the defendant's reliance on *Hickman*¹⁵ by attacking the body of academic and judicial comment that had built on the obiter observations of Dixon J¹⁶ as having created a '*Hickman* myth'. The plaintiff submitted that the ratio decidendi of *Hickman* was consistent with earlier decisions of the High Court such as the *Tramways Case [No 1]*¹⁷ and that to elevate any reading of Dixon J's obiter dicta in *Hickman* to one, which was inconsistent with that ratio, was wrong in principle.

The plaintiff's submissions noted that in a century of decisions there had been no instance in which the High Court had found that an officer of the Commonwealth had exceeded the jurisdiction conferred on him or her yet allowed the decision to stand because of the presence in the Act of a privative clause.

As to s 486A, the plaintiff submitted it was directly inconsistent with the Constitution. Section 486A(2) purported to prohibit, in absolute terms, the High Court of Australia from exercising its jurisdiction under s 75(v) in respect of any application, encompassed by its provisions, made to the High Court outside of 35 days of the notification of a decision¹⁸.

The plaintiff contended that a constitutionally guaranteed jurisdiction could not be removed in this way. Sections 73, 74, 76 and 77 of the Constitution provide in detail the circumstances in which Parliament can legislate upon the type of matters specified in s 75. Section 77(i) of the Constitution is a conclusive indication that it is not within the power of the Parliament to grant or withhold the jurisdiction conferred on the High Court by s 75(v) (contrast the terms of s 73). Even if it were within the incidental power to regulate matters relating to the procedures of the High Court the incidental power was governed by the necessity that it be proportionate and reasonably adapted to the purpose. The plaintiff submitted that s 486A went beyond that which would be allowed as reasonable regulation. It amounted to an effective bar on the High Court's exercise of a constitutionally granted jurisdiction.

The defendant's case

The defendant's submissions conceded that, if read literally, s 474(1) would oust the jurisdiction of the High Court. To that extent it would be invalid. To meet this objection the Commonwealth referred to the parliamentary record to demonstrate that the Minister had intended s 474 to be construed other than in a literal sense.

Counsel also submitted that other provisions of Part 8 of the Migration Act made it clear that it was not any part of the intention of Parliament to oust the jurisdiction of any federal court.¹⁹ Sections 475A, 476 and 477 were said to be expressly predicated on the Federal Court having jurisdiction under s 39B of the *Judiciary Act 1903* (Cth) in respect of 'privative clause decisions'.

Instead of a literal reading, the Commonwealth submitted that s 474 should be given an interpretation consistent with the approach taken by Dixon J to the construction of such clauses in *Hickman*, as follows:²⁰

The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary Constitution, the interpretation of provisions of the general nature of [the privative clause] is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that 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, 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.

Thus the defendant submitted that the effect of a privative clause was not to limit the jurisdiction of a court, but to expand the power of the decision-maker whose decision is affected by the privative clause.²¹

Section 474(1) was a substantive provision but it characterised conduct as valid or invalid by reference to certain remedies – namely the constitutional writs (which require that a person has failed or refused to exercise some power of a governmental character) or an injunction (which requires a breach of the Act that makes some action proposed to be taken 'unlawful').²² When it said that the constitutional writs do not lie it meant that (subject to the *Hickman* conditions) breaches of the Act do not involve jurisdictional error. When it said that an injunction

does not lie it meant that such breaches are not to be regarded as relevantly 'unlawful'. A statutory expansion of the concept of a 'decision' for this purpose merely sets the categories of conduct in respect of which the remedies referred to (if they lie at all) can only be obtained in the circumstances allowed by the *Hickman* principles.

The result, according to the Commonwealth submission, was that a decision (or purported decision) must be treated as valid so long as the decision-maker had complied with the three *Hickman* provisos²³ and so long as the Act conferring a power in those terms did not extend beyond the limits of Commonwealth legislative power.

Taking the argument to the instance of the *Migration Act 1958*, the Solicitor-General contended that when a privative clause was inserted as an amendment to an existing Act (rather than as a provision in the original legislation), there remained no place for the operation of any further *Hickman* exceptions (a reference to the notion of 'inviolable limits' referred to by Dixon J in subsequent judgments) because the amending law converted every statutory direction to, and limit on, a decision-maker's authority contained in the Act to mere points of guidance. This would leave a decision-maker free to ignore, or take as little or as much account of those limits as they may, so long as the decision-maker could not be proven to have acted in bad faith.

The Commonwealth submitted that the law governing the interpretation of privative clauses was well settled and the elaboration and application of the law following *Hickman* had never been marked by differences between members of the Court as to the basis or essential nature of the principles.²⁴

As to s 486A the Commonwealth submitted that the absolute time bar did not remove the right or ability, conferred by s 75(v) of the Constitution, of any person with a sufficient interest to challenge a 'privative clause decision' made by an officer of the Commonwealth. The defendant argued that s 486A(1) was in a form common to statutes imposing limitation periods. It only stood in the way of a plaintiff seeking the specified remedies if his or her application was not made within a prescribed period (within 35 days of actual notice of the decision). It did not deprive the High Court of its jurisdiction; it merely regulated the right of persons to proceed. Subsection 486A(2), which stated that the High Court must not make an order allowing an applicant to make an application outside of the 35 day period, was justified by the Solicitor-General as merely reinforcing the content of subsection (1), namely that the time for commencing a proceeding was not to be extended.

By imposing an absolute time limit, the Commonwealth argued that s 486A revealed a specific legislative intent different from the general position where there is no such absolute bar to further proceedings: that is where legislation is otherwise silent, the making of a jurisdictional error by a decision-maker will generally mean that the purported decision has no legal significance.²⁵ However, the Solicitor-General's argument proceeded, the legislature may indicate a contrary intention, for example that decisions affected by jurisdictional error are to be treated as valid after a reasonable period for challenging them has expired. There is, the Commonwealth submitted, no constitutional bar on Parliament determining that flawed decisions of

that kind can be or become effective. It is a matter for Parliament to determine what effect is to be given to decisions affected by some kind of error.

The end result, the Commonwealth submitted, was that s 486A worked in combination with s 474 to bring about a regime whereby a person adversely affected by a privative clause decision could successfully seek judicial review only for breach of one of the *Hickman* provisos, narrowly confined. If there was no such breach, the decision would be valid and effective irrespective of when any challenge was lodged. If there was a breach of a *Hickman* proviso, the decision would be liable to be set aside if proceedings were commenced within 35 days of the affected person receiving notice. Thereafter, Parliament intended that the decision must be treated as valid and effective irrespective of any kind of error affecting the decision, even fraud.

The impact of the Federal Court decision in *NAAV*

Plaintiff S157/2002 was commenced in the original jurisdiction of the High Court by writ of summons naming the Commonwealth of Australia as Defendant. The statement of claim sought declarations that the two impugned statutory provisions were invalid. The matter was listed for hearing before a seven member bench of the Full Court of the High Court of Australia by way of a case stated by Gummow J in that action. Thus the constitutional issues came before the High Court directly and not by way of an appeal.

However, a large number of primary applications for review of migration or refugee decisions were, contemporaneously, before the Federal Court of Australia. In those matters the meaning and effect of ss 474 and 486A was also in issue. A group of those cases came before a Full Court of the Federal Court shortly before the listing of *Plaintiff S157/2002* for hearing. The decision in those cases, *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*²⁶ (*NAAV*), was delivered after initial written submissions had been filed in *Plaintiff S157/2002*.

Although there is little reference to the case in any of the judgments delivered in *Plaintiff S157/2002*, the decision in *NAAV* played a crucial role in undermining a key submission of the Commonwealth. The nub of the Commonwealth's case as put to the High Court was that Dixon J's statement of principles in *Hickman* were settled law and that elaboration of these principles had never been marked by differences between members of that Court as to their basis or essential nature. In *NAAV* all five judges who constituted the Full Court were of a common view that *Hickman* bound them and that s 474 was thus not invalid. Yet despite this superficial unanimity three very divergent approaches emerged from their reasons. Ironically the success of the Commonwealth in obtaining a majority for an outcome substantially favourable to it in the Federal Court undermined its key argument in the High Court.

NAAV highlighted inconsistent ‘expansion of jurisdiction’, ‘validation’ and ‘Darling Casino’ theories of Hickman

The ‘expansion of jurisdiction’ theory

The law asserted by the Commonwealth to have been settled by *Hickman* was that ‘the effect of a privative clause is not to limit the jurisdiction of the court but to expand the power of the decision-maker whose decision is affected by the privative clause’²⁷. For convenience this may be described as the ‘*expansion of jurisdiction*’ theory of *Hickman*.

However, as a result of the contrasting judgments in *NAAV*, it became impossible to assert that there were not other, very differently premised, theories of *Hickman* that had commanded strong support in the High Court. Two of those theories were starkly highlighted by the divergent judgments of Black CJ and French J.

The ‘validation’ theory

Black CJ articulated what counsel for the plaintiff in *Plaintiff S157/2002* later termed a ‘*validation*’ theory of *Hickman*. His Honour held:

The Parliament must however be taken, by enacting s 474(1), to have implicitly changed the substantive law governing the Minister’s power and jurisdiction under the Act, so that decisions that may otherwise have been invalid may, by reason of the intention implicitly expressed in s 474(1) (interpreted according to the *Hickman* principle), now be ‘validated’²⁸.

This ‘*validation*’ theory depended on giving effect to the words of Dixon J in *Hickman* that ‘such a clause is interpreted as meaning that no decision *which is in fact* given by the body concerned shall be invalidated.’²⁹ The ‘*validation*’ theory does not treat a privative clause as expanding the decision-maker’s jurisdiction, but instead as making valid a determination that would, otherwise, have been unlawful. This idea emerged most clearly in the joint judgment of Mason ACJ and Brennan J in *R v Coldham; Ex parte Australian Workers Union* where their Honours stated:

Consequently, *the making of the award or order* is the occasion for taking the privative clause into account in interpreting the Tribunal’s authority or power more liberally. Before the award or order is made the Tribunal will be held to a strict construction of its powers uninfluenced by the clause, thereby enabling the grant of prohibition, notwithstanding that had the proceedings reached the stage where an award or order was made prohibition could not have been obtained (italics added)³⁰.

On analysis the ‘*expansion of jurisdiction*’ theory and the ‘*validation*’ theory of *Hickman* are mutually inconsistent.

The ‘*expansion of jurisdiction*’ theory posits that no invalid decision was ever made; the ‘*validation*’ theory posits that an otherwise invalid decision was made but by the operation of the privative clause, it was, *instanter*, validated. The ‘*validation*’ theory, if applicable, must give the Minister, his officers and the relevant tribunals power to determine questions of law conclusively and finally. Thus in *NAAV*, Black CJ, accepting a submission to this effect advanced by the Minister stated:

It must also be accepted that there is no constitutional reason why s 474(1) should not have the effect that the substantive law of the Act is altered so that the Minister has the power to determine questions of law (other than matters going to constitutional limits) conclusively and finally³¹.

The 'Darling Casino' theory: privative clauses do not protect invalid decisions.

French J, by contrast, in *NAAV* held that a privative clause, expressed to apply to decisions under an enactment, applied only to valid decisions. In doing so his Honour drew on the distinction made by Gaudron and Gummow JJ in *Darling Casino v New South Wales Casino Control Authority*³² between a 'decision under the Act' and a decision 'under or purporting to be under the Act'. In *Darling Casino* their Honours said:

There is one point we should add, because the Court of Appeal appears to have proceeded on a contrary view. It concerns the content of the phrase in s 155(1), [the relevant privative clause] 'a decision of the Authority under this Act'. The phrase is not 'under or purporting to be under this Act'. Section 11 obliges the Authority to have regard to certain matters. Section 12 forbids the Authority to grant an application unless satisfied of the matters there specified and for that purpose the Authority is to consider the items specified in s 12(2)(a)-(h). Section 13 contains a definition of 'close associate', a term used in s 12. Sections 11, 12 and 13 are central to the legislative scheme. Section 155 cannot fairly be construed as declaring an intention of the legislature that the Authority is empowered and protected in respect of determinations under s 18 reached other than upon satisfaction of the conditions which enliven its power. Those decisions would not have been made 'under this Act'³³.

Brennan CJ, Dawson and Toohey JJ concurred, adding:

Although we agree with Gaudron and Gummow JJ that the administrative procedure adopted by the authority in this case did not affect the validity of the exercise of its power...it should not be assumed that the exercise of a power conferred in general terms cannot be confined by the procedures adopted by a repository. If the power must be exercised in conformity with the rules of natural justice, a failure by the repository to adhere to a declared procedure may constitute or result in a failure to accord natural justice to a person whose interests are liable to affection by the exercise of the power. In such a case, an exercise of the power adversely to the interests of the person denied natural justice is liable to be set aside³⁴.

Such a '*Darling Casino*' theory of the *Hickman* obiter neither expands the decision-maker's jurisdiction, nor validates error. All it does is permit the Court to have regard to the clause (together with other indications contained within the Act) as a factor to assist it to determine whether a provision in an Act is mandatory or directory³⁵.

Early traces of the '*Darling Casino*' theory of the *Hickman* obiter can be identified in the joint judgment of Latham CJ and Dixon J in *R v Commonwealth Rent Controller*³⁶ and, more clearly, in the decision of Latham CJ in *R v Murray; Ex parte Proctor*³⁷ in which his Honour stated:

But reg 17 does prevent an order of the Board from being held to be invalid by reason of irregularities not going to jurisdiction. It is a statement of the intention of the legislature that not every direction prescribed for the conduct of the tribunal should be regarded as mandatory.³⁸

In *Commonwealth Rent Controller* Latham CJ and Dixon J, and in *R v Murray* Latham CJ, applied ordinary rules of statutory interpretation to ascertain whether or

not the provision they were then considering was mandatory. Had they been uncertain as to whether or not the provision was meant to be mandatory or directory the privative clause then under consideration might have had some effect (as a general indication of parliament's intention that not every direction need be regarded as mandatory) but because there was no ambiguity, there was no occasion for the privative clause to operate. While the decision in *Hickman* was referred to in each judgment, in neither was the methodology, nor the theory, of 'expansion of jurisdiction' or 'validation' applied.

Thus French J, in *NAAV* held that the reference in s 474 to a 'decision of an administrative character made...under this Act' must refer only to a valid decision; one made in substantive compliance with the decision-maker's statutory and common law obligations under the Act³⁹.

The decision in Plaintiff S157/2002

The 'Darling Casino' theory prevails: the Constitution entrenches judicial review

The High Court unanimously⁴⁰ applied the '*Darling Casino*' theory to the construction of s 474. The privative clause was held neither to expand a decision-maker's jurisdiction, nor to validate error. Section 75(v) was held to introduce into the Constitution 'an entrenched minimum provision of judicial review'⁴¹ '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'⁴².

A privative clause thus understood does not affect judicial review. It merely requires a judge to consider any such clause (and the terms in which it is expressed) as one factor, alongside other indications contained within the Act, to assist the reviewing court to decide whether compliance with any express or implied provision of an Act is essential to a decision's validity⁴³.

Each of the judgments expressly rejected the Commonwealth's submission that a privative clause took effect by expanding the jurisdiction of a decision-maker. Instead the High Court reaffirmed that any jurisdictional error results in a nullity⁴⁴. The fundamental premise of the legislation was held to have been unsound⁴⁵ and founded on an incorrect understanding of *Hickman*⁴⁶.

Further the court held that if s 474 was amended to give effect to the intention that the Solicitor General had contended it had—that is to expand the jurisdiction of a decision-maker (such that it would apply to decisions purportedly, rather than lawfully made) or to take effect by validating what would otherwise be an invalid decision--such a privative clause would then be in direct conflict with s 75(v) of the Constitution, and thus would be invalid⁴⁷.

In their joint judgment Gaudron, McHugh, Gummow, Kirby and Hayne JJ summarised that conclusion as follows:

When regard is had to the phrase 'under this Act' in s 474(2) of the Act, the words of that subsection are not apt to refer either to decisions purportedly made under the Act or, as some of the submissions made on behalf of the Commonwealth might suggest, to decisions

of the kind that might be made under the Act. Moreover, if the words of the subsection were to be construed in either of those ways s 474(1)(c) would be in direct conflict with s 75(v) of the Constitution and thus invalid. Further they would confer authority on a non-judicial decision maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71⁴⁸.

Because the High Court concluded that the section was not to be read as applying to invalid decisions, it also rejected the plaintiff's submission that the privative clause was unconstitutional, holding that, properly construed, s 474 did not attempt to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution.

Thus s 474 was held to be valid--but only because it did not apply to applications under s 75(v) for the issue of constitutional writs in respect of 'decisions' affected by jurisdictional error.

It followed, logically, from the court's construction of s 474 that section 486A was also valid, but without effect, in respect of the proceedings intended to be brought by the plaintiff.

The joint judgment and the concurring judgment of Gleeson CJ both held that, because the expression 'privative clause decision' in s 486A had the same meaning assigned by s 474(2) of the Act, it followed that s 486A did not apply to a decision where there had been jurisdictional error. Such a decision was not a decision 'made under the Act'⁴⁹.

In respect of injunctive relief under s 75(v) (a remedy available to cure some non-judisdictional errors but not sought by the plaintiff in this case) Gleeson CJ⁵⁰ and Gaudron, McHugh, Gummow, Kirby and Hayne JJ⁵¹ found it unnecessary to decide whether s 486A would prevent the court from granting such remedy, but the joint judgment suggested that s 486A might need to 'be read down to bring it within constitutional limits'⁵².

Callinan J took a different approach. His Honour accepted that the parliament might regulate the procedures by which proceedings for relief under s 75(v) of the Constitution may be sought and obtained. He stated: 'But the regulation must be truly that and not in substance a prohibition.'⁵³ His Honour took into account the reality that the people seeking remedies for defective refugee determinations may not speak English and will often be living or detained in localities remote from the availability of legal advice. Mindful that the section purported to deny power to the High Court to extend time that it might otherwise have under O 60 r 6 of the High Court Rules, Callinan J concluded that s 486A was 'therefore invalid to the extent that it purports to impose a time limit of 35 days within which to bring proceedings under s 75(v) in this court'.⁵⁴ His Honour thus held:

Section 486A, although not wholly invalid, can have no operation in relation to the constitutional remedies of mandamus, prohibition and injunction⁵⁵.

Settled issues: Ratio decidendi

General principles

- Section 75(v) introduces into the Constitution ‘an entrenched minimum provision of judicial review’,⁵⁶ ‘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’⁵⁷.
- A privative clause is therefore ineffective to reduce the scope of the constitutionally entrenched powers of judicial review granted to the High Court by s 75(v)⁵⁸.
- The constitutional writs of prohibition and mandamus are available to correct jurisdictional error. As no constitutional provision confers jurisdiction with respect to certiorari it remains open to the parliament to legislate to prevent the grant of that particular form of relief⁵⁹.
- There is a presumption that parliament does not intend to cut down the jurisdiction of the courts. Privative clauses must be strictly construed⁶⁰.
- A privative clause neither expands the jurisdiction of a decision-maker nor confers validity on a decision invalidly made⁶¹.
- In respect of decisions taken by officers of the Commonwealth,⁶² regard may be had to a privative clause to assist a court to determine whether compliance with an express or implied provision of an Act was intended to be essential to validity⁶³. This is all that remains of *Hickman*⁶⁴.
- This task is to be undertaken by applying ordinary rules of statutory interpretation⁶⁵ to ascertain whether or not the provision under consideration is, or is not, essential to validity.
- In ascertaining the intention of parliament, Australian courts will operate on the assumption that the legislature does not intend to abrogate or curtail any fundamental rights and freedoms. Nor will courts impute to the legislature an intention to authorise partiality or unfairness⁶⁶.
- If compliance with an express or implied provision is essential to validity, a decision otherwise made is vitiated by jurisdictional error⁶⁷.
- While it is necessary to attempt to reconcile the apparent conflict between a statutory provision imposing limitations or restraints upon a decision-maker’s jurisdiction or power and a privative clause, it is not necessary that that reconciliation be effected⁶⁸.
- Where there is no ambiguity there is no occasion for the privative clause to operate. It is wrong to read the rest of an Act as subject to any privative clause, or to make the privative clause the central and controlling provision of the Act⁶⁹.

- When it is unclear if a provision was meant to be mandatory or directory, then the privative clause can be taken into account, as a general indication that the parliament did not intend that every direction must be regarded as mandatory⁷⁰.

The application of these general principles

Express provisions

- Express statutory provisions, which define or confine the ambit of a decision-maker's powers, are not to be read as subservient to the general intention expressed by a privative clause⁷¹. They remain inviolable limits and constraints⁷². Any breach results in invalidity.

Implied provisions

- Implied provisions whose breach the High Court would, in the absence of a privative clause hold to constitute jurisdictional error,⁷³ (and thus result in invalidity) will ordinarily not be displaced by the general intention expressed by a privative clause⁷⁴.
- More specifically, a decision taken in breach of the rules of natural justice is not within the scope of protection given by a privative clause⁷⁵.

Purported decisions

- A privative clause drafted in terms applying to 'purported decisions', or 'decisions of a kind that might be made under a [specified] Act', would be in direct conflict with s 75 (v) of the Constitution and would be invalid in respect to any application to a decision of an officer of the Commonwealth. It would also infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth is to be exercised only by the courts referred to in s 71⁷⁶. Thus the protection is substantive, and cannot be evaded by such a legislative device⁷⁷.

Time limits

- Time limits expressed to bar applications under s 75(v) of the Constitution by parties seeking judicial review of administrative 'decisions' are ineffective⁷⁸.

Issues that appear to be settled because of clear obiter dicta

- It is not open to the executive and parliament to get around the issue of judicial review by conferring an unreviewable power on the Minister or his delegate by way of a totally open ended discretion as to which aliens can, and which aliens cannot, come to and stay in Australia⁷⁹.
- It is not open to the executive and parliament to get around the ineffectuality of the time bar by recasting s 486A so that it does not apply to decisions made under the Act but rather to 'purported' decisions⁸⁰.

Issues that remain unsettled

- While it may not be open to the executive and parliament to confer totally open ended discretions on an officer of the Commonwealth, it is not yet clear as to how and where the High Court will draw the boundary between the parliament lawfully conferring a discretion on an administrator, and the parliament going beyond that point so as to unlawfully grant effectively unreviewable power on a minister or a minister's delegate⁸¹.
- It is an open question as to whether broader review (for non-jurisdictional error) is constitutionally entrenched when injunctive relief is sought under s 75(v). The pleadings in *Plaintiff S157/2002* did not seek such relief. However, Gaudron, McHugh, Gummow, Kirby and Hayne JJ drew attention to this possibility in terms that suggest in their Honours' view it may be entrenched:

The other aspect of s 75(v) that should be noted is its conferral of jurisdiction in matters in which 'an injunction is sought against an officer of the Commonwealth'. Given that prohibition and mandamus are available only for jurisdictional error, it may be that injunctive relief is available on grounds that are wider than those that result in relief by way of prohibition and mandamus. In any event injunctive relief would clearly be available for fraud, bribery or improper purpose.⁸²

Callinan J reached no concluded view on this question, but tentatively expressed a contrary opinion⁸³.

- The validity of the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) remains untested. That legislation was not material in *Plaintiff S157/2002* because it came into force after the challenged tribunal decision had been made. Only Gleeson CJ referred to those recent amendments. His Honour pointed out that they were irrelevant⁸⁴ to the issues under consideration but observed:

A statute may regulate and govern what is required of a tribunal or other decision maker [in respect of the elements of procedural fairness] and prescribe the consequences, in terms of validity or invalidity, of any departure⁸⁵.

It is not clear whether Gleeson CJ meant this passage to convey anything more than a general statement of principle. Even if his Honour did so intend, the possibility remains open that other members of the Court would subject the principle to exceptions, for reasons grounded in the general principles articulated by Gaudron, McHugh, Gummow, Kirby and Hayne JJ⁸⁶ and their Honours' remarks regarding the primacy of the rule of law. This would not be a surprising outcome. The foundations for it exist. The *Communist Party Case*⁸⁷ demonstrates that it is not constitutionally possible for Parliament to legislate to confer a power upon a member of the executive that is arbitrary in the sense of being unconstrained.

In a similar vein Kirby and Callinan JJ in *Gerlach v Clifton Bricks*⁸⁸ stated:

Where a discretion is conferred by statute, it must be exercised in accordance with the language by which it is conferred and to achieve the purposes for which the power has been granted. To talk of 'absolute' judicial discretions, at least where such discretions are

conferred by an Australian statute, involves a contradiction in terms. Absolute discretions are a form of tyranny.

All repositories of public power in Australia, certainly those exercising such power under laws made by an Australian legislature, are confined in the performance of their functions to achieving the objects for which they have been afforded such power. No parliament of Australia could confer absolute power on anyone. Laws made by the federal and state parliaments are always capable of measurement against the Constitution. Officers of the Commonwealth are always answerable to this court, in accordance with the constitutional standard.

It may be that a law which purports--as does the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth)--to confer validity upon a tribunal decision for which there is no rational basis, and that is so unreasonable that no reasonable decision-maker could have made it, is vulnerable to challenge on the above grounds. Such a challenge would raise the kind of issues that are referred to in the above judgments. The argument would be that any legislative provision that authorises a decision-maker to reach arbitrary outcomes lacks the necessary connection with a head of power in s 51 of the Constitution.

A result along these lines would go along way towards realigning the law of Australia (at least as it applies with respect to decisions made by officers of the Commonwealth) with the common law of England, where legislation that was intended to authorise decisions made not in conformity with the rules of natural justice has been held ineffective to immunise a decision against judicial review.⁸⁹

- The validity of s 91X of the *Migration Act 1958* remains an open question. That section directs the High Court, the Federal Court and the Federal Magistrates Court not to publish (in electronic form or otherwise) the name of any person who has applied for a protection visa in related proceedings. It has prompted judicial disquiet. In other matters argued before the High Court, Gaudron J and Kirby J have each expressed concerns regarding the validity of s 91X⁹⁰. Gaudron J directed particularly harsh criticism at the measure⁹¹. In *Plaintiff S157/2002* Gummow J asked, during interlocutory proceedings, why the plaintiff's name could not be used⁹². In a footnote to their judgment Gaudron, McHugh, Gummow, Kirby and Hayne JJ pointedly observed 'in the absence of any direct challenge, it will be assumed that s 91X is constitutionally valid'⁹³.
- Finally it is uncertain what, if any, implications the High Court's decision in *Plaintiff S157/2002* will have with respect to State laws containing privative clauses and common law judicial review⁹⁴. Because their concerns involved only Commonwealth law, neither the plaintiff nor the Solicitor General made submissions as to whether, were the plaintiff's arguments to be adopted (as in substance they were), that that conclusion would require the principles of the common law of Australia as applying in the States and Territories, which are not constrained by s 75 (v), to be revisited. It seems likely that this area of the law will receive renewed attention.

Judicial methodology: a concluding comment

Justice Susan Kenny's paper *The High Court on Constitutional Law: the 2002 Term*⁹⁵ focused on the interpretive analyses that the High Court has employed in constitutional law cases in recent matters coming before it. Following Bobbitt⁹⁶, Kenny discerned five principle modes of interpretation employed by the High Court in resolving questions of construction—(1) textual⁹⁷; (2) historical⁹⁸; (3) structural⁹⁹; (4) doctrinal; and (5) prudential-ethical¹⁰⁰.

Her Honour suggested that in the recent past the doctrinal method has taken priority over other interpretive approaches. Her Honour described this approach as follows:

What may be termed the 'doctrinal' approach depends on the claim that principles may be derived from the Court's previous authorities relevant to the resolution of the constitutional question at hand....It joins the Constitution to the common law, which is part of our distinctive tradition as a common law country¹⁰¹.

The reasoning employed by Gleeson CJ and Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002* strongly conforms to Justice Kenny's analysis. The High Court resisted the plaintiff's invitation¹⁰² to hold sections 474 and 486A invalid and directly repudiate Dixon J's obiter remarks in *Hickman*. Instead the High Court resorted to traditional common law methodologies, distinguishing and explaining *Hickman* while effectively replacing it with, and consolidating, the very different conceptual approach articulated by Gaudron and Gummow JJ in *Darling Casino*¹⁰³.

I have suggested earlier in this paper that *Plaintiff S157/2002* 'exploded' the *Hickman* myth. Perhaps a better analogy is that the myth was quietly deflated. Given the level of public controversy surrounding migration and refugee policy, and the fact that strong differences and highly complex reasoning had hitherto marked the High Court's history of dealing with privative clauses, this was a remarkable result. The result was remarkable because not only did High Court craft a unanimous outcome entrenching judicial review (denying sections 474 and 486A any relevance to the proceedings intended to be brought by the plaintiff), but also it did so without provoking yet another outburst of political criticism directed at so-called judicial activism.

Yet this is perhaps the strength of the interpretive method employed by the court in this case. Justice Kenny drew attention to its advantages¹⁰⁴ as follows:

The virtues of what may be called the doctrinal mode are largely the virtues of the common law. In interpreting the constitutional text by reference to prior authorities, the Court promotes the values of continuity, stability and predictability. By promoting these values the Court enhances its own institutional legitimacy....These values are, furthermore, important to the institutional well-being of the other arms of government. That is, although they are the virtues of the common law they are constitutionally relevant values¹⁰⁵.

This may partly explain why even the Commonwealth, made subject to a costs award because its submissions had been 'rejected in significant measure',¹⁰⁶ claimed victory in this case.

Endnotes

- 1 Minister Ruddock, *Commonwealth Parliamentary Debates, House of Representatives, Second Reading Speech Migration Legislation Amendment Bill (No 4) 1997*, 25 June 1997; Senator Abetz, *Commonwealth Parliamentary Debates, Senate, Second reading speech, Migration Legislation Amendment Bill (No 1) 2001*, 26 February 2001.
- 2 (2003) 195 ALR 24; [2003] HCA 2.
- 3 The term 'jurisdictional error' has a narrow meaning when applied to a judicial decision (made by an independent judge, whose decisions are usually subject to appeal) but a substantially wider meaning when applied to a decision of a public servant, minister or administrative tribunal: see *Craig v South Australia* (1995) 184 CLR 163 at 179 per curiam (Brennan, Deane, Toohey, Gaudron and McHugh JJ). The distinction between jurisdictional and non-jurisdictional error has been abandoned in England.
- 4 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
- 5 *Darling Casino v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 635.
- 6 For more detailed analysis see below under the headings: The decision in *Plaintiff S157/2002*, and, Settled Issues.
- 7 See the definition of 'privative clause decision' in s 5 of the Act.
- 8 That is a clause expressed to, and intended to, oust the jurisdiction of the High Court.
- 9 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1.
- 10 *Re Australian Railways Union; Ex parte Public Transport Corporation* (1993) 117 ALR 17 at 23-24; *Re Media Entertainment and Arts Alliance; Ex parte Arnel* (1994) 179 CLR 84; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 179 ALR 238; *Muin v Refugee Review Tribunal; Lie v Refugee Review Tribunal* [2002] HCA 30.
- 11 Kirby and Callinan JJ held to this effect in *Gerlach v Clifton Bricks* (2002) 188 ALR 353 at 371.
- 12 The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. Also see *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 134 per Kirby J; 139 per Hayne J.
- 13 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1 at 193.
- 14 As Brennan J noted in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36, judicial review is rooted in the nature of the judicial function. This creates a responsibility confronted by all courts: not only by courts exercising jurisdiction under a written constitution, but also by courts applying the law within an unwritten constitution. Hence, English courts, even without a foundation such as Chapter III of the Constitution, have held it fundamental that the rule of law obliges them to disregard privative clauses of a kind such as s 474.
- 15 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
- 16 p 614-316.
- 17 (1914) 18 CLR 54.
- 18 The plaintiff's writ of summons was filed within 35 days but the substantive proceeding in contemplation --an application for writs of prohibition, mandamus and certiorari to set aside a decision of the Refugee Review Tribunal--was not. The plaintiff's statement of claim contended the purported effect of the impugned provisions of the *Migration Act* stood in the way of such an application being made--but asserted that those proceedings would be commenced should the plaintiff obtain the orders he sought. It was common ground between the parties that unless s 486A was invalid, or was otherwise inapplicable, any future substantive application must fail for having been brought out of time.
- 19 The Commonwealth submitted that although the Minister may have desired to 'restrict' judicial review, his Second Reading Speech had made it clear that this object was to be achieved by expanding the jurisdiction of decision-makers with the result that judicial review will be less likely to succeed and, therefore, less attractive.
- 20 70 CLR 598 at 615.
- 21 Citing, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Hayne J at 142.
- 22 Cf *Project Blue Sky Pty Ltd v Australian Broadcasting Authority* (1998) 194 CLR 355 at 392-393 [99]-[100] per McHugh, Gummow, Kirby and Hayne JJ.
- 23 For example, *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 251 per Mason CJ, 274 per Brennan J, 286-287 per Deane, Gaudron and McHugh JJ, 305 per Dawson J (with whom Toohey J agreed at 309).

- 24 The defendant's written submissions argued that the plaintiff should apply for leave to argue that Dixon J's exposition of the relevant principles in *Hickman* or the adoption of those principles in later cases was wrong. This argument was not pursued—unsurprisingly given that the plaintiff contended that the ratio decidendi of *Hickman* was correct but incorrectly understood and that Dixon J's comments were obiter.
- 25 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 76 ALJR 598; [2002] HCA 11, Gaudron and Gummow JJ at [51]; McHugh J at [67]; and Callinan J at [165].
- 26 (2002) 193 ALR 449.
- 27 Written submissions of the first respondent on the construction and validity of s 474(1) of the *Migration Act 1958* para 8: citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Hayne J at [166].
- 28 193 ALR 449 at 460.
- 29 70 CLR 518 at 615 (italics added).
- 30 (1983) 153 CLR 415 at 418-419.
- 31 193 ALR 449 at 460.
- 32 (1997) 191 CLR 602.
- 33 At 635.
- 34 At 609.
- 35 It is commonplace for courts faced with the interpretation of statutes to have to determine whether or not compliance with a particular provision should be mandatory (that is essential to validity) or directory such that a failure to comply with the strict letter is not fatal).
- 36 (1947) 75 CLR 36.
- 37 (1949) 77 CLR 387.
- 38 At 394-395.
- 39 193 ALR at 581-2; 590.
- 40 By a joint judgment of five justices, Gaudron, McHugh, Gummow, Kirby and Hayne JJ; the Chief Justice delivering a concurring but separate, and Callinan J a substantially concurring, but differently nuanced, judgment.
- 41 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [103].
- 42 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [104].
- 43 Or in the older language more recently disapproved of by the High Court (see the cases cited by Callinan J at fn 143 of His Honour's judgment), whether the provision is mandatory or directory. Whatever the language to be used to describe this technique of statutory construction, the High Court was resorting to well-established judicial methodology. It is commonplace for courts faced with the interpretation of statutes to have to determine whether or not compliance with a particular provision should be mandatory (that is essential to validity) or directory (that is such that a failure to comply with the strict letter is not fatal); see Gleeson CJ at [20].
- 44 That is an outcome having no legal effect.
- 45 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [91].
- 46 Gleeson CJ at [35]; Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [91]; Callinan J at [162].
- 47 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [75].
- 48 *Ibid.*
- 49 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [87]; Gleeson CJ at [41].
- 50 At [39].
- 51 At [91].
- 52 At [91].
- 53 At [173].
- 54 At [174].
- 55 At [175].
- 56 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [103].
- 57 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [104].
- 58 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [73].
- 59 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [80-81].
- 60 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [72].
- 61 See the discussion above under the heading, 'The decision in *Plaintiff S157/2002*'.
- 62 See s 75 (v) of the Constitution.
- 63 Gleeson CJ at [33].
- 64 Gleeson CJ at [33] and [35], Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [64].
- 65 Gleeson CJ at [20], Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [60].
- 66 Gleeson CJ at [37].

- 67 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [76].
- 68 This is implicit in the outcome of *Plaintiff S157/2002* and explicitly stated by Gaudron and Kirby JJ in *Re MIMA; Ex parte S134/2002* (2003) 195 ALR 1 at 18.
- 69 Gleeson CJ at [133].
- 70 Gleeson CJ at [20]; see also Latham CJ in *R v Murray; Ex parte Proctor* (1949) 77 CLR 387 at 394-495.
- 71 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [65-66]; Callinan J at [162].
- 72 Gaudron, McHugh, Gummow, Kirby and Hayne at [76].
- 73 For analysis of what the High Court has held to constitute jurisdictional error on the part of an administrative tribunal see *Craig v South Australia* (1995) 184 CLR 163. The Court (Brennan, Deane, Toohey, Gaudron and McHugh JJ) stated at 179:
If... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
- 74 Gleeson CJ at [25-27].
- 75 Gleeson CJ at [38]; Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [82].
- 76 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [75].
- 77 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [98].
- 78 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [86-91].
- 79 Gaudron, McHugh, Gummow, Kirby and Hayne JJ addressed this issue at [101-102]. In responding to the Solicitor-General's oral argument on this point, Gleeson CJ expressed similar views. He intimated that in his view such a provision would lack the indicia of a 'law'. The transcript is on the High Court web site: 3/4 September 2002. It seems clear that provided it is within a constitutionally conferred head of power, it is open to Parliament by plain and express language to authorise executive action in terms importing some discretion or to narrowly prescribe it. But an unbounded power cannot be conferred.
- 80 This is contended for in reliance not only on Callinan J's express finding at [174-175] but also on Gaudron, McHugh, Gummow, Kirby and Hayne JJ's reasoning at [75] and their Honours' strong comments at [98] and [103-104] that differences in understanding about privative clauses between the submissions of the Commonwealth and the decision of the Court were real and substantive and not mere verbal quibbles, and their Honours' finding that the High Court's jurisdiction to exercise judicial review is constitutionally entrenched.
- 81 Only the outline of the principles involved are set out, see Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [102].
- 82 At [82].
- 83 At [131].
- 84 Gleeson CJ at [24].
- 85 At [25].
- 86 At [98-104].
- 87 *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1.
- 88 (2002) 188 ALR 353 at 371.
- 89 *Reg v Home Secretary, Ex p Fayed* (CA) [1998] 1WLR 763; *R v Secretary of State for the Home Department ex p. Mehta* [1992] COD 484.
- 90 Gaudron J in *Applicant S275-02 and Anor v MIMA* S200/2003 High Court transcript 23 September 2002; Kirby J in *Dranichnikov v MIMA* B96/2000 High Court transcript 4 February 2003 (noting it was a 'purported' provision).
- 91 In an exchange between counsel for the Minister and the bench that may be unprecedented in its savagery.
- 92 High Court transcript 19 July 2002.
- 93 Footnote 41 p 37.
- 94 This issue was not addressed by the decision notwithstanding the intervention of the Attorney General of South Australia.
- 95 A paper delivered at the Gilbert and Tobin Centre of Public Law Constitutional Law Conference, Sydney, 21 February 2003.
- 96 Bobbitt, *Constitutional Fate*, pp 7-8, 93-94; Bobbitt, *Constitutional Interpretation* pp 12-13, 31f.

- 97 The doctrine of literalism; that is the text carries the meaning the words naturally bear. This was until relatively recently the High Court's preferred mode: see, for example, *The Engineers Case* (1920) 28 CLR 129.
- 98 A mode of interpretation that relies on ascertaining the purpose or understanding of the Constitution's framers to assist a court understand the text's meaning.
- 99 A mode of interpretation that looks to the way in which a provision intersects with other parts of the Constitution and gives it a meaning consistent with the structure of government created by the document as a whole.
- 100 A mode of interpretation that takes into account the relevant economic, social and moral considerations attending the case.
- 101 Op cit, f/n 95, at 8.
- 102 Extended by the plaintiff's arguments based on textual, historical and structural considerations.
- 103 (1997) 191 CLR 602 at 635.
- 104 It of course also has weaknesses as well as strengths. No single approach commands universal support. Many decisions of the High Court have been marked by robust disagreements as to methodology. *Plaintiff S157/2002* is a rare example of near unanimity in approach. The advantages and disadvantages of different approaches to constitutional interpretation are destined to remain the subject of judicial and academic argument and study for so long as the Court's duty to interpret the Constitution remains.
- 105 Kenny, op cit at 9-10
- 106 Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [107].