HOW SHOULD COURTS CONSTRUE PRIVATIVE CLAUSES?

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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.