

PRIVATIVE CLAUSES

When drafting legislation excluding judicial review of actions taken by administrative officers the drafter has a very difficult task. The drafter must strike a balance between the desire of the legislature to prevent judicial review of decisions considered to be of great importance to the State and preserving the traditional role of the courts in protecting citizens from unreasonable decisions made by administrators. Such clauses are known as privative clauses and the courts have not taken kindly to them.

A typical privative clause was contained in the former *National Security (Coal Mining Industry Employment) Regulations 1941* of the Commonwealth which provided that decisions of certain Local Reference Boards were:

“not to be challenged, appealed against, quashed or called into question, or subject to prohibition, mandamus or injunction, in any court on any account whatever”

I will attempt a brief review of privative clauses, mainly in the Australian scene, and in doing so I must acknowledge great reliance on a paper presented at a seminar on Judicial Review, Privative Clauses and the High Court in Canberra on 13 March 2003 by Dr David Bennett AO QC.

Parliament’s power to make laws is not absolute; it must be exercised subject to the Constitution under which it operates. The courts will strike down any law offending this principle.

The High Court’s original jurisdiction over the executive

Section 75(v) of the Australian Constitution expressly confers original jurisdiction on the High Court in all matters, “in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”. This provision clearly gives the High Court

power to review decisions by Commonwealth officials and bodies for “jurisdictional error”, by granting any of the prerogative writs referred to. Gleeson CJ explained the effect of paragraph (v) in *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 as follows (at 482-483):

It secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament ... Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive [the High Court] of its constitutional jurisdiction to enforce the law so enacted.

Commonwealth laws have often conferred power on a person or body to make a decision and further provided that the decision is final and shall not be questioned in the courts. Clearly there is some tension between the supreme power of parliament and the courts’ role of reviewing the legal validity of the relevant administrative action.

The leading case in which the High Court sought to resolve this conflict is *R v Hickman, ex parte Fox and Clinton* (1945) 70 CLR. In that case, the *National Security (Coal Mining Industry Employment) Regulations 1941* (Clth) conferred on Local Reference Boards the power to settle disputes between employers and employees “in the coal mining industry”.

Latham CJ stated the facts as follows:

The order of the Local Reference Board was made upon an application made on behalf of the Federated Mining Mechanics' Association of Australasia, an industrial union of employees. The Board acted under reg. 14 (1) (a), which provides that, subject to the

Regulations, a Local Reference Board shall have power to settle disputes as to any local matters likely to affect the amicable relations of employers and employees in the coal mining industry. Regulation 2 provides that the Regulations "shall apply to industrial matters in relation to the Coal Mining Industry." These provisions are, in my opinion, plainly provisions which prescribe, and, in prescribing, limit, the jurisdiction of the Board. An authority with a limited jurisdiction cannot give itself jurisdiction by a wrong determination as to the existence of a fact upon which its jurisdiction depends, or by placing a wrong construction upon a statute upon which its jurisdiction depends, unless by a valid provision the authority is given power to act upon its own opinion in relation to the existence of the fact or in relation to the construction of the statute."

Regulation 17 contained the classic privative clause, namely that decisions of the Local Reference Boards were:

... not to be challenged, appealed against, quashed or called into question, or subject to prohibition, mandamus or injunction, in any court on any account whatever.

The High Court granted a writ of prohibition holding that the dispute was not "in the coal mining industry". The Court avoided the sledge-hammer approach of striking down the privative clause but read down the clause as having a limited function.

The *Hickman* provisos

Dixon J's judgement contained the following passage:

“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 reg 17 is well established. They are not interpreted as meaning to set at large courts or other judicial bodies to whose decisions 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, provided always that the 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.”

This passage has come to be universally regarded, as stated by Menzies J in 1960, as “classical”.

There is therefore a balance between the ability of the legislature to ensure a degree of finality in decision-making and the courts retaining a measure of control over certain types of error in decision-making. This control was expressed in the last part of the passage quoted above and is known as the “*Hickman* provisos”.

These provisos can be summarised as follows:

1- There must be good faith on the part of the decision maker.

This time-honoured formula is vague and imports a value judgement on the part of the court. Was there “an honest attempt to deal with the subject matter confided” to the decision-maker.

- 2- The clause will protect a decision only if, to use Dixon J's words, "it relates to the subject matter of the legislation".
- 3- The decision must be "reasonably capable of reference to the power given to the body by the relevant enabling provisions".

A *Hickman* clause does not make a decision by an administrator immune from judicial review or, to use Dixon J's words, "set at large" decision-makers and empower them to do absolutely anything they please.

In the first place, there must be a bona fide exercise of power: decision-makers must act in good faith. This question is a little vague but obviously excludes any recklessness, fraud and corruption.

In *R v Murray; Ex parte Proctor [1949] HCA 10* a dispute arose as to whether an employer should have the power of requiring contract miners to build cogs, which constitute a particular form of mine timbering. This dispute was referred to a Local Reference Board under the *Defence (Transitional Provisions) Act 1946-1947*, and that Board made an order in favour of the contention of the union.

Dixon J stated:

"In so far as reg. 17 purports to deny the remedy where it properly lies, it is unconstitutional and void. But the question must always remain whether in a given case the writ does properly lie. That depends in turn upon the authority which the law gives to the proceedings which it is sought to prohibit. If the law denies to the tribunal in question all authority over the proceedings so that they cannot result in a lawful and effective exercise of power, then the proper remedy is prohibition. In form reg. 17 may appear to be an attempt to say that even where this is so there shall be no prohibition. But even in jurisdictions where there is no constitutional limitation upon legislative power similar enactments have not received so drastic an interpretation. They have been read rather as meaning that, where

the tribunal has made a bona-fide attempt to exercise its authority in a matter relating to the subject with which the legislation deals and capable reasonably of being referred to the power possessed by the tribunal, the acts of the tribunal shall not be invalidated and accordingly shall not be the subject of prohibition. The prosecutors obtained an order nisi for prohibition against the enforcement of the order. The grounds of the order nisi are, first: - "That the *Defence (Transitional Provisions) Act 1946-1947* in so far as it purports to continue in force the *National Security (Coal Mining Industry Employment) Regulations* is beyond the powers of the Parliament of the Commonwealth and void," and secondly: - 'That the *Defence (Transitional Provisions) Act 1946-1947* in so far as it purports to continue in force Part III. of the said Regulations is beyond the powers of the Parliament of the Commonwealth and void'."

Latham CJ's judgement was in similar terms:

"In terms (regulation 9) purports to exclude prohibition in relation to any decision of a Local Reference Board. Such a provision, however, does not exclude the jurisdiction of this Court under s. 75 (v.) of the Constitution. The members of a Local Reference Board are officers of the Commonwealth, within the meaning of that provision. It was so decided in *R. v. Hickman; Ex parte Fox and Clinton [1945] HCA 53; (1945) 70 CLR 598* and reference may also be made to *R. v. Drake-Brockman; Ex parte National Oil Pty. Ltd. [1943] HCA 35; (1943) 68 CLR 51* - a decision with respect to the Central Reference Board, acting under these regulations. 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. The effect of such a provision was stated in the following terms in the case of *R. v. The Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Ltd. [1947] HCA 32; (1947) 75 CLR 361*, at p 369, by Dixon J. and myself: - 'When Commonwealth legislation confers powers upon an officer a provision such as reg. 38 cannot be construed as intended to provide that his powers are absolutely unlimited. Such a construction would raise questions of the validity of the legislation. Such a provision cannot help to give effect to any legislation which it is beyond the

power of the Commonwealth Parliament to enact' - as the question here is one of the construction and not of the validity of the regulations,"

The High Court held that there was no honest attempt to deal with the subject matter confided to the decision-maker.

In the second place, a *Hickman* clause will only protect a decision if, to use Dixon J's words, "it relates to the subject matter of the legislation" and the third proviso is similar. The decision must be "reasonably capable of reference to the power given to the body".

The question of "jurisdictional error".

The leading case is the House of Lords decision in *Anisminic and Foreign Exchange Corporation and another* 1969 2 AC 147. This decision arose from the making of an Order in Council, *The Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962* under the *Foreign Compensation Act, 1950* which established the Foreign Compensation Commission.

Lord Reid stated as follows:

The argument adduced to the Court was that, by reason of the provisions of section 4 (4) of the 1950 Act, the courts are precluded from considering whether the Foreign Compensation Commission's determination was a nullity, and therefore it must be treated as valid whether or not inquiry would disclose that it was a nullity. Section 4 (4) is in these terms:

"The determination by the commission of any application made to them under this Act shall not be called in question in any court of law."

The Foreign Compensation Commission maintained that these are plain words only capable of having one meaning. Here is a determination which is apparently valid: there is nothing on the face of the document to cast any doubt on its validity. The appellants maintained that that is not the meaning of the words of this provision. They say that "determination" means a real

determination and does not include an apparent or purported determination which in the eyes of the law has no existence because it is a nullity. Or, putting it in another way, if you seek to show that a determination is a nullity you are not questioning the purported determination - you are maintaining that it does not exist as a determination. It is one thing to question a determination which does exist: it is quite another thing to say that there is nothing to be questioned.

It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly - meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity.

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.

The task of the commission was to receive claims and to determine the rights of each applicant. It is enacted that they shall treat a claim as established if the applicant satisfies them of certain matters. About the first there is no difficulty: the appellants' application does relate to property in Egypt referred to in Annex E. But then the difficulty begins.

If one uses the word 'jurisdiction' in its wider sense, they went beyond their jurisdiction in considering this matter. It was argued that the whole matter of construing the Order was something remitted to the commission for their decision. I cannot accept that argument. I find nothing in the Order to support it. The Order requires the commission to consider whether they are satisfied with regard to the prescribed matters. That is all they have to do. It cannot be for the commission to determine the limits of its powers. Of course if one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the court must be able to correct that - not because the tribunal has made an error of law, but because as a result of making an error of law they have dealt with and based their decision on a matter with which, on a true construction of their powers, they had no right to deal. If they base their decision on some matter which is not prescribed for their adjudication, they are doing something which they have no right to do and, if the view which I expressed earlier is right, their decision is a nullity. So the question is whether on a true construction of the Order the applicants did or did not have to prove anything with regard to successors in title. If the commission were entitled to enter on the inquiry whether the applicants had a successor in title, then their decision as to whether T.E.D.O. was their successor in title would I think be unassailable whether it was right or wrong: it would be a decision on a matter remitted to them for their decision. The question I have to consider is not whether they made a wrong decision but whether they inquired into and decided a matter which they had no right to consider."

The House of Lords found that the Commission rejected the appellants' claim on a ground which they had no right to take into account and that their decision was a nullity.

In the Australian scene the leading case is *Craig v South Australia (1995) 184 CLR 163*, a decision of the High Court on the issue of whether the District Court of South Australia had committed jurisdictional error (or whether there was an error on the face of the record). The High Court delivered a unanimous judgment holding that there was neither jurisdictional error nor error on the face of the record by the District Court and no grounds existed for the granting of certiorari.

By applying the doctrine of jurisdictional error to inferior courts (compared with tribunals) the High Court stated that jurisdictional error occurs if:

“...it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist (... infect(ing) either a positive act or a refusal or failure to act.)”

The High Court explained that jurisdictional error occurs most obviously where an inferior court purports to act wholly or partly beyond the general area of its jurisdiction. The court also identified less obvious situations where jurisdictional error can occur, namely if an inferior court:

- whilst acting wholly within the general area of its jurisdiction, does something which it lacks authority to do; or
- disregards or takes account of a matter in circumstance where the statute or other instrument establishing it and conferring its jurisdiction requires that a particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case; or
- misconstrues the statute which establishes it (and confers relevant jurisdiction) and thereby misconceives the

nature of the function it is performing or the extent of the powers in the circumstances of the case.

The High Court distinguished the *Anisminic* case by limiting its application to tribunals. Therefore, whilst error of law on the face of the record remains a ground of review available in relation to inferior courts, it does not apply to tribunals.

As Dixon J himself said in *Hickman*:

In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them.

The Migration Act Privative Clause

Section 474(1) of the *Migration Act* 1958 (Clth), as inserted in 2001, provides as follows:

- (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.*

Subsection (2) defines the term ‘privative clause decision’ as follows:

“a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5)”.

This means every decision of an administrative character made under the Act, except for a very limited class explicitly excluded by subsection (4) or specified by regulations under subsection (5).

Dr David Bennett, in the paper I have referred to, summarised the effect of this provision as follows:

“In practice, the decision is lawful provided:

- the decision-maker is acting in good faith;
- the decision is reasonably capable of reference to the power given to the decision-maker – that is, the decision-maker had been given the authority to make the decision concerned, for example, had the authority delegated to him or her by the Minister for Immigration and Multicultural Affairs, or had been properly appointed as a tribunal member;
- the decision relates to the subject matter of the legislation – it is highly unlikely that this ground would be transgressed when making decisions about visas since the major purpose of the Migration Act is dealing with visa applications; and
- constitutional limits are not exceeded – given the clear constitutional basis for visa decisions making in the Migration Act, this is highly unlikely to arise.

Thus the privative clause in the Migration Act represented an attempt at the highest example yet of cooperation between the courts and the Legislature. The Court had told Parliament that certain words will be construed as having a particular effect and Parliament took the hint and used those precise words with the expressed intention of having that precise effect.”

The NAAV cases

In *NAAV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2002] FCAFC 228*, the Federal Court of Australia, in considering five cases arising from unsuccessful visa applications, dealt with the issues of procedural fairness, misunderstanding the issue, taking into account an irrelevant consideration, error of law, making a decision under the wrong power and failure to comply with specific statutory requirements.

Von Doussa J referred to a “jurisdictional factor that attracts the jurisdiction” of the decision-maker. He added however that, in the context of the *Migration Act*, “the jurisdictional factors that will attract the authority and powers of decision-makers in the sense described in a particular case will be few.”

Black CJ agreed that the inviolable limitations in the Act were very few. His judgement included the following passage:

“It is difficult to formulate a precise principle for determining exactly when a provision in an Act containing a *Hickman* clause may be said to be outside the operation of such a clause and to have the character of an "inviolable limitation". Constitutional considerations aside, the cases where "inviolable limitations" have been identified by the High Court can be seen, however, as cases in which, if the legislation were interpreted in a particular way, essential structural elements created by the legislation would be violated, or else some other quite fundamental aspect of the legislation would change its character

in a way and to an extent that the Parliament could not be taken to have intended.”

“Accordingly, I consider that a correct answer to the legal question about contravention posed by section 116(1)(f) is in the nature of an "inviolable limitation" upon the power to cancel a visa on that ground. The decision is therefore reviewable, notwithstanding section 474(1)”.

Failure to comply with natural justice

The plaintiff in *Plaintiff S157/2002 v Commonwealth 2003 HCA 2* was an unsuccessful applicant for a protection visa who claimed that, but for the privative clause he would have been able to challenge the decision of the Refugee Review Tribunal to refuse him the visa on the ground that the Tribunal failed to comply with the rules of procedural fairness. His argument was that the privative clause was invalid as being inconsistent with the terms of section 75(v) of the Constitution. The High Court unanimously rejected the plaintiff’s argument and upheld the validity of the privative clause in section 474. However, in doing so, the Court disagreed with the Commonwealth’s view of the effect of the privative clause upon the Tribunals’ jurisdiction and thus the grounds of review available to an applicant for review of a Tribunal decision.

The majority of the Court confirmed that the presence of a privative clause in a statute required the Court to attempt, as a matter of statutory construction, to reconcile the privative clause with the other terms of the Act.

However, the joint majority wrote at page 64:

“Rather, the position is that the “protection” which the privative clause “purports to afford” will be inapplicable unless those provisos are satisfied.

And to ascertain what protection a privative clause purports to afford, it is necessary to have regard to the terms of the particular clause in question. Thus, contrary to the submissions for the Commonwealth, it is inaccurate to describe the outcome in a situation where the provisos are satisfied as an “expansion” or “extension” of the powers of the decision-maker in question.”

It is a matter of statutory interpretation to determine the effect of the *Hickman* provisos on the restrictions placed by the statute on the powers granted to the decision-maker and on this question the majority judgement said:

“When regard is had to the phrase “under this Act” in section 474(2) of the Act, the words of that sub-section 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.”

The joint majority judgement continued: “Once it is accepted, as it must be, that section 474 is to be construed conformably with Ch III of the Constitution, specifically section 75, the expression “decisions[s] ... under this Act” must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act.

“Therefore, if there has been jurisdictional error arising from a failure to discharge “imperative duties” or to observe “inviolable limitations or restraints”, the decision in question cannot properly be described in the terms used in section 474(2) as “a decision ... made under this Act” and is, thus, not a “privative clause decision” as defined in section 474(2) and (3) of the Act. ”

The conclusion is clear that a decision that does not comply with the principles of natural justice is not a "privative clause decision" within section 474(2) of the Act.

Inviolable Limitations

In a separate judgment Gleeson CJ considered the question of why procedural fairness was an “inviolable limitation”:

“In the present context, there is a question whether a purported decision of the Tribunal made in breach of the assumed requirements of natural justice, as alleged, is excluded from judicial review by section 474. The issue is whether such an act on the part of the Tribunal is within the scope of the protection afforded by section 474. Consistent with authority in this country, this is a matter to be decided as an exercise in statutory interpretation, the determinative consideration being whether, on the true construction of the Act as a whole, including section 474, the requirement of a fair hearing is a limitation upon the decision-making authority of the Tribunal of such a nature that it is inviolable. The line of reasoning developed by Dixon J in *Hickman* and later cases identifies the nature of the task involved, and the question to be asked. By identifying the task as one of statutory construction, all relevant principles of statutory construction are engaged.”

Gleeson CJ stated the “relevant principles of statutory construction” in this case as International law, fundamental rights and the rule of law and access to justice. He also said that the Tribunal was bound by the rules of procedural fairness and that if Parliament wished to circumscribe the Tribunal’s obligations of procedural fairness, it would have to say so more clearly.

Implications

When he was still President of the New South Wales Court of Appeal, Kirby J said the following in *Public Service Association of New South Wales v Industrial Commission of New South Wales* 1985 1 NSWLR 627, a case where the interpretation of an industrial relations statute was considered:

“There is a presumption, useful in statutory interpretation, that where a provision of legislation has been passed upon by authoritative decisions of the courts and is later re-enacted, Parliament can be taken, in the absence of a clear intention to the contrary, to know and accept the interpretation given to the legislation.”

It is now clear that procedural fairness is an “inviolable limitation” upon decision-makers under the Act as then drafted. The High Court has said that it requires Parliament to make its intentions absolutely clear if it wants to exclude or limit obligations of procedural fairness. However the point is now largely academic as in view of the *Migration Legislation Amendment (Procedural Fairness) Act 2002* which provides for certain requirements in the Act for a decision-maker to comply with the hearing rule of natural justice.

NAAV cases

In *NAAV of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 228 the question was whether the use by the Tribunal of certain undisclosed material, to the prejudice of the appellant, was a breach of the rules of natural justice. As a result there was a lack of procedural fairness. This was a jurisdictional error and

relief by way of certiorari, mandamus, prohibition and injunction should be granted pursuant to section 39B of the *Judiciary Act*. Further, it was contended that the privative clause did not preclude the grant of this relief, because jurisdictional error of this kind was within the exceptions to the operation of such a clause. In any event, it was said, it should be declared that section 474 is invalid, as impermissibly attempting to confer judicial power upon the Tribunal, contrary to Chapter III of the Constitution; or, if section 474 is to be construed so as to exclude relief where there has been a breach of natural justice, it is invalid as inconsistent with section 75 of the Constitution.

It was contended that a denial of natural justice, being a kind of jurisdictional error which had not been validly excluded from judicial review by "plain words of necessary intendment", was not immune from review by virtue of section 474. It was submitted that the provision of natural justice, or procedural fairness, was a fetter on the lawful exercise of a power, and, unless it was expressly excluded by the legislature, obedience to its requirements was a necessary and indispensable prerequisite to the making of a valid decision. It was thus submitted that a denial of procedural fairness is an error going to jurisdiction, for which prohibition will be granted.

Denial of natural justice

Finally the High Court decision of *Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476* is to be considered.

per GLEESON CJ: The plaintiff wishes to institute proceedings against the Minister for Immigration and Multicultural and Indigenous Affairs ("the Minister"), and the Refugee Review Tribunal ("the Tribunal"), invoking the jurisdiction of this Court under section 75(v) of the Constitution to issue writs of prohibition and mandamus against officers of the Commonwealth, and the power, in an appropriate case, to grant ancillary relief in the form of certiorari. The proceedings in contemplation concern a decision of the Tribunal confirming a refusal to grant the plaintiff a protection visa. The proposed challenge to the decision is based upon the ground of a denial of natural justice

"in that [the Tribunal] took into account material directly relevant and adverse to [the plaintiff's claim of refugee status] without giving him notice of the material or any opportunity to address it".

The first step in the plaintiff's argument, in support of the contention that section 474 is invalid, is an assertion that the section means what it says. It is argued that, in their ordinary and natural meaning, the words of section 474 purport to prevent any applicant from seeking, and any court, including this Court, from granting, any relief with respect to any application for review of a decision of an administrative character (save for some minor exceptions) under the Act. Therefore, the section purports to oust the jurisdiction conferred upon this Court by section 75(v) of the Constitution. The Parliament has no power to do that.

Furthermore, s 15A of the *Acts Interpretation Act 1901* (Clth) requires that an Act is to be "read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth."

Section 75(v) of the Constitution confers upon this Court, as part of its original jurisdiction, jurisdiction in all matters in which a writ of mandamus, or prohibition, or an injunction, is sought against an officer of the Commonwealth. It secures a basic element of the rule of law. The jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament. Within the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform. If the law imposes a duty, mandamus may issue to compel performance of that duty. If the law confers power or jurisdiction, prohibition may issue to prevent excess of power or jurisdiction. An injunction may issue to restrain unlawful behaviour. Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted. In the Convention debates at the time of the framing of the Constitution, Mr Barton explained the purpose of the provision:

"This will give the High Court original jurisdiction ... in these cases, so that when a person wishes to obtain the performance of a clear statutory duty, or to restrain an officer of the Commonwealth from going beyond his duty, or to restrain him in the performance of some statutory duty from doing some

wrong, he can obtain a writ of mandamus, a writ of prohibition, or a writ of injunction.

This provision is applicable to those three special classes of cases in which public officers can be dealt with, and in which it is necessary that they should be dealt with, so that the High Court may exercise its function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution."

The Parliament cannot abrogate or curtail the Court's constitutional function of protecting the subject against any violation of the Constitution, or of any law made under the Constitution. However, in relation to the second aspect of that function, the powers given to Parliament by the Constitution to make laws with respect to certain topics, and subject to certain limitations, enable Parliament to determine the content of the law to be enforced by the Court.

Privative clauses which deprive, or purport to deprive, courts of jurisdiction to review the acts of public officials or tribunals in order to enforce compliance with the law, or which limit, or purport to limit, such jurisdiction, may apply in either State or federal jurisdiction. Many of the considerations relevant to their interpretation and application are common to both.

Speaking of a nation with a unitary constitution, Denning LJ

said [http://www.austlii.edu.au/cgi-](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002)

[bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002) - fn3#fn3:

"If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end."

In a federal nation, whose basic law is a Constitution that embodies a separation of legislative, executive, and judicial powers, there is a further issue that may be raised by a privative clause. It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002> - fn4#fn4

In 1874, the Privy Council, in *Colonial Bank of Australasia v*

Willan <http://www.austlii.edu.au/cgi->

[bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn9#fn9](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn9#fn9), was dealing with a Victorian mining statute, which contained a provision that no proceeding under the statute should be removed or removable into the Supreme Court, subject to certain exceptions. Their Lordships said [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn10#fn10](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn10#fn10):

"It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a certiorari; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it."

Dixon J considered, and rejected, an argument that reg 17 excluded relief. He said: [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn12#fn12](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn12#fn12)

"The presence of this provision in the Regulations makes it necessary to say whether and to what extent it is ineffectual to protect the decision of the Board from invalidation. In the first place, it is clear that such a provision 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. But a writ of prohibition is a remedy that lies only to restrain persons acting judicially from exceeding their power or authority. It is therefore necessary to ascertain before issuing a writ whether the persons or body against which it is sought are acting in excess of their powers; and that means whether their determination, when made, would be void. The Board derives its power from Regulations of which reg 17 forms a part, and that regulation must be taken into account in ascertaining what are the true limits of the authority of the Board, and whether its decision is void."

Dixon J went on to state the primary principle for which his judgment stands [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn13#fn13](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn13#fn13):

"In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them."

"It is, of course, quite impossible for the Parliament to give power to any judicial or other authority which goes beyond the subject matter of the legislative power conferred by the Constitution ... It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition. But where the legislature confers authority subject to limitations, and at the same time enacts such a clause as is contained in reg 17, *it becomes a question of interpretation of the whole legislative instrument whether transgression of the limits, so long as done bona fide and bearing on its face every appearance of an attempt to pursue the power, necessarily spells invalidity.* In my opinion, the application of these principles to the Regulations means that any decision given by a Local Reference Board which upon its face appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid."

On the other hand it may be that, as in *Hickman*, the impugned act is not to be treated as if it were valid. In the case of a purported exercise of decision-making authority, limitation on authority is given effect, notwithstanding the privative provision. That may involve a conclusion that there was not a "decision" within the meaning of the privative clause. In a case such as the present, it may involve a conclusion that a purported decision is not a "decision ... under this Act" so as to attract the protection given by section 474.

Later again, in *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section*, Dixon J referred to "imperative duties or inviolable limitations or restraints" which may be imposed by legislation, contravention of which would not be protected by a privative provision. To describe a duty as imperative, or a restraint as inviolable, is to express the result of a process of construction, rather than a reason for adopting a particular construction; but it explains the nature of the judgment to be made. Because what is involved is a process of statutory

construction, and attempted reconciliation, the outcome will necessarily be influenced by the particular statutory context.

In *Australian Broadcasting Tribunal v Bond* [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn26#fn26](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn26#fn26), Deane J explained that, in the past, it was customary to refer to the duty to observe common law requirements of fairness as a duty "to act judicially". In a passage from *Hickman* quoted above, Dixon J can be seen using that expression. Later, the duty came to be referred to as a duty to observe the requirements of "natural justice". Later again, it became common to speak of "procedural fairness

In the present context, there is a question whether a purported decision of the Tribunal made in breach of the assumed requirements of natural justice, as alleged, is excluded from judicial review by s 474. The issue is whether such an act on the part of the Tribunal is within the scope of the protection afforded by section 474. Consistent with authority in this country, this is a matter to be decided as an exercise in statutory construction, the determinative consideration being whether, on the true construction of the Act as a whole, including section 474, the requirement of a fair hearing is a limitation upon the decision-making authority of the Tribunal of such a nature that it is inviolable. The line of reasoning developed by Dixon J in *Hickman* and later cases identifies the nature of the task involved, and the question to be asked. By identifying the task as one of statutory construction, all relevant principles of statutory construction are engaged. It cannot be suggested that Dixon J was formulating a principle of construction which excluded all others. On the contrary, by treating the exercise as a matter of construction he was opening the way for the application of other principles as well. Those principles have been stated by this Court on many occasions, and are as well known to Parliament as *Hickman* itself.

In such a context, the following established principles are relevant to the resolution of the question of statutory construction.

First, where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations.

Secondly, courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn33#fn33](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn33#fn33). As Lord Hoffmann recently pointed out in the United Kingdom [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn34#fn34](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn34#fn34), for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be "subject to the basic rights of the individual".

Thirdly, the Australian Constitution is framed upon the assumption of the rule of law. Brennan J said [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn37#fn37](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn37#fn37):

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

Fourthly, and as a specific application of the second and third principles, privative clauses are construed "by reference to a 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 to be implied" [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002 - fn38#fn38](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2003/2.html?query=Plaintiff%20S157/2002-fn38#fn38).

Fifthly, a principle of relevance to *Hickman* is that what is required is a consideration of the whole Act, and an attempt to achieve a reconciliation between the privative provision and the rest of the legislation. In the case of the Act presently under consideration, that is a formidable task. There may not be a single answer to the question. But the task is not to be performed by reading the rest of the Act as subject to section 474, or by making section 474 the central and controlling provision of the Act.

It follows that, in my view, if the Tribunal's decision in relation to the plaintiff was taken in breach of the rules of natural justice, as is alleged, then it is not within the scope of protection afforded by section 474. It is not, relevantly, a decision to which section 474 applies.

A suggested privative clause

In order to take into account the principles emerging from this long line of cases, a model privative clause along the following lines is suggested for consideration by Australian drafters:

- (1) *A decision of the Minister (or Tribunal) under this Act –*
- (a) is not subject to prohibition, mandamus, certiorari, injunction or declaration or any order of a court having similar effect; and*
 - (b) is not otherwise to be challenged, appealed against, quashed or called into question on any account.*
- (2) *Subsection (1) does not prevent a review of-*
- (a) a decision for which there was a want of jurisdiction; or*
 - (b) a decision on the ground of lack of procedural fairness or a failure to comply with the principles of natural justice; or*
 - (c) a decision that –*
 - (i) was based on a misunderstanding of a critical fact; or*
 - (ii) was made without any authority conferred by this Act; or*
 - (iii) is inconsistent with the objects of this Act.*

The reference to court orders “having similar effect” in subclause (1)(a) is to cater for jurisdictions which have abolished some or all of the old prerogative writs and the drafter should modify that paragraph accordingly.

Subclause (2)(a) is probably unnecessary as it overlaps with subclause (2)(c)(ii) but it may be worth considering. The comment of Denning LJ in *R v Medical Appeal Tribunal; Ex parte Gilmore* [1957] 1 QB 574 at 586 is worth repeating:

“If tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.”

Also Brennan J has said:

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

The “misunderstanding of a critical fact” in subclause (2)(c)(i) is inspired by the decisions of the Federal Court of Australia in the NAAV cases.

The reference to “the objects of this Act” in subclause (2)(c)(iii) assumes of course that there is an objects clause or that the objects are identified with sufficient clarity.