

Chapter 13

# Privative clauses: Politics, Legality and the Constitutional Dimension

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## Introduction

Privative clauses are essentially a legislative attempt to limit or exclude judicial intervention in a certain field. They have been deployed by parliaments over many years for a variety of apparent reasons – a desire for finality or certainty, a concern about sensitivity or controversy, a wish to avoid delay and expense, or a perception that a matter requires specialist expertise and/or awareness of executive context. Yet a common response from observers is that a broad and undiscerning use of such legislative devices promotes temporary and specific convenience, and perhaps political expediency, over fundamental legal values.

It has long been acknowledged<sup>2</sup> that to accompany the conferral of a specified public function with a privative clause appears to be a contradiction. Parliament is on the one hand conferring (probably well-defined) functions and powers, whilst also providing in effect that the recipient may act however it wishes free from judicial supervision and control. The contradiction here is not a trivial one. The Diceyan conception of the rule of law sits squarely in one corner<sup>3</sup> and is easily agitated in a system where the executive not only holds administrative power but also tends to dominate the legislature.<sup>4</sup> Moreover, even the vaguest notion of a ‘separation of powers’ suggests that there should ultimately be some limit on ouster of judicial intervention in executive decision-making. Yet by the same token, the principles of parliamentary supremacy and the floating ideals of a parliamentary democracy suggest that a clear legislative intention should be respected. Not surprisingly then, the history of privative clauses in Australia is a history of acute legal tension. The courts have long read such clauses narrowly, often reciting the relevant foundational legal tenets and presumptions about non-interference with rights or access to the judicial system.<sup>5</sup> Yet, perhaps inevitably, the resistance has been somewhat conceptually scattered.

The principal means by which the courts have evaded privative clauses are discussed in the first section of this chapter. However, it is important to note at the outset that privative mechanisms vary and continue to evolve, and hence constantly present new challenges to judges. There are some reasonably common formulations, for example a direction that any decision by a body is final and conclusive and not to be challenged, appealed or questioned in any court. However, many other versions that have been tried, refined and combined over the years – ultimately shading into broader legislative drafting practices that might not immediately seem privative in nature. The various devices employed,<sup>6</sup> beyond the clause which simply declares finality and/or prohibits judicial challenge, include restrictions on specified remedies, restrictions on available grounds of challenge, confinement or redirection of review jurisdiction, ‘conclusive evidence’ provisions, ‘no-invalidity’ type provisions, provisions declaring things to have effect ‘as if enacted’, and time limits.

The expanding constitutional entrenchment of ‘jurisdictional error’ review (particularly via the decision in *Kirk v Industrial Court (NSW)*<sup>7</sup>) has brought the mechanisms for ouster (direct and de facto) back to centre stage. How will these devices work in the new constitutional context? There has been a rush of academic interest here because a number of roads – practical, legal, political and theoretical – now converge at this particular point in administrative law. The pattern of recent commentary indicates that the natural response to *Kirk* perhaps proceeds through three stages of inquiry. First, given that standard privative clauses are now unable to protect jurisdictional error from High Court or Supreme Court review, how else might parliaments achieve this?

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<sup>2</sup> Eg *Clancy v Butchers' Chop Employees Union* (1904) 1 CLR 181.

<sup>3</sup> See Mark Aronson, ‘Commentary on “the Entrenched Minimum Provision of Judicial Review and the Rule of Law”’ (2010) 21 PLR 35 at 37.

<sup>4</sup> Cf Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.10].

<sup>5</sup> See recently *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492ff, 505.

<sup>6</sup> See further Administrative Review Council, Discussion Paper: *The Scope of Judicial Review* (2003), Appendix 2, p 157ff.

<sup>7</sup> (2010) 239 CLR 531.

Secondly, how might the courts legitimately respond to alternative attempts - ie, can the substance of the new constitutional protection be shored up in some way? Finally, how hard should courts and academics be working to achieve this abstract reinforcement of review jurisdiction? The discussion in this chapter will ultimately return to these matters, however first there is some background to traverse.

## Traditional Interpretative Techniques

As indicated above, the courts have for the most part maintained an awkward but determined resistance to privative provisions. The variety of techniques that have been employed in their reading down have been valuably mapped in the leading books in the field.<sup>8</sup> At a basic level, clauses have commonly been restricted to their express scope – eg their protection confined to the named body (strictly defined) or upheld only against the named judicial remedies.<sup>9</sup> Moreover, they have often been read down to their lesser viable operation. For example, an ousting of ‘actions’, ‘proceedings’ or ‘appeals’, or indeed an immunity from ‘liability’, may be read so as not to protect the decision maker from judicial review.<sup>10</sup> Similarly, basic ‘final and conclusive’ clauses have been read to exclude only appeal (rather than judicial review),<sup>11</sup> and ‘no certiorari’ clauses have been held to protect only the lesser target of this writ, errors on the record.<sup>12</sup> Of course the plaintiff may also have a part to play in the avoidance of a privative clause. They may, for example, commence proceedings prior to the making of a determination that would be protected,<sup>13</sup> or indeed refashion their arguments to target available remedies or grounds or to focus on particular unprotected aspects of the broader process in train (see below).

Here, also, we find one of the most important functions of the amorphous concept of ‘jurisdictional error’: even broadly worded privative clauses have frequently been held not to protect such serious error. This is an old methodology,<sup>14</sup> recently described as ‘elegant in its simplicity’.<sup>15</sup> A traditional explanation was that a purported ouster of review should not effectively render a power unlimited, by allowing a decision-maker to proceed without interference beyond the expressly defined jurisdiction.<sup>16</sup> As will be seen, constitutional considerations ultimately broadly reinforced this approach. Yet the traditional interpretative principle remains in the background, often manifested in (and implemented by) some variation on the basic logic that a clause declaring protection for a ‘decision’ will not apply where there is jurisdictional error because the resulting nullity means there is no ‘decision’ to protect.<sup>17</sup> Parliaments ultimately developed responses to this logic; most simply, privative clause protection was expressly extended to ‘purported decisions’.<sup>18</sup> The High Court at one point cast some doubt upon the textual effectiveness of such an extension,<sup>19</sup> but since appears to have acknowledged again its potential role in extending protection<sup>20</sup> (subject of course to constitutional considerations<sup>21</sup>).

There were always some conceptual difficulties with the ‘jurisdictional error’ approach. For example, this interpretative technique was ill-fitting where a privative clause specifically named remedies that were *only* available for jurisdictional error. More importantly, this close traditional (and contemporary) association between privative clauses and ‘jurisdictional error’ means that the former frequently become entangled in the uncertainties of the latter. Of course the privative clause deserves no sympathy on this front. As will be seen, migration privative devices themselves drove the unruly resurgence of the notion of jurisdictional error,<sup>22</sup> after its relative

<sup>8</sup> See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.3]; Robin Creyke and John McMillan, *Control of Government Action* (3rd edn, 2012, LexisNexis) at 870ff.

<sup>9</sup> See eg *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 (improperly constituted tribunal); *Wingecarribee Shire Council v Minister for Local Government* [1975] 2 NSWLR 779 (bar to prohibition and certiorari only).

<sup>10</sup> See eg *Applicants A1 and A2 v G E Brouwer* (2007) 16 VR 612 (no ‘action or proceedings’); *Curruthers v Connolly* [1998] 1 Qd R 339 (‘protection and immunity’, ‘no liability’).

<sup>11</sup> See eg *Hockey v Yelland* (1984) 157 CLR 124.

<sup>12</sup> Eg *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>13</sup> Eg *Batterham v QSR Ltd* (2006) 225 CLR 237; cf the comments in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [49]ff.

<sup>14</sup> See eg *Clancy v Butchers’ Chop Employees Union* (1904) 1 CLR 181.

<sup>15</sup> Will Bateman, ‘The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review’ (2011) 39(3) *Federal Law Review* 463 at 470.

<sup>16</sup> See *R v Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australasia Limited* (1947) 75 CLR 361 at 368-9.

<sup>17</sup> See eg *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (see below).

<sup>18</sup> See eg *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212; *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14.

<sup>19</sup> *Batterham v QSR Ltd* (2006) 225 CLR 237 at [26].

<sup>20</sup> See *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [103]ff; and the implications of *MZXOT v Minister for Immigration & Citizenship* (2008) 233 CLR 601.

<sup>21</sup> See eg *South Australia v Totani* (2010) 242 CLR 1 at [25].

<sup>22</sup> See Stephen Gageler, ‘Impact of Migration Law on the Development of Australian Administrative Law’ (2010) 17 *Australian Journal of Administrative Law* 92.

dormancy in the wake of the *Administrative Decision (Judicial Review) Act 1977* (Cth) (*ADJR Act*), the prevalence of the *Hickman* methodology as regards ouster in softer contexts, and the uncertainty emerging from UK developments.

The *Hickman* methodology was a separate approach to privative clause interpretation,<sup>23</sup> prominent in Australia for a long period, which drew the focus to a somewhat differently conceived supervisory bottom line. This approach involved (as we now understand it) a very strong presumption of reviewability when certain particularly serious errors were identified. The 1945 decision in question<sup>24</sup> concerned a privative clause relating to decisions of a coal mining industrial relations board. Dixon J in his separate judgment had particularly emphasised that to determine the effect of such clauses it was necessary to reconcile the power conferring provisions with the terms of the ouster. In his ensuing discussion the later courts found a formula to be applied in this context, which involved inquiry into whether the decision in issue was a bona fide attempt to exercise the power; was related to the subject matter of the legislation; and was reasonably capable of reference to the power conferred (ie does not on its face go beyond power).<sup>25</sup>

These vaguely-worded provisos are best understood, from a contemporary viewpoint, as targeting a core selection of jurisdictional errors<sup>26</sup> – sometimes called ‘manifest errors’. This formula was keenly recited in decisions for many years,<sup>27</sup> establishing a path of sorts through the privative clause dilemmas. Yet this methodology faded somewhat in application and rationale over time,<sup>28</sup> and its period of prominence has been remembered with varying degrees of fondness. Moreover, there were variations (at least in emphasis) in important restatements<sup>29</sup> and hence a lingering uncertainty over its precise effect. Ultimately constitutional considerations began to dominate in this context at the federal level and prompted some re-focussing of thought. As will be seen, the High Court has now carefully explained that the *Hickman* principle is essentially just a construction aid to help resolve the statutory contradiction that comes with a privative clause,<sup>30</sup> and indeed is only a first step in ascertaining the effect of such a clause (see below).

The contemporary Australian jurisprudence and commentary on privative clauses was relatively slow in coming. There was for a time a tendency to regard these issues as chiefly just the concern of industrial law (given the long prominence of privative clauses in that context). Moreover, the significance of this drafting device was disassembled to some extent (initially at the federal level) by the enactment of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*), which as discussed below contained a provision negating the operation of pre-existing privative clauses in other legislation and a mechanism by which classes of decision were excluded from review by the Act’s own schedule. Yet obviously the traditional privative clause did not remain peripheral for long.

## Privative clauses and contemporary federal jurisdiction: *Plaintiff S157*

From the early 1990s, accumulating controversies in the field of migration led to a series of Commonwealth legislative initiatives that began to significantly re-shape Australian administrative law.<sup>31</sup> Federal parliament, as part of its rationalisation of migration processes, sought essentially to restrict the Federal Court’s extensive capacity (under *ADJR Act* and general law jurisdiction) to review decisions in the field. The original strategy, essentially of substituting a scheme with constricted grounds,<sup>32</sup> did not have great effect - owing to the courts’ generous interpretations and plaintiffs’ strategic re-fashioning of arguments (or engagement of the High Court’s own s 75(v) jurisdiction).<sup>33</sup> In 2001 the legislature moved to a general, broadly-worded privative clause (s 474) that declared finality, prohibited challenge and excluded the key remedies in respect of ‘privative clause

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<sup>23</sup> At least for clauses apparently aimed at protecting jurisdictional error: see Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.150].

<sup>24</sup> *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.

<sup>25</sup> (1945) 70 CLR 598 at 615, 616 and 617; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 500.

<sup>26</sup> See eg Chris Finn, ‘Constitutionalising Supervisory Review at State Level: The End of Hickman?’ (2010) 21 Public Law Review 92 at 103; JJ Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 Public Law Review 77 at 82.

<sup>27</sup> See eg *R v Commonwealth Conciliation & Arbitration Commission* (1967) 118 CLR 219; *O’Toole v Charles David Pty Ltd* (1991) 171 CLR 232.

<sup>28</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.20].

<sup>29</sup> See eg *R v Murray; Ex Parte Proctor* (1949) 77 CLR 387 (per Dixon J) as to a second search for ‘inviolable’ or ‘imperative’ duties.

<sup>30</sup> See the discussion of *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 below.

<sup>31</sup> See generally Enid Campbell and Matthew Groves, ‘Privative Clauses and the Australian Constitution’ (2004) 4 *Oxford University Commonwealth Law Journal* 51.

<sup>32</sup> 1992 amendments established a new Pt 8 of the *Migration Act 1958* (Cth), declared valid in *Abebe v Commonwealth* (1999) 197 CLR 510.

<sup>33</sup> See particularly *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 esp at [77]ff; *Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 esp at [74], [146].

decisions' (broadly defined).<sup>34</sup> The Commonwealth's view was that this strongly worded clause should substantially confine judicial review, by limiting invalidity to actions which did not satisfy the *Hickman* provisos and thereby effectively expanding the relevant field of lawful activity.<sup>35</sup> The underlying thinking here was that privative clause protection would always be effective where the *Hickman* provisos were met – reflecting the bolder reading of *Hickman*.

The Commonwealth's position initially gained some traction.<sup>36</sup> However, the major High Court decision in *Plaintiff S157/2002 v Commonwealth*<sup>37</sup> would unseat much of this reasoning. In these s 75(v) High Court proceedings alleging breach of natural justice by the Refugee Review Tribunal (RRT), the plaintiff argued that the s474 privative clause was invalid in this constitutional setting (a possibility ultimately avoided), while the Commonwealth pressed its power-expansion reading of *Hickman*. The High Court confirmed that the Commonwealth's argument was an over-reading of *Hickman*, that the meaning of privative clauses must be ascertained from their terms and any necessary reconciliation with the power-conferring provisions, and that they did not (aided by *Hickman*) effect some automatic expansion of statutory authority or repeal of limits elsewhere stated (here in very expansive legislation).<sup>38</sup> The Court indicated that satisfaction of the *Hickman* provisos was required for privative clause protection to attach, but would not necessarily be sufficient: the second step required a search for any (other) inviolable or essential requirements attaching to the power.<sup>39</sup> Yet it was acknowledged that not every statutory limitation must be inviolable (with breaches incapable of protection). The majority observed it may be, by reference to the particular scheme (including it seems the privative clause itself), that some requirements might be construed as not essential to validity.<sup>40</sup> The idea behind this second step – a search for infringement of an inviolable or essential restraint – was not new. This was arguably implicit in *Hickman* itself and further developed thereafter.<sup>41</sup>

Having placed *Hickman* in its proper place, the Court in *Plaintiff S157* noted that there were also other rules of construction in play here. Citing the need to read privative clauses narrowly (based on presumptions about parliamentary intentions), and more critically the need to interpret them consistently with the constitution where possible, the joint majority arrived at a somewhat traditional textual restriction of s 474. It was held that a decision involving jurisdictional error was not a 'privative clause decision' to which s 474 attached.<sup>42</sup> The constitutional difficulties attending a broader interpretation of the clause, noted here by the Court, were significant. It is well accepted that the Commonwealth parliament may not deprive the High Court of its constitutional jurisdiction under s 75(v)<sup>43</sup> (in essence the supervision of jurisdictional error). Whatever the varied original purposes behind s 75(v), this 'accountability' function of the provision dominated its later history.<sup>44</sup> Moreover, significant constitutional difficulties pursue any attempt by federal parliament to confer upon an administrative body a power to conclusively determine the limits of its own jurisdiction.<sup>45</sup>

The joint majority in *Plaintiff S157* returned then to the notion of a 'reconciliation' of the statutory provisions, as a means of determining whether some failure constitutes a jurisdictional error (thus outside s 474 protection). However, their Honours quickly so classified the breach of natural justice claimed here, simply based on earlier precedent.<sup>46</sup> Interestingly, Gleeson CJ proceeded further on this path - noting that the question of whether an RRT decision in breach of natural justice was unprotected by the privative clause depended on a construction of the statute as a whole, which here made it clear that this was a breach of an indispensable condition on the power.<sup>47</sup> This late methodological divergence between Gleeson CJ and the joint majority was maybe not just a matter of judicial stamina. The lead-up reasoning of all of these judges obviously reflects some conflation of the search for 'essential' limitations and the notion of jurisdictional error,<sup>48</sup> but while this association is ever more

<sup>34</sup> *Migration Act 1958* (Cth), s 474(1)-(2). See also the then para (da) in Sched 1 of the *ADJR Act* (exclusion of 'privative clause decisions').

<sup>35</sup> *Hansard* House of Representatives (26 September 2001), pp 31559-31561. Cf eg *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 630 per Gaudron and Gummow JJ (and the cases cited there).

<sup>36</sup> See particularly *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298.

<sup>37</sup> (2003) 211 CLR 476.

<sup>38</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 499-501 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; cf at 493 per Gleeson CJ.

<sup>39</sup> (2003) 211 CLR 476 at 488, 512.

<sup>40</sup> (2003) 211 CLR 476 at 504, 506.

<sup>41</sup> See eg *R v Murray; Ex parte Proctor* (1949) 77 CLR 387; *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 and particularly *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212 at 232 per Spigelman CJ.

<sup>42</sup> (2003) 211 CLR 476 esp at 505ff (it was not a decision "made under" the Act as required for that category, perhaps not a 'decision' at all).

<sup>43</sup> (2003) 211 CLR 476 at 482, 498, 500, 505ff and 513. See earlier, eg, *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd [No 1]* (1914) 18 CLR 54.

<sup>44</sup> See Matthew Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 PLR 3; James Stellios, 'Exploring the Purposes of Section 75(v) of the Constitution' (2011) 34(1) UNSWLJ 70.

<sup>45</sup> (2003) 211 CLR 476 at 484, 505; cf *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *R v Coldham; Ex parte Australian Workers Union* (1983) 153 CLR 415.

<sup>46</sup> (2003) 211 CLR 476 at 506-508, cf 496.

<sup>47</sup> (2003) 211 CLR 476 at 490-491, 494. Cf *re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Akpata* [2002] HCA 34.

<sup>48</sup> See also (2003) 211 CLR 476 at 504-507 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ. Cf the implications of Gleeson CJ's

frequently seen<sup>49</sup> it is one which is as yet incomplete given the ongoing influence of the pre-mixed formulas from *Craig v South Australia*<sup>50</sup> and presumptions about the status of certain errors. The latter were on display here in *Plaintiff S157* in the joint judgment. At base, this divergence is perhaps a lingering tension between what may be termed 'internal' (ie derived from the statute at hand) and 'external' conceptualisations of jurisdictional error. To some extent this is an old dichotomy, lining up with the well-worn debate between 'ultra vires theorists' (who emphasise statutory boundaries) and 'common law theorists' (who emphasise the deeper historical and conceptual roots of the law).<sup>51</sup> Yet it would seem that this opposition might be heavily implicated in the very contemporary uncertainty over jurisdictional error. And it is very relevant to emerging questions about how legislatures can respond to the constitutional entrenchment of jurisdictional error review, and indeed how courts can respond to those responses.

The *Plaintiff S157* Court also read down a time limit on High Court review proceedings (s 486A – similarly attaching ineffectively to a "privative clause decision").<sup>52</sup> Yet subsequently, in *Bodruddaza v Minister for Immigration and Multicultural Affairs*,<sup>53</sup> the Court examined an amended s 486A that clearly sought to cover jurisdictional error and hence brought the constitutional issue into sharper relief.<sup>54</sup> The new s 486A was ruled invalid as subverting the constitutionally entrenched right under s 75(v) to seek review before the High Court. According to the Court,<sup>55</sup> the determination of validity here required consideration of the substance or practical effect of the provision, not merely its form - and in this respect reference was made to potential difficulties which applicants may face in identifying reviewable errors within the time frame set for appeal. This perhaps proved to be the high point of the High Court's shoring up of its territory in this context. Amendments which attempted to restrict the High Court's power of remittal (in a complicated confinement of review options) were subsequently ruled *valid* by the High Court in *MZXOT v Minister for Immigration & Citizenship*.<sup>56</sup> Arguments about undue burdens on the High Court and constitutional implications failed.<sup>57</sup>

The s 75(v) backstop has some important limits. One point worth emphasising is that the reach of this jurisdiction, and hence the federal supervisory guarantee, is limited by the notion of 'officer of the Commonwealth' and remains of uncertain application in the context of corporatised and outsourced federal activity.<sup>58</sup> A point of broader significance is the uncertain position of the Federal Court post *Plaintiff S157*. Notwithstanding its varying role in migration over recent years, the Federal Court is a key player in judicial review more broadly (including via its general law jurisdiction). Yet while the traditional textual confinement of s 474 was very relevant to Federal Court matters (at the time),<sup>59</sup> that Court is not a direct beneficiary of much of the constitutional reasoning in *Plaintiff S157* (or indeed in the *Kirk* decision on state Supreme Courts discussed below). Obviously the Federal Court has a range of traditional interpretative tools at its disposal for the evasion of privative clauses, however it may not be easy to find for it some greater protection of its judicial review function.<sup>60</sup>

It should also be remembered in any consideration of the Federal Court that its *ADJR Act* jurisdiction (albeit no longer significant in the migration context<sup>61</sup>), was initially reinforced by the inclusion of a provision<sup>62</sup> effectively negating for *AJDR Act* purposes the operation of pre-existing privative clauses (ie those enacted before 1 October 1980). The significance of this provision has obviously declined with the passage of time. Moreover, the *AJDR Act* has a 'Schedule 1' (now sizeable) which operates to expressly exclude various classes of decisions from *ADJR Act* review – including a broad swathe of migration decisions.<sup>63</sup>

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comments at 486, 489-490, 493.

<sup>49</sup> See esp *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 esp McHugh J (and see also Gummow J, Kirby J and Hayne J – Kirby J acknowledging the uncertainty leapt by such a connection: [173]); *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* [2004] HCA 32; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627.

<sup>50</sup> (1995) 184 CLR 163.

<sup>51</sup> See further Alan Robertson, 'Commentary on "the entrenched minimum provision of judicial review and the rule of law" by Leighton McDonald' (2010) 21 PLR 40; Meyerson D, "State and Federal Privative Clauses: Not So Different After All" (2005) 16 *Public Law Review* 39.

<sup>52</sup> (2003) 211 CLR 476 at 495, 509-510; cf Callinan J at 537.

<sup>53</sup> [2007] HCA 14.

<sup>54</sup> Note the express extension of the provision to 'purported' decisions (defined by reference to failures to exercise or excess of jurisdiction).

<sup>55</sup> [2007] HCA 14 at [54].

<sup>56</sup> (2008) 233 CLR 601.

<sup>57</sup> See further Lisa Burton, 'MZXOT v Minister for Immigration & Citizenship: Last stop on Route 75(v)?' (2009) 16 *AJ Admin L* 115.

<sup>58</sup> See Matthew Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 PLR 3.

<sup>59</sup> See particularly *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at [95]-[96].

<sup>60</sup> See eg the implications of the reasoning in *MZXOT v Minister for Immigration & Citizenship* (2008) 233 CLR 601 (re the current ss 476 and 476A of the *Migration Act 1958* (Cth)); cf *Abebe v Commonwealth* (1999) 197 CLR 510; and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *SZAJB v Minister for Immigration and Citizenship ('MIC')* (2008) 168 FCR 410 at [32]ff; *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at [504].

<sup>61</sup> See now *ADJR Act*, s 3 and Schedule 1 (clauses (da) and (db)).

<sup>62</sup> *ADJR Act*, s 4. See also *Judicial Review Act 1991* (Qld), s 18; *Judicial Review Act 2000* (Tas), s 15; *Administrative Decisions (Judicial Review) Act 1989* (ACT), s 4; *Administrative Law Act 1978* (Vic), s 12.

<sup>63</sup> See the cross-references to the broad definitions in ss 474(2) and 5E of the *Migration Act 1958* (Cth).

## Privative clauses and contemporary state jurisdiction: *Kirk*

Following *Plaintiff S157*, there was deliberation on the relevance of this decision to the operation of privative clauses at state level.<sup>64</sup> The traditional interpretative mechanisms obviously continued to apply, and the *Hickman* principle was generally assumed to have a role,<sup>65</sup> but inevitably there was discussion of grander potential restrictions on state legislative ouster.<sup>66</sup> There was quite a distance to travel here. In Australia there was a reasonably settled assumption that skilled state drafting could produce a privative clause that did effectively exclude review of jurisdictional error. A passage from *Darling Casino Ltd v New South Wales Casino Control Authority*, identifying only the narrower *Hickman* standard as the ultimate supervisory preserve, is often referred to in this regard.<sup>67</sup> And this thinking lingered. In the post-*Plaintiff S157* New South Wales decision of *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales*,<sup>68</sup> Spigelman CJ referred to *Darling Casino* and noted that at state level the *Hickman* principle operated “by a process of statutory construction without constitutional overlay”.<sup>69</sup> So while a privative clause clearly seeking to protect jurisdictional error would run aground in the federal (s 75(v)) context,<sup>70</sup> it was thought that a state equivalent may be more effective.<sup>71</sup> Constitutional arguments directed to the state position were on the radar by the time of *Mitchforce*<sup>72</sup> – building on dormant principles from *Kable v Director of Public Prosecutions (NSW)*.<sup>73</sup> Yet it was some years before such arguments, in an evolving form, attracted the courts’ full attention.

These questions arrived squarely before the High Court in the 2010 case of *Kirk v Industrial Court (NSW)*.<sup>74</sup> This case had various important implications for state law, but most importantly was a significant advance in the collaboration between administrative law and constitutional law in Australia. In effect, the High Court replicated for state Supreme Courts the constitutional protection afforded to its own s 75(v) jurisdiction. This major step perhaps should not have been unexpected,<sup>75</sup> and indeed was predicted by some,<sup>76</sup> but nonetheless it has produced a surge of busy legal and theoretical reflection not seen since the native title and free speech cases of the 1990s. In administrative law terms *Kirk* goes some way towards closing a circle as regards the resilience of judicial review jurisdiction in Australia. However, in constitutional law terms it is part of a broader story. The emerging constitutional personality of state Supreme Courts is now being keenly explored and debated.<sup>77</sup>

*Kirk* concerned an occupational health and safety prosecution in the New South Wales Industrial Court. The proceedings were potentially protected by a privative clause declaring such decisions final and prohibiting judicial intervention by any relief or remedy (s 179 of the *Industrial Relations Act 1996* (NSW)). In the first place, the High Court joint majority<sup>78</sup> found the proceedings to be flawed by reason of a lack of particularisation in the statement of charges<sup>79</sup> and the prosecution’s calling of Kirk as a witness (contrary to *Evidence Act* restrictions).<sup>80</sup> It was concluded that both of the identified errors were ‘jurisdictional errors’.<sup>81</sup> From that point, it was determined that the Supreme Courts’ supervisory jurisdiction over the errors was constitutionally protected. The Court confirmed that Chapter III of the Constitution requires there to be a body fitting the description ‘Supreme Court of a State’. It is beyond the power of a State, it was said, to alter the constitution or character of its Supreme Court so it ceases to meet the constitutional description.<sup>82</sup> Most importantly, and more controversially,<sup>83</sup> it was said that

<sup>64</sup> See eg Sexton M and Quilter J, “Privative Clauses and State Constitutions” (2003) 5 *Constitutional Law and Policy Review* 69.

<sup>65</sup> See eg *Maitland City Council v Anambah Homes Pty Ltd* (2005) 64 NSWLR 695.

<sup>66</sup> As to the difficulties here see eg Meyerson D, “State and Federal Privative Clauses: Not So Different After All” (2005) 16 *Public Law Review* 39 at 51; Spigelman J, “Integrity and Privative Clauses”, the third lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law, Brisbane (2 September 2004).

<sup>67</sup> (1997) 191 CLR 602 at 634 per Gaudron and Gummow JJ.

<sup>68</sup> (2003) 57 NSWLR 212.

<sup>69</sup> (2003) 57 NSWLR 212 per Spigelman CJ at 229.

<sup>70</sup> See *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14.

<sup>71</sup> (2003) 57 NSWLR 212 per Spigelman CJ at 230, 233.

<sup>72</sup> See (2003) 57 NSWLR 212 at 237ff.

<sup>73</sup> (1996) 189 CLR 51.

<sup>74</sup> (2010) 239 CLR 531.

<sup>75</sup> See further John Basten, ‘The Supervisory Jurisdiction of the Supreme Court’ (2011) 85 ALJ 273 at 278.

<sup>76</sup> See eg JJ Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 *Public Law Review* 77; cf also eg Enid Campbell and Matthew Groves, ‘Privative Clauses and the Australian Constitution’ (2004) 4 *Oxford University Commonwealth Law Journal* 51.

<sup>77</sup> See eg *Wainohu v New South Wales* (2011) 85 ALJR 746; *R v CAZ* [2011] QCA 231.

<sup>78</sup> French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

<sup>79</sup> (2010) 239 CLR 531 at 553ff.

<sup>80</sup> (2010) 239 CLR 531 at 565.

<sup>81</sup> (2010) 239 CLR 531 at 573. It was additionally noted that both of these errors appeared ‘on the face of the record’ as that expression must be understood in light of ss 69(3)–(4) of the *Supreme Ct Act 1970* (NSW): at 575. This had no bearing here, but importantly the majority flagged an impending reassessment of the common law’s confined understanding of the scope of the ‘record’.

<sup>82</sup> (2010) 239 CLR 531 at 566, 578–9.

<sup>83</sup> See eg Nick Gouliaditis, ‘Privative Clauses: Epic Fail’ (2010) 34(3) *Melbourne University Law Review* 870; Ronald Sackville, ‘The Constitutionalisation of State Administrative Law’ (2012) 19 AJ Admin L 127 at 131.

a defining characteristic of state Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority via the grant of relief on grounds of jurisdictional error (which is ultimately subject to High Court supervision via s 73 appeals).<sup>84</sup> Particular reference was made in this context to 'accepted doctrine' at the time of federation, the importance of this Supreme Court review function as regards state executive and judicial power, and the fact that loss of this supervision would create 'islands of power' immune from supervision and restraint. Consequently, the court declared that a state privative clause which purports to strip the Supreme Court of this function of correcting jurisdictional error is beyond state legislative power.<sup>85</sup>

The High Court majority ultimately took its new constitutional principle, as well as the traditional tools of strict textual interpretation, back to the privative clause in issue and concluded that it should be read down:<sup>86</sup> s 179 did not (and could not validly) exclude the jurisdiction of the Supreme Court to grant relief via certiorari, prohibition or mandamus to enforce the limits of the Industrial Court's statutory authority. For the purposes of this case then, it did not on its proper construction exclude certiorari for jurisdictional error.

As adverted to above, the constitutional foundation of *Kirk* (in fact its reliance on both the history and constitutional text) has been questioned. And some point out that this is a further promotion of the judiciary over the executive and legislature (when even the protection accorded to s 75(v) jurisdiction, on which *Kirk* builds, sits awkwardly with its original purposes).<sup>87</sup> Yet ultimately few seem to question the prospective worth of *Kirk*, and the High Court would be highly unlikely to ever relinquish the public law symmetry it has now achieved through replication of the s 75(v) constitutional guarantee. Former Chief Justice Spigelman has described the result in *Kirk* as a matter of 'gravity'; the product of ongoing constitutional 'pull' upon state administrative law.<sup>88</sup>

Subsequent lower court decisions have begun exploring the various implications of the *Kirk* decision, as regards prosecutorial and evidentiary practice and of course State legislative capacity. In the latter regard, *Kirk* might seem to have delivered a death blow to the old assumption that determined state parliaments could exclude review of jurisdictional error. The decision in *South Australia v Totani* confirmed<sup>89</sup> that bolder contemporary drafting techniques, such as the extension of privative clauses to 'purported decisions', now suffer the same difficulties in the state Supreme Court context as they do in the context of original High Court review. However, as will be seen, there are deeper issues to be explored here as regards the manner in which 'jurisdiction' might be defined by legislatures. The High Court took a further small step into these issues in the recent case of *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)*,<sup>90</sup> reading a limited express exception to the protection of a state privative clause (namely an exception for 'excess or want of jurisdiction') as including a failure to exercise jurisdiction. It was said that the reading of such provisions must take into account the incapacity of states to take from Supreme Courts their authority over jurisdictional error; and that the expression in issue was 'apt to include jurisdictional error, rather than merely some species of jurisdictional error.'<sup>91</sup> The High Court's handling to date of more sophisticated legislative manipulation of 'jurisdiction' is considered below.

What is left of the old *Hickman* principle? Following *Plaintiff S157* (and before the constitutional override arrived at the state level), important state cases had applied the aggregated *Hickman* approach: privative clause protection was apparently understood to depend on upon satisfaction of the *Hickman* provisos and compliance with any inviolable or 'essential' limitations. In *Mitchforce*<sup>92</sup> for instance, Spigelman CJ found that a boldly-worded privative clause protected a serious error of a state Industrial Relations Commission - on the basis that the error was not in breach of the *Hickman* provisos or any inviolable limit.<sup>93</sup> Yet following *Kirk*, it seems that *Hickman* (with its focus on a narrow category of particularly serious error - now only a subset of jurisdictional error it seems) is of little relevance at state level because the effectiveness of a privative clause turns essentially, for constitutional reasons, upon the existence (or not) of jurisdictional error. Obviously *Hickman* had been similarly undercut in the federal (s75(v)) context by *Plaintiff S157*. However its emerging redundancy was clearer in *Kirk*. By the time of *Kirk* the bolder, constitution-evading reading of *Hickman* could no longer be viably pressed. And moreover, while the *Plaintiff S157* court no doubt had in mind the need to preserve and re-rationalise the pre-constitutional interpretative principles for the sake of the Supreme Courts and Federal Court,

<sup>84</sup> (2010) 239 CLR 531 at 566-7, 580. The principle clearly extends to executive decision-making more broadly.

<sup>85</sup> (2010) 239 CLR 531 at 566-7, 581. Protection of non-jurisdictional error (including that appearing on the face of the record) is not beyond power (at 581).

<sup>86</sup> (2010) 239 CLR 531 at 581-2.

<sup>87</sup> Eg Ronald Sackville, 'The constitutionalisation of state administrative law' (2012) 19 AJAdminL 127 at 129ff.

<sup>88</sup> Chief Justice Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 77.

<sup>89</sup> (2010) 242 CLR 1 esp per French CJ at [26]ff. Cf *Wainohu v State of New South Wales* (2011) 243 CLR 181 at [15].

<sup>90</sup> (2012) 289 ALR 1.

<sup>91</sup> (2012) 289 ALR 1 at [60], [65] per Gummow, Hayne, Crennan, Kiefel and Bell JJ (hence questions of invalidity per se did not arise: at [53]).

<sup>92</sup> *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212.

<sup>93</sup> (2003) 57 NSWLR 212 at [92]ff. Cf *Maitland City Council v Anubah Homes Pty Ltd* (2005) 64 NSWLR 695.

there was far less need for this in *Kirk*.

*Hickman* may remain as an echo to remind us of the seriousness of the errors it identified (and the courts' historically uncompromising approach in that context). And indeed it may retain a theoretical presence via the remote possibility that some error might prove to be not 'jurisdictional' but still fall foul of its provisos. But certainly it can no longer offer to drafters and decision-makers the possibility of a 'safe harbour'<sup>94</sup> for all but these serious errors (which as noted above was always a brave reading). Importantly however, if the constitutional guarantee of jurisdictional error review does not somehow leak through to the Federal Court, one implication is that this court may conceivably provide a final refuge for the *Hickman* methodology (albeit in its clarified form).

As in the case of the federal (s 75(v)) guarantee, some interesting issues arise as to the precise reach of *Kirk* beyond traditional public sector boundaries. There is not, in the state general law context, a cornerstone phrase such as 'officer of the Commonwealth' to be interpreted (or perhaps reinterpreted) for these purposes. However, there are common law principles concerning the application of judicial review in private sector contexts (arising particularly from decisions such as *R v Panel on Take-overs and Mergers, Ex parte Datafin plc*<sup>95</sup>), which remain at present surprisingly unsettled in Australia context.<sup>96</sup>

Finally, the handling of the notion of 'jurisdictional error' in *Kirk* is an interesting (albeit less-discussed) aspect of the decision. The joint majority explored with some candour the tension and uncertainty that attends the concept. They discussed the touchstone decision in *Craig v South Australia*,<sup>97</sup> with its generic formulas for the identification of such error,<sup>98</sup> but emphasised that there is no 'bright line test' and that *Craig* provided not a rigid taxonomy but just examples. Yet ultimately the Court did not stray far from the formulas of *Craig*, identifying jurisdictional errors in the mistakes alleged (lack of particularisation and evidentiary breaches) simply in terms of those formulas.<sup>99</sup> This juxtaposition of predictive formulas and admissions of uncertainty might just reflect that the Court was focused on bigger issues and perhaps concerned to preserve flexibility in this field. Alternately, it might reflect the fact that the errors here returned the Court to the harder end of the jurisdictional error classificatory task,<sup>100</sup> after the matters before it had for some years accumulated around reasonably well-worn categories. Yet going one step further, perhaps the reasoning here echoes with the same important conceptual tension that seemed to be visible in *Plaintiff S157*; a tension between the 'internal' (statute and context-specific) conceptualisation of jurisdictional error and the 'external' (pre-mixed or predictive) one.

## Alternative mechanisms for restricting judicial review

These questions about the nature of jurisdictional error are fast losing their abstraction. In the wake of *Kirk*'s extended entrenchment of 'jurisdictional error' review, attention has been firmly focussed on what parliaments might now do to *redefine* 'jurisdiction' (or remove substantive limits on powers). And following this closely is the issue of how the courts might respond – are there limits on such legislative efforts? These are now the 'important imponderables'.<sup>101</sup> Answers might begin to emerge in the abstract, but ultimately in the examination of these dilemmas it will be necessary to place them back in their fuller political and institutional context.

The legislative devices that might carry on the work of the traditional privative clause include 'no-invalidity' clauses, the exclusion of grounds, the imposition of time bars or procedural obstacles, or simply the conferral on decision-makers of more broadly-stated powers and discretions. Some of these options are now being termed 'plenary provisions' by some – ie mechanisms for excluding substantive limits on power.<sup>102</sup> Beyond the more obvious ouster devices, with a broader sweep we could include strategies such as the wider use of 'subjective jurisdictional facts' or 'jurisdictional opinions' (to lessen the judicial scrutiny of compliance with jurisdictional conditions), or indeed the 'outsourcing' of decision-making (to tap into lingering uncertainty on the reach of judicial review).<sup>103</sup>

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<sup>94</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.150].

<sup>95</sup> [1987] QB 815.

<sup>96</sup> See in this regard Matthew Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 PLR 3. And see further (eg) *Ceca Institute Pty Ltd v Australian Council for Private Education and Training* [2010] VSC 552; *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* [2010] NSWCA 190.

<sup>97</sup> (1995) 184 CLR 163.

<sup>98</sup> (2010) 239 CLR 531,573–4.

<sup>99</sup> (2010) 239 CLR 531 at 573–5.

<sup>100</sup> As revealed by the different conclusions below: see *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156.

<sup>101</sup> John Basten, 'The Supervisory Jurisdiction of the Supreme Court' (2011) 85 ALJ 273 at 298.

<sup>102</sup> See particularly Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 463 at 467.

<sup>103</sup> See in this regard Matthew Groves, 'Outsourcing and s 75(v) of the Constitution' (2011) 22 PLR 3. Cf recently *Plaintiff M61/2010E v*



Moreover, the hobbled traditional privative clause may continue to play an indirect role. It may for example conceivably be an indicator that a jurisdictional condition is a subjective one (ie entrusted in large part to the decision-maker's judgment).<sup>104</sup> More importantly, on one view it is a legitimate participant in the reconciliation of provisions that delimits the unprotectable category of 'jurisdictional error' in the particular context. The logic of such an approach was apparently acknowledged in *Plaintiff S157*<sup>105</sup> and (albeit less clearly) in *Kirk*.<sup>106</sup> This methodology has been doubted in some quarters – perhaps in part because it carries echoes of the discredited reading of *Hickman*. Yet an approach that acknowledges a privative clause when identifying the precise jurisdictional tipping point<sup>107</sup> would seem to be quite different to an approach that reads such a clause as an automatic expansion of jurisdiction out to the limits of a narrow pre-set class of serious error. Perhaps the more important problem with this methodology, as Aronson and Groves have noted, is the difficulty of finding actual examples of its application.<sup>108</sup>

The courts' likely responses to the various drafting devices noted above, in the contemporary constitutional and political climate, are not in all cases obvious. The no-invalidity clause – declaring that specified errors or failures do not affect the validity of a decision – has been a particular focus in the post-*Kirk* commentary. Such a clause might seem to side-step constitutional constraints (by redefining jurisdictional limits on a power rather than ousting judicial supervision), and has in recent cases drawn a more moderate response from the High Court than privative clauses. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme*,<sup>109</sup> the nature of the procedural error in question (failure to comply with a succeeding obligation to give reasons) and a clause declaring that such failure did not affect the validity of the actual decision (a visa cancellation) prompted the majority to conclude on a *Project Blue Sky* analysis<sup>110</sup> that the failure did not impeach the decision for jurisdictional error (in s 75(v) proceedings). A similarly soft context presented itself in *Federal Commissioner of Taxation v Futuris Corporation Ltd*,<sup>111</sup> where in the face of a carefully constructed appeal regime the Court held that a more generally targeted 'no invalidity' clause (re non-compliance with the relevant Act's provisions) meant that errors to which it was directed did not go to jurisdiction (so as to attract a writ under s 75(v)). There was however some reading down of the term 'assessment' (to which the no invalidity provision applied); importantly it was said to exclude 'conscious maladministration'.<sup>112</sup>

There is a general consensus in the commentary that there must be a limit to the effectiveness of a 'no invalidity' clause. Beyond the possibility that it might logically not protect against correction or containment in some way of lesser 'unlawfulness',<sup>113</sup> it would seem there can be little doubt that an Act can effectively declare that breach of a particular statutory requirement does not affect validity – as one observer has pointed out such a provision appears to merely state expressly the intention that would be searched for in a *Project Blue Sky* analysis.<sup>114</sup> Indeed such deliberate legislative focus on identifying the essential and inessential conditions on a power might seem to be a productive way forward.<sup>115</sup> However, a general validation (for any error) raises more interesting issues.<sup>116</sup> For one, it is conceivable that the deeper-set conventional review grounds might not be so easily buried (see further below). More broadly, it has been suggested (for example) that 'no invalidity' and privative clauses are the same in practical effect<sup>117</sup> and the determination of validity is itself an essential part of the constitutionally protected judicial role,<sup>118</sup> or that the constitutional notion of 'jurisdictional error' cannot be

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*Commonwealth* [2010] HCA 41.

<sup>104</sup> Cf however the somewhat inverse effect in *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180 at [32]-[34].

<sup>105</sup> (2003) 211 CLR 476 at 504, cf 486, 490-91, 506. Cf also *Batterham v QSR Ltd* (2006) 225 CLR 237 at 249.

<sup>106</sup> *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [93]-[94].

<sup>107</sup> Cf Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.170].

<sup>108</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.40], [17.170]. For a pre-*Kirk* example (that would need some adjusting) see *Mitchforce Pty Ltd v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212. See further Mark Aronson, 'Commentary on "the Entrenched Minimum Provision of Judicial Review and the Rule of Law"' (2010) 21 PLR 35; and earlier Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life after *S157*' (2005) 33 *Federal Law Review* 141.

<sup>109</sup> [2003] HCA 56 at [44]ff per Gleeson CJ, Gummow and Heydon JJ.

<sup>110</sup> See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>111</sup> (2008) 237 CLR 146 at [23]-[24] per Gummow, Hayne, Heydon and Crennan JJ.

<sup>112</sup> Perhaps an echo of the *Hickman* first proviso: see John Basten, 'Jurisdictional error after *Kirk*: Has it a future?' (2012) 23 PLR 94 at 101.

<sup>113</sup> As to the potential reach here of the s 75(v) injunction see eg *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [47]; cf *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 482-83, 508. See also the reasoning in *Project Blue Sky* itself, but cf Benjamin O'Donnell, 'Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution' (2007) 28 *Australian Bar Review* 291.

<sup>114</sup> Alan Robertson, 'Commentary on "the entrenched minimum provision of judicial review and the rule of law" by Leighton McDonald' (2010) 21 PLR 40 at 42.

<sup>115</sup> John Basten, 'The Supervisory Jurisdiction of the Supreme Court' (2011) 85 ALJ 273 at 298.

<sup>116</sup> See eg Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

<sup>117</sup> Cf *Bodruddaza v Minister for Immigration and Multicultural Affairs* [2007] HCA 14.

<sup>118</sup> Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of *Hickman*?' (2010) 21 *Public Law Review* 92 at 106.

'hollowed out' and that parliaments at both levels are at least prevented from conferring a power without limits sufficient to render it 'non-arbitrary'.<sup>119</sup> The possibility that the expanding constitutional dimension of 'jurisdictional error' somehow alters its meaning, or produces a new variant of the concept, has been raised not infrequently in recent years. However, there appear to be differing views on whether this new dimension draws the old concept away from its foundations in basic statutory interpretation,<sup>120</sup> or pushes it further in that direction.<sup>121</sup>

The device of excluding specific grounds is one with which all administrative lawyers – particularly those working in migration – are familiar. Natural justice (or at least the fair hearing rule) has on occasions been pulled out at the roots in a legislative scheme (ie declared in some manner not to apply). It is not an easy drafting exercise,<sup>122</sup> but there has been little doubt that fair hearing principles can be so excluded from administrative decision-making processes. The recent Western Australian decision in *Seiffert v Prisoners Review Board*<sup>123</sup> answered a constitutional objection to this in the state context with the explanation that it defines the duties of the decision-makers' rather than seeks to oust supervisory jurisdiction. This history of the important ground of natural justice casts a sizeable shadow over attempts to elevate other grounds to some higher status.

Aspects of natural justice and other grounds have been expressly excluded at the point of defining permissible challenges – most notably (albeit not with great effect) in respect of the Federal Court's jurisdiction under the 1990s migration regime. It seems a simple provision declaring that a decision 'may not be challenged on ground X' will run into difficulties since *Plaintiff S157* and *Kirk* (in the High Court and State Supreme Court contexts respectively), if 'ground x' is determined to be a jurisdictional error in the circumstances. Similar considerations arise where a clause excludes review *except for* certain grounds (and the exception is insufficient to cover with the constitutional guarantees of review).<sup>124</sup> However, draftspersons are now perhaps less likely to contemplate such provisions. More difficult is the scenario where a no-invalidity clause is attached to a particular ground (or the limit inherent in the ground is otherwise somehow substantively removed). As indicated above, instinct might tell us (now with an uncertain constitutional tinge) that some grounds have deeper footings, that they reach somewhat beyond the specific statutory terms and intentions. However, most grounds are closely attached to statutory terms – making their extrication from statutory intent (including a no-invalidity clause) difficult. Moreover, as a number of observers have noted for some time now,<sup>125</sup> if some grounds are destined for higher status, which ones and why? And could the select list (and the grounds themselves) still evolve?

The High Court has given some signals in this context. As noted above 'conscious maladministration' was set apart to some extent in *Futuris* (which is particularly relevant to arguments of bad faith). In *Plaintiff S157* reference was made (in the context of the conventional privative clause there) to the continued availability of injunctive relief under s 75(v) for 'fraud, bribery, dishonesty or other improper purpose'.<sup>126</sup> However, the reasoning relied in part upon the first proviso of *Hickman* (in its re-rationalised form) and *Hickman's* operation beyond conventional privative clauses might be unpredictable. Moreover, the Court's reference to the possible constitutional invalidity of the clause (should *Hickman* fail to preserve High Court supervision over such matters) was perhaps simply a reminder that the s 75(v) cannot be removed – rather than an indication that the limits on the decision-making power below cannot be re-defined. Yet perhaps the comments in *Futuris*, and the reference there (in the context of a no invalidity clause) to the comments in *Plaintiff S157*, do take 'conscious maladministration' of these various types some way towards a special status.<sup>127</sup> Aronson and Groves note that such status might also logically attach to errors that need correction in order to prevent a failure of the demarcation between laws or regulatory bodies.<sup>128</sup> Of course in the case of decisions made and powers exercised by actual courts, constitutional principles potentially attach more directly to shore up conventional administrative law limits.

With respect to the imposition of time bars or other practical obstacles to review (the former being particularly important in the state context), the courts do appear to have the recipe for a principled response. These devices

<sup>119</sup> Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 463.

<sup>120</sup> Ronald Sackville, 'The constitutionalisation of state administrative law' (2012) 19 *AJAdminL* 127 at 133.

<sup>121</sup> Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 463 at 487.

<sup>122</sup> See eg *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204.

<sup>123</sup> [2011] WASCA 148 at [111] per Martin CJ.

<sup>124</sup> Cf *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 289 ALR 1.

<sup>125</sup> See eg J Kirk, 'The entrenched Minimum Provision of Judicial Review' (2004) 12 *AJ Admin L* 64; Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279.

<sup>126</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 408.

<sup>127</sup> As to the special case of fraud, see Zac Meyers, 'Revisiting the purposes of judicial review: Can there be a minimum content to jurisdictional error?' (2012) 19 *AJAdminL* 138.

<sup>128</sup> Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.40].

pose a lesser conundrum given that they would apparently simply be seeking to obstruct the constitutionally guaranteed jurisdictional error review, rather than undermine it by any redefinition of 'jurisdiction'. In the High Court decision in *Bodruddaza v Minister for Immigration and Multicultural Affairs*,<sup>129</sup> the sequel to *Plaintiff S157*, the Court looked to 'whether directly or as a matter of practical effect' the time bar provision in issue so curtailed or limited the right or ability to seek relief under s 75(v) that it was 'inconsistent with the place of that provision in the constitutional structure'. The *Kirk* decision might seem to allow such a methodology to be readily transposed for the state context. However, it must be remembered that the courts (prominently at state level) have a long history of some tolerance of time bars (pre-*Kirk*).<sup>130</sup> Moreover, the federal constitutional guarantee may not necessarily operate in exactly the same way in the state translation.<sup>131</sup>

Obiter from the High Court decision in *Plaintiff S157* raised some further possible responses to broad ouster devices. It was suggested that the conferral of too open-ended a power might lack the 'hallmark of the exercise of legislative power', namely the determining of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'.<sup>132</sup> Even if sufficiently extreme cases presented themselves, unfortunately such a proposition drops us into some perennial jurisprudential debates about the notion of 'law' that may have no exit. The difficulties of such an approach have been well canvassed by commentators such as McDonald<sup>133</sup> and Bateman.<sup>134</sup> It was also observed in *Plaintiff S157* that a federal power conferred in too open-ended a manner may thereby lack connection with a constitutional head of power, and that this was something a court might not repair without rewriting the statute (not a judicial function).<sup>135</sup> Yet the point might seem to be somewhat hypothetical given that an open-ended conferral of power could usually offer up the connection to a constitutional head without detracting much from its purpose of evading administrative law limits. Another separation of powers argument of relevance here is the well-cited but underexplored notion that parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.<sup>136</sup> Once again, the reach and usefulness of this idea in the context of broad attempts at ouster has been questioned,<sup>137</sup> and of course all separation of powers arguments necessarily lose much in any translation across to the state level.

One point to emphasise, at this stage of the debate, is that the construction of alternative appeal or review rights in conjunction with the attempted ouster (eg as in *Futuris*) appears to strengthen the legislature's position on many of the arguments outlined above.<sup>138</sup> For example, it perhaps evades a characterisation of the power as 'arbitrary', makes it harder to suggest that the parliament has conferred a power to 'conclusively' define jurisdictional limits, and might conceivably avoid the fundamental constitutional opposition by retaining an ultimate path back to superior court supervision.<sup>139</sup>

## Conclusion

As Justice Sackville has noted, the 'field of conflict' between courts and parliaments has shifted.<sup>140</sup> The High Court has drawn and extended a constitutional bottom line, protecting for itself and for state Supreme Courts their jurisdiction over 'jurisdiction'. The challenge for legislatures now it seems is to disentangle themselves from old drafting habits (and the vague search for *Hickam's* lost 'safe port'), and to look for space within the constitutional guarantees to effect substantive removal of administrative law limits and the redefinition of 'jurisdiction'. The task for courts, it seems, is to devise responses. This task is not a small one. Is the protected court role to enforce the limits of jurisdiction or to define them? Is it to ensure that parliament's design is respected or to ensure compliance with some particular methodology or standard? And from where and how will any unassailable administrative law limits be derived? Some sizeable theoretical, precedential and practical dilemmas crowd into

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<sup>129</sup> [2007] HCA 14 at [53], [79].

<sup>130</sup> See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.7], [17.210]. Cf JJ Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77 at 89ff.

<sup>131</sup> See eg Joshua P Knackstredt, 'Judicial Review after *Kirk v Industrial Court (NSW)*' (2011) 18 *AJ Admin L* 203 at 212.

<sup>132</sup> (2003) 211 CLR 476 at 512ff.

<sup>133</sup> Leighton McDonald, 'The Entrenched Minimum Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

<sup>134</sup> Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 463. See also, earlier, Simon Evans, 'Privative Clauses and Time Limits in the High Court' (2003) 5 *Constitutional Law and Policy Review* 61.

<sup>135</sup> (2003) 211 CLR 476 at 512ff.

<sup>136</sup> See eg *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 484, 505.

<sup>137</sup> Eg Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39(3) *Federal Law Review* 463.

<sup>138</sup> See further on the courts' greater tolerance of ouster in this context Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, 2013, Thomson Reuters) at [17.8].

<sup>139</sup> See John Basten, 'The Supervisory Jurisdiction of the Supreme Court' (2011) 85 *ALJ* 273 at 275.

<sup>140</sup> Ronald Sackville, 'The constitutionalisation of state administrative law' (2012) 19 *AJAdminL* 127 at 137.

these questions. However, as noted at the outset of this chapter, a third dimension has appeared in the debate. While the administrative lawyer naturally tends to assume that there will be wild new legislative attempts at ouster, and proceeds from the position that there must be clear limits, questions are now being asked about the appropriateness of these starting points.

Can we assume that legislatures will necessarily press hard on the constitutional guarantees in inappropriate circumstances? In the first place, the clarity of drafting required in any attempted ouster or removal of substantive limits (and the likely context of such attempts) may well ensure that the legislature's design is exposed to a very real political and public scrutiny. It should also be remembered that the evasion of courts by the construction of undefined powers will often come at some expense to the clarity and security of the underlying political purposes, and to administrative coherency and efficiency. Moreover, it is possible that our predictions about future legislative tactics might be skewed somewhat by the administrative extremes of recent times. The intractable political controversies in migration have in the last two decades produced an unprecedented raw interplay between politics and law. This recent context should be kept in mind as regards the motives and will that we attribute to the Australian legislatures more generally.

The arguments for a robust judicial response to legislative ouster, direct or indirect, have been well-rehearsed in this field of law – drawing as they do upon some fundamental tenets of our legal system. Yet there are also factors which suggest that some caution is in fact appropriate here. First, as mentioned above, the law has certainly already imposed on parliaments (in various ways) the requirement that their desire to depart from significant administrative law conventions must be expressed with 'irresistible clearness',<sup>141</sup> and no doubt the usefulness of this methodology is not yet exhausted. The same might be said of the mechanism of statutory 'reconciliation'. Whatever broad attempt at ouster is dropped in, administrative law is skilled at finding implied purposes and limits on power which might well invite some 'reconciliation' and hence rationalisation of the ouster mechanism.

It should also be remembered (against our Diceyan instincts) that effective legislative ouster of judicial review does not necessarily leave executive power in an accountability vacuum, even where specific appeal avenues have not been provided. It has been pointed out at the highest levels that in contemporary legal debates over executive performance we forget too quickly the potential of a diligent parliament and rigorous media, and the sophisticated oversight provided by proliferating integrity bodies.<sup>142</sup> Indeed we perhaps tend to overstate the purposes, capacity and effectiveness of judicial review in this regard, and the neutrality and universality of the standards and values it imposes.<sup>143</sup> The temptation to do so has been great in recent years, given the contests faced by judicial review in the overbearing field of migration. But again, we should be mindful of this recent context as we consider future responses to legislative ouster more generally, and particularly the size of the legal counterweight actually required.

The maturing collaboration between administrative law and constitutional law in Australia is of considerable theoretical and practical importance, and the task ahead of giving it sustainable and practical meaning is a sizeable one. Ultimately, there may need to be some acceptance that the 'immutable' constitutional jurisdiction must to some extent take its shape on a case by case basis. There are potential risks in overstating the constitutional guarantee, and searching too determinedly and too abstractly for clear and fixed limits on legislatures. Apart from the broad implications for governmental balances of power, as Justice Basten has recently noted there is a need to protect the 'political legitimacy' of the entrenched supervisory jurisdiction and avoid prompting a questioning of the judiciary's own accountability.<sup>144</sup>

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<sup>141</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 267 ALR 204 at [15].

<sup>142</sup> See eg RS French, "The Executive Power", Inaugural George Winterton Lecture, Sydney University, 18 Feb 2010; John McMillan, 'Re-thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423.

<sup>143</sup> See further John Basten, 'The Supervisory Jurisdiction of the Supreme Court' (2011) 85 ALJ 273.

<sup>144</sup> John Basten, 'The Supervisory Jurisdiction of the Supreme Court' (2011) 85 ALJ 273 at 294, 299.