RESTRICTING JUDICIAL REVIEW

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Introduction

I find myself in an odd position this evening posing as the champion of the courts. I have for some time now had a particular interest in and involvement with administrative tribunals. Hence, to be arguing that the migration tribunals should not be permitted to "go it alone" may seem inconsistent.

Let me say, however, that my respect for the operation of tribunals in this country is in the context of an administrative law system which is balanced by a range of avenues of review, thus ensuring there are inbuilt checks and balances. The courts are an integral part of that system as I see it and I do not welcome the prospect that their role may be significantly circumscribed or removed.

The mechanism by which that restriction or removal may be effected is the removal from the *Migration Act 1958* (Cth) of the existing Part 8 which contains limited grounds of judicial review, and the shoring up of this move by a comprehensively worded privative clause. The relevant provisions are contained in the Migration Legislation Amendment Bill (No 5) 1997.

The privative/ouster clause has been introduced in the wake of a period of judicial activism by, in particular, the Federal Court, coupled with increased pressure on the migration determination system from refugees and other would-be entrants.

The effect of that clause, according to the Explanatory Memorandum for the Bill is:

- To limit the review jurisdiction of the High Court and the Federal Court to errors in three areas - constitutional invalidity, decisions made in bad faith, and narrow jurisdictional error;[1]
- To apply these restrictions to virtually all substantive decisions in the migration jurisdiction;[2]
- To permit by regulation the removal of the prohibition on review, without, however, indicating the circumstances in which this ameliorating provision might be exercised;
- To establish a strict time limit of 28 days for review of applications and to take away any discretion to extend time;[3]
- To prohibit the Federal Court exercising any review jurisdiction until an applicant has fully exercised any merit review rights;[4]
- To prohibit absolutely review by the Federal Court of the personal discretionary powers of the Minister;[5] and
- To provide that there be no attempt to defeat these restrictions on the Federal Court's powers by commencing the matter in the High

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Court with a view to having it remitted to the Federal Court under section 44 of the *Judiciary Act 1903* (Cth).[6]

The outcome, as the Minister promised in his Second Reading Speech, is intended to "restrict access to judicial review in migration matters in all but exceptional circumstances".[7]

Assuming that the legislation is passed,[8] the next step will undoubtedly be a challenge to the provisions before the High Court. The High Court has three options:

- To invalidate the clauses because they have exceeded the constitutional protection provided by s 75(v), a feat not yet essayed;[9]
- To uphold the provisions as they stand; or
- To uphold the provisions but interpret them in a way which retains some effective review jurisdiction.

A subsidiary question is whether the more comprehensive restrictions on the Federal Court's jurisdiction will be upheld by the High Court. The argument in favour of validity is that the Federal Court is a creature of statute and its jurisdiction is *prima facie* not constitutionally protected. However, there are countervailing views.

Privative clauses in Commonwealth administrative law

If anyone had said to me a few years ago that administrative lawyers would be debating the merits of a federal privative clause of this kind I would have scoffed at the idea. Federal privative clauses have been notable by their absence. The Australian experience has been that these clauses have their principal place in the States', not the Commonwealth's, domain. There have been two reasons for this inhibition:

- The prohibition on ousting the judicial review jurisdiction of the High Court provided by section 75(v), the constitutional protection of the judicial review jurisdiction in this country; and
- The abrogation by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) s 4 of privative clauses then in force - at least for *ADJR Act* applications - a move which undoubtedly contributed to the disfavour in which such clauses have been held in the Commonwealth sphere.

With the signal exception of the industrial relations jurisdiction, there has been little need to explore the few privative clauses in Commonwealth legislation. The exception - industrial relations - was the area in which the principles in *R v Hickman; Ex parte Fox and Clinton*[10] (*Hickman*) were developed. These principles have been long accepted as the solution to the constitutional conundrum posed by a clash between s 75(v) and any ouster of jurisdiction by legislation of the federal Parliament, of which more anon. Again, however, few cases have examined the meaning of these principles. In summary, there has been a paucity of jurisprudence on the meaning and effect of federal ouster clauses generally or of the *Hickman* compromise.

Whether High Court will uphold validity of proposed privative clause

Against this background it is, therefore, surprising that the advice received by the Minister was, as he put it, "that the only workable option was a privative clause".[11] That surprise is due not only to the limited use hitherto made of privative clauses, but also because privative clauses has always been unpopular with courts, and there are alternatives.

There are several reasons why the privative clause is both risky and not the preferable option:

- litigation about these privative clauses will plunge administrative law at the Commonwealth level into a degree of uncertainty and complexity not yet experienced in this jurisdiction;

- exclusion of judicial review is wrong in principle. To make tribunals which are part of the executive the final arbiter of decisions by the executive is inappropriate. For the health of public administration, decision-makers need the safeguard of judicial review;

- it is doubtful that the High Court would fully uphold the privative clause as it applies to the Federal Court; and

- there are other options.

What is being attempted is to exclude - almost completely - judicial review of migration decisions. That leaves the jurisdiction solely in the hands of the merit review bodies - the Immigration Review Tribunal and the Refugee Review Tribunal. I think we need to ask ourselves:

- are we as a nation prepared to leave the development of migration law and policy to the Department of Immigration and Multicultural Affairs and to the two migration review tribunals?

- is it wise to oust the courts' jurisdiction in this or any other area of public administration?

- and, in particular, is it wise to do so by such an uncertain route as an ouster clause?

1 Complexity and uncertainty

The first point is that there may well be constitutional problems in designating the migration tribunals as, in effect, the final decision-maker. Finality has long been held to be an attribute of courts in their exercise of judicial power. Given the vigorous manner in which the separation of powers doctrine and its protection of Commonwealth judicial power has been applied in this country - especially in recent times[12] - I venture to suggest that there may well be constitutional uncertainty inherent in that choice.[13]

Secondly, the unwisdom of adopting this mode of excluding review is its uncertainty - uncertainty in interpretive terms. The privative clause is argued to be effective to exclude all but narrow jurisdictional error. However, the difference between a jurisdictional and a non-jurisdictional error has been elusive.[14] It was, after all, for that very reason that Lord Diplock in *Anisminic Ltd v Foreign Compensation Commission*[15] attempted to do away with these subtleties. Do we want decisions in the migration jurisdiction to be dependent on such a "tenuous"[16] distinction? Despite the exhortation in clause 474(6) of the Migration Legislation Amendment Bill (No 5) 1997 that:

> ... it is the intention of the Parliament that this section
>
> (a) be construed in a way that gives full effect to its natural and ordinary meaning; and
>
> (b) not be construed in a way that would limit its operation ... ,

can we be sure that the court will not take a stringent, rather than a literal, approach to its interpretation? The courts have consistently interpreted ouster clauses in a manner which does not read their terms literally and once that has occurred it is difficult to ascertain or predict their meaning.

Further, do we want to sanction constant calls on the High Court's time to determine, on a case by case basis, whether the error is jurisdictional or within jurisdiction? I say the High Court because, if the ouster clause is effective, it is the Federal Court's jurisdiction which is primarily affected. In effect, that would make the High Court the court of first

instance - an outcome which would surely be unwelcome to that body.

The Minister's advice is that this privative clause will only permit the High Court to review decisions which are unconstitutional, made in bad faith and in breach of the narrow jurisdictional error doctrine. These limited avenues for judicial review clearly refer to the constitutional compromise fashioned by Justice Dixon in the *Hickman* case decided in 1945 and referred to earlier. In *Hickman* Dixon J, faced with a broadly worded privative clause, enunciated a principle that decisions, within constitutional bounds, will be protected if they meet three conditions:

- the purported exercise of the power is *bona fide;*
- the exercise of the power relates to the subject matter of the legislation; and
- the decision is reasonably capable of reference to the power.[17]

Taking a literal view of the three provisos one could say that it would be highly unlikely that migration officials, the Minister, or members of the migration tribunals would act in bad faith; or make decisions on matters outside the migration field. That same conviction may not be available in relation to the ambit of the third criterion since its interpretation, even at first sight, is not so apparent. One thing, however, is certain. Courts have consistently refused to take a *prima facie* view of the meaning of privative clauses. It is the very reason interpreting them becomes so problematic.

It must also be remembered that such interpretation as there has been of the *Hickman* tests has occurred almost wholly in the industrial relations jurisdiction - a jurisdiction which has always been treated as *sui juris* not least because decisions are made by a long established and well respected specialist body, and it is an industrial tribunal, with highly developed expertise in the subject matter. There are additional distinctions which differentiate the two jurisdictions: the industrial relations jurisdiction is not a mass jurisdiction like migration; nor does it have the same strong human rights overtones.

Moreover, the most recent cases on *Hickman* do not appear to interpret its impact on broadly couched ouster clauses in the minimalist manner which the Minister's advisers have predicted. This is not the place or the time for minute analysis of these decisions. Some examples, however, give a flavour of the lack of clear principle in the area. By way of introduction the following points can be made.

It is clear that there is little useful jurisprudence on the three provisos. A statement in 1991 by *Mason CJ in the O'Toole v Charles David Pty Ltd*[18] that "[t]he scope and content of the three provisos in the *Hickman* principle have not been examined in any detail in subsequent decisions of this Court",[19] remains true today.

Aronson and Dyer, in their leading text on Australian judicial review, have pointed out that the various provisos "clearly present several leeways to which a court can resort if it is unwilling to concede an ouster clause much practical effect".[20]

The most recent case on the issue - *Darling Casino Ltd v New South Wales Casino Control Authority,*[21] bears out that comment. In *Darling Casino* Gaudron and Gummow JJ, in a judgment which was agreed with by Brennan CJ, Dawson and Toohey JJ, noted that, on the present state of the law, even a broadly couched ouster clause would not protect what are described as "inviolable limitations or restraints" upon the jurisdiction or power of the decision-maker.[22]

It is difficult to know what that description encompasses - indeed it has been suggested that "answering the question may come close to a process of selection from one of Professor Stone's categories of meaningless reference".[23] Read literally, it could be assumed, at the very least, that it would cover errors of any magnitude going to jurisdiction or to the power being exercised. There is clearly no suggestion that the principle would be confined to narrow jurisdictional error, that is, refusal to accept jurisdiction, or to mistakes about a tribunal's powers. Indeed, Dawson J in *O'Toole v Charles David Pty Ltd* indicated that *Hickman* only excluded minor or unimportant errors - or as he put it "a mere defect or irregularity".[24] That is a different opinion from the ones on which the Minister is relying.

In *Darling Casino Ltd,* Gaudron and Gummow JJ also indicated that breaches of statutory obligations or "imperative duties"[25] are not protected by a broadly worded ouster clause.[26] Again there is no suggestion that this expression is restricted to duties which can be described as within the narrow jurisdictional error band. In addition, Brennan CJ, Dawson and Toohey JJ noted that decisions made in breach of procedural fairness - a controversial area at present in the migration jurisdiction - would not be protected by a broad privative clause,[27] although such a clause could protect against other minor or procedural defects.[28]

Obiter dicta in other cases have suggested that the first proviso - exclusion from review of decisions made in good faith - would not protect decisions made for an improper or unauthorised purpose, or in abuse of power.[29] That suggestion would add considerable scope to this limb of the *Hickman* tests.

Finally, the words "not reasonably referable to the power" in the third proviso are clearly ripe for expansion. Previous cases have restricted this expression to decisions made "wholly without power"[30] or acts done "altogether outside the scope of the authority"[31]. Faced with a privative clause akin to the one proposed in the migration jurisdiction, the High Court is likely to reduce the reach of this proviso. That task is facilitated by the inclusion in the expression of that flexible lawyer's tool - reasonableness. The expression would permit the Court to exclude from the third proviso decisions which are "the very essence or subject matter of the inquiry",[32] quarantining only decisions which are collateral, preliminary or procedural in nature, other than decisions in breach of fair process. If it takes that path, the Court would follow recent English jurisprudence[33] which has interpreted similarly extensive clauses as not ousting review of the central matter for decisions or, as it was described, "an error of law on which the decision of the case depends".[34]

The upshot is, that despite the breadth of the ouster clause in the Migration Legislation Amendment Bill (No 5) 1997, the High Court is unlikely to restrict its review powers in the way predicted. Indeed, to rely on a narrow interpretation of the *Hickman* provisos is to ignore history and the industrial relations context in which *Hickman* has been used. It is significant that Aronson and Dyer have estimated that *Hickman* has validated decisions tainted with jurisdictional error in at most eight cases in the more than fifty years since the test was first developed.[35]

2 Exclusion of judicial review is wrong in principle

The principal beneficiary of the privative clause, if it were to be interpreted as intended, are the migration tribunals. These bodies are part of the executive. There is something inherently pernicious about hiving off from judicial supervision areas of executive decision-making. That is, it is hard to accept that Parliament would provide that certain administrative

decisions can be unlawful, unfair, unreasonable and procedurally tainted. Section 75(v) was inserted into the Constitution "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding federal power".[36] In a democratic society privative clauses threaten the fundamental balance between two arms of government by removing a key role of the courts as the watchdog against executive impropriety.[37]

In effect, what is being attempted is to 'judge-proof' migration decisions. The mechanism for achieving this is to rely on the possibility that the privative clause will trump s 75(v) of the Constitution. In principle, positive rights granted in the Constitution should not be abrogated lightly. There are surprisingly few of them. Moreover, this right - the right to seek review by the High Court of executive decision-making - represents the foundation stone for the administrative law system in this country. The High Court as the upholder of the rights in the Constitution is likely to think carefully before it concedes unbridled power to the executive particularly when it affects a high volume area of administrative decision-making. Indeed, as Barnes has noted there should be "a real conflict *from parliament's point of view* in the notion of an unenforceable right" (italics supplied).[38]

There are other reasons why the attempt to give virtually exclusive jurisdiction to migration tribunals is abhorrent. In the first place, it deprives someone of a remedy for wrongful government action and that means, in effect, "to grant dictatorial power".[39]

Whatever is said about unmeritorious claims by would-be migrants, it has been a proud tenet of our legal system that it is open to all, even to non-citizens. Our stature as a nation would be diminished by any erosion of that principle. Further, to say that all applicants have access to administrative review by the migration tribunals is no answer since that right is a partial and incomplete one.

For the High Court to embrace this privative clause would be to ignore precedent. The reason for the traditional reluctance of the courts to give full effect to privative clauses is that by doing so they permit inferior courts or tribunals to exceed the statutory limits of their jurisdiction without check. If the ouster clause in the proposed migration legislation is upheld it would sanction the logical contradiction that a body with powers limited by statute may expand those powers at will.

That notion has always been anathema to common law courts of superior jurisdiction. Witness the now well-known exchange between the current Chief Justice of the High Court, Sir Gerard Brennan, and counsel appearing for Lorenzo Ervin in the special leave application against the cancellation of Ervin's entry visa. His Honour commented of Part 8 of the *Migration Act 1958* (Cth), which excludes judicial review of certain grounds of review, that it was

> a matter of the gravest constitutional importance ... that this Court does not have the jurisdiction to control unlawful acts committed by a Minister

and the argument put by Ervin's counsel that the High Court lacked jurisdiction in the matter was

> completely inconsistent with the notion of judicial review for it would isolate the Executive from judicial control in respect of acts done which are unlawful, and that cannot be, surely, the intention that one would either attribute to the Constitution or to the Parliament.[40]

Behind that comment is the belief in the value of judicial review, a belief which is shored up by the common law presumption of statutory interpretation that the jurisdiction of the courts should not lightly be taken away.[41] That presumption is given even stronger force in relation to

the administrative law jurisdiction by s.75(v) of the Constitution.

Finally, it would be misguided to believe that the Court would uphold the full import of the ouster clause because of the stature of the court or tribunal, or the expertise of the decision-maker in the subject matter of the decision - an argument often presented in the case of bodies in the industrial relations arena.[42] Neither of those pre-requisites - stature or specialist membership - applies in the case of the migration tribunals, and given the High Court's recent statement in *Craig v South Australia*[43] affirming the secondary status of tribunals, I see no reason for optimism about the degree of deference which the Court would be prepared to give to the relatively new migration tribunals.

3 Validity of the privative clause in relation to the Federal Court.

The privative clause is aimed principally at the Federal Court. How effective is it likely to be? Clause 476 of the Bill is designed to preserve so much of the Federal Court's jurisdiction under s 75(v) which the High Court also retains (see earlier discussion on the effectiveness of the privative clause in relation to the High Court's jurisdiction). In addition, however, the Federal Court's review powers over personal discretionary decisions by the Minister, and over decisions which have not been fully considered by the merit review tribunals are ousted. The questions to be answered are whether the ouster of the Federal Court's jurisdiction under s.75(v) will be coterminous with that of the High Court, and, if not, what is the ambit of each? Second, are the additional exclusions likely to be upheld?

In *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation*[44] it was held by majority (Morling and French JJ, Pincus J dissenting) that "it is apparent from the language of s 39B, its identity with that of s 75(v) and the second reading speech, that the intention of the legislature was to confer on the Federal Court the full amplitude of the original jurisdiction of the High Court under s 75(v)", subject only to the specific statutory restrictions in s 39B itself.[45] Their Honours went on, in relation to statutes post-dating the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 4 - the provision which nullified the effect of privative clauses in federal legislation in force at its commencement - "there will be a powerful presumption, in the absence of clear words to the contrary, that no such displacement, qualification or limitation is intended".[46] For as Morling and French JJ noted, the consequence for the High Court of any erosion of the Federal Court's jurisdiction would be that it would "effectively return it, contrary to the legislative intention, to the exclusive province of the High Court".[47]

The practical implications which their Honours discerned are a powerful disincentive to treating the Federal Court differently from the High Court. That disincentive has received an added impetus in recent times by the concatenation of High Court decisions (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[48] *Grollo v Palmer*,[49] and *Kable v Director of Public Prosecutions (NSW)*[50]) which have developed the concept of an integrated federal court system for the purpose of the exercise of federal judicial power.

A key element of these cases has been the requirement that courts, both federal and state, should continue in existence and by implication continue to be available for the exercise of their jurisdiction. Since the supervisory jurisdiction of the High Court and Federal Court is but one element of the exercise of federal judicial power, it can be postulated that the High Court might be prepared to find an implied constitutional right arising from these principles that the Federal Court, like the High Court, retain its jurisdiction in this area largely unfettered. Otherwise if the

Federal Court were muzzled by a judge-proof privative clause, that might effectively disable the High Court itself.

As to the specific Federal Court exclusory provisions, the comment under 4 on the success of limited privative clauses suggests that the time-limited element of the clause may well be upheld, and to require that the review jurisdiction should not be exercised until merits review rights are exhausted is not unreasonable.

4 Other options

There are other options for reducing the number of judicial review applications. However, the preliminary point should be made that any action may be premature. The government should take heart from three migration decisions[51] - the decisions in *Ozmanian*, *Wu Shan Liang* and *Guo Wei Rong* - which are likely to have a major impact on the claimed activism of the Federal Court in this jurisdiction. It will take eighteen months to two years before the effect of these decisions is fully manifested but they will undoubtedly result in a downturn in the number of decisions which the Federal Court will be willing or able to review and there is already anecdotal evidence that this is happening.

Assuming that positive steps are required, it is clear from the treatment of privative clauses in common law countries that limited privative clauses are more likely to be upheld by the courts.[52] If that history is heeded, one option would be for the limits of migration review to be spelt out by Parliament in legislation. There are clearly democratic reasons why this is a more satisfactory solution.[53] There are two proposals which suggest themselves (and I claim no originality in suggesting either):

- Parliament should list those decisions which it does not wish to be reviewed. It attempted a partial list in the Migration Legislation Amendment Bill (No 5) - but only of those decisions which would not be subject to the operation of the privative clause.[54] It should also be possible for it to schedule those areas of decision-making over which it would prohibit review. The list could be included in the *Migration Act 1958* (Cth) itself; or by adding to Schedule I of the *Administrative Decisions (Judicial Review) Act 1977 (Cth).* Limited deference, rather than denial, might better promote the purpose of restraint.

- Preferably, however, there could be instituted a review by leave procedure for migration decisions heard by the Federal Court. That would require an amendment to the *Judiciary Act 1903* (Cth) s 39B. The High Court successfully operates such a system, and a similar scheme could be introduced at the Federal Court. The criteria for its exercise could be spelt out in legislation. For example, the matters excluded might be questions of general importance to the migration jurisdiction; cases of manifest error by the tribunals; or those in which new evidence was available which could not have been produced in the earlier hearing.[55] Such a restriction should be more than adequate to produce the downturn in the number of Federal Court cases which the Minister is understandably anxious to achieve.

- A further option is to lay down statutory criteria for the exercise of the Federal Court's discretion to review decisions brought under either the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 10 or the common law jurisdiction imported under the *Judiciary Act 1903* (Cth) s 39B. At present, the only criterion for exercise of that discretion is found in s 10(2)(b), namely, that there is a concurrent application before the Federal Court or another court in the same matter; or an alternative avenue for review. It would be possible,

> perhaps solely for the migration jurisdiction, to identify further criteria which the Court should take into account when assessing the reviewability of such applications.

In this context, it is noted that the time limit of twenty eight days for review of applications which is contained in the Migration Legislation Amendment Bill (No 5) 1997 clause 477 would probably be effective. Time-limited provisions are generally upheld, particularly, as here, where there are alternative avenues for merits review.[56]

Conclusion

Privative clauses in common law countries represent a battleground between two of the three arms of government - the legislature and the courts - and between fundamental principles - the sovereignty of parliament and the rule of law, with its concomitant principle that all action by government and its officials must be lawful.

There are undoubtedly tensions between these principles but if the balance between them becomes skewed too far in favour of one or the other, history has shown that a democratic society is the loser.

If the legislation is passed, the High Court will have to pronounce on the validity of this privative clause. In doing so the High Court will need to comment on the ambit of the *Hickman* tests, read in the light of the constitutional rights in s 75(v). Justice French, quoting from the *Convention Debates*, had this to say of s 75(v):

> in moving the inclusion of what became s 75(v) in the draft Constitution in March 1898, Edmund Barton observed that the words of the provision "could do no more harm and might protect us from a great evil".[57]

Let us hope that that will be the epitaph of the High Court's deliberations.

Endnotes

1 Migration Legislation Amendment Bill (No 5) clause 474 (1).
2 Id clause 474(2)-(6).
3 Id clause 477
4 Id clause 476(1).
5 Id clause 476(2).
6 Id clause 476(4).
7 The Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, Second Reading Speech, *Hansard Debates, House of Representatives*, 3 September 1997, 7338.
8 That assumption has been fortified by the recommendation of the Senate Legal and Constitutional Legislation Committee in its report of October 1997 that the Migration Legislation Amendment Bill (No 5) 1997 be passed without amendment (Senate Legal and Constitutional Legislation Committee *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (No 4) 1997; Migration Legislation Amendment Bill (No 5) 1997* at 41).
9 The extent to which a privative clause can render less effective the supervisory jurisdiction over an "officer of the Commonwealth" under s 75(v) has not been definitely determined (*David Jones Finance and Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 470-471, 472, 473 per Pincus J). See also M Aronson & B Dyer *Judicial Review in Australia* Sydney, Law Book, 1996, 960.
10 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
11 The Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, Second Reading Speech, *Hansard Debates, House of Representatives*, 3 September 1997, 7338.
12 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Harris v Caladine* (1991) 172 CLR 84; *Polyukhovich v Commonwealth* (1991) 176 CLR 501; *Leeth v Commonwealth* (1992) 174 CLR 455; *Lim v Minister for Immigration* (1992) 176 CLR 1; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.
13 *David Jones Finance and Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 470 per Pincus J.
14 eg *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56.
15 [1969] 2 AC 147.
16 GL Peiris "Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law" (1982) *Public Law* 451, 455. See also M Aronson and B Dyer *Judicial Review of Administrative Action* Sydney, Law Book Co, 1996, 967.
17 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615.

18 (1990) 171 CLR 232.
19 Id 249.
20 M Aronson and B Dyer *Judicial Review of Administrative Action* Sydney, Law Book Co, 1996, 974.
21 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 143 ALR 55.
22 *Id* 74. See also *R v Metal Trades Employers Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248.
23 J Stone *Precedent and Law: Dynamics of Common Law Growth* Sydney, Butterworths, 1985, 68-70 quoted in R French "The Rise and Rise of Judicial Review" (1993) *UWALR* 120 at 124.
24 *O'Toole v Charles David* (1991) 96 ALR 1, 50 per Dawson J.
25 *Darling Casino Pty Ltd v New South Wales Casino Control Authority* (1997) 143 ALR 55, 75.
26 Id 74. See also *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* 1951) 82 CLR 208 at 248.
27 Id 56.
28 Id 74.
29 *David Jones Finance and Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 466-67 per Morling and French JJ, 466 per Pincus J.
30 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 126 (HCA)
31 *The Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 443 (HCA).
32 G L Peiris "Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law" [1982] *Public Law* 440, 455.
33 *Pearlman v Harrow School Governors* [1979] QB 56.
34 Id 69-70 per Denning LJ, Eveleigh LJ agreeing at 77.
35 M Aronson & B Dyer *Judicial Review in Australia* Sydney, Law Book, 1996, 970.
36 Sir A Mason "The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights" (1994) 1 *Australian Journal of Human Rights* 3.
37 Senate Standing Committee for the Scrutiny of Bills *Alert Digest No 10 of 1997*, 27 August 1997, 29-30. Peiris also commented that "the instinctive security engendered by judicial surveillance is an inarticulate premise of current judicial approaches to preclusive provisions" (G L Peiris "Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law" [1982] *Public Law* 451 at 464).
38 Jeffrey Barnes "Administrative Law: Privative Clauses - the Compromise We Had to Have" (1992) *Australian Business Law Review* 172. The effect of the privative clause, if upheld, is to give a right without a remedy, contrary to the classic adage, 'no right without a remedy". Administrative law does not deserve this treatment.
39 HWR Wade *Constitutional Fundamentals* (rev'd edn) London, Stevens, 1989, 83.
40 Transcript of special leave application, http://www.austlii.edu.au/au/other/hca/transcripts/1997/B29/2.html at 7.
41 D C Pearce and R S Geddes *Statutory Interpretation in Australia* (4th ed) Sydney, Butterworths, 1996, para 5.24.
42 *Attorney-General (Qld) v Riordan; Ex parte Lamsoon (Aust) Pty Ltd* (1997) 146 ALR 445 at 450 451 per Brennan CJ & McHugh J, at 469-470 per Kirby J.
43 *Craig v SA* (1995) 184 CLR 163.
44 (1991) 99 ALR 776.
45 *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 459-460 per Morling and French JJ, at 472-473 per Pincus J dissenting.
46 Id 460.
47 Ibid.
48 (1996) 138 ALR 220.
49 (1995) 184 CLR 348.
50 (1996) 138 ALR 577.
51 *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; and *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 144 ALR 567.
52 "The odd result ... is that a privative clause qualified by the insertion of a limitation is more successful in achieving the end of ousting judicial review than a privative clause which is expressed without reservation to be intended to oust judicial review." (M A Allars *Introduction to Australian Administrative Law* Sydney, Butterworths, para 5.144).
53 Jeffrey W Barnes "Administrative Law: Privative Clauses - The Compromise We had to Have" (1992) *Australian Business Law Review* 169, 174.
54 Migration Legislation Amendment Bill (No 5) cl 474(4) This provision specifies the decisions which are not subject to the operation of the privative clause in cl 474(1).
55 A similar list was developed by the Administrative Review Council in its *Better Decisions* report (*Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39, 1995, para 8.63, recommendation 97).
56 *Baulkham Hills Shire Council v Minister for Planning and Environment* (1982) 49 LGRA 236; *Re Canadian Pittsburgh Industries and International Association of Bridge, Structural & Ornamental Ironworkers, Local Union* (1977) 77 DLR (3rd) 581; *Smith v East Elloe Rural District Council* [1956] AC 736; *R v Secretary of State for the Environment; Ex parte Ostler* [1977] QB 122.

57 *Official Records of the Australasian Federal Convention Debates*, Vol 2, Melbourne Government Printers 1898, 1876 quoted in R French "The Rise and Rise of Judicial Review" (1993) 23 *UWALR* 121 at 122.

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