PRIVATIVE CLAUSES—LATEST DEVELOPMENTS

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Outline

On 15 August 2002 the Full Court of the Federal Court (Black CJ, Beaumont, Wilcox, French and von Doussa JJ) handed down its decision in five appeals heard together on 3-4 June 2002.[1] I will call these appeals collectively "the *Privative Clause cases"*. The appeals concerned the rights of visa applicants and visa holders under the *Migration Act 1958* (Cth). Each of the five judges delivered his own set of reasons for his decision. The complete judgement of the Court therefore in effect comprises some 25 sets of reasons for decision (more strictly, 22, since in three of the cases the Chief Justice simply agreed with von Doussa J). The Austlii computer print-out of the case runs to 204 pages, and 676 paragraphs. Central to each case, however, is the privative clause contained in section 474 of the *Migration Act*.

I will begin with some general comments on what a privative clause is, and how it works. I will then move on to a brief account of the history of privative clauses in the jurisprudence of the High Court, and then make some remarks on the various qualifications on how a privative clause operates. With that, I shall then be in a position to offer some more detailed comments on the significance of the recent *Privative Clause cases*.

1. Introduction

In order to understand the rationale of privative clauses, it is necessary to take a step back to the concept of judicial review. There is a well-developed principle of the common law that the courts can use prerogative writs to control excesses of jurisdiction by inferior tribunals and, in certain cases, bodies with obligations to act judicially. This extends to refusals to exercise jurisdiction. It also has developed to matters not always classified as jurisdictional such as denial of natural justice (or absence of procedural fairness as it is now often called), asking the wrong question, taking into account irrelevant considerations, failing to take into account relevant considerations, and error of law on the face of the record.

In England (subject now to some EU considerations), all this can be altered by legislation. In Australia where we have a Parliament with limited powers and a written Constitution, it is not so easy. Section 75(v) of the Constitution confers original jurisdiction on the High Court in all matters in which certain prerogative writs are sought against officers of the Commonwealth. That jurisdiction cannot be taken away but its content can be altered.

Let me illustrate with an extreme example. The Federal Court has no power to grant a divorce. The High Court could issue a writ of Prohibition if it were to try. Parliament could not legislate to prevent the High Court from doing so. However, Parliament could confer

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jurisdiction on the Federal Court to grant divorces. Prohibition would then not lie because the court would be acting within jurisdiction.

The next question is one of construction. Suppose Parliament enacts "Prohibition shall not lie to prevent the Federal Court granting divorces". Which side of the line does this fall on. The answer lies in the *Hickman* doctrine.

The High Court decided *R v Hickman, ex parte Fox and Clinton*[2] in 1945. The National Security (Coal Mining Industry Employment) Regulations conferred jurisdiction on Local Reference Boards to settle disputes between employers and employees "in the coal mining industry". Mr and Mrs Fox were haulage contractors who sometimes carried coal. They sought prohibition in the High Court to prevent a Local Reference Board hearing a dispute involving them. They were successful notwithstanding a clause in the regulations providing that a decision of a Board:

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

The decision was unanimous but Dixon J set out some principles in his judgment which have become enshrined in our jurisprudence and which have been described by the High Court as "classical".[3] The statement (at pages 614-5) is as follows:

> The particular regulation is expressed in a manner that has grown familiar. Both under Commonwealth law, and in jurisdictions where there is a unitary constitution, the interpretation of provisions of the general nature of reg.17 is well established. They are not interpreted as meaning to set at large courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority, provided always that the decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

So that is the answer to the question about the validity of a provision that prohibition shall not lie to prevent the Federal Court granting divorces. We read it as meaning not what it says but as saying that "the jurisdiction of the Federal Court is extended to permit it to grant divorces". In his submissions in the recent *Privative Clause cases*, Bret Walker SC submitted that this meant that a *Hickman* clause not only was read as not meaning what it said but also prevented another provision (the provision describing the jurisdiction of the court) meaning what it said.[4]

That is to say, a *Hickman* clause has the effect--subject to the three qualifications stated by Dixon J--of supplementing the jurisdiction of the court or the power of a decision maker. As Black CJ put it in his reasons for decision in the *Privative Clause cases*, the "implicit effect" of a *Hickman* clause is that, "where certain provisos are met, the area of valid decision-making is expanded".[5]

That indeed was the legislative intention when a *Hickman* clause was inserted into the *Migration Act*. The Minister said in his second reading speech:

> Members may be aware that the effect of a privative clause such as that used in *Hickman's* case is to expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently.[6]

In the result, the privative clause in the Migration Act represents the highest example of co-operation between the courts and the Legislature. A line is to be drawn as to what words have a particular effect. The courts have told the Legislature that certain words will be construed as falling on a particular side of the line and the Legislature has taken the hint and used those precise words. There are strong reasons why the courts should not change their minds.

2. The subsequent history of *Hickman* clauses in the High Court

Dixon J's analysis seems to pass over .the literal words of the *Hickman* clause, which are quite emphatic: "shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever". This was the result of what academic commentators have described as a "High Court compromise".[7] The compromise, which quieted somewhat an argument that had existed since the early years of the Federation, was between the power of the Parliament to take steps to ensure the decisions of government officials are final on the one hand, and ability of the courts to control the exercise of executive power on the other. The effect of Dixon J's exposition in *Hickman*'s case is to acknowledge the ability of the legislature to ensure a degree of finality in decision making; but also to assert that the courts retain a measure, albeit a lesser measure, of control over certain types of error in decision making.

In the years following *Hickman's* case Dixon J repeated and re-affirmed his analysis in a number of High Court cases dealing with World War II national security regulations[8], and industrial legislation.[9] At first, the cases do not show the other members of the Court fully embracing his analysis (although they by no means show the other members of the Court rejecting it either). Aronson and Dyer suspect that in the years following *Hickman's* case Dixon J's analysis may have "commanded no more than lip service".[10] If this is so, Dixon J's lips must have moved authoritatively enough, for in time his doctrine came to be affirmed by other members of the Court[11] and indeed by 1960 Menzies J was able, as I have already said, to describe it as "classical".[12]

Even so, it is true that for fully three decades after *Hickman's* case, the scope and effect of Dixon J's analysis--and in particular the three limits he placed on the legislature's power to supplement the powers of decision makers--was relatively little explored. Sir Anthony Mason has observed that:

> The scope and content of the three provisos in the *Hickman* principle have not been examined in any detail in subsequent decisions of this Court.[13]

The *Hickman* doctrine began its re-ascent to prominence in the early 1980s. Since then, several High Court cases have reaffirmed the ability of the legislature, by means of a *Hickman* clause, to "stretch the jurisdiction which would otherwise be conferred" on a decision maker.[14]

3. The three express exceptions

What is the extent of this stretching of jurisdiction or power?

We must begin with a caveat: as we shall see, giving an exact answer to this question in any particular case always resolves down to a matter of statutory construction having regard to the relevant legislation. A *Hickman* clause should not be construed in the abstract. The clause must be considered in the context of the statute that surrounds it. It must be ascertained how the clause interacts with the other provisions in the statute.

That said, some general propositions can be stated as to the expansionary effect on jurisdiction of a *Hickman* clause. Subsequent cases which have had to interpret privative clauses, including the recent *Privative Clause cases*, involved clauses "in substantially the same terms" as the clause used in *Hickman's* case.[15] So there is a deal of case law that sets out the basic position.

Most important, and despite the apparently emphatic nature of the words used, a *Hickman* clause does not make an administrative decision utterly impervious to judicial review. A *Hickman* clause does not, to use Dixon J's words, "set at large" decision-makers and empower them to do absolutely anything they please. In a case not long after *Hickman*, in which Dixon J reaffirmed his earlier analysis, he said that a privative clause cannot be construed as intending to provide that a decision-maker's powers are "absolutely unlimited".[16] The legal effect of the *Hickman* clause is to expand the powers of decision-makers, or the jurisdiction of courts and tribunals, not to make them legally omnipotent.

There is an obvious reason for this. A decision-maker that is "set at large" could, in an extreme case, be empowered to subvert the very legislation that he or she is supposed to administer. Take a hypothetical dog-licensing act. It empowers dog-inspectors to fine dog-owners who do not have dog licences. It is no part of the purpose of this statute to allow dog-inspectors to fine cat-owners. But suppose our hypothetical statute contained a provision that made the actions of dog-inspectors completely impervious to every kind of legal challenge. The dog-inspectors could, even though under no misunderstanding about the difference between cats and dogs, perversely seek out cat-owners and fine them. Or the dog-inspectors might exempt their own families without good reason. More extremely, one might purport to grant a divorce. Such behaviour would tend to subvert the very purpose of the legislation the dog-inspectors are charged with administering.

The problem is solved by the three "exceptions" to the operation of a *Hickman* clause stated by Dixon J in his "classical" formulation.

In the first place, there must be a bona fide exercise of power: decision-makers must act in good faith and so conscientiously apply themselves to the questions before them. The *Hickman* clause has expanded the power of decision-makers, but not to the extent that they may behave dishonestly, or out of malice.[17] The presence of a standard-type *Hickman* clause will not give our hypothetical dog-inspector the power to issue fines merely out of spite. It has been suggested that "bona fides" includes more than merely the absence of dishonesty, spite or malice. One judge has recently suggested that bias might mean the absence of a bona fide exercise of power[18]; another has suggested that being motivated by an improper purpose might mean the absence of bona fides.[19] However, the content of the concept of good faith has not yet been fully explored.[20] In 1863, Lord Justice Turner of the English Court of Chancery could find no lack of bona fides in a local authority's decision to erect a urinal adjacent to the wall of Buckingham Palace. However, he doubted that the authority would be able to "erect a urinal in front of any gentleman's house". "It would be impossible", his Lordship said, "to hold that to be a bona fide exercise of the powers given by statute."[21] The law of bona fides has not advanced sufficiently since then to enable us to pronounce, with certainty, that he was wrong but we may at least have our doubts. What we do know, at minimum, is that an allegation of lack of good faith is a qualitatively different thing from a complaint of mere poor decision making.[22] Heerey J has said, and Beaumont J in the *Privative Clause cases* has agreed with him, that a charge of lack of bona fides involved "a serious question involving personal fault on the part of the decision maker". There is High Court authority, in the *Hickman* context, for the proposition the true test is whether there has been "an honest attempt to deal with the subject matter confided" to the decision maker.[23]

In the second place, a *Hickman* clause will only protect a decision if, to use Dixon J's words, "it relates to the subject matter of the legislation". Dixon J's third qualification is like it[24]: the decision must be "reasonably capable of reference to the power given to the body". There may be a difference between these two exceptions but, if there is, it is too subtle for me to detect it. The best one can say is that one relates to the statute as a whole and one to the provisions conferring jurisdiction. They mean that it is enough that the decision, on its face, does not exceed the authority of the decision maker.[25] That is a less demanding test than whether there was a "jurisdictional error" of the kind discussed by the House of Lords in *Anisminic*[26] and by the High Court in *Craig v South Australia.*[27] That class now seems wide enough to include all of the staple kinds of errors of law known to administrative law: misconstruing a statute and thereby asking the wrong question, failing to afford procedural fairness, taking into account irrelevant considerations, failing to take into account relevant considerations, and so on. Errors such as this will generally not be sufficient to fall within the second or third of Dixon J's qualifications. There must be an error of a much grosser kind. Indeed, if *Anisminic*-type errors were incapable of validation by a privative clause, then the privative clause would be drained of effect. And indeed, an argument in the *Privative Clause cases* to the effect that all "jurisdictional errors" of the *Anisminic* kind were beyond curing by a *Hickman* clause was squarely rejected.[28] The classic example of the second and third exceptions is *Hickman* itself where lorry owners who occasionally carried coal were held not to be subject to a body having jurisdiction in relation to the coal industry. Our dog-inspector who fines the cat-owner or grants a divorce would fall into the same category.

To summarise the original exceptions, a *Hickman* clause is not a shield that protects a decision maker who acts in bad faith, or makes a decision completely unrelated to matter at hand, or whose decision cannot on any view be related back to the power the decision-maker has been called upon to exercise. But the clause does remove the limitations on decision-making power otherwise imposed by many, if not all, of the other kinds of "jurisdictional errors", in the broad sense of the term, known to administrative law.

4. The possible fourth exception

So much for the three (or two) qualifications on the jurisdiction-expanding effect of a *Hickman* clause that are expressly mentioned in Dixon J's seminal exposition. Some have said, however, that in certain circumstances there may be a fourth (or third) qualification. An argument in support of this view might go like this. Every statute deals with a more or less confined topic.[29] Statutes that confer power on decision-makers empower them to act in certain circumstances. It may be that the provisions of a statute are such that for a decision maker to act in a certain way may undermine the statute. Let me again use an extreme hypothetical example to make the argument clear. Suppose our Dog Licensing Act provides that the inspector must not issue a dog licence where the owner already holds three dog licences. If the *Hickman* clause means that the inspector can do so, the statute may be at risk of becoming self-contradictory. It could be argued that this is a basic reason why a *Hickman* clause cannot be given literal effect. As Dixon J himself said in *Hickman's* case:

> In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them.[30]

The contrary argument is that the competing provision is read as merely indicating what the decision maker must attempt in good faith to do rather than creating a jurisdictional pre-requisite. Thus it has been said of particular statutes that they can impose "imperative duties or inviolable limitations or restraints" on a decision maker above and beyond Dixon J's three.[31] Whether a statute does in fact do so will always depend on the statute in question. If there truly is a "fourth exception", the wording of each particular statute will govern the

degree to which the express words of a *Hickman* clause must be adjusted so as to prevent the statute from falling into self-contradiction.[32]

Thus, in the end, it a matter of statutory construction. "The apparent inconsistency should be resolved by an attempt to arrive at the true intention of the legislative document containing the two provisions considered as a whole".[33] This is indeed what Black CJ accepted in the *NAAV* cases. He extracted from the "long line of High Court authority" the proposition that:

> Essentially what is involved is the reconciliation of apparently inconsistent statutory provisions.[34]

For this reason, the so-called "fourth" exception to *Hickman* will not always operate. Indeed, the general position may be that, by inserting a *Hickman* clause into legislation, Parliament is indicating that decisions of the relevant kind should be treated as invalid if, and only if, one of the three *Hickman* conditions is not met. The use of a *Hickman* clause would seem to evince a legislative intention that the only restraints that are to be placed on a decision maker are the "classical" three enunciated by Dixon J, and that there are no other "inviolable limitations". (This is one of the submissions that the Minister for Immigration and Multicultural and Indigenous Affairs took in relation to the *Migration Act* in the *Privative Clause cases*.)

5. The recent Federal Court decisions (ie the five *Privative Clause cases*)

With that I turn to the detail of the decisions of the Full Court of the Federal Court, in the recent five *Privative Clause cases.*

NAAV of 2002

The first case is *NAAV of 2002*. The appellant was an applicant for a visa whose application had been refused. The Refugee Review Tribunal had affirmed that refusal. The appellant argued before the Federal Court that he had not been accorded procedural fairness before the Tribunal. This was thus the most significant of the five cases. It required the court to decide whether the privative clause precluded prerogative relief for the denial of natural justice.

The appellant had claimed that he had been held in a prison in Burma; but that, as he had been hooded for a deal of that time, he was unable to remember details about the prison. The Tribunal read first hand reports of conditions in the prison in question, including by Amnesty International. The Tribunal in its reasons, said:

> I can find no reference to prisoners being hooded whilst being interrogated over the time as the applicant claims he was. Indeed, given the nature of the regime operating in Burma, it is difficult to understand the purpose of hooding prisoners like the applicant. The applicant's lack of knowledge about the prison, inconsistent information and his lack of information in relation to matters of prison life confirmed my view that he was not arrested and then detained in Insein prison as he claimed.[35]

The appellant also gave an account of travelling by boat from one part of Burma into Bangladesh, saying that the journey took 15 hours. The Tribunal consulted the Microsoft Incarta Interactive World Atlas 2000 and found that the distance of the journey was so great as to make it "implausible that the journey took just 15 hours". The Tribunal also noted some other geographical difficulties with the applicant's account.[36]

Finally, the appellant gave an account of a 100 metre long bridge being destroyed by fire. When questioned about the incident, the appellant said that the bridge was not a long one. The Tribunal said:

> From my own military experience, the applicant's account of the bridge being small at 100 metres long and being destroyed by fire is a nonsense.

The sources of information relied upon by the Tribunal--the prison accounts, the atlas and the Tribunal's own experience--were not disclosed by the Tribunal to the appellant in advance of its decision. This was despite the fact that during the hearing, the Tribunal made some comments to the effect that it would not be considering undisclosed independent information,[37] although Gyles J held that this was effectively neutralised by some subsequent comments by the Tribunal. The result was said to be that the appellant was not given an opportunity to address the Tribunal's concerns on these points. The appellant therefore argued that the Tribunal had not afforded him procedural fairness, and its decision was therefore invalid.

By a 3-2 majority, the court rejected this argument. Von Doussa J, with whom Black CJ agreed on this point, accepted that natural justice requirements of procedural fairness had indeed not been met in the appellant's case. However, in His Honour's opinion, the rules of procedural fairness had been excluded by section 474.[38] Beaumont J did not decide whether there had been a breach of the common law rules of procedural fairness. To do so was unnecessary, he said, because section 474 operated to prevent the Court from granting prerogative relief in cases of procedural deficiencies.[39]

Wilcox and French JJ dissented.

Wilcox J held that, as a matter of statutory construction, and notwithstanding the words of the *Hickman* clause, the words of the statute did not evince a clear legislative intention to exclude the rules of procedural fairness.[40] His Honour noted that there might be cases where the Tribunal could act on undisclosed information. However, given the Tribunal's earlier comments to the effect that it would not be considering undisclosed independent information, this was not one of them.[41] The Tribunal's decision was therefore invalid by reason of want of procedural fairness, notwithstanding section 474.

The other judge in dissent, French J, held that while section 474 created "a climate in the Act which is hostile to the general application of the common law procedural fairness"[42], the rules were not wholly excluded. There was in the appellant's case, he said, "a departure from the minimum standards of procedural fairness". In His Honour's opinion, "[t]he unfairness of what occurred is so clear and its impact on the outcome of the case so obvious that it may be said it was a breach which vitiated the exercise of the Tribunal's power".[43]

NABE of 2002

The second case involved a Sri Lankan national whose visa application had also been refused. He claimed that he had had some involvement with the Liberation Tigers of Tamil Eelam, an anti-government group. For this reason, he said, a pro-government group had detained him and mistreated him. He applied for a protection visa and was refused. The Refugee Review Tribunal affirmed the decision to refuse.

It appeared from the Tribunal's reasoning that it had misunderstood the applicant's story. The Tribunal thought that the applicant's claim was that he had been detained and mistreated by the authorities by reason of involvement with the pro-government group. Such a claim, of course, seems inherently implausible: why would the authorities mistreat someone who supported the government?

The applicant therefore claimed that the Tribunal, by misunderstanding and failing to genuinely and realistically consider his claims, had failed to exercise its jurisdiction. Moreover, he said that the Tribunal had acted on irrelevant considerations.

All five justices rejected this argument. The Tribunal's error, they said, was merely one of fact.[44] Moreover, at least two of the justices were of the opinion that even if this error was actually a "jurisdictional error" of the *Anisminic* type (as opposed to a mere error of fact), section 474 would have validated the decision in any event.[45] Each of the other three justices were either ambiguous on this point or did not express a view.[46]

Ratumaiwai

In the third case, *Ratumaiwai,* an applicant for a visa claimed that the Tribunal had misinterpreted the statutory criteria for the grant of a visa. The applicant claimed to be, in the words of the statute, a "special need relative" of his brother, who was an Australian resident and who was suffering osteoarthritis of the knees. The relevant statutory criteria for being a "special need relative" included being "willing and able to provide substantial and continuing assistance" to the Australian resident. The applicant said that the nature of the "assistance" that he could provide to his brother was financial and emotional. The Tribunal held that this kind of "assistance" does not fall within the statutory criteria. The applicant argued that the Tribunal had erred in law by misconstruing the statutory criteria.

All five justices rejected this argument. Each of them had, at the least, some doubts that the Tribunal misconstrued the statutory criteria in a relevant way.[47] Three judges added that any misconstruction that would have amounted to a "jurisdictional error" was shielded from invalidity by section 474 in any event.[48]

Turcan

In the fourth case, *Turcan*, a delegate of the Minister took steps to cancel a visa after forming the view that the visa holder had given false information in support of his initial visa application.

There is a provision in the Act that allows the Minister to cancel a visa on the basis of incorrect information having been given by the visa holder.[49] However, the Minister's delegate did not rely on this ground. She relied on a different ground, namely that she was "satisfied" that the initial grant of the visa was "in contravention" of the *Migration Act*.[50] For technical reasons I shall not burden you with, it was held that she was wrong. As a matter of law the initial grant of the visa, though it may have been made on the basis of false information, was not in contravention of the *Migration Act*.

Thus the delegate's "satisfaction" that this particular ground for cancellation was available to her was based on a wrong interpretation of the statute. Mr Turcan argued that the delegate's decision was therefore invalid: she purported to exercise a power that was not relevantly available to her.

By a 3-2 majority, the Court found for Mr Turcan. The result turned on whether or not the *Migration Act*, and in particular section 474, operated so as to make final and conclusive the delegate's "satisfaction" that the relevant ground for cancellation existed -- even if her satisfaction was based on a misunderstanding of the statute.

Von Doussa and Beaumont JJ took the view that, by reason of section 474, the delegate's satisfaction was beyond challenge--even if tainted by error of law. Von Doussa J said:

> In the present case I consider … [the relevant provision of] the Act should be construed as extending authority and power to the Minister (or the Minister's delegate) to reach an unchallengeable state of satisfaction as to the matters therein specified, provided that the three *Hickman* provisos are all fulfilled.[51]

However, a majority of the Court disagreed. The majority held that, to be valid, the delegate's satisfaction needed to be untainted by a mistake of law. French J said:

> Where the Minister or delegate relies upon a ground for cancellation which does not apply because he or she mistakes the law, the requisite state of satisfaction does not exist. So the delegate may not be satisfied of the breach of a section wrongly construed.[52]

Thus (in the majority's view) in this context section 474 only operated to protect a decision to cancel a visa that was based on a correct interpretation of the availability of the statutory grounds for cancellation.

How is it possible that section 474 can protect some erroneous decisions and not others? It is a matter of statutory construction: in reconciling the literal words of section 474 with other statutory prescriptions in the Act, in some places section 474 may take precedence and in others it arguably does not. It will be a matter of interpretation as to which provisions must give way, and to what extent. In the opinion of the majority, the requirement that the Minister's delegate's "satisfaction" that the relevant ground of cancellation was legally available was more virile than section 474. Black CJ thought the requirement was such as to be an "inviolable limitation" upon the power to cancel a visa.[53] Without it, the power to cancel was simply not triggered.

In a sense, the reasoning in *Turcan* is reminiscent of the line of cases following the decision of the High Court in *R v Connell, ex parte The Hetton Bellbird Collieries Limited*[54] where it was suggested that, where a decision-maker's power was conditioned on his or her being satisfied of a fact, that satisfaction was a jurisdictional pre-requisite so that if there was an error of law in reaching that satisfaction, it could be corrected by a prerogative writ. This has not been universally accepted but if it is not merely accepted but actually applied as a *Hickman* exception, it will represent a serious hazard for the effectiveness of *Hickman* clauses. It is, with respect, difficult to see how this doctrine can rise to that level.

Wang

In the fifth and final case a delegate of the Minister purported to cancel the appellant's visa after forming the view that the appellant's initial visa application had been supported by "bogus" documentation. The appellant claimed that the Minister's delegate had failed to comply with a statutory requirement in section 129 of the Act the effect of which was to require the appellant to be given notification of which documents in particular (for the appellant has submitted a number of them) the Minister's delegate considered to be "bogus".

The court, again by the same 3-2 majority, upheld this argument. The reasons of the majority and minority were roughly the same as in *Turcan*.

The majority took the view that the statutory notification requirement in section 129 was so fundamental a precondition to the exercise of a power to cancel a visa that, notwithstanding section 474, its absence was fatal to the cancellation decision. According to Black CJ, it is "one of the very few procedural requirements in the Act that have to be satisfied before the decision-maker's power is attracted, and the expansive effect of s 474(1) is activated."[55] According to French J, "[t]he internal logic of the scheme points to notification under section 129 as one of its essential elements".[56] Wilcox J agreed with the description of the notification requirement as a "jurisdictional fact prescribed by the Act".[57]

To the minority, however, section 474 trumped the statutory notification requirement. Otherwise, the object of section 474 would be defeated.[58] A "blatant disregard" of the notification requirements might mean that a decision to cancel was not a bona fide exercise of power, and therefore beyond the protection of a *Hickman* clause.[59] But that was not suggested in this case.

Summary of cases

In summary, then, in two of the cases the position of the Minister was, broadly speaking, upheld by all five judges. In one case it was broadly upheld by a 3-2 majority. In the remaining two cases, the position of visa-holders were upheld by a 3-2 majority.

Analysing the result by reference to the judges, Beaumont and von Doussa JJ found for the Minister in all five matters. Black CJ found for the Minister in 3 of the matters, and against him in the other two. Wilcox and French JJ found for the Minister in two of the cases, and against him in the remaining three. The Chief Justice was therefore the "swinging judge" who made the difference in the cases decided by majority.

6. Significance of the reasoning in the Privative Clause cases

So much for the detail of the cases. At a more general level, what is their significance? There are three general areas I should briefly like to touch on.

In the first place, there is the effect of a *Hickman* clause on what I described earlier as "the staple kinds of errors known to administrative law"—for example the failure to accord procedural fairness. So far as the *Privative Clause cases* concerned claims of a failure to afford procedural fairness, a majority of the Court (Black CJ, Beaumont and von Doussa JJ) held that, to the extent that there had been a failure to afford common law rules procedural fairness in the cases before them, that had been cured by the *Hickman* clause.[60] On the other hand Wilcox J (in dissent on this point) held that, considering the provisions of the statute as a whole, there was no sufficiently clear legislative intention to exclude the obligation to provide procedural fairness in decisions affecting visa entitlements. There was, therefore, still an obligation to provide procedural fairness.[61] Somewhere in between these two positions was French J. He said that:

> Broadly speaking the interpretive force of s 474 may be taken to create a climate in the Act which is hostile to the general application of common law procedural fairness. It cannot be taken to have excluded it altogether in all cases. In some cases a want of procedural fairness will amount to a failure to exercise the relevant power for other reasons such as bad faith or failure to comply with an essential requirement of the statute. In some cases the power to be exercised by an official decision-maker may be so dramatic in its effect upon the life or liberty of an individual that, absent explicit exclusion, attribution of an implied legislative intent to exclude procedural fairness would offend common concepts of justice…[62]

Thus a majority of the Court held that, in the particular statutory context of the *Migration Act*, the effect of the *Hickman* clause was to expand the power of decision-makers by removing, or at the very least (according to French J) lessening, the limitations that would otherwise be imposed by the common law rules of procedural fairness. And indeed, there are tolerably clear indications that the thrust of the majority reasoning applies similarly to matters such as misunderstanding a fact, taking into account irrelevant considerations, and failing to take into account relevant considerations.

In the second place, there is the content of the requirement to act bona fide. I have already said that this is a relatively undeveloped area of law. It may be that there will be an

increasing tendency among litigants to try to fit alleged errors into the category of bad faith. Indeed, in one of the five *Privative Clause cases* a visa-holder argued that the errors of which he complained amounted to bad faith on the part of the decision maker. The nature of his complaints seemed to fit more comfortably into the categories of failure of procedural fairness or misconstruction of a statute. The High Court has not yet spoken authoritatively on how great the area of overlap is between bad faith and other categories of legal error in decision making. Only French J seemed to clearly countenance a potentially significant degree of overlap.[63] The opinions of the other justices in the *Privative Clause cases* is less clear. It is an issue which may arise in future cases. In any event, as I suggested earlier, the concept of bad faith may not be so elastic as some have suggested.

In the third place, there is the so-called fourth exception to the effect of *Hickman* clauses. Whether there are, in the *Migration Act*, "inviolable limitations" on the exercise of administrative power beyond the classical three expressed by Dixon J, and, if so, what they are generated a diversity of comment among their Honours.

Black CJ took the view that a statute could be such that it contained inviolable limitations that a *Hickman* clause could not relax. The test, in his view, was whether there were limitations on decision-making power that are essential to the structure of a statute:

> Constitutional considerations aside, the cases where "inviolable limitations" have been identified by the High Court can be seen, however, as cases in which, if the legislation were interpreted in a particular way, essential structural elements created by the legislation would be violated, or else some other quite fundamental aspect of the legislation would change its character in a way and to an extent that the Parliament could not be taken to have intended. [64]

Von Doussa J, with whom Black CJ and Beaumont J expressed general agreement, spoke of a "jurisdictional factor that attracts the jurisdiction" of the decision maker.[65] He cited the language of Dixon J to the effect that a decision-maker must not contravene a "final limitation upon the powers, duties and functions" of the decision maker.[66] However, von Doussa J added that, in the context of the *Migration Act*:

> the jurisdictional factors that will attract the authority and powers of decision makers in the sense described in a particular case will be few.

One such factor would be, he said, the making of a visa application. That is a very rudimentary requirement. It may therefore be that such "jurisdictional factors" are of such a basic kind as to be unlikely greatly to tax decision-makers.[67] Indeed, von Doussa J suggested that the so-called fourth condition may not be significantly different from one of the three classical limitations, namely that a decision must be reasonably capable of reference to the power given to the decision maker:

> Whether the "fourth condition" stands separately or is encompassed within the three *Hickman* provisos, the consequence of the condition is the same. [68]

The Chief Justice agreed that the inviolable limitations in the *Migration Act* were very few. He nonetheless differed from von Doussa J in holding that in two of the five cases, certain statutory requirements in the visa application process (one of them of a procedural kind) were of such importance as not to be relaxed by the *Hickman* clause.[69] In the upshot, Wilcox and French JJ reached similar conclusions, although their reasoning was not the same.[70] Thus an authoritative test, for determining whether or not a statute with a *Hickman* clause contains additional "inviolable limitations" on decision-making power awaits authoritative articulation (if such a test is possible). This may be a reason for rejecting the "fourth exception".

Conclusion

All in all, then, in many respects (and leaving aside the constitutional issues raised by the case, which I have not touched upon), the decisions in the *Privative Clause cases* represent an application of settled *Hickman* doctrine.[71] As Wilcox J put it, the use of the standard *Hickman* clause words in section 474 of the *Migration Act* "is code for an instruction to apply the line of authority stemming from *Hickman*".[72] To apply that line of authority is what all the members of the Court sought to do.

The resulting analysis by the various members of the Court was (with the possible exception of Wilcox J) very broadly in a similar, though by no means identical, direction. As I have said, cases involving *Hickman* clauses ultimately resolve down to issues of statutory interpretation a subject on which, par excellence, judges can disagree. So it is in this case. Notwithstanding a very broad agreement as to the general effect of a *Hickman* clause, there were some significant points of difference among their Honours.

Thus the recent *Privative Clause cases*, while resolving a number of important issues concerning *Hickman* clauses, and in particular section 474 of the *Migration Act*, have left some matters without (as yet) an authoritative resolution. That may be unavoidable given the somewhat painstaking and incremental work of statutory interpretation involved in *Hickman* clause cases. The fortieth chapter of Genesis has Joseph asking, rhetorically, "Do not interpretations belong to God?" It may be in any event, that for the rest of us it is slower and more prosaic work.

Endnotes

1 *NAAV v MIMIA*, *NABE v MIMIA*, *Ratumaiwai v MIMIA*, *Turcan v MIMIA* and *Wang v MIMIA* [2002] FCAFC 228.

2 (1945) 70 CLR 598.

3 *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 455 (Menzies J)

4 See also *The Privative Clause cases*, [2002] FCAFC 228, [612] (von Doussa J).

5 *The Privative Clause cases* [2002] FCAFC 228, [21] (Black CJ), [633], [644] (von Doussa J); cf [354] (Wilcox J). Brennan J has said that a *Hickman* clause "expands the powers" conferred on a decision maker: *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 275; and see also *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 194 (Brennan J): "expanded".

6 Quoted in *The Privative Clause cases* [2002] FCAFC 228, [8] (Black CJ), [397] (French J), [604] (von Doussa J).

7 M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed) (2000), 689. In *The Privative Clause cases* [2002] FCAFC 228, [92]-[100], Beaumont J followed Wade and Forsyth in tracing the doctrine in *Hickman's* case back to the decision of the Privy Council in *The Colonial Bank of Australasia* (1874) LR 5 PC 417, see esp 542-543. Given the numerous comments as to the contrived nature of the "compromise", it is interesting to note Dixon J's claim in *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387, 400 that "[t]here is nothing artificial in such an interpretation" (ie his) of a *Hickman* clause.

8 *The King v The Commonwealth Rent Controller; Ex parte National Mutual Life Association of Australia Ltd* (1947) 75 CLR 361, 369 (Latham CJ, Dixon J); *The King v Central Reference Board; Ex Parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123, 146 (Dixon J); *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387, 398, 400 (Dixon J).

9 *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 249 (Dixon J); *The Queen v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 119 (Dixon CJ, Williams, Webb, Fullagar JJ); *Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 443, 446 (Dixon CJ).

[10] M Aronson and B Dyer, *Judicial Review of Administrative Action* (2nd ed) (2000), 689, 692.

[11] *The Queen v Kelly; Ex parte Berman* (1953) 89 CLR 608, 630-631 (Kitto J); *The Queen v The Members of the Central Sugar Cane Prices Board; Ex parte The Maryborough Sugar Factory Ltd* (1959) 101 CLR 246, 255 (Dixon CJ, Kitto and Windeyer JJ*); The Queen v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219, 252-253 (Kitto J); *North West County Council v Dunn* (1971) 126 CLR 247, 269 (Walsh J).

[12] *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 455 (Menzies J).

[13] *O'Toole v Charles David Proprietary Limited* (1991) 171 CLR 232, 249; and see *The Privative Clause cases* [2002] FCAFC 228, [297] (Wilcox J).

[14] *The Queen v Coldham; Ex parte Australian Workers' Union* (1982) 153 CLR 415, 421 (Murphy J) and see also 418 (Mason ACJ, Brennan J); *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 251 (Mason CJ), 269, 275 (Brennan J), 286 (Deane, Gaudron, McHugh JJ); *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 179-180 (Mason CJ), 210-211 (Deane and Gaudron JJ),

[15] The authorities are collected by Black CJ in the *Privative Clause cases* [2002] 228, [7].

[16] *The King v Commonwealth Rent Controller; Ex Parte National Mutual Life Association of Australasia Ltd* (1947) 75 CLR 361, 369 (Latham CJ, Dixon J).

[17] See, most recently, *SBAP v Refugee Review Tribunal* [2002] FCA 590, [49] (Heerey J): "Good faith or what I think is the same thing, the absence of bad faith, is not a term of art. In the context of administrative decision-making bad faith is a serious matter involving personal fault on the part of the decision-maker going beyond the errors of fact or law which are inevitable in any such process…The ways in which bad faith can occur are infinite and no comprehensive definition is possible. Nevertheless it can be said that the presence or absence of honesty will often be crucial".

[18] *NAAX v MIMA* [2002] FCA 263 (Gyles J).

[19] *SBAP v Refugee Review Tribunal* [2002] FCA 590 (Heerey J); and see also HWR Wade and CF Forsyth *Administrative Law* (7th ed) (1994), 439-440, which perhaps gives too wide an interpretation of "bad faith". In Australia at least, a finding of absence of bona fides (at least in the *Hickman* context) "will be rare and extreme": *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 287 (Deane, Gaudron and McHugh JJ).

[20] *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 249 (Mason CJ). See also *Smith v East Elloe Rural District Council* [1956] AC 737, 770 (Lord Somerville): "Mala fides is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained in the region of hypothetical cases. It covers fraud or corruption".

[21] *Biddulph v The Vestry of St George, Hanover Square* (1863) 33 LJ Ch 411, 417.

[22] *NAAP v MIMA* [2002] FCA 805 (Hely J).

[23] *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387, 398, 400 (Dixon J); and see *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 249-250 (Mason CJ).

[24] *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 287 (Deane, Gaudron, McHugh JJ).

[25] *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 249 (Dixon J).

[26] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 (Lord Reid).

[27] *Craig v South Australia* (1995) 184 CLR 163, 176-179 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).

[28] *The Privative Clause cases* [2002] FCAFC 228, [30] (Black CJ), [111]-[112] (Beaumont J), [636]-[638] (von Doussa J). See also Wilcox J at [374] and French J at [525]-[527].

[29] *The Privative Clause cases* [2002] FCAFC 228, [452] (French J).

[30] *The King v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 597, 616 (Dixon J).

[31] *The King v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248 (Dixon J); *The Queen v Coldham; Ex parte Australian Workers' Union* (1982) 153 CLR 415, 419 (Mason ACJ, Brennan J).

[32] "If a legislature gives certain powers and certain powers only to an authority which it creates, a provision taking away prohibition cannot reasonably be construed to mean that the authority is intended to have unlimited powers in respect of all persons, and in respect of all subject matters, and without observance of any conditions which the legislature has attached to the exercise of the powers": *The King v The Commonwealth Rent Controller; Ex parte National Mutual Life*

Association of Australia Ltd (1947) 75 CLR 361, 369 (Latham CJ, Dixon J); *NAAV v Minister for Immigration and Multicultural & Indigenous Affairs* [2002] 228, [17] (Black CJ).

33 *The King v Murray; Ex parte Proctor* (1949) 77 CLR 387, 399 (Dixon J); *The Queen v Coldham; Ex parte Australian Workers' Union* (1982) 153 CLR 415, 418 (Mason ACJ, Brennan J).

34 *The Privative Clause cases* [2002] FCAFC 228, [11] (Black CJ); see also [629]-630 (von Doussa J).

35 Reproduced at [76].

36 See [128]-[129].

37 [50]-[52] (Beaumont J), [312]-[315] (Wilcox J).

38 [648].

39 [113]-[117].

40 [329]-[332].

41 [319]-[320].

42 [536].

43 [556].

44 [158] (Beaumont J), [343] (Wilcox J), [562] (French J), [650] (von Doussa J); [4] (Black CJ agreeing with von Doussa J).

45 [650] (von Doussa J), [4] (Black CJ agreeing).

46 Beaumont J at [158] and French J at [562] are ambiguous. Wilcox J held that, as the error was merely one of fact he did not need to express a view on the operation of section 474 [344].

47 [188] Beaumont J, [348] (Wilcox J), [572]-[573] (French J), [651] (Von Doussa J), [4] (Black CJ agreeing with von Doussa J).

48 [188] (Beaumont J), [651] (von Doussa J), [4] (Black CJ agreeing with von Doussa J). Wilcox J agreed with the primary judge who held that even if the Tribunal did misconstrue the statute in a way that amounted to an error of law, this was not a "jurisdictional error" [348]. His Honour thus appears to take the view that it remains possible for a Tribunal to commit an error of law within jurisdiction; see also [572] (French J) and [651] (von Doussa J). (For the decision of the primary judge, see *Ratumaiwai v MIMIA* [22] FCA 311, [18], [29] (Hill J)).

49 *Migration Act*, s 116(1)(d).

50 *Migration Act*, s 116(1)(f).

51 [667] (von Doussa J); see also [229], [234]-[241] (Beaumont J).

52 [579].

53 [33]; and see [379] (Wilcox J).

54 (1944) 69 CLR 407.

55 [38].

56 [592].

57 [371]-[372].

58 [672] (von Doussa J), [275] (Beaumont J agreeing).

59 [674] (von Doussa J).

60 Ibid [113] (Beaumont J), [638], [648] (von Doussa J). On this point Black CJ agreed with von Doussa [4].

61 Ibid, [329]-[331].

62 Ibid, [536]; and see also [555]-[556].

63 Ibid, [527].

64 Ibid, [15] (Black CJ).

65 Ibid, [624].

66 Ibid, [619].

67 Ibid, [625].

68 Ibid, [626].

69 Ibid, [30]-[31], [37].

70 See [366], [377] (Wilcox J), [524], [579], [592] (French J).

71 [9] (Black CJ), [101], [104] (Beaumont J), [630] (von Doussa J).

72 Ibid, [354].