PRIVATIVE CLAUSES AND THE THEORETICAL UNDERPINNINGS OF ADMINISTRATIVE LAW IN AUSTRALIA

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*This essay was awarded the Victorian Chapter of AIAL's student essay prize in 2003.**

Introduction

To speak of the merits of a privative clause is, it might be said, to reveal one's theory of the state. This has been evident in the debate generated by the privative clause recently introduced into the *Migration Act 1958* (Cth).[1] In this paper I will attempt to articulate some of the administrative law principles that underlie this debate. The Migration Act's privative clause is an expression of the belief that in the migration jurisdiction administrative efficiency and fairness are best served by leaving the executive's decision-making undisturbed by judicial review. This provision represents the latest and most dramatic attempt by successive Australian governments to diminish the judiciary's influence on migration decisions. I will argue that generally speaking privative clauses lack a secure jurisprudential foundation. I will further argue that in attempting to achieve certain policy objectives, the Migration Act's privative clause unbalances the relationship between judicial and merits review, and undermines the rule of law. My conclusion is that the provision does not strike a reasonable balance between the competitive priorities that constitute administrative justice.

Judicial review and privative clauses

A privative clause is a provision within an Act that restricts the scope of judicial review for decisions made pursuant to the Act. Privative clauses achieve their effect through a variety of methods and to differing degrees.[2] Having as their object the limitation of courts' jurisdiction, privative clauses throw into sharp relief questions about the purpose of judicial review. Judicial review's purpose, from a traditional perspective, is to ensure that those upon whom Parliament has conferred power act according to and not beyond that power.[3] From this perspective, the courts, in assessing whether the administrative agency has acted *ultra vires*,[4] ask whether the *intention* of the legislature has been adhered to.[5] Paul Craig has pointed out that the traditional concept of judicial review sits uncomfortably with the courts' history of reading down privative clauses: rather than, he said, the courts applying the legislative intent explicit in the language of the provision, they read certain 'judicially developed principles' into the legislation.[6] However, he further argues, the traditional mode does not acknowledge this activity, but rather assumes the judiciary is complying with 'implied' legislative intent.[7]

In Australia, *R v Hickman*; *Ex Parte Fox and Clinton*[8] remains the authority regarding the interpretation of privative clauses. This judgement has been repeatedly applied by the High Court,[9] and, as will be discussed, its language informed the drafting of the migration privative clause. The *Hickman* decision and subsequent cases therefore warrant some attention. I will argue that these cases, read in light of Craig's critique of the traditional model of judicial review, adduce legislative intent in their reasoning, but implicitly employ principles external to intentions attributable to the legislature. Moreover, the cases demonstrate some of the

shortcomings of judicial reasoning that suppress substantive elements in the judgement. The judgement's shortcomings arise in relation to administrative law principles closely associated with the 'rule of law': that reasoning in a judgement should be based on articulated premises, and that laws should be open, general and predictable.[10] The law *Hickman* produced demonstrably does not fulfil these standards,[11] and the ways in which it does not are important, for present purposes, to set out.

Privative clauses and the rule of law

Articulation of the conceptual basis of the decision

In *Hickman*, Dixon J's 'strict' legalism, was, as he himself pointed out, confronted by a case which turned on the interpretation of a non-technical term.[12] He therefore conceded that contextual factors were crucial in deciding the case.[13] However, the formulation he produced, in the process of assuming the status of authority, has been decontextualised and reified. In later judgements, the principle is recited rather than explained.[14] It is unclear how what has come to be known as the '*Hickman* principle'[15] was derivable from a purported 'reconciliation' of the overall Act governing the decision-maker and the privative clause.[16] In fact the judgement seems to be a product of pragmatism and an unstated concept of fairness – the principle appeared to produce what was judged to be a 'reasonable' outcome in the decision-making context and on the existing facts. Possibly for this reason, it is difficult to characterise the *Hickman* principle theoretically: it asserts a belief in parliamentary sovereignty and assumes individual rights can be protected by the processes of representative democracy,[17] but in a most unDiceyan way insulates executive action from judicial review. The specific elements of the *Hickman* principle are also untheorised. The assessment of which kinds of legal error are not protected without express legislative intent, and which can be shielded by a privative clause assumes a hierarchy of lawfulness, the most fundamental forms of which are not readily abrogated. There is no doctrinal basis adverted to, however, in *Hickman* or subsequent cases, that suggests how such a hierarchy is formulated – why for example bona fides is indispensable, but natural justice is not. To make this point another way, there is no doctrine adduced that defines limits to the power the privative clause may confer. Without a statement of such doctrine, one might equally argue that within constitutional limits a privative clause should be read to override all inconsistent earlier provisions.[18]

Open and general laws

A privative clause of the form found in *Hickman* results in decisions that would otherwise be clearly unlawful, being declared lawful and unchallengeable. The principles that are generally applicable to administrative decisions, and that are associated with procedural fairness and reasonableness,[19] can be violated by the decision-maker, but the decision nonetheless stands. Privative clauses therefore result in a reduction in the generality with which fundamental administrative law principles are applied. They also produce less open decisions insofar as a 'valid' decision is illogical or unreasonable, based on unacknowledged evidence or reasoning, or not referable to clear laws.

Transparency of the law pertaining to privative clauses

A privative clause causes the statute governing the decision-maker to mean something other than that which it would otherwise mean. The statute no longer ensures administrative legality other than that which the privative clause preserves. A privative clause of the *Hickman* variety is on its face unconstitutional because it appears to deny the applicant access to the constitutional writs under s75(v) of the Constitution. The High Court's approach to this has been to read the clause down so that it is not taken to prohibit recourse

to these writs.[20] Neither therefore does the privative clause itself mean that which its plain words indicate.

Promotion of predictability in the laws' application

Law that is not transparent and whose effect is the result of an Act's partial nullification by one of its provisions is not likely to produce predictable outcomes.[21] The *Hickman* principle has not been straightforward to apply.[22] The precise breadth of the protection it offers otherwise invalid decisions remains unclear,[23] and the designation of its terms such as 'a bona fide attempt to exercise power',[24] and 'inviolable limits'[25] is vague.

Central administrative law vales are interrelated.[26] A derogation in the rule of law of the kind considered here reduces the accountability of administrative decisions because they are not referable to clear laws. It also reduces the ability of individuals to participate in decisions affecting them, because opaque and unpredictable laws are a poor guide to remedial action. There are sound rule of law related grounds for the legislature to avoid recourse to privative clauses. There has been legislation, most notably the ADJR Act, that has repealed privative clauses en masse.[27] However their ongoing existence suggests that there may be cogent reasons why they are resorted to, a possibility explored below.

Restrictions on judicial review within the migration jurisdiction

Opportunities for Federal Court review of administrative decisions in the migration jurisdiction have been progressively restricted. An account of the range of measures enacted is beyond this essay's scope. What will be briefly considered here are some examples of judicial responses to these restrictions. The *Migration Reform Act 1992* introduced a Part 8 into the *Migration Act 1958* which removed a breach of the rules of natural justice, and various non-jurisdictional errors of law[28] as grounds for judicial review of the migration tribunals' decisions.[29] While Part 8 did not contain a *Hickman* privative clause, relevantly to the validity and construction of the provisions, *Hickman* and later cases had established limits to the extent judicial review could be curtailed.[30] In a judgement that demonstrated the narrowness and indeterminacy of these limits, a divided High Court in *Abebe v The Commonwealth*[31] found Part 8 to be wholly valid.[32]

The validity of Part 8 established, the High Court delivered a series of judgements interpreting the extent to which Part 8's provisions restricted the grounds for review, and these restrictions' implications for the High Court's original jurisdiction. I will consider several of these cases here.[33]

During the lifetime of the former Part 8, the High Court repeatedly drew attention to these provisions' tendency to cause applicants to apply for a constitutional writ under s 75(v) of the Constitution on the basis of grounds that were, as a consequence of Part 8, denied if review was sought within the Federal Court.[34] Such a case is *Re RRT; Ex Parte Aala*[35] in which the applicant sought a writ of prohibition on the grounds that the Refugee Review Tribunal had denied him natural justice. The aspect of the case relevant to our concerns is that it illustrates how there is a loss of coherence in administrative law principles underpinning judicial review when the grounds for judicial review are severely restricted. The court held that a denial of natural justice by an 'officer of the Commonwealth' results in a decision made in excess of jurisdiction, an error of law which provides grounds for the issue of a constitutional writ.[36] Such a constitutional guarantee has been available since the commencement of the Constitution[37] where a breach of natural justice occurs, whether this be considered a breach of a common law duty or an implication of the empowering statute.[38] Their Honours make it very clear they regard leaving a breach of natural justice undisturbed as fundamentally undermining the integrity of administrative justice.[39] The import of this judgement in relation to statutory restrictions on judicial review is that it affirms procedural

fairness as a fundamental requirement of administrative justice, and by implication, suggests that statutory regimes that remove procedural fairness as a ground for review severely hobble a court's capacity to remedy injustice.

This point, drawn here in relation to procedural fairness, can be stated more broadly. In *Durairajasingham*,[40] another case heard under the High Court's original jurisdiction, McHugh J held that a constitutional writ can be granted when a tribunal makes a jurisdictional error. He stated[41] that jurisdictional error should be defined according to the decision in *Craig v South Australia*.[42] The breadth of this definition meant that the range of errors traditionally associated with broad *ultra vires* was made available as grounds for review. This decision highlighted the gulf between what the High Court regarded as unlawful administrative conduct, and what Part 8 permitted the Federal Court to find unlawful in a decision by one of the migration tribunals.

While the High Court's decisions within its original jurisdiction affirmed the availability of redress for breaches of administrative law that the former Part 8 deemed unreviewable by the Federal Court, its approach to Part 8 itself has been to accept as valid the breadth of the restrictions imposed on judicial review. This has entailed resolving tensions between provisions within the Migration Act that establish standards of administrative justice and Part 8 which rendered such standards largely unenforceable. Consequently, provisions providing that the RRT must act according to substantive justice,[43] that it possesses inquisitorial powers of investigation,[44] and that it must make findings on material questions of fact[45] were found in their breach or non-application, not to establish grounds for review. The device employed to achieve this 'resolution' was to cast these provisions as non-obligatory[46] or subject to how the tribunal saw fit to define them.[47] There is a formalism in this approach to the former Part 8 that does not accord with a substantive concept of the rule of law. However, in one of its last pre-privative clause migration decisions, the case of *Minister for Immigration and Multicultural Affairs v Yusuf*,[48] the High Court partially broke with its deference to Part 8. That decision endorsed the definition of jurisdictional error found in *Craig*,[49] and held that elements of such an error are grounds for review by the Federal Court in spite of the exclusion provisions.[50]

Even from this briefest of overviews of the courts' responses to restrictions on judicial review, it is evident that there is the appearance of a haphazard course being steered between affirming statutory attempts to restrict review, and finding new avenues to circumvent the restrictions. Possibly this pattern has reflected a healthy interplay between the legislature and the judiciary. Another interpretation is, however, that judicial review has produced such eclectic results because it has proceeded to too great an extent on the basis of divining legislative intent, and with too little reference to an underlying body of administrative principles.[51] This at least is a view consistent with Craig and Dyzenhaus's argument that the judiciary needs to articulate what constitutes the set of common law and constitutional principles that in reality inform its judgements.[52]

The *Migration Act* privative clause: its relationship with principles of administrative law

The Migration Act*'s privative clause*

The amendments to the judicial review provisions in the Migration Act repeal the former Part 8 and substitute a privative clause regime that severely restricts access to the judicial review of migration decisions The new Part 8's definition of a 'privative clause decision' adopts words virtually identical to the provision considered in *Hickman*.[53] The provision, therefore, on its face excludes judicial review of any decisions deemed to be covered by the privative clause.[54] The privative clause covers all decisions made under the Act, including primary decisions and decisions by the tribunals, with exceptions only in the area of matters

unconnected to the granting of visas.[55] The grounds for judicial review at the High Court, Federal Court and Federal Magistrates Court are, or at least are designed to be, identical.[56] The government's stated expectation is that in adopting the language of the *Hickman* provision, the courts will interpret the privative clause according to the *Hickman* principle.[57]

A proposition has been put that the migration privative clause expands the decision-maker's powers rather than restricting judicial review in the manner of the old Part 8.[58] This distinction, in view of what has just been argued, and certainly from a substantive rule of law perspective is, however, quite artificial.[59] It is clear that the privative clause introduces a radical regime of exclusion of judicial review, apparently giving 'legislative effect', in the Immigration Minister's words, 'to the government's longstanding commitment to introduce legislation that in migration matters will restrict access to judicial review in all but exceptional circumstances'.[60] The provisions embrace the *Hickman* approach to ousting judicial review, and therefore are attended by the same range of tensions in relation to administrative law principles and the rule of law that have been identified above. I will not reiterate these here, other than to suggest that such tensions, it can be persuasively argued, take on a particularly acute form in the migration jurisdiction. The *particular* effect of the restriction of judicial review of migration decisions must be considered in relation to the position of the applicant, the nature and role of the migration tribunals, and the human rights and international context of migration law. Before turning to these considerations, I wish to look, in brief overview, at the Federal Court's initial responses to reviews under the new Part 8.

Federal Court responses to the Migration Act privative clause[61]

In a number of ways the Federal Court's interpretation of s 474 of the *Migration Act 1958* has been illustrative of the criticisms directed at privative clauses in the discussion thus far. Section 474 has been accepted as constitutionally valid,[62] but there has been a schism in the court's understanding of the legal errors that the provision protects. The differing interpretation of the section's scope has been due to the adoption of two opposing approaches to how the *Hickman* test is applied,[63] to different views on when a jurisdictional error arises under the privative clause regime,[64] and to differences in the understanding of the three *Hickman* conditions.[65] Many of the decisions, in keeping with the government's expectation, confirm that the privative clause protects (and therefore in effect sanctions) legal errors[66] such as denial of natural justice,[67] exercise of power without reference to legislative criteria,[68] and the misconstruing of the applicant's claims.[69] The provision therefore clearly brings upon itself all the rule of law concerns that have been discussed above. Furthermore, the divisions within the Federal Court over the provision's construction again demonstrate indeterminacy and unpredictability in the operation of the *Hickman* principle. However, perhaps the most striking aspect of these judgements, in light of this paper's concerns, is the recourse to the legislature's intent to justify how the provision is read.[70] What is often happening here, very much in line with Paul Craig's propositions, is that Parliament is imputed with intentions that are in reality disguised judicial principles. Underlying this approach to judicial review appears to be an assumption that an overt assertion of administrative rights would amount to an affront to parliamentary sovereignty. Alternatively perhaps, considering the limited constitutional protection of individual rights,[71] together with the doctrine that holds that *explicit* legislative intent must override common law or statutory rights,[72] it may be that ascribing the source of the right to Parliament provides a safer basis for its assertion. Whether the emphasis on legislative intent is a consequence of the continuation of a Diceyan concept of parliamentary sovereignty or the dearth of entrenched individual rights, the predictability and clarity of the courts' judgements suffer as a result.

Performing merits review under a privative clause regime: implications for administrative justice

Arguments in support of the privative clause

Paul Craig has argued that, depending on the decision-making context and the interests at stake, administrative law principles should be and in fact are applied with varying 'intensity' by the courts.[73] The current government has argued that the migration jurisdiction is a context where judicial review should be constrained. The migration review tribunals were established to provide fair, expeditious and economical merits review of primary decisions.[74] Particularly in relation to the RRT, the government has claimed that judicial review has thwarted this objective in a number of ways.[75] Firstly, a relatively high proportion of RRT determinations are judicially reviewed which delays final determination, adds to costs, and, it is claimed, undermines the tribunal's legitimacy as an authoritative review body.[76] Secondly, the Federal Court, it is argued, has at times usurped the tribunals' merits review role, under the guise of applying an expansive notion of jurisdictional error, and has thereby ignored the legislature's clear intent to restrict the grounds for judicial review.[77] The court has consequently involved itself in matters going to the weighing of evidence and context which the tribunal is better equipped to assess. Consistent with this view, John McMillan has argued that the courts' failure to refrain from entering into nonjudicial areas of review has led to 'the imposition of legal cultural paradigms on executive processes'.[78] Thirdly, it is argued that judicial review has added little to the fairness of decisions.[79]

Similar arguments have been employed to justify privative clauses in other jurisdictions, and it is worth enumerating these in order to see whether they lend support for the migration privative clause.

(i) In some contexts tribunals' inquisitorial non-curial approach is better adapted to achieve a fair decision than are the courts' methods.[80]

(ii) In jurisdictions where cases typically turn on the weighing of complex evidence, a tribunal's specialist knowledge warrants deference from the courts.[81]

(iii) Tribunals are better placed to interpret ambiguous legislation with a view to its administrative consequences and in consideration of policy objectives.[82]

(iv) There are contexts in which the benefits of judicial review do not outweigh the delays, costs and frustrations to government policy it introduces.[83]

While these points taken together with the government's arguments require serious consideration,[84] they do not, in my view, in any way establish a persuasive case for the imposition of a privative clause. Most indeed are arguments for a credible merits review system, which is, I will contend, undermined by the privative clause. It needs to be stated, firstly, that a natural corollary of the separation of powers doctrine is a level of tension between the branches of government. The executive approaches individual decisions from the standpoint of government policy, public interest, economies of scale, and distributive justice. It tends to emphasise outcome over process.[85] A merits review tribunal must arrive at the correct or preferable decision,[86] and brings to its deliberations both the benefit of familiarity with the executive's functions, but also the executive's influence.[87] The judiciary must necessarily focus on the legality of the individual case.[88] Role tensions between the executive and judiciary are inevitable and only undesirable if they debilitate the functioning of one or other branch. If the proportion of RRT decisions judicially reviewed was undermining a government policy objective, and creating excessive workloads for the courts, the solution would not seem to be to undermine the judiciary's role. It has been argued convincingly that even if it is accepted that the proportion of RRT decisions reviewed has been too high,[89] this

phenomenon is a reflection of broader systemic problems not soluble by simply suppressing recourse to the courts,[90] and there are other ways of addressing the problem without compromising the rule of law.[91] I will not reiterate those arguments here, but will now direct the discussion to the ways in which the privative clause compromises the integrity of the merits review system.

Protecting the integrity of merits review

A merits review body that fails to enforce administrative law principles in the face of executive pressure loses any semblance of independence and has been reabsorbed into the bureaucracy from which it sprang. Judicial review of the tribunals' decisions affirms the tribunals' capacity to deliver decisions lawfully. Without judicial review being *in principle* available for every administrative decision, the decisions do not have the mantle of legality bestowed upon them.[92] A privative clause potentially renders many unfair decisions unreviewable. If there is no assurance that the tribunal has arrived at its decision through observing well established standards of administrative justice – those of procedural fairness, reasonableness, relevance, and acting within a clearly defined jurisdiction[93] - then the decision cannot claim to embody substantive justice. The decision has not had the potential of being subject to the scrutiny Chief Justice John Doyle associated with judicial review: 'wide ranging in terms of lawfulness, although it does not go to the merits'.[94]

Merits review and refugee determination – a special case?

The migration privative clause legislation transplanted a provision imposed primarily in industrial and licensing contexts into the migration jurisdiction.[95] The particular effects of the restriction of judicial review in the migration context relate to the applicant's situation, and the nature of migration law. A substantive application of the rule of law should conscientiously uphold a protection visa applicant's legal rights, because their circumstances are likely to make them less able to assert those rights.[96] As non-citizens they are subject to laws they have no ability to change.[97] Their applications before primary decision-makers and the tribunal are often conducted through an interpreter, in the absence of a thorough knowledge of how the determination is reached, without legal representation[98] and sometimes also without legal advice. The wrong decision regarding the likelihood of persecution will often cause the applicant to be deported and exposed to dangerous, even life threatening, circumstances. The government has frequently adverted to the number of cases reviewed in the Federal Court that affirm the RRT's decision. What is not as often acknowledged are the Federal Court reviews that expose fundamental legal errors made by the Tribunal.[99]

A second argument for active judicial oversight of refugee decisions is that they engage international legal obligations. The law applicable to protection visa applications must be interpreted in light of international jurisprudence. The courts have played an important role in interpreting domestic law according to developments in international refugee law.[100] Without such decisions Australia's laws might well stagnate and be less informed by international standards.[101]

Conclusion

The Migration Act's privative clause is an assertion of parliamentary sovereignty, but also a challenge to the rule of law. The provision again brings to our attention the paucity of entrenched rights protecting individuals affected by executive action. It was once possible to claim that responsible government is the 'ultimate guarantee of justice and individual rights'.[102] The provision reminds us of just how quaint this idea has become. For applicants within the migration jurisdiction the constitutional writs remain. Whether in relation to 'privative clause decisions' the writs offer substantive protection against administrative

injustice is a question for the High Court. The Court's answer will further shape the Australia polity's relationship to non-citizens.

Endnotes

* *This essay was written in 2002 before the High Court's decision in* S157/2002 v The Commonwealth *(2003) 194 ALR 24. For a discussion of that case see (2003) 37* AIAL Forum *1 and 20*.

1 The *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) came into force on 2 October 2001. This act repealed the former Pt 8 of the Migration Act (which controlled the grounds for review of decisions by the Federal Court), and replaced it with new judicial review provisions including a privative clause.

2 Statutory measures to restrict judicial review, some of which are not always formally described as privative clauses, include the conferral of wide discretionary powers on the decision-maker, restrictions on the kinds of inquiry a court can engage in, measures preventing remedies being granted by the courts, restrictions on the grounds for review, time limits on when an application for review can be sought, and the type of provision discussed in this paper: the direct ousting of the judiciary's ability to review decisions in a particular jurisdiction: See Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (2nd ed 2000) 675.

3 I will take the 'traditional' concept of judicial review to be the modern form of the Diceyan conception that has been attributed to William Wade and Christopher Forsyth: David Dyzenhaus, 'Reuniting the Brain: The Democratic Basis for Judicial Review' (1998) 9 *Public L Rev* 98, 100. In this conception of judicial review, the court is said to assist itself in determining legislative intent by reference to the values of the common law: where the statute is silent, these values may be imputed to the legislature's intent: Dyzenhaus at 100.

4 In administrative law a decision maker is *ultra vires* or 'beyond power' in a narrow sense, when the decision was not one authorised by the governing enactment, and in a broad sense, when the *way* the power was exercised in arriving at a decision was contrary to administrative law principles: see Paul Craig, *Administrative* Law (3rd ed) 5.

5 Paul Craig, *Administrative* Law (3rd ed) 5.

6 Ibid 14. Note that Craig is not arguing that legislative intent is unimportant, just that it does not fully explain what the judiciary actually does in interpreting legislation, nor is it adequate prescriptively.

7 Paul Craig, 'Competing Models of Judicial Review' [1999] *Public Law* 428, 436-439.

8 (1945) 70 CLR 598 ('*Hickman*').

9 See eg *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 ('*Darling Casino*'); for earlier applications of the *Hickman* principle, see those listed in *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Ltd* (1995) 183 CLR 168, 210.

10 These elements of the rule of law are associated with Joseph Raz's formal concept of the doctrine. The point argued here is that a privative clause violates even this limited version of the rule of law. A more substantive view of the rule of law sees these formal elements as a subset of the common law principles constituting a theory of justice that informs (or should inform) judicial decisions: see Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytic Framework' [1999] *Public Law* 467, 468-9, 485. In this paper I will take the substantive concept to have this general meaning, while acknowledging its exact content is open to various interpretations.

11 As will be argued below, the '*Hickman*' type privative clause's departure from the rule of law becomes more dramatic still when it is taken from its habitual industrial or licensing context, and applied to decisions affecting individuals within the migration jurisdiction.

12 The issue was the denotation of the phrase 'the coal mining industry' which appeared in a regulation that defined the jurisdiction of a board established under an Act governing employment in the coal industry. The phrase was not statutorily defined.

13 '[W]e have been left to ascertain as best we may what is the denotation of the very indefinite expression "coal mining industry". It is, I think, unfortunate that it had become necessary to submit such a question to judicial decision. From a practical point of view, the application of the Regulations should be determined according to some industrial principle or policy and not according to the legal rules of construction and the analytical reasoning upon which the decision of a court must rest. As it is, however, the question must be decided upon such considerations'.: *Hickman* (1945) 70 CLR 598, 614 (Dixon J). A case which Dixon J acknowledged would have been better resolved extra-judicially, and which turned on nebulous fact considerations, might seem unlikely to yield enduring principles of general application, but that it has done.

14 Thus for example, Mason CJ stated that the privative clause under consideration and the enabling provision represented a prima facie inconsistency, and explained that their reconciliation was to be achieved by 'reading the two provisions together and giving effect to each': *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Ltd* (1995) 183 CLR 168, 179. See also *Darling Casino* (1997) 191 CLR 602, 632-33; *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232, para 15 (Mason CJ); para 31 (Brennan J) ('*O'Toole*). Mason CJ acknowledged in *O'Toole* 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. And, in the absence of specific facts and evidence, the present case is scarcely a suitable vehicle for embarking on such an undertaking': para 16.

15 See *Hickman* (1945) 70 CLR 598, 614 (Dixon J); and for the elements of the principle stated according to their contemporary content, see Simon Evans, 'Protection Visas and Privative Clause Decisions: Hickman and The Migration Act 1958 (Cth), (2002) 9 *Aust Admin L Jo* 49-64, 54. Essentially a decision will be valid, notwithstanding provisions to the contrary in the enabling Act, if it 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': (Dixon J at 615). It must of course also not exceed constitutional limits (at

616). A further principle developed since *Hickman* suggests that (at least the High Court) cannot be prevented from reviewing a decision which involves the refusal by officers of the Commonwealth to discharge 'imperative duties' or which goes beyond 'inviolable limits or restraints': *Darling Casino* (1997) 191 CLR 602, 632 (Gaudron and Gummow JJ).

16 The *Hickman* principles apparently emerged from a process that Dixon J described thus: 'if in one provision it is said that certain conditions shall be observed, and in a later provision of the same instrument that, notwithstanding they are not observed, what is done is not to be challenged, there then arises a contradiction, and effect must be given to the whole legislative instrument by a process of reconciliation': *Hickman* (1945) 70 CLR 598,. 617.

17 Cf Mary Crock's argument regarding the limitations of representative government as a safeguard of individual rights: it is not valid, she said, for democracies 'to rely on the electoral mandate as a justification for the assertion of untrammeled administrative power': 'Privative Clauses and the Rule of Law: The Place of Judicial Review within the Construct of Australian Democracy' in Susan Kneebone (ed) *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1999) AIAL, 78.

18 This would of course be a standard approach to statutory construction consistent with the doctrine that Parliament cannot bind itself, and with judicial opinion: eg, *Goodwin v Phillips* (1908) 7 CLR 1, 7 (Griffith CJ). The qualification to this approach that has been developed post-*Hickman* is the doctrine stating that fundamental common law rights can only be abrogated by explicit legislative intent.

19 These principles which originally evolved in the common law, find statutory expression in ss 5-7 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act').

20 *Hickman* (1945) 70 CLR 598, 616; *Darling Casino* (1997) 191 CLR 602, 631; *O'Toole* (1990) 171 CLR 232 para 21 (Mason CJ) paras 26-28 (Dawson J).

21 As stated in *R v Coldham; Ex Parte Australian Workers' Union* (1983) 153 CLR 415, 418: where the statutes are inconsistent, the *Hickman* principle requires that the inconsistency is 'resolved by reading the … provisions together and giving effect to each'.

22 See Roger Douglas and Melinda Jones *Administrative Law* (1999) 350.

23 For example, Gaudron and Gummow JJ stated, obiter, in *Darling Casino* (1997) 191 CLR 602, 633-634, apparently contrary to the traditional *Hickman* formulation, that 'a clause which provides only that a decision may not be called into question in a court of law is construed as not excluding review on the ground that the decision involved jurisdictional error, at least in the sense that it involved a refusal to exercise jurisdiction or that it exceeded the jurisdiction of the decision-maker'.

24 For example, Dawson J suggested, obiter, that there may be a natural justice element requirement associated with bona fides: *O'Toole* (1990) 171 CLR 232, 305. In the same case, the court was divided as to whether in establishing mala fides, a subjective element could be considered or whether reliance must be placed solely on the evidence on the face of the record.

25 See n 15 above. In the first Full Federal Court review of applications under the privative clause, involving five applicants (*Naav, Nabe, Ratumaiwai, Wang, Turcan*), the respondent Minister for Immigration argued that 'inviolable limits' is simply a shorthand for the three established *Hickman* provisos: FFC, 3-4 June, 2002. See Aronson and Dyer, above n 2, 695 regarding the differing curial opinion about the denotation of this phrase.

26 Mark Aronson has catalogued these values as including accountability, openness, fairness, participation, consistency, rationality, legality, impartiality, and accessibility of judicial and administrative grievance procedures: cited in Eloise Murphy, 'Corporation and accountability: the case of City West Housing Pty Ltd' (2001) 8 *Aust Jo of Admin Law* 100, 102.

27 Section 4 of the ADJR Act states that 'This Act has effect notwithstanding anything contained in any law in force at the commencement of this Act'.

28 Following *Craig v South Australia* (1995) 184 CLR 163, 179, 'jurisdictional error' rather than *ultra vires* is employed to describe errors made by a tribunal; jurisdictional error since *Craig* includes errors associated with broad *ultra vires*. The ADJR Act makes the distinction for decisions within its jurisdiction irrelevant because tribunals and primary decision-makers alike are for the purposes of the Act makers of administrative decisions under an enactment: s 3. In this essay, what is stated regarding *ultra vires*' role in relation to judicial review, is equally applicable to tribunals whose decisions may be reviewed on the basis of jurisdictional error. Paul Craig's work employs the *ultra vires* concept in ways that would usually allow it to be used interchangeably with jurisdictional error as far as administrative tribunals are concerned.

29 Ie, the Refugee Review Tribunal and the Migration Review Tribunal. Part 8 of the *Migration Act 1958* (Cth) came into operation on 1 September 1994. The amendments excluded access to Federal Court review of Tribunal decisions provided by the ADJR Act and s 39B of the *Judiciary Act 1903* (Cth) as well as substituting a much narrower set of grounds for Federal Court review.

30 As discussed above, these limits are imposed by constitutional guarantees of access to review through s75(v) and the mysterious 'inviolable limitations' on the legislature's ability to restrict judicial review, first adverted to in *R v Metal Trades Employees' Association; Ex Parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 209, 248 (Dixon J).

31 (1999) 197 CLR 510.

32 While *Hickman* addresses the constitutional limits under s75(v) and instead *Abebe* was concerned with the constitutionality of restricting the Federal Court's ability to consider the whole of a legal 'matter', (a 'matter' as adverted to in ss 75-78 of the Constitution), one can argue that *Hickman* and subsequent cases' failure

to articulate the values underlying judicial review paved the way for the *Abebe* decision's deference to the former Part 8.

33 Obviously therefore, a survey of the relevant cases is not attempted. The cases were chosen because they were leading decisions in determining the scope of the 'former' Part 8. See Mary Crock, *Immigration and Refugee Law in Australia* (1998) chapter 13 regarding the operation of the former Part 8.

34 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Durairajasingham* (2000) 74 ALJR 405, 407 ('*Durairajasingham*'); *Re RRT*; *Ex Parte Aala* (2000) 176 ALR 219, 257 (Kirby J) ('*Aala*'); *Abebe v Commonwealth* (1999) 197 CLR 510, 534.

35 *Aala* (2000) 176 ALR 219.

36 The grant of a remedy was held to be discretionary: the issue was whether there had been a breach of natural justice, the determination of which may turn on the circumstances of the case: *Aala* (2000) 176 ALR 219, 223 (Gaudron and Gummow JJ); 259-260 (Kirby J). On the evidence, four of the five justices determined that the fair hearing rule had been breached, and constitutional writs were granted unanimously.

37 *Aala* (2000) 176 ALR 219, 225 (Gaudron and Gummow JJ).

38 *Aala* (2000) 176 ALR 219, 230 (Gaudron and Gummow JJ). Their Honours noted that differing views on the character of procedural fairness – as a common law duty or as an implication of the exercise of statutory power were expressed in *Kioa v West* (1985) 159 CLR 550. They also indicated that a statute might extinguish the obligation to procedural fairness and thereby make an action under s 75(v) unavailable on this ground, but did not touch on the constitutional issues this would raise (at 231). Obviously Part 8 was not regarded as causing the annulment of procedural fairness obligations in relation to constitutional writs.

39 For example, Kirby J asserted that: '[d]eparture from the fair hearing rule involves a derogation from the assumptions inherent in the grant to the tribunal by the parliament of the decision-making power. Those who enjoy such power must conform to the conditions of the grant. If they do not, they have not exercised the power in accordance with law but, instead, in accordance with some personal predilection. Correction by the issue of the constitutional writ simply upholds the rule of law': *Aala* (2000) 176 ALR 219, 230, 255. See also Gaudron and Gummow JJ (at 236).

40 (2000) 74 ALJR 405.

41 Ibid 412.

42 (1995) 184 CLR 163 (*Craig*').

43 *Migration Act 1958* s 420(2)(b).

44 *Migration Act 1958* ss 424(1), 424(2) and 427(1)(d).

45 *Migration Act 1958* s 430(1)(c).

46 The substantive justice 'direction' of s 420 was found not to be a mandatory procedural requirement in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 162 ALR 577. Regarding the non-obligatory nature of the investigatory powers: *Re Minister for Immigration and Multicultural Affairs; Ex parte Cassim* (2000) 175 ALR 209, 212-213 (McHugh J).

47 Regarding the finding that the Tribunal has only to set out findings on material questions of fact that *it* considers as material: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 75 ALJR 1105, 1108 (Gleeson CJ), 1117 (McHugh, Gummow and Hayne JJ).

48 (2001) 75 ALJR 1105 ('*Yusuf*').

49 (1995) 184 CLR 163.

50 *Yusuf* (2001) 75 ALJR 1105, 1121 (McHugh, Gummow and Hayne JJ).

51 Space prevents fuller treatment of this proposition. It remains true that the language of 'legislative intent' is consistently employed in recent judicial review of migration decisions, as identified below in the migration privative clause decisions. See also, for example, *Darling Casino* (1997) 191 CLR 602, 633.

52 Dyzenhaus, above n 3, 108 argues that the debate over the correct role of judicial review must escape the dichotomous thinking that posits either the common law or legislative intent as the preferable point of reference for judicial decision-making, and should instead address the question of what fundamental legal values underpin the relationship between Parliament and the judiciary.

53 Compare *Migration Act 1958* s 474(1) and the privative clause ('regulation 17') considered in *Hickman* (1945) 70 CLR 598, 598.

54 Another aspect of the amendments, that is not discussed here, is the time limits set on lodging an application to the High Court: *Migration Act 1958* s 486A. This time limit can be construed as another form of restriction on judicial review. The provision provides that an application must be made within 35 days of the actual notification of the (departmental or tribunal) decision.

55 See s 474(4) which permits judicial review of decisions pertaining to such matters as the constitution of the tribunals, costs associated with detention and deportation, and searches of persons and vessels.

56 This is achieved through providing that the Federal Court and the Federal Magistrates Court have no jurisdiction in relation to primary decisions except via the *Judiciary Act 1903* (ss 39B and 44) or s 39 of the *Federal Magistrates Act 1999* or s 32AB of the *Federal Court of Australia Act 1976* or s 483A of the Migration Act itself: see *Migration Act 1958* ss 475A, 476, 483A. Consequently these courts and the High Court can review primary and tribunal decisions by means of the constitutional writs.

57 See ss 475A and 484 which assume that some privative clause decisions are reviewable in the Federal Court and the Federal Magistrates Court.

58 Not atypical is Tamberlin J's view that '[u]nlike [the former] s 476, the effect of s 474 is not to withdraw jurisdiction from the Court in relation to a decision. Rather it purports to protect the administrative decision': *NABE v Minister for Immigration and Multicultural Affairs* [2002] FCA 281('*NABE*') para 11. The Explanatory

Memorandum for the Migration Legislation Amendment (Judicial Review) Bill 2001 states that the intention of the privative clause provision is 'to provide decision-makers with wider lawful operation for their decisions such that, provided the decision-maker is acting in good faith, has been given the authority to make the decision concerned … and does not exceed constitutional limits, the decision will be lawful': para 16. It is acknowledged though that the clause limits review to certain grounds: para 15. In the Bill's second reading speech – see below, n 60, 31315, the Minister stated that the provision will both expand the decision-maker's powers and limit the grounds for judicial review.

59 Cf Stephen Gaegler's positivist approach to such questions: he suggests that if the scope of judicial review is defined by what constitutes jurisdictional error, then the issue of significance is the scope of the administrator's jurisdiction, which is rightly determined by the legislature: 'The Legitimate Scope of Judicial Review' (2001) 54 *Admin Review* 28, 39. This argument may have been asserted with an eye to the constitutionality of the privative clause, in that if the provision is characterised as restricting access to the High Court via s 75(v), rather than expanding the decision-maker's powers, it is perhaps more likely to be declared unconstitutional.

60 Commonwealth, *Parl Deb H of R*, 26 September 2001, 31314 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs and Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs): Second Reading speech of the Migration Legislation Amendment (Judicial Review) Bill.

61 An account, even in overview, of the hundreds of decisions to date regarding s 474 will not be attempted here. Some of the more important cases will be alluded to insofar as they bear on the general issue of privative clauses and principles of administrative law. It is recognised that at the time of writing curial understanding of the provision is unsettled and literally shifting on a weekly basis.

62 See *NAAX v Minister for Immigration and Multicultural Affairs* [2002] FCA para 38-44 ('*NAAX*'). The applicants submitted that s 474's practical effect is to make the migration tribunals the final arbiters on questions of law, thus requiring them to exercise judicial power (contrary to *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245); and secondly s 474's expansion of the tribunals' powers causes the constitutional writs' availability under s 75(v) to be narrowed to the point where they have no practical application. These arguments were rejected. If this view is upheld in the High Court, s 75(v) offers no substantive protection of a right to judicial review. Evans, above n 15, 62 notes that High Court opinion has been divided on this point.

63 There are two points of difference in the approaches. Firstly, should it initially be decided whether s 474 applies, ie that the decision is a privative clause decision, or should attention be first directed to the nature of the purported error (see *Alam v Minister for Immigration, Multicultural Affairs and Indigenous Affairs* [2002] FCA 630 for a summary of the approaches). A second point of difference is the following: if under a *Hickman* privative clause jurisdictional error remains a ground for application for a constitutional writ (based on *Darling Casino* (1997) 191 CLR 602, 632), then is jurisdictional error to be defined broadly or narrowly?

64 The question here is the extent to which s 474 broadens the decision-maker's powers in relation to directive provisions of the Migration Act, such that their clear breach does not constitute a jurisdictional error: compare *Awan v Minister for Immigration, Multicultural Affairs and Indigenous Affairs* [2002] FCA 594 ('*Awan*'); *Walton v Phillip Ruddock, The Minister for Immigration and Multicultural Affairs* [2001] FCA 1839 ('*Walton*'); *Boakye-Danquah v Minister for Immigration, Multicultural Affairs and Indigenous Affairs* [2002] FCA 438 ('*Boakye-Danquah*') which find that breaches of directive provisions are not protected by s 474, and those decisions finding that the decision-maker's powers are extended by s 474 beyond what the directive provisions, read alone, would permit: *Wang v Minister for Immigration and Multicultural Affairs* [2002] FCA 477, para 29 ('*Wang*'); *NAAX* [2002] FCA 263; *Turcan v Minister for Immigration and Multicultural Affairs* [2002] FCA 397.

65 As previously discussed, the exact content of the *Hickman* conditions has never been precise. However the main point of difference regarding s 474 has been the concept of jurisdictional error consistent with the *Hickman* principle: that defined in *Craig v South Australia* (1995) 184 CLR 163, 179 (eg, *Boakye-Danqyah* [2002] FCA 438) or a narrower form of jurisdictional error (eg, *NAAX* [2002] FCA 263).

66 This is affirmed one should note, sometimes with considerable reluctance; for example Hill J wrote: 'I realise that in reaching this conclusion I am accepting that Parliament by enacting a privative clause can denude of any real content the ability of the Courts to grant relief by way of prerogative writ so that no remedy will be made available to a person whose future may be greatly affected by a decision made on entirely the wrong basis': *Wang* [2002] FCA 477, para 29.

67 *NAAX* [2002] FCA 263. The decision did however indicate that owing to the decision in *Re Minister for Immigration and Multicultural Affairs; Ex Parte Miah* (2001) 179 ALR 238, and despite the Migration Act's code designed to replace common law requirements of natural justice, elements of the rule in relation to informing the applicant of adverse material evidence may still form grounds for a constitutional writ: see para 79-82 (Gyles J). Denial of natural justice may also not be protected when it involves bias (para 36). In response to *Miah*, the Migration Legislation Amendment (Procedural Fairness) Bill 2002 has been drafted with the objective of ensuring the removal of natural justice as a possible basis for an application for judicial review of privative clause decisions.

68 *Wang* [2002] FCA 477, para 19-29.

69 *NABE* [2002] FCA 281. Tamberlin J acknowledged that the error could have affected the outcome: para 37.

70 The judgements evince many examples of this approach to interpretation. For example, in *Walton* [2001] FCA Merkel J contended that '[a]s s 474 and Part 8 are altogether silent on compliance or non-compliance with the rules of natural justice there may be obstacles in the path of an argument that the section provides

a clear legislative intention to abrogate or exclude the rules of natural justice': para 37. Similarly see North J *Awan* [2002] FCA 594. This is a difficult argument to sustain, given the privative clause is designed to be more restrictive than the former Part 8 (which excluded from Federal Court review breaches of natural justice) and sought to 'align' grounds for review across the Federal and High Courts (see Gyles J in *NAAX*, para 46-85 on this point; and also the Explanatory Memorandum para 16 which states the expectation that only 'narrow' jurisdictional error will provide grounds for review). What is in fact being asserted here is a curial belief that natural justice cannot be readily annulled as a grounds for a constitutional writ. Conversely, in some cases 'legislative intent' is used as an argument for a non-substantive reading of constitutional writs. In *Wang*, Hill J concluded that s 474 must protect jurisdictional error, because otherwise the section 'would have little work to do', and this cannot be Parliament's intent: [2002] 477 para 32-33. But one might equally argue that such an operation of s 474 leaves s 75(v) with little work to do, because jurisdictional error will rarely be present to form the basis of a constitutional writ. The constitutional writs, owing to a vast expansion in the tribunal's powers, thereby become in practice rarely available.

71 The individual rights that are constitutionally protected are very limited: see George Williams, *Human Rights under the Australian Constitution* (1999). Currently there is limited procedural protection for individuals subject to decisions by officers of the Commonwealth. For example, in relation to s 474's scope, Gyles J in *NAAX* [2002] FCA 477 para 44 held that '[s]o far as the present case is concerned, there is no constitutional inhibition upon the legislature defining the procedure of a tribunal so as to exclude all rules of natural justice that might otherwise be implied'. Moreover as noted above n 67, his Honour held that breaches of natural justice are thereby removed as a source of jurisdictional error on which to base a claim for a constitutional writ.

72 *Re Bolton, Ex Parte Beane* (1987) 162 CLR 514, 523 (Brennan J); *Coco v The Queen* (1994) 179 CLR 427, 437. These judgements hold that if legislation is to abrogate a fundamental common law right, it must be 'clearly manifested by unmistakable and unambiguous language' (*Coco*, at 437). See discussion: Williams, above n 71, 15-18. However, there is no authority suggesting that fundamental common law rights will be protected if the legislature demonstrates unambiguous intent to abrogate them.

73 Paul Craig, 'Formal and Substantive conceptions of the Rule of Law: An analytical framework' [1999] *Public Law* 467, 487.

74 Sections 353 and 420 of the *Migration Act 1958* state that reviews by the tribunals should be 'fair, just, economical, informal and quick'.

75 The discussion will be conducted with the review of protection visa applications at the Refugee Review Tribunal in mind, but most of the points made are applicable to the migration jurisdiction in general.

76 Commonwealth, *Parl Deb H of R*, 26 September 2001, 31315 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs and Minister for Reconciliation and Aboriginal and Torres Strait Islander Affairs): Second Reading speech of the Migration Legislation Amendment (Judicial Review) Bill.

77 See for example, Commonwealth, *Parl Deb Sen*, 2 December 1998, 1025, (Senator Ian Campbell): Second Reading speech of the Migration Legislation Amendment (Judicial Review) Bill (No 5) 1997. These criticisms have been unrelenting; for the most recent see Benjamin Haslem and Amanda Keenan, 'Butt out, Ruddock tells judges' *The Australian*, 4 June 2002, 1.

78 John McMillan, 'The Role of Judicial Review in Australian Administrative Law' (2001) 30 *AIAL Forum* 47, 54. McMillan's arguments were *not* made in relation to privative clauses, but are consistent with the tenor of arguments in their favour.

79 This argument is a corollary of the low rate at which the Federal Court remits decisions from the migration tribunals for reconsideration: about 90% of tribunal decisions are upheld in the courts: see second reading speech, above n 60, 31315.

80 See for example, *Public Service Association (SA) v Federated Clerks Union (SA)* (1991) 173 CLR 132 148-149 (Deane J), quoted in Aronson and Dyer, above n 2, 166 – in relation to industrial tribunals.

81 See discussion in Aronson and Dyer, above n 2, 164-165; the authorities only suggest deference regarding the tribunal's fact finding functions.

82 See for example, *Svecova v Industrial Commission of NSW* (1991) 39 IR 328, 331 quoted in Douglas and Jones, above n 22, 349.

83 Ibid. There is an implicit notion of 'efficiency' in this point that does not incorporate democratic participation as one measure of organisational effectiveness: see Anna Yeatman, *Bureaucrats, Technocrats, Femocrats: Essays in the Contemporary Australian State*, (1990) 46.

84 Criticism of delays and inefficiencies in the current system have not only come from the executive and some commentators, but also the judiciary. For example Gyles J recently stated regarding the RRT's objective to conduct reviews that are 'fair, just economical, informal and quick': '[t]here has been much emphasis in the cases upon the elements "fair" and "just", but little upon the elements "economical", "informal" and "quick" … The role of a court is not to prefer one objective over another. To do so is to subvert the will of the legislature. Achieving all of these objectives in a high volume jurisdiction necessarily requires balance and compromise. As this, and many other cases, show, the system has failed lamentably in relation to speed and economy, and perhaps in informality': *NAAX* [2002] FCA para 53.

85 Gabriel Fleming, 'The Proof is in the Eating: Questions about the Independence of Administrative Tribunals' (1997) 7 *Aust Jo of Admin Law* 33, 35. ARC Report No. 44, 5.

86 *Drake v Minister for Immigration* (1979) 46 FLR 409.

87 Fleming, above n 85, 53 commented that if tribunals are increasingly adopting the efficiency and performance orientation of the executive, the importance of their *independence*, the reason for their creation in the first place, must not be forgotten.

88 Cf Chief Justice John Doyle: the court is *not* considering the overall quality of decision-making – 'Accountability: Parliament, the Executive and the Judiciary' in Susan Kneebone (ed) *Administrative Law and the Rule of Law: Still Part of the Same Package?* (1999) AIAL 18, 27.

89 An issue that is itself contestable: see Ronald Sackville, 'Judicial Review of Migration Decisions: An Institution in Peril?' (2000) 23 *UNSW L Jo* 190, 196.

90 See Susan Kneebone, 'Removing Judicial Review of Migration (Refugee) Decisions: A System in Crisis in Need of a Holistic Approach' (2000) 11 *Pub L Rev* 87, 87, 91. The author suggested that the problem needs to be addressed in the broad context of Australia's international obligations and the overall system of refugee status determination. She argued that judicial review is essential to provide jurisprudential guidance to the RRT, but in the then current [ie pre-privative clause] system, applicants turned to judicial review as a panacea for systemic problems, and this distorted the judicial role.

91 The possibilities of leave arrangements to seek review at the Federal Court (Kneebone, above n 90, 91; Crock, above n 17, 82) and a second layer of merits review (Kneebone, above n 90, 91) have been suggested. The independence, credibility and quality of refugee determination decisions is also something that needs to be addressed.

92 Cf Doyle, above n 88, 26 who argued that judicial review enables 'the individual to require the executive government to demonstrate that its decision is lawful'; and Fleming, above n 85, 54: 'Judicial review is the safeguard against the tribunals falling into illegality and unfairness'.

93 Ie, the standards that apply in many other jurisdictions by virtue of the ADJR Act ss 5-7.

94 Doyle, above n 88, 26.

95 It has been argued that the industrial context has unique considerations that sometimes justify privative clauses: *Public Service Association (SA) v Federated Clerks Union (SA)* (1991) 173 CLR 132, 148-149 (Deane J), quoted in Aronson and Dyer, above n 2, 166.

96 Cf Lesley Hunter's outline of measures necessary for substantive procedural fairness for non-English speaking background and asylum-seeker applicants: 20 *AIAL Forum* 13-21.

97 See Crock, above n 17, 78, 80.

98 *Migration Act 1958* s 427(6)(a) regarding the RRT; representation in exceptional circumstances is available at the MRT: s 366A.

99 See for example, the finding of apprehended bias in *Re Refugee Review Tribunal; Ex Parte H* [2001] HCA 28.

100 Possibly the most significant example of the judicial development of refugee law in Australia was the decision in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. A recent example is found in the decision of *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 187 ALR 574.

101 Cf Kneebone, above n 90, 91. It has been accepted by the High Court that domestic law should be interpreted in a manner consistent with international law: *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J).

102 Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 54 cited in George Williams, *Human Rights under the Australian Constitution* (1999) 58.